

IN THE CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS
CIVIL DIVISION

SHIRLEY P BROWN, ET AL.

PLAINTIFF

v.

No.: 18CV-24-894

FRANK BARTON, ET AL.

DEFENDANT

FINAL ORDER & WRIT OF MANDAMUS

NOW on these 23rd and 25th days of September 2024 came on to be heard the Petition for Writ of Mandamus, Declaratory Judgment, and Injunctive Relief and the Motion for Temporary Restraining Order and Preliminary Injunctive Relief (collectively Petition) filed herein by Plaintiffs on September 19, 2024. Plaintiffs appeared in person and by and through counsel, Jennifer Standerfer. Separate Defendants Frank Barton and James Pulliaum appeared in person and all Defendants appeared by and through counsel, Joe Rogers. After considering the proof presented, reviewing the pleadings filed herein and applicable law, the Court being well and sufficiently advised hereby FINDS and ORDERS as follows:

Plaintiff's Petition should be and hereby is GRANTED IN PART AND DENIED IN PART.

FACTS & PROCEDURAL HISTORY

Prior to calling a witness, the parties agreed to advance this scheduled preliminary hearing to a full trial on the merits pursuant to Arkansas Rule of Civil Procedure (ARCP) 65(a)(2).

The 2024 General Election is scheduled November 5, 2024. Plaintiffs are residents of Crittenden County, Arkansas, are over the age of eighteen (18) years, and have expressed an intent

to vote during the early voting period of the upcoming General Election in West Memphis, Arkansas. Separate Defendants, Frank Barton, Anita Bell, and James Pulliaum (individually Barton, Bell or Pulliaum, collectively Commissioners) are the duly appointed members of the Crittenden County Election Commission (Commission). Barton is the chairperson of the Commission. Separate Defendant Crittenden County is a corporate body politic in Arkansas with governmental powers pursuant to Ark. Code Ann. §14-14-501. West Memphis is a city located within Crittenden County.

During the 2022 General Election early voting occurred at the First Baptist Church (West Memphis) in Crittenden County. The proof is undisputed that this early voting location was chosen by the Commission at a duly called meeting prior to the 2022 General Election.

On or about August 23, 2024, the Commission met and discussed one or more appropriate locations for early voting in the 2024 General Election. All three Commissioners were present. Following a discussion, a motion was made and properly seconded to provide for early voting at the West Memphis Library. Barton and Bell voted for this motion, but Pulliaum voted against it. Thus, the motion failed pursuant to Ark. Code Ann. §7-5-418(b)(1)(B). Additionally, on or about September 3, 2024, the Commission met again and discussed early voting. Again, all three members were present. Following discussion, no motion was made, but Barton did announce that, “[t]here is no early voting place in West Memphis” for the 2024 General Election. One day later, on September 4, 2024, the chair of the Crittenden County Democratic Party advised Barton orally and in writing that Pulliaum desired to change his vote and requested that Barton call an emergency meeting on the issue of a location for early voting in West Memphis. To date, Barton has not called a meeting to discuss the issue. In his testimony, Pulliaum admits that he never made a

motion for an alternative location at any meeting of the Commission, and Barton never failed to recognize Pulliaum to make such a motion.

On or about September 5, 2024, Crittenden County Clerk Paula Brown advised the Commission that she was designating the Seventh Street Church of Christ in West Memphis as an early voting site pursuant to the authority granted the clerk in Ark. Code Ann. §7-5-418(a)(1)(A). Brown did not obtain prior legal advice on the issue of whether she actually possesses the statutory authority to unilaterally designate her own early voting site.

Plaintiffs filed their Petition in this Court on September 19, 2024. On the issue of remedies sought, the Petition is not a model of clarity, though no fault is assigned here due to the fluid nature of what was happening relative to early voting in Crittenden County during this time. Essentially, this Court believes Plaintiffs' Petition ultimately seeks mandamus against the Commission. Thus, Plaintiffs seek an order from this Court compelling the Commission to open another early voting site in West Memphis whether at First Baptist Church (West Memphis) or elsewhere. Concomitant with mandamus, Plaintiffs seek injunctive relief and/or a declaratory judgment compelling Defendants to provide appropriate resources and staffing at the additional early voting site.

During argument, Plaintiffs did refine their request, and, importantly, this Court has granted Plaintiffs' request to amend their pleadings to conform to the proof as allowed in ARCP 15(b). Specifically, the argument and proof before the Court and unknowable to Plaintiffs at the time of the filing of their Petition is that all Defendants generally and the Commission Defendants specifically do not intend to provide resources, equipment, personnel, etc. that could accommodate early voting at the Seventh Street Church of Christ in West Memphis.¹ The discussion of authority

¹ Belt and suspenders. On September 26, 2024, Plaintiffs filed their Amended Petition for Writ of Mandamus, Declaratory Judgment, and Injunctive Relief. The amended petition is identical to the original petition with the

below is segregated by Plaintiffs' current specific requests to this Court pursuant to their pleadings as amended by ARCP 15. While each request is, in some sense, unique and will be analyzed as such, many of the issues, particularly those issues sounding in mandamus and statutory construction, permeate all three requests.

DISCUSSION OF AUTHORITY & APPLICATION OF LAW

*Mandamus Generally*²

Mandamus is an extraordinary writ, and “means an order of the circuit court granted upon the petition of an aggrieved party . . . commanding an executive, judicial, or ministerial officer to perform an act or omit to do an act, the performance or omission of which is enjoined by law.” Ark. Code Ann. §16-115-101 (Repl. 2016). Its purpose is to, “enforce an established right or to enforce the performance of a duty.” Monaco v. Lewis, 684 S.W.3d 583, 586 (Ark. 2024); see also Rogers v. Arkansas Dep’t of Corr. 638 S.W.3d 265, 268 (Ark. 2022). Mandamus does not, however, allow a Court, “to control or review matters of discretion and is used to enforce an established right.” Rogers, 638 S.W.3d at 268. Thus, [i]t is a settled rule of law, recognized by this court in numerous decisions, that mandamus will not lie to control an officer in the performance of a discretionary act nor to control the discretion of an officer in the performance of his duty where such discretion is vested by law, but will only lie to compel an officer to exercise his discretion where he has refused to act at all.” Miller v. Tatum, 279 S.W. 1002, 1005

exception that paragraphs 27-29 and 36-38 are added to the amended petition. These additional paragraphs track this Court's prior ruling concerning ARCP 15(b) and the issues actually tried to the Court. As a result, and probably as a technical matter, it is this amended petition that is properly before the Court for consideration today.

² Plaintiffs actually plead and seek, in addition to the writ of mandamus, both injunctive relief and a declaratory judgment. Arkansas law is clear that declaratory relief together with mandamus is the appropriate remedy in an election case. See, e.g., State v. Craighead County Bd. of Election Commr's, 779 S.W.2d 169 (1989). Whether injunctive relief is also an available remedy in an election case is less clear, but based on the facts of this case, this Court is not called upon to specifically determine whether injunctive relief is also available. The critical point here, confirmed by Plaintiffs during argument, is that all of its requested relief is premised on a successful mandamus claim.

(Ark.1926)(citations omitted). Finally, a petitioner seeking mandamus, “must show a clear and certain right to the relief sought and the absence of any other adequate remedy.” Wyatt v. Carr, 592 S.W.3d 656, 661 (Ark. 2020). While a petitioner’s burden of proof remains by a preponderance of the evidence, the relief sought by a petitioner, or mandamus itself, must be “clear and certain” under existing law. Id.

Early Voting at the West Memphis Library

The Arkansas Legislature has clearly granted one group of three people within each county the authority to establish early voting locations. The one group of three people is the local county election commission, here the Commissioners. See Ark. Code Ann. §7-5-418(b)(1)(A)(Supp. 2023).³ The statute at issue here is purely discretionary, and states, unequivocally, that, “[t]he county board of election commissioners *may* decide to hold early voting at additional polling sites outside the offices of the county clerk on any of the days provided for in subsection (a) of this section, *if it so chooses.*” Id. (emphasis added). In the exercise of this discretion, the Arkansas Legislature has also provided clearly and unequivocally that the unanimous vote of all three commissioners is required to establish additional early voting sites separate and apart from the county clerk’s designated site. Ark. Code Ann. §7-5-418(b)(1)(B)(Supp. 2023).

The proof on this issue is clear. Here, the Commission held two separate meetings (a) where all Commissioners were present and (b) where the three of them could not unanimously agree to establish an early voting site in West Memphis. The Commissioners did exactly what

³ In their pleadings, Plaintiffs arguably seek a writ of mandamus from this Court compelling Defendants, particularly, the Commission, to hold early voting at other appropriate locations within West Memphis to be determined by the Court. To the extent this was an actual request, Plaintiffs abandoned this argument, and, critically, this Court does not have subject matter jurisdiction to unilaterally order early voting occur at a location of its choice. That authority is solely granted to (a) the Commission and (b) arguably, *see infra*, the duly elected county clerk. The Court’s only authority—via mandamus—is to compel the Commission to follow “clear and certain” law as it relates to the duties imposed on the Commission by the Arkansas Legislature in statute.

was required of them by the statute. Thus, this Court has no “clear and certain” authority under existing law to grant the relief sought by Plaintiffs as it relates to West Memphis Library because the Commissioners’ actions are purely discretionary pursuant to Ark. Code Ann. §7-5-418(b)(1)(A).

In their Petition, amended petition, brief and argument, Plaintiffs make much of Barton’s obstinance, to date, in refusing to call a third meeting of the Commission so that, presumably, Pulliaum could change his vote and another early voting location could be established in West Memphis. Honestly, Plaintiffs’ argument here makes very little sense to this Court. Plaintiffs devote significant portions in their pleadings making the point that the West Memphis Library is an unsuitable location for early voting for various reasons. These same perceived deficiencies were pointed out by Pulliaum during the Commission meetings based on the proof presented. Whether the West Memphis Library is or is not a suitable location for early voting is not a question this Court is called upon to answer. But, assuming arguendo, that this Court were inclined to grant mandamus and order a third meeting so that Pulliaum could change his vote, his vote would essentially establish the West Memphis Library as the Commission’s designated early voting site in West Memphis. Thus, Plaintiffs ask this Court to grant an extraordinary writ and order a third meeting where, presumably, the Commissioners would then vote to establish an early voting site at the West Memphis Library—a location Plaintiffs contend is wholly inappropriate for this purpose. To this Court, this seems to be a particularly self-defeating example of circular logic.

More importantly, mandamus is not now nor has it ever been the appropriate remedy to redress a discretionary function. Had Barton not called any meeting to discuss possible early voting locations that might be established by the Commission or refused to recognize a motion properly made by Pulliaum, mandamus may have been appropriate. Here, however, Barton called

two such meetings where early voting locations were discussed, but the Commission was unable to unanimously agree upon a suitable location. It is not this Court's prerogative to order—via mandamus—the Commission to continue to hold multiple meetings until they can agree upon some suitable place.

In fact, Ark. Code Ann. 7-5-418(b)(1)(A) contemplates the exact scenario presented here: The Commission met and discussed possibilities for early voting locations in West Memphis, but they could not unanimously agree upon a particular location, and, *a fortiori*, since they could not agree, none is established by their action. The fact that the Chair of the Democratic Party and/or Pulliaum himself now claim Pulliaum desires to change his vote is of no legal consequence even if everyone agreed that the West Memphis Library was a suitable location. Pulliaum attended two meetings where early voting was discussed. During the first, a motion was made and seconded and Pulliaum's dissenting vote caused the motion to fail. During the second, no motion was made. The law does not "clearly and certainly" require Barton to call a third meeting, and, for that same reason, mandamus is inappropriate here.

Similarly, Plaintiffs argue in their post-trial brief that it is at least statutorily conceivable that Bell and/or Pulliaum could call a third meeting today to discuss the establishment of an early voting location in West Memphis since Barton remains opposed to calling such a meeting. Maybe. While the Court does not decide that issue today, the Court would concede the point that such a scenario is not clearly set forth in statute. However, even if Bell and/or Pulliaum possess such authority, the argument misses the bigger point that a third, fourth, fifth, etc. meeting whether called by Barton, Bell or Pulliaum is not "clearly and certainly" required by statute, and, thus, mandamus is not an appropriate remedy.

The Court pauses here to “acknowledge”⁴ the Commissions’ discretion granted in Ark. Code Ann. §7-5-418(b) and implore the Arkansas Legislature to at least consider the propriety of delegating such extraordinary and nearly unfettered power to three individuals in each Arkansas county who are placed in their position by one of two political parties. Whether Pulliaum, the appointee from the Democratic Party, has the unilateral authority to call a meeting of the Commission misses the larger point. Pulliaum clearly possesses the statutory authority to unilaterally block early voting by the Commission in all of Crittenden County.⁵ Pulliaum’s power in Crittenden County is the same power granted Bell and Barton in Crittenden County and the same power granted to each member of each local county board of election commissioners. In other words, a single, unelected, politically affiliated person in each Arkansas county has the unilateral power to completely stop early voting by the county board of election commissioners in that county.

As set forth more fully *infra*, this Court firmly believes it is now and has been since 1995 the Arkansas Legislature’s clear intent to provide its citizens an opportunity to vote early in each election and to encourage, to the extent possible, as many locations and opportunities for its citizens to exercise the right of suffrage guaranteed by the Arkansas Constitution in Article 3, Section 2. That this clear and unambiguous intent could be thwarted by a single, unelected, politically affiliated person in each Arkansas county is truly frightening and cannot possibly be what the Arkansas Legislature intends. This Court candidly acknowledges it is not this Court’s

⁴ Read: “stare in awe at.”

⁵ To his credit, the Court notes Pulliaum did not exercise/abuse this authority when it came to establishing an early voting site for the 2024 General Election in Marion. Rather, all three Commissioners voted unanimously to establish an early voting site in Marion pursuant to the authority granted them in Ark. Code Ann. §7-5-418(b)(1)(A). While not germane to this decision, the Court also notes for posterity (a) the fact that West Memphis has nearly double the population of Marion; (b) there are significant racial disparities between the two cities; and (c) traditionally, the two cities are “neighbors” only in the sense that they co-exist with each other and actually agree on very little.

prerogative to establish the public policy of this State, but, personally, this Court believes early voting is a highly effective method of encouraging citizens to exercise their right of suffrage. When a single, unelected, politically affiliated person in each Arkansas county possesses the unilateral authority to stop, at least from an early voting perspective, the constitutionally protected right of suffrage, the Arkansas Legislature has, at a minimum, the obligation to consider the wisdom of this broad delegation of authority.

Despite this Court's misgivings about the broad discretionary authority granted in Ark. Code Ann. §7-15-408(b)(1)(A), it is clear the Commission currently possesses it. For the above and foregoing reasons, this Court declines to order mandamus compelling the Commission to do anything related to early voting at the West Memphis Library and any concomitant relief sought through injunction and/or declaration. The Court specifically finds that the discretion afforded the Commission by the Arkansas Legislature in Ark. Code Ann. §7-5-418(b)(1)(A) is clear and unambiguous. As a result, there is no need for this Court to engage in a statutory construction analysis on this point. See Arkansas Dep't of Fin. & Admin v. Trotter Ford, Inc., 685 S.W.3d 889, 895 (Ark. 2024) (“When the language of the statute is plain and unambiguous, and conveys a clear and definite meaning, there is no need to resort to rules of statutory interpretation.”)

Early Voting at First Baptist Church (West Memphis)

The Court's foray into the quagmire that often is statutory construction begins, however, with the early voting location at First Baptist Church (West Memphis). Ark. Code Ann. §7-5-101 requires a county board of election commissioners to, *inter alia*, establish polling sites for elections. In some ways, this statute is clear, but as applied to the facts of this case—particularly early voting sites—it is, at best, enigmatic. As applied to these facts, Ark. Code Ann. §7-5-101 requires this Court to choose, albeit uncomfortably, which of several competing and sometimes

contradictive statutory construction analyses the Supreme Court might choose when, or if, these facts reached them. The Court's discomfort here was stated clearly by Professor Michael Mullane in 1995, when he wrote:

Over the years courts have announced and adopted a plethora of maxims, rules, and presumptions to guide their attempts to interpret statutes. Lawyers and judges often seem to be confronted by a large crowd of such mandates, each clamoring for attention and claiming priority of place. Most law students, lawyers, and judges yearn for an algebraic process of applying these various rules so that the correct interpretation of a statute can be arrived at by judges and predicted by lawyers with mathematical certainty. The problem is that the court has steadfastly maintained that every canon applies in every case. Furthermore although courts will often reject one canon as irrelevant on the facts of a given case, they have never suggested that any canon was entitled to priority over another as a matter of general principle. *The only overarching rule is that the goal of all statutory interpretation, and, therefore, of all canons, is to give effect to the legislature's intent.*

Michael W. Mullane, Statutory Interpretation in Arkansas: How Arkansas Courts Interpret Statutes. A Rational Approach., 2005 Ark. L. Notes 73, 73 (2005)(emphasis added).

The uncontroverted proof is that during the 2022 General Election early voting occurred in West Memphis at the First Baptist Church when the then-commission voted unanimously to establish early voting at that location. The proof is also clear that, while First Baptist Church may have been discussed as a possible location for early voting in the 2024 General Election, no motion was ever made to establish First Baptist Church as an early voting location for the 2024 General Election.

The Arkansas Legislature has made it clear that the designation of polling sites must be established by unanimous vote of the Commission. Ark. Code Ann. §7-5-101(a)(2)(Supp. 2023). Once established, “the polling sites for each election shall be the same as those established for the immediately preceding general election unless changed by order of the county board of election commissioners.” Ark. Code Ann. §7-5-101(d)(1)(Supp. 2023). So, it takes the unanimous vote

of the Commission to “establish” a voting site, but by what vote can the Commission “change” a previously established voting site? The statute provides no guidance, and there is no case-law on-point.

A related question—and likely the seminal question—is whether this statute applies at all to early voting. In other words, do “polling sites” include a site chosen only for day-of voting or does the term also include early voting sites? A “polling site” is statutorily defined as, “*a location selected by the county board of election commissioners where votes are cast.*” Ark. Code Ann. §7-1-101(29)(Supp. 2023)(emphasis added). It is axiomatic that votes are cast at an early voting site. Thus, the statutorily provided definition seems to clearly encompass a previously designated early voting site. On the other hand, the entirety of Ark. Code Ann. §7-5-101 deals exclusively with day-of voting sites as opposed to Ark. Code Ann. §7-5-418 which deals exclusively with early voting generally and early voting sites particularly.

The answer to these vexing questions decide this case as it applies to First Baptist Church (West Memphis), but the answers are, at best, unclear and, as stated above, require this Court to delve into complicated statutory construction analysis with little guidance from the Legislature or an appellate court. This Court certainly appreciates the deep water it has been thrown into and only hopes one or both of these parties appeal this decision so that this Court and future litigants may know what this enigmatic statute means.⁶

To be fair to the Arkansas Legislature, the ambiguity here—and thus the need for this Court to interpret Ark. Code Ann. §7-5-101(d)(1)—is not clear on the face of the statute. Facially, Ark. Code Ann. §7-5-101(d)(1) is both clear and unambiguous. The ambiguity arises not from the

⁶ For the same reasons, this Court hopes the parties will appeal its decision related to Seventh Street Church of Christ. See infra.

words chosen by the Arkansas Legislature, but, rather, from the application of these facts to the statute. In other words, the ambiguity is not because of anything in particular the Arkansas Legislature did, it is solely the by-product of the reality that the Arkansas Legislature did not foresee the potential problem presented when these facts are applied to the statute.

The ambiguity is clear based on the parties' argument. Plaintiffs argue that §7-5-101(d)(1) is properly read as an independent subsection establishing that once a voting site, and particularly an early voting site, is established in a previous election, the Commission cannot remove that site without a formal vote.⁷ Defendants argue that §7-5-101(d)(1) does not apply at all to early voting because that subsection is contained within a statute that deals exclusively with day-of voting. There is no language, however, in Ark. Code Ann. §7-5-101 which explicitly restricts that statute from application to early voting sites, and the statutorily provided definition of "polling site" seems to encompass both day-of and early voting sites. Thus, both arguments are an entirely reasonable interpretation of Ark. Code Ann. §7-5-101(d)(1). Because both interpretations cannot be true at the same time, an ambiguity exists in the statute, but the ambiguity was not created by the words used by Arkansas Legislature. Rather, the ambiguity is created by the application of these particular facts to the statute's words and supplied definitions.

Thus, the ambiguity in Ark. Code Ann. §7-5-101(d)(2) is best described as a "latent ambiguity." This Court's research has not found any case where an Arkansas appellate court has had occasion to opine on the interpretation of an election statute containing a latent ambiguity.

⁷ Whether Ark. Code Ann. §7-5-101(d)(1) requires a unanimous or majority vote of a county board of election commission to remove a previously established polling site is, at best, unclear and may be a defect in the statute affecting future cases. This defect (assuming it is one) is not germane to the Court's decision today and is mentioned here and elsewhere only to bring the issue to the Arkansas Legislature's attention. Here, there was no motion nor any vote to add, change or remove First Baptist Church (West Memphis) from the list of 2024 polling sites, so the issue of the requisite number of votes necessary to pass such a motion is not relevant.

However, Arkansas' appellate courts have long recognized that where a latent ambiguity exists, it is the court's responsibility to interpret the instrument. See, e.g., Chism v. Chism, 2021 Ark. App. 373 (latent ambiguity in court order); Smith v. Smith, 317 S.W.2d 275 (1958)(ultimately finding no latent ambiguity in testamentary instruments but acknowledging court's responsibility to conduct analysis where latent ambiguity exists); Williams v. J.W. Black Lumber Co., 628 S.W.2d 13 (1982)(latent ambiguity in contract). Notably, in Henson v. Fleet Mortgage Co., 892 S.W.2d 250 (Ark. 1995), the Arkansas Supreme Court was presented with a statutory construction issue that directly involved a latent ambiguity created by the application of facts to otherwise clear and unambiguous statutes dealing with recordation of instruments affecting real property in counties with dual county seats. Without mentioning the phrase "latent ambiguity," the Supreme Court went through its traditional statutory construction analysis in spite of the fact that the statutes at issue were facially unambiguous. Id. at 252-53.

In this Court's view, the problem with traditional statutory construction analysis lies not in how a court applies a particular tool to the problem, but, rather, in the selection of the tool in the first place. A rather exhaustive, if not determinative, review of the appellate decisions discussing statutory construction reveals the unfortunate truth that the selection of the tool oftentimes dictates the result of the case. Professor Mullane's thorough treatment of the topic acknowledges, at least tacitly, that there is scant appellate guidance on which tool is appropriate in a given circumstance. It is for this very reason that the Court has repeatedly requested the parties give the Arkansas Supreme Court the opportunity to opine on these statutes. This Court's struggle mirrors recent struggles within the Arkansas Supreme Court itself on this issue. In a March 2024 dissenting opinion where the Arkansas Supreme Court was called upon to interpret a tax statute, Justice Webb stated,

While it is true that the so-called "cardinal rule of statutory construction" is to construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language, it is not the only rule. This court has also held that the basic rule of statutory construction to which all other interpretive guides defer is to give effect to the intent of the legislature. In interpreting a statute and attempting to construe legislative intent, the appellate court looks to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, legislative history, and other appropriate means that throw light on the subject. Accordingly, we are supposed to construe statutes so that, if possible, every word is given meaning and effect. To do so, we are required to construe the entire statute so that no word is left void, superfluous, or insignificant, and meaning and effect are given to every word in the statute if possible. Moreover, interpretation of a statute should not be done in a vacuum; when construing any statute, we must place it beside other statutes relevant to the subject matter in question and ascribe meaning and effect to be derived from the whole. Statutes relating to the same subject should be read in a harmonious manner if possible.

Ark. Dep't of Fin. & Admin. v. Trotter Ford, Inc., 685 S.W.3d 889, 898-899 (Ark. 2024)(Webb, J. dissenting)(internal citations omitted).

Despite its placement in a dissenting opinion, Justice Webb's recitation of some of the applicable statutory construction tools is entirely accurate and is applicable to both First Baptist Church (West Memphis) and to the Seventh Street Church of Christ set forth *infra*. In an unbroken line of cases dating from the very beginning of statehood, the Supreme Court has repeatedly and with remarkable clarity reiterated a court's primary role in interpreting a statute is to divine legislative intent. See, e.g., Railway Co., v. B'Shears, 27 S.W. 2 (Ark. 1894); State v. Havens, 987 S.W.2d 686 (Ark. 1999); Roeder v. United States, 432 S.W.3d 627 (Ark. 2014); City of Benton v. Alcoa Rd. Storage, 513 S.W.3d 259 (Ark. 2017); Ark. Dep't of Fin. & Admin. v. Trotter Ford, Inc., 685 S.W.3d 889 (Ark. 2024); Hotels.com, L.P. v. Pine Bluff Adver. & Promotion Comm'n, 688 S.W.3d 399 (Ark. 2024). While that task is seldom easy, it is even more difficult in Arkansas because of the Arkansas Legislature seldom expresses its intent by statement outside of the words contained in its Acts.

While acknowledging that reasonable minds may differ, this Court determines that the best tools to divine the legislative intent of Ark. Code Ann. §7-5-101(d)(2) as it relates to the latent ambiguity presented here is a consideration of (a) the subject matter of the statute, see Burford Distrib., Inc. v. Starr, 20 S.W.3d 363 (Ark. 2000); (b) the object to be accomplished, see Nelson v. Timberline Intern., Inc., 967 S.W.2d 357 (Ark. 1998); and (c) the purpose to be served, see Burford Distrib., Inc. v. Starr, 20 S.W.3d 363 (Ark. 2000). Stated differently, "[a] general law does not apply where there is another statute governing the particular subject, irrespective of the date of either the general or particular law; neither repeals the other; the particular legislation covers the narrower field where it is applicable." Cheney v. East Texas Motor Freight, Inc., 346 S.W.2d 513, 515 (1961)(quoting Lawyer v. Carpenter, 97 S.W. 662, 663 (Ark. 1906)). See also Ark. Dep't of Fin. & Admin. v. Trotter Ford, Inc., 685 S.W.3d 889, 898-899 (Ark. 2024)(Webb, J. dissenting).

Here, Ark. Code Ann. §7-5-101 deals exclusively with day-of voting and day-of polling sites. It is true that the statutorily provided definition of "polling sites" in Ark. Code Ann. §7-1-101(29) seems to encompass early voting. Moreover, if that definition applied to Ark. Code Ann. §7-5-101(d)(1), the First Baptist Church (West Memphis) would be an early voting site for the 2024 General Election since it was "established for the immediately preceding general election," Ark. Code Ann. §7-5-101(d)(1)(Supp. 2023); and was not changed by the Commission for the 2024 General Election. However, in consideration of the subject matter, object and purpose of Ark. Code Ann. §7-5-101, this Court is convinced that this statute, generally, and thus, Ark. Code Ann. §7-5-101(d)(1), particularly, is not applicable to early voting or early voting "polling sites." Here, there is a specific statute dealing with early voting—Ark. Code Ann. §7-5-418—that most likely subsumes the field of early voting polling sites which would take precedence over the generality of Ark. Code Ann. §7-5-101 as that statute applies to early voting or early voting polling

sites. In the determination of legislative intent, the best (or safest) reading of these statutes is to read them separately and to read them as dealing with distinct subject matters, objects and purposes. One—Ark. Code Ann. §7-5-101—deals with day-of voting and day-of polling sites. The other—Ark. Code Ann. §7-5-418—deals with early voting and early voting polling sites.

By reading the two statutes in this fashion, the Court is able to make the two statutes harmonious. If the two statutes are read as Plaintiffs suggest, an absurd result is produced in that a previously established early voting site could only be eliminated upon some vote of the Commission,⁸ yet the establishment of an early voting site by the Commission each election year is a purely discretionary function requiring unanimous consent of the Commission. As aptly stated by Justice Webb, “interpretation of a statute should not be done in a vacuum; when construing any statute, [the court] must place it beside other statutes relevant to the subject matter in question and ascribe meaning and effect to be derived from the whole. Statutes relating to the same subject should be read in a harmonious manner if possible.” Ark. Dep't of Fin. & Admin. v. Trotter Ford, Inc., 685 S.W.3d 889, 898-899 (Ark. 2024)(Webb, J., dissenting)(citing Stivers v. State, 118 S.W.3d 558, 561 (Ark. 2003) and Gafford v. Allstate Ins. Co., 459 S.W.3d 277 (Ark. 2015)). It is only by reading Ark. Code Ann. §7-5-101 and Ark. Code Ann. 7-5-418 as dealing with different subject matters, objects and purposes can the two statutes survive the latent ambiguity presented here and be read in a harmonious manner together.

To read Ark. Code Ann. §7-5-101 as Plaintiffs suggest is to also render parts of Ark. Code Ann. §7-5-418(b) superfluous. That is a bridge too far for this Court, and if that is in fact what the Arkansas Legislature intended, it is up to the legislature to say so more clearly and/or up to the

⁸ Maybe a unanimous vote and maybe not. See footnote 7, *supra*.

Supreme Court to interpret the statutes in that fashion. If it is true that "every word and every provision is to be given effect. . . . None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence;" Barrett v. Thurston, 593 S.W.3d 1, 10 (Ark. 2020)(Wood, J. concurring)(quoting Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 174 (2012)); then the only conceivable way this Court can avoid a finding that parts of Ark. Code Ann. §7-5-418(b) are superfluous is to read that statute as dealing with different subject matters, objects and purposes than Ark. Code Ann. §7-5-101(d)(1).

For the above and foregoing reasons, this Court declines to order mandamus compelling the Commission to do anything related to early voting at First Baptist Church (West Memphis) and any concomitant relief sought through injunction and/or declaration. The Court specifically interprets Ark. Code Ann. §7-5-401 as dealing exclusively with day-of voting and day-of polling sites and Ark. Code Ann. §7-5-418(b) as dealing exclusively with the Commission's authority as it relates to early voting and early voting polling sites. The latent ambiguity identified by this Court in the two statutes can only be resolved by reading the statutes as dealing with different subject matters, objects and purposes.

Early Voting at Seventh Street Church of Christ

As set forth above, Crittenden County Clerk Paula Brown advised the Commission that she was designating the Seventh Street Church of Christ in West Memphis as an early voting site pursuant to the authority ostensibly granted county clerks in Ark. Code Ann. §7-5-418(a)(1)(A).

Subject to exceptions not applicable here, Ark. Code Ann. §7-5-418(a) provides that, ". . . early voting shall be available to any qualified elector who applies to the *county clerk's designated early voting location*, beginning fifteen (15) days before a preferential primary or general election

between the hours of 8:00 a.m. and 6:00 p.m. Monday through Friday and 10:00 a.m. and 4:00 p.m. Saturday and ending at 5:00 p.m. on the Monday before the election.” Ark. Code Ann. §7-5-418(a)(1)(A)(Supp. 2023)(emphasis added). As set forth above Ark. Code Ann. §7-5-418(b) deals exclusively with a county board of election commission’s authority to establish its own early voting sites. The remaining subsections of Ark. Code Ann. §7-5-418 deal with a myriad of other issues related to early voting.

On its face, Ark. Code Ann. §7-5-418(a)(1)(A) clearly and unequivocally grants county clerks the authority to designate early voting locations. Defendants’ argument attempts to create an ambiguity by pointing the Court to Ark. Code Ann. §7-5-401(c) which provides, in pertinent part that, “[i]n counties with more than one (1) county seat, the county clerk shall conduct . . . [e]arly voting at the county clerk’s designated early voting location in each county seat if the county clerk conducts early voting under §7-5-418.” Ark. Code Ann. §7-5-401(c)(2)(Supp. 2023).

To put it bluntly, Ark. Code Ann. §7-5-401(c) has no application here, and to the extent it is applicable, it is further proof that the Arkansas Legislature intended to grant county clerks the authority to establish—independent of the county board of elections commission—an early voting location outside the courthouse or county seat. Crittenden County has but a single county seat in Marion. Therefore, Ark. Code Ann. §7-5-401(c) is not applicable on its face. Even if it were, Ark. Code Ann. §7-5-401(c) does not, by implication, repeal the county clerk’s authority granted in Ark. Code Ann. §7-5-418(a)(1)(A).

It is well settled that statutes relating to the same subject should be read in a harmonious manner if possible. All legislative acts relating to the same subject are said to be *in pari materia* and must be construed together and made to stand if they are capable of being reconciled. Repeals by implication are strongly disfavored by the law, and a statute will only be impliedly repealed in Arkansas when two enactments cannot stand together. Repeal by implication is only recognized in two situations: (1) where the statutes are in irreconcilable conflict, and (2) where the

legislature takes up the whole subject anew, covering the entire subject matter of the earlier statute and adding provisions clearly showing that it was intended as a substitute for the former provision. We will not find a repeal by implication if there is a way to interpret the statutes harmoniously.

Sesley v. State, 380 S.W.3d 390, 391-92 (Ark. 2011)(internal citations omitted). On the contrary, Ark. Code Ann. §7-5-401(c) requires that when a county clerk exercises his/her discretion to designate an early voting site outside of the courthouses in counties with dual county seats, the clerk must conduct early voting within the jurisdiction of both county seats. In short, the plain and only plausible reading of Ark. Code Ann. §7-5-401(c) is that it neither conflicts with nor repeals Ark. Code Ann. §7-5-418(a)(1)(A). In fact, Ark. Code Ann. §7-5-401(c) is complimentary to Ark. Code Ann. §7-5-418(a)(1)(A) and, to the extent necessary, is significant proof that the grant of authority to county clerks contained in Ark. Code Ann. §7-5-418(a)(1)(A) was intended by Arkansas Legislature.

As with the Court's analysis concerning the West Memphis Library, *supra*, there is no need for this Court to engage in a statutory construction analysis on this point. See, e.g., Arkansas Dep't of Fin. & Admin v. Trotter Ford, Inc., 685 S.W.3d 889, 895 (Ark. 2024)("When the language of the statute is plain and unambiguous, and conveys a clear and definite meaning, there is no need to resort to rules of statutory interpretation.")

In addition to the complimentary nature of Ark. Code Ann. §7-5-401(c) and assuming there was ambiguity here requiring a statutory construction analysis, the Court is convinced for two separate legal reasons that the Arkansas Legislature intended to grant county clerks the authority to hold early voting at a location designed by him/her outside the courthouse. Moreover, the facts here point to another practical reason that early voting should occur at Seventh Street Church of Christ as directed by County Clerk Paula Brown.

From a legal standpoint, statutes dealing with election laws are interpreted liberally in favor of the constitutional right of suffrage. LaFargue v. Waggoner, 75 S.W.2d 235 (Ark. 1934). While the Arkansas Legislature is free to enact laws which protect the integrity of the voting process, see, e.g., Thuston v. League of Women Voters of Ark., 687 S.W.3d 805 (Ark. 2024), where there is room for interpretation of a statutory scheme directly related to voting generally and early voting in particular, this Court believes LaFargue remains controlling. Thus, assuming there was an ambiguity in Ark. Code Ann. §7-5-418(a)(1)(A), this Court would resolve that ambiguity in favor of a statutory interpretation that recognizes a county clerk's right to designate an early voting location outside the courthouse.

In a very real sense, a liberal interpretation of Ark. Code Ann. §7-5-418(a)(1)(A) in his regard, also ameliorates some of this Court's misgivings surrounding the broad grant of power contained in Ark. Code Ann. §7-5-418(b)(1)(A) to a single, unelected, politically affiliated person. When the two subsections—(a)(1)(A) and (b)(1)(A)—are read together as required when doing statutory construction analysis, the duly elected county clerk can act as a safeguard to ensure that there is early voting at some place outside the courthouse in each Arkansas county. Thus, citizens in all seventy-five (75) counties have at least one elected official with the power to conduct early voting outside the courthouse. While a single, unelected, politically affiliated person's power remains immense, it at least checked in one regard.

This first legal reason leads the Court directly to the practical reason. Arkansas is a poor state with many poor and/or rural counties. Many of these poor and/or rural counties have courthouses that may not be fully ADA compliant and are in varying states of disrepair. From a purely practical standpoint, early voting inside these courthouses during the fourteen (14) days prior to election day would be difficult, at best. That truth is evident here based on the proof.

The Crittenden County Courthouse in Marion is an old building in a bad state of disrepair. It was and can be again a beautiful building, but it has clearly seen its better days. In order to enter the public entrance to the courthouse, one must traverse a steep, outdoor, concrete set of approximately twenty (20) stairs. Separate Defendant Crittenden County does provide handicap-accessible access to the courthouse with a ramp leading to the basement of the courthouse. Once inside the dark, damp basement, persons unable to climb the stairs and/or persons in wheelchairs can make their way to a small elevator big enough for two people that would take them to the first floor of the courthouse where the county clerk's office is located. Even then, however, the practical problem with early voting is not solved. As confirmed by counsel for Defendants and known by this Court because of experience, there is no access to the basement, and, thus, no access to the elevator, when it rains. When it rains, the basement of the Crittenden County Courthouse floods. Depending on the amount of rain and the number of consecutive days of rain, the basement becomes largely impassible, especially by the elderly, infirm or handicapped.

Counsel for Defendants claim that is not a significant problem based on the presumption that it will not rain every day of early voting. Essentially, counsel would have this Court believe that the Arkansas Legislature and all Defendants—including Separate Defendant Crittenden County—care so little about the elderly, infirm or handicapped citizens in Crittenden County that their only opportunity to early vote is when it does not rain. The Court's guess is that most, if not all, the actual elected officials in Crittenden County do not share counsel's view. Clearly, County Clerk Paula Brown does not share this view because she has singularly sought to solve the practical problem of courthouse access during a rain by providing an early voting location at the Seventh Street Church of Christ pursuant to Ark. Code Ann. §7-5-418(a)(1)(A). To the point here, this practical consideration, while admittedly not a recognized statutory construction tool, is some

evidence that the Arkansas Legislature intended to grant county clerks the power to conduct early voting outside the courthouse because some number of those courthouses around Arkansas, particularly Crittenden County, are not suitable for early voting—or are only marginally suitable when it does not rain.

As set forth above, there is second legal reason this Court is convinced that the Arkansas Legislature fully intended to grant county clerks the right to designate an early voting location outside the courthouse. To be clear, this Court firmly believes that the plain language of Ark. Code Ann. §7-5-418(a)(1)(A) does not require this Court to engage in a statutory construction analysis, but because the intent seems so clear to this Court and as an accommodation to the parties the Court has gone down this path. It is almost universally accepted that divining legislative intent is a difficult, bordering on the impossible, task. This axiom is especially true in Arkansas. However, Ark. Code Ann. §7-5-418(a)(1)(A) may be the exception to that axiom.

Day-of voting has been available in the states since the dawn of our country. Some years later it was realized that some persons who desired to vote could not physically appear on election day due to causes not their own. As a result, states, including Arkansas, soon established a process that allowed for absentee voting. Thus, for many, many years there were two methods by which a citizen in Arkansas could exercise the right of suffrage—day-of voting and absentee voting. The Arkansas Legislature added a third in 1995. During the 1995 Regular Session, two companion bills containing identical language originating from each chamber of the Arkansas Legislature passed both chambers and became Act 686 of 1995 and Act 948 of 1995.

It is these Acts from 1995 that created early voting as a distinct, third method of voting separate and apart from day-of voting and absentee voting. Critical to the issue here, both Acts provide that, “[e]arly voting shall be available to any qualified elector who applies at the office of

the County Clerk during regular office hours beginning fifteen (15) days before an election and ending on the day before election day at the time the County Clerk's office regularly closes." 1995 Ark. Acts 686 §7; 1995 Ark. Acts 948 §7. Thus, following passage of these Acts, Arkansas citizens could vote up to fifteen (15) days prior to the election but only in the county clerk's office.

In their statutory construction argument, Defendants put great weight on and urge this Court to summarily declare that the plain language in Ark. Code Ann. 7-5-418(a)(1)(A) is limited by the plain language contained in Ark. Code Ann. §7-5-418(b)(1)(A). Particularly, Ark. Code Ann. §7-5-418(b)(1)(A) provides that, "[t]he county board of election commissioners may decide to hold early voting at additional polling sites *outside the offices of the county clerk . . .* if it so chooses." Ark. Code Ann. §7-5-418(b)(1)(A)(Supp. 2023)(emphasis added). The operative language in Ark. Code Ann. §7-5-418(b)(1)(B) was added to Ark. Code Ann. §7-5-418 by Act 967 of 1997. See 1997 Ark. Acts 967 §1. To this Court, the language used in Act 967 of 1997—and the language Defendants insist make this statute ambiguous—makes perfect sense when one considers that Act 686 of 1995 and Act 948 of 1995 require early voting to occur at the courthouse.

Defendant's argument, however, misses a subsequent and highly critical Act that followed. This Act provides a clear and unambiguous expression of the Arkansas Legislature's intent to both provide its citizens with the opportunity to early vote and its intent to grant county clerks the right to conduct early voting at a location of his/her choosing. Act 269 of 2003, as enacted and germane to this case significantly amended Ark. Code Ann. §7-5-418. The easiest way to see the changes—and, thus, the legislative intent—is to see the changes made to the statute by underlining the additions and striking through the deleted language of the prior version of the statute. The germane portion of Ark. Code Ann. §7-5-418 following enactment of Act 269 of 2003 using the strike-through/underline format is as follows:

(a)(1) Early voting shall be available to any qualified elector who applies to the county clerk ~~clerk's during regular office hours~~ designated early voting location beginning fifteen (15) days before ~~an a preferential primary, general primary, general election or general run-off election and ending on the day before election day at the time the county clerk's office regularly closes~~ between the hours of 8:00 a.m. to 6:00 p.m. Monday through Friday, and 1:00 p.m. to 4:00 p.m. Saturday, and ending at 6:00 p.m. on the Monday before the election.

2003 Ark. Acts 269 §1. To now read Ark. Code Ann. §7-5-418(b)(1)(A) as a limitation of Ark. Code Ann. §7-5-418(a)(1)(A) is to read language—or at least intent—into the current statute that was expressly removed in 2003. In other words, prior to 2003, Defendants' argument might have merit. Following the passage of Act 269 of 2003, however, the Arkansas Legislature expressed a clear and unambiguous intent that the early voting conducted by county clerks was not tied solely to the clerk's office with the "designated early voting location" addition nor limited by a courthouse's hours of operation.

As a result, even assuming this Court were to find that the statute was ambiguous and that a statutory construction analysis was necessary, the clear implication of the legislative history of Ark. Code Ann. §7-5-418(a)(1)(A) is strong evidence that the Arkansas Legislature intends to (a) provide its citizens every available opportunity to exercise the right of suffrage through early voting and (b) that county clerks have the statutorily delegated authority to conduct early voting at any properly "designated early voting location." Thus, while it may remain difficult to divine legislative intent generally, the intent seems clear based on the legislative history of Ark. Code Ann. §7-5-418(a)(1)(A).

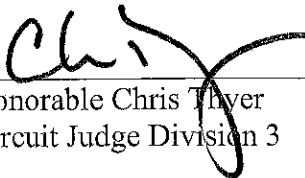
For the above and foregoing reasons, the Court hereby grants a Writ of Mandamus and any necessary concomitant relief requested in Plaintiffs' favor and against Defendants as to those portions of Plaintiffs' Petition (as amended by ARCP 15(b)) and as to those portions of Plaintiffs'

amended petition relative to early voting in the 2024 General Election in Crittenden County at Seventh Street Church of Christ in West Memphis. Specifically, the Court finds that Ark. Code Ann. §7-5-418(a)(1)(A) clearly and unambiguously grants County Clerk Paula Brown the authority to designate Seventh Street Church of Christ in West Memphis an early voting site for the 2024 General Election, and she clearly and unambiguously made that declaration. In the alternative, the Court would also find that this statutory grant of authority to county clerks is separate and distinct from the grant of authority given the Commission in Ark. Code Ann. §7-5-418(b)(1)(A). As a result, if the Court were compelled to conduct a statutory construction analysis, the only way to properly harmonize the two subsections is to find that while each deal with the same subject matter each have separate objects and purposes. Additionally, and in the alternative, even if the language in the statute was ambiguous, the Court would interpret the statute as granting County Clerk Paula Brown the authority to conduct early voting outside the county courthouse independent of the Commission based on the clear legislative intent expressed in the history of the statute. The Court also finds that Defendants' argument that §7-5-401(c) somehow modifies, alters or impliedly repeals a county clerk's otherwise clear grant of authority in Ark. Code Ann. §7-5-418(a)(1)(A) is misplaced; and, in fact, the Court would also find, in the alternative, that Ark. Code Ann. §7-5-401(c) is actually complimentary to Ark. Code Ann. §7-5-418(a)(1)(A) and is itself an expression of the Arkansas Legislature's intent to grant county clerks the right to conduct early voting outside the courthouse independent of a county board of election commission.

Whether termed "mandamus," "injunctive," "declaratory," or otherwise, based on Barton's testimony, counsel's argument, and the findings herein; the Court hereby orders and directs the Commission Defendants to conduct early voting at the Seventh Street Church of Christ in West Memphis for the 2024 General Election in the same or substantially the same manner as early

voting was conducted at First Baptist Church (West Memphis) for the 2022 General Election. The Commission Defendants shall conduct the early voting ordered herein and shall, in all ways, comply with all applicable Arkansas law concerning voting by the citizens of Crittenden County applicable to early voting including, without limitation, Ark. Code Ann. §§7-5-211; 7-4-109; 7-5-202; 7-5-416; 7-5-418; 7-5-413; and 7-4-107 together with all applicable rules, regulations and guidance promulgated by the State Board of Election Commissioners not in conflict with this Order. To the extent any rule, regulation or guidance of the State Board of Election Commission is in conflict with this Order, this Order shall control.

IT IS SO ORDERED this 30 day of September, 2024.



Honorable Chris Thyer
Circuit Judge Division 3

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