

**IN THE CIRCUIT COURT OF MONTGOMERY COUNTY  
STATE OF ALABAMA**

DONALD CURTIS CASEY, ET AL.                  )  
  )  
PLAINTIFFS,   )  
  )  
v.    )    CASE NUMBER: CV-14-430  
  )  
SENATOR DEL MARSH,                                 )  
  )  
DEFENDANT.   )

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Comes now the Defendant, Senator Del Marsh, to submit this Memorandum in Support of his Motion to Dismiss for failure to state a claim and failure to join indispensable parties under Rule 19 Ala.R.Civ.P.

**Initial Comments**

After filing a Motion for More Definite Statement, which was granted, the Court now has before it the original complaint and the Realtor's Petition to Clarify the Information Submitted by Realtors. Rather than file another motion for more definite statement, Senator Marsh shall respond to the Realtors' submissions head on. The Realtors' first submission shall be referred to as the complaint (compl.) and the second document shall be referred to as the clarification (clar.).

**FACTS**

Senator Del Marsh (Senator Marsh) serves as the State Senator for the 12<sup>th</sup> Alabama District.<sup>1</sup> The 12<sup>th</sup> District elected Senator Marsh to a fourth consecutive term in November 2010. Id. The Alabama Senate then elected Senator Marsh as President Pro Tempore of the Senate (Senate Pro Tempore) on December 10, 2010, and again on January 11, 2011. Id.

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<sup>1</sup> <http://www.legislature.state.al.us/senate/senators/senatebios/sd012.html>

The 2014 Alabama legislative session lasted from Tuesday, January 14, 2014, until Thursday, April 3, 2014.<sup>2</sup> On February 4, 2014, during the ongoing legislative session, Relators confronted Senator Marsh with a purported writ of *quo warranto* that carried no legal weight or authority because it was not signed or ordered by a judge.<sup>3</sup> Compl. at 3, 19. Again on February 20, 2014, also during the ongoing legislative session, Relators confronted Senator Marsh with another purported writ of *quo warranto* that, again, was not signed or ordered by a judge. Compl. at 3, 23.

On July 2, 2014, Relators requested an actual writ of *quo warranto* from this Court. Compl. at *passim*. Relators' request is almost incomprehensible and did not state any questions of fact or law. Moreover, Relators' request for a writ of *quo warranto* does not state any claim upon which a relief can be granted. Relators appeared to request relief from Act Number 2012-275 and Act Number 2012-276 (Acts). Compl. at 19. Relators also appeared to request relief from Senate Bills 7, 253, 258, 259, 261, 274, and 276 (Senate Bills). Id. Relators merely listed the acts, senate bills, and resolution without any explanation to the acts, senate bills, and resolution function. Id. Furthermore, Relators did not explain why they are opposed to the acts, senate bills, and resolution . Senator Marsh is left to speculate why this action is before this Court.

In the Realtors' clarification, they request that this Court:

1. Oust Senator Del Marsh from his senate seat and prevent him from serving any future term. (Clar. ¶ 9-20);

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<sup>2</sup> <http://www.legislature.state.al.us/index.html>

<sup>3</sup> Relators failed to adequately number their pages or paragraphs in their original filing, labeled as a *writ of quo warranto*, their addenda or their footnotes. Therefore, Senator Marsh and the State refer to each page sequentially as they appear in the complaint.

2. Declare the Legislature does not possess the authority to revise the Constitution of Alabama. (Clar. ¶ 21);
3. Declare that all amendments associated with SJR 82 are null and void (Clar. ¶ 24); and
4. Require Senator Marsh to pay their expenses. (Clar. ¶ 22).

### **STANDARD OF REVIEW**

In *Lloyd Foundation v. HealthSouth*, 979 So.2d 784 at 791 (Ala. 2007), the Alabama Supreme Court stated:

We have set forth the standard of review that must be applied in reviewing a dismissal pursuant to Rule 12(b)(6), Ala.R.Civ.P.:

The appropriate standard of review under Rule 12(b)(6) is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle her to relief. In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether she may possibly prevail. We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.

*Nance v. Matthews*, 622 So.2d 297, 299 (Ala. 1993)(citations omitted.)

### **SUMMARY OF THE ARGUMENT**

This Court should dismiss this action for failure to state a claim upon which relief can be granted and for failure to join indispensable parties. Relators cannot bring an action against Senator Marsh because, as a State Senator and Senate Pro Tempore, he has absolute legislative immunity for his legislative activity. Furthermore, Relators may only use a valid writ of *quo warranto* to challenge a legislators' right to hold public office. Here, Relators do not challenge Senator Marsh's qualifications for office. They merely seek to challenge his official action as a Senator and as Senate Pro Tempore. The Realtors do not allege that Senator Marsh has been

convicted of a crime or does not otherwise meet the qualifications to hold office. The gist of the Realtors' complaint is that they politically disagree with Senator Marsh's actions and for that reason, he should be removed from office. Disagreement with a public official's official action is not a ground for removal from office via *quo warranto*. The only remedy is the ballot box. Finally, Relators did not join indispensable parties to this suit and they have not filed proper security for costs.

## **ARGUMENT**

**1. Senator Marsh is immune from suit regarding acts undertaken within the sphere of legislative activities.**

According to Article IV, § 56 of the Alabama Constitution:

Members of the legislature shall, in all cases, except treason, felony, violation of their oath of office, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house shall not be questioned in any other place.

Additionally, § 29-1-7, Ala. Code 1975, states:

(a) Members of the Legislature of Alabama shall in all cases, except treason, felony and breach of the peace, be privileged from arrest and shall not be subject to service of any summons, citation or other civil process during their attendance at the session of their respective houses and in going to and returning from the same.

(b) Whoever knowingly and willfully denies to any member of the Legislature the privilege and immunity granted herein is guilty of a misdemeanor and, upon conviction, shall be punished by fine not exceeding \$1,000 or by imprisonment for not more than one year, or by both.

A legislative act is:

A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts.

Ex parte Marsh, 2013 WL 5298570 \*5 (Ala. Sept. 20, 2013), (quoting U. S. v. Brewster, 408 U.S. 501, 512, 92 S. Ct. 2531, 2537 (1972)).

**a. Senator Marsh is entitled to absolute legislative immunity in conjunction with his actions of enacting state legislation and proposing constitutional amendments.**

The most important issue is whether Senator Marsh is immune from suit in regards to the acts, senate bills and resolution. Absolute legislative immunity applies to state legislators acting within their legislative authority. The Senate Pro Tempore acts within his legislative authority when overseeing the senate, voting on bills, and passing legislatively proposed constitutional amendments. Senator Marsh acted within his legislative authority as a senator and is entitled to absolute legislative immunity when participating in enacting state legislation and proposing constitutional amendments.

Specifically dealing with the acts in question,<sup>4</sup> Senator Marsh acted within in legislative authority as Senate Pro Tempore when the Senate passed the acts. Act 2012-(275-276) were read for the first time in the Senate on March 15, 2012. On May 1, 2012, both bills passed the Senate after the third reading. On May 2, 2012, the House certified the bills, assigned the respective act numbers, and delivered the proposed amendments to the Secretary of State. At no time did Senator Marsh act unilaterally to pass any of the acts, bills, or resolution inasmuch as the Senate, not just one senator, must vote. Notably, the Realtors do not allege any procedural deficiency concerning the passage of any act, bill, or resolution.

In Ex parte Simpson, 36 So.3d 15 (Ala. 2009), the Supreme Court ruled that the mayor was immune from liability “for his participation as a voting member of the Town council in

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<sup>4</sup> Plaintiffs' complaint is a model for lack of clarity. The acts they appear to question in the unnumbered 19<sup>th</sup> page of their complaint are Acts 2012-275, 2012-276 and Senate Bills 2014-7, 253, 258, 259, 261, 274, 276, etc. In their clarification, the Realtors add SJR 82, which is attached to the clarification and shows it was assigned Act No. 2011-197. The clarification also vaguely states the Realtors want all amendments associated with SJR 82 declared null and void. SJR 82, in essence, created a commission to study the Constitution of Alabama and recommend changes for legislative consideration.

passing that ordinance.” Id. at 29. The Supreme Court of Alabama reasoned that legislative immunity is “well established and universal in nearly every state.” Id. at 29. The Supreme Court stated that “legislative immunity applies only to actions that are inherently legislative (policy-making) ...” Id. at 30.

Here, Senator Marsh acted within his legislative discretion in regards to the acts, senate bills, and resolution. In Alabama, a legislatively proposed constitutional amendment functions as a “legislative act” for immunity purposes because it is “generally done in Congress [the legislature] in relation to the business before it.” Ex parte Marsh, 2013 WL 5298570 \*5. (Bracketed words added.) Much like the mayor in Simpson, Senator Marsh is absolutely immune from liability for actions arising from his legislative and policy-making authority. Again similar to the mayor in Simpson, Senator Marsh would only be subject to liability if he stepped outside of his legislative authority. See. Ala. Const. 1901, Art. III Section 42 (“The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.”) See also. Ala. Const. 1901, Art. III Section 43 (“except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers ... to the end that it may be a government of laws and not of men.”) Relators cannot establish the Senator Marsh acted outside of his legislative authority as Senate Pro Tempore when the Senate passed the acts. Therefore, Senator Marsh is absolutely immune from suit because he acted within his legislative or policy-making authority.

In Ex parte Marsh, 2013 WL 5298570 (Ala.), another citizen also unsuccessfully brought suit against state legislators. The citizen alleged that the Alabama Accountability Act, or House

Bill (HB) 84, violated the Open Meetings Act. Id. The Alabama Supreme Court held that legislators are immune from suit under the Speech and Debate Clause of the State Constitution. Id. at \*4. The Alabama Supreme Court accepted the legislator's argument that:

[T]he separation of the branches of Alabama government (Ala. Const.1901, Art. III, §§ 42, 43) is the basis for providing a specific protection to Alabama legislators in the Alabama Constitution:

Members of the legislature shall, in all cases, except treason, felony, violation of their oath of office, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house shall not be questioned in any other place. Art. IV, §56.

Id. at \*5. The Alabama Supreme Court held that “the ‘speech or debate clause’ of § 56 protects against inquiry [discovery] into acts that occur in the regular course of the legislative process and into the motivation for those acts.” Id. (Bracketed word added.) Accordingly, the Alabama Supreme Court reasoned that “in order to promote the public welfare, Alabama law has conferred upon members of legislative bodies an absolute privilege from certain causes of action stemming from the performance of their legislative functions.” Id. at \*6. Thus, “Legislative immunity prevents probes for evidence with which to support the litigant’s challenge to a legislative decision as improperly motivated, procedurally defective, or otherwise infirm.” Id. at \*6.

Much like the citizens in Ex parte Marsh, Relators seek to challenge Senator Marsh’s legislative decision to allow the acts, senate bills, and resolution to proceed before the Senate as improperly motivated. Relators also improperly sought to void the acts by demanding Senator Marsh show *quo warranto*, or “by what authority,” why the Senate passed the acts, bills, and resolution. Compl. at 2, 3. Yet, much like the citizens in Ex parte Marsh, Relators are prohibited from challenging Senator Marsh’s legislative actions. Senator Marsh is protected by absolute

legislative immunity from any suit arising from his legislative decisions, such as this one, and from inquiries into the validity of his decision. Accordingly, Plaintiffs are not allowed under Alabama law to proceed with discovery as this case is due to be dismissed pursuant to legislative immunity.

Relators may argue that Senator Marsh is still liable because he went beyond his legislative powers by proposing amendments to the Alabama Constitution without calling a constitutional convention. However, this merely shows the Relators' lack of constitutional scholarship. Section 284, Ala. Const. 1901, provides the procedure for amending the Alabama Constitution.

The procedures in Section 284 provide in pertinent part that "the proposed amendments shall be read in the house in which they originate on three several days, and, if upon the third reading three-fifths of all the members elected to that house shall vote in favor thereof, the proposed amendments shall be sent to the other house." Additionally, the bill must then be read on three separate days and if after the third reading "three-fifths of all the members elected to that house shall vote in favor of the proposed amendments, the legislature shall order an election by the qualified electors of the state upon such proposed amendments." Id. Finally, if a "majority of the qualified electors who voted at such election upon the proposed amendments voted in favor of the [amendment], such amendments shall be valid to all intents and purposes as parts of this Constitution." Id. Needless to say, the Realtors are correct when they say the legislature may not amend the constitution. The legislature can only propose amendments, which become effective if the majority of qualified voters approve same.

Most importantly, the Alabama Constitution provides for two types of constitutional amendments: Convention Amendments and Legislatively proposed amendments. Section 286, Ala. Const. 1901, states in part:

No convention shall hereafter be held for the purpose of *altering or amending* the Constitution of this state, unless after the legislature by a vote of a majority of all the members elected to each house has passed an act or resolution calling a convention for such purpose.

Section 286 therefore provides legislative discretion for amending the Constitution through either convention amendments or legislatively proposed amendments. Importantly, Section 286 is limited by the procedures laid out in Section 284. Therefore, the real issue is whether Senator Marsh and the legislature followed the appropriate procedure to amend the Alabama Constitution through legislatively proposed amendment.

Viewing all the facts in the light most favorable to the non-moving party, Relators failed to provide any factual claim that Senator Marsh failed to follow the constitutional procedures under Sections 284 and 286 for amending the Alabama Constitution via legislatively proposed amendment. Furthermore, Relators' legally inept complaint fails to establish any factual claim that Senator Marsh overstepped his legislative authority under Sections 42, 43, or 56 of the Alabama Constitution. Therefore, Senator Marsh is fully protected by absolute legislative immunity. Under absolute legislative immunity, Relators are also prohibited from probing for evidence, i.e. discovery, to support their claim that Senator Marsh's actions were improperly motivated. Because Senator Marsh's actions are clearly within the scope of legislative authority, this Court should dismiss this claim.

**b. Senator Marsh is immune from service of process during the Alabama legislative session.**

Importantly, Relators did not properly serve Senator Marsh. Absolute legislative immunity extends to protect state legislators from service of process during legislative session.

The 2014 legislative session lasted from Tuesday, January 14, 2014, until Thursday, April, 3 2014. Acting as Senate Pro Tempore, Senator Marsh was immune from any service of process during the legislative session.

According to their complaint, Relators attempted to “serve” Senator Marsh during the Alabama legislative session. In their complaint, Relators state “February 4<sup>th</sup>, 2014, pursuant to Matthew 5:25, seeking to resolve a controversy without the use of public resources twelve people signed, before a notary public on an order of *quo warranto*.” (Compl. p. 2). On that same day, “Franklin R. Dillman and Donald Curtis Casey presented the same (*quo warranto*) to Senator Del Marsh (sic).” Relators then tried to assert that Senator Marsh acquiesced to their allegations because he did not answer their *quo warranto*. On February 20<sup>th</sup>, 2014, “Kenneth L. Freeman and Donald Curtis Casey presented (sic) Senator Del Marsh (sic) a statement of facts.” (Compl. p. 2). Again, Relators tried to assert that Senator Marsh acquiesced to their allegations by not responding.

In Ex parte Marsh, the Alabama Supreme Court held that “§ 29-1-7 is an extension of the legislative immunity set out in § 56 and provides that legislators are protected from service of process during the legislative session.” Ex parte Marsh, 2013 WL 5298570 \*6. Section 29-1-7(a), Ala. Code 1975, states, “Members of the Legislature of Alabama shall in all cases, except treason, felony and breach of the peace, be privileged from arrest and ***shall not be subject to service*** of any summons, citation or other civil process during their attendance at the session of their respective houses and in going to and returning from the same.” (Emphasis added). Moreover, § 29-1-7(b) states, “Whoever knowingly and willfully denies to any member of the Legislature the privilege and immunity granted herein is guilty of a misdemeanor and, upon

conviction, shall be punished by fine not exceeding \$1,000 or by imprisonment for not more than one year, or by both."

Here, Relators repeatedly, knowingly, and willfully denied Senator Marsh the privilege and immunity granted under § 56 of the Alabama Constitution and § 29-1-7 of the Alabama Code. During the Alabama legislative session, Relators attempted to serve Senator Marsh with improper legal paperwork at least twice. More importantly, Relators did not pursue the proper legal channels to challenge Senator Marsh's legislative discretion. At no time did any Court sign or certify Relators' first writ of *quo warranto*. Therefore, Relators' attempt to bring legal action outside of a court of law carries no legal efficacy even if Senator Marsh were not immune from service of process during legislative session.

Relators furthermore sought to achieve some sort of moral high-ground by continually noting how they acted "pursuant to Matthew 5:25" when they attempted to serve Senator Marsh with process during the 2014 legislative session. Although this may be wise in matters of personal disagreements, this carries absolutely no legal weight or authority in this Court nor does this allow Relators to knowingly and willingly deny Senator Marsh the privilege and immunity granted under § 56 of the Alabama Constitution and § 29-1-7 of the Alabama Code.

Although Relators did not act under any legal authority whatsoever, they attempted to act under color of law to knowingly and willfully deny Senator Marsh the privilege and immunity granted to him under the Alabama Constitution and the Alabama Code. Relators also opened themselves up to potential criminal liability. Relators' actions are punishable under § 29-1-7(b) "by fine not exceeding \$1,000 or by imprisonment for not more than one year, or by both." This Court should therefore honor Senator Marsh's absolute legislative immunity and dismiss this action with prejudice.

**2. Relators did not file a proper *quo warranto* motion.**

*Quo warranto* is a common law writ. Black's legal dictionary defines a writ of *quo warranto* as being "in the nature of a writ of right for the king, against him who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim, in order to determine the right." In the Alabama Code, and in the "common law writ, its prototype, have ordinarily but two functions... [A writ of *quo warranto*] inquires by what right the person proceeded against exercises official authority... And it inquires by what right any number of persons, one or more, exercise or enjoy a franchise, and determines that right." Leigh v. State, 69 Ala. 261, 266 (1881).

**a. Senator Marsh lawfully holds the Office of Senator and rightfully exercises his duties and powers.**

A writ of *quo warranto* serves to answer whether Senator Marsh lawfully holds the office of Senator and whether he rightfully exercises his duties and powers. A writ of *quo warranto* serves to challenge a person's right to hold public office. A State Senator lawfully holds office if he is twenty-five years of age at the time of their election, he resides in the district in which he is elected, and he is duly elected by the qualified voters of his district. Ala. Const. §§ 46, 47, 1901. Additionally, a senator lawfully holds the title of Senate Pro Tempore if he is a member of the Senate and is elected by the Senate to serve as Senate Pro Tempore. Ala. Const. § 51, 1901.

Senator Marsh has been a member of the Alabama State Senate from the 12<sup>th</sup> District since 1998. Pursuant to § 46 and § 47, the 12<sup>th</sup> District elected Senator Marsh to a fourth consecutive term in November 2010. Pursuant to § 51 of the Alabama Constitution, the Senate elected Senator Marsh as President Pro Tempore on December 8, 2010 and again on January 11, 2011.

In State v. Reed, 364 So.2d 303 (Ala. 1978), the State brought a statutory *quo warranto* claim on behalf of a registered voter to challenge the qualifications of a state legislator to hold office. The issue in Reed was not the validity of the writ of *quo warranto* but whether judicial remedy existed under the political question doctrine. Id. at 305. However, the Alabama Supreme Court held that, for a writ of *quo warranto*, “it is well established that the remedy lies to challenge a person's right to hold office based on grounds of ineligibility.” Id. at 305. The Alabama Supreme Court reasoned that “if the incumbent becomes ineligible to hold the office pending his incumbency, and continues to exercise its functions, he is a usurper, and may be ousted by *quo warranto* proceedings.” Id. The Alabama Supreme Court further reasoned that “it is undisputed that a conviction for an infamous crime goes to the eligibility of [the legislator] to hold office as a member of the Alabama Legislature” Id.

Unlike the legislator in Reed, there is no dispute of fact concerning Senator Marsh’s eligibility to hold office. Relators did not claim in their complaint that Senator Marsh was convicted of any infamous crime that would cause him to be ineligible to serve as a State Senator, nor do Relators claim that Senator Marsh was not qualified when elected by the 12<sup>th</sup> District. Rather, Relators merely assume that Senator Marsh overstepped his authority by serving as Senate Pro Tempore when the House and Senate passed the acts, bills and resolution. However, as has already been discussed at length in this brief, the House and Senate may legislatively propose constitutional amendments pursuant to Sections 284 and 286 of the Alabama Constitution.

Senator Marsh lawfully holds the office of Senator for the 12<sup>th</sup> District of Alabama and the position of Senate Pro Tempore. Although Relators made the naked assertion that Senator Marsh usurped public office, they state no facts to suggest that Senator Marsh is ineligible to

hold office. As previously stated, disagreement with Senator Marsh's legislative actions is not a ground for *quo warranto*. The Realtors' remedy is the ballot box. Relators therefore failed to properly state a cause of action in their writ of *quo warranto*.

**b. Relators cannot use a writ of *quo warranto* to challenge official action.**

Even if Relators properly filed their writ of *quo warranto* they cannot use the writ to challenge official action. A writ of *quo warranto* may either inquire by what authority a person holds a public office or by what authority a person exercises official powers. The result of a writ of *quo warranto* is to either quash the writ by show of authority or to oust the individual from office. Here, the Relators improperly sought to oust Senator Marsh by challenging his official action.

Senator Marsh presided over the Senate as Senate Pro Tempore when the legislature passed the acts, senate bills and resolution. The decision to amend the constitution via legislatively proposed amendment, instead of calling a constitutional convention, fell well within the discretion of the legislature. This legislative discretion, as an official action, cannot be challenged by a writ of *quo warranto*.

In Leigh v. State, 69 Ala. 261 (1881), citizens, joined by the State, brought a writ of *quo warranto* against local officials to prevent the county seat from being moved to another city. The Alabama Supreme Court ruled that the citizens could not bring the writ of *quo warranto* to challenge the result of a county seat election. The Alabama Supreme Court held that a writ of *quo warranto* "inquires by what right the person proceeded against exercises official authority... And it inquires by what right any number of persons, one or more, exercise or enjoy a franchise, and determines that right." Id. at 266. However, the Alabama Supreme Court also held that a writ

of *quo warranto* affords “no relief for official misconduct, and cannot be employed to test the legality of the official action of public or corporate officers.” Id.

The Alabama Supreme Court reaffirmed this decision in State v. Birmingham Water Works Co., 185 Ala. 388 (1913). In Birmingham Water Works, the State brought a writ of *quo warranto* on behalf of a citizen against the Birmingham Water Works Company for a breach of municipal contract. Id. at pp. 390-91. The Alabama Supreme Court remanded the case to trial in order to determine if the municipal company should lose their franchise. Id. at 414. The Alabama Supreme Court echoed Leigh and again stated that a writ of *quo warranto* affords “no relief for official misconduct, and cannot be employed to test the legality of the official action of public or corporate officers.” Id. at 417.

Much like the State in Leigh and Birmingham Water Works, Relators cannot challenge Senator Marsh’s official action. Senator Marsh acted officially, within the duties and authorities of his public office, when the legislature passed the acts, senate bills and resolution. Relators can only join the State to challenge a sitting legislator’s qualifications by a writ of *quo warranto*. However, official action, which falls within legislative discretion, cannot be properly challenged by a writ of *quo warranto*.

Relators sought to oust Senator Marsh over his official actions as Senate Pro Tempore. Even if Relators brought a valid writ of *quo warranto* they would be unable to challenge Senator Marsh’s official actions or legislative discretion. Therefore, this Court should dismiss this claim with prejudice.

**c. Relators failed to provide security for costs, which is a condition precedent for a writ of *quo warranto*.**

A writ of *quo warranto* is rightful to challenge by what authority a senator holds public office. However, a condition precedent to bringing a writ of *quo warranto* on behalf of the State

is security for the costs of litigation. A failure to provide security for costs is a jurisdictional defect. Here, this Court does not have subject-matter jurisdiction because no security for cost was provided by Relators before seeking a writ of *quo warranto*.

Relators attempted to serve Senator Marsh with an improper writ of *quo warranto* on February 14, 2014, while the legislature was still in session. On July 2, 2014, Relators then submitted an almost incomprehensible pleading before this Court seeking an actual writ of *quo warranto*. Relators then attempted to provide security for costs by pledging to “pay such sum as the Court deems proper as security for payment of such costs, damages, and reasonable attorney fees as may be incurred.” However, Relators failed to actually put up security for the cost of litigation. Merely promising to pay litigation costs is not the same as putting up actual security for the cost of litigation. Because Relators failed to provide security for costs, this Court does not have subject-matter jurisdiction over this case.

In Riley v. Hughes, 17 So. 3d 643 (Ala. 2009), the Supreme Court of Alabama dismissed an action *ex mero moto* for the absence of subject-matter jurisdiction because the respondents did not provide security for costs. The Alabama Supreme Court held that *quo warranto* is the “exclusive remedy to determine whether or not a party is usurping a public office.” Id. at 648. The Alabama Supreme Court further held that providing security for costs is a condition precedent and the failure to provide security for costs is a jurisdictional defect. Id. (Quoting Brannan v. Smith, 784 So. 2d 293, 297 (Ala. 2000)).

In Brannan v. Smith, 784 So. 2d 293(Ala. 2000), the Alabama Supreme Court upheld the dismissal of a writ for *quo warranto* for failure to provide security for costs. The Alabama Supreme Court held that “The giving of security for the costs of the litigation “is a condition on which the right to proceed in the name of the State is given to individuals.” Id. at 297.

Furthermore, the Alabama Supreme Court found that “failure to give security for costs in such proceedings ... is jurisdictional and fatal to the proceedings.” Id. Moreover, the Alabama Supreme Court reasoned, “Without the giving of such security, the relator usurps the authority of the State.” Id. (quoting Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 731-32 (1940)).

In Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 731-33 (Ala. 1940), the Alabama Supreme Court agreed that *quo warranto* is the exclusive remedy to challenge the eligibility of a person to hold public office. The Alabama Supreme Court also held that “the giving of security for the costs of the action is the condition upon which the relator is permitted to sue in the name of the State.” Id. at 732. Furthermore, the Alabama Supreme Court held that “without such security, he usurps the authority of the State.” Id.

Finally, in Ex parte Talley, 192 So. 271 (Ala. 1939), the Alabama Supreme Court granted a mandamus petition that sought to dismiss the suit at the relators’ cost. In Talley, the relators submitted a writ of *quo warranto* with a security that “was signed only by the relators listed in the same document as parties to the action... [and] there was no surety thereon.” Id. at 273. The Alabama Supreme Court held that the security was in fact “no security at all, since the obligors were **only those already bound for costs** as parties.” Id. (Emphasis added).

Similar to Riley, Brannan, Birmingham Bar Ass'n, and Talley, Relators failed to provide security for costs when they submitted their complaint before this Court. Failure to provide security for costs is a condition precedent to bring a writ of *quo warranto*. Without security for costs, this Court does not have subject-matter jurisdiction over this case. Furthermore, like Talley, the “security” they attempted to provide is no security at all because only the only obligors are those “already bound for costs as parties.” Therefore, Relators are in fact attempting

to usurp the State by bringing a claim on behalf of the State without providing security of costs before bringing their claim.

Security for costs is a condition precedent for Relators to bring a writ of *quo warranto* on behalf of the State. A mere promise to pay litigation costs by litigants already responsible for those costs is not sufficient. Relators attempt to usurp the State's authority because they failed to provide security for costs. Therefore, this Court should dismiss Relators writ of *quo warranto*.

**3. Relators cannot bring a claim because they omitted indispensable parties under Rule 19.**

Relators failed to join all necessary parties when they submitted their writ of *quo warranto*. In order to provide efficient litigation, all indispensable parties must be joined at the start of litigation. Relators failed to join all indispensable parties (the other members of the legislature) because they only brought their claim against one individual state senator.

Senator Marsh serves as Senate Pro Tempore, however, even in his leadership role he is unable to pass legislatively proposed constitutional amendments without the required three-fifths votes in both Houses. Even though his title allows him to oversee deliberations of bills and amendments, Senator Marsh is only allotted one yay-or-nay vote on any bill or amendment in the Senate. Furthermore, although Senator Marsh does decide, within his discretion, whether bills are brought to the floor, he cannot unilaterally pass an amendment without the support of three-fifths of the Senate. Therefore, in order for Relators to challenge Senator Marsh they must join every single member of the House and Senate who vote for any of the acts, bills or resolution.

Rule 19(a), Ala. R. Civ. P, provides "A person who is subject to jurisdiction of the court shall be joined as a party in the action if... in the person's absence complete relief cannot be accorded among those already parties." Rule 19(b) further provides that "if a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in

equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Rule 19(b) also includes multiple factors to consider, including:

to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties ... the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided ... whether a judgment rendered in the person's absence will be adequate ... [and] whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The Alabama Supreme Court in Ross v. Luton, 456 So. 2d 249 (Ala. 1984) explained the applicability of Rule 19. In Ross, the Alabama Supreme Court explained that "a court must [first] determine whether the absentee is a person who should be joined if feasible under Rule 19(a)." Id. at 256. The Alabama Supreme Court then further explained that "the determination of whether a party is indispensable under Rule 19(b) is based on equitable and pragmatic considerations." Id. at 257.

Here, if Relators submitted a sufficient complaint, a valid *quo warranto*, and this Court ignored the well established absolute legislative immunity doctrine then this Court must require Relators to join all indispensable parties. Indispensable parties must include all State Representatives and Senators who voted for the acts and bills; the Lieutenant Governor of Alabama because she presides over the Senate; and the Governor of Alabama because he signed the acts into law. All these persons are indispensable parties because Senator Marsh cannot unilaterally pass acts or proposed amendments to the Alabama Constitution as *Senate Pro Tempore*. Because the Relators failed to join indispensable parties, this Court must either dismiss this action or ignore all governmental immunities and require Relators to join every single indispensable party.

## **CONCLUSION**

This Court should dismiss this case because Relators failed to state a claim on which relief can be granted and because Relators failed to join indispensable parties. Relators cannot bring an action against Senator Marsh because he, as a State Senator and Senate Pro Tempore, holds absolute legislative immunity.

The exclusive right to for a citizen to challenge a legislator's qualification to hold public office is a writ of *quo warranto*. However, Relators failed challenge Senator Marsh's qualifications to lawfully hold public office. Furthermore, Relators cannot use a writ of *quo warranto* to challenge the official action of a legislator. Relators failed to provide adequate security for costs to bring a claim on behalf of the State of Alabama.

Even if Relators could bypass legislative immunity and the proper *quo warranto* standard, Relators' failed to join all indispensable parties to this action. Relators merely named one sitting State Senator to their claim. This is not sufficient to meet the standard under Rule 19.

Respectfully submitted,

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