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**IN THE  
SUPREME COURT OF ARKANSAS**

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**CITIZENS FOR A BETTER POPE COUNTY,  
A Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity**

**APPELLANTS**

**v.**

**No. CV-20-145**

**BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas;  
et al**

**APPELLEES**

**CHEROKEE NATION BUSINESSES, LLC**

**INTERVENOR**

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**ON APPEAL FROM THE CIRCUIT COURT  
OF POPE COUNTY, ARKANSAS  
FIRST DIVISION**

**THE HONORABLE WILLIAM M. PEARSON, CIRCUIT JUDGE**

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**CITIZENS' ABSTRACT, APPELLANTS' BRIEF, AND ADDENDUM**

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## I.

### INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL? None

II. BASIS OF SUPREME COURT JURISDICTION? See Section V.

() Check here if no basis for Supreme Court Jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

(1)  Construction of Constitution of Arkansas

(2)  Death penalty, life imprisonment

(3)  Extraordinary writs

(4)  Elections and election procedures

(5)  Discipline of attorneys

(6)  Discipline and disability of judges

(7)  Previous appeal in Supreme Court

(8)  Appeal to Supreme Court by law

III. NATURE OF APPEAL

(1)  Administrative or regulatory action

(2)  Rule 37

(3)  Rule on Clerk

(4)  Interlocutory appeal

(5)  Usury

(6)  Products liability

(7)  Oil, gas, or mineral rights

(8)  Torts

(9)  Construction of deed or will

(10)  Contract

(11)  Criminal

(12)  Other (Constitutional; Ark. R. Civ. Pro. 12(b)(6) and 15)



Citizens for a Better Pope County, along with James Knight,<sup>1</sup> filed a civil suit against Pope County Judge, Ben Cross, and the Quorum Court (QC) of Pope County for violating a citizen initiated county ordinance (Local Ordinance) that called for a local election before the County Judge or QC could issue support for a casino applicant under Constitutional Amendment 100. This amendment included Pope County as an authorized location for one of four casinos in Arkansas, and it provided that the casino applicant “shall . . . submit either a letter of support from the county judge or a resolution from the quorum court in the county where the proposed casino is to be located.” Ark. Const. amend. 100, § 4(n). Both Amendment 100 and the Local Ordinance became effective on November 14, 2018.

On August 13, 2019, the QC violated the Local Ordinance by passing a resolution of support for Cherokee Nation Businesses, LLC without first presenting the matter to a vote of the people as required by the Local Ordinance. Following this action, the QC called three separate special meetings to repeal the Local Ordinance. CFABPC attempted to stop these meetings through temporary restraining orders, but was denied. On the night of October 28, 2019, the QC repealed the Local Ordinance.

At the hearing on October 29, 2019, the Trial Court denied CFABPC’s Rule 15 Motion to Supplement its pleadings. The Trial Court went further and dis-

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<sup>1</sup> Appellants may be hereinafter collectively referred to as, “CFABPC”.

missed CFABPC's claim under Rule 12(b)(6) based on the constitutionality of the Local Ordinance and without allowing any discovery or evidence. The Trial Court rejected the claims of CFABPC, who argued that the Local Ordinance could be read in harmony with the Arkansas Constitution and the Arkansas code. CFABPC now brings this appeal.

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT? No.

V. EXTRAORDINARY ISSUES?

- appeal presents issue of first impression,
- appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,
- appeal involves federal constitutional interpretation,
- appeal is of substantial public interest,
- appeal involves significant issue needing clarification or development of the law, or overruling of precedent,
- appeal involves significant issue concerning construction of statute, ordinance, rule, or regulation.

VI. CONFIDENTIAL INFORMATION.

(1) Does the appeal involve confidential information as defined by Sections III(A)(11) and VII(A) of Administrative Order 19?

\_\_\_\_\_ Yes      x   No

(2) If the answer is "yes," then does this brief comply with Rule 4-1(d)?

\_\_\_\_\_ Yes    \_\_\_\_\_ No

## II.

### JURISDICTIONAL STATEMENT

#### 1. Issues of Law

a. Can Pope County Ordinance No. 2018-O-42 (hereinafter “Local Ordinance”) be read in harmony with the Arkansas Casino Gaming Amendment of 2018 (hereinafter “Amendment 100”) so as to uphold the will of local voters while not conflicting with Amendment 100? Amendment 100 provides that a casino applicant “shall . . . submit either a letter of support from the county judge or a resolution from the quorum court in the county where the proposed casino is to be located.” Ark. Const. amend. 100, § 4(n). The Local Ordinance requires the county judge or quorum court to refer “the question as to the issuance of support of a . . . Casino Applicant to a local election” before issuing the support called for under Amendment 100. **ADD 62-63.**

b. Based upon significant events that occurred the night before the hearing, were the Appellants entitled to amend their pleadings before the hearing proceeded and a final ruling was issued? During the hearing on October 29, 2019, the court denied the Appellants’ Rule 15 Motion to Supplement their pleadings after the county repealed the Local Ordinance the night before the hearing.

c. Did the Trial Court err in ruling on a question of law when the Arkansas standard for a 12(b)(6) Motion to Dismiss calls for sufficiently pleaded facts? At

the hearing on October 29, 2019, the court dismissed the Appellants' claim under Rule 12(b)(6), not on the basis of insufficient facts, but rather on a question of law as to the constitutionality of the Local Ordinance even though ambiguities may have existed in the language of both the ordinance and the amendment. Evidence was not allowed to be presented at this hearing to clarify any such ambiguities.

2. I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of legal significance for jurisdictional purposes: issue of first impression, issue of substantial public interest, issue needing clarification or development of the law, and substantial questions of law concerning the validity of an ordinance of a county.

This case presents an issue of first impression and an appeal involving substantial questions of law concerning the validity of a county ordinance. While the Trial Court determined that the Local Ordinance was invalid because it conflicted with Amendment 100, the Arkansas appellate courts have never determined the scope of the local provisions embedded in Amendment 100. Amendment 100 expressly states that the casino applicants must submit either "a letter of support from the county judge or a resolution of support from the quorum court." Ark. Const. amend. 100, § 4(n). However, under Amendment 100, no express authority is granted to the county judge or quorum court as it relates to the issuance of support for a casino. Yet the very same amendment does enumerate express duties to the

Arkansas Racing Commission and casino applicants. It was this void of express authority for the county officials that prompted the Pope County citizens to create a local ordinance through initiative. This Court needs to determine whether the Local Ordinance is harmonious with the language and intent of Amendment 100.

Additionally, this case presents an issue of substantial public interest: while a majority of Arkansans passed Amendment 100 in the November 2018 general elections, over 60% of Pope County residents voted against the measure. **ADD 53.** Additionally, nearly 70% of Pope County residents voted in favor of the Local Ordinance. **ADD 3, 9, 54.** Such statewide measures are likely to recur now that casino gaming is authorized in Arkansas. With statewide elections that have imposed and could potentially impose casinos on specific counties, the Arkansas Supreme Court needs to determine if measures such as the Local Ordinance are proper under the language of Amendment 100.

Lastly, this appeal involves a significant issue needing clarification of the law as noted above. Because casino gaming is now engrained in our state constitution and casino questions are novel to our state, the state's highest court needs to weigh in and clarify these issues.

For all of these reasons, the Supreme Court should hear and decide this case.

By /s/ Jerry L Malone  
Attorney for Appellants James Knight  
and CFABPC

### III.

#### POINTS ON APPEAL AND PRINCIPAL AUTHORITIES

**A. The Trial Court erred in granting the Appellees’ 12(b)(6) Motion to Dismiss by basing its decision on a question of law while the Arkansas standard calls for sufficiently pleaded facts.**

**1. Appellants pleaded facts sufficient to support the allegations in their complaint.**

*Ballard Group, Inc. v. BP Lubricants USA, Inc.*, 2014 Ark. 276, 436 S.W.3d 445 (2014)

*Harmon v. Payne*, 2020 Ark. 17, 592 S.W.3d 619 (2020)

**2. The Trial Court improperly ruled on an evaluation of the law rather than the sufficiency of the facts, particularly considering the ambiguity of the language in the law.**

*Little Rock Cleaning Sys., Inc. v. Weiss*, 326 Ark. 1007, 935 S.W.2d 268 (1996)

*Ark. Dept. of Corr. v. Shults*, 2018 Ark. 94, 541 S.W.3d 410 (2018)

**B. The Trial Court improperly denied a Rule 15 Motion to Supplement Pleadings when subsequent material facts altered the direction of the case.**

*Cavalry SPV, LLC v. Anderson*, 99 Ark. App. 309, 260 S.W.3d 331 (2007)

*Deer/Mt. Judea Sch. Dist. v. Kimbrell*, 2013 Ark. 393, 430 S.W.3d 29 (2013)

**C. Pope County Ordinance 2018-O-42 is valid under the Arkansas Constitution.**

**1. Pope County Ordinance 2018-O-42 operates in harmony with Arkansas Amendment 100.**

*Brock v. Townsell*, 2009 Ark. 224, 309 S.W.3d 179 (2009)

*Wilson v. Walther*, 2017 Ark. 279, 527 S.W.3d 709 (2017)

**2. Arkansas Amendment 100 does not grant power or authority to the Pope County Judge or Quorum Court.**

Ark. Const. Art. 2 §1

*Cochran v. Black*, 240 Ark. 393, 395–96, 400 S.W.2d 280, 282 (1966)

**3. Pope County Ordinance 2018-O-42 does not unlawfully regulate casino gaming according to Ark. Code. Ann. 14-14-806(4).**

*Tindall v. Searan*, 192 Ark. 173, 90 S.W.2d 476, 478 (1936)

Ark. Const. Art. 5 § 1

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**V.**  
**ABSTRACT**

**A. September 30, 2019, Hearing**

1. Introduction of Counsel:

**MR. STORY:** Travis Story and Greg Payne for Jim Knight and Citizens for a Better Pope County (CFABPC). **Supplemental Record (“SR”) 1.**

**MR. ROE:** Coby Roe with the Daily & Woods firm here on behalf of the defendants, along with Mr. Clay McCall. **SR1.**

**MR. RICHARDSON:** Scott Richardson, Dustin McDaniel and Bart Calhoun for Cherokee Nation Businesses. **SR1.**

2. Opening Statement on Behalf of CFABPC by Mr. Story:

**MR. STORY:** Taking up the issue of the Motion to Dismiss, I agree that emergency temporary restraining order to withhold or enjoin the meeting of the quorum court that night is moot, which explains the amended petition to shift to a mandamus-type of remedy. **SR2–3.**

There was a response to CFABPC’s amended complaint for which we have not had time to adequately reply. The amended complaint happened last week, so we have not had time to respond to that. We would ask that the Motion to Dismiss not be heard to-

day so that we can brief the Court on that issue. **SR3**. We believe there is going to be some evidence that we will need to present and that has come to light even just here in the past couple of days. **SR3–4**. We think we have to have those, and I plan on issuing some subpoenas for those. **SR4**.

3. Opening Statement on Behalf of Pope County by Mr. Roe:

**MR. ROE:** The plaintiffs initiated this action by filing their first Complaint or their first Petition on August 13. Thereafter, two days later on August 15, defendants filed their first Motion to Dismiss. As the Court just stated moments ago, plaintiffs amended on September 4, and the defendants recently filed another Motion to Dismiss. I'd have no objection if the Court and plaintiffs would like to hear all of those at one time instead of taking them up, two bites at the apple. **SR4**. There is no testimony anticipated on the Motion to Dismiss, and we stand on our affidavit. **SR5**.

4. Ruling by the Trial Court on Motion to Dismiss for Improper Service:

**THE COURT:** The Court will deny your Motion to Dismiss on that matter. **SR5**.

Findings: At the time this person was talking to the process server does not appear to me that he was serving papers so he had no duty

to show any identification or anything of that nature per Administrative Order No. 20. The facts don't fit based on the affidavit so that will be denied. **SR5.**

5. Statement on Behalf of CFABPC by Mr. Story on Motion to Intervene:

**MR. STORY:** I would like to be briefly heard on the Motion to Intervene. We do not feel that the intervenors have shown that they have either a right or would be permissibly able to intervene in this case simply because they have already got somebody who is well representing their interests and they are aligned with the county and the county officials. **SR6.**

This is one of those cases where, as we laid out in our brief, their interest is purely speculative. They do not have a license; they have merely filed an application for a license so to say they have some kind of right here is just something that is simply not true. And even if we look at the racing commission's own rules—which we have cited in our brief—it would say that there is no right that they would have under any of the racing commission standards. **SR6.**

So, intervention is not appropriate for the proposed intervenors as they are already well represented and those interests are well represented by current defense counsel. **SR6**. I do not believe they have shown the Court how they have an interest that is different than that. **SR7**.

6. Statement on Behalf of Cherokee Nation Businesses, LLC, (CNB) by Mr. Richardson on Motion to Intervene:

**MR. RICHARDSON:** Mr. Story addressed Rule 24 intervention. We request intervention under Rule 19 as well, which is not concerned about whether or not your interests are adequately represented by a standing party. It asks only if you have an interest relating to the subject matter of the action and whether, as a practical matter, the action might impair or impede your ability to protect that interest. **SR7**.

So we have a recognized interest in this matter. We have an economic development contract with the county for the resolution of support that the county had passed and offered to CNB. **SR8**.

This case is about that resolution of support. If that gets taken away by the Court, that will be a deprivation of our property right and our contract with the county. As the Court knows, Rule 19 and

Rule 24 concern the due process rights of litigants. So, if we have a property right, then we have a right to be heard before we are deprived of that right. **SR8.**

Under Rule 19, most of what Mr. Story argued does not really matter. What matters is whether or not we have an interest in the subject matter and whether or not this position may, as a practical matter, impair or impede that and we certainly meet that standard. **SR8.**

We contend that we are also entitled to intervene under Rule 24 because the same standards apply but also, with all due respect to the county, they are not an adequate representative of CNB because we are two sides of that contract that we have a property interest in. **SR8–9.** Although we work together under that contract, our interests in it are not aligned like they should be under Rule 24 before you would deny party intervention in a matter where their property interest might be deprived. **SR9.**

So, we have plenty of standing. I think it is fairly standard for a party to a contract to be allowed to intervene to protect their interest in that contract. We have a property interest regardless of

whether the racing commission grants or denies the application. The property contract is the contract that is effective now. **SR9**.

With respect to whether the contract is contingent upon us actually receiving a license, there are actions contemplated under the contract to continue on like is common in contracts. **SR9**. You enter the contract for future actions. **SR9–10**. But that contract is effective now. If the county decided to [rescind] the resolution of support, then CNB would have rights to enforce their rights under that contract and that exists whether or not we are at the racing commission or a license has been granted. **SR10**.

So at this point, we do have a present property right in that contract that is enforced and the result of this proceeding may impair or impede that, and our interests are not the same as the county's in that contract. **SR10**.

7. Statement on Behalf of Pope County by Mr. Roe on Motion to Intervene:

**MR. ROE:** On behalf of defendants, we did not file a response to CNB's Motion to Intervene and the county has no objection to the request to intervene. **SR10**.

8. Statement on Behalf of CFABPC by Mr. Story on Motion to Intervene:

**MR. STORY:** Rule 19 deals with joinder of a party that is necessary to this proceeding. Where we get off track is following the logic—that Your Honor already kind of figured out—is this contract is really not the issue of this particular litigation. **SR11.**

This particular litigation has to do with whether or not the county acted appropriately in the way they handled themselves in issuing the resolution to the racing commission and jumping over an ordinance that is valid here in Pope County. **SR11.**

Even when just looking at the pure rule, the goal of Rule 19 is simply to ask whether a full resolution of this case may be had with or without a member and the proposed intervenor. **SR11.** In this case, it can because they do not have a current property interest in that the application before both the racing commission and whether or not this case would even allow them to get that far to whether their contract could even be executed or be fulfilled is just simply not something that they are needed for in this piece of litigation. **SR11–12.** So, both under Rule 24 and Rule 19, we would ask that you deny their intervention. **SR 12.**



9. Ruling by the Court on Motion to Intervene:

**THE COURT:** I think from the pleadings that have been filed up to this point subsequent to what I am going to decide today addresses the proposed intervenor, some of their issues that they may have in this. **SR12.**

The first issue is Declaratory Judgment that Amendment 100 unconstitutionally conflicts with Amendment 14. The second issue is Declaratory Judgment that Resolution 2019-014, which is the support for Cherokee to have the letter or the resolution of support from the quorum court being invalid due to violation of Ordinance Number 2018-042. The next one is Declaratory Judgment that Pope County judge and quorum court members met in secret in violation of the FOIA. **SR12.** Lastly, there is the writ of mandamus relief being requested. **SR12–13.**

In addition to what Mr. Richardson is arguing, you also alleged that there were lobbyists representing CNB as well as quorum court members in these secret meetings. I think this elevates their interest a little bit more here in terms of making sure that they can defend because allegations have been made on their end of it. **SR13.**

Long story short, I think I will grant the permissive type of intervention. This is going to be conditional. Cherokee can participate with respect to all of the issues. That's going to be developed factually. I do not know where you all are at with that and we may need some time to get these things set. **SR13.**

So that motion is granted on permissive. If I determine after looking through this some more, and add some conditions to you, I'll determine what those are. I may hear some thoughts from either side on the defendant's part of it. **SR13.**

10. Discussion of Hearing to Address Remaining Issues:

**THE COURT:** That takes care of what we had set for today. These pleadings have come in as this case was set on those issues. So, to accomplish more, I think we need to wait until you all have an opportunity to plead more if you like or offer evidence. We will get it set for a hearing. If anyone is offering any testimony, evidence or anything of that nature, that will be the time to do it. Otherwise we will just hear arguments and then I will make my decision. **SR14.**

**MR. RICHARDSON:** I think as far as the county's second Motion to Dismiss and the Motion to Dismiss that we tendered with our Motion to Intervene, those are just legal arguments so I don't know. It's testing

the sufficiency of the complaints. **SR14.** It may develop differently as we go through the pleadings but I would not anticipate presentation of evidence at the next hearing, but that is up to the Court. **SR14–15.**

**THE COURT:** Issues one and three may, in my view of what I am looking at here, call for something like that. I am not going to give advisories what I am thinking about but you all are well-trained and know the law. You can check and see if we need some proof on those matters. **SR15.**

**MR. STORY:** The issue I think that is important as we have stated in our emergency Motion for Relief and even in the current Amended Complaint is November 18 is the date that I think is coming. And so I understand that there is going to be a Motion to Dismiss tendered and that will be something we will have to respond to. But if the Court would allow us to set a hearing prior to that time period, I think it would behoove us all. **SR15.**

**MR. RICHARDSON:** Cherokee Nation Business is prepared to move as quickly as the Court would like. **SR16.**

**MR. STORY:** I think we could do it sooner than thirty days. **SR16.**

**THE COURT:** I really think you all have most of everything developed up to this point by your additional pleadings. I do not know how much more you could add to it unless there is some evidence or testimony that needs to be taken. **SR16.**

**B. October 29, 2019, Hearing**

1. Argument on Behalf of CFABPC by Mr. Story on Motion to Supplement Pleadings:

**THE COURT:** Mr. Story, I will allow you to proceed and take up everything you think the Court needs to hear today and then allow the defendants and intervenors to respond to your arguments. I want to make sure we cover all of the pleadings that have been filed so we that we have a sufficient Final Order for whoever needs it. **RECORD (“R”) 415.**

**MR. STORY:** Your honor the plaintiff first requests to supplement their pleadings under Rule 15. **R415–416.** There was an additional quorum court meeting last night whereby the quorum court used an emergency—. **R416.**

**THE COURT:** I entered an order to deny the motion for Temporary Restraining Order or Preliminary Injunction. Does that carry it further? **R416.**

**MR. STORY:** It does not, Your Honor. That is part of the reason why the plaintiffs would simply ask for this. What took place last night was simply a repeal of the ordinance that the citizens had overwhelmingly passed through their initiative petitions. **R416.** This action effectively requires additional counts that the plaintiffs need to address and adds a whole new set of facts by that alters previous counts in Plaintiff's Amended Complaint substantially. **R416–7.** For those reasons, plaintiff requests an opportunity to supplement the pleadings. **R417.** It also impacts this very hearing today. **R417.**

2. Ruling on Motion to Supplement Pleadings:

**THE COURT:** As far as what the pleadings are and what the decisions, the issues that the Court is faced with the pleadings up to this point in time, the Court does not find any relevance whatsoever to whether or not that ordinance was repealed or not repealed. It holds no difference to what we are doing here today one way or the other. Therefore, I will deny your request for supplemental pleadings, because I see no relevance to what we are doing here today. **R417.**

**MR. STORY:** For my clients to not be barred by res judicata or any other issue I really feel the need to amend our pleadings considering any Final

Order that may result from today's proceedings. So, we simply ask the Court to let us do that. **R418.**

**THE COURT:** Unless you can tell me specifically what proposed or what proffer of facts would cause your pleadings to change what we are doing here today, which is questioning the constitutionality of Amendment 100, and how it may conflict with Amendment 14, and the effects of all of these things with the county ordinance that was subject to repeal, and the county ordinance that caused a letter of support. **R418.**

I believe those are the issues here today and whether or not a repeal of 2018-O-42—I do not see how any of that action makes one bit of difference in what we are doing here today. **R418.** Can you tell me how it does? **R418-9.**

**MR. STORY:** I would proffer that there is more than one way to submit the county's support to the racing commission. One way is through a letter from the county judge, another is through a resolution from the quorum court.

What took place last night is they effectively repealed the ordinance, which we believe was done improperly for a myriad of reasons, the most important being the lack of notice of what the

emergency was; and that the emergency, which was declared in order to actually pass the ordinance and have it go into effect. I believe the emergency ordinance is Ordinance 19-O-016. That is the new one that was passed last which effectively repealed ordinance 18-O-42. **R419**. So, by that action, being done in a manner that violated the state statute in dealing with the emergency clause it provides another path. **R419-20**.

**THE COURT:** I thought of that issue and came that close to coming down to the meeting last night. But after I thought about what we are looking at, if I followed your argument, emergency clause: You took issue with whether there was an emergency and whether there was a sufficient basis stated. You did not state what it was in your pleading so I had no way of knowing. But then it came to me after reading this that that's why they're there. **R420**.

Your request is premature as far as an emergency. That was part of the notice is to discuss or whatever 2018-O-42 and declare emergency. Well, they had not done anything yet. That is a legislative act by a governing body. **R420**.

You could not have known what it was; up to that point, they had not conducted their business yet. **R420-421**. Like I said, I

came close. I was looking at it but, there was nothing in existence at that point in time. **R421.**

**MR. STORY:** Your Honor, I think that is part of the violative act that they should have provided notice of that. **R421.**

**THE COURT:** The case you cited was something that occurred way after the fact. They actually stated in writing what the emergency was regarding as far as a quorum of members not being present, and they changed that to where they just gave them a certain amount of notice and then they went back to the original draft of 1952 or something. **R421.**

It was kind of a preemptive strike on your part when you do not know what the emergency is. No one knew what the emergency was yet because it had yet to be legislated. **R421.** I still do not know what it is from my seat, but you were asking for an injunction and restraining order. **R421-2.** So, that to me doesn't change anything we are doing now. Again, I will deny your Motion to Supplement Pleadings. **R422.**



3. Argument on Behalf of CFABPC by Mr. Story on Motions to Dismiss:

**MR. STORY:** So, for the rest of the hearing I believe we are here for the Court's letter in response to defense counsel not having any evidence being taken on their Motion to Dismiss and the intervenor's Motion to Dismiss. We are here today on the Intervenor's Motion to Dismiss and then the Defendant's Motion to Dismiss. Other than what I have already raised I do not think there is anything else that is to be heard today. **R422.**

**THE COURT:** Yes. We needed this day and I appreciated the letter he sent. I may have gotten a little sidetracked as far as trying to get everything done in one hearing and trying to move things more quickly than what they could be done. These are the Motions to Dismiss. **R422.** Do you just stand on your pleadings then? **R422-3.**

**MR. STORY:** I am happy to respond to them. **R423.**

**THE COURT:** I am giving you a chance to make any arguments that you would like to make. **R423.**

**MR. STORY:** I misunderstood. I thought we were talking about what we were going to hear today and then we would have argument time later. It was their motion, so I was going to let them—. **R423.**

**THE COURT:** You have offered to amend your pleadings, and I have denied that.

To the extent we are not taking evidence or testimony or anything like that, you are up on your arguments. **R423.**

**MR. STORY:** I do not know if defendants and intervenors will argue anything different than they have pleaded, so I reserve the right to amend this. **R423.**

Defendants and Intervenors have laid out several things that they believe we have yet to sufficiently plead in our complaint. We ask the Court to deny their Motions to Dismiss for the following reasons. **R423.**

One, as to the FOIA requests. There have been various requests that have said we have failed to plead specific facts. I believe we have pled sufficient facts in that while we have given generalities of various members of the quorum court have met, they have done this in secret in violation of the FOIA and that is one of our claims. We have sufficiently pled that. **R423.**

Defendants and intervenors would have us list each and every time they violated the FOIA, and to that extent I believe we can now come closer to doing that. But the actual Petition that we have is sufficient because one time of the quorum court secretly meeting

with prospective applicants is a violation and puts them on notice of the facts we have plead. So we would ask that count not be dismissed. **R423.**

With regards to the issue of the unconstitutionality of Amendment 100, we believe we have sufficiently pled that Amendment 100 is in violation of Amendment 14 in that it provides for control to the State without having local control in specific counties, which Amendment 14 prohibits. **R424–5.**

Since I am going first, I am guessing that defendants and intervenors might today argue that the emergency ordinance repealing the former Ordinance 18-O-42 changes that, but we argue it does not. The only way to harmonize Amendment 14 and Amendment 100 is to provide local control which is exactly what Ordinance 18-O-42 would be. Without that, Amendment 100 is going to violate Amendment 14 and therefore as to that part it becomes unconstitutional. So we believe we have stated sufficient facts within our Amended Complaint to show that. **R425.**

As to the argument regarding the failure to name the racing commission in this suit, there is a Pulaski County suit, and according to the code, the proper place to name any state agency is in Pu-

laski County. **R425-6.** We are not asking for relief from this Court as to the racing commission. I do not believe that this would be either the proper jurisdiction or the proper place to name the racing commission individually, although it has been done in Pulaski County. If the Court were to find that the racing commission is needed, we would simply in the alternative ask the Court to allow us to amend to name the racing commission if we have got to bring them in. We would ask the Court to find that that is not a proper reason to dismiss. **R426.**

And as to their final issue of whether Ordinance 18-O-42 can be harmonized with Amendment 100, the answer is, “yes.” **R426.** As we state in our Amended Complaint, the drafter of the Amendment, Nate Steel, is on the record and we cite the Court to one of the interviews that he did that shows there has always been a desire for local control, desire for there even to be an election. **R426-7.**

The ordinance does not add to the Constitution. The Constitution puts in the local control already. This is merely the people of Pope County enacting an ordinance that governs the elected officials of Pope County. It adds a requirement before they are to submit a resolution or letter that they should have gone and sub-

mitted that to a vote of the people. We believe that is proper, that is a valid way to harmonize both Amendment 100 and the ordinance. And to specifically say that the ordinance adds something to the constitutional amendment is just an overreach. **R427.**

I think it has always been contemplated in Amendment 100 that a local election could chill the effect of ever having a casino in Pope County. **R427.** The ordinance is just the mechanism by which the people can speak to their elected representatives and say we do or do not want a casino in Pope County. There is no requirement in Amendment 100 that there be a casino in Pope County. Everybody points to the language that said the racing commission shall issue a license, but that presupposes that something else has happened. Even in Amendment 100 it presupposes that there has been a letter or a resolution. There are no directives inside Amendment 100 making that either have to happen or have to happen within a certain time period. So I think the argument that says we have to have one is disingenuous because there is not a requirement in Amendment 100 to have any casino in Pope County. **R428.**

**THE COURT:** Would that not be contrary to the draft of the ordinance itself, when it roughly says it's not that we don't want a casino we just

want to have some say on whether the support letter is issued or not? **R428.**

**MR. STORY:** I think that is why it can be read in harmony. It is not saying “no” to a casino. It is just putting in a mechanism whereby allowing the people to have the ultimate local control. **R429.**

**THE COURT:** As to who it is or whether you get one? **R429.**

**MR. STORY:** I think the way the ordinance is contemplated it’s for the judge or the local officials to bring forth the best candidate and then to put on the ballot for the people to vote for the best candidate. **R429.**

**THE COURT:** I agree that’s how I think it reads. But back to the original question: Could it not have a chilling effect on whether a letter is ever allowed? **R429.**

**MR. STORY:** I think that is the same effect that was already built into Amendment 100. The Local Ordinance has already been built into Amendment 100 and this does not change that. **R429.** If there were no requirement for a letter or requirement for a resolution, then the ordinance might be in violation of Amendment 100, but without that—. **R429–30.**

I am saying that it doesn't matter what the county judge, the city council, or what the quorum court says, it matters what the people say. **R430.**

**THE COURT:** That is not what Amendment 100 says. **R430.**

**MR. STORY:** I think that's a dual process as we discussed before. It does matter what the county judge says and what the quorum court says. They could have very easily decided that, in this case, Cherokee Nation Businesses were the one they felt was the best applicant to put forward. And instead of them voting directly on the resolution, they could have submitted it to be voted on by the people. **R430.** That would have done both: qualified under the ordinance and Amendment 100 and allowed the people of Pope County determine whether they are going to be for or against Cherokee Nation Businesses being the casino. **R430-1.**

If it failed to pass, it would have allowed somebody else to be brought forward and it would have gone until either it was successful or ultimately Pope County's will is simply reflective of what it was at the original vote when they said overwhelmingly no, we do not want Amendment 100 and yes, we do not want the ordinance

because we want local control and we want to be able to say what is going to happen to us. **R431.**

I will rest now but would like to potentially reserve some rebuttal time. **R431.**

**THE COURT:** I think you have addressed all four issues that we are dealing with today. **R431.**

4. Argument on Behalf of Pope County by Mr. Roe on Motions to Dismiss:

**MR. ROE:** As the Court indicated earlier, we are here on Defendant's Motion to Dismiss filed pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure. And defendants lay out several arguments relative to Plaintiff's Amended Petition. One of the claims is for declaratory judgment that Amendment 100 is unconstitutional because it conflicts with Amendment 14 of the Constitution. **R432.**

Amendment 14 simply prohibits the General Assembly from enacting special or local legislation, that's all it prohibits on its face. It has no effect on a constitutional amendment like Amendment 100. **R432.**

The case law the plaintiffs cited in their briefing, *Smith v. Cole*, does not give any indication that Amendment 14 has any ef-



fect on a subsequent constitutional amendment, because that case dealt with an act of the General Assembly. **R432–3**. There has been no other applicable case law cited, and I have found no case law that suggests Amendment 14 has any application to the constitutional amendment. The shortest way to the conclusion proffered by the defendants is that the claim must fail on its face. Amendment 14 has no application to Amendment 100. **R433**.

Even if we accepted that it did, Amendment 100, which is an act after Amendment 14, prevails over Amendment 14. I believe we have cited case law in our brief to say that supports that proposition. **R433**.

Secondly, the next claims we would like to address are the two FOIA violation claims, and defendants have two arguments with respect to that claim. **R433**. The plaintiffs claim the defendants violated the open-meeting provision of FOIA and the relief they request is an order mandating the defendants to rescind the August 13 resolution. **R434**.

Defendant's first argument regarding why that claim fails is because there is a failure to assert sufficient facts to state a claim for violation. If you look at Plaintiff's Amended Petition, the

Court should accept those factual allegations, and the only factual allegation relative to that claim is that the defendants met in secret. In Plaintiff's Response, they assert: "Any secret meeting during which county business is discussed is a violation of FOIA." And that is just not true pursuant to cases of the Arkansas Supreme Court. **R434.**

There have been a few that have come out of the Sebastian County area. **R434.** But there was a case earlier this year in June, the *Wade* case cited in our briefs, involving discussions between City Board of Directors among themselves about a potential item that was going to come before the board at a public meeting. **R434–5.** The Arkansas Supreme Court held that email discussions which did not take any action did not violate the open-meeting provision of FOIA. **R435.**

Plaintiffs have made no allegation that defendants had a secret meeting where some sort of action was taken. They recognize and plead that the August 13 resolution was enacted at an open, properly noticed public meeting. A majority of the quorum court members voted in its favor. So, defendants assert that plaintiffs

failed to plead sufficient facts to maintain that FOIA violation and ask the Court to dismiss this claim. **R435.**

The second attack I have with respect to the FOIA claim involves the writ of mandamus, the request that the Order mandate that the defendants rescind the resolution. **R435.**

Most FOIA cases involve a plaintiff seeking injunctive relief, prohibiting a governmental body from doing something improper again, such as telling them not to send emails, telling them not to discuss business outside of an open meeting. **R435–6.**

There are events where a court can invalidate an action of the governing body if it violates the FOIA, and that is what plaintiffs essentially seek because an Order rescinding the action would have the effect of invalidating the August 13 resolution. But before a court can invalidate a legislative action, the plaintiffs must have given the defendant an opportunity to address the issue so they can fix it themselves if there was an issue—an opportunity to cure. Here, the plaintiffs have not pleaded that they have afforded defendants any opportunity to cure the purported FOIA violation. **R436.**

Even if there was a FOIA violation by the quorum court, plaintiffs should not be entitled to the relief that they seek. As recognized by the plaintiffs, the resolution was properly enacted at a noticed open public meeting of the Pope County Quorum Court. There has not been any allegation by the plaintiffs that there was a FOIA issue relative to that August 13 meeting when the resolution was enacted. Therefore, an Order directing the defendants to rescind that resolution is not appropriate, and I think we could easily envision a scenario where it would be appropriate. **R437.**

For example, let's say you have a quorum court that has a meeting but they do not give proper notice to the media or anyone who has requested it under the open-meetings provision and for whatever reason—negligence or not necessarily malfeasance—they do not give proper notice and they have a meeting and enact an ordinance. **R437.** Then someone says, “you took action at a meeting and there was no notice,” and they were given an opportunity to cure it. **R437–8.**

They obviously don't have another meeting and take that action again at a properly noticed public meeting and if they failed to do that—to seize the opportunity to cure—then it would be appro-

priate for a Trial Court to come in and say, “yeah, you violated it because you did not give notice; I am going to undo your ordinance that you passed because you did not give notice to the public as you are supposed to do.” **R437-8**. That would be the proper scenario where the invalidation of a legislative action would be proper. **R438**.

The next issue is plaintiff’s claim for Declaratory Judgment that resolution 2019-R-4 is invalid based on not following the procedures set forth in Ordinance 2018-O-42. **R438**. Defendants maintain that the ordinance is unconstitutional because it conflicts with Amendment 100. Amendment 100 and the Arkansas Racing Commission rules set forth requirements of the casino applicants to submit an application. And one of those requirements is that for an applicant to operate a casino in this county submit either a letter from the county judge or a resolution of support from the quorum court of the county. That language is in Amendment 100 and demonstrates that the county judge and the quorum court had inherent power and authority to determine which applicant receives those support documents, whether it be a resolution or a letter. Further, that language demonstrates that those officials necessarily

have discretion to determine which applicant that they want to issue those support documents to. **R439.**

The ordinance—2018-O-42—was an initiated measure enacted by the electorate of Pope County at the general election of 2018. **R439.** It requires an election to be held before the county judge or quorum court can issue those support documents. In fact, the ordinance says that the electorate must approve and authorize those county officials before they can issue those support documents. **R440.**

Defendants maintain that that language of the Ordinance is a clear and obvious restriction and prohibition on the county officials' authority as granted by Amendment 100. Section 3.1 of the ordinance is titled, "Restriction on the county judge until authorized by vote of the people." Similarly, 3.2 is a restriction on the quorum court until authorized by a vote of the people. **R440.**

Amendment 100 does not permit such restriction or prohibition on those county officials. This would not only have a chilling effect as mentioned earlier, but it could, as plaintiffs recognize in their Response to Cherokee Nations Businesses' Motion to Dismiss at Page 3, act as a complete bar to the application for a casino

license if Pope County voters reject the issuance of a letter or resolution of support. **R440-1.**

I agree with the Court that if a county official determines we want to support this applicant, it may not matter. In fact, under the ordinance, it does not matter because the voters have the authority to trump that discretion and if they do not agree with the support documents being issued; those county officials cannot do it. So it is the voters who have the authority under the ordinance, which is contrary to the authority that was given to those officials under the constitutional amendment. **R441.**

In response to the Motion to Dismiss, the plaintiffs have asserted that Amendment 100 is silent on the issue of whether a local county can have this ordinance, and if it is silent, then it is so prohibited. **R441-2.** This is a fallacy that is demonstrated by several cases. One that I will bring to the Court's attention is *Allred v. McLoud*, 343 Ark. 35, that dealt with a Madison County Local Ordinance that attempted to place term limits on certain county officials, including justices of the peace, the county judge and some others. The case went to the Arkansas Supreme Court to determine whether it violated the Constitution in Article 7, Section 41 which

sets out the eligibility requirements for a justice of the peace. That section said that a justice of the peace must be a qualified elector and resident of the township. **R442.**

The Constitution did not speak to term limits for a justice of the peace. It was silent on that. **R442.** But the Arkansas Supreme Court concluded it did not mean that the county was free to enact those limits because that was an additional requirement or qualification for that county official, and the Court struck it down as unconstitutional. **R442–3.**

Returning to this case, simply because an amendment does not expressly say Pope County is prohibited from requiring an election, that is not necessary for this Court to conclude there is a conflict or the ordinance is unconstitutional. **R443.**

The final argument we have asserted relative to the ordinance's unconstitutionality is that it is an improper regulation of gambling which is prohibited by Arkansas Code Annotated 14-14-806. And that section of the code provides that a quorum court cannot exercise legislative power to regulate any form of gambling unless authorized by the general assembly. **R443.**



There is no statute or constitutional provision which permits the election that's mandated by Ordinance 2018-O-42, and I think the election is an obvious regulation or restriction of gambling because a casino applicant cannot submit its application until that election. **R443-4**. So it is an obvious restriction on it until the voters approved that measure, or approve the letter or resolution being issued. Therefore, the ordinance conflicts with that statute and Article 5, Section 1 of the Constitution, because it conflicts with a statute or a general law of the state, it is also unconstitutional. **R444**.

The final thing I would address is plaintiff's separate request for mandamus, asking the Court to enter an order mandating the defendants rescind of the resolution of August 13. That relief hinges on the constitutionality of the ordinance. Even so, mandamus would be an inappropriate remedy. Mandamus is appropriate when a public officer is required to do a plain and specific duty which requires no exercise of discretion or official judgment according to the *Clowers* case that we have in our brief. **R444**.

The Arkansas Supreme Court also held that a Writ of Mandamus will not fly to control or review matters of discretion in

*Carroll v. Hobbs*, 2014 Ark. 395. **R444–5**. Mandamus should only be granted by the Court when it is directed towards a purely ministerial duty of a government official. Rescinding the resolution is not a purely ministerial duty. It is a discretionary measure by the county, so the mandamus is not the appropriate relief. **R445**.

Even more fundamental is that, according to the Arkansas Supreme Court, a mandamus is a discretionary remedy which is only available if a plaintiff has no other adequate remedy. Plaintiff has asked this Court to enter Declaratory Judgment rendering the resolution invalid and of no legal effect. If the Court were to do that, it would kill the resolution. **R445**. It would be invalid and you would not need a mandamus directing the county to rescind it. **R445–6**. So, the plaintiffs have an appropriate remedy, which is to ask this Court to declare the resolution invalid, which they have done. If the Court does that, we do not have to get to mandamus.

Your Honor, that is all I have prepared and would be happy to answer any questions you have. **R446**.

5. Argument on Behalf of CNB by Mr. Richardson on Motions to Dismiss:

**MR. RICHARDSON:** Good morning, Your Honor. Scott Richardson for Cherokee Nation Businesses, Intervenor. Mr. Roe has done a good job of covering the issues so I'm going to try not to replot too much ground. Mr. Story is trying hard to form arguments without much law to support them. Particularly the claim that the Constitution is unconstitutional is easily dispensed with. **R446.**

There is black letter of law that if an argument is correct, that Amendment 100 conflicts with Amendment 14, the latter controls the former. **R446-7.** This is repeal by implication. I do not think I have to go that far here to find the repeal by implication because the two amendments work separately. Amendment 14 does not control other amendments of the Constitution. Either way, plaintiff's argument loses. If there's not a direct conflict, then their claim loses. If there is a direct conflict or there's a repeal by implication, Amendment 100 carries the day. **R447.**

As far as the additional qualification argument of the ordinance, the Court's questions did a good job of bringing out the issue there. Amendment 100 gives the county judge and the quorum court the discretion to support a casino. **R447.** The ordinance

gives some discretion to the city, but since we are just talking about the county here today I will stick with that. **R447-8**. The ordinance would prohibit that. If the county judge wanted to support a casino applicant and the quorum court wanted to support a casino applicant—which is what we have here—the ordinance stands as a bar to that if it is valid. If it is not valid because it is an additional qualification, that is not allowed by Amendment 100. **R448**.

There's a reference to Nate Steel and a YouTube video but none of that is relevant. What matters is what's in the four corners of the document and what the amendment actually says. There are reasons courts do not look at what sponsors or other people who are advocating an amendment say it means because as written it could mean something quite different. There may also be posturing going on. **R448**.

What the amendment means here is quite clear and that is the people, through Amendment 100, chose to give local input to the people of Pope County through their elected representatives. **R448-9**. You have elected people, through the county judge, through the quorum court members, who are able to listen to their constituents and represent their interests. An election like the

plaintiffs referred to last November, is kind of a snapshot in time of what people might think about a measure. But the elected officials can interact with the people they represent and are not limited to a snapshot in time as to what the populace thinks about the merits of whatever measure the Court does here. **R449.**

The county judge and quorum court have responded with their constituents and made their decision that the support of Cherokee Nation Businesses is important. As plaintiffs have admitted, they have done that in calling meetings and they have not really taken much issue with the procedures laid out. **R449.**

We agree with the Courts decision to deny the request to amend. **R449–50.** We have pleadings that we are here on today and whatever other pleadings might come in the future are not here to be dealt with today.

With respect to the argument that Amendment 100 doesn't specifically prohibit it so therefore the county can act on it: generally, the law of silence does not equal consent, and that's what the Arkansas Supreme Court has held time and again. That argument could have been raised in each one of the cases that we and the county have cited for the Court on additional qualifications, and

the Supreme Court has never gone with that argument. They have said when the superior law, the Amendment set out the qualifications, then those are the qualifications. And the local authorities cannot add to or take from those qualifications, and this certainly would be an additional one. **R450.**

It is also invalid because Amendment 100 sets who gets to issue those letter or resolutions of support, and that is in the county judge or the quorum court. **R450.** A vote of the people is a completely different method of expressing that local will and that is not what the Constitution provided for. **R450-1.**

The regulation of gambling argument, I think, is quite clear. The whole purpose of the ordinance was for the county to add more hurdles to the goal of the people in Amendment 100. That's clearly regulation of gambling and prohibited by statute, and I have not seen any case law or statutes cited against that argument. **R451.**

As far as the FOIA violations there are no facts in the Complaint. I have no information about what meetings are being talked about, who allegedly attended, what was done at those meetings, what was allegedly decided or what information was presented.

As the county has ably pointed out and we have in our brief, just because members of a board or commission get together outside of a regularly called meeting does not mean there is an automatic violation of the FOIA. **R451.**

And on that, the remedy for a violation of the FOIA is an open meeting and that's what happened here. **R451-2.** The quorum court met following the alleged secret meetings and aired all this in public. The public was allowed to speak and they made their decision in public. So, to the extent that there might have been an FOIA violation it has already been cured by the open meeting. **R452.**

You can also look to that decision and say there is nothing in the Complaint suggesting any impropriety other than some varied conclusions about some unknown secret meeting, and they even mention the Cherokee Nation Businesses in that and I don't know what they are alleging. Part of the purpose of a complaint is give the other side enough information so they can adequately respond. We can't respond because we have no idea what they are talking about. **R452.**

I think that's essentially our arguments. The ordinance is invalid because it is an additional qualification. It does try and change the constitutional scheme and dismissal is the appropriate remedy today. We have taken things in a little different order. If Mr. Story has new or additional arguments, I would appreciate some time for rebuttal since we are the movant and they are the respondent. But unless the Court has some other questions, I'll have a seat. **R452-3.**

6. Ruling by the Court on Motions to Dismiss:

**THE COURT:** I have what I need to hear. I think you've probably made all your arguments in the pleadings and now you've had the opportunity to make those before this Court. This shall be my ruling: I know and understand this is a very big event for Pope County. **R453.**

Culturally, from the people, it's divided as far as the issue. I want the people to know the Court applies the law. The Court may have an internal opinion but that opinion does not come forward as it is what the law provides, what our constitution and local precedent in courts that dictate how the Court applies its duties. We do not make the laws. We apply the laws made by the governing bodies. In this instance we are dealing with the State of Arkansas through an initiative of Amendment 100; and the quorum court,



through its ordinances regarding 2019-R-014 and also 2018-O-42.

**R454.**

First, we have Request for Declaratory Judgment that Amendment 100 unconstitutionally conflicts with Amendment 14. The Court will deny relief with respect to that request finding that Amendment 14 only deals with acts of the General Assembly. Statutes are to be construed as they are read. **R454.** The amendment reads just that—this was not an act which is being challenged here of the General Assembly. And to the extent—and I am not finding, that it does—that there is any conflict between Amendment 100 and Amendment 14—repeal by implication. If there was something there, then the latter always prevails over the earlier; that’s the law. That’s black letter. I think I remember that from law school, so that’s something we learn early on. For those reasons and those findings Declaratory Judgment that Amendment 100 unconstitutionally conflicts with Amendment 14, that will be denied and dismissed. **R455.**

Next the Declaratory Judgment that Resolution 2019-R-014, the act of the quorum court in granting a letter to Cherokee Nation Businesses, LLC, Amendment 100 is in conflict with 2018-O-42.

They are not harmonious. They are not *in pari materia* as the doctrine is called. **R455**. And you add to this Arkansas statutes 14-14-806(4) which states quorum courts are not to be regulating gambling; it is written in the statute. **R455-6**.

And the other reason set forth is that it imposes an additional qualification to Amendment 100. They are not harmonious. It does, and I think the attorneys picked up on my questions as whether or not the act of a public local election to control the discretion that was built into the county judge, the quorum courts or the city through Amendment 100 creates an obvious conflict in that they can stop any decision made by a quorum court if it is not in agreement with what the local—I mean we can assume in a perfect world that everybody would agree but as we all know, we do not live in a perfect world and there are disagreements and local people may not wish for in their vote to seek a letter of support. Thus, we would never get a casino and that is totally contrary and conflicts with Amendment 100. So it does add an additional qualification which is not authorized by the law and Amendment 100 would prevail in that. **R456**.

I find that Ordinance 2018-O-42 is not moot to the extent that whatever action was taken by the quorum court yesterday evening in repealing that, they still have to answer for the actions that were taken pursuant to it or not taken pursuant to it for the time period it was in effect. **R456-7.**

At the time that it was in effect for purposes of what actions were taken—which actions were valid actions by the quorum court and the county judge—this ordinance is unconstitutional because it conflicts with and adds a qualification to Amendment 100. Therefore, Declaratory Judgment that Resolution 2019-R-014 is denied. **R457.**

Number 3, Declaratory Judgment that Pope County Judge and quorum court members met in secret violation of the FOIA. First, there were insufficient facts in the pleadings. Under Rule 12(b)(6), that matter will be dismissed. **R457.**

Again, the Freedom of Information Act provides for remedies if something like that happens. Just to state that there were secret meetings—quorum court members, any government body at the local level or any level—is something that has been tried before the Arkansas Supreme Court and decided in the past and most re-

cently didn't come to anything albeit they exchanged some emails about the personnel director with the police department. **R457–8.** And it appears these councilmen are doing their thing and not having a meeting. They hadn't done anything. We do not know what happened in this case—just a secret meeting. How would it be if they could not see each other at breakfast or coffee and discuss what is going on or share their thinking but they do not take action until they get to that meeting? Those kinds of things are going to happen. **R458.**

I think it is a real fine line that you have to be careful as an elected official in local government when you do such things. But to not allow them to talk to each other at all is not what the courts mean. **R458.**

I do not know what this allegation of violations of FOIA, secret meetings, is either. I cannot tell from the pleadings so it fails under Rule 12(b)(6) as failing to plead sufficient facts. **R459.**

Down to Writ of Mandamus: I think is moot at this point. Mr. Roe set out what mandamus is for and that is not what this is for. It is not for discretionary matters. It is for ministerial duties.

As an example, assuming the ordinance was constitutional and then the county judge did not act, maybe mandamus would be proper. It is just kind of semantics here more than anything but mandamus is not proper. It is not designed for this situation, plus it is moot at this point because 2018-O-42 was unconstitutional.

**R459.**

Have I left anything out, gentlemen?

**MR. CALHOUN:** Your Honor, I know you ruled insufficient facts pursuant to 12(b)(6) on the FOIA violations. I just wanted to clarify should we put in the Order that even if they had sufficient facts for a FOIA violation, that it would still be insufficient to support the claim for relief they are seeking, which is invalidation based on case law?

**R460.**

**THE COURT:** You could add that to fully address it and make that a good final Order on that issue. Yes, sir. **R460.**

## VI.

### STATEMENT OF THE CASE

This is an appeal of a civil case that was dismissed with prejudice under Ark. R. Civ. Pro. 12(b)(6) for “fail[ing] to state facts upon which relief can be granted.” **ADD 69, 98-99, 147, 177.** Namely, the facts of this case rely upon the constitutionality of a local county ordinance intended to harmonize with the provisions of Arkansas Constitutional Amendment 100. **ADD 3-5.** This case was originally presented before Division 1 of the Fifth Circuit Court in Pope County, Arkansas. **ADD 1.** On October 29, 2019, the trial judge, the honorable William Pearson, granted a Motion to Dismiss all four counts of CFABPC’s complaint. **ADD 177.** This appeal addresses two procedural issues in the case and one of the counts, namely: the inappropriate basis underlying the granting of the 12(b)(6) Motion to Dismiss, the prejudice resulting from the denial of the Rule 15 Motion to Supplement the Pleadings, and the constitutionality of Pope County Ordinance No. 2018-O-42 (hereinafter “Local Ordinance”).

The Appellants in this case are Citizens for a Better Pope County, a Local Option Ballot Question Committee, and James Knight (chairman of the committee), in his individual capacity.<sup>2</sup> **ADD 1.** CFABPC is the sponsor of the Local Ordinance. **ADD 1.** Mr. Knight is an Arkansas taxpayer and resident of Pope Coun-

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<sup>2</sup> Appellants may be collectively referred to as, “CFABPC”.

ty. **ADD 1.** The Appellees in this case are county judge, Ben Cross, and the 13 justices of the peace for Pope County. **ADD 1-3.** Additionally, Cherokee Nation Businesses, LLC (CNB) was permitted to intervene as a party in the case alleging a unique interest that was not protected by Pope County. **Ab 4, 8-9.** CNB’s alleged interest was that the challenged resolution of support from the Pope County Quorum Court (QC) named CNB as the casino applicant of choice by the QC and that it was party to an economic development agreement — though that agreement was not necessarily germane to the underlying litigation. **ADD 39, Ab 3-4, 7.**

CFABPC was formed with the purpose of creating and advocating for a local ordinance that harmonized with the provisions of Arkansas Constitutional Amendment 100 that was passed by Arkansas voters in the November 2018 general elections. **ADD 1, 3, 4.** Amendment 100 provided, in part, that the casino applicant “shall . . . submit either a letter of support from the county judge or a resolution from the quorum court in the county where the proposed casino is to be located.” **ADD 38.** The Local Ordinance at issue in this appeal required the county judge or quorum court to refer the question of issuing support of a Casino Applicant to a local election before issuing any such support. **ADD 62-63.**

At the general elections in November of 2018, Amendment 100 (known as Issue 4 on the statewide ballot) passed in Arkansas, notwithstanding 61% of Pope County residents voting against the measure. **ADD 53.** Pope County residents did,

however, adopt the Local Ordinance, on that same day, with nearly 70% voting in favor of that measure. **ADD 3, 9, 54.**

On August 13, 2019, the Pope County QC voted to adopt Resolution No. 2019-R-014 by a vote of eight “For” and four “Against” with one “Abstain.” **ADD 64.** This resolution alleged support for CNB as the casino operator of choice for Pope County under Amendment 100, **ADD 64**; however, the QC did not refer this support for a casino applicant to the people of Pope County under the Local Ordinance. **ADD 56-57.** Additionally, the QC did not repeal the Local Ordinance before taking their action. **Ab 41.**

The actions of the QC led CFABPC to file suit against Pope County. In this suit, CFABPC sought a declaratory judgment to overturn the resolution of support for CNB because the QC violated the Local Ordinance. **ADD 58-61.** On September 24, 2019, Pope County filed a 12(b)(6) Motion to Dismiss for “failure to state facts upon which relief can be granted.” **ADD 65, 69-70.** At a hearing on September 30, 2019, the Trial Court denied a Motion to Dismiss for improper service, **Ab 2-3**, and then the Trial Court stated that another hearing would follow to address the 12(b)(6) Motion to Dismiss. **Ab 9.** Additionally, the Trial Court stated that parties should bring evidence to the next hearing to support their claims. **Ab 9.**

In a letter to the court dated October 3, 2019, Pope County’s attorney objected to evidence being presented in a hearing on a 12(b)(6) motion, noting that such



a hearing should only be based on the allegations in the complaint. **ADD 96-97**. According to Pope County's attorney, discovery had not yet occurred and "the matter [was] far from being in a position to be tried." **ADD 97**. On October 4, 2019, the Trial Court responded to this letter and agreed that evidence would be improper at this juncture, noting that the scope of the hearing would simply be on the Motion to Dismiss. **ADD 95**. On October 9, 2019, CNB joined with Pope County and filed a Motion to Dismiss pursuant to Ark. R. Civ. P. 12(b)(6). **ADD 98**.

The hearing for the Motions to Dismiss brought by Pope County and CNB occurred on October 29, 2019. **ADD 177**. On the eve of the trial, the QC called an emergency meeting in which they repealed the Local Ordinance, presumably with the purpose of mooted the court case. **Ab 13, ADD 94**. At the hearing on the very next day, CFABPC's attorney made a Rule 15 motion to amend the pleadings based upon multiple recent events that had transpired between submission of the pleading and the October 29<sup>th</sup> hearing, including the action to repeal the Local Ordinance the night before the hearing. **Ab 11-12**. The trial judge denied that motion. **Ab 12, 15**. The Trial Court ruled that the question of the constitutionality of the Local Ordinance was not mooted by the action as it related to the acts of the QC because the ordinance was lawfully in place at the time of their August action to support of CNB, **Ab 41**; therefore, amending the pleadings at this point would

have no relevance to the Motion to Dismiss being heard that day. **Ab 12.** Despite the Trial Court allowing the hearing to proceed without evidence or discovery, the court ruled that the Local Ordinance unlawfully conflicted with Amendment 100. **Ab 41.** This ruling had the effect of voiding the Local Ordinance, and it allowed the QC's resolution of support to stand. **Ab 41.**

CFABPC timely filed an appeal with the Arkansas Supreme Court. **ADD 184.** CFABPC requests this court to reverse the dismissal regarding the constitutionality of the Local Ordinance and of the Freedom of Information Act claims by the Trial Court because the petition, as amended, stated facts sufficient for relief to be granted. Additionally, the Trial Court erred in denying the Rule 15 Motion to Supplement the Pleadings. The substantive events that occurred and the absence of time between the QC's actions on the evening of October 28<sup>th</sup> and the hearing on October 29<sup>th</sup> significantly prejudiced CFABPC during that hearing. Finally, the Trial Court erred in voiding the Local Ordinance. Upon review, this court will find that the Local Ordinance is constitutionally valid because it does not conflict with Amendment 100 or any statute in the Arkansas code. Rather the Local Ordinance can be read in harmony with the Arkansas Constitution and the Arkansas code. CFABPC humbly requests that this court overturn the rulings of the Trial Court and remand this case for further proceedings on the merits.

## VII.

### ARGUMENT

**A. The Trial Court erred in granting the Appellees’ 12(b)(6) Motions to Dismiss because it based its decision on a question of law while the Arkansas standard calls for sufficiently pleaded facts.**

1. Standard of Review

The Court should reverse the Trial Court’s order in granting the Motions to Dismiss because the Appellants’, Citizens for a Better Pope County and Mr. James Knight,<sup>3</sup> claims survive under the applicable standard of review for Rule 12(b)(6) motions in courts in the state of Arkansas. The Court reviews Rule 12(b)(6) motions to dismiss under the abuse of discretion standard. *Harmon v. Payne*, 2020 Ark. 17, 3, 592 S.W.3d 619, 622 (2020). The abuse of discretion standard means that the court looks to the underlying facts to test the sufficiency of the complaint, noting that when “the complaint states only conclusions without facts”, the Court will affirm the granting of a Rule 12(b)(6) motion. *Ballard Group, Inc. v. BP Lubricants USA, Inc.*, 2014 Ark. 276, 6, 436 S.W.3d 445, 449 (2014). The well-settled standard of review for 12(b)(6) motions in Arkansas requires that “the facts alleged in the complaint [be treated] as true and view[ed] [] in the light most favorable to the plaintiff.” *Harmon*, 2020 Ark. at 3, 592 S.W.3d at 622.

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<sup>3</sup> Appellants may be hereinafter collectively referred to as, “CFABPC”.

As this analysis will show, CFABPC's complaint does not merely state conclusions, but rather it states facts sufficient to survive a 12(b)(6) Motion to Dismiss. Additionally, a hearing for a 12(b)(6) motion is not the venue to resolve questions of law, but rather it is the venue to determine whether facts are sufficiently pleaded, such that if true, to warrant the granting of the relief requested in the complaint. *See Little Rock Cleaning Sys., Inc. v. Weiss*, 326 Ark. 1007, 1012, 935 S.W.2d 268, 271 (1996). CFABPC's pleadings meet this standard; therefore, the Trial Court's ruling should be reversed and remanded for further hearings.

## 2. Argument

### *(a) CFABPC alleged facts sufficient to grant relief under the Local Ordinance.*

The Trial Court erred in granting the Appellees'<sup>4</sup> 12(b)(6) Motion to Dismiss when CFABPC had pleaded facts sufficient to grant relief. Under the standard of review as stated above, CFABPC's alleged facts should have been taken as true and any reasonable inferences should have been viewed in their favor. *See Harmon*, 2020 Ark. at 3, 592 S.W.3d at 622. The facts of their pleading are sufficient, and only the questions of law are in dispute. Thus, purely based on a 12(b)(6) motion, CFABPC's claims should not have been dismissed.

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<sup>4</sup> Appellees (Pope County Judge and Quorum Court) along with Intervenor (Cherokee Nation Businesses, LLC) may be collectively referred to as, "Appellees".

Arkansas has long been a fact pleading jurisdiction, not a notice pleading jurisdiction; therefore, “the facts alleged in the complaint [are treated] as true and view[ed] [] in the light most favorable to the plaintiff.” *Id.* Ark. R. Civ. Pro. 12(b)(6) states that a claim may be dismissed for “failure to state *facts* upon which relief can be granted.” (emphasis added). However, Rule 12(b)(6) must be read in coordination with Rule 8(a) of the Arkansas Rules of Civ. Pro. in order to test the sufficiency of the complaint. *Ark. Dept. of Env. Quality v. Brighton Corp.*, 352 Ark. 396, 403, 102 S.W.3d 458, 462 (2003). Ark. R. Civ. Pro. 8(a) provides that the pleader must set forth “a statement in ordinary and concise *language of facts* showing . . . that the pleader is entitled to relief.” (emphasis added). These facts are not mere conclusions; “all reasonable inferences are resolved in favor of the complaint; and the pleadings are liberally construed.” *Harmon*, 2020 Ark. at 3, 592 S.W.3d at 622.

In CFABPC’s complaint, the facts are clearly delineated and support its claim that the Pope County Quorum Court (QC) violated the citizen initiated Pope County Ordinance No. 2018-O-42 (Local Ordinance). **ADD 56**. The elements of the Local Ordinance are as follows: (1) The county judge or QC<sup>5</sup> shall be prohib-

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<sup>5</sup> For the purposes of this appeal, the county judge and quorum court may be referred to collectively herein as, “county officials.”

ited from issuing a letter or resolution of support for a casino applicant unless; (2) The question of support is referred to the voters of Pope County, Arkansas, in either a special or general election; and (3) A majority of the registered Pope County voters in the election approve such action. **ADD 62-63.** The fact pattern below establishes the sufficiency of CFABPC’s pleading, which supports their conclusions.

First, under the Arkansas standard for 12(b)(6) motions, this Court should treat as true the following facts from CFABPC’s complaint regarding Amendment 100, which support the elements that entitle them to relief: (1) The Arkansas Casino Gaming Amendment of 2018 (hereinafter “Amendment 100”) is a valid law in the Constitution of Arkansas. **ADD 53.** (2) On November 7, 2018, Arkansas voters adopted Amendment 100, while voters in Pope County voted against Amendment 100 by a vote of 39% “For” and 61% “Against.” **ADD 53.** (3) Pertinent to this case, Amendment 100 contains a provision that required casino applicants to obtain a letter of support from the county judge in the county where the casino would be located or a resolution of support from the quorum court in the county where the casino would be located. **ADD 53.**

Next, under the Arkansas standard for 12(b)(6) motions, this Court should treat these facts as true from CFABPC’s complaint regarding the Local Ordinance, which support the elements that entitle it to relief: (1) In response to Amendment 100, Pope County voters followed the state’s initiative process under Ark. Const.

Art. 5 § 1 and created the valid Local Ordinance. **ADD 54, 131.** (2) The Local Ordinance stated that before the county judge issued a letter of support or the quorum court issued a resolution of support for a casino applicant that these county officials must refer the question of support to the voters of Pope County. **ADD 62-63.** (3) At the same election on November 7, 2018, Pope County voted for the Local Ordinance by a vote of 70% “For” and 30% “Against.” **ADD 54.** (4) Both Amendment 100 and the Local Ordinance were adopted and put in effect simultaneously on November 14, 2018. **ADD 63.**

Then, under the Arkansas standard for 12(b)(6) motions, this Court should treat as true these facts from CFABPC’s complaint regarding the illegal actions of the Pope County Quorum Court, which support the elements that entitle it to relief: (1) On August 13, 2019, the Pope County QC violated the Local Ordinance by holding a special meeting to issue a letter of support for a casino applicant, Cherokee Nation Businesses, LLC (CNB). **ADD 56.** (2) At this meeting, the Pope County QC voted to adopt Resolution No. 2019-R-014 by a vote of eight “For” and four “Against” with one “Abstain.” **ADD 64.** (3) Although this resolution alleged support from Pope County, the question was never referred to the people of Pope County for a vote under the Local Ordinance. **ADD 59.** (4) On August 15, 2019, CNB submitted its casino application, along with the alleged resolution of support to the Arkansas Racing Commission (ARC). **ADD 57-58.**

Based upon these facts, CFABPC sought to have the QC's resolution of support for CNB nullified because "no letter or resolution of support in favor of a casino applicant may be issued . . . without presenting the issue for popular vote to registered voters of Pope County pursuant to Ordinance 2018-O-42." **ADD 59.** Under the applicable rules for civil litigation in this state and as held by this Court on many occasions, CFABPC's complaint sufficiently pleaded the facts stated above, and these facts should have been treated as true by the Trial Court.

Additionally, these facts show that the QC intentionally violated a known county ordinance that was on the books and had not been judicially invalidated; therefore, CFABPC is entitled to relief. CFABPC's complaint meets the Arkansas standard of review for 12(b)(6) motions, thus the Trial Court's ruling regarding the Local Ordinance should be reversed and remanded for further proceedings.

*(b) The Trial Court improperly based its dismissal on an evaluation of the law, not the sufficiency of the facts.*

Based upon an incorrect application of a 12(b)(6) motion, the Trial Court dismissed the case based on the merits stating that the Local Ordinance contradicted Amendment 100; however, the hearing was based on a 12(b)(6) motion alleging that CFABPC had failed to state facts upon which relief can be granted. **ADD 65, 98.** The Trial Court made its decision by improperly evaluating the law during a hearing on a 12(b)(6) Motion, instead of evaluating the sufficiency of the facts. In making this improper determination, the Pope County QC's resolution of support



for Cherokee Nation Businesses (CNB), Resolution 2019-R-14, was upheld without any discovery being performed, without any testimony being given, or without any trial taking place. **ADD 97**. Unless reversed, this miscarriage of justice will result in a grave disregard to the due process and other lawful rights of the nearly 70% of Pope County residents who voted for the Local Ordinance. **ADD 54**.

In *Little Rock Cleaning Sys., Inc. v. Weiss*, this Court made a clear delineation on the purpose of 12(b)(6) motions in Arkansas stating that a difference exists between pleading sufficient facts and determining a case based upon the interpretation of law. *See* 326 Ark. at 1012. In order to plead sufficient facts under 12(b)(6), the complaint must bring more than mere allegations; “it [must] support[] those allegations with facts.” *Id.* If the complaint is absent of facts, only then the Court may dismiss a claim. *See Ballard Group*, 2014 Ark. at 6, 436 S.W.3d at 449.

However, the court may not go outside of the pleadings in a 12(b)(6) motion to determine if facts are sufficiently pleaded. *See* Ark. R. Civ. Pro. 12(b)(8). If a court considers evidence or exhibits outside of the complaint, then the 12(b)(6) motion is converted to a Rule 56 motion for summary judgment. *Bayird v. Floyd*, 2009 Ark. 455, 2, 344 S.W.3d 80, 82 (2009). Under a Rule 56 motion for summary judgment, however, testimony is not allowed, and in allowing testimony, a 12(b)(6) hearing would be considered a bench trial. *Klever v. Klever*, 2017 Ark. App. 330, 5-6, 525 S.W.3d 29, 33 (2017).

In this case, neither evidence nor testimony was allowed, thus nothing occurred in the proceedings to convert the hearing to either a summary judgment hearing or a bench trial. **ADD 95.** Additionally, the only time in which summary judgment is appropriate is “when there are no genuine issues of material fact.” *Hotfoot Logistics, LLC v. Shipping Point Marketing, Inc.*, 2013 Ark. 130, 5, 426 S.W.3d 448, 451 (2013). Summary judgment is not appropriate where differing conclusions could be drawn by reasonable people as is the situation with the provisions of Amendment 100. *Id.*

(i) In order to understand the intent of Amendment 100, a full trial would be necessitated

In evaluating the meaning of Amendment 100, using the facts of the case to determine the intent of the drafter is of utmost importance. The primary rule of “statutory interpretation is to give effect to the intent of the legislature.” *Ark. Dept. of Corr. v. Shults*, 2018 Ark. 94, 4, 541 S.W.3d 410, 412 (2018). The first step of interpretation requires a plain reading of the law. *Id.* If the plain reading of the law is ambiguous, the Court seeks to “reconcile statutory provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part.” *Id.*

In Amendment 100, the language imposing a requirement upon casino applicants to obtain letters or resolutions of support has been the source of much controversy and misunderstanding. The language of Amendment 100 expressly assigns authority and duties to certain parties, namely the ARC and each of the casi-

no applicants. *See* Ark. Const. amend. 100 § 4(a) and 4(n). However, there is no express authority or duty assigned to the county officials, as incorrectly argued by the Appellees in the Trial Court. In fact, the Pope County attorney calls the county official’s authority “inherently implie[d].” **ADD 148-49**. Implying such an authority or duty to the county officials would violate the principles of statutory interpretation which state that “[the Court] will not read into a statute language that was not included by the legislature.” *Shults*, 2018 Ark. at 4-5, 451 S.W.3d at 412.

As applied to Amendment 100, if the drafter had wanted to grant authority or impose a duty on the county officials, then it would have done so expressly, as was done with the ARC and the casino applicants. *See* Ark. Const. amend. 100 § 4(a) (stating the ARC “shall administer and regulate casino licenses”); *See also* Ark. Const. amend. 100 § 4(n) (requiring “all casino applicants for a casino license in Pope County . . . to submit either a letter of support from the county judge or a resolution of support from the quorum court”).

As is evident from the unambiguous, plain language of Amendment 100, no authority or power is vested in the county officials. Amendment 100 simply requires something of the casino applicant and provides authority to the ARC. *See* Ark. Const. amend. 100 § 4(a) and (n). However, should this Court decide that the provision could be interpreted in various ways by reasonable people, discovery and

further proceedings would be necessary. *See Hotfoot Logistics*, 2013 Ark. at 5, 426 S.W.3d at 451.

(ii) The Trial Court erred by dismissing the Freedom of Information Act (FOIA) claim pursuant to Rule 12(b)(6) and further issuing an advisory opinion on that same claim

As previously stated, in Arkansas claims may only be dismissed for “failure to state facts upon which relief can be granted,” Ark. R. Civ. Pro. 12(b)(6), when the pleader fails to set forth “a statement in ordinary and concise language of facts showing . . . that the pleader is entitled to relief,” Ark. R. Civ. Pro. 8(a). These facts are not mere conclusions; “all reasonable inferences are resolved in favor of the complaint; and the pleadings are liberally construed.” *Harmon*, 2020 Ark. at 3, 592 S.W.3d at 622.

Here, CFABPC alleged the fact that the county officials participated in private meetings with casino applicants and to discuss the passage of Resolution 2019-R-14. **ADD 60**. Per the Arkansas standard for fact pleading, these allegations are not conclusions and must be treated as facts with any reasonable inferences resolved in CFABPC’s favor. On that basis alone, the Trial Court’s decision should be reversed and remanded for further hearings. Furthermore, the Trial Court does not have the authority to render an advisory opinion based on speculation. *See Stephenson v. Whittington*, 6 Ark. App. 4, 6, 636 S.W.2d 878, 879 (1982) (stating that a potential breach of a deed provision was speculative and any result-

ing judgment by the Trial Court was considered an inappropriate advisory opinion).

Here, in contravention of Rule 12(b)(6) and Rule 8(a), the Trial Court decided that sufficient facts were not pleaded, and yet the court went on to adopt CNB's statement that "even if they had sufficient facts for a FOIA violation, that it would still be insufficient to support the claim for relief they are seeking." **Ab 43-44**. In response to this statement, the court said, "You could add that [to the final order] to fully address it and make that a good final Order on that issue. Yes, sir." **Ab 44**.

In the actual written order by the court (presumably drafted by Appellees), **Ab 43-44, ADD 183**, the court states multiple speculative opinions regarding the merits of any FOIA violations. For example, "to the extent there was a FOIA violation, that violation was cured." **ADD 182**. Without evidence being presented or, more appropriately at the 12(b)(6) stage, without those factual assertions being presented in the Appellants' claim, such statements by the court are purely speculative. In another example the court states, "even if [the allegations] constitute a FOIA violation, [they] do not satisfy the elements [required] . . . for invalidation of a legislative act." **ADD 182**. Again, this is an evaluation of the facts as applied to the law, when the court stated facts do not exist. Either the facts exist sufficient for the case to move forward to discovery and later a ruling upon their legality, or facts do not exist so that dismissal is appropriate. As it stands, the Trial Court ef-

fectively told CFABPC that even though they could bring this claim again with more facts, they should not do so because the court has now advised them as to its opinion on the matter regardless of the facts potentially revealed by evidence.

Concluding this point as to the Rule 12(b)(6) dismissal on the constitutionality of the Local Ordinance and the FOIA claims, both dismissals should be reversed and remanded to the Trial Court for further proceedings. As stated in a letter to the Trial Court by the Appellees' attorney on October 3, 2019, "This matter is far from a position to be tried . . . The parties have yet to engage in any discovery to explore any facts supporting or disputing the asserted claims." **ADD 97**. The Trial Court responded by sending a letter to all the parties on October 4, 2019. **ADD 95**. The court confirmed that the hearing on October 29, 2019, would simply be to discuss a recently denied request for injunctive relief and the Motion to Dismiss, and evidence would not be allowed. **ADD 95**. Nothing indicated that a full trial would be in order at that hearing. **ADD 95**. The letter from the court affirmed to CFABPC understanding that the hearing on the Motion to Dismiss would serve only to determine if the facts were sufficiently pleaded. **ADD 95, Ab 16**.

As shown above, CFABPC did plead sufficient facts, and demonstrated that evidence would be needed to move the case forward, while also establishing that it would be improper to consider evidence when deciding a motion to dismiss under Rule 12(b)(6). Further, summary judgment would fail because reasonable people

could differ on the interpretation of the language of Amendment 100, and such doubts are resolved in favor of the nonmoving party. *Hotfoot Logistics*, 2013 Ark. at 5, 426 S.W.3d at 451. Because the motion to dismiss was improper and summary judgment would fail, this case should have moved to a trial on the merits, including both discovery and evidence. As it stands, the Trial Court's hearing on the Rule 12(b)(6) motion was not the proper venue to decide the questions of law regarding the constitutionality of the Local Ordinance, nor was it the proper place to issue an advisory opinion on the FOIA claims.

Accordingly, the order granting the motions to dismiss should be reversed and remanded for further proceedings because CFABPC's claims survive the Arkansas standard of review for 12(b)(6) motions because it sufficiently pleaded facts upon which relief can be granted and did not merely state conclusions.

**B. This Court should reverse the Trial Court's decision because the Trial Court improperly denied a Rule 15 Motion to Supplement Pleadings when subsequent material facts altered the direction of the case.**

1. Standard of Review

Challenges to the denial of a Rule 15 motion are reviewed under the abuse of discretion standard. *Deer/Mt. Judea Sch. Dist. v. Kimbrell*, 2013 Ark. 393, 20, 430 S.W.3d 29, 44 (2013). An abuse of discretion has been defined by this court as acting improvidently by exercising judgment "thoughtlessly and without due consideration." *Poff v. Brown*, 374 Ark 453, 457, 288 S.W.3d 620, 623 (2008).

Specific to Rule 15, this court has more concisely defined the standard of abuse of discretion by stating that the Trial Court is granted “broad discretion in allowing or denying amendments.” *Deer/Mt. Judea*, 2013 Ark. at 20, 430 S.W.3d at 44.

However, abuse of discretion occurs when the motion is denied and neither prejudice nor undue delay would be caused by the amendment. *See id.* “Where neither a continuance is requested nor a demonstration of any prejudice resulting from an amendment is shown, the amendment should be allowed.” *Cavalry SPV, LLC v. Anderson*, 99 Ark. App. 309, 311, 260 S.W.3d 331, 332 (2007).

## 2. Argument

This Court should reverse the Trial Court’s decision on all counts because the Trial Court abused its discretion in denying a Rule 15 Motion to Supplement Pleadings based upon subsequent facts that would have significantly altered the direction of the case. Under Ark. R. Civ. Pro. 15(d), “A party may at any time without leave of court file a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.” Rule 15 “permit[s] liberal amendments to pleadings at any time without leave of the court.” *Cavalry*, 99 Ark. App. at 311, 260 S.W.3d at 332.

In this case, significant events occurred between the date of the filing of the second amended pleadings and the hearing on October 29, 2019. These events required supplemental pleadings and discovery. **Ab 12.** The most notable event oc-



curred on the eve of the hearing. On the evening of October 28, 2019, the Pope County QC called its third “emergency” meeting in less than a month with the sole purpose of repealing the Local Ordinance in what was presumably an effort to moot the hearing on October 29<sup>th</sup>. **Ab 13, ADD 94**. In the hearing on October 29, 2019, CFABPC’s attorney made a Rule 15 Motion to Supplement the Pleadings based upon these events and was denied, even though these events substantially changed the nature of the case and would have added multiple claims. **Ab 12**.

In holding the meeting on the night before the hearing, there was no time to amend the pleadings before the hearing the following morning, thus CFABPC was significantly prejudiced. Yet, the Appellees made no objection to this Rule 15 motion; Appellees made no motion for a continuance; and their case was not prejudiced by the request to amend. Thus, none of the reasons to deny a Rule 15 motion were met. In fact, the Trial Court’s only reasoning was that it did not “find any relevance whatsoever [to the hearing] whether the ordinance was repealed or not repealed,” **Ab 12**, and relevancy is not a valid reason for denial under Rule 15. Further, without discovery or time to draft amended pleading, the Trial Court could not properly ascertain the relevancy of the request, thus its only reasoning is without the due consideration called for under the abuse of discretion standard.

Under Rule 15, the only valid reasons to deny a supplemental pleading is if the opposing party is prejudiced or if granting the motion would cause undue de-

lay. *Cavalry*, 99 Ark. App. at 311, 260 S.W.3d at 332. In relation to timing, the Trial Court only mentions that it wanted to get to a final order that day. **Ab 11.** Such reasoning does not indicate a call for judicial efficiency, but rather a disregard of the need for evidence and a proper trial.

The Trial Court's decision to deny the Rule 15 motion does not meet the elements required under the abuse of discretion standard. Therefore, this court should reverse the Trial Court's decision to proceed with the hearing because the Trial Court improperly denied a Rule 15 motion to amend or supplement pleadings based upon subsequent material facts that altered the direction of the case.

**C. The Order granting Appellees' Motion to Dismiss should be reversed because Pope County's Local Ordinance is Constitutional.**

1. Standard of Review

On appeal, this Court uses a *de novo* standard of review for cases involving statutory construction and constitutional interpretations by the Trial Court. *Bull-ock's Kentucky Fried Chicken, Inc. v. City of Bryant*, 2019 Ark. 249, 5, 13, 582 S.W.3d 8, 12, 16 (2019). According to the Court, *de novo* review of statutory interpretation means that the Supreme Court gives no deference to the lower court's opinion because it is the duty of the Supreme Court "to determine the meaning of a statute." *Dept. of Ark. State Police v. Keech Law Firm, P.A.*, 2017 Ark. 143, 2, 516 S.W.3d 265, 267 (2017). The appellant must show that the Trial Court erred

in its interpretation, or the Trial Court's interpretation will stand. *Bullock's*, 2019 Ark. at 13, 582 S.W.3d at 16.

Upon performing a *de novo* review, this Court will find that the Trial Court erred in its interpretation of the Pope County's Local Ordinance and Arkansas Amendment 100; therefore, it should reverse the Trial Court's decision that granted the Appellees' Motion to Dismiss the constitutional claim by CFABPC.

## 2. Argument

The Appellees' Motion to Dismiss should be reversed, even if this Court affirms that a 12(b)(6) hearing was the proper venue to decide a question of law, because Pope County's Local Ordinance is constitutional. The Court's primary rule of "statutory interpretation is to give effect to the intent of the legislature." *Shults*, 2018 Ark. at 4, 541 S.W.3d at 412. The Court seeks the intent by first interpreting legislation from its plain and unambiguous language and "giving the words their ordinary and usually accepted meaning in common language." *Id.*

In the case of ambiguity, the Court seeks to "reconcile statutory provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part." *Id.* More pointedly, the Court seeks to "give meaning to every word in the statute." *Davis v. Pennymac Loan Services, LLC*, 2020 Ark. 180, 4 (2020). According to the Court, if an irreconcilable difference does *not* exist, then construing the statutes in a harmonious manner is required. *Brock v. Townsell*, 2009 Ark.

224, 20, 309 S.W.3d 179, 191 (2009). “Furthermore, [the Court] will not read into a statute language that was not included by the legislature.” *Shults*, 2018 Ark. at 4-5, 541 S.W.3d at 412.

*(a) The Local Ordinance does not contradict Amendment 100 but rather is harmonious with Amendment 100.*

The Appellee’s primary claim states that the Local Ordinance conflicts with Amendment 100 because it adds requirements beyond the scope of the amendment. **ADD 113, 75**. This claim is without merit because the Arkansas rules for statutory interpretation require two pieces of legislation to be interpreted harmoniously if they can be reconciled together. *Brock*, 2009 Ark. at 20, 309 S.W.3d at 191. All legislation is presumed constitutional and the opposing party must prove otherwise. *Wilson v. Walther*, 2017 Ark. 279, 9, 527 S.W.3d 709, 715 (2017). This is a high bar because only a clear incompatibility can overturn legislation. *Id.* To overturn legislation based upon a facial challenge, the party challenging the law must show that under no set of circumstances could the act be valid or constitutionally applied. *Martin v. Kohls*, 2014 Ark. 427, 11, 444 S.W.3d 844, 850 (2014).

Here, the Local Ordinance does not conflict with Amendment 100 but rather harmonizes with it. The plain language of Amendment 100 imposes no duty on and grants no authority to the county officials. Rather, it simply requires that the casino applicants must submit either “a letter of support from the county judge or a resolution of support from the quorum court.” Ark. Const. amend. 100, § 4(n).

The plain language clearly puts the onus upon the casino applicant to obtain the showing of support from county officials. Without the requisite support from the proper county officials, the casino operator's application packet is incomplete, and a license cannot be issued by the ARC. *See* Ark. Const. amend. 100, § 4(n).

While Amendment 100 expressly imposes a requirement on the casino applicant to acquire support from either the county judge or QC, the plain language is silent on the process that the county officials must use to implement the provision. Amendment 100 does not discuss a process or procedure that the county officials must use when deciding to issue support for a casino applicant. The Local Ordinance, however, provides such a process in harmony with Amendment 100.

The Appellees confuse the concept of adding requirements to Amendment 100 with statutes that work in harmony with the Constitution. The Appellees rely upon inapplicable cases in order to exemplify "additional qualifications." A brief review of some of the authority relied upon by the Appellees demonstrates the substantive differences between and among them and the case at hand. For example, one of the primary cases relied upon by the Appellees is that of *Stilley v. Makris*, 343 Ark. 673, 38 S.W.3d 889 (2001). The proposed legislative measure in *Stilley*, among other constitutional and statutory violations, set out procedures for the sale of county owned property that were completely different from the procedures already existing in Ark. Code Ann. § 14-16-105, where the county judge and county

were specifically empowered to sale county owned property and where specific provisions set out the process by which it was to be done by the county judge and county. *See generally Stilley*, 343 Ark. at 678-82, 38 S.W.3d at 892-94.

The process that was proposed by initiative petition in *Stilley* was in direct conflict and contravention with the detailed and specific process and procedure that had already been promulgated by the state legislature to authorize the sale of county owned property by the county judge and county. In essence, the proposed initiative in *Stilley* sought to modify existing law.

That is not the situation with which we are dealing here. Here, based on reasonable information and belief, the Appellees can point to no such existing constitutional or statutory provision that sets out the process or procedure for the county officials to use when deciding whether to issue letters or resolutions of support to applicants for a casino gaming license from the ARC.

Likewise, other cases relied upon by the Appellees are not applicable herein. In *Daniels v. Dennis*, 365 Ark. 338, 339, 229 S.W.3d 880, 881 (2006), the measure at issue conflicted with a constitutional provision (Ark. Const. amend. 80 §16) that specifically addressed the matter being covered by the measure being proposed. Similarly in *Proctor v. Daniels*, 2010 Ark. 206, 4, 392 S.W.3d 360, 363 (2010), the legislative measure at issue was in direct contravention of specific constitutional provisions that set out the qualifications for judge (i.e. Ark. Const. amend. 80 and

Article 5, § 9). In *Martin*, 2014 Ark. at 15, 444 S.W.3d at 852-53, the proposed Arkansas voter identification requirements were in direct conflict with Article 3 § 1 of the Arkansas Constitution, which set out the specific qualifications for Arkansas voters. Ark. Const. Art. 3 § 1. And, in *Allred v. McLoud*, 343 Ark. 35, 31 S.W.3d 836 (2000), the Court reversed because the initiative in question contradicted a general law of the state, whereas Amendment 100 operates functionally as local legislation.

As distinguished from the cases cited by the Appellees, the language of the Local Ordinance can be read in harmony with Amendment 100 because the ordinance provides a process by which the local officials may operate effectively at the local level. The Appellees have shown no authority or precedent that is on point otherwise. In fact, the Appellees have made no showing that the Local Ordinance facially contradicts the Amendment 100, whereas the analysis above shows that the Local Ordinance does in fact harmonize with Amendment 100. Thus the Trial Court's ruling should be reversed and the Local Ordinance should be upheld.

*(b) Neither the plain language of the ordinance nor the intention of the drafter ever granted constitutional authority to the county officials.*

Under the rules of statutory interpretation, the court first looks to the plain language of the law to interpret its meaning, and the court will not add language to the statute where the drafter has excluded it. *See Shults*, 2018 Ark. at 4-5, 541 S.W.3d at 412. In order to support their view, the Appellees make the non-

meritorious claim that the Local Ordinance removes constitutional authority from the county officials, namely the county judge and the quorum court.

This claim fails because a plain reading of the amendment shows that no language exists in Amendment 100 that extends any power or authority to the county officials beyond the level they had before the creation of Amendment 100. To read Amendment 100 in such a way as to impute this authority to the county officials violates the rules of statutory interpretation, which states “[the Court] will not read into a statute language that was not included by the legislature.” *Id.*

Additionally, the Bill of Rights to the Arkansas Constitution states that “[a]ll political power is inherent in the people and government is instituted for their protection, security and benefit, and they have the right to alter, reform or abolish the same in such manner as they may think proper.” Ark. Const. Art. 2 §1. The people reserve the right to limit the power of their elected officials through referendum and initiative. As stated by the Arkansas Supreme Court in *Cochran v. Black*, 240 Ark. 393, 396–98, 400 S.W.2d 280, 282-83 (1966):

Our initiative and referendum amendment to the Constitution, Amendment No. 7, reserves to the people full power to refer measures enacted to a vote of the people, and likewise full power to propose legislative measures for enactment by vote of the people. Furthermore, the amendment specifically extends said powers to municipalities and counties.

...



We are firmly committed to a liberal construction of constitutional Amendment No. 7, bearing in mind the purpose of its adoption and the object it sought to accomplish. This amendment provides a necessary and potent protection against ill-advised, oppressive or improvident legislative functions, and actions of the electors thereunder, in attempting to obtain relief, should not be thwarted by strict or technical construction. We are neither authorized nor remotely inclined to disturb the proper application of this wholesome constitutional reservation of power to the people.

Because no language in Amendment 100 grants power to the local officials, the power of establishing the process for how the county officials decide whether to provide support to a casino operator ultimately resides with the Pope County voters. Had the drafters intended that Amendment 100 would grant such authority, they no doubt would have expressly done so, as was done in other parts of the amendment. For example, Amendment 100 affirmatively directed that the ARC “shall administer and regulate casino licenses.” Ark. Const. amend. 100 § 4(a). Additionally, Amendment 100 requires “all casino applicants for a casino license in Pope County . . . to submit either a letter of support from the county judge or a resolution of support from the quorum court.” Ark. Const. amend. 100 § 4(n). There is no such express grant of authority to the local officials.

Because Amendment 100 lacks affirmative language bestowing power or authority upon the county officials, their power is the standard power under Arkansas law (meaning limited by the people). However, Amendment 100 does impose spe-

cific requirements on casino applicants and the ARC. The Appellees have not pointed to any specific constitutional or statutory provisions that *require* the county officials to provide support to an applicant seeking a casino license in Pope County. Simply because an applicant requests such support, the Appellees have not referred this Court to any provisions which require the county officials to provide such support. Therefore, because Amendment 100 did not bestow any constitutional authority on the county judge or QC, it stands to reason that the Local Ordinance does not deprive the county judge or quorum court of any constitutional authority. Accordingly, the Appellees' argument fails; the Trial Court's ruling should be reversed; and the Local Ordinance should be declared constitutional.

*(c) The Local Ordinance is not a regulation of gambling.*

Finally, the Appellees erroneously contend that the Local Ordinance is a regulation of casino gaming in violation of Ark. Code Ann. § 14-14-806(4). The Local Ordinance does not regulate casino gaming for two primary reasons: first, the Local Ordinance only legislates the conduct of county affairs, not casino gaming; and second, the Local Ordinance can and should be read in harmony with both Ark. Code. Ann. 14-14-806(4) and Amendment 100.

(i) The Local Ordinance makes no effort to regulate gambling but rather only legislates as to the conduct of county affairs.

The Trial Court inaccurately ruled that the Local Ordinance was unconstitutional because it attempted to regulate gambling in violation of Ark. Code Ann. 14-

14-806(4). Such could not be farther from the truth. The Ordinance, on its face, legislates only with respect to the county judge or the QC of Pope County, Arkansas. The Ordinance goes on to specifically state that it is the “County Judge” and “the Quorum Court” who are required to take actions as outlined in the Local Ordinance when the appropriate circumstances are present. **ADD 62-63.**

Unless the Appellees are suggesting that the county officials would be “regulating gambling” by issuing a letter or passing a resolution in support of an applicant for a casino license, it cannot constitute a “regulation of gambling” for the Local Ordinance to require its county officials to submit any such letter or resolution to the voters of Pope County at a local election.

It is notable that the Appellees cited *City of Little Rock v Reinman*, 107 Ark. 174, 155 S.W. 105, 106 (1913), to define the word, “regulate”, but did not provide any context regarding the facts of that case or other cases that have cited *Reinman* over the intervening years. **ADD 77-78, 102.** It is notable because those cases deal with instances where local ordinances are “regulating” residents and businesses concerning matters such as zoning for junk yards in the city limits, regulating signage and landscaping, blasting in rock quarries, and keeping chickens in city limits. None of those cases suggest that a county ordinance cannot, “define[] . . . principles of a county government for the control and conduct of county affairs” as does the Local Ordinance addressed herein. *See* Ark. Code Ann. § 14-14-904(i).

(ii) The Local Ordinance can and should be read in harmony with Ark. Code. Ann. 14-14-806(4).

Ark. Code. Ann. 14-14-806(4) prohibits a county quorum court from exercising “legislative power to regulate any form of gambling, lotteries, or gift enterprises,” unless such power is granted by the General Assembly. The Appellees base their argument on Article 5 § 1 of the Arkansas Constitution which states that “no local legislation shall be enacted contrary to . . . any general law of the State.”

First, as applied here, Ark. Code Ann. § 14-14-806(4) does not operate as a “general law” as claimed by the Appellees. As previously noted, the Local Ordinance was drafted in response to statewide Amendment 100 which specifically designated Pope County as a potential casino location. **ADD 53, 129.** In Amendment 100, only four (4) specific counties are designated as potential casino locations, while Arkansas has a total of 75 counties. **ADD 53.** According to this Court, “[we] have repeatedly held that when one or more counties is exempt from any law, that this exemption makes the law local.” *Tindall v. Searan*, 192 Ark. 173, 90 S.W.2d 476, 478 (1936). Additionally, “local legislation arbitrarily applies to one geographic division of the state to the exclusion of the rest of the state.” *McCutchen v. Huckabee*, 328 Ark. 202, 210, 943 S.W.2d 225, 227 (1997).

Here, the selection of Pope County as a potential casino site was completely arbitrary. **ADD 130.** The express criteria for the casino locations was county population and prosperity. **ADD 130.** According to the Arkansas Economic Devel-

opment Council, Pope County is a Tier 2 county (Tier 1 being the highest), while other similar Arkansas counties in terms of population are rated as Tiers 3 and 4.

**ADD 130.** Further, the vote in Pope County in 2018 on Amendment 100 shows that the people of Pope County were adamantly against their county being selected as a casino site (61% opposed to Amendment 100). *See ADD 53, 55.*

Based upon the facts of the record, no rational reason exists for Pope County serving as a casino site. Therefore, for purposes of considering and disposing of this argument by Appellees, Amendment 100 should be viewed as local legislation and as applied under Amendment 100, Ark. Code Ann. § 14-14-806(4) would operate as local legislation. Thus, it is impossible for the Local Ordinance to be “in conflict” with a “general law” as put forth by the Appellees because, for purposes of the issue of gambling regulation, both Amendment 100 and Ark. Code Ann. § 14-14-806(4) are the functional equivalent of (if not actually) local legislation.

Additionally, the Appellee’s argument twists the Arkansas Code so that it contradicts their very reasoning for voiding the Local Ordinance. Their basic premise for voiding the Local Ordinance is that the Arkansas Constitution voids a conflicting county ordinance under Article 5 § 1 of the Arkansas Constitution. It follows that the Arkansas Constitution would also void a conflicting state statute.

Here, the plain language of Ark. Code Ann. § 14-14-806(4) says that the quorum court cannot exercise legislative power on casino gaming unless directed

by the General Assembly. Therefore, under Article 5 § 1 of the Arkansas Constitution, Section 14-14-806(4) would be void *if* Amendment 100 gave the Pope County QC the authority to legislatively issue support for the casino operator because Amendment 100 was not legislation from the General Assembly.

However, in accordance with statutory interpretation rules and well-settled Arkansas law, it appears that all three pieces of legislation (Amendment 100, Ark. Code Ann. 14-14-806(4), and the Local Ordinance) can and should be read harmoniously. As previously discussed in this brief, the Local Ordinance harmonizes with Amendment 100. *See generally* **Arg. 18-21**. Now, CFABPC will demonstrate how Ark. Code Ann. 14-14-806(4) is harmonious with Amendment 100, and also how the Local Ordinance is harmonious with Ark. Code Ann. 14-14-806(4).

First, Ark. Code Ann. 14-14-806(4) is harmonious with Amendment 100. Under state law, a resolution is simply a mechanism by which a governing body such as the quorum court makes statements of policy “merely to express an opinion.” Ark. Code. Ann. § 14-14-904(j). According to Amendment 100, the letter of support from the county judge accomplishes the same end as a resolution of support from the quorum court; therefore, it follows that the letter of support is also merely an expression of opinion. Accordingly, neither the letter of support from the county judge nor a resolution of support by the quorum court is a legislative act that would violate 14-14-806(4), but rather they are simply general acts under Arti-

cle 5 §1 of the Constitution of Arkansas. Such a general act would not violate Section 14-14-806(4) because that statute plainly speaks only about legislative acts; therefore, Amendment 100 and Section 14-14-806(4) can operate in harmony.

Second, the Local Ordinance is harmonious with 14-14-806(4). Under Article 5 § 1 of the Arkansas Constitution, “The second power reserved by the people is the referendum, and . . . legal voters may, by petition, order the referendum against any general Act.” Article 5 is very clear that the right of referendum applies to counties by stating that the “referendum powers of the people are hereby further reserved to the legal voters of each . . . county as to all local, special and municipal legislation of every character in and for their respective . . . counties.”

The Local Ordinance calls for a legal vote of the people before the county officials provide support for a casino operator. This vote properly aligns with Article 5 § 1 of the Arkansas Constitution, and it also aligns with the motto of our great state, “Regnat Populus.” Ark. Code Ann. § 1-4-107 (meaning “the people rule”). Because the Local Ordinance is simply calling for the local officials to refer their expression of opinion to the people for a vote, the lack of legislative action also keeps the Local Ordinance in harmony with 14-14-806(4).

In conclusion, the Local Ordinance is not an unlawful regulation of casino gaming. Rather it is simply a mechanism to legislate the conduct of county affairs. Additionally, any attempt to read the Local Ordinance as contradictory to state

statute also fails because the Local Ordinance can and should be read in harmony with the state Constitution and the Arkansas code.

### **VIII. CONCLUSION**

The Trial Court's order granting the motion to dismiss under 12(b)(6) should be reversed and remanded for a number of reasons. First, the court erred because it based its 12(b)(6) decision on a question of law while the Arkansas standard calls for sufficiently pleaded facts. As exemplified, CFABPC sufficiently pleaded the facts. Second, the Trial Court improperly denied a Rule 15 motion to amend or supplement pleadings because subsequent events materially altered the direction of the case. The Trial Court acted improvidently by exercising judgment in a thoughtless manner and without due consideration. Lastly, even if this Court affirms that the 12(b)(6) motion hearing was the proper venue to decide a question of law and that the Rule 15 motion was properly denied, the order granting the Motion to Dismiss should still be reversed because Pope County's Local Ordinance is constitutional. The Local Ordinance both harmonizes with the Arkansas Constitution, and it properly invokes the rights of the people as reserved under the Arkansas Constitution without conflicting with any constitutional provision or state statute.

Respectfully submitted,

/s/ Jerry L. Malone  
Jerry L. Malone (Bar ID: 85096)



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Attorney for Appellants

**IX.**

**CERTIFICATE OF SERVICE**

I, Jerry L. Malone, hereby certify that on this 26th day of May 2020, I served Citizens for a Better Pope County's Abstract, Appellant's Brief, and Addendum in accordance with applicable rules and procedures using the eFile System of the Arkansas Supreme Court, on the following persons:

Colby T. Roe  
Daily & Woods, PLLC  
P.O. Box 1446  
Fort Smith, AR 72902

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1020 West Main Street  
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Dustin McDaniel, Scott Richardson, and Bart Calhoun  
McDaniel, Wolff, & Benca, PLLC  
1307 W. 4<sup>th</sup> Street  
Little Rock, AR 72201

Additionally, I, Jerry L. Malone, hereby certify that on this 26th day of May 2020, I served Citizens for a Better Pope County's Abstract, Appellant's Brief, and Addendum in accordance with applicable rules and procedures via regular first class U.S. Mail, postage prepaid, on the following person:

Hon. William M. Pearson  
Fifth Judicial Circuit, First Division  
P.O. Box 1406  
Clarksville, AR 72830

/s/ Jerry L. Malone  
Jerry L. Malone

**X.**

**CERTIFICATE OF COMPLIANCE**

Case Name: Citizens for a Better Pope County, a local option ballot question initiative; Jim Knight, in his individual capacity v. Ben Cross, in his official capacity as County Judge of Pope County, Arkansas; et al; and Cherokee Nation Businesses LLC  
Docket Number: CV-20-145  
Title of Brief: Appellant's Brief

I have submitted and served on opposing counsel (except for incarcerated pro se litigants) an unredacted and, if required, a redacted PDF document(s) that comply with the Rules of the Supreme Court and Court of Appeals. The PDF document(s) are identical to the corresponding parts of the paper document(s) from which they were created as filed with the court. To the best of my knowledge, information, and belief formed after scanning the PDF documents for viruses with an antivirus program, the PDF documents are free of computer viruses. A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties.

**Identification of paper documents not in PDF format:**

The following original paper documents are not in PDF format and are not included in the PDF document(s):

None

/s/ Jerry L. Malone  
**Jerry L. Malone**  
**Attorney at Law**  
**May 26, 2020**

**XI.**

**ADDENDUM**

D. Pleadings

1. CFABPC’s Verified Petition for Declaratory Judgment, **Record (“R”) 1** ..... ADD 1
2. CFABPC’s Motion for Emergency Temporary Restraining Order and Preliminary Injunction and Incorporated Brief, **R10** ..... ADD 7
3. Pope County Judge and QC’s Response to Motion for Temporary Restraining Order and Preliminary Injunction and Memorandum of Authorities in Support, **R41** ..... ADD 19
  - Exhibit – Economic Development Agreement, **R50**..... ADD 27
4. CNB’s Motion to Intervene with Incorporated Brief of Law in Support, **R61** ..... ADD 38
5. CNB’s Motion to Dismiss, **R68** ..... ADD 41
  - CNB’s Brief in Support of Motion to Dismiss Complaint, **R72**..... ADD 43
6. CFABPC’s Amended Verified Petition for Declaratory Judgment and for Writ of Mandamus, **R96** ..... ADD 51
7. Pope County Ordinance No. 2018-O-42 (“Local Ordinance”), **R109** ..... ADD 62
8. Pope County Resolution No. 2019-R-014, **R111** ..... ADD 64
9. Pope County Judge and QC’s Motion to Dismiss, **R175**..... ADD 65
  - Pope County Judge and QC’s Memorandum Brief in Support of Motion to Dismiss, **R184** ..... ADD 68

10.	Order Scheduling Case for Hearing, <b>R200</b> .....	ADD 83
11.	CFABPC’s Renewed Emergency Motion for Temporary Restraining Order and Incorporated Brief, <b>R203</b> .....	ADD 85
	• Exhibit - Correspondence between Pope County Judge Ben Cross and Pope County Citizen, <b>R214</b> ....	ADD 94
12.	Correspondence of Trial Court to Attorney’s, <b>R218</b> .....	ADD 95
13.	Correspondence of Pope County Attorney to Trial Court, <b>R223</b> .....	ADD 96
14.	CNB’s Brief in Support of Motion to Dismiss Amended Petition, <b>R225</b> .....	ADD 98
15.	CNB’s Motion to Dismiss Amended Petition, <b>R240</b> .....	ADD 112
16.	CNB’s Response to CFABPC’s Renewed Emergency Motion for Temporary Restraining Order and Incorporated Brief, <b>R243</b> .....	ADD 114
17.	Pope County Judge and QC’s Response to CFABPC’s Renewed Emergency Motion for Temporary Restraining Order and Memorandum Brief in Support, <b>R250</b> .....	ADD 118
18.	CFABPC’s Response to Pope County Judge and QC’s Motion to Dismiss and Incorporated Brief, <b>R280</b> .....	ADD 128
19.	CFABPC’s Response to CNB’s Motion to Dismiss and Incorporated Brief, <b>R311</b> .....	ADD 137
20.	Pope County Judge and QC’s Reply to CFABPC’s Response to Motion to Dismiss, <b>R322</b> .....	ADD 146
21.	CNB’s Reply to CFABPC’s Response to Motion to Dismiss, <b>R338</b> .....	ADD 152
22.	CFABPC’s Second Renewed Motion for Temporary Restraining Order and Incorporated Brief, <b>R354</b> .....	ADD 165

23.	Order Denying Renewed Motion for Temporary Restraining Order, <b>R370</b> .....	ADD 176
E.	Final Order, <b>R395</b> .....	ADD 177
F.	Notice of Appeal, <b>R403</b> .....	ADD 184

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS,  
AT RUSSELLVILLE

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

PLAINTIFFS

v.

Case No. 58CV-19- 439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas; and  
PHILLIP HANEY, CALEB MOORE,  
TIM WHITTENBURG, REUBEN BROWN,  
JACKIE HEFLIN, JAMIE JACKSON,  
BLAKE TARPLEY, DOUG SKELTON,  
BILL SPARKS, JAMES KUSTURIN,  
RAY BLACK, JOSEPH PEARSON and  
ERNIE ENCHELMAYER, in their  
official capacities as members of the  
Quorum Court of Pope County, Arkansas,

FILED  
POPE CO. CIRCUIT COURT  
2019 AUG 13 PM 1:53  
SARAH L. GRIFFIN  
POPE COUNTY CLERK  
DEFENDANTS

VERIFIED PETITION FOR DECLARATORY JUDGMENT

COMES NOW, the Plaintiffs, by and through undersigned counsel, pursuant to A.C.A. § 16-111-101 et seq. and Rule 57 of the Arkansas Rules of Civil Procedure, and in support of their Petition for Declaratory Judgment, state and allege as follows:

INTRODUCTION

1. That Plaintiff, Citizens for a Better Pope County, is a registered Local Option Ballot Question Committee consisting of residents of Pope County, Arkansas who was the Sponsor of the local initiated act which is now codified as Pope County Ordinance 2018-O-42.
2. That Plaintiff James Knight is a tax payer and resident of Pope County, Arkansas.
3. That Defendant BEN CROSS is the duly elected County Judge of Pope County, Arkansas and is a resident of Pope County, Arkansas.
4. That Defendant PHILLIP HANEY is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.

5. That Defendant CALEB MOORE is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
6. That Defendant TIM WHITTENBURG is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
7. That Defendant REUBEN BROWN is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
8. That Defendant JACKIE HEFLIN is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
9. That Defendant JAMIE JACKSON is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
10. That Defendant BLAKE TARPLEY is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
11. That Defendant DOUG SKELTON is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
12. That Defendant BILL SPARKS is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
13. That Defendant JAMES KUSTURIN is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
14. That Defendant RAY BLACK is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
15. That Defendant JOSEPH PEARSON is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.



16. That Defendant ERNIE ENCHELMAYER is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.

17. That jurisdiction and venue are proper in Pope County, Arkansas.

#### FACTUAL BACKGROUND

18. That in the November, 2018 general elections, the citizens of Arkansas passed Arkansas Constitutional Amendment 100 that authorized casinos and casino gaming in the State of Arkansas.

19. That Amendment 100 states that the Arkansas Racing Commission is authorized to issue four (4) casino licenses, one of which was mandated to be to a facility to be located in Pope County, Arkansas.

20. That Amendment 100 requires, prior to the issuance of a casino license for a casino facility to be located in Pope County, a letter of support from the County Judge or a resolution of the Pope County Quorum Court.

21. That during that same November 2018 general election, the residents of Pope County approved by a vote total of 70% in favor to 30% opposed an initiated measure entitled the Pope County Local Control for Casino Gaming Amendment of 2018.

22. The Pope County Local Control for Casino Gaming Amendment of 2018 was enacted and added to the Pope County Code of Ordinances as Ordinance No. 2018-O-42. This ordinance established a condition precedent to Amendment 100, or any other state law, prior to the issuance of a letter of support by the County Judge or a resolution by the Quorum Court for a Casino or a Casino Applicant "without first referring the question as the issuance of support of a Casino or Casino Applicant to a local election, at either a general election or special election, where . . . a majority of the registered voters of Pope County must approve . . ."

23. That there is no language in Amendment 100 by which the terms of Pope County Ordinance 2018-O-42 is not allowed.

24. That there is no language in Ordinance 2018-O-42 that conflicts with the language of Amendment 100.

25. That the language of Ordinance 2018-O-42 was drafted with the intent to be harmonious with Amendment 100, and all of Arkansas law.

26. That under the *in pari materia* doctrine of statutory interpretation, two separate provisions of law relating to the same subject should be read in a harmonious manner.

#### DECLARATORY JUDGMENT

27. That Plaintiffs restate and incorporate the allegations contained in Paragraphs 1-26 set forth above.

28. That the Quorum Court of Pope County, Arkansas has published an Agenda for a "Special Called Quorum Court Meeting" scheduled for August 13, 2019 at 5:00 p.m. during which items on the agenda include "Discussion of Ark. Constitutional Amendment 100 & Ordinance No. 2018-O-42;" and "Resolution Regarding Ark. Constitutional Amendment 100." See a calendar posting of the Agenda for the Special Called Quorum Court Meeting attached as Exhibit A, and incorporated word-for-word herein.

29. That to the best information, knowledge and belief of Plaintiffs, the Quorum Court intends to vote to approve a resolution in favor of one of the casino applicants at said meeting without following Ordinance No. 2008-O-42.

30. That read harmoniously, Amendment 100 and Ordinance 2018-O-42 prevent the issuance of a letter of support or a resolution in favor of a casino applicant without a prior popular vote of the registered voters of Pope County.

31. That any act on the part of the County Judge of the Quorum Court in derogation of the Ordinance 2018-O-42 is void and illegal.

32. That an illegal act of either the County Judge or the Quorum Court is an exception to the doctrine of sovereign immunity and any member(s) acting in violation of the law can be sued in their individual capacity.

33. That Ordinance 2018-O-42 is not inappropriate or illegal.


34. That Ordinance 2018-O-42 does not conflict with Amendment 100.

35. That both Amendment 100 and Ordinance 2018-O-42 can be read harmoniously.

36. That no letter of support or resolution in favor of a casino applicant may be issued by either the County Judge or Quorum Court of Pope County respectively, without presenting the issue for popular vote to the registered voters of Pope County pursuant to Ordinance 2018-O-42.

WHEREFORE, Plaintiffs pray for an Order of this Court declaring that Pope County Ordinance 2018-O-42 can be read in harmony with Arkansas Constitutional Amendment 100 such that the County Judge and Quorum Court are prohibited from taking any action in their respective official capacities in expressing their approval of a casino applicant without first presenting the issue to the registered voters of Pope County in an election according to the provisions of Pope County Ordinance 2018-O-42, and for such other and further relief the Court deems just and proper.

Respectfully submitted,  
STORY LAW FIRM, PLLC

by   
Travis W. Story (2008274)  
Gregory F. Payne (2017008)  
Katie L. Freeman (2014199)  
438 E. Millsap Rd., Suite 103  
Fayetteville, AR 72703

< [Calendar](#)

Tuesday, August 13, 2019

05:00 PM AGENDA SPECIAL CALLED QUORUM COURT MEETING

AGENDA FOR SPECIAL CALLED QUORUM COURT MEETING  
AUGUST 13, 2019

TIME: 5:00 P.M.

CALL TO ORDER:

PRAYER: JUSTICE PEARSON

ROLL CALL:

PUBLIC COMMENTS ADDRESSING AGENDA.

BUSINESS:

1. DISCUSSION OF ARK. CONSTITUTIONAL AMENDMENT 100 & ORDINANCE NO. 2018-O-42. JUSTICE \_\_\_\_\_
2. REVIEW OF ECONOMIC DEVELOPMENT AGREEMENT. JUSTICE \_\_\_\_\_
3. RESOLUTION REGARDING ARK. CONSTITUTIONAL AMENDMENT 100. JUSTICE \_\_\_\_\_

COMMENTS FROM THE PUBLIC:

ANNOUNCEMENTS:

ADJOURN:

05:00 PM SPECIAL CALLED QUORUM COURT MEETING 5:00 P.M.



ADD 006

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS,  
AT RUSSELLVILLE

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

PLAINTIFFS

v.

Case No. 58CV-19- 439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas; and  
PHILLIP HANEY, CALEB MOORE,  
TIM WHITTENBURG, REUBEN BROWN,  
JACKIE HEFLIN, JAMIE JACKSON,  
BLAKE TARPLEY, DOUG SKELTON,  
BILL SPARKS, JAMES KUSTURIN,  
RAY BLACK, JOSEPH PEARSON and  
ERNIE ENCHELMAYER, in their  
official capacities as members of the  
Quorum Court of Pope County, Arkansas ,

FILED  
POPE CO. CIRCUIT COURT  
2019 AUG 13 PM 1:54  
POPE COUNTY, ARKANSAS  
M

DEFENDANTS

**MOTION FOR EMERGENCY TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION AND INCORPORATED BRIEF**

COMES NOW the Plaintiffs, by and through undersigned counsel, pursuant to Rule 65 of the Arkansas Rules of Civil Procedure, and in support of their Emergency Motion for Temporary Restraining Order and Preliminary Injunction, state and allege as follows:

**INTRODUCTION**

1. That Plaintiff Citizens for a Better Pope County, is a registered Local Option Ballot Question Committee consisting of residents of Pope County, Arkansas who was the Sponsor of the local initiated act which is now codified as Pope County Ordinance 2018-O-42.
2. That Plaintiff James Knight is a tax payer and resident of Pope County, Arkansas.
3. That Defendant BEN CROSS is the duly elected County Judge of Pope County, Arkansas and is a resident of Pope County, Arkansas.

4. That Defendant PHILLIP HANEY is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
5. That Defendant CALEB MOORE is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
6. That Defendant TIM WHITTENBURG is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
7. That Defendant REUBEN BROWN is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
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15. That Defendant JOSEPH PEARSON is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.

16. That Defendant ERNIE ENCHELMAYER is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.

17. That jurisdiction and venue are proper in Pope County, Arkansas.

#### FACTUAL BACKGROUND

18. That in the November, 2018 general elections, the citizens of the Arkansas passed Arkansas Constitutional Amendment 100 that authorized casinos and casino gaming in the State of Arkansas.

19. That Amendment 100 states that the Arkansas Racing Commission is authorized to issues four (4) casino licenses, one of which was mandated to be to a facility to be located in Pope County, Arkansas.

20. That Amendment 100 requires, prior to the issuance of a casino license for a casino facility to be located in Pope County, a letter of support from the county judge or a resolution of the Pope County Quorum Court.

21. That during that same November 2018 general election, the residents of Pope County approved an initiated measure by a vote total of 70% in favor to 30% opposed, entitled the Pope County Local Control for Casino Gaming Amendment of 2018.

22. The Pope County Local Control for Casino Gaming Amendment of 2018 was enacted and added to the Pope County Code of Ordinances as Ordinance No. 2018-O-42. This ordinance established a condition precedent to Amendment 100, or any other state law, prior to the issuance of a letter of support by the County Judge or a resolution by the Quorum Court, for a Casino or a Casino Applicant "without first referring the question as the issuance of support of a

Casino or Casino Applicant to a local election, at either a general election or special election, where . . . a majority of the registered voters of Pope County must approve . . . .”

23. That there is no language in Amendment 100 by which the terms of Pope County Ordinance 2018-O-42 is not allowed.

24. That there is no language in Ordinance 2018-O-42 that conflicts with the language of Amendment 100.

25. That the language of Ordinance 2018-O-42 was drafted with the intent to be harmonious with Amendment 100, and all of Arkansas law.

26. That under the *in pari materia* doctrine of statutory interpretation, two separate provisions of law relating to the same subject should be read in a harmonious manner.

#### INJUNCTIVE RELIEF

26. That Plaintiffs restate and incorporate the allegations contained in Paragraphs 1-26 set forth above.

27. That the Quorum Court of Pope County, Arkansas has published an Agenda for a “Special Called Quorum Court Meeting” scheduled for August 13, 2019 at 5:00 p.m. during which items on the agenda include “Discussion of Ark. Constitutional Amendment 100 & Ordinance No. 2018-O-42” and “Resolution Regarding Ark. Constitutional Amendment 100.”

28. That the County Judge of Pope County, Arkansas was reported to have told other applicants they were going to issue a letter to a casino or casino applicant on August 13, 2019 as reported in the Arkansas Democrat Gazette in an article by Jeannie Roberts where she reported:

On Saturday, two of the five contenders for a casino license in Pope County -- Warner Gaming and the Choctaw Nation Division of Commerce -- said they were told by Ben Cross, county judge of Pope County, that the Quorum Court would support giving the license to another rival, Cherokee Nation Businesses, at the special meeting.



See Exhibit B, an article Jeannie Roberts, *Arkansas casino talks held illegally, residents say*, Arkansas Democrat Gazette, August 9, 2019 (visited August 9, 2019) <https://www.arkansasonline.com/news/2019/aug/13/casino-talks-held-illegally-residents-s/?news-arkansas>.

29. That to the best information, belief and knowledge of Plaintiffs, the Quorum Court intends to vote to approve a resolution in favor of one of the casino applicants at said meeting without a vote as required by Ordinance No. 2018-O-42. See a calendar posting of the Agenda for the Special Called Quorum Court Meeting attached as Exhibit A, and incorporated word-for-word herein.

30. That read harmoniously, Amendment 100 and Ordinance 2018-O-42 prevent the issuance of a letter of support or a resolution in favor of a casino applicant without first obtaining approval to do so by a vote of the voters of Pope County.

31. That any act on the part of the County Judge of the Quorum Court in derogation of the Ordinance 2018-O-42 is void and illegal.

32. That any act, resolution, or otherwise, done outside the implementation of both Amendment 100 and Ordinance 2018-O-42 is an illegal act, and outside of the official capacities of the Pope County, Arkansas County Judge and the Pope County, Arkansas Quorum Court Members, and they should be enjoined both in their official and individual capacities.

33. That an illegal act of either the County Judge or the Quorum Court is an exception to the doctrine of sovereign immunity and any member(s) acting in violation of the law can be sued in their individual capacity.

34. That Ordinance 2018-O-42 is not inappropriate or illegal.

35. That Ordinance 2018-O-42 does not conflict with Amendment 100.

36. That both said provisions of law can be read harmoniously.

37. One of the actual drafters of Amendment 100, Nate Steel, an attorney at law, and spokesman for the Group Drive Arkansas Forward, was interviewed on AETN and stated:

In addition to Pope County, for example, there have been ordinances passed locally that say it must pass in Pope County before the Mayor or County Judge could issue a letter of support, and we've said publicly that's is fine. Uh, we provide for local control in this amendment [referring to amendment 100] but we also intended to inspire that kind of discussion on a local level.

AETN, Arkansas Week October 5, 2018, YouTube (October 5, 2018)  
<https://youtu.be/zFBsCqPM LE>, from 4:43 to 5:01 (last checked August 13, 2019 at 9:06am).

38. That no letter of support or resolution in favor of a casino applicant may be issued by either the County Judge or Quorum Court of Pope County respectively, without presenting the issue for popular vote to the registered voters of Pope County pursuant to Ordinance 2018-O-42.

39. That Plaintiffs seek a temporary restraining order and preliminary injunction. In order to determine whether to issue a temporary restraining order or preliminary injunction under Rule 65, the court must consider (1) whether irreparable harm will result in the absence of an injunction or restraining order, and (2) whether the moving party has demonstrated a likelihood of success on the merits. *Three Sisters Petroleum v. Langley*, 348 Ark. 167, 72 S.W.3d 95 (2002).

40. That in accordance with Plaintiff's best knowledge and belief and with a plain language interpretation of the laws cited herein, Plaintiffs believe they have good faith upon which to establish that they will prevail on the merits of the underlying case filed contemporaneously herein.

41. That the registered voters of Pope County will be immediately and irreparably harmed and loss or damage will result if their right to vote on a proposed approval of a casino applicant is transmitted to the Arkansas Racing Commission without the issue being submitted to

the voters of Pope County, which action is scheduled to be taken on the day following the filing of this motion.

42. That either or both the County Judge or Quorum Court of Pope County should be enjoined from taking any action that could be construed to be expressing the approval of the County as set forth in Amendment 100 in derogation of their obligations under Pope County Ordinance 2018-O-42.

43. A temporary restraining order is necessary in this case to prevent further harm to the taxpayers of Pope County, Arkansas.

44. Counsel for Plaintiff anticipate that Clayton McCall, County Attorney for Pope County, Arkansas, will represent the Defendants and Counsel was successful in contacting Mr. McCall to give him notice of the filing of this Motion prior to the filing of this Motion. See Exhibit C, attached and incorporated as set out word-for-word herein.

WHEREFORE, Plaintiffs pray for a Temporary Restraining Order and Preliminary Injunction of this Court declaring that Pope County Ordinance 2018-O-42 can be read in harmony with Arkansas Constitutional Amendment 100 such that the County Judge and Quorum Court, or either of them, are prohibited from taking any action in their respective official capacities in expressing their approval of a casino applicant without first presenting the issue to the registered voters of Pope County in a popular election according to the provisions of Pope County Ordinance 2018-O-42, and for such other and further relief the Court deems just and proper.

Respectfully submitted,

STORY LAW FIRM PLLC

by 

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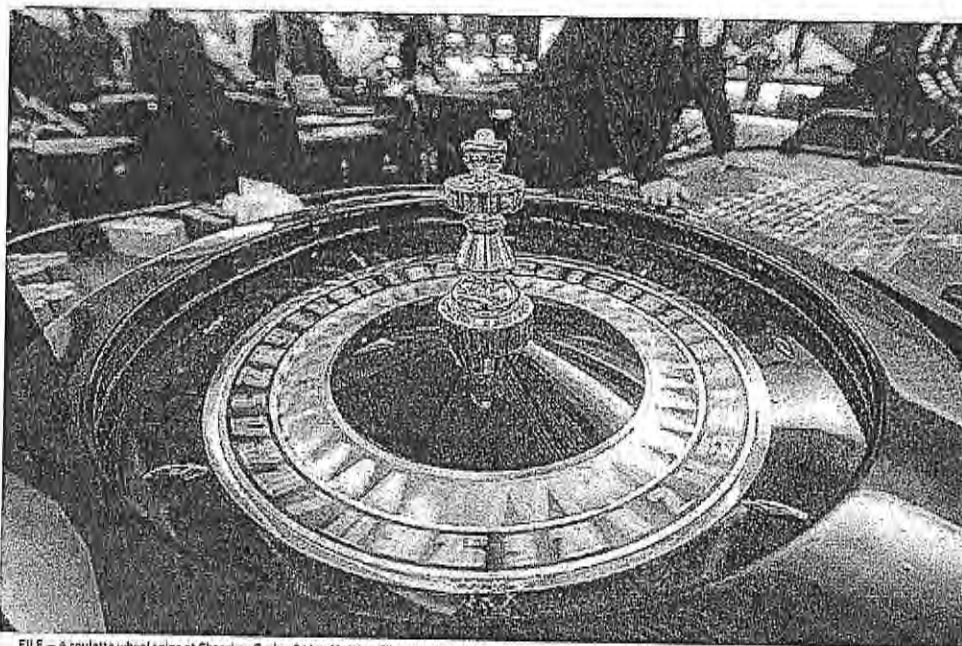
# Arkansas casino talks held illegally, residents say

## Complaints in Pope County state meetings law breached

by Jeannie Roberts | Today at 7:21 a.m.

15 COMMENTS

Follow



FILE - A roulette wheel spins at Cherokee Casino & Hotel in West Siloam Springs, Okla.

A Pope County justice of the peace and seven other residents complained Monday to the Pope County prosecutor that the county judge and some members of the county's Quorum Court held private meetings -- once in a Russellville park -- in the past few months to discuss the competition for a casino license there.

Two other Pope County Justices of the peace said Monday that they were invited to one of the meetings, but did not go because doing so would violate the Arkansas Freedom of Information Act.

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Hans Stirtz, a Pope County resident, filed an affidavit on behalf of the anti-casino group Concerned Citizens of Pope County. In documents obtained by the *Arkansas Democrat-Gazette*, dated Monday and directed to Jeff Phillips, Pope County prosecutor, Stirtz said the general subject of the "illegal meetings concern the issue of a Pope County casino license, with the outcome being a closed-door decision to award a letter of support to a casino operator absent the public discussion" required under state law. Messages left for Phillips were not returned as of late Monday. Violations of the law are a Class C misdemeanor.

Voters approved Amendment 100 to the Arkansas Constitution in 2018 to allow the state to have four casinos, including one in Pope County. Pope County voters rejected the amendment and approved an initiated ordinance that would require local officials to seek voter

approval before endorsing a casino. State Racing Commission rejected the license applications of five casino operators because they lacked endorsements of current local officials.

The Quorum Court will hold a special meeting at 5 p.m. today to hear proposals from casino applicants.

[RELATED: See complete Democrat-Gazette coverage of casinos in Arkansas at [arkansasonline.com/casinos](http://arkansasonline.com/casinos)]

On Saturday, two of the five contenders for a casino license in Pope County -- Warner Gaming and the Choctaw Nation Division of Commerce -- said they were told by Ben Cross, county judge of Pope County, that the Quorum Court would support giving the license to another rival, Cherokee Nation Businesses, at the special meeting.

Multiple messages left for Cross over three days have not been returned.

Also Monday, Cherokee Nation Businesses unveiled an updated proposal -- after more than a week of teasers via billboards and newspaper advertisements -- for its "Legends Resort & Casino Arkansas" that would be located on 130 acres north of Interstate 40 along Hob Nob Road, between Weir Road and Alaskan Trail, on the northern edge of Russellville.

According to Arkansas Code Annotated 25-19-106, meetings of a public governing body are open to the public. Also, the public must be given at least two hours' notice of special meetings.

"It is our belief that these allegations will not be denied, but rather justified as necessary by those involved," Stirtz said in the letter.

Notarized affidavits from Stirtz; Pope County Justice of the Peace Joseph Pearson; and residents Anna Stirtz, Roger Fryar, Janet Fryar, Jane Harrell, Cliff Goodin and Larry Walker claim there were three meetings with Cross and multiple justices of the peace that were held without proper public notice.

#### COURTHOUSE BBQ

In one of his two affidavits, Pearson, the District 12 justice of the peace, numbered complaints from 1 to 17 about a May 7 meeting.

Pearson said Justice of the Peace Ernie Enchelmayer called him May 6 and asked him to meet the next day with other Quorum Court members at the Shiloh Park pavilion in Russellville.

ARTICLE CONTINUES BELOW

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Pearson said he asked a local resident May 7 to call the Pope County clerk's office to ask when the next Quorum Court meeting would be held and was told the next meeting would be the June regular meeting. When questioned further, the county clerk said there was no meeting scheduled for May 7.

In her affidavit, Anna Stirtz said she was the one who called the county clerk's office to ask about the meeting.

Pearson said he received a voice mail May 7 from Enchelmayer stating that the meeting would now be held at 6 p.m. at the courthouse.

Pearson said he then notified other residents of the meeting and its change of venue.

"I asked several members of the Quorum Court if proper notice of the meeting had been sent out to the press, where I was assured that proper notice had been sent out," Pearson said in the affidavit.

(When contacted Monday by a *Democrat-Gazette* reporter, Pope County Clerk Pam Ennis said she was unaware of a May 7 meeting of the Quorum Court and there were no minutes of the meeting nor records of notification to the press or others.)

Pearson said in the affidavit that he arrived at the courthouse May 7 to find the public entrance locked. He eventually gained entrance and "saw that there were several Justices present and some members of the public."

Pearson did not state the names of the other Quorum Court members present, but an affidavit from Roger Fryar said those in attendance were: Enchelmayer, Pearson, Caleb Moore, Reuben Brown, Ray Black, Tim Whittenburg, Jackie Heflin and Doug Skelton. The Quorum Court has 13 members.

Messages left for all except Enchelmayer were not returned as of late Monday.

Enchelmayer answered a call from a *Democrat-Gazette* reporter while he was shopping with his children but said he could not talk.

"I get it that it's very important, but I don't have time to take out of my day right now. I've got to do family things," he said before hanging up on the reporter.

Pearson said in his affidavit that sometime after he arrived at the May 7 meeting, "Judge Cross entered the room and stated that he wanted to show the Justices the upstairs space in the Courthouse where he was moving his office."

Pearson said that while the justices of the peace were upstairs, one of them asked why citizens were present in the courthouse downstairs.

"Judge Cross told the Justices to just 'eat BBQ and go home,' and then Judge Cross left the Courthouse," Pearson said, adding that he and the other justices of the peace invited the members of the public "upstairs for BBQ."

"The Justices present and myself discussed the issue of a Pope County casino with the citizens present. While everyone ate," Pearson said.

Anna Stiritz, in her affidavit, said she took a brief video of the May 7 meeting because she "was alarmed by the yelling and wanted a record."

"Most of the talk was about how the Quorum Court was not willing to send the casino issue out for a vote by the county, and that the Quorum Court had the power to choose the casino operator themselves," Anna Stiritz said in the document.

Residents Harrell, Goodin and Janet Fryar also attested that the May 7 meeting occurred and echoed the narrative of the others.

Walker said in an affidavit that he contacted the Pope County clerk's office on May 8 to request minutes of the previous day's meeting but was told there "was no meeting and therefore no minutes existed."

Walker said that about 2 p.m. that day, Cross called him to say there had indeed been a meeting and he gave Quorum Court members a tour of the courthouse annex.

"Judge Cross acknowledged that several justices had stayed behind, but he was unaware of what, if any, discussion took place," Walker said in the affidavit.

## TWO JUSTICES

When contacted Monday, Justices of the Peace Bill Sparks and Blake Tarpley said they had been invited to the May 7 meeting in the park but did not attend.

"I really wasn't sure of why they were meeting and I didn't go," Sparks said.

Tarpley said his wife was ill at the time.

"But I wouldn't have went to it if I thought it was something improper," Tarpley said.

Sparks said he also did not attend an Aug. 1 "drinks and dinner" meeting that Hans Stiritz said in an affidavit was held at the Old Bank Grill, hosted by the Cherokee Nation and attended by "more than five Pope County Justices."

"I wouldn't have gone if I had been invited because it would have violated the Freedom of Information Act," Sparks said. "I do everything I can to respect that. You know, I've been involved in public service for a long time. Sometime you wish things were a little bit different, but when it's the law, it's the law."

Stiritz said in the affidavit that the dinner at the bank likely "resulted in an agreement for a majority of the Quorum Court to issue an exclusive letter of support to the Cherokee Nation to launch their casino gaming operation."

When asked, Cherokee Nation Businesses Vice President of Communications Amanda Clinton declined to say whether the Aug. 1 meeting occurred.

"We are excited to release details of our proposed project -- Legends Resort & Casino Arkansas -- but we very politely decline to provide any further comments today," Clinton said in an email.

## LETTERS, LAWSUITS

Hans Stiritz also said that Cross and Justices of the Peace Moore, Enchelmayer and James Kusturin met together with representatives of Gulfside Casino Partnership on Aug. 6.

Gulfside was issued letters of support from two officials in Pope County just before they left office in December. Later, the Arkansas Racing Commission ruled that endorsement letters must come from sitting officials at the time of the application submission. Also, Act 371, approved by the Legislature this year, requires that the letters of support come from current officeholders.

Applications from Gulfside, along with those from the other four contenders for the Pope County casino license -- Kehl Management of Dubuque, Iowa; Warner Gaming of Las Vegas; Choctaw Nation Division of Commerce of Durant, Okla.; and the Cherokee Nation Businesses -- were rejected by the Racing Commission because none contained the required endorsements.

In a separate affidavit, Pearson said that on Thursday, he was told by "an anonymous Pope County Justice" that the meeting with Gulfside concerned a discussion with Gulfside owner Terry Green about a potential lawsuit.

Gulfside officials, who have appealed the Racing Commission's denial, have said previously they would seek legal remedies if their application was rejected based on the letters of endorsements coming from previous officeholders.

Amendment 100 -- which also allows a casino in Jefferson County and allows Oaklawn Racing Casino Resort in Hot Springs and Southland Gaming and Racing in West Memphis to expand their operations into full-fledged casinos -- only states that endorsement from local officials is required. The amendment does not differentiate between current or previous officials or give a specific time frame for producing the endorsement.

"The anonymous Justice told me that we [Quorum Court] needed to pick a vendor because he was afraid that we would be forced into a partnership with the Gulfside Casino group," Pearson said in the second affidavit.

When contacted, Gulfside did not comment on the Aug. 6 meeting and, instead, emailed a statement and chart from Green saying that Gulfside's proposal trumps the Cherokee Nation's.

"This now one-phase \$254-million project will create significant tax revenue and stop gaming dollar from going to casinos in Oklahoma--enabling maximum long-term benefits to Pope County," Green said.

Bill Warner of Warner Gaming said his company is still willing to participate in an open evaluation process "if it is fair to all competitors."

"We've been invited to submit a new proposal at a hastily called emergency meeting, and have been informed that the selection of an operator has already been made, without any kind of public deliberation," Warner said. "Obviously, this does not provide for a level playing field. A closed evaluation process with a pre-determined winner deprives the public of the benefits of a competitive process, and does not allow for any kind of public input as to what citizens of Pope County would like to see in a hotel/casino project. Should the quorum court decide to allow for a more transparent process, we stand ready to submit an updated proposal."

**NEW PROPOSAL**

On Monday morning, the Cherokee Nation Businesses unveiled an updated proposal featuring renderings of a \$225 million resort that would include 50,000 square feet of gambling with 1,200 slot machines and 32 table games as well as sports betting.

The resort also would feature a 200-room luxury hotel, a 15,000-square-foot meeting and conference center, a resort pool, an outdoor music venue, a recreational vehicle and dog park, and an outdoor water park.

"Since submitting our initial application to the Arkansas State Racing Commission in May, we have remained fully committed to the people of Pope County and to taking our proposed development to the next level," Shawn Slaton, CEO of Cherokee Nation Businesses, said in a statement. "Today, with much excitement, we are pleased to unveil our plans. We've embraced the community's feedback and are confident this resort destination brings something for everyone."

The project would be completed in one phase within 18 months and would create about 1,000 direct jobs, according to the statement.

A Section on 08/13/2019

Print Headline: Arkansas casino talks held illegally, residents say

**Topics**

[Quorum Court](#), [Pope county](#), [Justices](#), [Information Act](#), [Ben Cross](#), [Arkansas](#), [Gulfside Casino Partnership](#), [Arkansas Racing Commission](#), [Anna Stirtz](#), [Warner Gaming](#), [Larry Walker](#), [Ernie Eichelmayr](#), [Arkansas State Racing Commission](#), [Jeff Phillips](#), [Amanda Clinton](#), [Jefferson county](#), [Shawn Slaton](#), [Kehl Management](#), [Weir road](#), [Ray Black](#), [Tim Whittenburg](#), [Oaklawn Racing Casino Resort](#), [Bill Warner](#)

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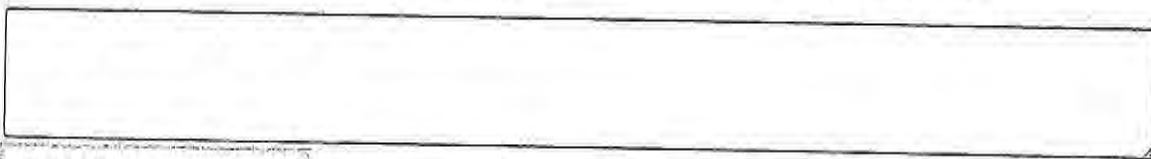
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IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS,  
AT RUSSELLVILLE

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

PLAINTIFFS

Vs.

Case No. 58CV-19-439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas; and  
PHILLIP HANEY, CALEB MOORE,  
TIM WHITTENBURG, REUBEN BROWN,  
JACKIE HEFLIN, JAMIE JACKSON,  
BLAKE TARPLEY, DOUG SKELTON,  
BILL SPARKS, JAMES KUSTURIN,  
RAY BLACK, JOSEPH PEARSON and  
ERNIE ENCHELMAYER, in their  
official capacities as members of the  
Quorum Court of Pope County, Arkansas

DEFENDANTS

**RESPONSE TO MOTION FOR EMERGENCY TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION  
AND MEMORANDUM OF AUTHORITIES IN SUPPORT**

Comes now the Defendants, Ben Cross, in his official capacity as County Judge of Pope County, Arkansas and Phillip Haney, Caleb Moore, Tim Whittenburg, Reuben Brown, Jackie Heflin, Jamie Jackson, Blake Tarpley, Doug Skelton, Bill Sparks, James Kusturin, Ray Black, Joseph Pearson and Ernie Enchelmayer, in their official capacities as members of the Quorum Court of Pope County ("Defendants"), and for their Response to Plaintiffs' Motion for Emergency Temporary Restraining Order and Preliminary Injunction ("Motion"), state and allege:

1. Defendants deny each and every material allegation set forth in the Motion as fully as though said allegations were set forth herein word for word and denied word for word, except such allegations as may be hereinafter expressly admitted.

2. Defendants do not have sufficient information to admit or deny the allegations in paragraph 1 of the Motion and, therefore, deny the same on information and belief.

3. Defendants do not have sufficient information to admit or deny the allegations in paragraph 2 of the Motion and, therefore, deny the same on information and belief.

4. Defendants admit the allegations in paragraphs 3 through 16 of the Motion.

5. With respect to paragraph 17 of the Motion, Defendants admit that jurisdiction and venue are proper in this Court.

6. Defendants admit the allegations in paragraphs 18 through 19 of the Motion.

7. Defendants admit all but the last part of the allegations in paragraph 20 of the Motion and state that it contains a typographical omission by stating that Amendment 100 requires a "resolution of the Pope County Quorum Court." Amendment 100 requires a "resolution of *support* of the Pope County Quorum Court."

8. Defendants admit the allegations in paragraph 21 of the Motion; however, Defendants deny that the initiated measure referenced therein was valid or constitutional. Said initiated measure is in conflict with the Arkansas Constitution, as discussed below, and, therefore, was not effective upon the vote of the residents of Pope County.

9. Defendants deny the allegations in the first sentence of paragraph 22 of the Motion. With respect to the remaining allegations of paragraph 22, Defendants admit that Ordinance No. 2018-O-42 ("Local Ordinance") purportedly established a condition precedent to Amendment 100. Defendants deny the Local Ordinance had any effect in curtailing the authority of the Pope

County Judge or members of the Pope County Quorum Court, as established by the Arkansas Constitution.

10. Defendants deny the allegations in paragraphs 23 and 24 of the Motion.

11. Defendants do not have sufficient information to admit or deny the allegations in paragraph 25 of the Motion and, therefore, deny the same on information and belief.

12. Paragraph 26 of the Motion does not set forth factual allegations to which a response is required. To the extent a response is required, Defendants assert that the doctrine relative to statutory interpretation referenced in paragraph 26 speaks for itself.

13. With respect to the allegations in the second paragraph numbered "26" of the Motion, Defendants renew and adopt by incorporation its allegations previously set forth herein.

14. Defendants admit the allegations in paragraph 27 of the Motion.

15. With respect to paragraph 28 of the Motion, Defendants do not have sufficient information to admit or deny the allegations relative to what the County Judge of Pope County "was reported to have told other applicants." Defendants admit that Exhibit "B" to the Motion appears to be a copy of an Arkansas Democrat Gazette article dated August 9, 2019. Defendants deny the remaining allegations of paragraph 28 of the Motion.

16. With respect to the allegations of paragraph 29 of the Motion, Defendants admit that at the Quorum Court's meeting of August 13, 2019, it did approve a resolution 2019-R-014 of support in favor of a casino applicant. Defendants admit that the Local Ordinance was not followed in enacting Resolution No. 2019-R-014 because the Local Ordinance is contrary to Amendment 100 of the Arkansas Constitution ("Amendment 100") and the Local Ordinance was repealed by the passage of Amendment 100. *See* Arkansas Constitution, Article 5, § 1. Because the Local Ordinance was repealed by Amendment 100, Plaintiffs' requests for injunctive relief

and declaratory judgment are moot. *See* Libertarian Party of Arkansas v. Martin, 876 F.3d 948, 951 (8th Cir. 2017)("When a law has been amended or repealed, actions seeking declaratory judgment or injunctive relief for earlier versions are generally moot . . ."). Defendants deny that the action taken at the Quorum Court meeting of August 13, 2019, was improper, illegal, or contrary to their authority as County Judge or members of the Quorum Court. Defendants admit that attached to the Motion as Exhibit "A" is a copy of the Agenda for the Pope County Quorum Court's meeting of August 13, 2019.

17. Defendants deny the allegations in paragraphs 30 through 36 of the Motion.

18. Defendants do not have sufficient information to admit or deny the allegations in paragraph 37 of the Motion and, therefore, deny the same on information and belief.

19. Defendants deny the allegations of paragraph 38 of the Motion.

20. With respect to paragraph 39 of the Motion, Defendants admit that Plaintiffs seek a temporary restraining order and preliminary injunction; however, Defendants deny that Plaintiffs are entitled to such relief. The Arkansas Supreme Court case cited in paragraph 39 of the Motion speaks for itself and no response to Plaintiffs' citation to that case is required.

21. With respect to the allegations of paragraph 40 of the Motion, Defendants do not have sufficient information to admit or deny what Plaintiffs "believe" and, therefore, deny the same on information and belief. Defendants deny that Plaintiffs have demonstrated a likelihood of success on the merits of this action.

Pleading affirmatively, pursuant to Ark. Code Ann. § 14-14-914(a)(Repl. 2013), no county legislation can be enacted which is contrary to the Arkansas Constitution. The Local Ordinance is in conflict with Amendment 100 which grants the Pope County Judge and the Pope County Quorum Court the authority to issue either a letter or resolution of support for a casino

applicant. The Local Ordinance improperly restricts the constitutionally-granted authority of the Pope County Judge and Quorum Court.

Moreover, the Local Ordinance is in conflict with Art. 5, § 1 of the Arkansas Constitution in that the Local Ordinance requires a higher standard to approve a letter or resolution of support to a casino applicant. The Local Ordinance requires a “majority of the registered voters of Pope County” to approve and authorize the County Judge or Quorum Court to issue a letter/resolution of support. Article 5, § 1 of the Constitution provides that any measure submitted to the people “shall take effect and become law when approved by a majority of the votes cast upon such measure . . . .” Because the Local Ordinance is in conflict with the Arkansas Constitution, it is void and therefore repealed by effect pursuant to Art. 5, § 1 of the Arkansas Constitution.

22. Defendants deny the allegations of paragraph 41 of the Motion.

23. Defendants deny the allegations in paragraph 42 of the Motion. For the reasons set forth above, the Local Ordinance is unconstitutional and void.

24. Defendants deny the allegations in paragraph 43 of the Motion. Pleading affirmatively, Plaintiffs' request for an emergency temporary restraining order and preliminary injunction is moot. An injunction is mandatory when it commands a person to do a specific act and an injunction is prohibitory when it commands a person to refrain from doing a specific act. *IBAC Corp. v. Becker*, 371 Ark. 330, 334, 265 S.W.3d 755 (2007). By their Motion, Plaintiffs request a prohibitory injunction. See "wherefore" clause of Motion.

At its August 13, 2019 meeting, the Pope County Quorum Court passed a Resolution No. 2019-R-014 pursuant to Amendment 100. Resolution No. 2019-R-014 expressed the Pope County Quorum Court's approval of the casino applicant noted therein. Plaintiffs request an emergency restraining order or preliminary injunction which would prohibit the action taken by

the Quorum Court at its August 13, 2019, meeting. The entry of an order prohibiting action which has already occurred is unnecessary. Plaintiffs' request for an emergency temporary restraining order and preliminary injunction should be denied. This Court can proceed to address the merits of this action in due time and as its docket permits.

25. With respect to paragraph 44 of the Motion, Defendants do not have sufficient information to admit or deny what counsel for the Plaintiffs "anticipate" and, therefore, deny the same on information and belief. Defendants admit Plaintiffs' counsel did contact the undersigned prior to Plaintiffs' filing this Motion and their Petition for Declaratory Judgment.

26. Pleading affirmatively, Rule 65 of the Arkansas Rules of Civil Procedure provides that a court may issue a temporary restraining order without notice "only if specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." While Plaintiffs' Petition for Declaratory Judgment ("Petition") contained a verification of Separate Plaintiff James Knight, the Petition does not allege that Plaintiffs will suffer immediate and irreparable injury, loss, or damage unless a temporary restraining order is entered. Plaintiffs do assert immediate and irreparable harm, loss, and damage in the Motion (para. 41); however, the Motion is not verified. Nor have Plaintiffs submitted an affidavit in conformance with Rule 65(b)(1)(A). Therefore, Plaintiffs request for the entry of a temporary restraining order, prior to the opportunity for Defendants to be heard on this matter, must be denied due to the failure to comply with Rule 65.

27. Pleading affirmatively, in the event of an entry of a temporary restraining order or preliminary injunction, Plaintiffs must give security in an amount the Court considers sufficient to pay the costs and damages of Defendants if Defendants are found to have been wrongfully

enjoined or restrained. Ark. R. Civ. P. 65(c). The damage that Pope County would incur should the Plaintiffs' Motion be granted would equal at least Thirty Eight Million and Eight Hundred Thousand and 00/100 (\$38,800,000.00) as evidenced by the Economic Development Agreement attached hereto as Exhibit "1" and incorporated herein by reference and Defendants request that, in the event this Court grants the Plaintiffs' Motion for a temporary restraining order or injunction, Plaintiffs be required to post a bond in the amount of same.

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WHEREFORE, Defendants respectfully request that the Court deny Plaintiffs' Motion for Emergency Temporary Restraining Order and Preliminary Injunction and for such further relief to which they may be entitled.

BEN CROSS, in his official capacity as County Judge of Pope County, Arkansas; and PHILLIP HANEY, CALEB MOORE, TIM WHITTENBURG, REUBEN BROWN, JACKIE HEFLIN, JAMIE JACKSON, BLAKE TARPLEY, DOUG SKELTON, BILL SPARKS, JAMES KUSTURIN, RAY BLACK, JOSEPH PEARSON and ERNIE ENCHELMAYER, in their official capacities as members of the Quorum Court of Pope County, Arkansas

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ECONOMIC DEVELOPMENT  
AGREEMENT

This Economic Development Agreement (the "Agreement") is entered into as of August 13<sup>th</sup> 2019 by and between the citizens of Pope County, Arkansas acting by and through the Pope County Judge Ben Cross (the "County") and Cherokee Nation Businesses, LLC, (the "Operator"). Capitalized terms used and defined elsewhere in this Agreement are defined in Section 1.

RECITALS

- A. Operator seeks to make application to the Arkansas Racing Commission (the "Commission") for the casino license established in Arkansas Constitutional Amendment 100 in Pope County, Arkansas (the "License").
- B. As a condition precedent to submission of such application, Operator is required by Amendment 100, the Rules of the Commission, and Arkansas Act 371 of 2019, to provide written evidence of the County's support of said application;
- C. The Pope County Judge has the authority, pursuant to Ark. Const. Amend 55 Sec 1(a) and Ark. Code Ann. Sections 14-14-801(a), 14-14-801(2), 14-14-1102(b)(7)(A), 14-164-201, *et seq.*, 14-170-205, and 14-176-103, to negotiate in good faith with the Operator, to enter into this Agreement, to perform all of the terms and conditions imposed upon the County hereunder, and to require performance by Operator of the terms and conditions upon it hereunder;
- D. Operator's development plans contemplate not only a Casino, but also ancillary facilities including recreational and entertainment components;
- E. The Project will result in hundreds of millions of dollars of capital investment by Operator, thousands of jobs, significant direct and indirect revenues and other economic benefits to the County and surrounding area; and
- F. This Agreement shall become effectuated, fully executed and enforceable upon endorsement signatures of representatives of both the County and Operator and the passage of a Resolution of Support by the Pope County Quorum Court for the Operator's casino license application to be submitted to the Commission.

**NOW, THEREFORE**, in consideration of their execution and delivery of this Agreement, the passage of a Resolution of Support for the Operator and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Operator and the County hereby agree to the following:

**1. Definitions**

The terms defined in this Section 1 shall have the meanings indicated for purposes of this

Agreement. Capitalized terms which are used primarily in a single Section of this Agreement are defined in that Section.

- (a) "Amendment 100" refers to Amendment 100 to the Arkansas Constitution, known as the Arkansas Casino Gaming Amendment of 2018.
- (b) "Casino" shall have the meaning given such term in Rule 1.065 of the Rules.
- (c) "Commission" means the Arkansas Racing Commission.
- (d) "Rules" means the Arkansas Casino Gaming Rules in effect from time to time as promulgated by the Commission pursuant to Amendment 100.

## 2. General Provisions

### 2.1 Purpose

The County has determined that the development, construction and operation of the Project will (i) be in the best interests of the citizens of Pope County and its municipalities; (ii) support and contribute to the economic growth within the County and the entire State of Arkansas; (iii) contribute to the provision and preservation of gainful employment opportunities for residents of the County; and (iv) support and promote tourism in Central Arkansas and the County. Accordingly, the County Judge has evaluated each potential operator for Pope County and the terms of a potential agreement prior to agreeing to the terms of this Agreement.

### 2.2 Application for License

Operator shall comply with the applicable rules and regulations adopted and/or prescribed by the Commission, presently or in the future, which govern the operation of Casino gaming at the Project, including the Rules. The parties agree that (i) the Rules are incorporated into this agreement, as and when adopted or prescribed, the same as if set forth fully herein, and (ii) in the event of a conflict between the provisions of this Agreement and the Rules, the Parties agree to take all reasonably necessary steps to amend or modify this Agreement to accommodate or reflect the Rules in a manner that preserves to the extent possible the economic benefits of the transactions contemplated hereby to each of the Parties.

### 2.3 Term

The term of this Agreement shall commence upon (i) execution of this Agreement by the County Judge, and the authorized representative of the Operator, and (ii) the passage of a Resolution of Support for the Operator's Casino License Application to be submitted to the Commission, and shall continue until the expiration of the term of the License, including any and all renewals or extensions thereof (the "Term").

### 3. Project

(a) Operator will pursue development of the Project, which will meet the following minimum commitments:

- i. a minimum construction cost of Two Hundred Twenty Five Million DOLLARS (\$225,000,000), in addition to the Economic Development Fee referenced in 4.1(b) below;
- ii. casino/gaming facilities constructed in compliance with the License and any rules or regulations imposed by the Commission;
- iii. a hotel with a minimum of 200 rooms which shall, meet the construction and operational standards necessary to achieve the American Automobile Association's "Four Diamond" hotel rating, or substantial equivalent thereof;
- iv. a mixed-use indoor conference and music venue capable of accommodating a minimum of one thousand (1,000) guests;
- v. multiple price-point dining facilities, sports bar/communal areas;
- vi. a sports book/simulcast parlor, subject to the Commission's Rules;
- vii. a waterpark;
- viii. a recreational vehicle park;
- ix. an outdoor music venue capable of accommodating a minimum of five thousand (5,000) guests;
- x. a medical air ambulance landing zone for use by medevac patients; and
- xi. a separate, secure office space to be utilized as a sub-station by local law enforcement agencies.

(b) Operator shall use commercially reasonable efforts to promptly apply for, pursue and obtain the License, in the name of its wholly owned subsidiary, Legends Resort and Casino, LLC, an Arkansas LLC, and all other approvals necessary for the design, development, construction and operation of the Project (the "Approvals").

(c) Operator agrees to keep the County reasonably informed with respect to the progress of design and construction of the Project. The County acknowledges and agrees that the Operator may alter the Project and its components from time to time provided that said alterations shall remain in compliance with this Agreement.

### 3.1 Duty to Complete; Commencement of Operations

The Operator will use commercially reasonable efforts to commence and complete construction of the Project, and to commence operations of the Project, at the earliest dates reasonably practicable, taking into account, among other factors, (i) the process for obtaining the License and the Approvals, and the potential of regulatory delays and/or legal challenges, (ii) the typical time frames for design, development and construction of projects of this nature and magnitude, (iii) the process of recruiting and training the necessary skilled workforce and obtaining all necessary permits/licenses for operating the Project, and (iv) events or factors that are unforeseeable or outside the Operator's control, including any Force Majeure event.

### 3.2 Project Operations

Operator agrees to diligently operate and maintain the Project in accordance with the Rules and in compliance with this Agreement.

### 3.3 Maintenance; Transfer

(a) Operator agrees at all times during the term of this Agreement to use reasonable business judgment and diligence to maintain and/or upgrade the improvements comprising the Project, and to refrain from making transfers of any interest in the Project except as may be expressly authorized by the Commission and in consultation with the County Judge and Quorum Court of Pope County.

(b) The terms of this Agreement shall be binding and enforceable by the County against any successor in interest to the Operator.

## 4. Obligations of Operator

### 4.1 Economic Development Fee

(a) The Operator recognizes and acknowledges that the construction and operation of the Project will cause direct and indirect impacts and benefits within Pope County. The Operator also recognizes and acknowledges that the ultimate responsibility to mitigate the community impacts of the Project rests upon local governmental units.

(b) The Operator shall be obligated to pay Economic Development Fees in the total amount of Thirty-Eight Million Eight Hundred Thousand DOLLARS (\$38,800,000.00) (the "EDF"), to be distributed among certain municipalities and fire protection districts or associations within Pope County. Operator shall deliver to the Recipients within thirty (30) days of the successful resolution of all litigation or administrative challenges relating to the issuance of the License (the "Final Conditions") cashier's checks, as follows, to-wit:

- i. \$27,599,373 to Pope County, Arkansas;
- ii. \$3,361,608 to the City of Pottsville, Arkansas;
- iii. \$3,532,236 to the City of Atkins, Arkansas;
- iv. \$1,444,000 to the City of London, Arkansas;
- v. \$1,505,356 to the City of Dover, Arkansas;
- vi. \$242,427 to the City of Hector, Arkansas;
- vii. \$800,000 to the Crow Mountain Fire Protection District;
- viii. \$130,000 to the Pope County Fire Association;
- ix. \$30,000 to the Arkansas Tech University Foundation;
- x. \$25,000 to the Russellville Center For the Arts;
- xi. \$25,000 to the Dover Public Education Foundation;
- xii. \$25,000 to the Hector Public Education Foundation;
- xiii. \$25,000 to the Atkins Red Devil Foundation;
- xiv. \$25,000 to the Pottsville Community Scholarship Fund;
- xv. \$10,000 to the Dover Chamber of Commerce;
- xvi. \$10,000 to the Atkins People For a Better Atkins; and
- xvii. \$10,000 to the River Valley Arts Center.

(c) The EDF hereinabove provided is agreed to be appropriate and adequate and fairly and lawfully established. Any share of the EDF that is refused by a Recipient will be paid to Pope County.

#### 4.2 Community Development Grants

(a) It is in the best interests of the County and the Operator to provide resources for continuing charitable contributions to the people of Pope County, Arkansas. Accordingly, beginning on the second anniversary date of the commencement of Casino gaming operations, and on each subsequent anniversary date during the term of this Agreement, Operator shall contribute the sum of Two Million DOLLARS (\$2,000,000) to a charitable foundation which is properly established and operating pursuant to state and federal law to be designated by the County prior to commencement of the payments described in this sub-section.

(b) The amount of the contributions provided in (a) above shall be adjusted every five (5) years during the term hereof to reflect the percentage increase in the Consumer Price Index for All Urban Consumers, U.S. City Average published by the Bureau of Labor Statistics of the United States Department of Labor ("CPI") over the previous five (5) years, calculated by using the most recently published CPI at the date of the adjustment, and the CPI on the same date five (5) years prior to the date of the adjustment.

#### 4.3 Ongoing Research and Economic Development Support

(a) Operator shall contribute the sum of Twenty Five Thousand DOLLARS (\$25,000), every two (2) years during the term of this Agreement, to the Arkansas Tech University Foundation for purposes of study/research relating to the economic impact of the Project.

(b) Operator shall contribute the sum of One Hundred Thousand DOLLARS (\$100,000) annually to the Russellville Economic Development Alliance, or its successor or assigns.

(c) The amount of the contributions provided in (a) and (b) above shall be adjusted every five (5) years during the term hereof to reflect the percentage increase in the Consumer Price Index for All Urban Consumers, U.S. City Average published by the Bureau of Labor Statistics of the United States Department of Labor ("CPI") over the previous five (5) years, calculated by using the most recently published CPI at the date of the adjustment, and the CPI on the same date five (5) years prior to the date of the adjustment.

(d) The contributions provided in (a) and (b) above shall begin on the first anniversary date of the commencement of Casino gaming operations.

#### 4.4 Certain Hiring Practices

(a) Operator agrees to use commercially reasonable efforts to create positions for and set a targeted goal of filling three percent (3%) of its workforce at the Project with individuals who have one or more "disabilities" (as that term is defined under the Americans with Disabilities Act).

(b) Operator agrees to hire a full time employee certified as an addiction counselor or contract with an appropriate Pope County non-profit organization to provide addiction counseling services.

(c) Operator agrees that upon commencement of operations, all employees who do not receive gratuities as part of their regular compensation will be subject to a \$13 per hour minimum wage.

#### 4.5 Utility Services; Infrastructure

County agrees to fully cooperate with, utilize its best efforts, and actively assist Operator in the timely procurement of necessary utility and other public services, including, without limitation, electric, gas, water, sewer and sanitation services, as well as necessary infrastructure improvements, including, without limitation, street and highway improvements, access thoroughfares, curb cuts and signalized intersections, all at costs, assessments or rates generally available to other commercial users within Pope County, Arkansas. Operator agrees that it will

assume and pay all costs associated with the street and drainage infrastructure improvements and modifications upon county roadways and rights-of-way necessary for the development of the Project.

## 5. Covenants of Operator

The Operator covenants that throughout the Term, the Operator shall:

(a) Do or cause to be done all things necessary to preserve, renew and keep in full force and effect its legal existence, and refrain from making any organic changes to its legal form (including changing the legal status of its wholly owned subsidiary as an Arkansas LLC), or any changes in the status of the Project site that would have the effect of eliminating or changing any of its responsibilities regarding the payment of taxes, assessments, levies, permit fees, or the like, to the State of Arkansas or any subdivision or agency thereof, or to Pope County or any of its subdivisions, municipalities or agencies thereof

(b) Do or cause to be done all things necessary to preserve, renew and keep in full force and effect the rights, licenses, registrations, permits, certifications, approvals, consents, franchises, patents, copyrights, trade secrets, trademarks and trade names that are used in the conduct of its businesses and other activities, and comply with all governmental requirements applicable to the operation of its business and other activities, in all material respects, whether now in effect or hereafter enacted.

(c) Violation or breach of this Section shall result in liquidated damages equal to the then present value of the subsequent 15 years of tax losses to the state of Arkansas, Pope County and all municipalities within, as a direct result of such a breach or violation.

## 6. Default

### 6.1 Events of Default

The occurrence of any of the following shall constitute an "Event of Default" under this Agreement:

(a) If any material representation or warranty made by Operator hereunder shall prove to have been false or misleading in any material respect as of the time made or furnished.

(b) Subject to Force Majeure, if Operator shall materially default in the performance of any (i) governmental requirement; or (ii) commitment, agreement, covenant, term or condition (other than those specifically described in any other subparagraph of this Section 6.1) of this Agreement, and in such event if Operator shall fail to remedy any such default within one hundred eighty (180) days after receipt of written notice of default with respect thereto.

(c) If Operator fails to make any payments required to be made by Operator hereunder as and when due, and further fails to make any such payment within ninety (90) days after receiving written notice of default from the County; provided that if any such payment be the subject of a good faith dispute as to the amount thereof and Operator is proceeding with diligence to resolve such dispute, the time for making such payment shall be extended pending such resolution.

(d) If the County, either through letter from the County Judge's Office or Resolution of the Quorum Court, endorses or expresses support for any other casino license applicant during the term of this Agreement.

## 6.2 Remedies

(a) Upon an Event of Default, the County shall have the right if it so elects to: (i) institute and prosecute proceedings to enforce in whole or in part the specific performance of this Agreement by Operator, and/or to enjoin or restrain Operator from commencing or continuing said breach, and/or to cause by injunction Operator to correct and cure said breach or threatened breach; and/or (ii) exercise any and all other remedies available at law or in equity.

(b) Except as expressly stated otherwise, the rights and remedies of the County whether provided by law or by this Agreement, shall be cumulative, and the exercise by the County of any one or more of such remedies shall not preclude the exercise by it, at the same or different times, of any other such remedies for the same default or breach, to the extent permitted by law. No waiver made by the County shall apply to obligations beyond those expressly waived in writing.

(c) In the event that the County, either through letter from the County Judge's Office or Resolution of the Quorum Court endorses or expresses support for any other casino license applicant during the term of this Agreement, this Agreement shall become voidable, at the election of the Operator, after which Operator shall no longer be bound hereunder and may continue to pursue its casino license application utilizing the Resolution of Support before the Commission.

## 6.3 Termination

Except for the provisions that by their terms survive, this Agreement shall terminate upon the occurrence of any of the following, and upon notification of such occurrence by Operator to County:

(a) The Commission fails to issue the License or issues the same to someone other than Operator;

(b) Operator's License (i) is revoked by a final, non-appealable order; (ii) expires and is not renewed by the Commission and Operator has exhausted any rights it may have to appeal such



expiration or non-renewal; or (iii) subsequently terminates due to conditions the Commission imposes which are not satisfied within the time periods specified therein, subject to any cure periods or extension rights.

**7. Miscellaneous**

**7.1 Applicable Law and Construction**

The laws of the State of Arkansas shall govern the validity, performance and interpretation of this Agreement. This Agreement has been negotiated by the County and Operator, and the Agreement, shall not be deemed to have been drafted by the County or by the Operator, but by each of them.

**7.2 Venue**

The parties expressly agree that any actions or legal proceedings relating to this Agreement may be brought in the State of Arkansas and that any legal action or procedure of any nature which may be brought by any party relating to this Agreement may only be brought in the following venues, to wit: the Circuit Court sitting in Pope County, Arkansas, or the United States District Court sitting in Little Rock, Arkansas.

**7.3 Complete Agreement**

This Agreement constitutes the full and complete agreement between the parties with respect to the subject matter hereof, and supersedes and controls in its entirety over any and all prior agreements, understandings, representations and statements whether written or oral by each of the parties.

**7.4 No Joint Venture**

The County and the Operator agree that nothing contained in this Agreement or any other documents executed in connection herewith is intended or shall be construed to establish the County and Operator as joint venturers or partners.

**7.5 Time of the Essence**

All times, wherever specified herein for the performance by Operator of its obligations hereunder, are of the essence of this Agreement.

**7.6 Captions**

The captions of this Agreement are for convenience of reference only and in no way define, limit or describe the scope or intent of this Agreement or in any way affect this Agreement.

## 7.7 Force Majeure

(a) An event of "Force Majeure" shall mean the following events or circumstances, to the extent that they delay or otherwise adversely affect the performance beyond the reasonable control of Operator, or its agents and contractors, of their duties and obligations under this Agreement: (i) Strikes, lockouts, labor disputes, disputes arising from a failure to enter into a union or collective bargaining agreement, inability to procure materials on favorable terms due to market-wide shortages, failure of utilities, labor shortages or explosions; (ii) Acts of God, tornadoes, floods, sinkholes, fires and other casualties; (iii) Acts of a public enemy, acts of war, terrorism, effects of nuclear radiation, or national or international calamities; (iv) Concealed and unknown conditions of an unusual nature that are encountered below ground or in an existing structure; (v) Any litigation or administrative delay which impedes the ability of Operator to complete the Project, unless based in whole or in part on the actions or failure to act of Operator; (vi) The failure by, or unreasonable delay of, the County, the State of Arkansas or any other governmental authority or subdivision to issue any licenses, permits or approvals on terms Operator reasonably deems necessary to develop, construct, open or operate the Project, unless such failure or delay is based materially on the actions or failure to act of Operator, or its agents and contractors; or (vii) Any impacts to major modes of transportation to the Project Site, whether private or public, which adversely and materially impact access to the Project Site.

(b) Notwithstanding any other provision of this Agreement to the contrary, Operator shall be entitled to an adjustment in the time for, or excuse of the performance of, any duty or obligation of Operator under this Agreement for Force Majeure events, but only for the number of days due to and/or resulting as a consequence of such causes and only to the extent that such occurrences actually prevent or delay the performance of such duty or obligation or cause such performance to be commercially unreasonable.

## 7.8 Amendments

This Agreement may not be modified or amended except by a written instrument signed by the Parties; provided, however, that the parties acknowledge that the Commission may, subsequent to the date of this Agreement, promulgate additional rules or regulations, issue interpretations or adopt policies or evaluation criteria which rules, regulations, interpretations, policies or criteria may conflict with, or may not have been contemplated by, the express terms of this Agreement. In such event, the Parties agree to take all reasonably necessary steps to amend or modify this Agreement to accommodate or reflect the provisions of all such regulations, interpretations, policies or criteria, in a manner that preserves to the fullest extent possible the economic benefits of the transactions contemplated hereby to each of the Parties.

7.9 Further Assurances and Assistance

The County and Operator will cooperate and work together in good faith to the extent reasonably necessary and commercially reasonable to accomplish the mutual intent of the parties that the Project be successfully completed as expeditiously as is reasonably possible. The County also agrees to utilize its best efforts to assist Operator in its dealings with the City of Russellville, whether in obtaining required approvals, services, permits or permissions or addressing matters of concern or importance to its officials or citizens.

7.10 Severability

In the event one or more provisions of the Agreement shall be deemed unenforceable, the remaining provisions of this Agreement shall remain in full force and effect.


7.11 Exclusivity

County agrees that it shall not negotiate or enter into another economic development agreement, or any similar agreement to this Agreement, with any other party so long as this Agreement has not been terminated.

IN WITNESS WHEREOF, the Parties have set their hands and had their seals affixed on the dates set forth after their respective signatures below on this 13<sup>th</sup> day of August, 2019.

"COUNTY"

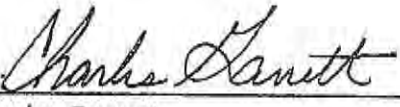
Counsel for Pope County, Arkansas

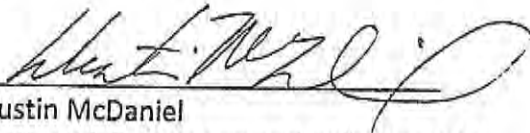
By:   
Ben D. Cross  
Pope County Judge  
8/13/2019  
@ 7:18 P.M.

  
Clayton E. McCall  
McCall Law Firm  
1020 West Main St.  
Russellville, AR 72801

"OPERATOR"

Counsel for Cherokee Nation Businesses, LLC

By:   
Charles Garrett  
Executive Vice President  
Cherokee Nation Businesses, LLC

  
Dustin McDaniel  
McDaniel, Richardson and Calhoun, PLLC  
1020 West 4<sup>th</sup> St.  
Suite 410  
Little Rock, AR 72201

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

VS.

NO. 58CV-19-439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas, et al.

FILED  
2019 AUG 26 AM 7:51  
POPE COUNTY CLERK  
PLAINTIFFS  
DEFENDANTS

MOTION TO INTERVENE WITH  
INCORPORATED BRIEF OF LAW IN SUPPORT

Comes Intervenor, Cherokee Nation Businesses, LLC ("CNB"), by and through its attorneys, McDaniel, Richardson & Calhoun, PLLC, and for its Motion to Intervene with Brief of Law in Support, states as follows:

1. Pursuant to Ark. Const. Amend. 100 ("Amendment 100"), enacted by the Arkansas voters in November 2018, the Arkansas Racing Commission is to award a casino license to an entity to operate a casino in Pope County, Arkansas. For an applicant to be considered, that applicant must either be issued a letter of support from the County Judge or resolution in support from the Quorum Court. Ark. Const. Amend. 100 § 4(n) states that "[t]he Arkansas Racing Commission shall require all casino applicants for a casino license in Pope County and Jefferson County to submit either a letter of support from the county judge or a resolution from the quorum court in the county where the proposed casino is to be located . . . ."

2. On August 13, 2019, Plaintiffs filed this lawsuit alleging that Ordinance 2018-O-42 ("the ordinance") prohibits the Quorum Court from issuing a resolution of support, despite the ordinance being unconstitutional due to the following: (1) the ordinance contradicts Amendment 100 in violation of Article 5, § 1 of the Arkansas Constitution; and (2) the ordinance improperly

infringes and abrogates the constitutional and statutory authority of the County Judge and Quorum Court. Ordinance 2018-O-42 is attached hereto as Exhibit A.

3. On August 13, 2019, subsequent to the lawsuit being filed, the Quorum Court issued a resolution of support for CNB, making it the only casino applicant with the required letter of support. *See* Exhibit B.

4. CNB must be joined as a party in this matter because it was issued a letter of support from the Pope County Quorum Court that Plaintiffs allege is "void and illegal." *See* Plaintiffs' Complaint, ¶ 31.

5. CNB has a unique interest in this matter that cannot be protected or represented by other litigants: with this resolution, CNB is now the only casino applicant which meets the minimum requirements of Amendment 100. Further, as CNB – and only CNB – meets the minimum requirements for a casino license, CNB has a legitimate expectation to receive a casino license and thus has a property interest protected by the due process clauses of the Arkansas and United States Constitutions.

6. The Arkansas Rules of Civil Procedure require the joinder of a person "as a party in the action if . . . he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter, impair or impede his ability to protect that interest, or, (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest." Ark. R. Civ. P. 19(a).

7. The Arkansas Rules of Civil Procedure allow a party to intervene in a matter as of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter

impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Ark. R. Civ. P. 24(a).

8. The Plaintiffs request relief that would impair CNB's interests. Specifically, the resolution of support is required to receive a casino license, and if such were invalidated CNB would arguably no longer meet the minimum requirements under Amendment 100.

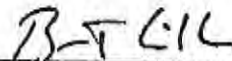
9. Further, no other party is similarly situated to adequately protect CNB's interests in this matter. CNB is the only litigant that received a resolution of support from the Quorum Court and is the only litigant that has any interest in, or is an applicant for, a casino license.

10. Attached as Exhibit C to this Motion is CNB's Motion to Dismiss and Brief in Support that it proposes to file in this matter. Ark. R. Civ. P. 24(c).

11. Attached as Exhibit D to this Motion is CNB's Motion to Consolidate.

WHEREFORE, Intervenor Cherokee Nation Businesses, LLC respectfully requests that it be joined as a party in this matter and for all other relief to which Intervenor is entitled.

Respectfully submitted,



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Dustin McDaniel # 99011  
Scott P. Richardson # 2001208  
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Attorneys for Intervenor



IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS

**CITIZENS FOR A BETTER POPE COUNTY,**  
a Local Option Ballot Question Committee,  
**JAMES KNIGHT, in his individual capacity**

**PLAINTIFFS**

**VS.**

**NO. 58CV-19-439**

**BEN CROSS, in his official capacity**  
as County Judge of Pope County, Arkansas, et al.

**DEFENDANTS**

**CHEROKEE NATION BUSINESSES, LLC**

**INTERVENOR**

**MOTION TO DISMISS COMPLAINT**

Cherokee Nation Businesses, LLC ("Intervenor"), by and through her counsel, and for its Motion to Dismiss, states as follows:

1. Intervenor requests that Plaintiffs' claims be dismissed pursuant to Ark. R. Civ. P. 12(b)(6).
2. Specifically, Plaintiffs rely on Ordinance 2018-O-42 ("the ordinance") which is unconstitutional due to the following: (1) the ordinance contradicts Amendment 100 in violation of Article 5, § 1 of the Arkansas Constitution; and (2) the ordinance improperly infringes and abrogates the constitutional and statutory authority of the County Judge and Quorum Court.
3. Further, a county ordinance is not binding on a state agency, in this case a commission created by the Arkansas Constitution.
4. Intervenor is filing a brief in support simultaneously with this Motion to Dismiss.

WHEREFORE, the Intervenor prays that this Court grant its Motion to Dismiss; for attorney's fees and costs; and for all other proper relief.

RESPECTFULLY SUBMITTED,

BART CALHOUN  
SCOTT RICHARDSON

DUSTIN McDANIEL  
Attorneys for Intervenor

By:

\_\_\_\_\_  
Bart W. Calhoun, Ark. Bar No. 2011221  
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[scott@mrcfirm.com](mailto:scott@mrcfirm.com)

**CERTIFICATE OF SERVICE**

I, Bart W. Calhoun, hereby certify that a copy of the foregoing has, on this 23rd day of August, 2019, been served, unless otherwise indicated, by regular first class mail, on the following persons:

Travis Story  
Story Law Firm, PLLC  
438 E. Millsap Road, Ste. 103  
Fayetteville, AR 72703

\_\_\_\_\_  
Bart W. Calhoun



**IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS**


**CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity**

**VS.**

**NO. 58CV-19-439**

**BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas, et al.**

**CHEROKEE NATION BUSINESSES, LLC**

BY:   
**PLAINTIFFS**  
**DEFENDANTS**  
**INTERVENOR**  
2019 JUN 26 AM 7:52  
POPE COUNTY CLERK  
POPE COUNTY, ARKANSAS

**FILED**

**BRIEF IN SUPPORT OF MOTION TO DISMISS COMPLAINT**

Cherokee Nation Businesses, LLC ("Intervenor"), by and through its counsel, and for its Brief in Support of its Motion to Dismiss, states as follows:

**I. INTRODUCTION**

Intervenor requests that Plaintiffs' claims be dismissed pursuant to Ark. R. Civ. P. 12(b)(6). Pursuant to Ark. R. Civ. P. 12(b)(6), Plaintiffs' Complaint should be dismissed for failure to state facts upon which relief can be granted. Plaintiffs filed a Complaint on August 16, 2019, requesting this Court (1) invalidate the Pope County resolution of support adopted on August 13, 2019 and (2) restrict the Arkansas Racing Commission from relying on that resolution.

The ordinance Plaintiffs rely on, Ordinance 2018-O-42 ("the ordinance") violates the constitution due to the following: (1) the ordinance contradicts Amendment 100 in violation of Article 5, § 1 of the Arkansas Constitution; and (2) the ordinance improperly infringes and abrogates the constitutional and statutory authority of the County Judge and Quorum Court. The ordinance is attached hereto as Exhibit A. Further, a county ordinance is not binding on the Arkansas Racing Commission, a commission created by the Arkansas Constitution and delegated the responsibility of promulgating rules and carrying out the purposes of Amendment 100.

II. ARGUMENT

A. The Ordinance Is Contrary To Amendment 100 and Local Official Authority

Article 5, § 1, of the Arkansas Constitution states that “[t]he legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly . . . .” Article 5, § 1 further states that “[t]he initiative and referendum powers of the people are hereby further reserved to the legal voters of each municipality and county as to all local, special and municipal legislation of every character in and for their respective municipalities and counties, **but no local legislation shall be enacted contrary to the Constitution or any general law of the State, and any general law shall have the effect of repealing any local legislation which is in conflict therewith.**” (emphasis added).

County voters cannot amend the constitution or state law through a county election (“no local legislation shall be enacted contrary to the Constitution or any general law of the State. . . .”). Additionally, Ark. Code Ann. 14-14-914(b) states similarly that “[n]o county legislative measure shall be enacted contrary to the Arkansas Constitution or any general state law which operates uniformly throughout the state, and any general law of the state shall have the effect of repealing any county ordinance which is in conflict therewith.” The Arkansas Supreme Court has reaffirmed both provisions stating “[o]ur well-established rule is that an initiated ordinance that is contrary to state law on its face should not be certified for inclusion on the ballot.” *Stilley v. Makris*, 343 Ark. 673, 678, 38 S.W.3d 889, 892 (2001) (finding that the initiative petition conflicted with numerous statutory provisions for the sale of county property), citing *Stilley v. Henson*, 342 Ark. 346, 28 S.W.3d 274 (2000), *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996), *Czech v. Baer*, 283

Ark. 457, 677 S.W.2d 833 (1984). County government may not enact laws "contrary to state law." *Cox v. Commissioners of Maynard Fire Imp. Dist. No. 1*, 287 Ark. 173, 174, 697 S.W.2d 104, 105 (1985).

The ordinance's restriction on the authority of the Arkansas Racing Commission, the Quorum Court and the County Judge is unconstitutional. Ark. Const. Amend. 100 § 4(n) states that "[t]he Arkansas Racing Commission shall require all casino applicants for a casino license in Pope County and Jefferson County to submit either a letter of support from the county judge or a resolution from the quorum court in the county where the proposed casino is to be located . . . ." Further, Amendment 100 confers responsibility on the Arkansas Racing Commission to adopt rules to carry out the Amendment's purpose and to administer the issuance of casino licenses (Ark. Const. Amend. 100, § 4), and directs the Arkansas General Assembly to enact laws and appropriate money to fulfill the Amendment's purposes (Ark. Const. Amend. 100, § 3(c)). Amendment 100 specifically requires the Arkansas Racing Commission to adopt rules governing "[t]he manner in which [it] considers applications for issuance of casino licenses." Ark. Const. Amend. 100, § 4(e). Nothing in Amendment 100 grants the voters or Pope County the authority to promulgate rules, require elections, or to determine how the Arkansas Racing Commission considers applications.

Amendment 100 granted discretion to two specific offices to decide whether to issue letters or resolutions of support: the office of the county judge and the county quorum court. The voters of Pope County have sought to change Amendment 100 so neither the county judge nor the quorum court have the authority to issue letters of support. The initiated ordinance transfers the constitutionally granted authority from those two bodies to the voters of Pope County. Not only does the ordinance prohibit the county judge and quorum court from issuing a generic letter of support, but it also requires the question of which potential applicant to support to be decided by

the voters of Pope County. In direct contravention of Amendment 100, it completely eviscerates the Constitution's requirement that the county judge or the quorum court decide when, how, and who to support.

In *Stilley v. Henson*, a citizen utilized the initiative process of Amendment 7 to put an ordinance on the ballot that would reduce the rate of an existing county sales and use tax. The sales and use tax it sought to reduce was at one percent (1%) and "levied pursuant to the provisions of Ark. Code Ann. §§ 26-74-201 et seq., which mandate specific procedures for levying a county sales and use tax and for repealing a tax that has been previously levied." 342 Ark. 346, 352, 28 S.W.3d 274, 278 (2000). However, the Arkansas code does not contemplate or set forth procedures for reducing a sales and use tax, only levying and abolishing. *Id.* The authority to levy or abolish a tax does not imply the authority to reduce a tax. *Id.* at 354, 28 S.W.3d at 279. The Supreme Court found that the ordinance was "facially invalid and fails to comply with Amendment 7 because it is contrary to Ark. Code Ann. §§ 26-74-201 et seq., which grants counties and their voters the authority to adopt or abolish a county sales and use tax, but does not grant them the authority to reduce the rate of an existing tax." *Id.* at 356, 28 S.W.3d at 280.

Similarly, nothing in Amendment 100 or the Arkansas code grants counties and their voters the authority to place restrictions on the Quorum Court's or County Judge's authority to issue letters or resolutions of support. Likewise, nothing in Amendment 100 authorizes the electorate to place additional requirements on licensure or impose its own rules in addition to the Arkansas Racing Commission's rules and acts of the General Assembly. The Ordinance results in an additional qualification to Amendment 100 and restricts the authority specifically granted to local officials and the Arkansas Racing Commission by Amendment 100. Such is not permissible.

Further, Justice Corbin's dissent in *Stricklin v. Hays*, where the majority acknowledged Justin Corbin had raised an interesting issue but declined to opine as it wasn't raised at the trial court below, is instructive on the subject of the electorate abrogating local government official authority. Justice Corbin stated:

In sum, whether we consider this ordinance to be administrative in nature or a legislative ordinance that is in conflict with an already established law of this State, the ordinance is not the type subject to the people's power of referendum and is, thus, invalid. It impermissibly infringes upon the power of the city council to fix the salaries of its police and fire personnel and effectively ties the hands of the individual council members, such that they are no longer part of a deliberative body acting independently, exercising their best judgments on this issue. *See Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996), cert. denied, — U.S. —, 117 S.Ct. 1081, 137 L.Ed.2d 216 (1997). The ordinance should be considered as nothing more than an advisory indication of how the voters of that city wish their tax dollars to be spent; it cannot be binding law. If it is the continuing desire of the citizens of North Little Rock that their city police and fire personnel be paid the same as their counterparts in Little Rock, they need only voice such desires to their elected council members. The council members, in turn, could debate the feasibility of the request, exercising their judgments in the best interest of both the city and its residents. Likewise, if those citizens are unhappy with the individual performances of the council members, their remedy is to voice their disapproval at the polls by voting for candidates who share their views; they have no recourse to ensure such a measure from the referendum procedure established by Amendment 7. I would thus affirm the trial court's ruling, as it reached the right result, even though it may have been for a different reason. *See Calcagno v. Shelter Mut. Ins. Co.*, 330 Ark. 802, 957 S.W.2d 700 (1997).

332 Ark. 270, 278, 965 S.W.2d 103, 108 (1998). Likewise, "[i]t is fundamental that a city's legislative power cannot be delegated to a committee or an administrative body . . . Nor can the city directors delegate or bargain away their legislative authority." *Czech v. Baer*, 283 Ark. 457, 460, 677 S.W.2d 833, 835 (1984). The constitutional authority of local governments cannot be stripped away through delegation or initiative, which is precisely what the ordinance does.

The ordinance unlawfully withdraws the Quorum Court's and County Judge's authority to issue a letter of support. In addition to this, the election requirement is an additional requirement

not imposed or authorized by Amendment 100 or an act of the General Assembly, and therefore in conflict with existing state law and is, thus, invalid. Had Amendment 100 intended for local elections to be called on the issue or for counties to be able to impose their own rules, it would have certainly stated so. But it did not, and instead entrusted to local officials the matter of local approval, and it provided the Arkansas Racing Commission with sole authority to promulgate rules to carry out the purposes of the Amendment. As the ordinance pertains to the subject matter covered by Amendment 100, impairs the Commission's specific authority, and abrogates county officials' authority, it is null and void. Accordingly, Plaintiff's complaint seeking to enforce the ordinance should be dismissed.

*B. The Ordinance Is Not Binding On The Arkansas Racing Commission*

The Plaintiffs' claims stand for the notion that a local ordinance can be binding upon a state commission created by the Arkansas Constitution. That is incorrect. In *Ark. Dept. of Comm. Correction v. City of Pine Bluff*, the Arkansas Supreme Court was presented the issue of sovereign immunity as it pertains to city ordinances being enforced against state agencies and reasoned:

Section 16-93-1603 assigns to the Board the responsibility to promulgate rules that "set minimum standards for all transitional housing facilities in the State of Arkansas," and directs that those standards must include, among other things, "[c]ompliance with any local zoning ordinances." Ark. Code Ann. § 16-93-1603(a), (c)(2). The purpose of the statute is not, as the City asserts, to give the City the power to enforce its zoning regulations. Rather, the purpose of the statute is to set out the authority and obligations of the Board. Section 16-93-1604(a) (Supp.2011) provides that DCC "shall implement the rules described in section 16-93-1603," and section 16-93-1604(b)(1) provides that DCC "shall be responsible for the enforcement of the rules" established by the Board under section 16-93-1603. In other words, the legislature specifically provided in 16-93-1604(b)(1) that the entity responsible for the enforcement of compliance with a municipality's zoning ordinance was not the municipality, but DCC, a state agency. We find nothing in the statutory scheme that indicates a legislative intent to waive sovereign immunity.

*Ark. Dept. of Comm. Correction v. City of Pine Bluff*, 2013 Ark. 36, 8, 425 S.W.3d 731, 736.

Similarly, there is nothing in Amendment 100 directing the Arkansas Racing Commission to follow local ordinances. Amendment 100 grants the Arkansas Racing Commission the authority to promulgate rules and enforce Amendment 100. It grants no such authority to the counties or the counties' electorate. As such, the Ordinance is null and void as to the Arkansas Racing Commission.

C. The Resolution Cannot Be Invalidated

A resolution, pursuant to Arkansas law, is nothing more than expression of quorum court policy and opinion. As stated by Ark. Code Ann. § 14-14-904(j), "[a] county resolution is defined as the adoption of a formal statement of policy by a quorum court, the subject matter of which would not properly constitute an ordinance. A resolution may be used whenever the quorum court wishes merely to express an opinion as to some matter of county affairs, and a resolution shall not serve to compel any executive action."

Thus, a resolution has no legal significance unless otherwise afforded authority by Arkansas statute or the Arkansas Constitution. Simply stated, as a resolution is generally not binding, there is nothing to void. In this case, the resolution has legal significance only because Amendment 100 affords it constitutional significance. Plaintiff's requested relief to void the resolution stands to reason that a county ordinance is somehow superior to Amendment 100. That argument, for the reasons stated above, is flawed and cannot stand.

### III. CONCLUSION

Plaintiffs rely on an ordinance which is invalid for numerous reasons. The ordinance contradicts Amendment 100 and unlawfully abrogates the Arkansas Racing Commission's and county officials' authority. Further, the ordinance is not binding on the Arkansas Racing Commission, as a county ordinance cannot be supreme to the constitutional authority of the

Arkansas Racing Commission. For these reasons, Intervenor requests this Court dismiss Plaintiff's Complaint.

WHEREFORE, the Intervenor prays that this Court grant its Motion to Dismiss; for attorney's fees and costs; and for all other proper relief.

RESPECTFULLY SUBMITTED,

BART CALHOUN  
SCOTT RICHARDSON  
DUSTIN McDANIEL  
Attorneys for Intervenor

By:

\_\_\_\_\_  
Bart W. Calhoun, Ark. Bar No. 2011221  
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[bcalhoun@mrcfirm.com](mailto:bcalhoun@mrcfirm.com)  
[scott@mrcfirm.com](mailto:scott@mrcfirm.com)

**CERTIFICATE OF SERVICE**

I, Bart W. Calhoun, hereby certify that a copy of the foregoing has, on this 23rd day of August, 2019, been served, unless otherwise indicated, by regular first class mail, on the following persons:

Travis Story  
Story Law Firm, PLLC  
438 E. Millsap Road, Ste. 103  
Fayetteville, AR 72703

\_\_\_\_\_  
Bart W. Calhoun



IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS,  
AT RUSSELLVILLE

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

PLAINTIFFS

v.

Case No. 58CV-19-439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas; and  
PHILLIP HANEY, CALEB MOORE,  
TIM WHITTENBURG, REUBEN BROWN,  
JACKIE HEFLIN, JAMIE JACKSON,  
BLAKE TARPLEY, DOUG SKELTON,  
BILL SPARKS, JAMES KUSTURIN,  
RAY BLACK, JOSEPH PEARSON and  
ERNIE ENCHMAYER, in their  
official capacities as members of the  
Quorum Court of Pope County, Arkansas,

DEFENDANTS

POPE CO. CIRCUIT CLERK  
FILED  
TIME: 9:57  
DATE: 9/4/2019  
*Paul D. Story*

AMENDED VERIFIED PETITION FOR DECLARATORY JUDGMENT AND  
FOR WRIT OF MANDAMUS

COMES NOW, the Plaintiffs, by and through undersigned counsel, pursuant to A.C.A. §  
16-111-101 et seq. and Rule 57 of the Arkansas Rules of Civil Procedure, and in support of their  
Amended Petition for Declaratory Judgment, state and allege as follows:

INTRODUCTION

1. That Plaintiff, CITIZENS FOR A BETTER POPE COUNTY, is a registered Local  
Option Ballot Question Committee consisting of residents of Pope County, Arkansas who was  
the Sponsor of the local initiated act which is now codified as Pope County Ordinance 2018-O-  
42.
2. That Plaintiff JAMES KNIGHT is a tax payer and resident of Pope County, Arkansas.
3. That Defendant BEN CROSS is the duly elected County Judge of Pope County,  
Arkansas and is a resident of Pope County, Arkansas.

4. That Defendant PHILLIP HANEY is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
5. That Defendant CALEB MOORE is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
6. That Defendant TIM WHITTENBURG is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
7. That Defendant REUBEN BROWN is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
8. That Defendant JACKIE HEFLIN is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
9. That Defendant JAMIE JACKSON is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
10. That Defendant BLAKE TARPLEY is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
11. That Defendant DOUG SKELTON is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
12. That Defendant BILL SPARKS is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
13. That Defendant JAMES KUSTURIN is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
14. That Defendant RAY BLACK is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.

15. That Defendant JOSEPH PEARSON is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.

16. That Defendant ERNIE ENCHELMAYER is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.

17. That jurisdiction and venue are proper in Pope County, Arkansas.

#### FACTUAL BACKGROUND

18. That in the November, 2018 general elections, the citizens of Arkansas passed Issue 4, codified as Amendment 100 to the Constitution of the State of Arkansas, in a statewide election that authorized casinos and casino gaming in the State of Arkansas.

19. That Amendment 100 states that the Arkansas Racing Commission is authorized to issue four (4) casino licenses, one for a facility to be located in Pope County, Arkansas.

20. That Amendment 100, by dictating that the Arkansas Racing Commission is to set aside Pope County as the location for a casino, conflicts and cannot be harmonized with existing Arkansas Constitutional Amendment 14 that prohibits special or local acts, regardless of whether such measure is initiated by legislation or constitutional mandate.

21. That in setting aside Pope County from the rest of the State of Arkansas for the possible location of a casino, Amendment 100 is an amendment of local or special effect that was rejected by the voters of Pope County in the 2018 general election.

22. That as reported by the Arkansas Secretary of State, Official Results of the vote totals for Issue 4 in Pope County registered as 39.42% in favor, and 60.58% against.

23. That Amendment 100 requires, prior to the issuance of a casino license to a casino applicant for a casino to be located in Pope County, that the applicant submit a letter of support from the County Judge or a resolution of the Pope County Quorum Court.

24. That during said November 2018 general election, the residents of Pope County approved an initiative measure for local control over the issuance of county approval of a casino applicant by a vote total of 70% in favor to 30% opposed, entitled the Pope County Local Control for Casino Gaming Amendment of 2018, codified as Pope County Ordinance No. 2018-O-42, a copy of said ordinance attached hereto as Exhibit A and incorporated herein by reference.

25. That Ordinance No. 2018-O-42 established a condition precedent to Amendment 100, or any other state law, prior to the issuance of a letter of support by the County Judge or a resolution by the Quorum Court for a Casino or a Casino Applicant "without first referring the question as the issuance of support of a Casino or Casino Applicant to a local election, at either a general election or special election, where . . . a majority of the registered voters of Pope County must approve . . ."

26. That there is no conflicting language in Amendment 100 that would prohibit the reservation of local control as the voters of Pope County reserved to themselves by passage of Ordinance 2018-O-42.

27. That the intent of Amendment 100, as evidenced by the requirement of said letter or support or resolution in favor, is to maintain local control over the issue of whether a casino is to be constructed in Pope County. As expressed by Nate Steel, counsel for Driving Arkansas Forward, a ballot question committee that sponsored Amendment 100 and who took part in the drafting of said amendment, "this amendment, unlike any other, is 100% local control." Talk, Business & Politics on YouTube, 1/9/18, <https://www.youtube.com/watch?v=-NBpcz38fTWo>, at 1:16.

28. That the expressed criteria for the proposed location of a casino in Pope County was based on consideration of population and economic prosperity of the county as established by the statutory tier rating system of the Arkansas Economic Development Council ("AEDC"). On a economic prosperity scale of 1 to 4, 1 being the highest, Pope County is Tier 2, while other counties of similar population in Arkansas are rated Tier 3 or Tier 4. Talk, Business & Politics on YouTube, 1/9/18, <https://www.youtube.com/watch?v=NBpez38fTW0>, at 3:49.

29. That, as evidenced by the results of the 2018 popular vote on both Issue 4 and Ordinance 2018-O-42 and the AEDC tier rating system, Pope County has been arbitrarily selected as the potential site for a casino as it does not reasonable relate to the expressed criteria for the selection process, and that Pope County neither desires nor is in financial need for a casino to be located there considering there are other less prosperous counties Tier 3 and Tier 4 counties that would conceivably benefit from the purported positive economic impact.

30. That in addressing the enhanced local control measure reserved by the voters of Pope County in November, 2018 through enactment of Ordinance 2018-O-42, Mr. Steel acknowledged and emphasized the consistency of the ordinance with the drafters' intent fundamental to Amendment 100, as distinguished from all previous efforts to legalize casino gambling in the State of Arkansas, in that "in addition to Pope County, for example, there have been ordinances passed locally that say it must pass in Pope County before the Mayor or County Judge could issue a letter of support, and we've said publicly that's fine. We provide for local control in this amendment [100], but we also intended to inspire that kind of discussion on a local level." AFTN, Arkansas Week on YouTube, 10/5/18, <https://youtu.be/zFBsCqPM> I.F., at 4:43.

31. That, therefore, the language of Ordinance 2018-O-42 can be harmonized with the language of Amendment 100, and all other provisions of Arkansas law, and reflects the purpose of Amendment 100 as construed by the drafters.

32. That under the *in pari materia* doctrine of statutory interpretation, two separate provisions of law relating to the same subject should be read in a harmonious manner.

33. That on the 13th day of August, 2019, the Quorum Court of Pope County, Arkansas held a "Special Called Quorum Court Meeting" during which meeting a vote was held on a proposed Resolution 2019-R-014 in support of casino license applicant Cherokee Nation Businesses, LLC/Legends Resort and Casino, LLC to build and operate a casino to be located in Pope County, said Resolution was voted on and passed by majority vote of the Quorum Court, said Resolution is attached hereto as **Exhibit B** and incorporated herein by reference.

34. That the process whereby said resolution was considered in the days and weeks preceding the August 13 special meeting was rife with illegal activity in the form of secret meetings between members of the Pope County Quorum Court and lobbyists representing proposed intervenors, in violation of Arkansas FOIA, A.C.A. § 25-19-101, et seq.

35. That Pope County Ordinance No. 2018-O-42 has been neither amended nor repealed.

36. That neither the County Judge or the Quorum Court of Pope County is vested with the authority to determine whether Ordinance 2018-O-42 is unlawful or unconstitutional, a power reserved by the courts of this State of competent jurisdiction.

37. That said resolution passed by the Pope County Quorum Court and transmitted to the Arkansas Racing Commission, was done while Ordinance 2018-O-42 remains the law of Pope County and is, therefore, an illegal act, representing malfeasance by the County Judge and majority of the Quorum Court of Pope County, Arkansas, is void, and should not be recognized

as the letter of support or resolution required of all casino license applicants contemplated by Amendment 100.

38. On the 15<sup>th</sup> date of August, a purported Casino Applicant presented to the Arkansas Racing Commission what it represented as a valid resolution in support from Pope County in the form of Resolution 2019-R-014, and asked that they be issued the Casino License for Pope County, Arkansas.

39. That on the 15<sup>th</sup> day of August, 2019, without reference to said Applicant, the Arkansas Racing Commission announced the re-opening of the application period for prospective casino applicants for a Casino License to be located in Pope County for a ninety (90) day period.

40. That on information and belief, the 90-day application period begins on Sunday August 18<sup>th</sup>, and runs through November 15<sup>th</sup>, 2019.

41. That for a valid letter of support to be presented to the Arkansas Racing Commission would require a general or special election, but to date the Pope County Quorum Court has not called for an election as required by Ordinance 2018-O-42.

42. That on information and belief, given the Pope County Quorum Court schedule, the Pope County Election Commission Schedule, and Arkansas Election law, the next date for a possible special election would be December 10, 2019.

43. That the soonest a valid letter of support could be delivered to the Arkansas Racing Commission would be twenty-six (26) days after the re-open application period closes on the 15<sup>th</sup> of November, if Ordinance 2018-O-42 is ignored.

44. That during the time it would take to have a vote of the people as required under Ordinance 2018-O-42, the Arkansas Racing Commission could rule that Resolution 2019-R-014,

delivered on August 15, 2019 is valid and under the Arkansas Racing Commission rules which state that the Commission "shall" issue a license if the minimum criteria are met (including a letter from the county officials in Pope County, Arkansas) then they could issue such license.

I. DECLARATORY JUDGMENT THAT AMENDMENT 100 UNCONSTITUTIONALLY CONFLICTS WITH AMENDMENT 14

45. That Plaintiffs restate and incorporate the allegations contained in Paragraphs 1-44 set forth above.

46. That there exists an inherent conflict in the reading of Amendment 100 and Amendment 14 in that Amendment 100 arbitrarily separates the citizens of Pope County and Pope County as a geographic unit and, therefore, can only be read as a local or special act from which the residents of Pope County can reasonably expect to be spared and protected by the guarantees afforded them in Amendment 14, and that it violates the fundamental rights of the citizens of Pope County.

47. That Amendment 100 should be declared unconstitutional in that it violates the fundamental rights of the residents of Pope County as set forth in Amendment 14.

WHEREFORE, Plaintiffs pray for an Order of this Court declaring Amendment 100 as invalid as being in conflict with the inalienable rights afforded Plaintiffs under Amendment 14 of the Arkansas Constitution.

II. DECLARATORY JUDGMENT THAT RESOLUTION 2019-R-014 IS INVALID DUE TO VIOLATION OF ORDINANCE 2018-O-42

48. That Plaintiffs restate and incorporate the allegations contained in Paragraphs 1-47 set forth above.

49. That read harmoniously, Amendment 100 (assuming its validity) and Ordinance 2018-O-42 require all casino applicants for a casino license for a casino to be located in Pope



County to submit either a letter of support from the County Judge or a resolution from the Quorum Court, the issuance of either of which is prohibited without first referring the question to the registered voters of Pope County at a special or general election.

50. That pursuant to A.C.A. § 14-14-904(i), a county ordinance is an enactment of "compulsory law for a quorum court that defines and establishes the permanent or temporary organization and system of principles of county government for the control and conduct of county affairs."

51. That the act on the part of the County Judge of the Quorum Court in passing said Resolution 2019-R-014 was performed in violation of Ordinance 2018-O-42, is void and illegal.

52. That the illegal acts of either the County Judge or the Quorum Court is an exception to the doctrine of sovereign immunity and any member(s) acting in violation of the law can be sued in their individual capacity, is malfeasance and should result in removal from office.

53. That Ordinance 2018-O-42 is not inappropriate or illegal.

54. That Ordinance 2018-O-42 does not conflict with Amendment 100.

55. That, assuming the validity of Amendment 100, both Amendment 100 and Ordinance 2018-O-42 can be read harmoniously.

56. That no letter of support or resolution in favor of a casino applicant may be issued by either the County Judge or Quorum Court of Pope County respectively, without presenting the issue for popular vote to the registered voters of Pope County pursuant to Ordinance 2018-O-42.

57. That Resolution 2019-R-014 should be declared to be of no legal effect and should be recalled or rescinded having been passed without presentation of the issue for popular vote to the registered voters of Pope County pursuant to Ordinance 2018-O-42.

WHEREFORE, the process of considering and passing Pope County Resolution 2019-R-014 having taken place in violation of state and Pope County law, Plaintiffs pray for an Order of this Court declaring Resolution 2019-R-014 legally invalid.

III. DECLARATORY JUDGMENT THAT THE POPE COUNTY JUDGE AND MEMBERS OF THE QUORUM COURT MET IN SECRET IN VIOLATION OF FOIA

58. That Plaintiffs restate and incorporate the allegations contained in Paragraphs 1-57 set forth above.

59. That the process under which the County Judge and Quorum Court considered and drafted Resolution 2019-R-014 was illegal in that it involved secret meetings between the County Judge and members of the Quorum Court and secret meetings between the County Judge, members of the Quorum Court and representatives of prospective casino applicants.

60. That the County Judge and Quorum Court members having engaged in private, illicit meetings to consider provisions of draft Resolution 2019-R-014 with each other, and with representatives of proposed casino applicants, the process resulting in Resolution 2019-R-014 was in direct violation of A.C.A. 25-19-101 et seq., Arkansas FOIA, and as such, Resolution 2019-R-014 is void and should be rescinded.

WHEREFORE, Plaintiffs pray for an Order of this Court mandating that the County Judge or Quorum Court of Pope County rescind Resolution 2019-R-014 for all intents and purposes.

IV. WRIT OF MANDAMUS REQUIRING RESCISSION OF STATEMENT OF SUPPORT SET FORTH IN RESOLUTION 2019-R-014

61. That Plaintiffs restate and incorporate the allegations contained in Paragraphs 1-60 set forth above.

62. That Resolution 2019-R-014, having been passed in violation of Pope County Ordinance 2018-O-42 is of no legal effect.

63. That Resolution 2019-R-014, in that it was the product of illegal meetings between the Pope County Judge, members of the Quorum Court and representatives of potential casino applicants, violated the provisions of Arkansas FOIA and should be rescinded.

64. That by Order of this Court, a letter should be drafted by the County Judge of Pope County and communicated to the Arkansas Racing Commission rescinding Resolution 2019-R-014 as the letter of support or resolution from the quorum court as required by Amendment 100.

WHEREFORE, Plaintiffs pray for an Order of this Court mandating that the County Judge or Quorum Court of Pope County rescind Resolution 2019-R-014 for all intents and purposes.

WHEREFORE, Plaintiffs pray for Orders of this Court declaring that Amendment 100 unconstitutionally conflicts with Amendment 14 of the Arkansas Constitution, that, in the alternative, Pope County Ordinance 2018-O-42 can be read harmoniously with Arkansas Constitutional Amendment 100 such that the County Judge and Quorum Court are to be enjoined from taking any action in their respective official capacities in expressing their approval of a casino applicant without first presenting the issue to the registered voters of Pope County in an election according to the provisions of Pope County Ordinance 2018-O-42, for a writ mandating the rescission of Pope County Resolution 2019-R-014 for the purpose of expressing the support of Pope County officials of an applicant for a license of a casino to be located in Pope County, and for such other and further relief the Court deems just and proper.

Respectfully submitted,  
STORY LAW FIRM, PLLC

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007



ORDINANCE NO. 2018-O-42

BE IT ENACTED BY THE QUORUM COURT OF THE COUNTY OF POPE, STATE OF ARKANSAS; AN ORDINANCE TO BE ENTITLED: "AN ORDINANCE AMENDING POPE COUNTY'S CODE OF ORDINANCES TO ADD AN AMENDMENT PROHIBITING ELECTED OFFICIALS FROM PROVIDING REQUIRED DOCUMENTATION ON BEHALF OF A CASINO APPLICANT APPLYING FOR A CASINO LICENSE WITHIN POPE COUNTY, ARKANSAS WITHOUT A VOTE OF THE PEOPLE AT EITHER A GENERAL ELECTION OR SPECIAL ELECTION AUTHORIZING THE PUBLIC OFFICIAL OR OFFICIALS TO TAKE SUCH ACTION."

SECTION 1: The Code of Ordinances, Pope County, Arkansas, is amended by adding a section (article, etc.) to read as follows:

§ 1.1 Short Title. This Amendment shall be known as the "Pope County Local Control for Casino Gaming Amendment of 2018."

§ 2.1 Definitions. For the purposes of this Amendment, the terms below are defined as follows:

(a) "Casino" shall be defined as a facility where casino gaming is conducted as authorized by any Arkansas law or constitutional amendment.

(b) "Casino Applicant" is defined as any individual, corporation, partnership, association, trust, limited liability company or other entity applying for a license to operate a facility where casino gaming is conducted as authorized by Arkansas law or constitutional amendment.

(c) "Casino Gaming" is defined as dealing, operating, carrying on, conducting, maintaining, or exposing for play any game played with cards, dice, equipment, or any mechanical, electromechanical, or electronic device or machine for money, property, checks, credit, or any representative value. If and when not prohibited by federal law, casino gaming shall also be defined to include accepting wagers on sporting events.

(d) "County Judge" is defined as the individual who is duly elected or appointed to serve as the County Judge for Pope County, Arkansas.

(e) "Quorum Court" is defined as the body of duly elected justices of the peace who make up the Pope County, Arkansas Quorum Court.

§3.1 Restriction on the County Judge until authorized by a Vote of the People. The County Judge shall be prohibited from issuing a Letter of Support or substantially giving similar approval or support for a Casino Applicant who is applying to the Arkansas Racing Commission, or other governing authority, for a license to conduct Casino Gaming at a casino to be located within Pope County, Arkansas without first referring the question as to the issuance of support of a Casino or Casino Applicant to a local election, at either a general election or special election, where in order for the County Judge to issue any such support letter or similar, a majority of the registered voters of Pope County, Arkansas must approve and authorize the County Judge to take such action.

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008

**§3.2 Restriction on the Quorum Court until authorized by a Vote of the People.** The Quorum Court shall be prohibited from passing any resolution giving approval or support for a Casino Applicant who is applying to the Arkansas Racing Commission, or other governing authority, for a license to conduct Casino Gaming at a casino to be located within Pope County, Arkansas without first referring the question as to the issuance of such a resolution in support of a Casino or Casino Applicant to a local election, at either a general election or special election, where in order for the Quorum Court to issue any resolution or similar, a majority of the registered voters of Pope County, Arkansas must approve and authorize the Quorum Court to take such action.

**§4.1 Severability.** If any section of this Amendment or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application of this Amendment that can be given effect without the invalid provision or applications, and to this end, the provisions of this amendment are declared to be severable.

**SECTION 2: Effective Date:** this Amendment shall be effective on and after November 14, 2018.

DATE: \_\_\_\_\_

APPROVED:

\_\_\_\_\_  
JIM ED GIBSON, COUNTY JUDGE  
DATE SIGNED: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
LAURA MCGUIRE, COUNTY CLERK

VOTES FOR: \_\_\_\_\_ VOTES AGAINST: \_\_\_\_\_  
ABSTAIN: \_\_\_\_\_ PRESENT: \_\_\_\_\_ ABSENT: \_\_\_\_\_

ADOPTED BY THE ELECTORS OF POPE COUNTY PER ACA § 14-14-917 (g) AT THE NOVEMBER 6, 2018 GENERAL ELECTION AND NONPARTISAN JUDICIAL RUNOFF.

# OF REGISTERED VOTERS AS OF NOVEMBER 5, 2018: 34,481  
FOR: 12,209  
AGAINST: 5728

EFFECTIVE ON AND AFTER NOVEMBER 14, 2018 AS SET OUT IN SECTION 2 OF THIS ORDINANCE.

08/23/2019 PRI 16:11 FAX

009



RESOLUTION NO. 2019-R-014

"BE IT RESOLVED BY THE QUORUM COURT OF THE COUNTY OF POPE, STATE OF ARKANSAS THAT: A RESOLUTION IN SUPPORT OF CHEROKEE NATION BUSINESSES, LLC/LEGENDS RESORT AND CASINO, LLC (COLLECTIVELY "CNB") CASINO LICENSE APPLICATION"

WHEREAS, we the Pope County Quorum Court have considered the qualifications and suitability of five potential casino operators to establish a facility in Pope County, giving specific attention to public safety, public benefit, business integrity, entertainment amenities and long-term commitment to community partnership; and

WHEREAS, The County Judge has executed an Economic Development Agreement with CNB that establishes significant commitments to the benefit of Pope County; We thank the County Judge for the leadership and judgment he has demonstrated in selecting the proposal and operator best suited for Pope County and negotiating the most favorable terms possible in the Agreement,

NOW THEREFORE BE IT RESOLVED that the Pope County Quorum Court grants and expresses its support for a casino license application to be submitted by the Cherokee Nation Businesses, LLC/Legends Resort and Casino, LLC to build and operate the Legends Resort and Casino in Pope County, Arkansas.

DATE: 8-13-19

APPROVED:

[Signature]

BEN D. CROSS, COUNTY JUDGE

DATE SIGNED: 8/13/2019

@ 7:25 P.M.

ATTEST:

Pam Ennis  
PAM ENNIS, COUNTY CLERK

VOTES FOR: 8 VOTES AGAINST: 4  
ABSTAIN: 1 PRESENT: 13 ABSENT: 0

A-335

FILED  
POPE CO. CIRCUIT CLERK  
TIME: 2:36 PM  
DATE: 9-24-19  
*[Signature]*

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS,  
CIVIL DIVISION (I)

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

PLAINTIFFS

Vs.

Case No. 58CV-19-439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas, et al.

DEFENDANTS

**DEFENDANTS' MOTION TO DISMISS**

Comes now, Defendants, Ben Cross, in his official capacity as County Judge of Pope County, Arkansas and Phillip Haney, Caleb Moore, Tim Whittenburg, Reuben Brown, Jackie Heflin, Jamie Jackson, Blake Tarpley, Doug Skelton, Bill Sparks, James Kusturin, Ray Black, Joseph Pearson and Ernie Enchelmayer, in their official capacities as members of the Quorum Court of Pope County, Arkansas (collectively "Defendants"), and for their Motion to Dismiss the Amended Verified Petition for Declaratory Judgment and for Writ of Mandamus ("Amended Petition"), state and allege:

1. Pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure, Defendants move to dismiss Plaintiffs' Amended Verified.

2. Plaintiffs' Amended Petition asserts the following counts:

Count I – Declaratory Judgment that Ark. Const. Amendment 100 unconstitutionally conflicts with Ark. Const. Amendment 14;

Count II – Declaratory Judgment that Resolution No. 2019-R-014 is invalid due to

violation of Ordinance No. 2018-0-42;

Count III – Declaratory Judgment that the Pope County Judge and members of the Quorum Court met in secret in violation of the Arkansas Freedom of Information Act (“FOIA”); and,

Count IV – Writ of Mandamus requiring rescission of statement of support set forth in Resolution No. 2019-R-014.

3. The request of Plaintiffs for declaratory judgment that Amendment 100 of the Arkansas Constitution is unconstitutional (Amended Petition, paras. 45-46 (Count I)) fails. The voters of Arkansas lawfully adopted Amendment 100 in the 2018 general election. Amendment 14 of the Arkansas Constitution has no applicability to Amendment 100. However, if Amendment 100 conflicts with Amendment 14, the provisions of Amendment 100 prevail. Tindall v. Searan, 192 Ark. 173, 90 S.W.2d 476 (1936).

4. Plaintiffs’ request for declaratory judgment finding Resolution No. 2019-R-014 invalid (Count II) and its request for writ of mandamus (Count IV) rest on the constitutionality of Ordinance No. 2018-O-42 (“Subject Ordinance”). See Amended Petition, paras. 53-57 & 62. The Subject Ordinance is unconstitutional due to the following: (1) the Subject Ordinance contradicts Amendment 100 of the Arkansas Constitution in violation of Article 5, § 1 of the Arkansas Constitution; (2) the Subject Ordinance improperly infringes on and attempts to abrogate the constitutional authority of the Pope County Judge and Quorum Court of Pope County; and, (3) the Subject Ordinance is prohibited by Ark. Code Ann. § 14-14-806 (Repl. 2013). Because the Subject Ordinance is unconstitutional and invalid, Plaintiffs’ request for declaratory judgment finding Resolution No. 2019-R-014 invalid and their request for a writ of



mandamus should be dismissed pursuant to Rule 12(b)(6). In addition, Plaintiffs have adequate remedies available and, therefore, they are not entitled to a writ of mandamus.

5. Plaintiffs' claim asserting that Pope County officials violated the FOIA (Amended Petition, paras. 58-60 (Count IV)) fails to plead sufficient facts to entitle Plaintiffs to the relief requested. Rule 8(a) of the Arkansas Rules of Civil Procedure require such facts to be pled. Moreover, Plaintiffs' requested relief – rescission of Resolution 2019-R-014 – is not an appropriate remedy for such purported FOIA violation. Plaintiffs' declaratory judgment request relative to a purported FOIA violation must be dismissed.

6. This Motion is based on all matters of record and the attached exhibits:

Exhibit "1" – Resolution No. 2019-R-014; and,

Exhibit "2" – Ordinance No. 2018-O-42.

A memorandum brief in support of this Motion is filed contemporaneously herewith.

WHEREFORE, Defendants, Ben Cross, in his official capacity as County Judge of Pope County, Arkansas and Phillip Haney, Caleb Moore, Tim Whittenburg, Reuben Brown, Jackie Heflin, Jamie Jackson, Blake Tarpley, Doug Skelton, Bill Sparks, James Kusturin, Ray Black, Joseph Pearson and Ernie Enchelmayer, in their official capacities as members of the Quorum Court of Pope County, Arkansas request that their Motion to Dismiss be granted, for their reasonable costs and attorney's fees, and for all other proper relief to which they may be entitled.

BEN CROSS, in his official capacity as  
County Judge of Pope County, Arkansas;  
and PHILLIP HANEY, CALEB MOORE,  
TIM WHITTENBURG, REUBEN  
BROWN, JACKIE HEFLIN, JAMIE  
JACKSON, BLAKE TARPLEY, DOUG  
SKELTON, BILL SPARKS, JAMES

FILED  
POPE CO. CIRCUIT CLERK  
TIME: 2:58 p.m.  
DATE: 9/24/19  
*[Signature]*

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS,  
CIVIL DIVISION (I)

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

PLAINTIFFS

Vs. Case No. 58CV-19-439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas, et al.

DEFENDANTS

**MEMORANDUM BRIEF IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION

On August 13, 2019, Plaintiffs, Citizens for a Better Pope County, a local option ballot question committee, and James Knight, in his individual capacity (collectively "Plaintiffs") initiated this action by filing their Verified Petition for Declaratory Judgment against Defendants, Ben Cross, in his official capacity as County Judge of Pope County, Arkansas and Phillip Haney, Caleb Moore, Tim Whittenburg, Reuben Brown, Jackie Heflin, Jamie Jackson, Blake Tarpley, Doug Skelton, Bill Sparks, James Kusturin, Ray Black, Joseph Pearson and Ernie Enchelmayer, in their official capacities as members of the Quorum Court of Pope County, Arkansas (collectively "Defendants"). On September 4, 2019, Plaintiffs filed their Amended Petition for Declaratory Judgment and for Writ of Mandamus ("Amended Petition"). Plaintiffs' Amended Petition seeks or asserts: (1) declaratory judgment finding Amendment 100 of the Arkansas Constitution unconstitutional (Amended Petition, paras. 45-47); (2) declaratory judgment finding

Resolution No. 2019-R-014 (hereinafter "Subject Resolution" or "Resolution"), enacted by the Pope County Quorum Court on August 13, 2019, invalid (Id. at paras. 48-57); (3) a violation of the Arkansas Freedom of Information Act ("FOIA") by the Pope County Judge and members of the Pope County Quorum Court and requests the Court enter an order mandating Defendants rescind the Subject Resolution (Id. at paras. 58-60); and, (4) a writ of mandamus directing the Defendants rescind the Resolution (Id. at paras. 61-64).

For the reasons set forth below, the Amended Petition fails to set forth sufficient facts demonstrating that Plaintiffs are entitled to the relief requested therein. The Amended Petition should be dismissed pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure.

#### I. STANDARD OF REVIEW

Arkansas has adopted a clear standard requiring fact pleading in a complaint: "a pleading which sets forth a claim for relief. . . shall contain (1) a statement in the ordinary and concise language of facts showing that the pleader is entitled to relief . . ." Ark. R. Civ. P. 8(a)(1). Rule 12(b)(6) provides for the dismissal of a complaint for "failure to state facts upon which relief can be granted." Hollingsworth v. First Nat'l Bank & Trust Co., 311 Ark. 637, 639, 846 S.W.2d 176 (1993). These rules must be read together and require that facts, and not mere conclusions, must be alleged. Id. (citing Rabalais v. Barnett, 284 Ark. 527, 683 S.W.2d 919 (1985)).

In deciding a 12(b)(6) motion, the trial court treats the facts alleged in the complaint as true and views them in a light most favorable to the plaintiff. Dockery v. Morgan, 2011 Ark. 94, at 6, 380 S.W.3d 377 (citing McNeil v. Weiss, 2011 Ark. 46, 378 S.W.3d 133). The above rules of civil procedure require fact pleading and a complaint must state facts, not mere conclusions, in order to entitle the plaintiff to the relief sought. Travelers Cas. & Sur. Co. v. Arkansas State

Hwy. Comm'n, 353 Ark. 721, 726, 120 S.W.3d 50 (2003). The Court should “treat only the facts alleged in the complaint as true but not the plaintiff’s theories, speculation, or statutory interpretation.” Dockery, 2011 Ark. 94, at 6. As such, Defendants’ challenges to Plaintiffs’ legal conclusions asserted in the Amended Petition do not preclude the Court from granting Defendants’ Motion to Dismiss.

**II. PLAINTIFFS’ REQUEST FOR DECLARATORY JUDGMENT FINDING  
AMENDMENT 100 UNCONSTITUTIONAL FAILS AND SHOULD BE DISMISSED.**

In Count I of the Amended Petition (paras. 45-47), Plaintiffs ask that the Court declare Amendment 100 of the Arkansas Constitution (“Amendment 100”) unconstitutional because it violates the 14th Amendment of the Arkansas Constitution (“Amendment 14”). There is no conflict between those amendments because Amendment 14 is not applicable to a constitutional amendment – it is only a prohibition as to special or local legislation passed by the General Assembly. Assuming Amendment 14 could prohibit a constitutional amendment like Amendment 100, and assuming there is a conflict between the two amendments, Amendment 100 controls and Plaintiffs’ claim should be dismissed.

Amendment 14 provides that “[t]he General Assembly shall not pass any local or special act.” (Emphasis Added). This constitutional provision prohibits only the legislature from enacting local or special legislation. See Board of Trustees v. City of Little Rock, 295 Ark. 585, 589, 750 S.W.2d 950 (1988) (“Amendment 14 prohibits the general assembly from passing local or special acts.”); see also Rooker v. City of Little Rock, 234 Ark. 372, 375, 352 S.W.2d 172 (1961) (“Amendment 14 is a restriction on the General Assembly . . .”). In light of Amendment 14, special or local acts may only be adopted by the voters pursuant to the provisions of Art. 5, §

1 of the Arkansas Constitution. See Tindall v. Searan, 192 Ark. 173, 177, 90 S.W.2d 476 (1936) (“[T]here is no possible way to pass a local act except under the provisions of the Initiative and Referendum Amendment [incorporated in Ark. Const., Art. 5, § 1].”).

Regarding Amendment 14, the Arkansas Supreme Court has stated:

The language of the Amendment is plain and unambiguous, and its meaning clear, disclosing the intention of the people in adopting it, and dispensing with the necessity of seeking other aids for its interpretation. The restrictive provisions of the Constitution on the legislative power relative to the passage of local or special legislation, leaving its exercise to the discretion of the Legislature, had been so disregarded and abused as to create an intolerable condition. Numerous measures were enacted in all sessions of the General Assembly, general in their terms and nature, and from the operation of which from one or more of the counties of the State were excepted, and this amendment was adopted to remedy the evil, and the power of the General Assembly to enact local or special legislation was withdrawn, the General Assembly being prohibited by its terms from passing any local or special act.

Webb v. Adams, 180 Ark. 713, 715-16, 23 S.W.2d 617 (1929). Plaintiffs’ bald, unsupported legal conclusion that “Amendment 14 prohibits special or local acts, regardless of whether such measure is initiated by legislation or constitutional mandate” (Amended Petition, para. 20)(emphasis added) is legally incorrect, as shown by the above authorities.

“[T]he mandate of the people prohibiting local and special legislation as found in the 14th Amendment” (Board of Trustees v. Beard, 273 Ark. 423, 424, 620 S.W.2d 295 (1981)) has no bearing on Amendment 100 because Amendment 100 is not an act or legislation passed by the General Assembly. Amendment 100 is not prohibited by Amendment 14 because the former is a constitutional amendment which was proposed by initiated petition and adopted by the voters of Arkansas in the 2018 general election. Amendment 14 has no application to Amendment 100 and, therefore, there is no conflict between those amendments. Plaintiffs’ request for the Court to declare Amendment 100 unconstitutional should be dismissed.

Accepting, arguendo, Plaintiffs' legal conclusion that the prohibition of special or local acts in Amendment 14 applies "regardless of whether such measure is initiated by legislation or constitutional mandate" (Amended Petition, para. 20) and accepting as true that there is a conflict between Amendments 14 and 100, the claim asserted by Plaintiffs should still be dismissed. If Amendment 100 conflicts with Amendment 14, the provisions of Amendment 100 "must prevail" since it was adopted after Amendment 14. See Tindall, 192 Ark. at 180 ("The Initiative and Referendum Amendment, like all other amendments, must be construed together with the provisions of the Constitution before its adoption. If the amendment is in conflict with a provision of the Constitution, the amendment must prevail."). Even without the authority of Tindall, it should be axiomatic that the passage of a constitutional provision which is in conflict with a previous constitutional provision necessarily prevails over the former provision. Plaintiffs' claim alleging Amendment 100 as unconstitutional should be dismissed pursuant to Rule 12(b)(6).

III. BECAUSE ORDINANCE NO. 2018-O-42 IS UNCONSTITUTIONAL,  
PLAINTIFFS' REQUEST FOR A FINDING THAT RESOLUTION NO.  
2019-R-014 IS INVALID AND THEIR REQUEST FOR A WRIT OF  
MANDAMUS FAIL TO STATE A CLAIM AND SHOULD BE DISMISSED.

Plaintiffs assert that the Subject Resolution (attached as Exhibit "1" to Defendant's Motion to Dismiss) is illegal because it was passed without the Pope County Judge or Quorum Court following the procedure set forth in Ordinance 2018-O-42 (hereinafter "Subject Ordinance" or "Ordinance") (attached as Exhibit "2" to Defendant's Motion to Dismiss) – namely, referring the question as to the issuance of a letter or resolution of support of a casino applicant to a local election. Amended Petition, para. 57. As such, Plaintiffs ask the Court to

“declar[e] Resolution 2019-R-014 legally invalid.” *Id.* at first prayer clause on page 10.

Similarly to the above assertion, Plaintiffs seek an order of the Court “mandating that the County Judge or Quorum Court of Pope County rescind” (*id.* at first prayer clause on page 11) the Resolution because it was “passed in violation of” the Ordinance. *Id.* at para. 62. Plaintiffs’ request to declare the Resolution invalid (Count II of Amended Petition) and request for a writ of mandamus (Count IV of Amended Petition) rest upon the presumed validity and constitutionality of the Subject Ordinance.<sup>1</sup>

Because the Subject Ordinance is invalid and unconstitutional, Plaintiffs’ requested declaratory judgment and mandamus relative to the Subject Resolution must be dismissed.

- A. The Subject Ordinance is unconstitutional because it contradicts Amendment 100 of the Arkansas Constitution in violation of Article 5, § 1 of the Arkansas Constitution and because it infringes upon and seeks to abrogate the constitutional authority of the Pope County Judge and Quorum Court.

Article 5, § 1 of the Arkansas Constitution states that “[t]he legislative power of the people of this state shall be vested in the General Assembly, which shall consist of the Senate and House of Representatives, but the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly. . . .” Continuing, that constitutional section further provides that “the initiative and referendum powers of the people are hereby further reserved to the legal voters of each municipality and county as to all local, special and municipal

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<sup>1</sup> Plaintiffs assert that the alleged violation of the FOIA as an additional basis for their request for mandamus. Amended Petition, para. 63. In section V(B) below, Defendants address why any alleged violation of the FOIA does not provide a basis for the mandamus request.

legislation every character in and for their respective municipalities and counties, but no local legislation shall be enacted contrary to the Constitution or any general law of the state, and any general law shall have the effect of repealing any local legislation which is in conflict therewith." (Emphasis Added).

Pursuant to the above provision of Article 5, § 1, county voters cannot amend the Arkansas Constitution or state law through a county election. Moreover, Ark. Code Ann. § 14-14-914(b) (Repl. 2013) states that "[n]o county legislative measure shall be enacted contrary to the Arkansas Constitution or any general state law which operates uniformly throughout the state, and any general law of the state shall have the effect of repealing any county ordinance which is in conflict therewith." The Arkansas Supreme Court has reaffirmed both provisions stating the "well-established rule is that an initiated ordinance that is contrary to state law on its face should not be certified for inclusion on the ballot." Stilley v. Makris, 343 Ark. 673, 678, 38 S.W.3d 889 (2001) (finding that the initiated petition conflicted with numerous statutory provisions for the sale of county property) (internal citations omitted); see also Cox v. Commissioners of Maynard Fire Imp. Dist. No. 1, 287 Ark. 173, 175, 697 S.W.2d 104 (1985) ("No county is authorized to pass an ordinance contrary to the general law of the State.").

Amendment 100 requires the Arkansas Racing Commission to "issue four casino licenses," one of which "shall [be] award[ed] . . . to a casino applicant for a casino to be located in Pope County . . ." Ark. Const. Amend. 100, §§ 4(i) & (k). Further, the amendment states that "[t]he Arkansas Racing Commission shall require all casino applicants for a casino license in Pope County and Jefferson County to submit either a letter of support from the county judge or a resolution from the quorum court in the county where the proposed casino is to be located . . ."



Id. at § 4(n). Continuing, Amendment 100 confers responsibility on the Arkansas Racing Commission to adopt rules to carry out its purpose and to administer the issuance of a casino license. Id. at § 4(c). Amendment 100 specifically requires the Arkansas Racing Commission to adopt rules governing “the manner in which [it] considers applications for issuance of casino licenses.” Id. at § 4(e)(2). The Amendment directs the Arkansas General Assembly to enact laws and appropriate money to fulfill its purposes. Id. at § 3(c).

The Subject Ordinance unconstitutionally imposes an additional requirement to Amendment 100 relative to the issuance of a letter or resolution of support to a casino applicant. Nothing contained within Amendment 100 purports to grant the electorate of Pope County the authority to determine whether a casino applicant may be issued a letter or resolution of support. Because the Ordinance is in conflict with Amendment 100, it is unconstitutional and was repealed by Amendment 100 upon the Amendment’s adoption. See Ark. Const. Art. 5, § 1.

Amendment 100 granted discretion to two specific offices to decide whether to issue letters or resolutions of support to a casino applicant in Pope County – the office of the Pope County Judge and the Pope County Quorum Court. Ark. Const. Amend. 100, § 4(n). There is nothing contained within Amendment 100 or the Arkansas Code which grants counties or their voters the authority to place restrictions on the Pope County Judge and Quorum Court’s authority to issue letters or resolutions of support to casino applicants. By the purported enactment of the Ordinance, the Pope County electors have sought to change Amendment 100 so that neither the Pope County Judge nor Quorum Court may issue a letter or resolution of support to a casino applicant unless “approve[d] and authorize[d]” by a “majority of the registered voters of Pope County . . . .” See Subject Ordinance §§ 3.1 & 3.2 (Motion Exhibit “2”). The Ordinance is a

“[r]estriction” (see headings of §§ 3.1 & 3.2 of the Subject Ordinance) on the Pope County Judge and Quorum Court’s constitutionally granted authority to determine, in their sole discretion as Pope County Judge or members of the Quorum Court, whether and to whom to issue a letter or resolution of support. Because the Subject Ordinance requires the voters’ approval before a letter/resolution of support is issued, the Ordinance attempts to grant to the voters of Pope County the ability to determine not only if a letter of support is issued, but also control over which potential casino applicant may be supported by the Pope County Judge or Quorum Court.

In direct contravention of Amendment 100, the Subject Ordinance wholly eviscerates the Constitution’s requirement that the Pope County Judge or Quorum Court decide, in their sole discretion, when, how and who to support as a casino applicant. The Subject Ordinance attempts to abrogate these officials’ authority and unconstitutionally attempts to vest same in the electorate of Pope County. As such, the Ordinance is unconstitutional and was invalid upon purported passage. See Allred v. McLoud, 343 Ark. 35, 40, 31 S.W.3d 836 (2000) (holding that local legislation is invalid if “county initiative is at odds with the general law of this state”).

“It is fundamental that a city’s legislative power cannot be delegated to a committee or an administrative body. Nor can the city directors delegate or bargain away their legislative authority.” Czech v. Baer, 283 Ark. 457, 460, 677 S.W.2d 833 (1984) (internal citation omitted). The constitutional authority of local governments cannot be stripped away through delegation or initiative, as was attempted by the Ordinance. As explained above, the Subject Ordinance attempts to unlawfully divest the Pope County Judge’s and Quorum Court’s authority granted by Amendment 100 to issue a letter or resolution of support to a casino applicant. Moreover, the requirement of an election of the electorate of Pope County before a letter or resolution of the

support may be issued is an additional requirement not imposed or authorized by Amendment 100 or an Act of the General Assembly. The Ordinance is in conflict with existing state law and is invalid. See Ark. Const. Art. 5 § 1 and Ark. Code Ann. § 14-14-914(b).

Because the Subject Ordinance is unconstitutional and/or invalid, Defendants request the Court dismiss Plaintiffs' claims seeking to invalidate the Resolution (Count II (Amended Petition, paras. 48-57)) and seeking a writ of mandamus directing a rescission of the Resolution (Count IV (Amended Petition, paras. 61-64)).

B. The Subject Ordinance is prohibited by Arkansas Code Annotated § 14-14-806 (Repl. 2013).

Arkansas Code Annotated § 14-14-806(4) prohibits counties from exercising "legislative power to regulate any form of gambling, lotteries, or gift enterprises" unless such power is delegated to them by the Arkansas General Assembly. The Subject Ordinance requires an election of the voters of Pope County before the Pope County Judge or Quorum Court can issue a letter or resolution in support of the casino applicant. See Motion Exhibit "2," §§ 3.1 & 3.2. Because the Subject Ordinance is prohibited by Ark. Code Ann. § 14-14-806, it is unconstitutional or void pursuant to Article 5, § 1 of the Arkansas Constitution.

It should be without dispute that the Subject Ordinance's requirement of an election before the issuance of a letter or resolution of support of a casino applicant is a form of "regulation" which is prohibited pursuant to Ark. Code Ann. § 14-14-806. With respect to the meaning of the word "regulate," the Arkansas Supreme Court has stated:

The power to regulate gives authority to impose restrictions and restrains upon the trade or business regulated. "Regulate" means "to direct by rule or restriction, to subject to governing principles of laws." Webster's Dictionary. In City of Rochester v. West, 164 N.Y. 510, 58 N.E. 673, 53 L.R.A. 548, 79 Am. St. Rep. 659, the court

said, "To regulate is to govern by, or subject to, certain rules or restrictions. It implies a power of restriction and restraint not only as a manner of conducting a specified business, but also as to the erection in or on which the business is to be conducted."

City of Little Rock v. Reinman-Wolfort Auto. Livery Co., 107 Ark. 174, 180 155 S.W. 105 (1913).

There is no provision within Arkansas law, including recent legislative acts pertaining to the licensing of casinos, which grants counties or local legislative bodies the authority to regulate gambling by requiring an election mandated by the Ordinance. The Subject Ordinance seeks to unlawfully regulate "gambling" by imposing restrictions not authorized by the Constitution (Amendment 100) relative to the Pope County Judge and Quorum Court's issuance of letters and resolutions of support to casino applicants. The Ordinance purports to prevent the operation of a casino in Pope County unless an election is held and a majority of the registered voters of Pope County support the issuance of a letter or resolution in support of such applicant. See Ark. Const. Amend. 100, § 4(n) and Subject Ordinance, §§ 3.1 & 3.2. This is prohibited by Ark. Code Ann. § 14-14-806, because the Subject Ordinance attempts to grant to the county "a power of restriction and restraint" that is not authorized by Amendment 100 or any other state law. Pursuant to Article 5, §1, the Subject Ordinance is invalid and unconstitutional.

Pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure, Defendants ask that the Court dismiss Plaintiffs' declaratory judgment request finding the Subject Resolution invalid (Count II (Amended Petition, paras. 48-57)) and Plaintiffs' request for a writ of mandamus rescinding the Subject Resolution (Count IV (Amended Petition, paras. 61-64)).

#### IV. PLAINTIFFS ARE NOT ENTITLED TO A WRIT OF MANDAMUS.

Plaintiffs have requested the Court issue a writ of mandamus directing the Defendants' rescind the Resolution. Amended Petition, para. 64. A writ of mandamus is "an appropriate remedy when a public officer is called upon to do a plain and specific duty, which is required by law and requires no exercise of discretion or official judgment." Clowers v. Lassiter, 363 Ark. 241, 244, 213 S.W.3d 6 (2005). A writ of mandamus is a discretionary remedy, to be issued only if a petitioner shows "a clear and certain legal right to the relief sought and there is no other adequate remedy available." Id.

As noted above, Plaintiffs have requested the Court find the Subject Resolution "of no legal effect" and "legally invalid." Amended Petition, para. 57 and the first prayer clause on page 10. If the Court enters an order finding the Subject Resolution invalid, there is no need for a writ of mandamus. A declaratory judgment finding the Resolution invalid is an adequate remedy available to the Plaintiffs. Therefore, Plaintiffs are not entitled to a writ of mandamus and their claim for such relief should be dismissed.

#### V. PLAINTIFFS FAIL TO SUFFICIENTLY PLEAD A VIOLATION OF THE FOIA AND THE REQUESTED RELIEF FOR SUCH ALLEGED VIOLATION IS NOT APPROPRIATE.

##### A. Plaintiffs have not sufficiently plead a violation of the FOIA.

Under the above referenced Rules of Civil Procedure, Plaintiffs are required to plead facts, not merely conclusions, showing they are entitled to the relief requested. Plaintiffs have failed to comply with that standard with respect to their allegation of a violation of the FOIA by Defendants. The allegations with respect to that claim are conclusions, which the Court should not accept as true in considering Defendants' Motion to Dismiss. However, even if the

allegations are accepted as true, Plaintiffs' have failed to plead a violation of the FOIA.

Plaintiffs' assert the following regarding their FOIA claim:

- The process by which the Subject Resolution was considered “in the days and weeks preceding the August 13 special meeting was rife with illegal activity in the form of secret meetings . . . .” Amended Complaint, para. 34;
- The process by which Defendants “considered and drafted Resolution 2019-R-014 was illegal in that it involved secret meetings . . . .” *Id.* at para. 59;
- The Defendants “engaged in private, illicit meetings to consider provisions of draft Resolution 2019-R-014 with each other . . . .” *Id.* at para. 60; and,
- The Subject Resolution “was the product of illegal meetings” between the Defendants. *Id.* at para. 63.

The above conclusory allegations wholly fail to state a claim under the pleading standards required by the Arkansas Rules of Civil Procedure. Plaintiffs fail to allege when such meetings occurred, who was present, what was discussed, how such meetings were illegal, what action, if any, occurred at such meetings and other pertinent facts related thereto. The allegations fail to state a claim for a violation of the FOIA. Dismissal by the Court is appropriate.

Even assuming “secret meetings” did occur as alleged by Plaintiffs, that does not necessarily mean the Defendants violated the FOIA. The Arkansas Supreme Court has held that pre-meeting information sharing between members of a governing body, even when conducted without notice to the public, does not violate the open-meeting requirement of the FOIA. See McCutchen v. City of Fort Smith, 2012 Ark. 452, 425 S.W.3d 671 and City of Fort Smith v. Wade, 2019 Ark. 222. McCutchen and Wade aptly provide that not all meetings of elected

government officials – even those unknown to the public – violate the open-meeting provision of the FOIA. Because Plaintiffs have failed to state a claim setting forth a violation of the FOIA, their request for declaratory judgment asserting that Defendants violated the FOIA should be dismissed.<sup>2</sup>

- B. Plaintiffs fail to show they are entitled to the requested relief of mandamus for the alleged violation of the FOIA by Defendants.

An act of an Arkansas legislative body, including a quorum court, can be invalidated if the body violates the open-meeting requirement of the FOIA. See Rehab Hosp. Services Corp. v Delta-Hills Health Systems Agency, Inc., 285 Ark. 397, 401, 687 S.W.2d 840 (1985). A plaintiff seeking to invalidate a legislative act must give the governing body “the opportunity to address the issue.” Id. at 401-02. A plaintiff must also prove that the legislative body “knowingly” violated the FOIA and that the plaintiff was prejudiced by such violation. National Park Medical Center, Inc. v. Arkansas Dept. Of Human Services, 322 Ark. 595, 603, 911 S.W.2d 250 (1995) and Bradshaw v. Fort Smith Sch. Dist., 2017 Ark. App. 196, at 6-7, 519 S.W.3d 344.

As set forth in the Amended Petition, Plaintiffs assert that the Resolution is void and request that the Court mandate the Defendants rescind same, i.e., Plaintiffs seek to invalidate the Resolution. Plaintiffs have failed to provide the Defendants the opportunity to address any purported FOIA violation before requesting the Court invalidate the Subject Resolution. Moreover, Plaintiffs have not plead that Defendants knowingly violated the FOIA or that Plaintiffs have been prejudiced by the alleged FOIA violations.

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<sup>2</sup> While the heading of Plaintiffs’ claim regarding the FOIA (Count III (p. 10 of Amended Petition)) is styled as a request for declaratory judgment, Plaintiffs do not actually seek declaratory relief. Instead, Plaintiffs ask the Court to issue an order “mandating” that Defendants rescind the Subject Resolution. See second prayer clause at p. 10 of Amended Petition.

The Pope County Quorum Court held a properly noticed public meeting on August 13, 2019 – Plaintiffs make no allegation that such meeting failed to comply with the FOIA. At the August 13, 2019, public meeting the Subject Resolution “was voted on and passed by a majority of the Quorum Court . . . .” Amended Petition, para. 33. Therefore, assuming, arguendo, that Plaintiffs have properly stated a claim of violation of the FOIA, there is no basis for granting the requested relief of mandating rescission of the Subject Resolution, which was validly adopted at an open, public meeting.

Plaintiffs’ Amended Petition fails to sufficiently demonstrate that they are entitled to an order directing the rescission of the Subject Resolution; therefore, Defendants request this Court dismiss Plaintiffs’ claim relative to the FOIA.

#### CONCLUSION

Based on the foregoing, Defendants respectfully request that their Motion to Dismiss be granted.

BEN CROSS, in his official capacity as  
County Judge of Pope County, Arkansas;  
and PHILLIP HANEY, CALEB MOORE,  
TIM WHITTENBURG, REUBEN  
BROWN, JACKIE HEFLIN, JAMIE  
JACKSON, BLAKE TARPLEY, DOUG  
SKELTON, BILL SPARKS, JAMES  
KUSTURIN, RAY BLACK, JOSEPH  
PEARSON and ERNIE ENCHELMAYER,  
in their official capacities as members of the  
Quorum Court of Pope County, Arkansas



**IN THE CIRCUIT COURT OF POPE COUNTY, AR  
DIVISION I**

**CITIZENS FOR A BETTER POPE COUNTY,**  
a Local Opinion Ballot Question  
Committee, and  
**JAMES KNIGHT**, in his individual capacity  
**PLAINTIFF**

**VS. 58CV-19-439**

**BEN CROSS**, in his official capacity as County  
Judge of Pope County, Arkansas; and  
**PHILLIP HANEY, CALEB MOORE, REUBEN  
BROWN, JACKIE HEFLIN, JAMIE JACKSON,  
BLAKE TARPLEY, DOUG SKELTON, BILL  
SPARKS, JAMES KUSTURIN, RAY BLACK,  
JOSEPH PEARSON** and **ERNIE  
ENCHELMAYER**, in their official capacities as  
members of the Quorum Court of Pope  
County, Arkansas  
**DEFENDANTS**

**CHEROKEE NATION BUSINESSES, LLC  
INTERVENOR**

FILED  
2019 OCT -3 AM 8:35  
Clerk of the Circuit Court  
Pope County, Arkansas

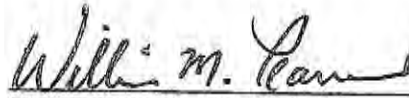
**ORDER SCHEDULING CASE FOR HEARING**

Now on this date the above-captioned case comes on for consideration by the Court and the Court doth hereby find, order, and decree:

The above-captioned case is hereby set for a hearing on Plaintiff's Amended Verified Petition for Declaratory Judgment and Writ of Mandamus and all other pending Petitions/Motions at 10:00 a.m. (or as soon thereafter as the business of the Court will allow) on the 29<sup>th</sup> day of October, 2019, in the courtroom on the third floor of the Pope County Courthouse located in Russellville, Arkansas. All attorneys of record and necessary parties shall appear before this Court on said date and time for the commencement of the hearing in this matter.

HC

IT IS SO ORDERED.



**WILLIAM M. PEARSON**  
Circuit Judge -- Division I

Date: 30 SEPTEMBER 2019

COPY TO:

Travis Story/Gregory Payne/Katie Freeman  
Colby T. Roe  
Clayton E. McCall  
Bart Calhoun

via fax: 479-443-3701  
via fax: 479-782-6160  
via fax: 479-967-3309  
via fax: 501-588-2104

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS,  
AT RUSSELLVILLE

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

PLAINTIFFS

v.

Case No. 58CV-19-439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas; and  
PHILLIP HANEY, CALEB MOORE,  
TIM WHITTENBURG, REUBEN BROWN,  
JACKIE HEFLIN, JAMIE JACKSON,  
BLAKE TARPLEY, DOUG SKELTON,  
BILL SPARKS, JAMES KUSTURIN,  
RAY BLACK, JOSEPH PEARSON and  
ERNIE ENCHELMAYER, in their  
official capacities as members of the  
Quorum Court of Pope County, Arkansas,

DEFENDANTS

FILED  
POPE CO. CIRCUIT CLERK  
TIME: 5:14 P.M.  
DATE: 10-3-19  
*[Signature]*

RENEWED EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER  
AND INCORPORATED BRIEF

COMES NOW the Plaintiffs, by and through undersigned counsel, pursuant to Rule 65 of the Arkansas Rules of Civil Procedure, and in support of their Renewed Emergency Motion for Temporary Restraining Order and Preliminary Injunction, state and allege as follows:

INTRODUCTION

1. That Plaintiff Citizens for a Better Pope County, is a registered Local Option Ballot Question Committee consisting of residents of Pope County, Arkansas who was the Sponsor of the local initiated act which is now codified as Pope County Ordinance 2018-O-42.
2. That Plaintiff James Knight is a tax payer and resident of Pope County, Arkansas.
3. That Defendant BEN CROSS is the duly elected County Judge of Pope County, Arkansas and is a resident of Pope County, Arkansas.

4. That Defendant PHILLIP HANEY is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
5. That Defendant CALEB MOORE is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
6. That Defendant TIM WHITTENBURG is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
7. That Defendant REUBEN BROWN is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
8. That Defendant JACKIE HEFLIN is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
9. That Defendant JAMIE JACKSON is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
10. That Defendant BLAKE TARPLEY is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
11. That Defendant DOUG SKELTON is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
12. That Defendant BILL SPARKS is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
13. That Defendant JAMES KUSTURIN is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
14. That Defendant RAY BLACK is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.

15. That Defendant JOSEPH PEARSON is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.

16. That Defendant ERNIE ENCHELMAYER is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.

17. That jurisdiction and venue are proper in Pope County, Arkansas.

#### FACTUAL BACKGROUND

18. That in the November, 2018 general elections, the citizens of the Arkansas passed Arkansas Constitutional Amendment 100 that authorized casinos and casino gaming in the State of Arkansas.

19. That Amendment 100 states that the Arkansas Racing Commission is authorized to issues four (4) casino licenses, one of which was mandated to be to a facility to be located in Pope County, Arkansas.

20. That Amendment 100 requires, prior to the issuance of a casino license for a casino facility to be located in Pope County, a letter of support from the county judge or a resolution of the Pope County Quorum Court.

21. That during that same November 2018 general election, the residents of Pope County approved an initiated measure by a vote total of 70% in favor to 30% opposed, entitled the Pope County Local Control for Casino Gaming Amendment of 2018.

22. The Pope County Local Control for Casino Gaming Amendment of 2018 was enacted and added to the Pope County Code of Ordinances as Ordinance No. 2018-O-42. This ordinance established a condition precedent to Amendment 100, or any other state law, prior to the issuance of a letter of support by the County Judge or a resolution by the Quorum Court, for a Casino or a Casino Applicant "without first referring the question as the issuance of support of a

Casino or Casino Applicant to a local election, at either a general election or special election, where . . . a majority of the registered voters of Pope County must approve . . . .”

23. That there is no language in Amendment 100 by which the terms of Pope County Ordinance 2018-O-42 is not allowed.

24. That there is no language in Ordinance 2018-O-42 that conflicts with the language of Amendment 100.

25. That the language of Ordinance 2018-O-42 was drafted with the intent to be harmonious with Amendment 100, and all of Arkansas law.

26. That under the *in pari materia* doctrine of statutory interpretation, two separate provisions of law relating to the same subject should be read in a harmonious manner.

#### INJUNCTIVE RELIEF

27. That Plaintiffs restate and incorporate the allegations contained in Paragraphs 1-26 set forth above.

28. That on September 4, 2019, Plaintiffs filed their Amended Verified Petition including allegations, *inter alia*, that members of the Pope County Quorum Court met secretly amongst themselves as well as with representatives of prospective casino applicants in violation of A.C.A. § 25-19-101 et seq, Arkansas FOIA.

29. That the Quorum Court of Pope County, Arkansas has published an Agenda for a Regular Quorum Court Meeting scheduled for October 3, 2019 at 5:00 p.m. during which items on the agenda include “10. Discussion of Pope County Local Ordinance 2018-O-42.” See Agenda for Regular Quorum Court Meeting October 3, 2019 attached as **Exhibit A** and incorporated word-for-word herein.

30. That to the best knowledge and belief of Plaintiffs, the Quorum Court intends to vote to repeal Pope County Ordinance 2018-O-42.

31. That a previous vote to issue a letter of support that took place on August 13, 2019 resulted in a vote of the Quorum Court of 8 votes in favor of issuance of a Resolution in support of casino applicant Cherokee Nation Businesses, 4 opposed and one abstention.

32. That to the best knowledge and belief of Plaintiffs, a vote to repeal Ordinance 2018-O-42 would result in 9 votes in favor of repeal with 4 votes against, with one vote switching from a vote against issuance of Resolution 2019-R-014 to a vote in favor of repeal of Ordinance 2018-O-42.

33. That, therefore, in the fog of allegations of FOIA violations and the potential misfeasance of office, one member of the Quorum Court has switched from a no vote on the casino issue to a yes vote.

34. That to the best knowledge and belief of Plaintiffs, said allegations of FOIA violations are the subject of pending criminal investigations by investigators of the State of Arkansas.

35. That should the Quorum Court in the October 3 meeting as anticipated, Plaintiffs will suffer immediate and irreparable harm before the adverse parties can be heard in opposition as required by Rule 65(b)(1) of the Arkansas Rules of Civil Procedure

36. That despite language of Article 5. Section 1 of the Arkansas Constitution that allows repeal of ordinances by a supermajority, Arkansas case law suggests that "legislators and city councils are limited in power to deal with measures adopted by the people." *Wallace School District No. 1, Little River County v. County Board of Education Little River County*, 214 Ark. 436, 216 S.W.2d 790 (1949).

37. That the intent of the Quorum Court is to eliminate the Ordinance so that they can eliminate the Pope County litigation. See Affidavit of William Bruce Brown, Marked as Exhibit B and incorporated by reference as if set out word-for-word herein.

38. That the status quo of this case should be maintained until further facts regarding issuance of Resolution 2019-R-14 and subsequent private meetings of the Quorum Court can be investigated.

39. That the Quorum Court of Pope County should be enjoined from taking any action to repeal Ordinance 2018-O-42 during the pendency of this litigation or upon further order of this Court.

40. That Prior to filing this motion, I attempted to contact Mr. Clay McCall who represents the Defendants. See Affidavit of Travis W. Story, Marked as Exhibit C and incorporated by reference as if set out word-for-word herein.

WHEREFORE, Plaintiffs renew their prayer for a Temporary Restraining Order previously mooted by issuance of Resolution 2019-R-14 prohibiting the Pope County Quorum Court from taking any action in their respective official capacities to repeal Pope County Ordinance 2018-O-42 during the pendency of the pending litigation, and for such other and further relief the Court deems just and proper.



AGENDA FOR REGULAR QUORUM COURT MEETING  
OCTOBER 3, 2019

TIME: 5:00 P.M.

CALL TO ORDER.

PRAYER: JUSTICE SPARKS

ROLL CALL:

JOURNAL OF PROCEEDINGS SEPTEMBER 9, 2019 QUORUM COURT MEETING

COMMITTEE & OTHER REPORTS:

CORRESPONDENCE:

PUBLIC COMMENTS ADDRESSING AGENDA:

UNFINISHED BUSINESS:

NONE

NEW BUSINESS:

1. HOT CHECK FUND REPORT PER ACA § 16-21-120 BY PROSECUTING ATTORNEY JEFF PHILLIPS
2. ORDINANCE APPROPRIATING \$9,000.00 FROM THE GENERAL FUND FOR THE COUNTY CLERK  
JUSTICE PEARSON
3. ORDINANCE APPROPRIATING \$8,000.00 FROM THE COUNTY CLERK COST FUND FOR THE COUNTY CLERK.  
JUSTICE BROWN
4. ORDINANCE APPROPRIATING \$655,000.00 FROM THE SURPLUS INVESTMENT FUND FOR THE COUNTY JUDGE FOR THE PURCHASE OF LAND ADJOINING THE COUNTY COMPLEX.  
JUSTICE SKELTON



5. ORDINANCE TRANSFERRING FUNDS PREVIOUSLY APPROPRIATED FOR THE DETENTION CENTER'S COMMUNICATIONS FACILITY & EQUIPMENT FUND.  
JUSTICE HANEY
6. MR. OMAR CLEMENS, REPRESENTATIVE FROM ENERGY, TO ADDRESS THE COURT ON SOLAR POWER SERVICES PROVIDED BY ENERGY.
7. JUDGE CROSS TO DISCUSS THE FORMATION OF A JAIL COMMITTEE.
8. DISCUSSION OF ORDINANCE IMPLEMENTING A HOTEL, RESTAURANT AND BEVERAGE TAX IN THE COUNTY.
9. DISCUSSION FOR A CONSTRUCTION PERMIT PROCEDURE FOR IMPROVEMENTS IN THE COUNTY.
10. DISCUSSION OF POPE COUNTY LOCAL ORDINANCE 2018-O-42.

ITEMS OR ORDINANCES COMING OUT OF THE BUDGET OR PERSONNEL COMMITTEE MEETINGS.

COMMENTS FROM THE PUBLIC:

ANNOUNCEMENTS:

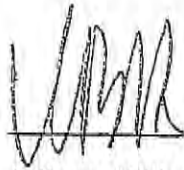
ADJOURN:

### Affidavit of William Bruce Brown

On this day before me personally appeared William Bruce Brown, and as such, he makes this affidavit:

1. I am over the age of 18.
2. I am a resident of Pope County, Arkansas.
3. I am of sound mind, and competent to make this affidavit.
4. I have personal knowledge of the following.
5. I emailed Pope County Judge Ben Cross on October 3, 2019 in regards to the Quorum Court agenda item #10 for October 3, 2019 which states "Discussion of Pope County Ordinance 2018-O-42".
6. Judge Cross replied to my email that the intent of tonight's discussion would be to eliminate the case locally,
7. I affirm that the attached email correspondence with Judge Cross is a full and complete representation of my correspondence with Judge Cross regarding this issue.
8. All statements within the affidavit are true and accurate to the very best of my knowledge.

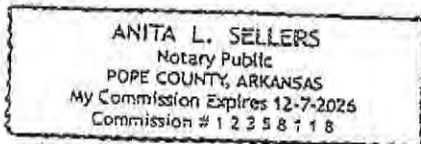
Further, affiant sayeth not.




---

Affiant- William Bruce Brown

WITNESS my hand and official seal this 3<sup>rd</sup> day of October 2019.





---

Notary Public

My commission expires:

State of Arkansas

County of Pope





Bruce Brown <wbrucebrown@gmail.com>

**Ordinance2018-O-42**

2 messages

Bruce Brown <wbrucebrown@gmail.com>  
To: Ben Cross <pcjudge@suddenlinkmail.com>

Thu, Oct 3, 2019 at 9:02 AM

Dear Judge Cross,  
I am writing this e-mail in a response to the news of a reported attempt to repeal Ordinance 2018-O-42. I am confused. At the previous quorum court meeting the Ordinance was determined to be invalid, therefore the vote against the majority of Pope county voters to write a casino letter. Now there is a sudden push to repeal the very ordinance that was not constitutional?  
This looks very questionable to me and I would encourage you to not repeal the ordinance and follow the majority vote in Pope County. Allow the voice of the people to be heard.  
Thank you for your time  
Bruce Brown

Ben Cross <pcjudge@suddenlinkmail.com>  
To: Bruce Brown <wbrucebrown@gmail.com>

Thu, Oct 3, 2019 at 9:35 AM

Doc,

Thanks for your comments. The problem is there are two identical cases being pursued by Jim Knight, one against the county, and one against the state. Right now we are having to use your tax dollars to defend the county from a lawsuit locally, which is also being litigated at the state level. We have a Pope county tax payer suing Pope county, which in turn, has to utilize your tax dollars to defend against its' own residents. There is something inherently wrong about that. So, if you have the state defending against the same action, we can save your tax dollars by eliminating the case locally. That being said, I don't have a vote and I can't repeal anything, I'm just trying to save Pope county the expense of duplicate litigation.

Thanks,

Ben

[Quoted text hidden]



**Dianne Briggs**  
Court Reporter  
Phone: 479-968-1073  
Fax: 479-968-2506

**Cindi Sheely**  
Trial Court Assistant  
Phone: 479-754-3495  
Fax: 479-754-5821

**William M. Pearson**  
Circuit Judge - Division I  
5<sup>th</sup> Judicial District  
Pope, Johnson & Franklin Counties  
P.O. Box 1406  
Clarksville, AR 72830

04 October 2019

**VIA FAX ONLY**

POPE CO. FILED  
CIRCUIT CLERK  
TIME: 10:10 AM  
DATE: 10-4-19  
*[Signature]*

Travis Story/Gregory Payne/Katie Freeman	479-443-3701
Colby T. Roe	479-782-6160
Clayton E. McCall	479-967-3309
Bart Calhoun	501-588-2104
Scott Richardson/Dustin B. McDaniel	501-588-2104

Re: *Citizens for a Better Pope County, et al vs. Ben Cross, In his official capacity as County Judge of Pope County, AR, et al*  
Pope County Circuit Court --  
Case No. 58CV-19-439

Counselors:

I am in receipt of Mr. Roe's letter of October 3, 2019, a copy of which was e-mailed to each of you. Mr. Roe's letter is well taken and I agree that it would be inappropriate to allow additional evidence prior to rulings on all Rule 12(b) motions.

In addition, late yesterday I received Plaintiff's filed renewed emergency motion requesting immediate injunctive relief to enjoin the Pope County Quorum Court from taking any action as it pertains to Pope County Ordinance 2018-O-42 during the pendency of this action. Following failed attempts to conduct a conference call between counsel, I denied the injunctive relief and informed Mr. Story and Mr. McCall.

With that, the scope of the hearing scheduled October 29th will pertain to the Motions to Dismiss now pending and any responsive pleadings necessary in consideration of the Plaintiff's most recent request for injunctive relief.

Respectfully,

*William M. Pearson*  
William M. Pearson  
Circuit Judge - Division I

WMP/cas  
pc: Court File

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▪ Also Licensed in Wyoming & North Dakota

October 3, 2019

Honorable William M. Pearson  
Pope County Circuit Judge  
P.O. Box 1406  
Clarksville, AR 72830-1406

Via Facsimile Only (479) 754-5821

Re: Citizen for a Better Pope County, et al. v. Ben Cross, in his official capacity as County Judge of Pope County, Arkansas, et al;  
Pope County Circuit Court; Civil Division Case No. 58CV-19-439

Dear Judge Pearson:

We are writing with respect to the above referenced matter.

The Court's hearing on September 30, 2019, addressed Defendants' first Motion to Dismiss (filed on August 15, 2019) and Cherokee Nation Businesses, LLC's Motion to Intervene. Following the filing of Plaintiffs' Amended Verified Petition for Declaratory Judgment and for Writ of Mandamus, Defendants filed a second Motion to Dismiss on September 24, 2019. At the September 30 hearing, the Court indicated a future hearing would be scheduled relative to Defendants' second Motion to Dismiss. In response to an inquiry from the Court, Plaintiffs' counsel stated that Plaintiffs intend to present witness testimony (and possibly other evidence) at a hearing on Defendants' second Motion to Dismiss.

Defendants' second Motion to Dismiss was filed pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure. Arkansas law is well established that when deciding a motion to dismiss filed under Rule 12(b)(6), a trial court should only consider the allegations in the complaint; moreover, it is improper for the trial court to consider matters outside the complaint when ruling on a 12(b)(6) motion. See Klever v. Klever, 2017 Ark. App. 330, at 4, 525 S.W.3d 329 ("In determining whether to dismiss a complaint under Ark. R. Civ. P. 12(b)(6), it is improper for the circuit court to look beyond the complaint."); SMS Planting Co. v. Farm Bureau Mut. Ins. Co. of Ark., 2015 Ark. App. 331, at 6, 463 S.W.3d 714 ("Our courts have held that it is improper for the circuit court to look beyond the complaint to decide a Rule 12(b)(6) motion."); King v. French, 2011 Ark. App. 256, at 6-7, 383 S.W.3d 426 ("In deciding a motion to dismiss under Rule 12(b)(6), the trial court is limited to consideration of the pleadings."); Dukes v. Norris, 369 Ark. 511, 514, 256 S.W.3d 483 (2007) ("A trial judge must look only to the allegations in the complaint to decide a motion to dismiss.").

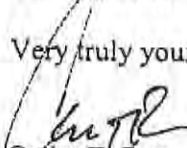
If a court does consider matters outside of the pleadings in deciding a 12(b)(6) motion, the court should treat the motion as one for summary judgment. Koch v. Adams, 2010 Ark. 131, at 5, 361 S.W.3d 817. However, in such event, it is improper for the court to hear and consider oral testimony when deciding a summary judgment motion. Klever, 2017 Ark. App. 330, at 5-6; Chiodini v. Lock, 2010 Ark. App. 340, at 14, 374 S.W.3d 835; see also Regions Bank & Trust v. Stone County Skilled Nursing Facility, 73 Ark. App. 17, 20, 38 S.W.3d 916 (2001) ("The purpose of a summary judgment hearing is not to try the issues, but rather to determine if there are any issues to try.").

If the Court allows testimony to be presented at a hearing on Defendants' 12(b)(6) Motion, the matter is essentially converted into a bench trial. See Klever, 2017 Ark. App. 330, at 6. This matter is far from being in a position to be tried to the Court and to do so this early in the case would be prejudicial to Defendants, if not all the parties. The parties have yet to engage in any discovery to explore any facts supporting or disputing the asserted claims. However, before the parties begin the discovery process, the Court should first rule on the Motion to Dismiss filed by Defendants on September 24, 2019 – including any forthcoming motion to dismiss filed by Cherokee Nation Businesses – after the motion has been fully briefed by the parties.

Based on the above authorities of the Arkansas Appellate Courts, Defendants object to Plaintiffs presenting any evidence (witness testimony or documentary) at a hearing on Defendants' second Motion to Dismiss as the same would be improper for the Court to consider in deciding the Motion.

Thank you for your attention to this matter.

Very truly yours,

  
Calby T. Roe

cmm

cc: Mr. Travis W. Story (via electronic mail)  
Mr. Gregory F. Payne (via electronic mail)  
Ms. Katie L. Freeman (via electronic mail)  
Mr. Bart W. Calhoun (via electronic mail)  
Mr. Scott P. Richardson (via electronic mail)  
Mr. Dustin B. McDaniel (via electronic mail)  
Mr. Clayton E. McCall (via electronic mail)

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

PLAINTIFFS

VS. NO. 58CV-19-439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas, et al.

DEFENDANTS

CHEROKEE NATION BUSINESSES, LLC

INTERVENOR

FILED  
POPE CO. CIRCUIT CLERK  
TIME: 1:02  
DATE: 10-9-19  
*[Signature]*

BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED PETITION

Cherokee Nation Businesses, LLC ("Intervenor" or "CNB"), by and through its counsel,  
and for its *Brief in Support of its Motion to Dismiss Amended Complaint*, states as follows:

I. INTRODUCTION

Relying on a facially unconstitutional local ordinance, Plaintiffs Citizens for a Better Pope County and James Knight ("CBPC") filed this action in an effort to control the action of Pope County officials and a State Agency, the Arkansas Racing Commission ("ARC"). Plaintiffs claim that the Pope County Quorum Court acted illegally by following the process laid down by the people of Arkansas in Amendment 100, rather than the local ordinance that conflicts with Amendment 100. Specifically, Plaintiffs claim that Ordinance 2018-O-42 ("ordinance") requires an election before a resolution of support may be issued by the Pope County Quorum Court and prevents the ARC from accepting applications and relying on a resolution of support issued without an election. Plaintiffs also allege that the resolution of support should be invalidated because it was adopted in violation of the Arkansas Freedom of Information Act ("FOIA"), Ark. Code Ann. § 25-19-101, *et seq.*

Intervenor requests that Plaintiffs' claims be dismissed pursuant to Ark. R. Civ. P. 12(b)(6); failure to state facts upon which relief can be granted. The ordinance Plaintiffs rely on violates



the Arkansas Constitution and Arkansas law because: (1) the ordinance unlawfully imposes an additional, unauthorized qualification on casino applications to Amendment 100; (2) it attempts to exercise a power prohibited to counties by Arkansas law – regulating gambling; (3) the ordinance contradicts Amendment 100 in violation of Article 5, § 1 of the Arkansas Constitution; and (4) the ordinance improperly infringes and abrogates the constitutional and statutory authority of the County Judge, Quorum Court, and ARC. Additionally, Plaintiffs have failed to include necessary parties, specifically state officials, as is required by the Arkansas Rules of Civil Procedure and Ark. Code Ann. § 16-111-101, *et seq.* Lastly, Plaintiffs wholly fail to state facts upon which invalidation of the resolution for FOIA violations can be granted.

**II. ARGUMENT<sup>1</sup>**

**A. The Ordinance Unlawfully Imposes An Additional Qualification To Amendment 100**

Despite Amendment 100 setting forth the minimum requirements and qualifications for a casino applicant, Plaintiffs contend that the qualification imposed by the ordinance is legal. That position cannot stand. The Arkansas Supreme Court has clearly explained that local governments cannot add qualifications where not allowed by the Arkansas Constitution:

It is beyond dispute that the General Assembly does not have the authority to impose qualifications for judicial office in addition to those set out in the constitution. For instance, in *Daniels v. Dennis*, 365 Ark. 338, 229 S.W.3d 880 (2006), this court held that Act 1148 of 2005, which provided that a

---

<sup>1</sup> Plaintiff contends that Amendment 100 conflicts with Amendment 14 and is therefore unconstitutional. This argument deserves little attention. First, it is elementary that an Amendment to the Arkansas Constitution cannot be unconstitutional. To hold otherwise would deny the people of Arkansas the ability to amend their Constitution. Second, Amendment 14 prohibits the General Assembly from passing local or special acts. *Bd. of Trustees for City of Little Rock, Ark., Police Pension Fund v. City of Little Rock*, 750 S.W.2d 950, 952 (Ark. 1988). It is a restriction only on the General Assembly not the people of Arkansas. *See Rooker v. City of Little Rock*, 234, 352, S.W.2d 172 (1961). This action does not concern an act of the General Assembly. Finally, if a later amendment truly conflicts with an earlier amendment, the earlier amendment is repealed by implication. *State ex rel. City of Little Rock v. Donaghey*, 106 Ark. 56, 152 S.W. 746, 748 (1912). Thus, Plaintiffs' claim has no merit.

person appointed as a circuit judge was ineligible to run as a candidate in the same judicial district to which she was appointed, was unconstitutional because it added a qualification required of candidates for judicial office. Also, we have held that a statute prohibiting a judge who had been removed from office from thereafter being appointed or elected to serve as judge was unconstitutional because the law imposed an additional qualification. *Proctor v. Daniels*, 2010 Ark. 206, 392 S.W.3d 360. We have applied this rule of law in other contexts, as well. In *Allred v. McCloud*, 343 Ark. 35, 31 S.W.3d 836 (2000), **this court held that a local initiative that fixed term limits for county officials at five two-year terms was unconstitutional because it added a new qualification for candidacy that was not contained in the Arkansas Constitution.** In the case of *Mississippi County v. Green*, 200 Ark. 204, 138 S.W.2d 377 (1940), we noted that article 7, section 29 of the Arkansas Constitution fixed the qualifications for county judge, and we held unconstitutional a statute requiring a county judge to be "learned in the law," because it provided an additional qualification not found in the Arkansas Constitution. This court recently held that the voter-identification law was unconstitutional on its face because it imposed a qualification for voting beyond what is recognized by the constitution. *Martin v. Kohls*, 2014 Ark. 427, 444 S.W.3d 844.

*Landers v. Stone*, 2016 Ark. 272, 7-8, 496 S.W.3d 370, 376 (2016) (emphasis added).

Similar to the facts in *Allred v. McCloud*, the Plaintiffs here rely on an initiated ordinance, Ordinance 2018-O-42, which imposes an additional qualification on casino applicants that is not found in Amendment 100: that a casino applicant must win a local election prior to a resolution or letter of support being issued by the Quorum Court or County Judge. In *Allred*, the Supreme Court found that the Arkansas Constitution addressed and set forth the qualifications for certain county officials and did not limit the terms of office for candidates for those positions. Therefore, the Court held that a local initiative that set term limits in addition to the qualifications provided by the Constitution unlawfully imposed additional qualifications. 343 Ark. 35, 31 S.W.3d 836 (2000). The Court held that an act or ordinance unlawfully setting additional qualifications was "void," *Id.* at 30, quoting *Mississippi County v. Green*, 200 Ark. 204, 138 S.W.2d 377 (1940). Being void, the ordinance is without legal effect and unenforceable. *Le v. Nguyen*, 2011 Ark. App. 20, 380 S.W.3d 485 (holding void contract without legal effect, unenforceable, and must be

disregarded by court); *Davis v. Office of Child Support Enforcement*, 322 Ark. 352, 908 S.W.2d 649 (1995) (holding “[v]oid judgments have no legal effect . . . [t]hey are worthless; no rights can be obtained from them” and they are inoperative).

Likewise, Amendment 100 sets forth various qualifications for a casino applicant, one of those qualifications being that the applicant present a resolution or letter of support from the Quorum Court or County Judge. However, nothing in Amendment 100 refers to or authorizes a county to require an election before the issuance of such resolution or letter. Similarly, nothing in Amendment 100 requires or authorizes as a condition for award of a casino license that an applicant be successful in a local election for the privilege of submitting an application. Instead, the Amendment reposes the authority to issue a letter of support in the County Judge and the authority to issue a resolution of support in the Quorum Court. The ordinance would, instead, transfer that authority from these elected officials to the electorate. The ordinance serves as a complete bar to application for a casino license that appears nowhere in Amendment 100 and that Amendment 100 grants no authority to the local electorate to add onto Amendment 100.

The ordinance unlawfully seeks to control the actions of the State by preventing the Arkansas Racing Commission from exercising its Constitutionally delegated responsibilities. For these reasons, the ordinance is unlawful, void, and of no legal effect. As void it cannot be used either to invalidate the resolution of support in favor of Intervenor or to control the action of Pope County officials or the ARC. Plaintiffs’ claims should be dismissed.

**B. Arkansas Law Prohibits Counties From Regulating Gambling**

Counties are prohibited from exercising “legislative power to regulate any form of gambling, lotteries, or gift enterprises” unless such power is delegated to them by the Arkansas General Assembly. Ark. Code Ann. § 14-14-806(4). Nothing in the Arkansas Code, including

recent legislative acts pertaining to the licensing of casinos, grants counties or their legislative bodies the authority to regulate gambling by requiring an election prior to the issuance of a resolution or letter of support. Likewise, nothing in Amendment 100 grants counties such authority. Instead, Amendment 100 grants the ARC and the General Assembly authority to implement Amendment 100.

Ark. Const. Art. 5, § 1 states that “no local legislation shall be enacted contrary to the Constitution or any general law of the State, and any general law shall have the effect of repealing any local legislation which is in conflict therewith.” In other words, counties may not enact laws, including by initiative, that are “at odds with the general law of this state.” *Allred v. McLoud*, 343 Ark. 35, 31 S.W.3d 836 (2000). The ordinance is in violation of Art. 5, § 1 as it conflicts with Ark. Code Ann. § 14-14-806(4). Requiring an election before the issuance of a resolution or letter of support is undoubtedly “regulation” which is unlawful. Our Supreme Court has elaborated on the meaning of the word “regulate”:

The power to regulate gives authority to impose restrictions and restraints upon the trade or business regulated. “Regulate” means “to direct by rule or restriction, to subject to governing principles or laws.” Webster's Dictionary. In *City of Rochester v. West*, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659, the court said: “To regulate is to govern by, or subject to, certain rules or restrictions. It implies a power of restriction and restraint, not only as to the manner of conducting a specified business, but also as to the erection in or upon which the business is to be conducted.” *Cronin v. Peoples*, 82 N. Y. 318, 37 Am. Rep. 564.

*City of Little Rock v. Reinman*, 107 Ark. 174, 155 S.W. 105, 106 (1913).

The ordinance unlawfully regulates “gambling” by imposing restrictions not authorized by the Constitution on the issuance of resolutions and letters of support. This local restriction prevents a person or entity from operating a casino in Pope County unless an election is held and a majority of votes cast support the issuance of a resolution or letter of support. Based on Plaintiffs' own

allegations, an entity cannot operate a casino in Pope County unless an election is first held. This is an absolute restriction and invariably conflicts with Ark. Code Ann. § 14-14-806(4), because the ordinance grants to the County “a power of restriction and restraint” that is not authorized by Amendment 100 or any other state law. Pursuant to Art. 5, § 1, the Ordinance is invalid. For these reasons, Plaintiffs’ claims should be dismissed.

**C. The Ordinance Is Contrary To Amendment 100 and Local Official Authority**

Article 5, § 1, of the Arkansas Constitution states that “[t]he legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly . . .” Article 5, § 1 further states that “[t]he initiative and referendum powers of the people are hereby further reserved to the legal voters of each municipality and county as to all local, special and municipal legislation of every character in and for their respective municipalities and counties, **but no local legislation shall be enacted contrary to the Constitution or any general law of the State, and any general law shall have the effect of repealing any local legislation which is in conflict therewith.**” (emphasis added).

County voters cannot amend the Constitution or state law through a county election (“no local legislation shall be enacted contrary to the Constitution or any general law of the State. . .”). Additionally, Ark. Code Ann. 14-14-914(b) states similarly that “[n]o county legislative measure shall be enacted contrary to the Arkansas Constitution or any general state law which operates uniformly throughout the state, and any general law of the state shall have the effect of repealing any county ordinance which is in conflict therewith.” The Arkansas Supreme Court has reaffirmed both provisions stating “[o]ur well-established rule is that an initiated ordinance that is contrary to

state law on its face should not be certified for inclusion on the ballot.” *Stilley v. Makris*, 343 Ark. 673, 678, 38 S.W.3d 889, 892 (2001) (finding that the initiative petition conflicted with numerous statutory provisions for the sale of county property), citing *Stilley v. Henson*, 342 Ark. 346, 28 S.W.3d 274 (2000), *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996), *Czech v. Baer*, 283 Ark. 457, 677 S.W.2d 833 (1984). County government may not enact laws “contrary to state law.” *Cox v. Commissioners of Maynard Fire Imp. Dist. No. 1*, 287 Ark. 173, 174, 697 S.W.2d 104, 105 (1985).

The ordinance unlawfully abrogates the authority of the County Judge, Quorum Court, and ARC, and unconstitutionally transfers it to the voters of Pope County. *See Allred v. McLoud*, 343 Ark. 35, 31 S.W.3d 836 (2000) (holding that local legislation is invalid if “County initiative is at odds with the general law of this state”); *Walker v. Washington County*, 263 Ark. 317, 319-320, 564 S.W.2d 513, 514-515 (1978) (“quorum court has no legislative powers other than those expressly directed or permitted”). The ordinance’s restriction on the authority of the ARC, the Quorum Court and the County Judge is unconstitutional. Ark. Const. Amend. 100 § 4(n) states that “[t]he Arkansas Racing Commission shall require all casino applicants for a casino license in Pope County and Jefferson County to submit either a letter of support from the county judge or a resolution from the quorum court in the county where the proposed casino is to be located . . . .” Further, Amendment 100 confers responsibility on the ARC to adopt rules to carry out the Amendment’s purpose and to administer the issuance of casino licenses (Ark. Const. Amend. 100, § 4), and directs the Arkansas General Assembly to enact laws and appropriate money to fulfill the Amendment’s purposes (Ark. Const. Amend. 100, § 3(c)). Amendment 100 specifically requires the ARC to adopt rules governing “[t]he manner in which [it] considers applications for issuance of casino licenses.” Ark. Const. Amend. 100, § 4(c). Nothing in Amendment 100 grants

the voters of Pope County the authority to promulgate rules, require elections, or to determine how the ARC considers applications.

At the local level, Amendment 100 granted discretion to two specific offices to decide whether to issue letters or resolutions of support: the office of the county judge and the county quorum court. The voters of Pope County have sought to change Amendment 100 so neither the county judge nor the quorum court have the authority to issue letters of support. The initiated ordinance transfers the constitutionally granted authority from those two bodies to the voters of Pope County. Not only does the ordinance prohibit the county judge and quorum court from issuing a generic letter of support, but it also requires the question of which potential applicant to support to be decided by the voters of Pope County. In direct contravention of Amendment 100, it completely eviscerates the Constitution's requirement that the county judge or the quorum court decide when, how, and who to support, and thus is wholly unconstitutional. *See Stilly v. Makris*, 343 Ark. 673, 38 S.W.3d 889 (2001) (holding that a petition for the sale of a county hospital was invalid because it eliminated powers specifically granted to the county judge and quorum court and also unconstitutionally impaired the counties contractual obligations).

In *Stilley v. Henson*, a citizen utilized the initiative process of Amendment 7 to put an ordinance on the ballot that would reduce the rate of an existing county sales and use tax. The sales and use tax it sought to reduce was at one percent (1%) and "levied pursuant to the provisions of Ark. Code Ann. §§ 26-74-201 et seq., which mandate specific procedures for levying a county sales and use tax and for repealing a tax that has been previously levied." 342 Ark. 346, 352; 28 S.W.3d 274, 278 (2000). However, the Arkansas Code does not contemplate or set forth procedures for reducing a sales and use tax, only levying and abolishing. *Id.* The authority to levy or abolish a tax does not imply the authority to reduce a tax. *Id.* at 354, 28 S.W.3d at 279. The

Supreme Court found that the ordinance was “facially invalid and fails to comply with Amendment 7 because it is contrary to Ark. Code Ann. §§ 26–74–201 *et seq.*, which grants counties and their voters the authority to adopt or abolish a county sales and use tax, but does not grant them the authority to reduce the rate of an existing tax.” *Id.* at 356, 28 S.W.3d at 280.

Similarly, nothing in Amendment 100 or the Arkansas Code grants counties and their voters the authority to place restrictions on the Quorum Court’s or County Judge’s Constitutionally delegated authority to issue letters or resolutions of support. Likewise, nothing in Amendment 100 authorizes the electorate to place additional requirements on licensure or impose its own rules in addition to the ARC’s rules and Acts of the General Assembly. The Ordinance substantially rewrites the scheme under Amendment 100 regarding letters or resolutions of support and restricts the authority specifically granted to local officials and the ARC by Amendment 100. This is not permissible.

Further, Justice Corbin’s dissent in *Stricklin v. Hays*, where the majority acknowledged Justin Corbin had raised an interesting issue but declined to opine as it was not raised at the trial court below, is instructive on the subject of the electorate abrogating local government official authority. Justice Corbin stated:

In sum, whether we consider this ordinance to be administrative in nature or a legislative ordinance that is in conflict with an already established law of this State, the ordinance is not the type subject to the people’s power of referendum and is, thus, invalid. It impermissibly infringes upon the power of the city council to fix the salaries of its police and fire personnel and effectively ties the hands of the individual council members, such that they are no longer part of a deliberative body acting independently, exercising their best judgments on this issue. *See Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996), cert. denied, — U.S. —, 117 S.Ct. 1081, 137 L.Ed.2d 216 (1997). The ordinance should be considered as nothing more than an advisory indication of how the voters of that city wish their tax dollars to be spent; it cannot be binding law. If it is the continuing desire of the citizens of North Little Rock that their city police and fire personnel be paid the same as their counterparts in Little Rock, they need only voice such



desires to their elected council members. The council members, in turn, could debate the feasibility of the request, exercising their judgments in the best interest of both the city and its residents. Likewise, if those citizens are unhappy with the individual performances of the council members, their remedy is to voice their disapproval at the polls by voting for candidates who share their views; they have no recourse to ensure such a measure from the referendum procedure established by Amendment 7. I would thus affirm the trial court's ruling, as it reached the right result, even though it may have been for a different reason. *See Calcagno v. Shelter Mut. Ins. Co.*, 330 Ark. 802, 957 S.W.2d 700 (1997).

332 Ark. 270, 278, 965 S.W.2d 103, 108 (1998). In like manner, "[i]t is fundamental that a city's legislative power cannot be delegated to a committee or an administrative body . . . Nor can the city directors delegate or bargain away their legislative authority." *Czech v. Baer*, 283 Ark. 457, 460, 677 S.W.2d 833, 835 (1984). The Constitutional authority of local governments cannot be stripped away through delegation or initiative, which is precisely what the ordinance does.

The ordinance unlawfully withdraws the Quorum Court's and County Judge's authority to issue a resolution or letter of support. In addition to this, the election requirement, as set forth in more detail above, is an additional requirement not imposed or authorized by Amendment 100 or an act of the General Assembly, and therefore it is in conflict with existing state law and is, thus, invalid. Had Amendment 100 intended for local elections to be called on the issue or for counties to be able to impose their own rules, it would have certainly stated so. But it did not, and instead entrusted to local officials the matter of local approval, and it provided the ARC with sole authority to promulgate rules to carry out the purposes of the Amendment. As the ordinance pertains to the subject matter covered by Amendment 100, it impairs the ARC's specific authority and abrogates county officials' authority. It is null and void. Accordingly, Plaintiffs' claims should be dismissed.

**D. The Resolution Cannot Be Invalidated**

A resolution, pursuant to Arkansas law, is nothing more than expression of quorum court policy and opinion. As stated by Ark. Code Ann. § 14-14-904(j), "[a] county resolution is defined

as the adoption of a formal statement of policy by a quorum court, the subject matter of which would not properly constitute an ordinance. A resolution may be used whenever the quorum court wishes merely to express an opinion as to some matter of county affairs, and a resolution shall not serve to compel any executive action.”

Thus, a resolution has no legal significance unless otherwise afforded authority by Arkansas statute or the Arkansas Constitution. Simply stated, as a resolution is generally not binding, there is nothing to void. In this case, the Resolution has legal significance only because Amendment 100 affords it constitutional significance. Plaintiff’s requested relief to void the Resolution stands to reason that a county ordinance is somehow superior to Amendment 100. That argument, for the reasons stated above, is flawed and cannot stand.

**E. Plaintiffs Fail to Include Necessary Parties**

Ark. Code Ann. § 16-111-111 states: “When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard . . . .”

Although the Plaintiffs request rescission of the resolution which is now in the possession of the ARC, the Plaintiffs fails to include the ARC as a defendant. The relief requested by Plaintiffs is of no import if it cannot be applied to the ARC. Thus, the ARC is a necessary party pursuant to Ark. Code Ann. § 16-111-111, as it certainly has an interest that would be affected by the requested declaration. “Failure to include such a party is fatal to a declaratory judgment action.” *Files v. Hill*, 268 Ark. 106, 114, 594 S.W.2d 836, 841 (1980). Because Plaintiffs have failed to include necessary parties, their Complaint should be dismissed.

**F. Plaintiffs Cannot Invalidate the Resolution Pursuant to FOIA**

An act of an Arkansas legislative body, including a quorum court, can be invalidated if the body violates the open meeting requirement of the Arkansas Freedom of Information Act ("FOIA"), Ark. Code Ann. § 25-19-101, *et seq.* See *Rehab Hosp. Services Corp. v. Delta-Hills Health Systems Agency, Inc.*, 285 Ark. 397, 401, 687 S.W.2d 840, 843 (1985). But for a plaintiff to have a claim to invalidate a legislative act, there must be a showing that the government body has been given "the opportunity to address the issue." *Id.* at 401-02, 687 S.W.2d at 843. This requirement derives from the principle that one must exhaust his or her administrative remedies first. *Id.*, see also *National Park Medical Center, Inc. v. Arkansas Depl. of Human Services*, 322 Ark. 595, 604, 911 S.W.2d 250, 255 (1995). Further, a plaintiff must prove that the government body "knowingly" committed the FOIA violation and that it "seek[s] to protect the public's right to information" and not just invalidation for its own purposes. *National Park Medical Center, Inc.*, 322 Ark. at 603, 911 S.W.2d at 255. In addition, a plaintiff must prove that he or she was prejudiced by the FOIA violation. *Bradshaw v. Fort Smith School District*, 2017 Ark. App. 196, 6-7, 519 S.W.3d 344, 348-49 (2017).

The Plaintiffs' only request for relief in regard to their allegations of FOIA violations is that the resolution be invalidated. To CNB's knowledge, no Arkansas appellate case exists where invalidation has been upheld. To be granted invalidation, the Plaintiffs must prove the following: (1) that a FOIA violation has been committed; (2) that the violation was committed knowingly; (3) that Plaintiffs brought the violation to the body's attention and gave opportunity to correct it; (4) that Plaintiffs seek invalidation to protect public's right to information and not for their own purposes; and (5) that Plaintiffs have been prejudiced. *National Park Medical Center, Inc.*, 322 Ark. at 603-604, 911 S.W.2d at 255, *Bradshaw*, 2017 Ark. App. at 6-7, 519 S.W.3d at 348-49.

Plaintiff's Amended Petition is deficient and fails to set forth facts which meet the requirements for invalidation. Arkansas is a "fact pleading" jurisdiction. So, plaintiffs in this State must plead actual facts about the events at issue. The Arkansas Supreme Court has left no doubt about this fact pleading requirement:

Arkansas has adopted a clear standard to require fact pleading; "a pleading which sets forth a claim for relief . . . shall contain (1) a statement in ordinary and concise language of facts showing that the pleader is entitled to relief . . ." ARCP Rule 8(a)(1). Rule 12(b)(6) provides for dismissal of a complaint for "failure to state facts upon which relief can be granted." This court has stated that these two rules must be read together in testing the sufficiency of the complaint; facts, **not mere conclusions**, must be alleged.

*Brown v. Tucker*, 330 Ark. 435, 438 (1997) (quoting *Malone v. Trans-States Lines, Inc.*, 325 Ark. 383 (1996) (emphasis added)). Moreover, Arkansas Courts must presume public officials' actions "to be valid and within the bounds of the law." *Bill's Printing, Inc. v. Carder*, 357 Ark. 242, 250, 161 S.W.3d 803, 808 (2004). Plaintiffs have failed to meet this standard. Plaintiffs fail to specifically state which government officials were allegedly in illegal meetings, when these meetings took place, where the meetings took place, and how these meetings were illegal. Plaintiffs only make conclusory allegations that illegal meetings were held and FOIA violations transpired. Similarly, Plaintiffs fail to allege that the FOIA violations were committed knowingly, an absolute requirement for invalidation. Plaintiffs' complete lack of any factual allegations regarding the alleged FOIA violations fails to overcome the presumption that the members of the Quorum Court followed the law.

Second, the Pope County Quorum Court and County Judge held a three-hour special meeting on August 13, 2019, at which public comments were taken. Amended Verified Petition for Declaratory Judgment and For Writ of Mandamus p. 6, para. 33. In fact, comments were presented by Plaintiffs' counsel. Thus, to the extent there were FOIA violations, the violations

were corrected by an open, public meeting and public discussion pursuant to FOIA, and Plaintiffs cannot legitimately claim they have been prejudiced. To say any alleged violations were not corrected would be to say that the Quorum Court is forever barred from issuing a resolution of support. Invalidation may be appropriate in a scenario where a government body enacts legislation at a meeting called without following the requirements of FOIA (for example, failing to follow notice requirements), but Plaintiffs do not make such an allegation. They only allege that, essentially, once FOIA violations have risen from an alleged meeting before the meeting, the legislative body is forever barred from taking legislative action on the matters discussed in the improper meeting. This argument has no basis in law. Lastly, Plaintiffs have submitted nothing to the Quorum Court requesting it correct itself, likely because the proper remedy for correcting the alleged violations is to hold a public meeting, which has been done. For these reasons, Plaintiffs have failed to set forth facts upon which relief can be granted.

CNB agrees with the arguments submitted by Pope County as well and incorporates Pope County's Motion to Dismiss and Memorandum Brief in Support of Defendant's Motion to Dismiss herein as if fully set out word for word. Ark. R. Civ. P. 10(c).

### III. CONCLUSION

Plaintiffs' claims should be dismissed as the ordinance is unconstitutional, and Plaintiffs have failed to state a claim for relief in regard to their FOIA allegations that can be granted.

WHEREFORE, the Intervenor prays that this Court grant its Motion to Dismiss Amended Complaint; for attorney's fees and costs; and for all other proper relief.

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

PLAINTIFFS

VS.

NO. 58CV-19-439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas, et al.

DEFENDANTS

CHEROKEE NATION BUSINESSES, LLC

INTERVENOR

FILED  
POPE CO. CIRCUIT CLERK  
TIME: 1:02 pm  
DATE: 10-9-19  
*Ben Cross*

MOTION TO DISMISS AMENDED PETITION

Cherokee Nation Businesses, LLC ("Intervenor"), by and through its counsel, and for its *Motion to Dismiss Amended Petition*, states as follows:

1. Arkansas Constitution, Amendment 100 allows four casinos to be opened in the State of Arkansas, including one in Pope County. The voters of Arkansas, with the adoption of Amendment 100, provided for a particular method of local input on the casino to be located in Pope County by requiring casino applicants to submit either a letter of support from the County Judge or a resolution of support from the Quorum Court. At the same time, Plaintiffs attempted to enact an initiated ordinance – Ordinance 2018-O-42 ("the ordinance") – that substantially altered the Constitutional framework for application for a casino license. The ordinance is void, among other reasons, as an unconstitutional addition of qualifications and restrictions on the Constitutional standard adopted by the people. Plaintiffs cannot use the unconstitutional ordinance to control the actions of the County or Arkansas Racing Commission. As explained more fully in the Brief of Law filed with this Motion, Plaintiffs' Amended Complaint should be dismissed.

- 2. Plaintiffs filed their Original Petition on August 13, 2019.
- 3. Plaintiffs filed an Amended Petition on September 4, 2019.

4. Intervenor requests that Plaintiffs' claims be dismissed pursuant to Ark. R. Civ. P. 12(b)(6).

5. Specifically, Plaintiffs rely on the ordinance which is void and unenforceable due to the following: (1) the ordinance unlawfully imposes an additional qualification to Amendment 100; (2) Arkansas law, specifically Ark. Code Ann. § 14-14-806(4), prohibits counties from regulating gambling; (3) the ordinance contradicts Amendment 100 in violation of Article 5, § 1 of the Arkansas Constitution; and (4) the ordinance improperly infringes and abrogates the constitutional and statutory authority of the County Judge and Quorum Court.

6. Further, Plaintiffs have failed to include the Arkansas Racing Commission in its Complaint as is required by Ark. Code Ann. § 16-111-111.

7. Lastly, Plaintiffs, in regards to their allegation that the resolution should be invalidated due to violations of the Arkansas Freedom of Information Act, Ark. Code Ann. § 25-19-101, *et seq.*, have failed to state facts upon which relief can be granted.

8. Intervenor is filing a brief in support simultaneously with this Motion to Dismiss Amended Petition.

9. Intervenor agrees with and incorporates herein by reference the Motion to Dismiss and Memorandum Brief in Support filed by Pope County in this matter. Ark. R. Civ. P. 10(c).

WHEREFORE, the Intervenor prays that this Court grant its Motion to Dismiss Amended Petition; for attorney's fees and costs; and for all other proper relief.

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

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VS.

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BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas, et al.

DEFENDANTS

FILED  
POPE CO. CIRCUIT CLERK  
TIME: 1:02 P.M.  
DATE: 10-9-19  
*Sharon [Signature]*

**RESPONSE TO PLAINTIFFS' RENEWED EMERGENCY MOTION FOR  
TEMPORARY RESTRAINING ORDER AND INCORPORATED BRIEF**

Intervenor, Cherokee Nation Businesses, LLC ("CNB"), by and through its attorneys, McDaniel, Richardson & Calhoun, PLLC, states as follows for its *Response to Plaintiffs' Renewed Emergency Motion for Temporary Restraining Order and Incorporated Brief*:

1. Late in the afternoon on October 3, 2019, Plaintiffs filed a motion requesting an *Ex Parte* Temporary Restraining Order to enjoin the regular business planned to be conducted by the Quorum Court that evening. Plaintiffs requested *ex parte* relief without notice to the opposing parties. However, the Court notified the parties of the motion and sought to conduct a telephone hearing on the matter. Unable to do so, the Court has denied the emergency relief requested. CNB appreciates the Court's careful, deliberate approach to the matter.

2. Plaintiffs' Renewed Motion requests an injunction from the Court "prohibiting the Pope County Quorum Court from taking any action in their respective official capacities to repeal Pope County Ordinance 2018-O-42 during the pending litigation." Renewed Motion p. 6. Thus, while Plaintiffs' attempt to disturb the Quorum Court's legally convened special meeting on October 3 is now moot, it is possible that Plaintiffs may attempt to rely on their motion for any Quorum Court meetings in the future.



3. "Rule 65 of the Arkansas Rules of Civil Procedure governs the issuance of preliminary injunctions. In determining whether to issue a preliminary injunction pursuant to Rule 65, the circuit court must consider two issues: (1) whether irreparable harm will result in the absence of an injunction or restraining order and (2) whether the moving party has demonstrated a likelihood of success on the merits." *City of Jacksonville v. Smith*, 2018 Ark. 87, 5, 540 S.W.3d 661, 665-66.

4. There is no irreparable harm for a legislative body lawfully exercising the authority delegated to it by Arkansas law. Plaintiff's current request for a preliminary injunction centers on a properly convened action of the Pope County Quorum Court in relation to an initiated ordinance. The Arkansas Constitution preserves to the people the right to pass local legislation, but it is not an unlimited right. Ark. Const. Art. 5 § 1. Arkansas statutes govern initiated ordinances at the county level. *Id.* ("General laws shall be enacted providing for the exercise of the initiative and referendum as to counties."). Regarding the amendment or repeal of initiated ordinances, Arkansas law provides as follows:

No measure approved by a vote of the electors shall be amended or repealed by a quorum court except by affirmative vote of two-thirds (2/3) of the whole number of justices comprising a court. On the passage of an amendment or repealing measure, the yeas and nays shall be called and recorded in the minutes of the meeting.

Ark. Code Ann. § 14-14-918(b). Thus, a Quorum Court may properly meet to consider whether an initiated ordinance should have continuing effect or if it should be amended or repealed. This is ordinary business for a county's legislative body.

5. Plaintiffs' Motion alleges no facts suggesting anything irregular in the calling of the October 3, 2019, special meeting of the Pope County Quorum Court. Arkansas courts recognize "that a public officer's actions are presumed to be valid and within the bounds of the law." *Bill's Printing, Inc. v. Carder*, 357 Ark. 242, 250, 161 S.W.3d 803, 808 (2004). Thus, absent

specific facts alleged to the contrary (there are none here), this Court must assume that the Quorum Court followed the law in calling the special meeting. “[A]bsent evidence to the contrary,” this Court also must assume that the Quorum Court “will follow the law in performance of their duties” in calling any future meetings relating to this subject-matter. *Dilday v. State*, 300 Ark. 249, 251-52, 778 S.W.2d 618, 620 (1989). Plaintiffs conclusory allegations fail to demonstrate any irregularity over which this Court could assume jurisdiction. *Panhandle Oil and Gas, Inc. v. BHP Billiton Petroleum, LLC*, 2017 Ark. App. 201, 6-7, 520 S.W.3d 277, 282 (“Arkansas is a fact-pleading state”).

6. Our Constitution has “a specific separation-of-powers provision.” *Hobbs v. Jones*, 2012 Ark. 293, 9, 412 S.W.3d 844, 851. It provides:

§ 1. The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to 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.

§ 2. No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Ark. Const. Art. 4 §§ 1, 2. “The legislative branch . . . has the power and responsibility to proclaim the law through statutory enactments. The judicial branch has the power and responsibility to interpret the legislative enactments.” *Hobbs*, 2012 Ark. 293 at 9. On the County level, it is for the Quorum Court to “exercise local legislative authority.” Ark. Const. Amend. 55, § 1; *see also* Ark. Code Ann. § 14-14-801(a). Calling legislative meetings and amending or repealing ordinances is core to a quorum court’s legislative purview. Ark. Code Ann. § 14-14-901 & 904. The judicial branch of the State cannot override the legislative branch’s exercise of its day-to-day functions.

7. Moreover, Plaintiffs complaint in this matter fails "to state facts upon which relief can be granted" in this matter. Ark. R. Civ. P. 12(b)(6). This failure is fully explained in Defendants and Intervenors' Motions to Dismiss which are incorporated herein by reference. Ark. R. Civ. P. 10(c).

8. In short, if the Pope County Quorum Court decides at a duly called meeting to repeal the ordinance at the center of Plaintiffs' lawsuit, it is well within its authority to do so. Absent any factual allegations of ultra vires or illegal conduct by the Quorum Court (which are absent here) Plaintiffs cannot enlist this Court to interfere in the regular operation of the Quorum Court. Accordingly, Plaintiffs' *Renewed Emergency Motion for Temporary Restraining Order and Incorporated Brief* should be denied.

WHEREFORE, Intervenor Cherokee Nation Businesses, LLC respectfully requests that this Court deny Plaintiffs' *Renewed Emergency Motion for Temporary Restraining Order*.

Respectfully submitted,



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Attorneys for Intervenor

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS  
CIVIL DIVISION (I)

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

Vs.

Case No. 58CV-19-439

PLAINTIFFS  
FILED  
POPE CO. CIRCUIT CLERK  
TIME: 11:14 AM  
DATE: 10-11-19  
*[Signature]*

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas; and  
PHILLIP HANEY, CALEB MOORE,  
TIM WHITTENBURG, REUBEN BROWN,  
JACKIE HEFLIN, JAMIE JACKSON,  
BLAKE TARPLEY, DOUG SKELTON,  
BILL SPARKS, JAMES KUSTURIN,  
RAY BLACK, JOSEPH PEARSON and  
ERNIE ENCHELMAYER, in their  
official capacities as members of the  
Quorum Court of Pope County, Arkansas

DEFENDANTS

**DEFENDANTS' RESPONSE TO PLAINTIFFS' RENEWED  
EMERGENCY MOTION FOR TEMPORARY RESTRAINING  
ORDER AND MEMORANDUM BRIEF IN SUPPORT**

Comes now the Defendants, Ben Cross, in his official capacity as County Judge of Pope County, Arkansas and Phillip Haney, Caleb Moore, Tim Whittenburg, Reuben Brown, Jackie Heflin, Jamie Jackson, Blake Tarpley, Doug Skelton, Bill Sparks, James Kusturin, Ray Black, Joseph Pearson, and Ernie Enchelmayer, in their official capacities as members of the Quorum Court of Pope County ("Defendants"), and for their Response to Plaintiffs' Renewed Emergency Motion for Temporary Restraining Order and Incorporated Brief ("Motion"), state and allege:

1. Defendants deny each and every material allegation set forth in the Motion as fully as though said allegations were set forth herein word for word and denied word for word, except such allegations as may be hereinafter expressly admitted.

2. Defendants do not have sufficient information to admit or deny the allegations in paragraph 1 of the Motion and, therefore, deny the same on information and belief.

3. Defendants do not have sufficient information to admit or deny the allegations in paragraph 2 of the Motion and, therefore, deny the same on information and belief.

4. Defendants admit the allegations in paragraphs 3 through 16 of the Motion.

5. With respect to paragraph 17 of the Motion, Defendants admit that jurisdiction and venue are proper in this Court.

6. Defendants admit the allegations in paragraphs 18 through 19 of the Motion.

7. Defendants admit all but the last part of the allegations in paragraph 20 of the Motion and state that it contains a typographical omission by stating that Amendment 100 requires a "resolution of the Pope County Quorum Court." Amendment 100 requires a "resolution of *support* of the Pope County Quorum Court."

8. Defendants admit the allegations in paragraph 21 of the Motion; however, Defendants deny that the initiated measure referenced therein was valid or constitutional. As set forth in Defendants' Motion to Dismiss filed on September 24, 2019, said initiated measure is in conflict with the Arkansas Constitution and, therefore, it is unconstitutional and invalid.

9. Defendants deny the allegations in the first sentence of paragraph 22 of the Motion. With respect to the remaining allegations of paragraph 22, Defendants admit that Ordinance No. 2018-O-42 ("Local Ordinance") purportedly established a condition precedent to Amendment 100. Defendants deny the Local Ordinance had any effect in curtailing the authority of the Pope

County Judge or members of the Pope County Quorum Court ("Quorum Court"), as established by the Arkansas Constitution.

10. Defendants deny the allegations in paragraphs 23 and 24 of the Motion.

11. Defendants do not have sufficient information to admit or deny the allegations in paragraph 25 of the Motion and, therefore, deny the same on information and belief.

12. Paragraph 26 of the Motion does not set forth factual allegations to which a response is required. To the extent a response is required, Defendants assert that the doctrine relative to statutory interpretation referenced in paragraph 26 speaks for itself.

13. With respect to the allegations in the Paragraph 27 of the Motion, Defendants renew and adopt by incorporation its allegations previously set forth herein.

14. Defendants admit the allegations in paragraph 28 of the Motion. Defendants deny that Plaintiffs' Amended Verified Petition states any claim upon which relief can be granted.

15. Defendants admit the allegations in paragraph 29 of the Motion. Defendants admit that Exhibit "A" to the Motion is a copy of the agenda for the October 3, 2019, meeting of the Quorum Court.

16. With respect to the allegations of paragraph 30 of the Motion, the Quorum Court did not vote to repeal the Local Ordinance at its October 3, 2019 meeting; therefore, the allegations of paragraph 30 of the Motion are denied.

17. With the exception of noting that the Quorum Court previously voted to issue a resolution of support to a casino applicant on August 13, 2019, Defendants admit the allegations in paragraph 31 of the Motion.

18. Defendants do not have sufficient information to admit or deny the allegations in paragraph 32 of the Motion relative to the "best knowledge and belief of Plaintiffs" and, therefore, deny the same on information and belief.

19. Defendants do not have sufficient information to admit or deny the allegations in paragraph 33 of the Motion and, therefore, deny the same on information and belief.

20. Defendants do not have sufficient information to admit or deny the allegations in paragraph 34 of the Motion and, therefore, deny the same on information and belief.

21. Defendants deny the allegations in paragraph 35 of the Motion.

22. Relative to the allegations in paragraph 36 of the Motion, Defendants admit that the Arkansas Constitution, as well as a statute, allows the Pope County Quorum Court to repeal any ordinance adopted by initiated measure. Defendants deny that the Arkansas Supreme Court case referenced in paragraph 36 in any way restricts the authority of the Pope County Quorum Court to repeal any ordinance, including those adopted by initiated measure like the Local Ordinance.

23. With respect to the allegations in paragraph 37 of the Motion, the Quorum Court has not held a vote regarding the repeal the Local Ordinance; therefore, the "intent" of the Quorum Court, as a body, is unknown. Defendants deny the allegations in paragraph 37 of the Motion.

24. Defendants deny the allegations in paragraph 38 of the Motion.

25. Defendants deny the allegations in paragraph 39 of the Motion.

26. Defendants do not have sufficient information to admit or deny the allegations in paragraph 40 of the Motion and, therefore, deny the same on information and belief. While it is unknown what steps Plaintiffs' counsel took to notify Defendants' counsel of the filing of the Motion, it is clear that Plaintiffs' counsel failed to timely serve Defendants' counsel with the Motion. The Motion contains a certificate of service wherein Mr. Story "certif[ied]" that he

served on the Motion on the undersigned on Thursday, October 3, 2019, via email. However, Plaintiffs' counsel did not serve Defendants' counsel with the Motion until Monday, October 07, 2019. See email attached hereto as Exhibit "1."

WHEREFORE, Defendants respectfully request that the Court deny Plaintiffs' Renewed Emergency Motion for Temporary Restraining Order and for such further relief to which they may be entitled.

**MEMORANDUM BRIEF IN SUPPORT OF DEFENDANTS' RESPONSE TO  
RENEWED EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER**

- A. The Quorum Court has constitutionally and statutorily prescribed authority to repeal the Local Ordinance.

Plaintiffs' Motion requests this Court entered a "Temporary Restraining Order . . . prohibiting the Pope County Quorum Court from taking any action in their respective official capacities to repeal Pope County Ordinance 2018-O-42" during this litigation. See Plaintiffs' Motion, prayer clause at p. 6. Plaintiffs' Motion is wholly without legal support as this Court has no authority to restrict the Quorum Court from repealing the Local Ordinance if it proceeds to do so pursuant to Article 5, § 1 of the Arkansas Constitution and Ark. Code Ann. § 14-14-918(b) (Repl. 2013). Plaintiffs' Motion should be denied.

As asserted by Plaintiffs, the Local Ordinance (attached as Exhibit A to Plaintiffs' Amended Verified Petition) was an initiative measure approved by the Pope County electorate at the November 2018 general election. Plaintiffs' Motion, para. 21. The Local Ordinance was enacted by the electors of Pope County pursuant to the Article 5, § 1 of the Arkansas Constitution ("The initiative and referendum powers of the people are hereby further reserved to the legal voters of each municipality and county as to all local, special and municipal legislation of every character in and for their respective municipalities and counties . . .") and Ark. Code



Ann. § 14-14-914(a) (Repl. 2013) ("The powers of initiative and referendum are reserved to the electors of each county government pursuant to Arkansas Constitution, Amendment 7.").

With respect to the amendment or repeal of a measure approved by the voters, Article 5, § 1 provides:

No measure approved by a vote of the people shall be amended or repealed by the General Assembly or by any city council, except upon a yea or nay vote on roll call of two-thirds of all the members elected to each house of the General Assembly, or of the city council, as the case may be.

Arkansas Code Annotated § 14-14-918(b) similarly states:

No measure approved by a vote of the electors shall be amended or repealed by a quorum court except by affirmative vote of two-thirds (2/3) of the whole number of justices comprising a court. On the passage of an amendment or repealing measure, the yeas and nays shall be called and recorded in the minutes of the meeting.

Because the Local Ordinance was an initiative measure passed by the electors of Pope County, it is subject to amendment and repeal pursuant to the Arkansas Constitution and Ark. Code Ann. § 14-14-918(b). The Pope County Quorum Court has constitutionally and statutorily granted authority to repeal, or amend, the Local Ordinance. Further, there is no provision of Arkansas law which suggests that a court may curtail or restrict a governing body's authority to repeal an initiative measure approved by the electors.

Any attempt by a court to restrict a quorum court's ability to repeal or enact legislation would run afoul the separation of powers doctrine set forth in Article 4, § 2 of the Arkansas Constitution. See Wells v. Purcell, 267 Ark. 456, 462, 592 S.W.2d 100 (1979) ("Neither of the three separate departments of government is subordinate to the other and neither can arrogate to itself any control over either one of the others in matters which have been confided by the constitution to such other department."). Therefore, the Court may not interfere with the

Quorum Court's legislative process by prohibiting it from repealing the Local Ordinance. See id. at 467 ("The courts cannot interfere with the legislature or legislative process; they can only determine the validity of its acts."). The above principles hold true even if a court believes the legislative action at issue is unwise. See Hill v. Bank of Northeast Arkansas, 264 Ark. 412, 417, 572 S.W.2d 150 (1978) ("The wisdom, advisability, expediency, propriety, and necessity of particular legislation are matters solely for consideration of the legislative department and are not for judicial determination."). Plaintiffs' Motion should be denied.

To assert this Court cannot prohibit the Quorum Court from repealing the Local Ordinance does not mean the Pope County voters are without a remedy with respect to the issue presented in Plaintiffs' Motion. Electors of Pope County are permitted to exercise a fundamental right of democracy by contacting their elected justices of the peace and expressing their opinions relative to the Local Ordinance. Moreover, should the Quorum Court take such action with which the electorate disagrees, those individuals can exercise another fundamental right of democracy at the ballot box. The Pope County electors' remedy is not to have the judiciary improperly prohibit the legislators of Pope County from conducting their constitutionally and statutorily prescribed legislative duties, which is the request of Plaintiffs' Motion.

Plaintiffs' cite only Wallace School Dist. No. 1, Little River County v. County Board of Edu., Little River County, 214 Ark. 436, 216 S.W.2d 790 (1949) (Plaintiffs' Motion, para.36) as a purported basis for this Court to enjoin the Quorum Court "from taking any action to repeal" (id. at para. 39) the Local Ordinance. A cursory review of Wallace demonstrates that it provides no support for Plaintiffs' request for a temporary restraining order prohibiting the Quorum Court from exercising its constitutional and statutory authority. Wallace concerned the dissolution of the Wallace School District and annexation of its territory to a neighboring district upon petition,

after an election regarding such issue failed. 214 Ark. at 437. Appellants therein attempted to analogize the situation presented to an attempt to repeal or amend an initiative measure adopted pursuant to the powers of initiative and referendum. *Id.* at 438. In making such analogy, appellants cited "decisions in which it was held that legislatures and city councils are limited in power to deal with measures adopted by the people." *Id.*

A quorum court's limitations to "deal with" initiative measures adopted by the voters, as referenced in Wallace, is expressly set forth in the Constitution and Ark. Code Ann. § 14-14-918. Except in the context of an initiative measure, a quorum court can repeal or amend any ordinance by "[a] concurrence by a majority of the whole number of members elected to the quorum court." Ark. Code Ann. § 14-14-905(c)(1)(B) (Repl. 2013.). However, in the context of an initiative measure, such power is limited in that a vote of two-thirds of the quorum court members is required to repeal or amend such measure. With respect to initiative measures, Wallace provides no additional requirement than those acknowledged by the Arkansas Constitution and by Arkansas statutes.

The Quorum Court has the authority to repeal the Local Ordinance and it would be improper for this Court to restrict such authority. Defendants respectfully request the Court deny Plaintiffs' Motion.

B. Plaintiffs have failed to show they would suffer immediate and irreparable harm if the Quorum Court repeals the Local Ordinance, nor have they demonstrated a likelihood of success on the merits.

"In determining whether to issue a TRO pursuant to Rule 65, a circuit court must consider two issues: (1) whether irreparable harm will result in the absence of an injunction or restraining order, and (2) whether the moving party has demonstrated a likelihood of success on the merits." Arkansas Dept. of Human Services v. Ledgerwood, 2017 Ark. 308, at 8, 530

S.W.3d 366 (internal citation omitted). Harm is generally only considered irreparable if such harm cannot be adequately compensated by money damages or redressed in a court of law. AJ & K Operating Co., Inc. v. Smith, 355 Ark. 510, 518, 140 S.W.3d 475 (2004). "The test for determining the likelihood of success is whether there is a reasonable probability of success in the litigation" and "[s]uch a showing is a benchmark for issuing a preliminary injunction." Ledgerwood, 2017 Ark. 308 at 12.

Defendants' filed a Motion to Dismiss Plaintiffs' Amended Verified Petition on September 24, 2019. Defendants' Motion to Dismiss is adopted by referenced and is incorporated herein. For the reasons noted in the Motion to Dismiss, Plaintiffs do not have a reasonable probability of success in this matter. Therefore, their Motion should be denied.

While Plaintiffs assert at paragraph 35 of their Motion that they will "suffer immediate and irreparable harm" if the Court does not enter a temporary restraining order, Plaintiffs fail to assert any specific facts which demonstrate such irreparable harm. Instead, Plaintiffs' Motion seems to indicate that the "irreparable harm" they will suffer if the Court fails to enjoin the Defendants from repealing the Local Ordinance is their asserted claims become more difficult to prosecute (or, perhaps, are mooted altogether). When a litigant takes appropriate action to strengthen its defense to asserted claims or to "eliminate the . . . litigation" (Motion, para. 37), that does not mean the opposing litigant will suffer the "irreparable harm" which Rule 65 is designed to present. See e.g., Baptist Health v. Murphy, 365 Ark. 115, 226 S.W.3d 800 (2006) (finding of irreparable harm to doctor-patient relationships); Ledgerwood, 2017 Ark. 308, at 11 (finding of irreparable harm because "appellees have sustained injuries for which money damages are not available"); contra Smith, 355 Ark. at 520 ("We hold that the contention in this case that remediation could destroy evidence for a trial on damages does not constitute

irreparable harm." ). If the Quorum Court repeals the Local Ordinance, which, as noted above, is within its authority, the fact that such action may negatively impact Plaintiffs' claims in this action is not "irreparable harm."

Plaintiffs assert that the "status quo" of this matter should be maintained "until further facts regarding issuance of Resolution 2019-R-14 and subsequent private meetings of the Quorum Court can be investigated." Plaintiffs' Motion, para. 38. Any potential repeal of the Local Ordinance will not prohibit Plaintiffs from further investigating the above issues relative to their pleaded claims while this action remains pending. Plaintiffs' "harm" is nonexistent. If there is a repeal of the Local Ordinance, the validity of such action can be reviewed by a court (see Wells, supra); therefore, Plaintiffs have an adequate remedy and the harm alleged is not irreparable pursuant to Arkansas Law. See Smith, supra.

Plaintiffs have utterly failed to demonstrate they will suffer irreparable harm unless this Court prohibits the repeal of the Local Ordinance by the Quorum Court. Plaintiffs' Motion must be denied.

#### CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny Plaintiffs' Renewed Emergency Motion for Temporary Restraining Order.

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS,  
AT RUSSELLVILLE

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

PLAINTIFFS

v. Case No. 58CV-19-439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas; and  
PHILLIP HANEY, CALEB MOORE,  
TIM WHITTENBURG, REUBEN BROWN,  
JACKIE HEFLIN, JAMIE JACKSON,  
BLAKE TARPLEY, DOUG SKELTON,  
BILL SPARKS, JAMES KUSTURIN,  
RAY BLACK, JOSEPH PEARSON and  
ERNIE ENCHELMAYER, in their  
official capacities as members of the  
Quorum Court of Pope County, Arkansas ,

DEFENDANTS

FILED  
POPE CO. CIRCUIT CLERK  
TIME: 1:49 P.M.  
DATE: 10-11-19  
*[Signature]*

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND  
INCORPORATED BRIEF

COMES NOW, the Plaintiffs, by and through undersigned counsel, and in Response to Defendants' Motion to Dismiss, state and allege as follows:

1. Defendants, in their Motion to Dismiss, take issue with Plaintiffs' observation of the conflict between Arkansas Constitutional Amendment 100 with Amendment 14. The two provisions, the former setting aside Pope County specifically for the location of a casino, and the latter prohibiting local or special legislation, can be read either to conflict or harmonize, preferably to harmonize. In either regard, since Amendment 14 prohibits local law and Amendment specifically calls for it, an action for Declaratory Judgment under the provisions of Rule 57 of the Arkansas Rules of Civil Procedure and A.C.A. § 16-111-101 et seq. is clearly appropriate under the facts of this case.

Amendment 14 prohibits the General Assembly from passing “any local or special act.” While Defendants rights observe that Amendment 100 is not an action of the General Assembly, caselaw suggests the prohibition is much broader. As stated by the Arkansas Supreme Court, “[i]n our opinion it is immaterial whether or not local legislation is induced by constitutional mandate or passed because not prohibited by the Constitution. If such legislation is invalid, it is not strengthened by the fact that it was superinduced by constitutional mandate.” *Smith v. Cole*, 187 Ark. 471, 61 S.w.2d 55, 56-57 (1933). A risk inherent to the initiative process without the screening process typically afforded traditional legislation through the Arkansas Bureau of Legislative Research, is the possibility of the result being conflicting constitutional provisions between newly enacted amendments by popular vote, and by setting aside Pope County (and Jefferson County), Amendment 100 is essentially “local,” as it applies to a subdivision of the state “less than whole.” *Foster v. Jefferson County Bd. of Election Com’rs*, 328 Ark. 223, 944 S.W.2d 93 (1997). Consistent with the rights of the people reserved to them by Amendment 14, in passing Ordinance 2018-O-42, the citizens of Pope County have expressed that they simply do not want a casino to be located there, and their rights they executed under Article 5, § 1 that:

permits the exercise of power reserved to the people to control, to some extent at least, the policies of the state, but more particularly of counties and municipalities, as distinguished from the exercise of similar power by the Legislature, and since that residuum of power remains in the electors, their acts should not be thwarted by strict or technical construction.

*Tindall v. Searan*, 192 Ark. 173, 90 S.W.2d 476 (1936).

Assuming, *arguendo*, that there exists some economic rational basis for the targeting of Pope County by Amendment 100 sufficient to overcome the local character of the amendment, what is not to be overcome is the fundamental nature of the right that “the people reserve to themselves to propose legislative measures” as stated in Article 5, § 1, and which resulted in

passage of Ordinance 2018-O-42 by overwhelming popular vote of the citizens of Pope County. By that measure, considering the fundamental nature of the franchise rights of the citizens of Pope County, not only is there no conflict between Ordinance 2018-O-42 and Amendment 100 but the ordinance proves Amendment 14 acts as intended.

The criteria for the proposed location of a casino in Pope County was based on consideration of population and economic prosperity of the county as established by the statutory tier rating system of the Arkansas Economic Development Council ("AEDC") as expressed by Nate Steele in a television interview.<sup>1</sup> On an economic prosperity scale of 1 to 4, 1 being the highest, Pope County is Tier 2, while other counties of similar population in Arkansas are rated Tier 3 or Tier 4.<sup>2</sup> Therefore, as evidenced by the results of the 2018 popular vote on both Issue 4 and Ordinance 2018-O-42 and the AEDC tier rating system, Pope County has been arbitrarily selected as the potential site for a casino as it does not reasonably relate to the expressed criteria for the selection process, and that Pope County neither desires nor is in financial need for a casino to be located there considering there are other less prosperous counties Tier 3 and Tier 4 counties that would conceivably benefit from the purported positive economic impact. The point for our purposes here being that there is no rational basis for Pope County being the site for a proposed casino location, a recognized exception to the local or special legislation rule of Amendment. In that sense, Amendment 14 and Amendment 100 cannot be reconciled.

2. Defendants maintain the argument that Pope County Ordinance 2018-O-42 is unconstitutional as being in conflict with Amendment 100 in that it "improperly infringes on and

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<sup>1</sup> Talk, Business & Politics on YouTube, <https://www.youtube.com/watch?v=NBpez38fTWo> 1/9/18, at 3:49.

<sup>2</sup> See Arkansas Population and Incentive Tier Maps attached hereto as **Exhibits A and B** and incorporated herein by reference.



attempts to abrogate the constitutional authority of the Pope County Judge and Quorum Court of Pope County," a statement that is nothing more than an unsupported legal conclusion without basis in law or fact nor specific reference to language within the amendment. While article 5, § 1 of the Arkansas Constitution provides that "no local legislation shall be enacted contrary to the Constitution or any general law of the State, and any general law shall have the effect of repealing any local legislation which is in conflict therewith," contrary to Defendants' argument, there simply is no language in Amendment 100 that prohibits the presentation of the question regarding a letter or resolution in favor of a casino applicant to the voters of Pope County as called for in Ordinance 2018-O-42. Likewise, the voters of Pope County overwhelmingly passed Ordinance 2010-O-42 and as was their right under the Article 5, § 1, a constitutional provision that:

provides a necessary and potent protection against ill-advised, oppressive or improvident legislative functions, and actions of the electors thereunder, in attempting to obtain relief, should not be thwarted by strict or technical construction. We are neither authorized nor remotely inclined to disturb the proper application of this wholesome constitutional reservation of power to the people.

*E.W. Cochran v. Black*, 240 Ark. 393, 400 S.W.2d 280, 283 (1966).

As an initial point, the cited provisions used the disjunctive "or" to distinguish constitutional provisions from "general law of the State," and relevant to the facts here, there is no applicable general law, i.e., there is no apparent conflict between Ordinance 2018-O-42 with any Arkansas statute since:

[a] general law is one that operates upon all counties, cities and towns alike. A law is special in a constitutional sense when by force of an inherent limitation is arbitrarily separates some person, place or thing from those upon which, but for some separation it would operate and a local law is one that applies to any subdivision or division of the state less than the whole.

*Laman v. Harrill*, 233 Ark. 967, 349 S.W.2d 814, 816 (1961). Moreover, Defendants claim that 2018-O-42 “wholly eviscerates the Constitution’s requirement that the Pope County Judge or Quorum Court decide, in their sole discretion, when, how and who to support as a casino applicant.”<sup>3</sup> Amendment 100 simply and clearly requires only that a potential casino applicant “submit either a letter or support from the county judge or a resolution from the quorum court . . . .”<sup>4</sup> Defendants take that as a constitutional grant of “sole discretion” to the County Judge or Quorum Court. In support of that proposition, they cite cases regarding the prohibition of a delegation of legislative authority. Defendants may desire that level of sweeping, dictatorial authority in this instance, but fail to point out the language contained in Amendment 100 that expressly grants such ultimate power or likewise implies the demise of the democratic processes afforded Plaintiffs under the Arkansas Constitution they seek here. It must be noted that Arkansas law defines a “resolution” as one means of county approval Amendment 100 requires, as “the adoption of a formal statement of policy” used “whenever the quorum court wishes merely to express an opinion as to some matter or county affairs” that “shall not serve to compel any executive action.”<sup>5</sup> Hardly the formal function of a legislative body contemplated by A.C.A. § 14-14-806 as Defendants suggest. On the contrary, Mr. Nate Steel, one of the drafters of Amendment 100, as set forth in Paragraph 30 of Plaintiffs’ Amendment Petition, not only acknowledged, but emphasized, in public commentary, that Amendment 100, as distinguished from all previous efforts to legalize casino gambling in the State of Arkansas, considered local control efforts since “in addition to Pope County, for example, there have been ordinances passed locally that say it must pass in Pope County before the Mayor or County Judge could

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<sup>3</sup> Defendants’ Brief in Support, p. 9.

<sup>4</sup> § 4(n).

<sup>5</sup> A.C.A. § 14-14-904(i).

issue a letter of support, and we've said publicly that's fine. We provide for local control in this amendment [100], but we also intended to inspire that kind of discussion on a local level."

AETN, Arkansas Week on YouTube, 10/5/18, <https://youtu.be/zFBsCqPMLE>, at 4:43.

Ordinance 2018-O-42 is entirely consistent with that expression of local control, and is an appropriate exercise of the rights of the citizens of Pope County as set forth in the Arkansas Constitution and nothing whatsoever to do an attempt to legislate gambling as Defendants suggest.

The irony of the argument put forth by Defendants on Page 10 of their brief is not lost on Plaintiffs. Defendants suggest that by enacting the voting requirement of Ordinance 2018-O-42 is a form of "regulation" of gambling prohibited by A.C.A. § 14-14-806 by the Pope County electorate, and that such a proposition "should be without dispute." What should be without dispute is, as noted by Defendants, that A.C.A. § 14-14-806(4) prohibits a county quorum court from "[t]he legislative power to regulate any form of gambling," yet Amendment 100 requires, and the Pope County Quorum Court has illegally done, the issuance of a resolution in favor of a casino applicant prior to applying. Defendants argue that Ordinance 2010-O-42 "seeks to unlawfully regulate 'gambling' by imposing restrictions not authorized by the Constitution" and that, therefore, "the Subject Ordinance is invalid and unconstitutional."<sup>6</sup> Applying Defendants' logic, by granting sole discretion to the Pope County Quorum Court to issue a supporting resolution, does not Amendment 100 repeal A.C.A. §14-14-806 in allowing the quorum court the power to "regulate" gambling by the issuance of said resolution? And, if not, does that not mean that the question of issuance of a supporting resolution, and, likewise, public control over the

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<sup>6</sup> Defendants Brief, p. 11.

outcome of the decision of that decision, is simply not the act of “legislative power” contemplated by A.C.A. §14-14-806? The answers are, of course, respectively, no and yes.

Since Defendants suggest also that it is general law with which Ordinance 2018-O-42 conflicts, it must be noted that a “general law” is one that operates uniformly throughout the state, whereas Amendment 100, for all purposes here, sets out Pope County in particular, the Arkansas Supreme Court in *Tindall v. Searan*, a case cited by Defendants, stands for the proposition that “[w]e have repeatedly held that when one or more counties is exempt from any law, that this exemption makes the law local.” 192 Ark. 173, 90 S.W.2d 476, 478 (1936). There exists, then, a facial conflict, between Amendment 100 and the rights the people reserved to themselves as set forth in Amendment 14 that can only be resolved through recognition that Amendment 100 was not intended to prevent the Pope County initiative that resulted in Ordinance 2018-O-42, but intended it, and Defendants have failed to put forth the language of Amendment 100 that suggests otherwise.

Since 2018-O-42 is not unconstitutional, when the Pope County Quorum Court met on August 13, 2019 to consider passage of Resolution 2019-R-14, Ordinance 2018-O-42 remained “an enactment of compulsory law for a quorum court”<sup>7</sup> in Pope County on that date. The Quorum Court, in one fell swoop, not only gutted the democratic process but invaded the exclusive province of the courts in unilaterally determining which laws to follow and which to ignore. *See, Wells v. Riviere*, 269 Ark. 156, 599 S.W.2d 375, 381 (1980). The Pope County Quorum Court had no legal authority to declare Ordinance 2018-O-42 unconstitutional, acted illegally, and their actions should be unwound in the form of retraction of Resolution 2019-R-14

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<sup>7</sup> A.C.A. § 14-14-904(i).

and the holding of a popular election as set forth by the will of the people expressed in the ordinance.

3. Defendants' assert that Plaintiffs failed to plead sufficient facts by which they would be entitled to relief in claiming Pope County officials violated Arkansas FOIA. Plaintiffs alleged in Paragraphs 59 and 60 of their Amended Petition that the County Judge and Quorum Court members were involved in secret meetings between themselves and representatives of prospective casino applicants. To the extent that Plaintiff failed to detail specific dates and times of said meetings it is an arguable point, one that Plaintiffs expect to flesh out in discovery. However, any secret meeting during which county business is discussed as alleged by Plaintiffs, is a violation of FOIA and Plaintiffs sufficiently pleaded that fact.

Given that the purpose of FOIA is for the public business is conducted in public, that both Amendment 100 and Ordinance 20180-O-42 are the results of the initiative process of Amendment 14, and that FOIA § 25-19-104 allows for criminal penalties for negligent violations of its provisions, mandamus relief is perfectly appropriate under the facts of this case. Nevertheless, Defendants would have this Court dismiss Plaintiffs' Petition in light of these facts. However:


No court of justice can, in its nature, be made a handmaid of iniquity. Courts are instituted to carry into effect the laws of the country. How can they, then, become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal.

*Tallman et al., v. Drainage Comr's*, 126 Ark. 6, 186 S.W. 296, 298 (1916). Defendants clearly acted illegally and cannot therefore seek relief for said activity from this Court.

WHEREFORE, Plaintiffs pray for an Order of this Court denying Defendants' Motion to dismiss for the reasons stated herein, for an award of its costs associated with the defense of this

Motion including reasonable attorneys' fees, and for such other and further relief the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response was served this 11th day of October, 2019 on all parties of record by eflex:

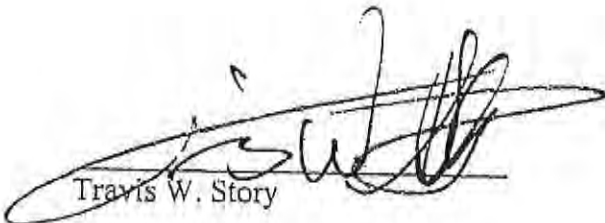
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IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS,  
AT RUSSELLVILLE

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

POPE CO. FILED  
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TIME: 11:52 AM  
DATE: 10-18-19  
PLAINTIFFS  
*Quitting*

v. Case No. 58CV-19-439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas, et al.; and

DEFENDANTS

CHEROKEE NATION BUSINESS, LLC

INTERVENOR

PLAINTIFFS' RESPONSE TO INTERVENOR'S MOTION TO DISMISS AND  
INCORPORATED BRIEF

COMES NOW, the Plaintiffs, by and through undersigned counsel, and in Response to  
Intervenor's Motion to Dismiss, state and allege as follows:

I. INTRODUCTION

Intervenor is understandably frustrated that the exercise of democracy in Pope County stands as a roadblock to a conclusion that must have seemed preordained. It is egregious for them to suggest, however, that Plaintiffs' efforts in this action represent anything other than an attempt to recognize and enforce the will of Pope County voters expressed in the 2018 general elections when they overwhelmingly against passage of Amendment 100 and in favor of Pope County Ordinance 2018-O-42. So while Defendants and Intervenor present Amendment 100 as the introduction of a new era in Pope County of the exercise of county affairs by special interests and their "significant commitment to the benefit of Pope County,"<sup>1</sup> the voters have not just "attempted" to exercise, but have affirmatively exercised their franchise rights they reserve unto themselves in Article 5, Section 1 of the Arkansas Constitution. Passage of Pope County

<sup>1</sup> See, Pope County Resolution 2019-R-14.

Ordinance 2018-O-42 does nothing more than afford the voters of Pope County control over their local affairs and the actions of the County Judge and Quorum Court prior to issuance of support for a particular casino applicant. Not only is that act not precluded by Amendment 100, it is entirely consistent with the constitutional framework and underlying philosophy behind the initiative process that resulted in Ordinance 2018-O-42, an act which is presumed constitutional.

II. ARGUMENT

A. Ordinance 2018-O-42 Does Not Impose Additional Qualifications for a Casino Applicant

Intervenor submit that Amendment 100 “provided for a particular method of local input” by stating the “all casino applicants” are to “submit either a letter of support from the county judge or a resolution from the quorum court of the county.”<sup>2</sup> Amendment 100 neither mandates nor, in fact, alters the routine discretionary process of the quorum court that may or may not result in a letter or resolution of support for a casino applicant, nor does it preclude the County Judge or Quorum Court from presenting a question of such significant economic and cultural importance to Pope County voters. In that regard Amendment 100 is silent and, contrary to Intervenor’s argument that silence be construed as prohibition, the opposite is true in that “[a] county acting through its Quorum Court may exercise local legislative authority not denied by the Constitution or by law.” AR Const. Amend. 55, § 1.

While § 4(k) of Amendment 100 dictates that the Arkansas Racing Commission “shall” award a casino license to a casino applicant to a casino to be located in Pope County and “shall” require a casino applicant to provide a letter or resolution of support, there is no similar mandatory language targeted toward the County Judge or Quorum Court in the exercise of their

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<sup>2</sup> AR Const. Amend 100, § 4(n).



discretion under Amendment 100. In fact, a plain reading of the amendment finds no timeline for the issuance of said letter or resolution, and as can reasonably be implied under a plain reading of Amendment 100, there exists the possibility that no letter or resolution is forthcoming on behalf of any applicant, leaving the Racing Commission frustrated in its constitutional mandate. But the blame for that eventuality lies at the doorstep of the drafters of Amendment 100, not the Pope County voters.

Intervenor argues that the Quorum Court's deference to Pope County voters would result in a prohibited "additional qualification" to the requirements of Amendment 100. While Section 4 does set forth preconditions for a casino license applicant, it does not dictate to the Pope County Quorum Court how best to conduct its legislative affairs. A.C.A. 14-14-904(j) defines a "resolution" as nothing more than "a formal statement of policy by a quorum court" having no force of law since such a resolution "shall not serve to compel any executive action." Likewise, a letter from the County Judge is similar expression of policy from the county executive. In either case, nothing in the text of Amendment 100 expressly prohibits the Quorum Court from eliciting from the public their sentiment on what that policy should be. And in neither case are there additional burdens in the application process placed upon a casino license applicant, other than that self-imposed in their efforts of broader persuasion or the pledging of emoluments to a more numerous body politic. The ordinance only acts as a complete bar to application for a casino license only if the Quorum Court in its discretion presents a resolution of support in favor or a casino applicant, and the voters reject it. Intervenor's argument that a popular vote in Pope County would prevent the Arkansas Racing Commission from exercising its constitutional obligations is not material to the issues presented here, but is extraordinary in the suggestion,

therefore, that any deliberative process by the duly elected legislative body of the county is a mere inconsequential formality.

The power of the County Judge or Quorum Court to issue a letter or resolution in favor of a casino applicant as set forth in § 4 is no extraordinary grant of authority attributable to Amendment 100 as argued by Intervenor, but rather describes the routine exercise of discretion afforded them under Arkansas law. Such a discretionary act here, however, is proscribed by Ordinance 2018-O-4 as “an enactment of compulsory law for a quorum court that defines and establishes the permanent or temporary organization and system of principles of a county government for the control and conduct of county affairs.”<sup>3</sup> The practical effect of Ordinance 2018-O-42 is to require the Quorum Court to present to the voters of Pope County the issuance of a letter or resolution of support in favor of a casino applicant as a condition precedent to said letter or resolution. Ordinance 2018-O-42 was the compulsory law of Pope County when the Quorum Court voted to issue Resolution 2019-R-14 in favor of Intervenor in contravention of that law. Nevertheless, Ordinance 2018-O-42 does not add an additional qualification in the sense that it requires a casino applicant to take any additional steps in the application process. Intervenor counters that “nothing in Amendment 100 refers to or authorizes a county to require an election before the issuance of such resolution or letter,” but the issue is not what Amendment 100 or any other constitutional provision authorizes but what it prohibits, since county government “may exercise local authority not expressly prohibited by the Arkansas Constitution.” A.C.A. § 14-14-801(a). Ordinance 2010-O-42 simply requires the Quorum Court to afford the electorate of Pope County the expression of its will regarding a casino applicant prior to the execution of its legislative function, and “a county government acting through its

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<sup>3</sup> A.C.A. § 14-14-904(i).

Quorum Court may exercise local legislative authority not expressly prohibited by the Constitution or by law for the affairs of the county.” *Walker v. Washington*, 263 Ark. 317, 564 S.W.2d 513, 514 (1978). If a permissive legislative function is not prohibited, neither is one mandated by law. Since the requirement of an election is not prohibited by Amendment 100 prior to the Pope County Quorum Court exercising its legislative function, it is not unlawful. Ordinance 2018-O-42 was and remains the compulsory law of Pope County and its constitutionality is presumed. *Graves v. Greene County*, 2013 Ark. 493, 430 S.W.2d 722 (2013).

**B. Regulating Gambling**

The only pertinent observation contained in this section of Intervenor’s argument is the existence of a statutory provision located in A.C.A. § 14-14-806(4) by which a county quorum court is prohibited from the exercise of legislative power to regulate any form of gambling. In assailing Ordinance 2018-O-42 as a condition precedent to the quorum court’s exercise of its legislative affairs, Intervenor swerves us into the contradictory propositions that the quorum court reserves the right in its discretion to issue a resolution in support of a casino applicant, and presumably to vote *not* to as well, that by Intervenor’s logic would be the very regulation of gambling they seek to prevent here. Ordinance 2018-O-42, therefore, is no more a regulation of gambling than the requirement of § 4 of Amendment 100 of resolution of the quorum court. For constituency’s sake, as the initiative act of the voters of Pope County would be prohibited, so too would be the quorum court’s discretionary act to approve or disapprove an applicant as required by Amendment 100. If that is indeed the case, the prohibitions contained in § 14-14-806 were effectively repealed upon passage of Amendment 100 and Intervenor’s argument is moot. If not, the quorum court’s vote on a resolution represents the up-or-down, illegal regulation of gambling prohibited by § 14-14-806. If the act of passing a resolution in support of a casino applicant is

not regulation of gambling, neither is the effect of a requirement to call for popular vote prior to the quorum court's legislative act. One can only presume that rather than legitimately making the preceding argument, Intervenor views the passage by the quorum court of a resolution in their favor as the only one of several options compliant with Amendment 100, a resolution against them is an invalid act of local legislative authority, and a popular election to be held on the issue as constitutionally prohibited.

*C. Conflict with Amendment 100 and "Local Official Authority"*

To restate Plaintiffs' position, there simply is no language in the text of Amendment 100 that precludes an interim election prior to the Quorum Court issuing a resolution in favor of a casino applicant. Likewise, there is no "general law" of the state that conflicts with Ordinance 2018-O-42, or if there is, Intervenor fails to cite one. As an initial point, they argue that "Amendment 100 granted discretion to two specific offices to decide whether to issue letters or resolutions of support," Defendants' Brief, p. 8. A county resolution is defined as the adoption of a formal statement of policy by a quorum court,<sup>4</sup> and neither Amendment 100 nor any general law of the state precludes the quorum court from seeking public support for that policy, including putting the issue to a popular vote. In this instance, the Pope County Quorum Court, for thirty-eight million reasons, has chosen to ignore the law and not seek public input, but that does not prevent the voters of Pope County, independent from the quorum court, from forcing the issue by enacting Ordinance 2018-O-42 for "[n]o one doubts that the people, in adopting the Initiative and Referendum Amendment, intended to reserve to themselves the power to control their local affairs . . ." *Tindall v. Searan*, 192 Ark. 173, 90 S.W.2d 476, 478 (1936). Clearly the effect of Amendment 100 is local and as one of the drafters of Amendment 100, Nate Steele, publicly

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<sup>4</sup> A.C.A. § 14-14-904(j).

announced, “there have been ordinances passed locally that say it must pass in Pope County before the Mayor or County Judge could issue a letter of support, and we’ve said publicly that’s fine. We provide for local control in this amendment [100], but we also intended to inspire that kind of discussion on a local level.”<sup>5</sup> Ironically, the initiative process that gave birth to Amendment 100 is derailing Intervenor’s train, but it is the fundamental interests reserved to the voters of Arkansas in general, and of Pope County in particular, that are protected by the Arkansas constitution, not those through the manipulation of law will reap a financial windfall.

***D. Resolution to be Invalidated***

As the golden ticket for a casino license to an applicant, a letter or resolution of support carries a bit more legal significance in the present context than a mere expression of policy. Given that Resolution 2019-R-14 was issued illegally as in violation of compulsory Pope County law in the form of Ordinance 2018-O-42 and, as stated by Intervenor, “the Resolution has legal significance . . . because Amendment 100 affords it constitutional significance.”<sup>6</sup> If this Court were to find that the Quorum Court acted illegally in issuing Resolution 2019-R-14, it would be wholly within the discretion of this court, and an appropriate form of relief, for it to exercise its equity jurisdiction and invalidate said resolution.

***E. Failure to Include Parties***

Plaintiffs’ claims made in its Petition are solely against the Pope County Quorum Court and remedies sought its failure to abide by Pope County law. As such, Intervenor’s suggestion that the Arkansas Racing Commission is a necessary party as somehow interested fails, especially considering that the application process for a casino license for a casino to be located

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<sup>5</sup> AETN, Arkansas Week on YouTube, 10/5/18, <https://youtu.be/zFBsCqPM LE>, at 4:43.

<sup>6</sup> Intervenor’s Brief, p. 11.

in Pope County is still open. Plaintiffs' filed this action against the Pope County Quorum Court and Intervenor was granted leave to intervene on a limited basis by this Court. All the necessary parties are present and Intervenor's argument is meritless.

**F. FOIA Violations by the Quorum Court**

The Arkansas Supreme Court has held that "some actions taken in violation of the requirements of [FOIA] may be voidable. It will be necessary for us to develop this law on invalidation on a case-by-case basis." *Rehab Hospital Services Corp. v. Delta-Hills Health Systems Agency*, 285 Ark. 397, 687 S.W.2d 840, 843 (1985). Intervenor proposes a five (5) point test as if it were set forth in law. However, all that the law requires is a knowing violation of FOIA resulting in prejudice and that the law of invalidation would be made on a case-by-case basis. *Id.* Plaintiffs have alleged that members of the Pope County Quorum Court met secretly with each other and with representatives of potential casino applicants to discuss public business, specifically passage of Resolution 2019-R-14. Intervenor suggests that Plaintiff is under an obligation to prove that quorum court members "knowingly" violated FOIA when engaged in private meetings with casino applicants. Likewise, Intervenor objects that Plaintiffs must prove they were prejudiced by the FOIA violations in light of the fact that Resolution 2019-R-14 was a product of those private negotiations and said resolution contains the nod to "significant commitments to the benefit of Pope County" made in secret. The expressed public policy animating FOIA is that "[i]t is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy." A.C.A. § 25-19-102. Subsequent public discussions of the actions of the Quorum Court are no cure if the public cannot be assured that the private negotiations were free of undue influence or

self-dealing, especially considering the value of the "significant commitments" that were made that have indelibly stained the deliberative process. Clearly, this Court has jurisdiction to invalidate the actions of the Quorum Court in this instance. While obviously this legislative body is not forever barred from taking legislative action on these matters, perhaps, given the present violations of law, this particular body of legislators should be and the voters of Pope County left to determine of whom the body is composed after the next election. While Intervenor argues that Plaintiff cannot prove knowing violations or prejudice, we are here on a Motion to Dismiss for failure to allege sufficient facts. For these purposes, Plaintiffs have sufficiently alleged all the above facts in their Amended Complaint and Intervenor's Motion to Dismiss must be denied.

WHEREFORE, Plaintiffs pray for an Order of this Court denying Intervenor's Motion to dismiss for the reasons stated herein, for an award of its costs associated with the defense of this Motion including reasonable attorneys' fees, and for such other and further relief the Court deems just and proper.

Respectfully submitted,

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IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS,  
CIVIL DIVISION (I)

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

PLAINTIFFS

Vs.

Case No. 58CV-19-439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas, et al.

DEFENDANTS

**DEFENDANTS' REPLY TO  
PLAINTIFFS' RESPONSE TO MOTION TO DISMISS**

INTRODUCTION

On September 24, 2019, Defendants, Ben Cross, in his official capacity as County Judge of Pope County, Arkansas and Phillip Haney, Caleb Moore, Tim Whittenburg, Reuben Brown, Jackie Heflin, Jamie Jackson, Blake Tarpley, Doug Skelton, Bill Sparks, James Kusturin, Ray Black, Joseph Pearson and Ernie Enchelmayer, in their official capacities as members of the Quorum Court of Pope County, Arkansas (collectively "Defendants") filed their Motion to Dismiss, and memorandum brief in support thereof ("Brief"), with respect to the Amended Petition for Declaratory Judgment and for Writ of Mandamus ("Amended Petition") of Plaintiffs, Citizens for a Better Pope County and James Knight. Plaintiffs filed their Response to Defendants' Motion to Dismiss and Incorporated Brief ("Response") on October 11, 2019.<sup>1</sup> For

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<sup>1</sup> Plaintiffs' Response contains a certificate of service whereby their counsel "certif[ied]" that the Response was served "on all parties of record by eflex" on October 11, 2019. As noted on the Arkansas Judiciary's website, the Circuit Court of Pope County does not participate in



the reasons noted below and in Defendants' Brief, the Amended Petition should be dismissed pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure.

I. PLAINTIFFS' ARGUMENT THAT AMENDMENT 14 AND  
AMENDMENT 100 ARE IN CONFLICT IS WITHOUT A LEGAL BASIS.

Plaintiffs assert Amendment 14 of the Arkansas Constitution ("Amendment 14") and Amendment 100 of the Arkansas Constitution ("Amendment 100") "cannot be reconciled." Response, unnumbered page 3. Plaintiffs cite Smith v. Cole, 187 Ark. 471, 61 S.W.2d 55 (1933) as support for the position that the prohibition within Amendment 14 on "local or special acts" is not limited to the General Assembly, but "much broader." Response, unnumbered page 2. As aptly shown by the authorities at pp. 3-4 of Defendants' Brief, Amendment 14 is only a prohibition on the General Assembly, and Smith does not hold, or even "suggest[]" (Response, unnumbered page 2.) otherwise.

Smith concerned whether Section 2 of Act No. 250 of 1933 was an unconstitutional special or local act in violation of Amendment 14. 187 Ark. at 472. Section 2 of said act provided for the salaries of county officials within the state, with the exception of Union County officials. Id. There, appellants argued that "special or local legislation [wa]s not prohibited because of th[e] constitutional mandate" of Ark. Const. Art. 16, § 4, which expressly provided for the General Assembly to fix the salaries of state officers. Id. at 474-75. In that context, the Court stated the following, which is the language relied on by Plaintiffs:

In our opinion it is immaterial whether or not local legislation is induced by constitutional mandate or is passed because not prohibited by the Constitution. If

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electronic filing via the eFlex system. As such, all parties of record were not served by "eflex" as certified by Plaintiffs' counsel. Plaintiffs' counsel has failed to serve Plaintiffs' Response on each of the parties as required by Rule 5(b) of the Arkansas Rules of Civil Procedure.

such legislation is invalid, it is not strengthened by the fact that it was superinduced by constitutional mandate.

Id. at 475.

As noted above, Smith addressed legislation enacted by the General Assembly pursuant to, or “induced by,” a constitutional provision. The fact that the questioned legislation in Smith was “induced by” (or “superinduced by”) the Constitution does not equate that legislation with a constitutional amendment proposed by initiated petition and adopted by the electors of Arkansas, e.g. Amendment 100. It is a perversion of Smith’s holding to suggest, as Plaintiffs have, that such case stands for the proposition that Amendment 14 is applicable to a constitutional amendment like Amendment 100. Amendment 14 has no application to Amendment 100 and Plaintiffs’ claim must be dismissed.

## II. ORDINANCE NO. 2018-O-42 IS UNCONSTITUTIONAL.

As a rebuttal to Defendants’ assertion that Ordinance No. 2018-O-42 (“Subject Ordinance”) is unconstitutional, Plaintiffs note “there is simply no language in Amendment 100 that prohibits the presentation of the question regarding a letter or resolution in favor of a casino applicant to the voters of Pope County” as required by the Subject Ordinance. Response, unnumbered page 4. While it is true Amendment 100 does not expressly prohibit the election required by the Subject Ordinance, that express prohibition is not necessary to find that the Subject Ordinance conflicts with Amendment 100. Amendment 100 expressly requires a casino applicant to submit either a letter of support from the Pope County Judge or a resolution of support from the Quorum Court. Ark. Const. Amend. 100, § 4(n). Such language inherently implies that the County Judge and the Quorum Court have the authority to provide a casino

applicant with such documents. Depending on the result of the election required under the Subject Ordinance, the County Judge and Quorum Court may be prohibited from issuing a letter or resolution of support. Such prohibition and “restriction” (Subject Ordinance §§ 3.1 & 3.2) on the County Judge and Quorum Court patently conflicts with the authority granted to those officials by Amendment 100. Therefore, the Subject Ordinance is unconstitutional.

Plaintiffs’ references to another attorney’s statements relative to Amendment 100 provide no support for their argument that the Subject Ordinance is valid. Response, unnumbered pages 5-6. If the Subject Ordinance is “contrary to the Constitution or any general law of the State” (Ark. Const. Art. 5, § 1), it is unconstitutional, regardless of others’ opinions (even attorneys) relative to Amendment 100.

In addition to conflicting with the Constitution, Defendants maintain that the Subject Ordinance conflicts with Ark. Code Ann. § 14-14-806(4) (Repl. 2013). Defendants’ Brief, pp. 10-11. That statute prohibits county quorum courts from exercising “legislative power to regulate any form of gambling, lotteries, or gift enterprises.” In response, Plaintiffs argue that the issue of “public control over the outcome of the decision” to provide a letter or resolution of support, i.e., the requirement of an election under the Subject Ordinance, “is simply not the act of ‘legislative power’ contemplated by A.C.A. § 14-14-806.” Response, unnumbered pages 6-7. However, as noted by Plaintiffs at unnumbered page 7 of their Response, the Subject Ordinance is “an enactment of compulsory law for a quorum court.” Ark. Code Ann. § 14-14-904(i) (Supp. 2017). As an enactment of compulsory law, the Subject Ordinance is certainly an act of legislative power of the Quorum Court. Plaintiffs fail to demonstrate that the Subject Ordinance is not a regulation of “gambling” prohibited by and in conflict with Ark. Code Ann. § 14-14-

806(4); therefore, such statute has effectively repealed the Subject Ordinance pursuant to Article 5, § 1 of the Arkansas Constitution.

**III. PLAINTIFFS FAIL TO SUFFICIENTLY PLEAD A  
VIOLATION OF THE FOIA AND THE REQUESTED RELIEF  
FOR SUCH ALLEGED VIOLATION IS NOT APPROPRIATE.**

In response to Defendants' argument that Plaintiffs have failed to sufficiently plead a violation of the Arkansas Freedom of Information Act ("FOIA") (Defendants' Brief, pp. 12-14), Plaintiffs boldly assert that "any secret meeting during which county business is discussed . . . is a violation of FOIA . . . ." Response, unnumbered page 8. That statement is inaccurate and directly rebuffed by recent opinions of the Arkansas Supreme Court. See McCutchen v. City of Fort Smith, 2012 Ark. 452, 425 S.W.3d 671 and City of Fort Smith v. Wade, 2019 Ark. 222. Pursuant to McCutchen and Wade, even if the County Judge and the Quorum Court members discussed county business outside of a public meeting, that does not necessarily justify a conclusion that Defendants violated the FOIA. Plaintiffs have failed to state a claim for a violation of the FOIA.

At pages 14-15 of their Brief, Defendants asserted Plaintiffs are not entitled to a writ of mandamus in the event the Court finds a violation of the FOIA. Plaintiffs proffer that "mandamus relief is perfectly appropriate" in light of: (1) "the purpose of the FOIA; (2) the Subject Ordinance and Amendment 100 "are the results of the initiative process;" and, (3) the FOIA provides for "criminal penalties for negligent violations of its provisions." Response, unnumbered page 8. None of Plaintiffs' listed justifications are remotely pertinent in determining whether mandamus relief is appropriate here. The authorities listed at page 14 of Defendants' Brief set forth the factors a plaintiff must show when requesting a court invalidate a

legislative act as a result of a FOIA violation. Plaintiffs make no attempt to address those factors. Plaintiffs request for a writ of mandamus fails and should be dismissed.

CONCLUSION

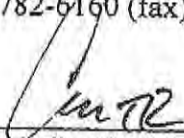
For the reasons set forth in above and in Defendants' Brief, Defendants respectfully request that their Motion to Dismiss be granted.

BEN CROSS, in his official capacity as County Judge of Pope County, Arkansas; and PHILLIP HANEY, CALEB MOORE, TIM WHITTENBURG, REUBEN BROWN, JACKIE HEFLIN, JAMIE JACKSON, BLAKE TARPLEY, DOUG SKELTON, BILL SPARKS, JAMES KUSTURIN, RAY BLACK, JOSEPH PEARSON and ERNIE ENCHELMAYER, in their official capacities as members of the Quorum Court of Pope County, Arkansas

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IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

FILED PLAINTIFFS  
POPE CO. CIRCUIT CLERK  
TIME: 11:32 AM  
DATE: 10-28-19  
[Signature]  
DEFENDANTS

VS. NO. 58CV-19-439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas, et al.

CHEROKEE NATION BUSINESSES, LLC INTERVENOR

REPLY TO PLAINTIFFS' RESPONSE TO CNB'S MOTION TO DISMISS

Cherokee Nation Businesses, LLC ("Intervenor" or "CNB"), by and through its counsel,  
and for its *Reply to Plaintiffs' Response to CNB's Motion to Dismiss*, states as follows:

I. INTRODUCTION

Plaintiffs, in their response, utilize dramatic verbiage to submit implausible arguments to continue to support their claims for relief. Plaintiffs argue, in response to County Defendants' Motion to Dismiss, that somehow an amendment to the Arkansas Constitution, here Amendment 100, can be unconstitutional pursuant to a prior amendment to the Arkansas Constitution. It is elementary that an amendment to the constitution amends it, and cannot be invalidated by it. Additionally, Plaintiffs present to this Court that Ordinance 2018-O-42 ("the ordinance") is somehow exempt from long standing precedent that local legislation, or any legislation for that matter, cannot impose additional qualifications already set forth by the Arkansas Constitution, namely Amendment 100. Similarly, Plaintiffs contend that the ordinance is exempt from the prohibition on counties regulating gambling, which the ordinance undoubtedly does. These arguments, as well as all other arguments submitted by Plaintiffs, have no merit and are merely red herrings Plaintiffs put forth in an attempt to continue their litigation.

## II. ARGUMENT

### A. Amendment 100 Is Lawful.

Plaintiff contends that Amendment 100 conflicts with Amendment 14 and is therefore unconstitutional. Although this argument is facially contrary to reason, Plaintiffs contend that Amendment 14's restriction on local and special legislation applies to Amendment 100. It is obvious that an Amendment to the Arkansas Constitution cannot be unconstitutional. To hold otherwise would deny the people of Arkansas the ability to amend their Constitution.

While Plaintiffs admit that Amendment 100 is not an Act by the Arkansas General Assembly, Plaintiffs rely on *Smith v. Cole*, 187 Ark. 471, 61 S.W.2d 55 (1933), for their argument that an amendment to the Arkansas Constitution can somehow be in violation of Amendment 14 of the Arkansas Constitution. To be clear, nothing in this case, or any other case cited by Plaintiffs, pertains to an amendment to the Arkansas Constitution being unconstitutional; rather, *Smith* addresses the constitutionality of Act 250 of 1933 of the Arkansas General Assembly, which addressed salaries for county officials while exempting county officials of Union County. Amendment 14's restriction applies only to the Arkansas General Assembly. *Rooker v. City of Little Rock*, 234 Ark. 372, 375-76, 352 S.W.2d 172, 174 (1971).

In the present case, the issue is not, like in *Smith*, whether a legislative act is contrary to Amendment 14; rather, the issue is whether the People of Arkansas can amend their Constitution. The answer to that inquiry is, of course, they can do so. To the extent a subsequent amendment is contrary to a prior amendment, the subsequent amendment repeals by implication the prior amendment. *See City of Fayetteville v. Washington County*, 369 Ark. 455, 255 S.W.3d 844 (2007); *see also State ex rel. City of Little Rock v. Donaghey*, 106 Ark. 56, 152 S.W. 746, 748 (1912) ("earlier expressions yield when necessary to give effect to the latest expressions of the intention

of those entitled to control"). Thus, to the extent Amendment 100 and Amendment 14 contradict each other, Amendment 100 controls, and Plaintiffs' claim has no merit.

**B. The Ordinance Unlawfully Imposes An Additional Qualification To Amendment 100**

Plaintiffs fail to demonstrate that the ordinance does not impose an additional qualification to Amendment 100. Plaintiffs simply argue that Amendment 100 is "silent" regarding whether Pope County voters can enact an ordinance requiring a vote before issuance of a letter or resolution of support. See Plaintiffs' Response, p. 2. Similarly, Plaintiffs argue that Amendment 100 is "silent" regarding the discretionary process of the Quorum Court. *Id.* Unfortunately, Plaintiffs miss the point in their reliance on silence. These distractions have no impact on the analysis as to whether the ordinance imposes an additional qualification. Certainly, Amendment 100 is not silent on minimum qualifications for applicants and required local support. Amendment 100 clearly sets forth the minimum requirements and qualifications for a casino applicant and requires a letter or resolution of support from the County Judge or Quorum Court. Although it is uncontested that the ordinance imposes an additional step to licensure for a casino applicant, Plaintiffs attempt to have it both ways: they argue that an election is not an additional qualification while in the same breath arguing that an applicant may only receive a letter or resolution of support if approved by voters via election. The Arkansas Supreme Court has clearly explained that local governments cannot add additional steps like those imposed by the ordinance where not allowed by the Arkansas Constitution.

In *Allred v. McLoud*, 343 Ark. 35, 31 S.W.3d 836 (2000), the appellants asserted that "because the provisions of the Arkansas Constitution and state statutes fix the general laws concerning eligibility for the county offices involved, the initiative is local legislation which conflicts with and runs counter to the general law of this state." The Supreme Court agreed and



found that the Arkansas Constitution addressed and set forth the qualifications for certain county officials. Specifically, the Arkansas Constitution requires that a justice of the peace “be a qualified elector and a resident of the township” while the local initiative imposed a limit on justices of the peace and other county officials of five (5) two-year terms and stated a person would be ineligible after serving five (5) two-year terms. *Id.* at 37-38, 31 S.W.3d at 836-38. The Court held this local initiative setting term limits in addition to the eligibility requirements provided by the Constitution unlawfully imposed additional qualifications. *Id.* The Court held that an act or ordinance unlawfully setting additional qualifications was “void.” *Id.* at 40, 31 S.W.3d at 838, quoting *Mississippi County v. Green*, 200 Ark. 204, 138 S.W.2d 377 (1940). Being void, the ordinance is without legal effect and unenforceable. *Le v. Nguyen*, 2011 Ark. App. 20, 380 S.W.3d 485 (holding void contract without legal effect, unenforceable, and must be disregarded by court); *Davis v. Office of Child Support Enforcement*, 322 Ark. 352, 908 S.W.2d 649 (1995) (holding “[v]oid judgments have no legal effect . . . [t]hey are worthless; no rights can be obtained from them” and they are inoperative).

In *Martin v. Kohls*, 2014 Ark. 427, 444 S.W.3d 844, the Arkansas Supreme Court addressed a similar issue: Where the Arkansas Constitution, specifically Article 3, sets forth the requirements to vote (residency, age, etc.) but is silent regarding whether a person must submit identification, is it lawful for a legislative act to require proof of identification to vote? In firmly concluding no, the Supreme Court stated that “[t]hese four qualifications set forth in our state’s constitution simply do not include any proof-of-identity requirement.” *Id.* at 14, 444 S.W.3d at 852. Because the constitution set forth the requirements for voting eligibility and did not specifically authorize the legislature to impose additional steps, the Court found the legislative act unconstitutional on its face. *Id.*

Similar to the facts in *Allred* and *Martin*, the Plaintiffs here rely on an initiated ordinance, Ordinance 2018-O-42, which imposes an additional qualification on casino applicants that is not found in Amendment 100: that a casino applicant must win a local election prior to a resolution or letter of support being issued by the Quorum Court or County Judge. Amendment 100 sets forth various qualifications for a casino applicant, one of those qualifications being that the applicant present a resolution or letter of support from the Quorum Court or County Judge. However, nothing in Amendment 100 refers to or authorizes a county to require an election before the issuance of such resolution or letter. Similarly, nothing in Amendment 100 requires as a condition for award of a casino license that an applicant be successful in a local election for the privilege of submitting an application. Instead, the Amendment gives the Quorum Court and County Judge the discretion to issue resolutions and letters of support. Plaintiffs contend that Amendment 100's silence is fatal. But a cursory review of *Allred* and *Martin* reveals the fallacy in Plaintiffs' argument. Nothing in Article 7 or Article 3 of the Arkansas Constitution – the articles at issue in *Allred* and *Martin* – references or is pertinent to term limits or voter identification. It is silent. But still, our Supreme Court found imposing term limits by local initiative and requiring proof of identification to be unlawful additional qualifications.

The same is true here, as the ordinance would serve as a complete bar to application for a casino license regardless of whether the applicant satisfies the minimum requirements of Amendment 100. Plaintiffs admit to that when stating “[t]he ordinance only acts as a complete bar . . . if the Quorum Court in its discretion presents a resolution of support in favor of a casino applicant and the voters reject it.” See Plaintiffs' Response, p. 3. Thus, there's absolutely an additional qualification, as, per the ordinance, there is one more absolute hurdle to jump after receiving a resolution of support. The fact we are litigating these issues proves the bar, as CNB

has a resolution of support from the Quorum Court yet Plaintiffs contend that is not sufficient. For these reasons, the ordinance is unlawful, void, and of no legal effect. As void it cannot be used either to invalidate the resolution of support in favor of Intervenor or to control the action of Pope County officials or the ARC. Plaintiffs' claims should be dismissed.

**C. Arkansas Law Prohibits Counties From Regulating Gambling**

Plaintiffs state that "[t]he only pertinent observation contained in this section of Intervenor's argument is the existence of a statutory provision located in A.C.A. § 14-14-806(4)." That's a fair observation, as this section is **entirely** about Ark. Code Ann. § 14-14-806(4). Plaintiffs, in response to separate Motions to Dismiss, make two arguments in their contention that the ordinance does not violate Ark. Code Ann. § 14-14-806(4): (1) Mr. Nate Steel has stated that local ordinances such as the one at issue are not contrary to Amendment 100; and (2) public control, here the ordinance, is not an act of legislative power contemplated by Ark. Code Ann. § 14-14-806(4). Plaintiffs' arguments are without merit.

First, Plaintiffs would have this Court rely upon youtube videos to interpret Amendment 100. Such is improper. It is well established that in interpreting the Arkansas Constitution and its amendments the courts will utilize the rules of statutory construction, which does not include reviewing comments made by drafters of amendments or legislation. "When interpreting the Arkansas Constitution, we read it as written, and language that is plain and unambiguous is to be given its obvious and common meaning." *Kelly v. Martin ex rel. State*, 2014 Ark. 217, 3-4, 433 S.W.3d 896, 899, citing *City of Fayetteville v. Washington Cnty.*, 369 Ark. 455, 468, 255 S.W.3d 844, 853-54 (2007). "Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision." *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 720, 120 S.W.3d 525, 537 (2003). Even if an amendment or

statute is ambiguous, a court may only turn to “an examination of the whole Act, reconciling provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part.” *ACW, Inc. v. Welss*, 329 Ark. 302, 313, 947 S.W.2d 770, 775 (1997). However, there is no case law supporting reliance on public statements of drafters, especially not youtube videos. For these reasons, Plaintiffs’ reliance on public statements should be disregarded.

In regards to Plaintiffs’ second argument, it is clear that counties are prohibited from exercising “legislative power to regulate any form of gambling, lotteries, or gift enterprises” unless such power is delegated to them by the Arkansas General Assembly. Ark. Code Ann. § 14-14-806(4). Plaintiffs concede that Amendment 100 does not repeal Ark. Code Ann. § 14-14-806(4). *See* Plaintiffs’ Response to County Defendants’ Motion to Dismiss, p. 6-7. Even assuming it does, it would only repeal the statute to the extent it conflicts with Amendment 100. Reading Ark. Code Ann. § 14-14-806(4) and Amendment 100 in harmony pursuant to the doctrine of *in pari materia* (cited by Plaintiffs themselves in various pleadings), the correct interpretation, disregarding Plaintiffs’ attempts to over-complicate the matter, is that the statute still prohibits counties regulating gambling except for the power granted by Amendment 100 to the County Judge and Quorum Court to issue letters and resolutions of support. This is supported by *Martin*, where the Arkansas Supreme Court stated that if circumstances exist where the legislative act would be valid, it is not facially unconstitutional. *Martin*, 2014 Ark. at 11, 444 S.W.3d at 850-51. Ark. Code Ann. § 14-14-806(4) is undoubtedly still valid and applicable except for the express authorization by Amendment 100 to county officials to submit letters and resolutions of support.

Nothing in the Arkansas Code, including recent legislative acts pertaining to the licensing of casinos, grants counties or their legislative bodies the authority to regulate gambling by requiring an election prior to the issuance of a resolution or letter of support. Likewise, nothing in

Amendment 100 grants counties such authority. Instead, Amendment 100 grants the ARC and the General Assembly authority to implement Amendment 100. The ordinance attempts to regulate gambling where there is no authority for it to do so.

Ark. Const. Art. 5, § 1 states that “no local legislation shall be enacted contrary to the Constitution or any general law of the State, and any general law shall have the effect of repealing any local legislation which is in conflict therewith.” In other words, counties may not enact laws, including by initiative, that are “at odds with the general law of this state.” *Allred v. McLoud*, 343 Ark. 35, 31 S.W.3d 836 (2000). The ordinance is in violation of Art. 5, § 1 as it conflicts with Ark. Code Ann. § 14-14-806(4). “Regulation” has been defined as “the act or process of controlling by rule or restriction.” Black’s Law Dictionary, 3rd Ed. (1996). Requiring an election before the issuance of a resolution or letter of support is undoubtedly “regulation” which is unlawful, as such mandate imposes a “restriction and restraint” upon “the trade or business regulated.” *See City of Little Rock v. Reinman*, 107 Ark. 174, 155 S.W. 105, 106 (1913).

Specifically, the ordinance unlawfully regulates “gambling” by imposing restrictions not authorized by the Constitution on the issuance of resolutions and letters of support. This local restriction prevents a person or entity from operating a casino in Pope County unless an election is held and a majority of votes cast support the issuance of a resolution or letter of support. Based on Plaintiffs’ own allegations, an entity cannot operate a casino in Pope County unless an election is first held. This is an absolute restriction and invariably conflicts with Ark. Code Ann. § 14-14-806(4), because the ordinance grants to the County “a power of restriction and restraint” that is not authorized by Amendment 100 or any other state law. Pursuant to Art. 5, § 1, the Ordinance is invalid. For these reasons, Plaintiffs’ claims should be dismissed.

**D. Plaintiffs Fail to Include Necessary Parties**

Ark. Code Ann. § 16-111-111 states: “When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard . . . .”

Although the Plaintiffs request rescission of the resolution which is now in the possession of the ARC, the Plaintiffs fail to include the ARC as a defendant. The relief requested by Plaintiffs is of no import if it cannot be applied to the ARC. To put the issue squarely in front of this Court, if the resolution is invalidated, how can that be applied to the ARC, which has accepted CNB’s application containing the resolution of support, if it is not a party? And if it cannot, what is the purpose of this litigation without the ARC? This clearly demonstrates that ARC is a necessary party pursuant to Ark. Code Ann. § 16-111-111, as it certainly has an interest that would be affected by the requested declaration. “Failure to include such a party is fatal to a declaratory judgment action.” *Files v. Hill*, 268 Ark. 106, 114, 594 S.W.2d 836, 841 (1980). Otherwise, if a judgment in favor of Plaintiffs is not binding on the ARC, the issues presented by Plaintiff are completely moot. Because Plaintiffs have failed to include necessary parties, their Complaint should be dismissed.

**E. Plaintiffs Cannot Invalidate the Resolution Pursuant to FOIA**

The Plaintiffs’ only request for relief in regards to their allegations of FOIA violations is that the resolution be invalidated, not an injunction as to future conduct. To CNB’s knowledge, no Arkansas appellate case exists where invalidation has been upheld. Still, in their response, Plaintiffs wholly ignore the five elements necessary for invalidation: (1) that a FOIA violation has

been committed; (2) that the violation was committed knowingly; (3) that Plaintiffs brought the violation to the body's attention and gave opportunity to correct it; (4) that Plaintiffs seek invalidation to protect public's right to information and not for their own purposes; and (5) that Plaintiffs have been prejudiced. *National Park Medical Center, Inc. v. Arkansas Dep't of Human Services*, 322 Ark. 595, 603-604, 911 S.W.2d 250, 255 (1995), *Bradshaw v. Eort Smith School District*, 2017 Ark. App. 196, 6-7, 519 S.W.3d 344, 348-49 (2017). Specifically, Plaintiffs cite *Rehab Hospital Services Corp. v. Delta-Hills Health Systems Agency*, 285 Ark. 397, 687 S.W.2d 840 (1985) to support their argument that these five elements are not necessary. Of course, Plaintiffs cite a case that predates those cited by CNB, so this Court should follow the most recent precedent which sets forth the five elements.

Plaintiff's Amended Petition is deficient and fails to set forth facts which meet the requirements for invalidation. Plaintiffs state that "we are here on a Motion to Dismiss for failure to allege sufficient facts," not to determine if Plaintiff can prove their case. Intervenor agrees, and it has not made any statements otherwise. As put forth in CNB's Motion to Dismiss, Arkansas is a "fact pleading" jurisdiction. So, plaintiffs in this State must plead actual facts about the events at issue. Plaintiffs simply fail to do that. The Arkansas Supreme Court has left no doubt about this fact pleading requirement:

Arkansas has adopted a clear standard to require fact pleading: "a pleading which sets forth a claim for relief . . . shall contain (1) a statement in ordinary and concise language of facts showing that the pleader is entitled to relief . . ." ARCP Rule 8(a)(1). Rule 12(b)(6) provides for dismissal of a complaint for "failure to state facts upon which relief can be granted." This court has stated that these two rules must be read together in testing the sufficiency of the complaint; facts, **not mere conclusions**, must be alleged.

*Brown v. Tucker*, 330 Ark. 435, 438 (1997), quoting *Malone v. Trans-States Lines, Inc.*, 325 Ark. 383 (1996) (emphasis added). Moreover, Arkansas Courts must presume public officials' actions

“to be valid and within the bounds of the law,” *Bill's Printing, Inc. v. Carder*, 357 Ark. 242, 250, 161 S.W.3d 803, 808 (2004). Plaintiffs have failed to meet this standard. Plaintiffs fail to specifically state which government officials were allegedly in illegal meetings, when these meetings took place, where the meetings took place, and how these meetings were illegal. Plaintiffs only make conclusory allegations that illegal meetings were held and FOIA violations transpired. Now, in their response to County Defendants' Motion to Dismiss, Plaintiffs, putting the cart before the horse, state they “expect to flesh out [the details] in discovery.” Plaintiffs' Response to County Defendants' Motion to Dismiss, p. 8. Fishing expeditions are not allowed to meet the fact pleading standard. Nothing in Rule 8 or 12 of the Arkansas Rules of Civil Procedures sanctions such approach. Similarly, Plaintiffs fail to allege that the FOIA violations were committed knowingly, an absolute requirement for invalidation – and a requirement they admit exists. *See* Plaintiffs' Response, p. 8. Plaintiffs' complete lack of any factual allegations regarding the alleged FOIA violations, in addition to failing to allege that the violations were committed knowingly, fails to overcome the presumption that the members of the Quorum Court followed the law.

But even if Plaintiffs have satisfied the fact pleading standard as to the first element (violation of FOIA), in their response they ignore the other elements required for invalidation. The Pope County Quorum Court and County Judge held a three-hour special meeting on August 13, 2019, at which public comments were taken. Amended Verified Petition for Declaratory Judgment and For Writ of Mandamus p. 6, para. 33. In fact, comments were presented by Plaintiffs' counsel. Thus, to the extent there were FOIA violations, the violations were corrected by an open, public meeting and public discussion pursuant to FOIA, and Plaintiffs cannot legitimately claim they have been prejudiced.



Plaintiffs agree that the Quorum Court should not be forever barred from issuing a resolution of support. *See* Plaintiffs' Response, p. 9. However, Plaintiffs state that "perhaps, given the present violations of law, this particular body of legislators should be and the voters of Pope County left to determine of whom the body is composed after the next election." *See* Plaintiffs' Response, p. 9. To describe this as anything other than an outrageous statement not supported by law would be incorrect. Plaintiffs are now stating that the resolution should be voided and the Quorum Court be enjoined from issuing a resolution of support until after the next election. Requesting that the governing body be made a lame duck by another branch of government is improper. Invalidation may be appropriate in a scenario where a government body enacts legislation at a meeting called without following the requirements of FOIA (for example, failing to follow notice requirements), but Plaintiffs do not make such an allegation. They only allege that, essentially, once FOIA violations have risen from an alleged meeting before the meeting, the legislative body is forever barred, or at least until the next election, from taking legislative action on the matters discussed in the improper meeting. This argument has no basis in law. Lastly, Plaintiffs have submitted nothing to the Quorum Court requesting it correct itself, likely because the proper remedy for correcting the alleged violations is to hold a public meeting (not wait until the next election), which has been done. For these reasons, Plaintiffs have failed to set forth facts upon which relief can be granted.

CNB agrees with the arguments submitted by Pope County as well and incorporates Pope County's Motion to Dismiss and Memorandum Brief in Support of Defendant's Motion to Dismiss herein as if fully set out word for word. Ark. R. Civ. P. 10(e).

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### III. CONCLUSION

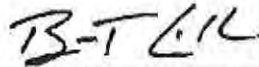
Plaintiffs' claims should be dismissed as the ordinance is unconstitutional, and Plaintiffs have failed to state a claim for relief in regards to their FOIA allegations that can be granted.

WHEREFORE, the Intervenor prays that this Court grant its Motion to Dismiss Amended Complaint; for attorney's fees and costs; and for all other proper relief.

RESPECTFULLY SUBMITTED,

BART CALHOUN  
SCOTT RICHARDSON  
DUSTIN McDANIEL  
Attorneys for Intervenor

By:



---

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IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS,  
AT RUSSELLVILLE

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

PLAINTIFFS

v.

Case No. 58CV-19-439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas; and  
PHILLIP HANEY, CALEB MOORE,  
TIM WHITTENBURG, REUBEN BROWN,  
JACKIE HEFLIN, JAMIE JACKSON,  
BLAKE TARPLEY, DOUG SKELTON,  
BILL SPARKS, JAMES KUSTURIN,  
RAY BLACK, JOSEPH PEARSON and  
ERNIE ENCHELMAYER, in their  
official capacities as members of the  
Quorum Court of Pope County, Arkansas ,

DEFENDANTS

CHEROKEE NATION BUSINESSES, LLC.

INTERVENOR

FILED  
POPE CO. CIRCUIT CLERK  
TIME: 5:19  
DATE: 10/28/2019  
*Ernie Enchelmay*

**SECOND RENEWED MOTION FOR TEMPORARY RESTRAINING ORDER AND  
INCORPORATED BRIEF**

COMES NOW the Plaintiffs, by and through undersigned counsel, pursuant to Rule 65 of the Arkansas Rules of Civil Procedure, and in support of their Second Renewed Motion for Temporary Restraining Order and Preliminary Injunction, state and allege as follows:

**INTRODUCTION**

1. That Plaintiff Citizens for a Better Pope County, is a registered Local Option Ballot Question Committee consisting of residents of Pope County, Arkansas who was the Sponsor of the local initiated act which is now codified as Pope County Ordinance 2018-O-42.
2. That Plaintiff James Knight is a tax payer and resident of Pope County, Arkansas.
3. That Defendant BEN CROSS is the duly elected County Judge of Pope County, Arkansas and is a resident of Pope County, Arkansas.

4. That Defendant PHILLIP HANEY is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
5. That Defendant CALEB MOORE is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
6. That Defendant TIM WHITTENBURG is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
7. That Defendant REUBEN BROWN is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
8. That Defendant JACKIE HEFLIN is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
9. That Defendant JAMIE JACKSON is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
10. That Defendant BLAKE TARPLEY is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
11. That Defendant DOUG SKELTON is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
12. That Defendant BILL SPARKS is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
13. That Defendant JAMES KUSTURIN is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.
14. That Defendant RAY BLACK is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.

20-001-2013 20:10 FROM KENT JOHNSON. PHONE #1(574)33700 FAX2010.COM p.3

15. That Defendant JOSEPH PEARSON is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.

16. That Defendant ERNIE ENCHELMAYER is a duly elected Justice of the Peace, a member of the Quorum Court, and a resident of Pope County, Arkansas.

17. That jurisdiction and venue are proper in Pope County, Arkansas.

#### FACTUAL BACKGROUND

18. That in the November, 2018 general elections, the citizens of the Arkansas passed Arkansas Constitutional Amendment 100 that authorized casinos and casino gaming in the State of Arkansas.

19. That Amendment 100 states that the Arkansas Racing Commission is authorized to issues four (4) casino licenses, one of which was mandated to be to a facility to be located in Pope County, Arkansas.

20. That Amendment 100 requires, prior to the issuance of a casino license for a casino facility to be located in Pope County, a letter of support from the county judge or a resolution of the Pope County Quorum Court.

21. That during that same November 2018 general election, the residents of Pope County approved an initiated measure by a vote total of 70% in favor to 30% opposed, entitled the Pope County Local Control for Casino Gaming Amendment of 2018.

22. The Pope County Local Control for Casino Gaming Amendment of 2018 was enacted and added to the Pope County Code of Ordinances as Ordinance No. 2018-O-42. This ordinance established a condition precedent to Amendment 100, or any other state law, prior to the issuance of a letter of support by the County Judge or a resolution by the Quorum Court, for a Casino or a Casino Applicant "without first referring the question as the issuance of support of a

Casino or Casino Applicant to a local election, at either a general election or special election, where . . . a majority of the registered voters of Pope County must approve . . . .”

23. That there is no language in Amendment 100 by which the terms of Pope County Ordinance 2018-O-42 is not allowed.

24. That there is no language in Ordinance 2018-O-42 that conflicts with the language of Amendment 100.

25. That the language of Ordinance 2018-O-42 was drafted with the intent to be harmonious with Amendment 100, and all of Arkansas law.

26. That under the *in pari materia* doctrine of statutory interpretation, two separate provisions of law relating to the same subject should be read in a harmonious manner.

INJUNCTIVE RELIEF

27. That Plaintiffs restate and incorporate the allegations contained in Paragraphs 1-26 set forth above.

28. That on September 4, 2019, Plaintiffs filed their Amended Verified Petition including allegations, *inter alia*, that members of the Pope County Quorum Court met secretly amongst themselves as well as with representatives of prospective casino applicants in violation of A.C.A. § 25-19-101 et seq, Arkansas FOIA.

29. That the Quorum Court of Pope County, Arkansas has published an Agenda for a “Special Called Quorum Court Meeting” scheduled for October 28, 2019 at 5:00 p.m. during which the sole item on the agenda is for “An Ordinance Repealing Pope County Ordinance 2018-O-42; and to Declare an Emergency,” the third such meeting in the month of October, see October 28 Agenda attached hereto as **Exhibit A** and incorporated herein by reference.

30. That to the best knowledge and belief of Plaintiffs, the Quorum Court intends to (1) vote to repeal Pope County Ordinance 2018-O-42 and (2) to declare an emergency so that said repeal would take effect immediately.

31. That a previous vote to issue a letter of support that took place on August 13, 2019 resulted in a vote of the Quorum Court of 8 votes in favor of issuance of a Resolution in support of casino applicant Cherokee Nation Businesses, 4 opposed and one abstention.

32. That a regular meeting of the Pope County Quorum Court took place on October 3, 2019 on which an agenda item of "Discussion of Pope County Local Ordinance 2018-O-42" appeared, but at which time the Quorum Court failed to repeal said Ordinance, see October 3 Agenda attached hereto as **Exhibit B** and incorporated herein by reference.

33. That a special meeting of the Pope County Quorum Court was called for on October 21, 2019 on which an agenda item of "An Ordinance Repealing Pope County Ordinance 2018-O-42; And To Declare an Emergency" appeared, but at which time the Quorum Court failed to garner sufficient votes to repeal said Ordinance, see October 21 Agenda attached hereto as **Exhibit C** and incorporated herein by reference.

34. That now, the proposed Repeal of Ordinance 2018-O-42 appears on the agenda for the Pope County Quorum court at yet another special meeting, at which time the Quorum Court intends to repeal said amendment, and yet again declare the fictitious emergency.

35. The A.C.A. § 14-14-904(a) sets forth the time and place for Quorum Court Assembly "at a regular time and place as established by ordinance . . . ."

36. That an exception to said regular meetings exists "[b]y declaration of emergency or determination that an emergency exists and the safety of the general public is at risk," in which

case the county judge may change the time and place with 24-hours notice. A.C.A. § 14-14-904(a)(2).

37. That no such emergency exists for the calling of a Special Meeting, nor does the nature or immediacy of the purpose of said special meeting exist as required by Pope County Ordinance Article II, Section 2-46(f).

38. That, likewise, no emergency exists for the Quorum Court to enact an emergency ordinance repealing Ordinance 2018-O-42 as set forth in A.C.A. § 14-14-908.

39. That “an emergency clause in an ordinance “has a significant effect on the people’s right of referral,” and their authority to react and repeal such an act of the Quorum Court. *Burroughs v. Ingram*, 319 Ark. 530 (893 S.W.2d 319, 320 (1995).

40. That while it is a matter of legislative determination to declare an emergency exists, “pursuant to Amendment 7, it is a judicial determination whether facts constituting an emergency are stated.” *Burroughs, supra*.

41. That said declaration of emergency must be something “more than an ‘academic declaration of a known governmental requirement,’” as “such declarations do not validly state an emergency.” *Id.*

42. That the calling of “special” meetings until the county judge obtains the 2/3 majority of votes he seeks necessary to repeal Ordinance 2018-O-42 such that this is the third such meeting on the subject is not an emergency.

43. That should the Quorum Court act to repeal 2018-O-42 on an emergency basis during the October 28th meeting, Plaintiffs will suffer immediate and irreparable harm to their rights they have reserved unto themselves under Amendment 7.



44. That the status quo of this case should be maintained until further facts regarding issuance of Resolution 2019-R-14 and subsequent private meetings of the Quorum Court can be investigated.

45. That the Quorum Court of Pope County should be enjoined from taking any action to repeal Ordinance 2018-O-42 during the pendency of this litigation or upon further order of this Court.

46. That Prior to filing this motion, I attempted to contact counsel for Defendants, Mr. Clay McCall and Colby Roe. See Affidavit of Travis W. Story, attached hereto as **Exhibit D** and incorporated herein by reference.

WHEREFORE, Plaintiffs renew their prayer for a Temporary Restraining Order previously mooted by issuance of Resolution 2019-R-14 prohibiting the Pope County Quorum Court from taking any action in their respective official capacities to repeal Pope County Ordinance 2018-O-42 during the pendency of the pending litigation, and for such other and further relief the Court deems just and proper.

Respectfully submitted,

STORY LAW FIRM, PLLC

by 

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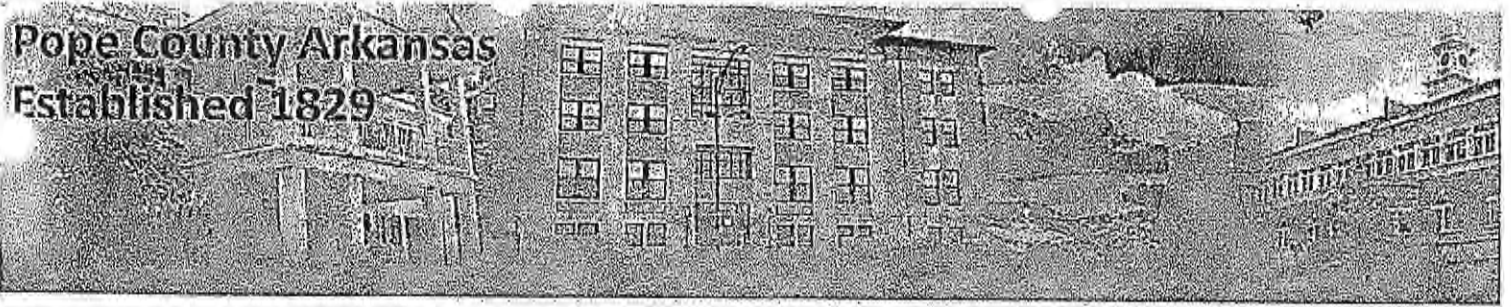
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Pope County Arkansas  
Established 1829



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**SPECIAL CALLED QUORUM COURT MEETING  
OCTOBER 28, 2019 AT 5:00 P.M.**

**AGENDA FOR SPECIAL CALLED QUORUM COURT MEETING  
OCTOBER 28, 2019**

TIME: 5:00 P.M.

CALL TO ORDER:

PRAYER: JUSTICE WHITTENBURG

ROLL CALL:

PUBLIC COMMENTS ADDRESSING AGENDA:

BUSINESS:

- 1. AN ORDINANCE REPEALING POPE COUNTY ORDINANCE 2018-O-02; AND TO DECLARE AN EMERGENCY.

COMMENTS FROM THE PUBLIC:

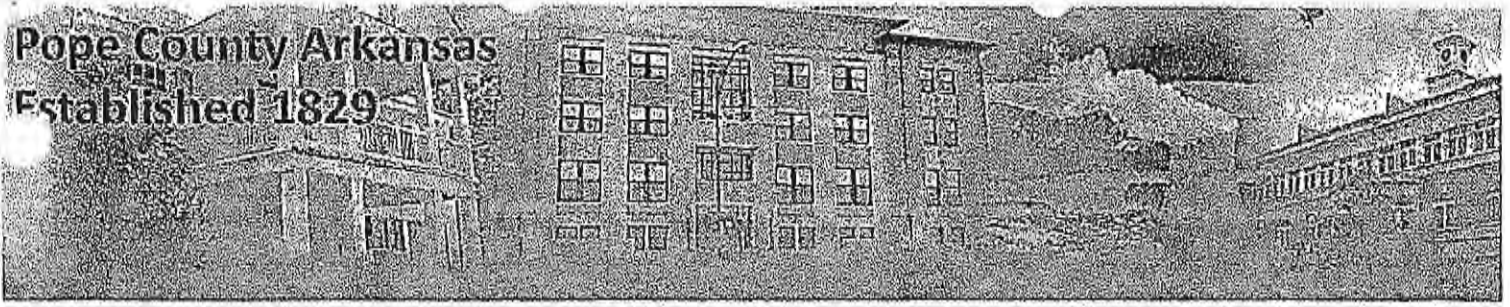
ANNOUNCEMENTS:

ADJOURN:



# Pope County Arkansas

Established 1829



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Thursday, October 03, 2019

05:00 PM QUORUM COURT MEETING 5:00 P.M.

05:00 PM AGENDA QUORUM COURT MEETING AT 5:00 PM

AGENDA FOR REGULAR QUORUM COURT MEETING  
OCTOBER 3, 2019

TIME: 5:00 P.M.

CALL TO ORDER:

PRAYER: JUSTICE SPARKS

ROLL CALL:

JOURNAL OF PROCEEDINGS: SEPTEMBER 5, 2019 QUORUM COURT MEETING

COMMITTEE & OTHER REPORTS:

CORRESPONDENCE:

PUBLIC COMMENTS ADDRESSING AGENDA:

UNFINISHED BUSINESS:

NONE

NEW BUSINESS:

1. NOT CHECK FUND REPORT PER ACA § 16-21-120 BY PROSECUTING ATTORNEY JEFF PHILLIPS.
2. ORDINANCE APPROPRIATING \$5,000.00 FROM THE GENERAL FUND FOR THE COUNTY CLERK. JUSTICE PEARSON
3. ORDINANCE APPROPRIATING \$8,000.00 FROM THE COUNTY CLERK COST FUND FOR THE COUNTY CLERK. JUSTICE BROWN
4. ORDINANCE APPROPRIATING \$655,000.00 FROM THE SURPLUS INVESTMENT FUND FOR THE COUNTY JUDGE FOR THE PURCHASE OF LAND ADJOINING THE COUNTY COMPLEX. JUSTICE SKELTON



- 5. ORDINANCE TRANSFERRING FUNDS PREVIOUSLY APPROPRIATED FOR THE DETENTION CENTER'S COMMUNICATIONS FACILITY & EQUIPMENT FUND.  
JUSTICE BANEY
- 6. MR. OMAR CLEMONS, REPRESENTATIVE FROM ENTERGY, TO ADDRESS THE COURT ON SOLAR POWER SERVICES PROVIDED BY ENTERGY.
- 7. JUDGE CROSS TO DISCUSS THE FORMATION OF A JAIL COMMITTEE.
- 8. DISCUSSION OF ORDINANCE IMPLEMENTING A HOTEL, RESTAURANT AND BEVERAGE TAX IN THE COUNTY.
- 9. DISCUSSION FOR A CONSTRUCTION PERMIT PROCEDURE FOR IMPROVEMENTS IN THE COUNTY.
- 10. DISCUSSION OF POPE COUNTY LOCAL ORDINANCE 2018-O-42.

ITEMS OR ORDINANCES COMING OUT OF THE BUDGET OR PERSONNEL COMMITTEE MEETINGS.

COMMENTS FROM THE PUBLIC:

ANNOUNCEMENTS:

ADJOURN:

**Pope County does not discriminate on the basis of age, sex, race, religion, national origin, or disability.**

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AGENDA FOR SPECIAL CALLED QUORUM COURT MEETING  
OCTOBER 21, 2019

TIME: 5:00 P.M.

CALL TO ORDER:

PRAYER: JUSTICE TARPLEY

ROLL CALL:

PUBLIC COMMENTS ADDRESSING AGENDA:

BUSINESS:

1. AN ORDINANCE REPEALING POPE COUNTY ORDINANCE 2018-O-42; AND TO DECLARE AN EMERGENCY.
2. DISCUSSION CONCERNING 2020 HEALTH INSURANCES.
3. DISCUSSION CONCERNING 2020 AUTO & PROPERTY INSURANCES.
4. AN ORDINANCE ESTABLISHING A COUNTY PLANNING BOARD PURSUANT TO ARK. CODE ANN. §14-17-201 ET SEQUITUR.
5. AN ORDINANCE APPROPRIATING \$655,000.00 FROM THE SURPLUS INVESTMENT FUND FOR THE PURCHASE OF LAND ADJOINING THE COUNTY COMPLEX.

COMMENTS FROM THE PUBLIC:

ANNOUNCEMENTS:

ADJOURN:



IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS  
DIVISION ONE

CITIZENS FOR A BETTER POPE COUNTY, )  
 )  
 PLAINTIFFS )  
 )  
 VS. NO. 58CV-19-439 )  
 )  
 )  
 BEN CROSS, in his official capacity )  
 As County Judge of Pope County, et al. )  
 )  
 DEFENDANTS )  
 )  
 CHEROKEE NATION BUSINESSES, LLC. )  
 )  
 INTERVENORS )

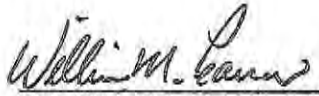
BY:   
WILLIAM M. PEARSON  
POPE COUNTY CIRCUIT CLERK  
2019 OCT 29 AM 8:43

FILED

ORDER DENYING RENEWED MOTION FOR  
TEMPORARY RESTRAINING ORDER

Now on this 28<sup>th</sup> day of October, 2019, comes on for consideration the Second Renewed Motion for Temporary Restraining Order filed herein by the Plaintiffs, Citizens For a Better Pope County, and the Court being sufficiently advised does hereby by deny the motion.

IT IS SO ORDERED.

  
WILLIAM M. PEARSON  
Circuit Judge  
Dated: 4:45 p.m. 10-28-19

Copy to:  
All Counsel of Record

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS  
CIVIL DIVISION (I)

CITIZENS FOR A BETTER POPE COUNTY,  
a Local Option Ballot Question Committee,  
JAMES KNIGHT, in his individual capacity

PLAINTIFFS

BY: [Signature]  
SAGHEL I. [Signature]  
POPE COUNTY CLERK  
2019 NOV -4 AM 11:10  
FILED

vs.

NO. 58CV-19-439

BEN CROSS, in his official capacity  
as County Judge of Pope County, Arkansas, et al.

DEFENDANTS

ORDER

On this 29<sup>th</sup> day of October 2019, this matter came on for hearing the Motion to Dismiss of Defendants, Ben Cross, Phillip Haney, Caleb Moore, Tim Whittenburg, Reuben Brown, Jackie Heflin, Jamie Jackson, Blake Tarpley, Doug Skelton, Bill Sparks, James Kusturin, Ray Black, Joseph Pearson, and Ernie Enchelmayer ("Defendants") and the Motion to Dismiss of Intervenor, Cherokee Nation Businesses, LLC ("CNB"). The Court, having heard the arguments of the parties and having reviewed the Motions of Defendants and CNB and Plaintiffs' responses thereto, being fully advised in the premises, finds and orders:

1. Plaintiffs filed their Amended Verified Petition for Declaratory Judgment and for Writ of Mandamus ("Amended Petition") on September 4, 2019, asserting various claims against Defendants, which are discussed more fully below.

2. Plaintiffs have requested a declaratory judgment that Amendment 100 of the Arkansas Constitution unconstitutionally conflicts with Amendment 14 of the Arkansas Constitution. Defendants and CNB argue that by its terms Amendment 14 applies only to acts of the General Assembly and not to Constitutional Amendments

proposed and adopted by initiative process. Plaintiffs have cited no authority to the contrary. Defendants and CNB also argue that if the two amendments are in direct conflict to each other, then the later adopted amendment (here Amendment 100) controls over the earlier amendment (here, Amendment 14), thus causing a repeal by implication.

3. Amendment 14 provides "The General Assembly shall not pass any local or special act." Ark. Const. Amend. 14. It is silent as to amendments passed by the people of Arkansas pursuant to Amendment 7. The Court is not aware of any authority for the proposition that an initiated amendment to the Arkansas Constitution is limited by Amendment 14, and Plaintiffs have cited none. Therefore, the Court finds that Amendment 14 applies only to acts of the General Assembly.

4. Alternatively, to the extent there may be a conflict between Amendment 100 and Amendment 14 (and the Court does not find any such conflict), Amendment 100 would control and the effect would be a repeal by implication of the conflicting portion of Amendment 14. Defendants' and CNB's motions to dismiss are granted with prejudice on this claim.

5. Plaintiffs have also requested a declaratory judgment that Resolution 19-R-14 (resolution of support) conflicts with Ordinance 18-O-42. Ordinance 18-O-42 was an initiated ordinance that purported to require an election before the County Judge or the Quorum Court could issue a letter or resolution of support for a casino license as provided under Amendment 100. Plaintiffs argue that Ordinance 18-O-42 can be read in harmony with Amendment 100 to further the purpose of local control



provided for in Amendment 100. Plaintiffs also argue that because Amendment 100 is silent regarding how the County Judge and Quorum Court exercise their authority to issue support letters or resolutions, then the County is free to add qualifications to that process. Defendants and CNB argue that Ordinance 18-O-42 is unconstitutional in that it conflicts with Amendment 100's grant of authority and discretion to the County Judge and the Quorum Court to issue letter(s) or resolution(s) of support for potential casino applicants. Defendants and CNB also argue that Ordinance 18-O-42 adds an additional qualification to Amendment 100's qualifications for a casino applicant and is therefore unconstitutional. CNB properly notified the Attorney General's Office on or about October 10, 2019, of its claim that Ordinance 18-O-42 is unconstitutional.

6. The Court finds that Ordinance 18-O-42 is not *in pari materia* with Amendment 100. Indeed, it is in direct conflict with Amendment 100. Amendment 100 specifies that the authority and discretion to issue letters or resolutions of support lie with the County Judge and the Quorum Court. Amendment 100 does not place that authority or discretion in the electorate of Pope County. Accordingly, Ordinance 18-O-42 is unconstitutional and void. Moreover, pursuant to the case law cited by Defendants and CNB in their pleadings and at oral arguments, Ordinance 18-O-42 adds a qualification that was intended to operate and/or has the effect of operating as a bar to the issuance of a letter or resolution of support by the offices charged with that duty: the County Judge and the Quorum Court. In fact, Plaintiffs admit this in their Response to CNB's Motion to Dismiss when stating that "[t]he

ordinance only acts as a complete bar . . . if the Quorum Court in its discretion presents a resolution of support in favor of a casino applicant and the voters reject it." See Plaintiffs' Response, p. 3. Accordingly, because it imposes an additional qualification not found in or authorized by Amendment 100, especially when such qualification could act as a complete bar, Ordinance 18-O-42 is unconstitutional and void. The Court specifically finds that Ordinance 18-O-42 was unconstitutional and void at the time that the Quorum Court passed Resolution 19-R-14. Thus, the Ordinance was of no effect and does not impair Resolution 19-R-14. Plaintiffs' request for a declaratory judgment finding Resolution 19-R-14 invalid or of no legal effect is denied and dismissed with prejudice, as Plaintiffs do not have a claim as a result of Ordinance 18-O-42 being unconstitutional.

7. Defendants and CNB further contend Ordinance 18-O-42 is unenforceable as an attempt by Pope County to regulate gambling in violation of Arkansas Code Annotated § 14-14-806(4). The Court agrees and grants the Motions to Dismiss with prejudice on this issue, as Plaintiffs do not have a claim as a result of Ordinance 18-O-42 being unconstitutional. The Court specifically finds that Ordinance 18-O-42 was unconstitutional and void at the time that the Quorum Court passed Resolution 19-R-14. Thus, the Ordinance was of no effect and does not impair Resolution 19-R-14. Plaintiffs' request for a declaratory judgment finding Resolution 19-R-14 invalid or of no legal effect is denied and dismissed with prejudice.

8. In their Amended Petition, Plaintiffs assert a claim that the action of the Quorum Court in passing Resolution 19-R-14 was preceded by one or more

unspecified "secret meetings" of some number of members of the Quorum Court. Plaintiffs claim these alleged "secret meetings" violate the open meetings provision of the Arkansas Freedom of Information Act ("FOIA") Ark. Code Ann. § 25-19-106 and, thus, the action of the Quorum Court in passing Resolution 19-R-14 was invalid. Defendants and CNB specifically denied that any non-public meetings took place at any time between CNB or its representatives and any members of the Pope County Quorum Court. Defendants and CNB move to dismiss under Arkansas Rule of Civil Procedure 12(b)(6) arguing the Amended Petition contains insufficient facts to support the alleged violations of the FOIA. Defendants and CNB also argue that the allegations in the Amended Petition demonstrate that the County Judge and Quorum Court complied with the FOIA's open meetings provision and, to the extent there were violations, such violations were cured by the open meeting of the Quorum Court on August 13, 2019, at which Resolution 19-R-14 was adopted.

9. The Arkansas Supreme Court has held that contact between board members before a meeting does not necessarily equate to an FOIA open-meetings violation. *City of Fort Smith v. Wade*, 2019 Ark. 222, 578 S.W.3d 276; *McCutchen v. City of Fort Smith*, 2012 Ark. 452, 425 S.W.3d 671. The Court finds that Plaintiffs have not pleaded sufficient facts to demonstrate that a meeting by Defendants occurred in violation of the FOIA. The Amended Petition provides no details about the alleged secret meetings; i.e. there is no who, what, when, where, or why illuminating what acts Plaintiffs contend violate the FOIA. Accordingly, Plaintiffs' claim asserting a violation of the FOIA is dismissed under Rule 12(b)(6).

10. Plaintiffs acknowledge that after the purported secret meetings by Defendants, a public meeting was held at which the Quorum Court voted to adopt Resolution 19-R-14. Importantly, Plaintiffs do not allege that the Quorum Court or any number of its members met outside a public meeting to vote on adopting Resolution 19-R-14. There is no allegation that the August 13, 2019, public meeting of the Quorum Court was called improperly. Thus, to the extent there was a FOIA violation, that violation was cured, at least as to the relief sought by Plaintiffs, by an open meeting, which subjects Plaintiffs' FOIA claim to dismissal under Rule 12(b)(6).

11. Further, Plaintiffs' only request for relief in regards to alleged FOIA violations is invalidation of Resolution 19-R-14. The allegations submitted by Plaintiffs, even if they constitute a FOIA violation, do not satisfy the elements set forth by the Arkansas Supreme Court and Arkansas Court of Appeals for invalidation of a legislative act for a FOIA violation. Plaintiffs have failed to state a claim for a violation of the FOIA that would warrant the invalidation of Resolution 19-R-14. Accordingly, Plaintiffs' request for declaratory judgment that the Defendants violated the FOIA resulting in invalidation is dismissed under Rule 12(b)(6).

12. Finally, Plaintiffs' request for a Writ of Mandamus is rendered moot by the above findings and will be denied.

13. This Order constitutes a final order disposing of all issues in this matter.

IT IS SO ORDERED.

*William M. Pearson*  
 JUDGE WILLIAM M. PEARSON

*11-4-19*  
 DATE \_\_\_\_\_

Prepared By:

Attorneys for Intervenor:

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Scott Richardson, Ark. Bar No. 2001208  
Bart W. Calhoun, Ark. Bar No. 2011221  
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[bcalhoun@mrcfirm.com](mailto:bcalhoun@mrcfirm.com)

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Russellville, AR 72801

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS  
CIVIL DIVISION (I)

CITIZENS FOR A BETTER POPE COUNTY,  
A Local Option Ballot Question Committee;  
JAMES KNIGHT, in his individual capacity

PLAINTIFFS

FILED  
POPE CO. CIRCUIT CLERK  
TIME: 11:59  
DATE: 12-03-19

v. Case No. 58CV-19-439

BEN CROSS, in his official capacity  
As County Judge of Pope County, Arkansas, et al.

DEFENDANTS

CHEROKEE NATION BUSINESSES, LLC

INTERVENOR

NOTICE OF APPEAL

Plaintiffs, Citizens for a Better Pope County, a Local Option Ballot Question Committee, and James Knight, in his individual capacity, for their Notice of Appeal, state:

1. **Appealing Parties.** The parties taking this appeal are Plaintiffs, Citizens for a Better Pope County, a Local Option Ballot Question Committee, and James Knight, in his individual capacity.
2. **Orders Being Appealed.** Plaintiffs appeal from the Court's Order entered October 3, 2019, granting Intervenor's Motion to Intervene, and the Court's Order entered November 4, 2019, granting Defendants' Motion to Dismiss. The November 4 order is a final, appealable order.
3. **Designation of Record.** Plaintiffs designate the entire record on appeal up to and including the Court's Order entered November 4, 2019, granting Defendants' Motion to Dismiss. Material filed of record after November 4, 2019 is not designated in this notice.
4. **Certificate of Transcript.** Plaintiffs have ordered the transcripts and made financial arrangements required by the court reporter, pursuant to Ark. Code Ann §16-13-510(c), and the Clerk to compile the record.

5. **Jurisdiction of the Supreme Court of Arkansas.** Plaintiffs appeal to the Supreme Court of Arkansas; Appellants designate subdivision (2) of Arkansas Supreme Court and Court of Appeals Rule 1-2(a), which gives the Supreme Court jurisdiction. This appeal involves the interpretation or construction of the Constitution of Arkansas. *See* Ark. Sup. Ct. R. 1-2(a)(1).

6. **Abandonment of Claims.** Plaintiffs abandon any pending but unresolved claims raised by the Amended Petition, but reserve their rights as they pertain to any pending but unresolved motions.

Respectfully submitted,

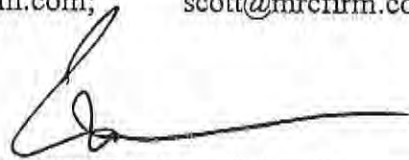
STORY LAW FIRM, PLLC

By: 

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Gregory F. Payne (2017008)  
Katie L. Freeman (2014199)  
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**CERTIFICATE OF SERVICE**

I, Travis W. Story, hereby certify that on December 3, 2019, a copy of the foregoing was served on counsel for Defendants and Intervenor, by email to [croe@dailywoods.com](mailto:croe@dailywoods.com); [clay@mccalllawpllc.com](mailto:clay@mccalllawpllc.com); [dmcDaniel@mrcfirm.com](mailto:dmcDaniel@mrcfirm.com); [scott@mrcfirm.com](mailto:scott@mrcfirm.com); and [bcalhoun@mrcfirm.com](mailto:bcalhoun@mrcfirm.com) respectively.

  
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