

NO. CV-24-674

IN THE ARKANSAS COURT OF APPEALS

FRANK BARTON, ANITA BELL, and
JAMES PULLIAUM in their official capacity as
the CRITTENDEN COUNTY BOARD of
ELECTIONS COMMISSIONERS;

APPELLANTS &
CROSS APPELLEES

VS.

SHIRLEY P. BROWN and
LAVONDA L. TAYLOR

APPELLEES &
CROSS APPELLANTS

ON APPEAL FROM THE
CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS
THE HONORABLE CHRIS THYER CIRCUIT JUDGE

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
Table of Contents	2
Points on Appeal	3
Table of Authorities	4-6
Argument	
Point I	7-16
Point II	16
Request for Relief	17
Certificate of Service	18
Certificate of Compliance with Administrative Order 19, Administrative Order 21 Sect. 9, and with word count limitations	18

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POINTS ON APPEAL

Point I.

Circuit Court erred in finding the Crittenden County Clerk had the authority under Ark. Code Ann. §7-5-418(a)(1)(A) to designate the Seventh Street Church of Christ in West Memphis as an early voting site for 2024 general election.

Point II.

Circuit Court erred in granting mandamus directing the Crittenden County Election Commissioners to conduct early voting at early voting location selected by the County Clerk in West Memphis just as they had done when Election Commissioners conducting early voting at early voting polling site they selected in West Memphis in 2022 General Election.

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TABLE OF AUTHORITIES

Cases	Page
<u>Burnett v Thurston</u> , J Wood concurring 2020 Ark. 36, 595 S.W.3d 1,10	10,13
<u>First State Bank v. City of Elkins</u> , 2018 Ark. 197, 546 S.W.3d 477	11
<u>Martz v. Felts</u> 2019 Ark. 297, 585 S. W. 3d 675	16
<u>McCarthy v. Walker</u> , 2021 Ark. 105, 622 S.W.3d 162 (2021)	8
<u>Robinson v. Taylor</u> , 342 Ark. 459, 295 S.W.3d 691 (2001)	10
 Statutes and Rules	
Ark. Code Ann.§7-1-101 et set	9
Ark. Code Ann.§7-4-101	8
Ark. Code Ann. §7-4-102	9
Ark. Code Ann.§7-5-101 et set	9
Ark. Code Ann.§7-5-211 et set	9
Ark. Code Ann.§7-5-301 et set	9
Ark. Code Ann.§7-5-401	10,15,16
Ark. Code Ann.§7-5-401(b)	11,12
Ark. Code Ann. §7-5-401(c)(2)	10,11,16
Ark. Code Ann. §7-5-402(2)	15
Ark. Code Ann.§7-5-404(a)(1)(A)	12
Ark. Code Ann.§7-5-404(a)(3)(ii)	12
Ark. Code Ann. §7-5-404(a)(3)(vi)(a)	12

Ark. Code Ann. §7-5-405(b)(1)	13
Ark. Code Ann. §7-5-407 et set	9
Ark. Code Ann. §7-5-409(b)(1)	12
Ark. Code Ann. §7-5-411(a)(1)(A)	12
Ark. Code Ann. §7-5-411(a)(2)	12
Ark. Code Ann. §7-5-411(a)(3)	12
Ark. Code Ann. §7-5-413	9,13
Ark. Code Ann. §7-5-413(a)(1)	13,15,16
Ark. Code Ann. §7-413(b)	13
Ark. Code Ann. §7-5-418	9
Ark. Code Ann. §7-5-418(a)(1)	9
Ark. Code Ann. §7-5-418(a)(1)(A)	7,9,10,13,15,16
Ark. Code Ann. §7-5-418(a)(1)(B)	9
Ark. Code Ann. §7-5-418(b)(1)(A)	9,14,16
Ark. Code Ann. §7-5-418(b)(1)(B)	14
Ark. Code Ann. §7-5-418(b)(3)(A)	9,16
Ark. Code Ann. §7-5-418(b)(3)(B)	9,16
Ark. Code Ann. §7-5-509, 510, 512, 513, 515, 516, 517, 528, 529, 530, 531	9
Ark. Code Ann. §7-5-601 et set	9

Ark. Code Ann. §7-5-701 et set	9
Ark. Code Ann. §7-7-304, 305, 306, 308	9
Ark. Code Ann. §7-7-401-402	9
Ark. Code Ann. §7-9-101 et set	9

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POINT 1

THE CIRCUIT COURT ERRED IN FINDING THE CRITTENDEN COUNTY CLERK HAD THE AUTHORITY UNDER ARK. CODE ANN. §7-5-418(a)(1)(A) TO DESIGNATE THE SEVENTH STREET CHURCH OF CHRIST IN WEST MEMPHIS AS AN EARLY VOTING POLLING SITE.

Appellees argue the Circuit Court has the authority to consider what it believed to be the condition of the Crittenden County Courthouse in determining whether the County Clerk has authority under Ark. Code Ann. §7-5-418(a)(1)(a) to hold early voting outside the Courthouse in Marion, the county seat of Crittenden County, Arkansas for the 2024 general election (Brief at 21-22). Appellants submit it was inappropriate for the Judge of the Circuit Court to assert his personal beliefs, or what he perceives to be the thoughts of Appellants' counsel concerning the condition of the Crittenden County Courthouse in construing the statutes of Arkansas as to whether they allow the County Clerk to designate an early voting location outside the county seat of Marion, Arkansas. (RP73)

Early voting was established in Arkansas by Act 94 of 1995 (Appellants' Primary Brief at 16). Early voting was held at the Crittenden County Courthouse complex in Marion from 1995 until 2020 (RT 83). There were no additional early voting sites in Marion or West Memphis until 2020 when the County Election Commissioners moved early voting out of the Courthouse because of COVID (RT83). In 2020, early voting was held at Marion Performing Arts Center in Marion, and at the Civic Center in West Memphis for the 2020 general election,

pursuant to directives from the Crittenden County Election Commissioners (RT 76), and at the Marion Performing Arts Center in Marion and First Baptist Church of West Memphis for the 2022 general election per directions from the Crittenden County Election Commissioners (RT 74).

Appellees argue the Circuit Court correctly decided the County Clerk should have the authority to set early voting wherever the County Clerk pleases since she is an elected official because “the duly elected County Clerk can act as a safe guard to ensure that there was early voting outside the Courthouse in Arkansas” against the actions of a single, unelected, politically affiliated person to exercise unchecked power concerning early voting.” (Appellee brief at 23). Appellants cite McCarthy v. Walker, 2021 Ark. 105, 622 S.W.3d 162 (2021) in support of this position. McCarthy was a case where this Court held it was unconstitutional for the legislature to allow private industry to appoint persons to a governmental board.

This is not the case here because the State Board of Election Commissioners, who supervise and train county election commissioners on election law and procedure in Arkansas, consist of seven (7) people, five (5) of whom consist of the Secretary of State, one person chosen by the President Pro Tem of the Senate, one by the Speaker of House, and two persons chosen by the governor, all of whom are elected officials under Ark. Code Ann. §7-4-101. The County Board of Election

Commissioners are elected by their respective county committees under Ark. Code Ann. §7-4-102 and they have their duties and responsibilities set by the state legislature under Ark. Code Ann. §7-1-101 et set, §7-4-101 et set, §7-5-101 et set, §7-5-211 et set, §7-5-301 et set, §7-5-407 et set, §7-5-413, 418, §7-5-509, 510, 512, 513, 515, 516, 517, 528, 529, 530, 531, §7-5-601 et set, §7-5-701 et set, §7-7-304, 305, 306, 308, §7-7-401-402, and §7-9-101 et set. Consequently, there is absolutely no merit to Appellees' argument that the Circuit Court was correct in stating it had the right to consider that the County Clerk checked the authority of the County Election Commissioners in construing the provisions of Ark. Code Ann. §7-5-418 (a)(1)(A) to determine the legislature intended by inserting language "clerk's designated early voting location" in §7-5-418 (a)(1)(A) to allow the County Clerk to hold early voting anywhere in the County. The reason it lacks merit is because the Arkansas Legislature granted the County Election Commissioners the sole authority to designate additional early voting polling sites outside the offices of the County Clerk, if they do so by unanimous vote under Ark. Code Ann. §7-5-418(a)(1) and §7-5-418(a)(1)(B).

The Circuit Court's decision that both the County Election Commission and the County Clerk have the authority to establish early voting polling sites outside of the County Courthouse at the County seat (RP77) would render meaningless the provision of §7-5-418(b)(1)(A), and (B)(3)A, which gives this authority to the

County Election Commissions. The Circuit Court’s construction is contrary to the rules of statutory construction, cited in Burnett v Thurston, J Wood concurring 2020 Ark. 36, 595 S.W.3d 1,10 that “(E)very word and every provision is to be given effect... none should be given an interpretation that causes it to duplicate another provision, or to have no consequences.”

Appellees’ torture their interpretation of Act 1092 of 1997 that amended language in Act 948 of 1995 to change language in §7-5-418 (a)(1)(A) from “early voting shall be available to any qualified voter who applies at the office of the County Clerk during regular office hours...” to... who applies to the County Clerk during regular office hours when they state such language shows clear legislative intent to remove the location limitation that previously existed for the County Clerk (Brief at 21). This is not true because it assumes the clerk is moving her office to somewhere outside the Courthouse in Marion which has not occurred.

Likewise, Appellees’ claim Ark. Code Ann. §7-5-401 does not require the County Clerk to hold early voting the County Clerk conducts under that statute at the county seat considering §7-5-401(c)(2) violates the rule of statutory construction that a particular provision of a statute must be construed with reference to the statute as a whole, Robinson v. Taylor, 342 Ark. 459, 295 S.W.3d 691 (2001), and that courts reconcile statutory provisions in Arkansas to make

them consistent, harmonious, and sensible. First State Bank v. City of Elkins, 2018 Ark. 197, 546 S.W.3d 477.

§7-5-401(b) which provides that “the County Clerk shall be furnished a suitable room at the County Courthouse or other locations designated for the purposes of exercising all the powers and duties concerning the application for, the issuance of, and the voting of absentees, and early voting ballots required by law of the County Court” must be reconciled with language in §7-5-401(c)(2) “...County Clerk’s designated early voting location in each county seat”...by conducting early voting at some suitable room at the courthouse or other locations in the county seat.” The Circuit Court’s conclusion §7-5-401(c)(2) does not affect 7-5-401(b), and justifies the County Clerk designation of an early voting site in West Memphis outside the County seat means Arkansas law requires all Counties with two county seats to hold early voting in each County seat, but in Counties with only one County seat the County Clerk’s early voting location can be anywhere. This interpretation leads to an absurd result which is not allowed under Arkansas rules of statutory constitution. First State Bank v City of Elkins 2018 Ark. 191, 546 S. W. 3d 477.

Tellingly Appellees do not address argument raised by Appellants on pages 27 and 28 of their primary brief that §7-5-401(b) not only requires early voting to be conducted at the “County Courthouse or other location designated for the

purpose of exercising all of the powers and duties concerning applications for, the issuance of and the voting of absentee and early voting ballots required by law of the county Clerk.” Therefore the County clerk must not only hold early voting at the Courthouse or other location designated for early voting but she must take applications for, issue and allow the voting of absentee ballots at this location. Consequently §7-5-401(b) cannot sensibly be construed to allow County Clerk to hold early voting at the Seventh Street Church of Christ in West Memphis because the application for, the issuance of, and the voting of absentee ballots would have to be at the Seventh Street Church of Christ in West Memphis.

This is impossible under Arkansas law concerning absentee voting for multiple reasons. First under §7-5-404(a)(1)(A) the County Clerk must verify the application for absentee ballot form the voter registration record. Second this application must be submitted in person at the office of the County Clerk (§7-5-404(a)(3)ii), or by email or fax to the County Clerk’s office (§7-5-404(a)(3)(vi)(a). Third upon receipt of such application if the County Court determines the applicant is a qualified registered voter, the County Clerk shall detach the ballot stub and deposit the ballot stub into a sealed box designated as “Absentee Stub Box”... pursuant to §7-5-409(b)(1). Fourth to vote absentee the ballot must be delivered by mail to the office of the County Clerk under §7-5-411(a)(1)(A), or by delivering of ballot to the County Clerk by 7:30 p.m. on election day by agent of voter upon

proper verification of the signature of the voter by the County Clerk and validation of identity of authorized agent, or by the voter at the close of business hours on the day before the election under §7-5-411(a)(2) or (a)(3) respectively. All these provisions must be construed with §7-5-401(b) because it is crystal clear early voting must be conducted at the County Clerk's office or other suitable location where not only early voting can occur but also where applications for, issuance of, and voting of absentee ballots takes place. It is absurd to contend all this can be done at the Seventh Street Church of Christ in West Memphis because the County Clerk early voting location at the West Memphis Seventh Street Church of Christ does not begin until 15 days before the election under §7-5-418(a)(1)(A) and applications for absentee ballots must be available from the County Clerk 60 days before election day under Ark. Code Ann. §7-5-405(b)(1) .

It also significant Appellees did not address Ark. Code Ann. §7-5-413(a)(1) that was discussed in Appellant's primary brief at pages 29 and 30. It provides "At least one voting machine equipped for use by individuals with disabilities should be placed in the County Clerk designated location for early voting for the election in accordance with this subchapter and any off site polling locations established by the County Board Election Commissioners." §7-5-401 is in the subchapter with §7-5-413 as is §7-5-418. Therefore the subsections must be construed together. Burnett v Thurston, J Wood concurring 2020 Ark. 36, 595 S.W.3d 1,10

The evidence in this case clearly reveals the reason the County Election Commissioners did not establish an early voting location in West Memphis for the 2024 general election was because the Democratic Election Commissioner preferred a polling site that was more suitable for electioneering (RT40, 51), while the two Republican commissioners felt the new West Memphis Library was a better polling site (RT180). Therefore, they could not create an early voting polling site outside the offices of the Crittenden County Clerk under Ark. Code Ann. §7-5-418 (b)(1)(A) because that requires unanimous consent of the County Election Commissioners under Ark. Code Ann. §7-5-418 (b)(1)(B).

Appellees' attempt to portray Chairman Frank Barton as a villain seeking to deny early voting rights to persons in West Memphis (Appellants' Brief at 17-18, 23, 26) is disingenuous. The truth of the matter is that Chairman Barton, an experienced election commissioner having served on the board since 2015 (R177), gave the democratic minority member an opportunity at the second meeting of the Crittenden County Election Commission to change his vote so there would be early voting place in West Memphis, but he declined to accept the Chairman's offer (RT181, 182,202).

Chairman Barton's testimony the County Clerk did not have the authority to establish an early voting locations in West Memphis but that authority rested solely with the County Election Commissioner was based on his experience, training and

familiarity with election law (RT189,191,194,206, 207). Consequently it is unjust for appellees to argue Chairman Barton seeks to hold anyone hostage (Appellees Brief at 10) just as the Circuit Court's implication appellants are seeking to deny disabled people the early vote, and that appellants' counsel does not care are also not warranted (RT73). Appellants set an early voting location in Marion for the 2024 general election and tried to set one in West Memphis but were thwarted by the Democrat member. They are required to provide one voting machine at the Marion site for disabled people under §7-5-413(a)(1). They have also established election and polling sites for all precincts in the County under §7-5-101 for election day where disabled people can vote. The law further provides for absentee ballots for absentee voting by disabled people. Ark Code Ann §7-5-401(b), and §7-5-402(2).

In conclusion, appellants submit this is not a case about the County Election Commissioners seeking to deny anyone the right to early vote or not cooperating with the County Clerk's selection of an early voting location outside of the seat of county government in the county seat of Marion where the County Clerk and all other offices of county government are located, but a case of statutory construction that establish the County Clerk cannot designate an early voting site for the 2024 general election outside the seat of county government in Marion pursuant to Ark. Code Ann. §7-5-418 (a)(1)(A) because of the provisions of law set forth in Ark.

Code Ann. §7-5-418 (b)(1)(A),(b)(3)(A),and(b)(3)(B);§7-5-401(b),(c)(2); and §7-5-413 (a)(1), and (b).

POINT II

CIRCUIT COURT ERRED IN GRANTING MANDAMUS DIRECTING THE CRITTENDEN COUNTY ELECTION COMMISSIONERS TO CONDUCT EARLY VOTING AT EARLY VOTING LOCATION SELECTED BY THE COUNTY CLERK IN WEST MEMPHIS JUST AS THEY HAD DONE WHEN ELECTION COMMISSIONERS CONDUCTING EARLY VOTING AT EARLY VOTING POLLING SITE THEY SELECTED IN WEST MEMPHIS IN 2022 GENERAL ELECTION.

As established in Point I, the County Clerk has no authority to set a early voting location at the Seventh Street Church of Christ in West Memphis for the 2024 general election. Consequently the Circuit Court cannot grant mandamus directing Crittenden County Election Commissioners to conduct early voting there just as they did in 2022 at the First Baptist Church of West Memphis because that is a discretionary function they have under §7-5-418(a)(1)(A),. Martz v. Felts 2019 Ark. 297, 585 S. W. 3d 675. The Crittenden County Election Commissioners did not select the Seventh Street Church of Christ in West Memphis as an additional early voting polling site therefore it was error for the Circuit Court to order them to conduct early voting there.

REQUEST FOR RELIEF

Appellants request this court to reverse findings of the Crittenden County Circuit Court that the County Clerk of Crittenden County, Arkansas has the authority to establish an early voting location at the 7th Street Church of Christ in West Memphis, Arkansas for the 2024 general election under Point I of their argument, and dismiss appellees' petition that the County Clerk has such authority with prejudice.

Appellants further request under Point II that this court find that the Circuit Court of Crittenden County, Arkansas erred in granting appellees' petition for mandamus directing appellants to conduct early voting at the West Memphis 7th Street Church of Christ designated by the Crittenden County Clerk in the manner they did at the First Baptist Church in West Memphis at the 2022 general election, and dismiss appellees' petition for mandamus with prejudice.

CERTIFICATE OF SERVICE

Cross Appellees Frank Barton, Anita Bell and James Pulliaum, in their Official Capacity as the Crittenden County Board of Election Commissioners by their attorneys Rogers & Coe, do hereby certify that they served a copy of their brief on Cross Appellants, Shirley P. Brown and Lavonda L. Taylor, by service by email on their attorney, Jennifer A. Waymack Standerfer at jenniferwaymack@sbcglobal.net and Crittenden County Circuit Court Honorable Judge Christopher Thyer by email to tferrell@2ndjudicial.org.

this 15th day of October, 2024.

/s/Joe M. Rogers
Joe M. Rogers
Attorney for Cross Appellees

CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE ORDER 19, ADMINISTRATIVE ORDER 21§9, AND WITH WORD COUNT LIMITATIONS

On this 15th day of October, 2024, I hereby certify that this brief complies with (1) Administrative Order No. 19's requirements concerning confidential information, (2) Administrative Order No. 21, Section 9 and that this document does not contain hyperlinks to external papers or websites, and the word count for this document is 2527 words within the limitation of 8,600 words allowed for cross appellees' brief. I have submitted and served on opposing counsel an unredacted, and if required, a redacted PDF document(s) that comply with the Rule of the Supreme Court and Court of Appeals. The PDF document is identical to the corresponding parts of the paper document from which they were created as filed with the Court. To the best of my knowledge, information, and belief formed after scanning the PDF document for viruses with an antivirus program, the PDF document(s) are free of computer viruses. A copy of this certificate has been filed with the Court and has been served on all opposing parties.

/s/Joe M. Rogers
Joe M. Rogers
Attorney for Cross Appellees