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# CV-23-755

## IN THE SUPREME COURT OF ARKANSAS

**Arkansas Voter Integrity Initiative, Inc. and Conrad Reynolds** **Appellants**

***v.***

**John Thurston, *et al.*** **Appellees**

On Appeal from the Circuit Court of Pulaski County, Sixth Division
The Honorable Tim Fox, Circuit Judge

Joint Brief of Appellees



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## Points on Appeal and Principal Authorities

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    - Ark. Code Ann. § 7-5-504(6) & (7)

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    - *Taffner v. Arkansas Dep't of Hum. Servs.*, 2016 Ark. 231, 493 S.W.3d 319

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    - *Bauer v. Beamon*, 2023 Ark. 194, 678 S.W.3d 782
    - *Jackson v. Buchman*, 338 Ark. 467, 996 S.W.2d 30 (1999)

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    - *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996)
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## Statement of the Case and the Facts

This appeal concerns Appellants' attempt to change the law regarding the use of voting machines in Arkansas elections. The machines at issue are the ExpressVote ballot-marking device and the DS200 tabulator (also referred to as the "Machines"), both of which are manufactured by separate Appellee Election Systems & Software, LLC ("ESS"). (RP 849). The process of voting on these machines is not in dispute. Once voters make their selections and review them on a summary screen, the ExpressVote prints physical ballots that display the voters' choices in both readable text and barcode form. (RP 849-850). Voters then feed the ballots into the DS200, which reads the barcodes and tabulates the votes. (RP 849-850). The ExpressVote and DS200 are inspected and certified by the Election Assistance Commission, approved for use by the State Board of Election Commissioners, and were selected by the Secretary of State. (RT 18, 54-55, 105-139). There is no evidence that either machine has ever been tampered with, hacked, or manipulated so as to surreptitiously tabulate votes inconsistent with any Arkansas voter's choices. Appellants readily concede this point. (RT 57-58).



Notwithstanding, on December 19, 2022, Appellant Arkansas Voter Integrity Initiative, Inc. ("AVII") filed suit against the Arkansas Secretary of State John Thurston and the State Board of Election Commissioners ("State Appellees"), as well as ESS, to challenge the use of the Machines under Ark. Code Ann. § 7-5-

504(6) and (7). These provisions mandate voting machines to "permit the voter to verify in a private and independent manner the votes selected by the voter on the ballot before the ballot is cast" and "provide the voter with the opportunity in a private and independent manner to change the ballot or correct any error before the ballot is cast." *See* Ark. Code Ann. §§ 7-5-504(6) and (7). The is required by the Help America Vote Act ("HAVA"), 52 U.S.C. § 21081(a)(1)(A)(i-ii), which Arkansas is required to follow. *See* Ark. Code Ann. § 7-5-606(e). AVII alleged that the Machines do not comply with § 7-5-504(6) or HAVA because voters cannot read a barcode with the naked eye, which is the only way the DS200 tabulates votes, and so voters cannot verify their choices on the ballots before casting them. (RP 5-6). AVII sought a declaratory judgment and an injunction prohibiting the Machines' use in upcoming elections. (RP 5-10).



All Appellees timely answered. In ESS's answer, it asserted that the complaint should be dismissed for failing to allege a cause of action against it. (RP 13). The circuit court agreed and found AVII had not pled a "viable claim against the separate defendant that sounds either in contract or in tort." (RP 24). An order dismissing ESS without prejudice was entered on March 14, 2023. (RP 24).

On May 4, 2023, AVII filed an Amended Complaint, again naming State Appellees and ESS as defendants. It also joined Conrad Reynolds and Donnie Scroggins as plaintiffs. (RP 25). Like the original, the Amended Complaint

requested declaratory and injunctive relief based on the theory that the Machines failed to comply with Arkansas law and HAVA. (RP 30-39). Appellees also added an illegal exaction class-action claim and sought damages solely from ESS for alleged fraud and violations of the Arkansas Deceptive Trade Practices Act (ADTPA). (RP 30-39). Each cause of action asserted by Appellants hinged on the same allegation that the Machines do not comply with § 7-5-504(6) and HAVA because of their reliance on barcodes. (RP 30-39).

On May 17, 2023, ESS moved to dismiss the Amended Complaint against it based on Arkansas Rules of Civil Procedure 12(b)(6). (RP 104-114). Specifically, it asserted that Appellants: failed to plead facts pertaining to the elements of a fraud claim, such as a misrepresentation made by ESS to Appellees; failed to plead facts to make out an illegal exaction; and failed to allege a deceptive, consumer-oriented practice within the ambit of the ADTPA. (RP 104-114).



The case was subsequently removed to federal court where State Appellees filed an answer and a response in opposition to the motion for an injunction that Appellants filed contemporaneous with their Amended Complaint. (RP 500-509, 512-539). Before the motion for injunction was resolved, the case was remanded to the circuit court on July 25, 2023. (RP 495-499).

After remand, the circuit court promptly set a hearing for August 7, 2023. At the hearing, Appellants informed the court that they were not ready to proceed. (RT

14). Despite their request for expedited consideration, Appellants requested a continuance because Mr. Reynolds was purportedly unavailable, Appellants did not have their expert witness present, and Appellants' counsel claimed to have had a printer problem that prevented him from being prepared to present the case. (RT 14-18). In response, the trial court put Appellants on notice that it could combine the hearing on the motion for injunctive relief with a trial on the merits under, and the case would be over because Appellants were not prepared to proceed. (RT 15-16). Instead, however, the trial court granted a continuance. In so doing, however, the trial court admonished the parties to be prepared because depending on the evidence and the testimony offered, the trial court indicated it may advance the hearing to a trial on the merits. (RT 22). The trial court specifically told the parties that "we're moving the case forward on the trial court level" on the rescheduled hearing date. (RT 30). The court took the motion to dismiss under advisement. (RT 32).



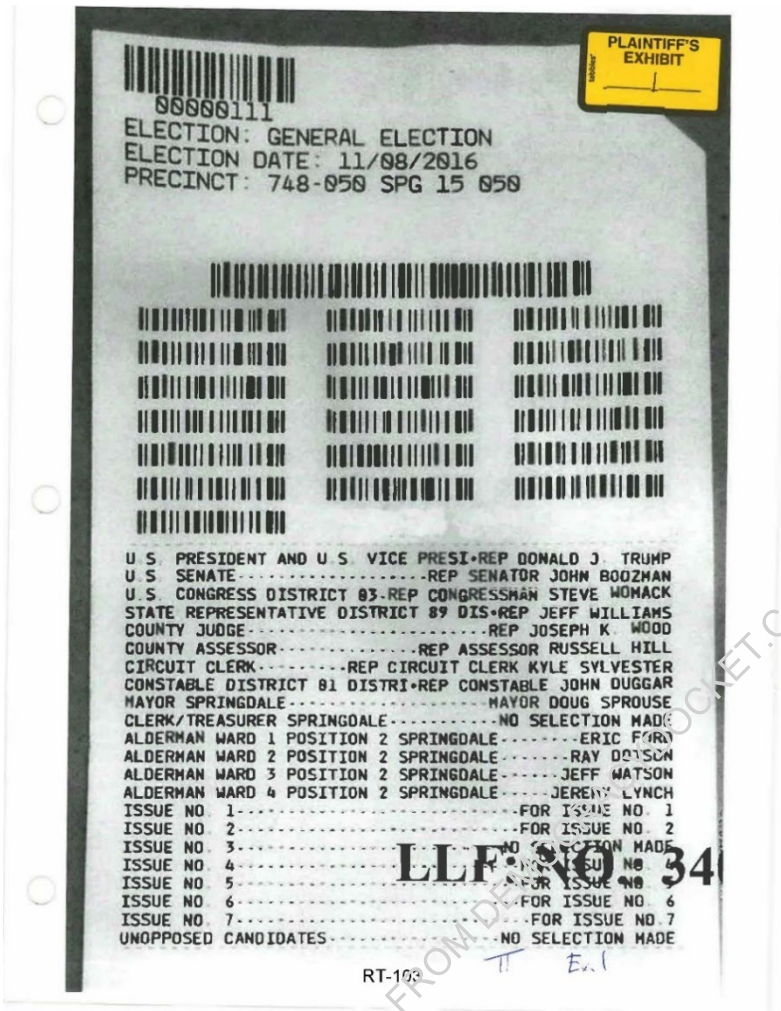
The proceedings reconvened on September 11, 2023. Appellants began by calling the director of the State Board of Elections, Daniel Shults. Mr. Shults explained the step-by-step how a voter uses the ExpressVote and DS200 and provided corresponding photographs. (RT 42-73).

As explained by Mr. Shults, the voting process on the Machines is straightforward. The voter is given a ballot and begins the voting process by inserting her ballot into the ExpressVote ballot-marking device. (RT 63, 146). The contests

appear, and the voter makes her selections on the touchscreen. (RT 64, 147). After, the voter must click "Review Selections." (RT 64, 149). The "review screen" will appear, with this message: "This is a summary of your vote selections. To make a change touch a selection to return to the ballot. To finish voting, you must print and then cast your ballot." (RT 66, 150). This page shows all the selections of the voter and permits the voter to go back and make any changes to her selections. (RT 75-76, 150). The voter must go through this review screen before she can print the ballot; it cannot be skipped. (RT 75-76). If satisfied, the voter clicks "Print Ballot." (RT 66, 150). What is printed from the machine is the voter's ballot. (RP 850) (RT 151). The display instructs the voter to remove the ballot from the machine and cast it in a ballot box or tabulator. (RT 156). The printed ballot shows the selections of the voter in English text and a corresponding bar code. (RT 151). The voter can look at the printed ballot to verify her selections in human-readable text. The bar code is read by the tabulator. (RT 47). The ballot is not cast legally until it is inserted into the tabulator. (RT 79).



In conjunction with Mr. Shults' testimony (and on Appellants' motion), the Court admitted the following exemplar ballot from 2016 (RT 12-19, 103):



PLAINTIFF'S EXHIBIT

00000111
ELECTION: GENERAL ELECTION
ELECTION DATE: 11/08/2016
PRECINCT: 748-050 SPG 15 050

U.S. PRESIDENT AND U.S. VICE PRESI•REP DONALD J. TRUMP
U.S. SENATE----------REP SENATOR JOHN BOOZMAN
U.S. CONGRESS DISTRICT 03-REP CONGRESSMAN STEVE WOMACK
STATE REPRESENTATIVE DISTRICT 89 DIS•REP JEFF WILLIAMS
COUNTY JUDGE----------REP JOSEPH K. WOOD
COUNTY ASSESSOR----------REP ASSESSOR RUSSELL HILL
CIRCUIT CLERK---------REP CIRCUIT CLERK KYLE SYLVESTER
CONSTABLE DISTRICT 01 DISTRI•REP CONSTABLE JOHN DUGGAR
MAYOR SPRINGDALE----------MAYOR DOUG SPROUSE
CLERK/TREASURER SPRINGDALE----------NO SELECTION MADE
ALDERMAN WARD 1 POSITION 2 SPRINGDALE--------ERIC FORD
ALDERMAN WARD 2 POSITION 2 SPRINGDALE-------RAY DOBSON
ALDERMAN WARD 3 POSITION 2 SPRINGDALE------JEFF WATSON
ALDERMAN WARD 4 POSITION 2 SPRINGDALE-----JEREMY LYNCH
ISSUE NO. 1----------FOR ISSUE NO. 1
ISSUE NO. 2----------FOR ISSUE NO. 2
ISSUE NO. 3----------NO SELECTION MADE
ISSUE NO. 4----------FOR ISSUE NO. 4
ISSUE NO. 5----------FOR ISSUE NO. 5
ISSUE NO. 6----------FOR ISSUE NO. 6
ISSUE NO. 7----------FOR ISSUE NO. 7
UNOPPOSED CANDIDATES----------NO SELECTION MADE

RT-103





The format of the exemplar ballot has not materially changed since 2016. (RT 52). Appellants did not dispute that the ballot displays both barcodes and text as represented by the 2016 exemplar admitted into evidence.

The trial court also examined Mr. Shults, after which it asked Appellants to confirm the nature of their claims and the relief sought. Appellants' counsel confirmed that they were bringing a threshold challenge that the ExpressVote and DS200 do not comply with Arkansas Code Annotated § 7-5-504(6) and HAVA

because the DS200 only reads barcodes, which cannot by read and verified by the voter, and that they sought a declaratory judgment to that effect. (RT 68-69, 78-79).

Based on the testimony and evidence before it, the trial court then indicated that the Machines and voting process complied with the statute but then asked Appellants—pointedly and repeatedly—if they had evidence or testimony relevant to whether the Machines provide the voter with the opportunity to review and verify their choices on the ballot before casting them. (RT 76, 80-86, 88, 91-98). In response, Appellants directed the court to two experts who were purportedly going to testify that the voter could not trust the barcode because the software could be hacked—meaning, it was possible for the printed ballot to contain barcodes inconsistent with what was printed in readable text. (RT 83-84). When asked by the circuit court if they had testimony or examples to demonstrate that any such hacking had occurred in Arkansas, Appellants' counsel stated numerous times that he had none; he only had testimony that it was possible. (RT 83-84, 86, 90-91). The trial court explained, however, that whether something nefarious can happen subsequent to the voter checking the review screen of the ExpressVote, reading the names on the printed ballot, and then casting it into the DS200, is irrelevant to the threshold question of whether the voter has an opportunity to review and verify her selections as required by Arkansas law. (RT 85-88). Further, whether the process should or should not include barcodes, or whether other safeguards should be implemented,

was a decision for the legislature, not the courts. (RT 92). Nonetheless, the trial court accepted as a proffer Appellants' experts' testimony that it was possible for the ExpressVote to be hacked and to print a ballot with inconsistent text and barcodes. (RT 85). Appellants did not proffer any other testimony or evidence.

After the trial court ruled against Appellants on the record, they moved to recuse. (RT 93). The court denied the motion. (RT 93).

On September 22, 2023, the circuit court entered an order, in which it made findings related to how voters utilize the ExpressVote and DS200 consistent with the testimony and evidence. It also found that although the average voter cannot read a barcode, the ballot also contains readable text. (RP 849-850). The court concluded that the machines as configured and used in Arkansas comply with Arkansas law and HAVA. In turn, the court denied Appellants' motion for injunction and motion to recuse and denied all remaining causes of action, intending for the order to be final. The court also granted ESS's motion to dismiss based on the allegations in the Amended Complaint, or alternatively, because Appellants had no evidence to support a cause of action against ESS. (RP 851) The court dismissed the Amended Complaint with prejudice. (RP 851). This appeal followed. (RP 853-858).

## Argument

Appellants mischaracterize this case as convoluted; it could not be more straightforward. Arkansas law requires that the voting machines approved and used in elections "permit the voter to verify in a private and independent manner the votes selected by the voter on the ballot before the ballot is cast" and "provide the voter with the opportunity in a private and independent manner to change the ballot or correct any error before the ballot is cast." *See* Ark. Code Ann. §§ 7-5-504(6) and (7). At the September 11th hearing, the circuit court heard testimony from SBEC Director Shults on how the ExpressVote and DS200 are utilized to vote in Arkansas elections. There is no dispute among the parties as to how the Machines are configured and how they are used by voters in an election. There is no dispute that the ballot printed by the ExpressVote includes both readable text and barcodes. There is no dispute that the normal human beings cannot read barcodes. Given the undisputed facts, the only question left to be decided was a legal question for the circuit court: did the Machines as configured and used in Arkansas elections comply with § 7-5-504(6) and HAVA? The circuit court correctly concluded that they did.



Now, Appellants attempt to interject non-existent, irrelevant issues and attorney arguments to get a second bite at the apple. This Court should not let them do so. Whether a machine is susceptible to hacking has nothing to do with the issue before the circuit court and this Court—namely, the voter's ability to verify her

selections before casting a ballot. As the circuit court correctly noted, whether voting machines should use barcodes or whether other safeguards should be implemented, is a policy question. To that point, Arkansas now authorizes the use of paper ballots in elections in addition to the electronic voting machines already sanctioned by State and federal law. If Appellants want to effect additional change in the election laws, they should redirect their arguments from this Court to the General Assembly or the electorate.

Nonetheless, even assuming *arguendo* that some legal or procedural misstep occurred below, Appellants have not demonstrated that they were prejudiced by it. Appellants sought injunctive relief against State Appellees. This is an equitable remedy and does not entitle Appellants to a jury trial. *See Bauer v. Beamon*, 2023 Ark. 194, at 8, 678 S.W.3d 782, 788 (citing *In re Estates of McKnight v. Bank of Am., NA.*, 372 Ark. 376, 277 S.W.3d 173 (2008)). As to ESS, a hearing is not required before the circuit court can grant a motion to dismiss. *Stay Strong, Status Quo v. Bradford*, 2020 Ark. 331, 3, 609 S.W.3d 367, 369. And Appellants have not identified for this Court any remaining fact issues to be tried on a declaratory judgment or any other cause of action. Indeed, because the configuration and process of voting on the Machines are undisputed, what is left for a jury to try on the actions pled? Appellants proffered no testimony or evidence below, save for expert testimony about the possibility that the Machines may be hacked, which is both

irrelevant and speculative. While Appellants insist that they were entitled to put on evidence, they failed to elucidate what that evidence would be and how it would transform a legal question into a factual one for a jury. As this court has reiterated, erroneous evidentiary rulings will not support reversal if the rulings are found to be harmless error. *Jackson v. Buchman,* 338 Ark. 467, 996 S.W.2d 30 (1999). That is the case here.

Lastly, Appellants' opening brief wholly omits any argument that the circuit court erred by granting ESS's motion to dismiss. Thus, this argument is abandoned and need not be considered by the Court. Even so, on the merits, the circuit court's dismissal should be affirmed, and Appellants' Amended Complaint should be dismissed with prejudice.



## I. The Circuit Court properly determined the voting machines used in Arkansas elections comply with Ark. Code Ann. § 7-5-504(6) & (7) and HAVA.

*Standard of Review*

Appellants presented the circuit court with a question of law: the interpretation and application of Ark. Code Ann. § 7-5-504(6) and (7). *See Board of Trustees of University of Arkansas v. Andrews*, 2018 Ark. 12, at 9, 535 S.W.3d 616, 621 (citing *Ark. Dep't of Corr. v. Shults*, 2017 Ark. 300, at 4, 529 S.W.3d 628, 631). The correct interpretation and application of an Arkansas statute is a question of law, which the appellate court decides de novo. *Andrews*, 2018 Ark. 12, at 9, 535 S.W.3d at 621

(citing *Shults*, 2017 Ark. 300, at 4, 529 S.W.3d at 631). The circuit court's interpretation of a statute will be accepted on appeal in the absence of error. *Andrews*, 2018 Ark. 12, at 9, 535 S.W.3d at 621 (citing *Shults*, 2017 Ark. 300, at 4, 529 S.W.3d at 631).

*The Voting Machines Comply*

Here, the language employed by the General Assembly in sections 7-5-504(6) and (7) is clear and unambiguous. Before a ballot is cast, the Machines must "permit the voter to verify . . . the votes selected by the voter on the ballot" and provide the voter with "the opportunity" to change the ballot or make corrections. The rules of statutory construction are clear and well established:

> The primary rule of statutory interpretation is to give effect to the intent of the legislature. Where the language of a statute is plain and unambiguous, this court determines legislative intent from the ordinary meaning of the language used. In considering the meaning of a statute, this court construes it just as it reads, giving the words their ordinary and usually accepted meaning in common language. This court construes the statute so that no word is left void, superfluous, or insignificant, and this court gives meaning and effect to every word in the statute, if possible. If the language of a statute is clear and unambiguous and conveys a clear and definite meaning, it is unnecessary to resort to the rules of statutory interpretation.

*Simpson v. Calvary SPV I, LLC*, 2014 Ark. 363, at 3-4, 440 S.W.3d 335, 337-38 (internal citations omitted).

The steps of the voting process on the Machines in Arkansas are undisputed, and the voter can verify the selections made by reading the text of the ballot printed by the ExpressVote. To accept Appellants' argument, the Court would have to read words into the statute that are not there—just as Appellants did in their brief. *See* Appellants' Brief at 22 ("Applying the definition of verify to the language of the statute, *the statute now reads* that a voter must be able to prove, confirm or establish the truth of, or to authenticate sufficient to an oath or affidavit, the votes selected by the voter on the ballot before the ballot is cast.") (emphasis added). This result is untenable.



Moreover, to agree with Appellants, one would have to assume that some nefarious activity has occurred such that the barcode does not match the readable text. Such an assumption, however, is completely unfounded. Appellants confirmed multiple times that they have no evidence that the barcodes do not correspond to the selections in human-readable text on Arkansas ballots. (*See*, *e.g*. RT72). The circuit court correctly found that the Machines permit the voter to verify and change her vote before inserting, or casting, it into the tabulator. (RT 76). Appellants have not cited any authority to warrant a different conclusion from this Court. Not only is the *VoterGA v. State* case not binding on this Court, as Appellants acknowledge, it concerns a different machine and a "very different" statute. (Appellants' Brief at 25-26). Therefore, the Machines comply with Ark. Code Ann. § 7-5-504(6) and (7) and

the concomitant provision under HAVA (52 U.S.C. § 21081(a)(1)(A)(i–ii)). The circuit court should be affirmed.

## II. The Circuit Court did not abuse its discretion in denying the oral Motion to Recuse following the Court's ruling from the bench.

*Standard of Review*

The decision to recuse is within the discretion of the trial court. *Riverside Marine Manufacturers, Inc. v. Booth*, 93 Ark. App. 48, at 51, 216 S.W.3d 611, 613 (2005). Thus, the denial of the motion to recuse is reviewed under an abuse-of-discretion standard. *See Matter of Estate of Edens*, 2018 Ark. App. 226, at 20, 548 S.W.3d 179, 191. The party seeking recusal has the burden to show bias or prejudice by the court. *Marine Manufacturers, Inc.*, 93 Ark. App. at 51, 216 S.W.3d at 613.

*The Motion to Recuse was Properly Denied*

Appellants' argument for recusal is without merit. Arkansas Code of Judicial Conduct Rule 2.11 governs recusal and mandates, "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding." Ark. Code Jud. Conduct R. 2.11(A)(1). Further, canon 3E(1) of the Code of Judicial Conduct, requires a judge to recuse from cases in which his or her impartiality might reasonably be questioned.

Yet, "[J]udges are presumed to be impartial and the party seeking disqualification bears a substantial burden in proving otherwise." *Spurlock v. Estate of Ladd*, 2023 Ark. App. 253, at 8, 669 S.W.3d 214, 220 (quoting *Duty v. State*, 45 Ark. App. 1, at 5, 871 S.W.2d 400, 402 (1994)). "The fact that the circuit court ruled against the appellant 'is not sufficient to demonstrate bias.'" *Spurlock*, 2023 Ark. App. 253, at 9, 669 S.W.3d at 221 (citing *McKinney v. State*, 2019 Ark. App. 347, 583 S.W.3d 399). "Judges have a duty to hear a case 'unless there is a valid reason to disqualify[.]'" *Spurlock*, 2023 Ark. App. at 9, 669 S.W.3d at 221 (citing *Perroni v. State*, 358 Ark. 17, 24, 186 S.W.3d 206, 210 (2004)). "Judges may have—or develop during trial—an opinion or a bias, but this does not make the trial judge so biased and prejudiced as to require his disqualification in further proceedings. Whether a judge has become biased to the point that he should disqualify himself is a matter to be confined to the conscience of the judge. The reason is that bias is a subjective matter peculiarly within the knowledge of the trial judge." *Spurlock*, 2023 Ark. App. 253, at 9-10, 669 S.W.3d at 221 (quoting *Matthews v. Rodgers*, 279 Ark. 328, 651 S.W.2d 453 (1983) (internal citations omitted)).



Appellants do not argue actual bias, but rather an appearance of bias based on their belief the trial judge prejudged the issues in this case. As demonstrated in the record, Appellants moved for recusal only after disagreeing with the trial court's ruling that the Machines complied with Arkansas law. (RT 93). In making this

determination, the trial court explained the issue before the trial court was compliance with the statute and the additional "evidence" that Appellants wanted to offer that it was possible the Machines could be hacked was irrelevant to whether the voter has an opportunity to verify her selections before casting her vote. (RT 94-100). Appellants contend this shows the trial court prejudged the issues in this case, likening it to the circumstances in *Riverside Marine Manufacturers, Inc. v. Booth*, 93 Ark. App. 48, 216 S.W.3d 611 (2005). Their reliance is misplaced.

In *Riverside*, the plaintiffs (Booths) filed suit against Riverside alleging breach of a consulting agreement. *Id.* at 50, 216 S.W.3d at 613. In pre-trial hearings, the trial judge indicated Riverside was going to lose the case. *Id.*, 216 S.W.3d at 613. Then, at the close of day one of the bench trial, before the plaintiffs rested, the trial judge said, "[U]nless something happens, Riverside is going to have to pay. If you-all want to settle this beforehand, now is the time." *Id.*, 216 S.W.3d at 613. "The judge then stated that he was giving his thoughts on the matter in case the parties did not want to proceed and acknowledged that Riverside had not put on its defense." *Id.*, 216 S.W.3d at 613. Riverside moved for a mistrial and requested the judge recuse from the case due to his comments. *Id.*, 216 S.W.3d at 613. The judge denied the motions and Riverside appealed. *Id.*, 216 S.W.3d at 613.

The Court of Appeals reasoned that the trial judge's comments, "although recognizing that Riverside had yet to present its case, gave the appearance of having

a mindset that could not be reconciled with the proposition that he was committed to hear all relevant, credible evidence, weighing it and arriving at a judicious result." *Id.* at 51, 216 S.W.3d at 614. Where the trial judge is sitting as the fact finder, the appearance of fairness is even more important. *Id.* at 52, 216 S.W.3d at 614. The court held that judge's comments and the timing thereof gave the appearance that the judge had already decided about Riverside's liability. *Id.* at 53, 216 S.W.3d at 615. The case was reversed and remanded with directions to transfer the case to another judge. *Id.*, 216 S.W.3d at 615.



Here, the record demonstrates no appearance of prejudice or bias on the part of the trial judge. No prejudgment comments were made, and the circuit court asked Appellants multiple times what relevant evidence they had to offer. They had none. The circuit court has wide discretion in deciding whether evidence is relevant and admissible. *Thacker v. State*, 2015 Ark. 406, at 4, 474 S.W.3d 65, 67. It is not required to allow Appellants to admit irrelevant evidence. Even so, the trial court accepted as a proffer Appellants' experts' testimony that the Machines could be hacked. That was Appellants only proffer. There can be no abuse of discretion for refusing to admit unidentified, unspecific evidence either.

The only basis for Appellants' motion is an adverse ruling. Adverse rulings, however, are not grounds for recusal. *Taffner v. Arkansas Dep't of Hum. Servs.*, 2016 Ark. 231, at 14, 493 S.W.3d 319, 329 ("The mere fact of adverse rulings is not

enough to demonstrate bias.") (citing *Gates v. State,* 338 Ark. 530, 2 S.W.3d 40 (1999)); *see also Carton v. Missouri Pac. R. Co.*, 315 Ark. 5, 10, 865 S.W.2d 635, 637 (1993) (the judicial cannons do not even suggest that a trial judge is required to recue because he or she ruled against a party's motions or objections throughout a trial). The circuit court did not abuse its discretion in denying Appellants' motion to recuse. Appellants have demonstrated no reversible error on this point.

## III. The Circuit Court properly denied the Motion for a New Trial, and even if any procedural error occurred, it was harmless.



*Standard of Review*

Appellants moved for a new trial pursuant to Arkansas Rule of Civil Procedure 59(a)(1), (6), and (8), based on the purported wrongful denial of their right to a jury trial. This court employs a de novo standard of review for claims to a right to a jury trial. *Bauer v. Beamon*, 2023 Ark. 194, at 8, 678 S.W.3d 782, 787 (citing *Bandy v. Vick*, 2020 Ark. 334, 608 S.W.3d 903). The circuit court will be reversed only where error is shown. *Bauer*, 2023 Ark. 194, at 8, 678 S.W.3d at 787 (citing *Rowe v. Hobbs*, 2012 Ark. 244, 410 S.W.3d 40). Here, Appellants fail to demonstrate any error by the circuit court.

*The Motion for New Trial Was Properly Denied*

As a threshold matter, Appellants were not entitled to a jury trial on their claims for injunctive and declaratory relief. As this Court reiterated in *Bauer*, "The Arkansas Constitution does not ensure the right to a jury in all possible instances,

but rather in those cases where the right to a jury trial existed when the constitution was framed." 2023 Ark. 358, at 13, 678 S.W.3d at 787 (citing *Baptist Health v. Murphy*, 2010 Ark. 358, 373 S.W.3d 269). "The right to a jury trial extends only to those cases that were subject to trial by jury at the common law." *Id.*, 2023 Ark. 194, at 8, 678 S.W.3d at 787-88 (citing *Williams v. Baptist Health*, 2020 Ark. 150, 598 S.W.3d 487). Because there was no right to a jury trial at the common law, the constitutional right to a jury trial does not extend to cases in equity." *Id.*, 2023 Ark. 194, at 8, 678 S.W.3d at 787-88 (citing *In re Estates of McKnight v. Bank of Am., NA.*, 372 Ark. 376, 277 S.W.3d 173 (2008)).



Here, the injunctive relief sought by Appellants is an equitable remedy for which no right to a jury trial exists. *Williams*, 2020 Ark. 150, at 9, 598 S.W.3d at 495. As to the declaratory judgment, the statute cited by Appellants, Arkansas Code Annotated § 16-111-109, states that when a declaratory judgment involves issues of fact, such issues may be tried and determined in the same manner as in other civil actions. Again, however, neither the record nor Appellants' arguments to this Court identify any issues of fact remaining to be tried. The factual issues necessary to determine whether the Machines comply with Arkansas and federal law are undisputed, as such only a question of law remained for the court to decide. Further, the trial court's answer to the legal question of the Machines' compliance with Ark.

Code Ann. § 7-5-504(6) & (7) and HAVA disposed of all other causes of action asserted by Appellants.

In a similar vein, even if the Court were to find error in the procedure below, it is harmless error. "Error may not be predicated upon an evidentiary ruling unless a substantial right is affected, and we will not reverse in the absence of prejudice." *Jackson v. Buchman*, 338 Ark. 467, 476, 996 S.W.2d 30, 36 (1999) (citing Ark. R. Evid. 103(a); *Larimore v. State,* 317 Ark. 111, 877 S.W.2d 570 (1994)). Appellants bear the burden of demonstrating to this Court what prejudice was caused by the alleged erroneous ruling. *Id.* (citing *Webb v. Thomas,* 310 Ark. 553, 837 S.W.2d 875 (1992)). Appellants have not met this burden, and the circuit court should be affirmed.



**IV. The Circuit Court correctly granted ESS's Motion to Dismiss.**

The circuit court granted Appellee ESS's motion to dismiss based on (1) solely the allegations in the amended complaint, or alternatively, (2) a lack of evidence to support the causes of action pled. (RP 851) Appellants' opening brief, however, does not even mention the motion to dismiss, let alone argue and cite authority for reversal. It is Appellants' burden to show the existence of reversible error. *Landers v. Stone*, 2016 Ark. 272, 17, 496 S.W.3d 370, 381 (citing *Burdine v. Ark. Dep't of Fin. & Admin.*, 2010 Ark. 455, 379 S.W.3d 476). Here, that burden has

not been satisfied, and the circuit court's order granting the motion to dismiss should be affirmed.

### A. Appellants abandoned any argument for reversal of the Motion to Dismiss by omitting it from their opening brief.

Appellants' opening brief does not argue for reversal of the dismissal of ESS. As such, the Court should summarily affirm. It is well-established that each point relied on for reversal must be set forth in the opening brief in order to be considered on appeal. Ark. S. Ct. R. 4-2(b); *Williams v. City of Fayetteville*, 348 Ark. 768, 778, 76 S.W.3d 235, 240 (2002) (citing *Jordan v. State,* 323 Ark. 628, 917 S.W.2d 164 (1996); *Commonwealth Pub. Serv. Co. v. Lindsay,* 139 Ark. 283, 214 S.W. 9 (1919)). An argument cannot be made for the first time in an appellant's reply brief. Thus, even if issues are raised below, they are deemed abandoned if they are not argued in the opening brief on appeal. *Jordan*, 356 Ark. at 256, 147 S.W.3d 691, 696.



Furthermore, this Court has held that "when a circuit court's decision is based on more than one independent ground, and an appellant challenges only one of those grounds on appeal, the appellate court will affirm without addressing any of those grounds." *Corbitt v. City of Little Rock*, 2022 Ark. 144, at 3, 2022 WL 2254360, at 1 (citing *Jones v. Miller*, 2017 Ark. 190, at 5, 520 S.W.3d 253, 256). Any point lacking convincing argument or citation to supporting authority will not be heard. *See Hendrix v. Black*, 373 Ark. 266, 269–70, 283 S.W.3d 590, 593 (2008) (citing

*Wooten v. State,* 351 Ark. 241, 91 S.W.3d 63 (2002); *Qualls v. Ferritor*, 329 Ark. 235, 237–38, 947 S.W.2d 10, 11 (1997)).

Here, Appellants' opening brief is completely devoid of any argument or authority for reversing the circuit court's dismissal of ESS. As such, Appellants have abandoned that argument, and the Court should not consider any belated attempt to assert one in reply. Furthermore, the circuit court stated two independent grounds for granting the motion to dismiss ESS. Appellants challenged neither. Accordingly, the dismissal of ESS should be summarily affirmed.



**B. The Circuit Court did not abuse its discretion by granting ESS's Motion to Dismiss.**

*Standard of Review*

Even if the Court were to consider the merits of an argument, the circuit court correctly granted the motion to dismiss. The Court reviews the granting of a Rule 12(b)(6) dismissal under the abuse-of-discretion standard. *Ballard Grp., Inc. v. BP Lubricants USA, Inc.*, 2014 Ark. 276, at 5, 436 S.W.3d 445, 449 (citing *J.B. Hunt, LLC v. Thornton,* 2014 Ark. 62, 432 S.W.3d 8); *Jonesboro Healthcare Ctr., LLC v. Eaton–Moery Envtl. Servs., Inc.,* 2011 Ark. 501, 385 S.W.3d 797).

*The Circuit Court Properly Dismissed the Amended Complaint on the Merits*

In reviewing a circuit court's decision on a 12(b)(6) motion to dismiss, the Court looks only to the allegations in the operative complaint and not to matters outside the complaint. *Henson v. Cradduck*, 2020 Ark. 24, 4, 593 S.W.3d 10, 14

(citing *Ark. State Plant Bd. v. McCarty*, 2019 Ark. 214, 576 S.W.3d 473). Arkansas law requires fact pleading and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Id.* The facts alleged in the complaint are viewed in the light most favorable to the party who filed the complaint. *Parnell v. FanDuel, Inc.*, 2019 Ark. 412, at 2–3, 591 S.W.3d 315, 317–18 (citing *Travelers Cas. & Sur. Co. of Am. v. Ark. State Highway Comm'n*, 53 Ark. 721, 120 S.W.3d 50 (2003)). Facts alleged in the complaint are treated as true, but a plaintiff's theories, speculation, or statutory interpretation are not. Henson, 2020 Ark. 24, at 4, 593 S.W.3d at 14.



Appellants' Amended Complaint relies on the same claim—that the ExpressVote and DS200 do not comply with § 7-5-504 and HAVA—to assert three claims against ESS: (1) fraud; (2) illegal exaction; and (3) violations of the ADTPA. Yet, the facts alleged do not support these causes of action against ESS. Nor could they. There is no claim whereby ESS could logically or rightfully be found to owe Appellants damages and be ordered to pay AVII and Conrad Reynolds money. It is clear that Appellants are stretching these theories of liability to try and keep ESS embroiled in litigation. Dismissal was proper.

*i. The Amended Complaint fails to state facts to support a fraud claim against ESS.*

Under Arkansas law, a fraud claim requires proof of five elements: (1) a false representation of material fact; (2) knowledge that the representation is false or that

there is sufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance. *Hampton v. Taylor*, 318 Ark. 771, 777, 887 S.W.2d 535, 539 (1994). Further, Arkansas Rule of Civil Procedure 9(b) states that "all averments of fraud . . . shall be stated with particularity." *See Watkins v. Arkansas Dep't of Agric.*, 2018 Ark. App. 460, at 9, 560 S.W.3d 814, 822 ("[O]ur caselaw provides that fraud must be specifically alleged, and a complaint must state something more than mere conclusions and must clearly set forth the facts relied on as constituting fraud.") (citing *Woodend v. Southland Racing Corp.*, 337 Ark. 380, 989 S.W.2d 505 (1999)); *see also J.D. Fields & Co. v. Nucor-Yamato Steel*, 976 F. Supp. 2d 1051, 1068 (E.D. Ark. 2013) (stating that the complaint must identify the "who, what, where, when, and how" of the alleged fraud because the purpose of the heightened standard is to "enable the defendant to respond specifically and quickly to the potentially damaging allegations") (citing *Parnes v. Gateway 2000, Inc.,* 122 F.3d 539 (8th Cir. 1997)). The Amended Complaint fails on all fronts.



Nowhere does the Amended Complaint contain factual allegations of a false representation made specifically to AVII, Conrad Reynolds, or Donnie Scroggins. Instead, as acknowledged by Appellants in the Amended Complaint, if any representations were made, they were made to the State via its contractual

relationship with ESS. (RP 36-38) ("That in its contract with the State and the counties, ESS 'warrant[ed] . . . that at the time of deliver [sic], the ES&S Equipment and ES&S software sold and licensed . . . will comply with all applicable requirements of state election laws."). Notably, no Appellant is a party to that contract. There is not a single factual allegation of any communication—let alone a specific misrepresentation as required by Rule 9(b)—from ESS to Appellants. Necessarily, it follows then that there are no facts pled on the other required elements for fraud, such as justifiable reliance and damages. Appellants did not, and could not, take any action based on their reliance on a non-existent representation to them.

Without facts to support the required elements of their fraud claim, dismissal is appropriate. *See, e.g.*, *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, at 12, 372 S.W.3d 324, 333 (affirming dismissal of a fraud claim because "the complaint is wholly insufficient with respect to providing particular factual allegations of knowledge of falsity, intent to induce action or inaction in reliance on the representation, justifiable reliance on the representation, and damages"); *see also* *Davis v. Davis*, 2016 Ark. App. 33, at 5, 480 S.W.3d 878, 882 (affirming dismissal of a fraud claim for making conclusory allegations and for failing to identify any particular factual allegations, such as specific conversations with the defendant, that supported the misrepresentation claim). The circuit court's dismissal should be affirmed.

*ii. The Amended Complaint fails to state facts to support an illegal exaction claim against ESS.*

Like their fraud claim, Appellants' illegal exaction claim fails to meet basic pleading requirements. As this Court has explained, "an illegal exaction is an exaction that is either not authorized by law or is contrary to law." *Prince v. Arkansas State Highway Comm'n*, 2019 Ark. 199, at 5, 576 S.W.3d 1, 4 (citing *Stromwall v. Van Hoose,* 371 Ark. 267, 265 S.W.3d 93 (2007)). There are two types of illegal exaction cases that can arise under article 16, section 13 of the Arkansas Constitution: "public funds" cases, where the plaintiff contends that public funds generated from tax dollars are being misapplied or illegally spent; and "illegal tax" cases, where the plaintiff asserts that the tax itself is illegal. *Id.,* 2019 Ark. 199, at 5, 576 S.W.3d at 4 (citing *McGhee v. Ark. State Bd. of Collection Agencies*, 360 Ark. 363, 201 S.W.3d 375 (2005)). "It is axiomatic that, before a public-funds type of illegal exaction will be allowed to proceed, there must be facts showing that monies generated from tax dollars or arising from taxation are being misapplied or illegally spent. *Dockery v. Morgan*, 2011 Ark. 94, at 15, 380 S.W.3d 377, 387 (citing *Brewer v. Carter*, 365 Ark. 531, 231 S.W.3d 707 (2006)). Further, "when the expenditure is authorized by statute, no illegal exaction occurs." *Id.*, 2019 Ark. 199, at 5, 576 S.W.3d at 4 (citing *Sullins v. Cent. Ark. Water*, 2015 Ark. 29, 454 S.W.3d 727).

Here, Appellants label their action a "public funds case" and as it pertains to ESS specifically the only allegation in the Amended Complaint is that it "received

misapplied and misspent public funds." (RP 33). This bare allegation is not enough to support an illegal exaction claim against ESS.

More generally, the pleading is deficient because there are no facts showing misspending of tax dollars. Appellants only allege that "the State was authorized by the legislature to purchase and maintain voting machines pursuant to the County Voting System Grant Fund (CVSGF)" and cite Ark. Code Ann. § 19-5-1247. (RP 32). The CVSGF, however, is comprised of monies derived from various fees. *See* Ark. Code Ann. § 19-5-1247(b) ("The Secretary of State shall periodically remit to the Treasurer of State the fees the Secretary of State collects associated with the Uniform Commercial Code activity under §§ 4-9-525(a)(1), 4-9-525(a)(3), and 4-9-525(b)--(d), and the Treasurer of State shall deposit those funds into the County Voting System Grant Fund."). Fees for filing and copying are not taxes for purposes of an illegal exaction. *See McCafferty v. Oxford Am. Literary Project, Inc.*, 2016 Ark. 75, at 7, 484 S.W.3d 662, 667 (affirming dismissal of an illegal exaction because the university's cash funds at issue were not generated or arising from taxation but instead were derived from campus operations (housing, bookstore, and food services). Merely alleging use of generic "public funds" is not enough to state a claim for illegal exaction. *See id.* (discussing cases). Without any facts to show that *tax dollars* were allegedly being misspent, Appellants' claim fails. Accordingly, the Court should affirm dismissal of the illegal exaction count against ESS.

*iii. The Amended Complaint fails to plead a viable claim under the ADTPA.*

Lastly, Appellants allege that ESS violated the ADTPA in numerous ways, including but not limited to: "warrant[ing] that its voting machines and software complied with Arkansas and federal law"; "represent[ing] that its voting machines and software would allow a voter to verify his or her votes before placing it into the DS200 to be cast"; "advertising to the state and its voters that ESS's machines complied with state and federal law when it knew, or should have known, that they did not"; "[selling] warranties, services, or goods in the form of machines, software, and maintenance programs under the false pretense that the products complied with the state and federal voting laws." (RP 34-36). None of the enumerated allegations is sufficient to state a claim under the ADTPA.



The ADTPA provides a private right of action to "any person" who suffers actual damage or injury as a result of a violation of the Act. *See* Ark. Code Ann. § 4–88-113(f). The Arkansas legislature amended the Act in 2017 to make clear an injury must result in an "actual financial loss proximately caused by his or her reliance on the use of a practice declared unlawful under this chapter." Ark. Code Ann. § 4-88-113(f)(1)(A)(2). The ADTPA prohibits a number of practices, and includes a catchall provision prohibiting "any unconscionable, false, or deceptive act or practice in business, commerce, or trade." Ark. Code Ann. §4-88-107(a)(1)-(10). To prevail, a private plaintiff must allege and prove both (1) a deceptive consumer-

oriented act or practice that is misleading in a material respect, and (2) an injury resulting from such act. *Parnell*, 2019 Ark. 412, at 4, 591 S.W.3d at 318 (citing *Skalla v. Canepari*, 2013 Ark. 415, 430 S.W.3d 72). Here, the Amended Complaint fails both prongs of the test.

The acquisition of voting machines for use in Arkansas elections is not a consumer-oriented act or practice. This is true in the same way that the Arkansas appellate courts have held that farming practices do not fall under the umbrella of the ADTPA. *See Crutchfield v. Tyson Foods, Inc.*, 2017 Ark. App. 121, at 6, 514 S.W.3d 499, 503 (affirming dismissal of the plaintiffs' ADTPA claim, reasoning "they have not pled facts demonstrating that Tyson's alleged unequal treatment of the growers with which it contracts for the production of chickens is a 'consumer-oriented act or practice'"); *see also Skalla*, 2013 Ark. 415, at 14, 430 S.W.3d at 82 (affirming the grant of summary judgment on the plaintiff's ADTPA claim because the plaintiff's allegations concerned farming practices rather than consumer-oriented acts).



Additionally, there is no factual allegation constituting "an actual financial loss proximately caused" by the allegedly unlawful act. Similar to their fraud claim, Appellants have not alleged any direct communication, involvement, or dealings with ESS—meaning, they have not alleged and cannot prove that their reliance on

any deceptive act caused their damages. Reliance and causation are required elements under Arkansas Code Annotated § 4-88-113(f)(1)(A)(2).

Finally, the Amended Complaint is devoid of facts alleging a cognizable injury under ADTPA. *See Parnell*, 2019 Ark. 412, at 4, 591 S.W.3d at 318. For example, Appellants allege that they have been required to pay unidentified "fees" for the machines and that they have sustained "the loss of the ability to legally participate in state, federal, and local elections." (RP 36). These allegations do not constitute the "actual financial loss" required by the Act. As such, the Amended Complaint fails to state facts to support a claim under the ADTPA, and the circuit court's dismissal of this cause of action against ESS should be affirmed.



**C. Affirming the Court's ruling on the Machines' compliance with Arkansas and federal law is dispositive of the claims against ESS.**

As another grounds for affirmance, if the Court affirms the circuit court's ruling that the Machines comply with the requirements of Arkansas law and HAVA, all causes of action against ESS necessarily fail. This is because the separate claims against ESS for fraud and violations of the ADTPA, as well as illegal exaction, are all predicated on a finding that the Machines do not comply. (RP 34-38). Indeed, as an alternative grounds for dismissal, the circuit court found that there was no evidence to support the claims against ESS. (RP 851). Thus, if the Court affirms the circuit court, it should do so in *toto* and affirm the dismissal of all claims against ESS.

For the reasons already articulated, Appellants were not entitled to a jury trial on their claims being appealed.

**D. Dismissal of the Claims Against ESS Must be with Prejudice.**

Finally, affirmance of the dismissal of ESS should be a dismissal with prejudice. This is for two reasons. First, the circuit court already dismissed AVII's claims against ESS on the original complaint. Thus, under Arkansas Rule of Civil Procedure 41(b), the dismissal of the same claims a second time must be with prejudice. Second, rather than amend, Appellants brought this appeal from the order dismissing all their claims against ESS. As this Court has consistently held, when a complaint is dismissed under Rule 12(b)(6), the dismissal is usually without prejudice and the plaintiff has the option to appeal or plead further. *Sluder v. Steak & Ale of Little Rock, Inc.*, 368 Ark. 293, 298, 245 S.W.3d 115, 118 (2006) (citations omitted). If the plaintiff chooses to appeal, he or she waives the right to plead further, and the complaint will be dismissed with prejudice if the matter is affirmed. Id. Here, because Appellants appealed the circuit court's order dismissing the Amended Complaint, affirmance by this Court must result in a final dismissal with prejudice of the claims against ESS.

## Conclusion

The findings and rulings of the circuit court were correct and proper in every respect. The ExpressVote and DS200 machines used in Arkansas comply with the challenged state and federal election laws. In arriving at its ruling, the trial court showed no actual or appearance of bias or prejudice toward Appellants. Moreover, the claims being appealed were properly decided by the trial court and there were no disputed fact issues that could be tried by a jury. Appellants have no viable claims against ESS and have abandoned any argument to the contrary. This Court should affirm.

## Request for Relief

John Thurston, in his official capacity as Arkansas Secretary of State, Arkansas State Board of Election Commissioners, in its official capacity, and Election Systems and Software, LLC, respectfully request that this Court affirm the circuit court's September 22, 2023 order.

Respectfully submitted,

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## Certificate of Service

I certify that on January 25, 2024, I filed a true and correct copy of the foregoing using the Court's eFlex system, which notifies all counsel of record, and e-mailed a copy to the Honorable Tim Fox.

/s/ Jordan Broyles
Jordan Broyles

## Certificate of Compliance

I, the undersigned attorney, hereby certify that this Appellees' Brief complies with Administrative Order No. 19 in that all "confidential information" has been excluded from the "Case Record" by (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal, as applicable.

I further certify that this Brief satisfies Administrative Order 21, Section 9 which states that briefs shall not contain hyperlinks to external papers or websites.

Further, the undersigned states that the foregoing brief conforms to the word-count limitation identified in Rule 4-2(d). According to Microsoft Word (Office 365), this brief contains 7,821 words.

/s/ Jordan Broyles
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