



2015

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Recommended Citation

Jerald A. Sharum, *The Arkansas Supreme Court's Unconstitutional Power Grab in Arkansas Department of Human Services V. Shelby and the Judiciary's Authority in Child-Welfare Cases*, 37 U. ARK. LITTLE ROCK L. REV. 391 (2015).

Available at: <https://lawrepository.ualr.edu/lawreview/vol37/iss3/2>

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THE ARKANSAS SUPREME COURT'S UNCONSTITUTIONAL
POWER GRAB IN *ARKANSAS DEPARTMENT OF HUMAN SERVICES V.*
SHELBY AND THE JUDICIARY'S AUTHORITY IN CHILD-WELFARE
CASES

*Jerald A. Sharum**

I. INTRODUCTION

In *Arkansas Department of Human Services v. Shelby*, the Arkansas Supreme Court held that a circuit court acting as a juvenile court had sufficient authority over the internal staffing operations of the Arkansas Department of Human Services (“the Department”) to “fix” a problem identified by a court that has the effect of coercing the Department to reduce a caseworker’s caseload or otherwise dictate the Department’s internal operations¹ in child-welfare proceedings (“*Shelby*-style order”).² A bare majority of the Court³ based this authority on the majority’s assertion of a broad jurisdiction vested in circuit courts over juvenile matters that includes the specific powers granted to circuit courts by the Arkansas Juvenile Code as well as a circuit court’s common law jurisdiction over minors in equity and a circuit

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1. See Ark. Dep’t of Human Servs. v. *Shelby*, 2012 Ark. 54, at 3–5, 2012 WL 401615, at *3–5 (affirming a circuit court’s order to “rectify” a caseworker’s caseload based on the circuit court’s “jurisdiction to protect minor[,] . . . assure that the necessary services are being delivered[, and] . . . control and protect the integrity of the proceedings and the rights of the litigants”).

2. Child-welfare proceedings are specialized cases prescribed under the Arkansas Juvenile Code that address the abuse, neglect, and dependency of juveniles that arise from the acts or omissions of a given juvenile’s parent, guardian, custodian, or caretaker, as well as issues related to the state’s protective custody of minors in such circumstances. *E.g.*, ARK. CODE ANN. § 9-27-302 (Supp. 2013); *id.* § 9-27-303(18)(A) (Supp. 2013); *id.* § 9-27-306(a)(1)(B)–(C) (Supp. 2013). This article focuses on these proceedings, specifically those where a juvenile has been removed from the custody of a parent and placed in an out-of-home placement due to the acts or omissions of that parent. Practitioners in Arkansas and elsewhere also commonly refer to child-welfare proceedings as dependency-neglect cases, in part to differentiate such cases from delinquency and family-in-need-of-services cases, which are other kinds of child-welfare proceedings that deal with the different elements of a child’s welfare. Although this article does not address these other cases per se, the principles and conclusions set out in this article likely apply similarly to those kinds of cases.

3. The majority opinion was written by Chief Justice Jim Hannah and joined by Justices Karen Baker, Jim Gunter, and Courtney Hudson Goodson. The dissent was written by Justice Paul E. Danielson and joined by Justices Donald L. Corbin and Robert L. Brown. See *Shelby*, 2012 Ark. 54, at 1, 5, 2012 WL 401615, at *1, *5.

court's "inherent authority" to protect the integrity of its proceedings and safeguard litigants appearing before it ("the Inherent Protection Power").⁴ This article terms these broad assertions of authority—along with their underlying jurisdictional bases—the *Shelby* Doctrine.⁵

The *Shelby* Doctrine, however, is wrong. Arkansas courts do not have the authority to enter *Shelby*-style orders or otherwise direct the internal operations of any state executive agency, including the Department in child-welfare cases like *Shelby*, nor do any of Arkansas's courts have the broad jurisdiction and authority related to juveniles and all types of litigants that the *Shelby* Doctrine suggests. More specifically, the *Shelby* Doctrine is wrong because the authority asserted in *Shelby* exceeds the jurisdiction allowed to the judiciary by the Arkansas Constitution. First, the *Shelby* Doctrine violates Amendment 67 because it asserts that circuit courts have jurisdiction over juveniles in equity that the General Assembly has not provided by law and assumes authority outside the limited jurisdiction provided under the juvenile code to courts in child-welfare proceedings.⁶ Second, the *Shelby* Doctrine authorizes circuit courts to compel the Department to act in violation of the state's sovereign immunity, which deprives Arkansas courts of the jurisdiction to coerce a state agency like the Department to act.⁷

Moreover, the *Shelby* decision itself is a dangerous precedent that silently overturns dozens of prior Arkansas Supreme Court cases⁸ and gives circuit courts across the state a license to direct any state agency to comply with a given circuit court's determination of what a given agency's staffing, internal operations, or services should be.⁹ In this way, the *Shelby* Doctrine allows circuit courts to assume in a very practical way the nonjudicial role of super-social worker in child-welfare proceedings without the training or expertise of an actual social worker and without the training or expertise that specialized agencies like the Department have in implementing public poli-

4. *Id.* at 3–5, 2012 WL 401615, at *3–5.

5. Although *Shelby* was not the first case in which a member of the Arkansas Supreme Court voiced approval for the judiciary's authority to manage the juvenile system to assure the Department's performance in a given case or in future cases, it is the first case where that authority was specifically set out and sanctioned by a majority of the Arkansas Supreme Court. See Ark. Dep't of Health & Human Servs. v. Briley, 366 Ark. 496, 506–08, 237 S.W.3d 7, 14–15 (2006) (Hannah, C.J., concurring in part and dissenting in part); Ark. Dep't of Human Servs. v. Clark, 304 Ark. 403, 411, 802 S.W.2d 461, 465 (1991) (Glaze, J., concurring). Although neither of these progenitors addressed the constitutional issues raised in this article, the *Shelby* Doctrine must be interpreted through the lens of these prior cases—particularly Chief Justice Hannah's dissenting opinion in *Briley*—because they inform the *Shelby* Doctrine's analytical context.

6. See discussion *infra* Part III.A.

7. See discussion *infra* Part III.B.

8. See discussion *infra* Part III.A.

9. See *Shelby*, 2012 Ark. 54, at 6, 2012 WL 401615, at *6 (Danielson, J., dissenting).

cies related to child welfare. Indeed, at least one circuit court has already attempted to employ the broad authority announced in *Shelby* to manage the Department's human resources in counties directly.¹⁰ And if the authority announced in *Shelby* is left unchecked, there is arguably no limit to the expansion of the judiciary's authority into other areas.

Part II of this article begins the analysis to reach these conclusions by setting out *Shelby* and the essential elements of the *Shelby* Doctrine. Part III then compares the limits imposed on the judiciary's authority by the Arkansas Constitution with the authority asserted in the *Shelby* Doctrine and argues that *Shelby*-style orders exceed those limits based on the impact of Amendment 67 on the judiciary's jurisdiction in child-welfare proceedings, the *Shelby* Doctrine's violation of the Department's sovereign immunity, and the judiciary's lack of a constitutionally sufficient role in child-welfare proceedings sufficient to allow a circuit court to enter a *Shelby*-style order. Part IV then concludes that the judiciary will continue to assume unconstitutional roles unless the Arkansas Supreme Court repudiates the *Shelby* Doctrine.

II. ARKANSAS DEPARTMENT OF HUMAN SERVICES V. SHELBY

The harbinger of the *Shelby* Doctrine, *Arkansas Department of Human Services v. Shelby*, reached the Arkansas Supreme Court after the Department filed a petition for certiorari¹¹ from a child-welfare proceeding in Jefferson County in which the circuit judge, the Honorable Earnest E. Brown, had ordered the Department to "rectify" the high caseload of the Department's caseworker assigned to the case.¹² The Department alleged that the

10. Ark. Dep't of Human Servs. v. Sliger, JV-2010-40 (Scott Co. Cir. Ct. Apr. 17, 2012) (ordering the Department to hire or assign a caseworker into the Department's Division of Children and Family Services in Scott County). Interestingly, the circuit judge in *Sliger* reconsidered his order upon considering some of the arguments raised in this article and modified the order to more closely track the order sanctioned in *Shelby*, to wit, "the Department shall fix the staffing issues that gave rise to this Court's finding of no reasonable efforts." Ark. Dep't of Human Servs. v. Sliger, JV-2010-40 (Scott Co. Cir. Ct. May 22, 2012).

11. The Department originally filed its appeal with the Arkansas Court of Appeals under several theories of appeal, including an appeal from an order designated as a final and appealable order under Rule 54(b) of the Arkansas Rules of Civil Procedure, an appeal from a mandatory injunction under Rule 2(a)(6) of the Arkansas Rules of Appellate Procedure – (en dash) Civil, and as a petition for a writ of certiorari under Rule 6-1 of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas. The Arkansas Supreme Court asserted jurisdiction on November 15, 2011, because the appeal involved an extraordinary writ. *Shelby*, 2012 Ark. 54, at 1 n.1, 2012 WL 401615, at *1. The case was formally submitted to the Arkansas Supreme Court on January 26, 2012, as a petition for a writ of certiorari, and the court issued its opinion in *Shelby* on February 9, 2012. *Id.*, 2012 WL 401615, at *1.

12. *Id.* at 1–3, 2012 WL 401615, at *1–3 (quoting Transcript of Record, Ark. Dep't of Human Servs. v. Shelby, JV-2010-1130 (Jefferson Co. Cir. Ct. July 13, 2011)).

circuit court did not have the jurisdiction to order the Department to change the caseloads of its caseworkers and that such an order violated the Arkansas Constitution's separation-of-powers doctrine.¹³

The basis for Judge Brown's order was that even though the Department was statutorily required to prepare a case plan long before the permanency planning hearing in the case,¹⁴ the Department's caseworker had testified that she was not able to prepare a case plan by the time of the permanency planning hearing because the caseworker had forty-one cases on her caseload and was responsible for fifty juveniles in foster care.¹⁵ As Judge Brown explained:

Forty-one cases are too much, so I'm going to do this. . . . Y'all either fix it or the Court will call somebody to fix it. This lady's got too many cases. She's got too many tough cases to do that. Now, somebody's going to have to split out some of these cases and do it and I don't get into that micromanaging there, but based on what I was told by Cecile Bluch [sic] in Little Rock what the average load is supposed to be in Pine Bluff. Forty-one cases, especially the types of cases she has, is [sic] too many and I want that rectified within five business days of today's court order. She's got too many cases, and I don't want nobody [sic] else to get 41 either as a result of it, but there's some deficiency in the system if that particular thing happens there.¹⁶

13. *See id.*, at 1, 2012 WL 401615, at *1.

14. The juvenile code requires that the Department prepare a complete case plan within thirty days from the date of the dependency-neglect adjudication hearing. ARK. CODE ANN. § 9-27-402(a)(4) (Supp. 2013); *id.* § 9-28-111(a)(2)(C) (Supp. 2013). Adjudication hearings and permanency planning hearings are each one of six main types of hearings that occur in child-welfare proceedings in which a juvenile is placed in foster care or another out-of-home placement due to the acts or omissions of a parent. *See id.* §§ 9-27-315 (Supp. 2013) (probable cause hearings), -327 (Supp. 2013) (adjudication hearings), -329 (Supp. 2013) (disposition hearings), -337 (Supp. 2013) (review hearings), -338 (Supp. 2013) (permanency planning hearing), -359 (Supp. 2013) (fifteen-month review hearings).

15. *Shelby*, 2012 Ark. 54, at 2–3, 2012 WL 401615, at *2–3. Judge Brown's dissatisfaction is understandable given the importance of case plans as the roadmaps for many child-welfare proceedings and the stage of the *Shelby* case at the time of Judge Brown's order. Case plans are developed by the Department in consultation with all parties and attorneys in the dependency-neglect cases and provide the benchmark for evaluating the progress of the parents, guardians, and custodians at each stage of a dependency-neglect case. *See, e.g.*, ARK. CODE ANN. §§ 9-27-303(9), -338(c), -341(a), -359(b), -360(b), -361(a) (Repl. 2009 & Supp. 2013). The lack of a case plan in *Shelby* at the time of the permanency planning hearing was also even more significant because permanency planning hearings are generally held a year after a juvenile enters an out-of-home placement in order to finalize a permanency plan for the juvenile, which may in turn call for the termination of a parent's rights to the juvenile. *See* ARK. CODE ANN. § 9-27-338(a) (Supp. 2013).

16. *Shelby*, 2012 Ark. 54, at 3–4, 2012 WL 401615, at *3–4 (quoting Transcript of Record, Ark. Dep't of Human Servs. v. *Shelby*, JV-2010-1130 (Jefferson Co. Cir. Ct. July 13, 2011)).

Judge Brown reflected this sentiment in his written order and directly ordered the Department to rectify the specific issue of the caseworker's caseload: "That, the case worker testified that she has 41 cases on her caseload and fifty juveniles in foster care. That within five days, [the Department] shall rectify this issue."¹⁷

A divided Arkansas Supreme Court affirmed Judge Brown's jurisdiction to order the Department to fix the caseworker's caseload as necessary and appropriate to address the Department's failure to comply with the juvenile code.¹⁸ First, the majority held that a circuit court had the jurisdiction over juveniles in equity that authorized such a court to "make all orders that will properly safeguard the[] rights" of juveniles appearing before it, including orders to protect such juveniles and "assure that . . . necessary services are being delivered."¹⁹ Second, the majority concluded that a circuit court's "inherent authority" to protect the integrity of its proceedings and safeguard litigants appearing before it allowed the circuit court to compel the Department to fulfill the Department's obligations under the juvenile code and "correct problems that were preventing work and services [from being performed by the Department]."²⁰

The majority also held that the Juvenile code did not limit a circuit court's jurisdiction in child-welfare proceedings because the juvenile code was not a circuit court's only source of jurisdiction over juveniles.²¹ Rather, the majority reasoned, the jurisdiction over juveniles historically held by courts of equity in Arkansas provided modern circuit courts with the necessary additional jurisdiction to act outside the juvenile code in issuing orders to the Department.²²

The majority further found that Judge Brown's order did not violate Arkansas's separation-of-powers doctrine because Judge Brown did not specify *how* the Department was to correct the "problem."²³ Acknowledging

17. *Id.* at 3, 2012 WL 401615, at *3.

18. *Id.* at 3–5, 2012 WL 401615, at *3–5. The framing of the majority and dissenting opinions through a jurisdictional lens is not surprising because the legal issue presented for appeal to the Arkansas Supreme Court was that Judge Brown's order (1) exceeded the circuit court's jurisdiction, and (2) violated the Arkansas Constitution's separation-of-powers doctrine. *Id.* at 1, 2012 WL 401615, at *1. Moreover, the Department presented the appeal to the Arkansas Supreme Court through a petition for a writ of certiorari, which is a writ for extraordinary relief largely focused on jurisdiction. *E.g.*, Ark. Dep't of Human Servs. v. Denmon, 2009 Ark. 485, at 7, 346 S.W.3d 283, 288 (providing that a writ of certiorari is available only if "there is a lack of jurisdiction, an act in excess of jurisdiction on the face of the record, or the proceedings are erroneous on the face of the record").

19. *Shelby*, 2012 Ark. 54, at 3–4, 2012 WL 401615, at *3–4.

20. *Id.* at 4–5, 2012 WL 401615, at *4–5.

21. *Id.* at 3–4, 2012 WL 401615, at *3–4.

22. *See id.*, 2012 WL 401615, at *3–4.

23. *Id.* at 5, 2012 WL 401615, at *5.

that a circuit court “is generally without jurisdiction to judicially review the discretionary functions of the executive branch of government,” the majority concluded that Judge Brown did not impermissibly attempt to control any discretionary functions of the Department because he had merely ordered the Department to “fix” the staffing problems that kept the Department “from fulfilling its obligations and duties” and did not give a specific description of *how* the Department was to correct the problems.²⁴

In a rare three-justice dissent, Justice Danielson, joined by Justices Corbin and Brown, argued that Judge Brown’s order violated the separation-of-powers doctrine and set a “horrible precedent” that would allow any circuit court “to direct any state agency to comply with [the circuit court’s] desire for how [the state agency] should operate.”²⁵ Not only did the dissenting justices believe the majority’s claim that the “circuit court was not ordering [the Department] how it was to correct the problem” to be disingenuous given the facts in the case and the specificity of Judge Brown’s orders, they also rejected the notion that a circuit court had any management authority over the Department at all.²⁶ The dissent also observed that instead of ordering the Department to correct its staffing problem, the circuit court could have constitutionally used its contempt power to ensure that the Department had prepared the case plan; the dissent cautioned, however, that even when a court enters an order through a recognized power such as a circuit court’s contempt power, that court must be careful not to exceed its jurisdictional limitations.²⁷

But what the majority and dissenting opinions in *Shelby* did not say is just as important as what the opinions did say—especially the majority opinion. First, neither opinion evaluated the impact of Amendment 67 to the Arkansas Constitution on the jurisdiction of circuit courts in juvenile matters. Second, neither opinion articulated a fully formed analysis that evaluated the authority of the General Assembly to prescribe jurisdiction under Amendment 67 or the authority of a circuit court to act outside of the juvenile code. Third, neither opinion evaluated whether the doctrine of sovereign immunity prohibited the direct coercion of the Department that the circuit court in *Shelby* employed by ordering the Department to rectify its staffing problems, much less how the Department’s sovereign immunity could be overcome by a circuit court’s purported jurisdiction in equity over juveniles or a circuit court’s “inherent authority” to protect the integrity of the circuit court’s proceedings and safeguard “litigants” appearing before the circuit court.

24. *Id.*, 2012 WL 401615, at *5.

25. *Shelby*, 2012 Ark. 54, at 6, 2012 WL 401615, at *6 (Danielson, J., dissenting).

26. *Id.* at 5–6, 2012 WL 401615, at *5–6.

27. *Id.* at 6, 2012 WL 401615, at *6.

Part III of this article addresses these and other issues by evaluating the *Shelby* Doctrine in light of Amendment 67 to the Arkansas Constitution and the Department's sovereign immunity against coercion by the judiciary. And as described below, this article concludes that the *Shelby* Doctrine is unconstitutional under both principles.

III. THE *SHELBY* DOCTRINE VS. THE ARKANSAS CONSTITUTION

The *Shelby* Doctrine is wrong because it sanctions a vastly expanded role of circuit courts in child-welfare proceedings based entirely on jurisdictional foundations that violate the Arkansas Constitution. First, the *Shelby* Doctrine violates Amendment 67 because it asserts that circuit courts have jurisdiction over juveniles in equity that the General Assembly has not provided by law. Second, the *Shelby* Doctrine violates the sovereign immunity of the State of Arkansas by authorizing circuit courts to compel the Department to act without the application of an appropriate exception to the Department's sovereign immunity.

Part III.A of this article introduces Amendment 67 and explains the impact that Amendment 67 has had on the role and authority of the General Assembly to define the child-welfare system and prescribe the jurisdictional role that the judiciary plays in that system under Amendment 67. Part III.B then applies the doctrine of sovereign immunity to the *Shelby* Doctrine and evaluates whether *Shelby*-style orders fall within any recognized exceptions to the Department's sovereign immunity. Part III.B also specifically evaluates whether the Inherent Protection Power asserted by the *Shelby* Doctrine should constitute a new sovereign immunity exception and whether the judiciary's role in child-welfare proceedings provides sufficient support for interpreting the Inherent Protection Power as a new sovereign immunity exception.

A. Amendment 67 and the Apotheosis of the General Assembly in Child-Welfare Proceedings

Amendment 67 was enacted during one of the most tumultuous times in the history of Arkansas's child-welfare system and was part of the General Assembly's plan to change the constitutional and statutory framework that governed child-welfare proceedings. It represented the second of three major steps taken by the General Assembly to address serious issues in the child-welfare system in place at the time and was the vehicle through which the modern juvenile code was adopted.

This article argues that Amendment 67 should be further interpreted as controlling the judiciary's jurisdiction in child-welfare proceedings because Amendment 67 impacts the judiciary's jurisdiction in child-welfare proceed-

ings and limits the judiciary's jurisdiction to only the jurisdiction allowed under Amendment 67—a limitation that in practical terms circumscribes the judiciary's jurisdiction to only that jurisdiction provided through the juvenile code. In these ways, Amendment 67 allows the General Assembly to define the child-welfare system as the General Assembly sees fit—even if that definition conflicts with how the judiciary would want the system to operate and even if the judiciary does not have the authority it would want to have over the Department's implementation and performance in the child-welfare system.

Arkansas courts and legal commentators, however, have provided only limited treatment of Amendment 67's import to the judiciary's jurisdiction in child-welfare proceedings and have never expressly concluded that Amendment 67 operates to limit affirmatively the jurisdiction of the judiciary. This article therefore now turns to first set out Amendment 67, the circumstances in which Amendment 67 was adopted, and the proper interpretation that should be given to Amendment 67's text.

1. *Arkansas's Child-Welfare Menagerie and the Adoption of Amendment 67 and the Juvenile Code of 1989*

Amendment 67 was adopted in 1988, became effective in 1989, and was part of the most significant shift in Arkansas's child-welfare system since the system was first created in 1907.²⁸ In relevant part, Amendment 67 provides the following:

The General Assembly shall define jurisdiction of matters relating to juveniles . . . and may confer such jurisdiction upon chancery, circuit or probate courts, or upon separate divisions of such courts, or may establish separate juvenile courts upon which such jurisdiction may be conferred, and shall transfer to such courts the jurisdiction over juvenile

28. The child-welfare system began with the adoption of Act 237 in 1907, an act that broadly empowered county courts to take custody of at-risk juveniles between the ages of three and fifteen and make placements to institutions and private foster care. Act of Apr. 30, 1907, No. 237, 1907 Ark. Acts 555. The General Assembly almost immediately began to expand and modify the child-welfare system into an increasingly more complex and robust system, beginning with the adoption of the first formal juvenile code, the Juvenile Code of 1911, and the establishment of the first "juvenile court." Act of Apr. 15, 1911, No. 215, 1911 Ark. Acts 166 (codified as amended at ARK. CODE ANN. §§ 9-27-301 to -367 (Repl. 2009 & Supp. 2013)). The 1911 Juvenile Code was amended at least thirteen times from 1911 to 1975, ultimately leading up to the adoption of the 1975 Juvenile Code, which substantially revised the child-welfare system to formally provide, among other things, state custody of dependent-neglected juveniles and emergency custody. Arkansas Juvenile Code of 1975, No. 451, §§ 33, 38, 1975 Ark. Acts 1179, 1193, 1196 (codified at ARK. CODE ANN. §§ 45-401 to -454 (Repl. 1977 & Supp. 1985)). The 1975 Juvenile Code was the juvenile code in effect at the time of the adoption of Amendment 67. 1975 Ark. Acts 1200, at § 51.

matters now vested in county courts by Section 28 of Article 7 of this Constitution.²⁹

Amendment 67 therefore expressly contemplates three main components. First, Amendment 67 grants the General Assembly the power to define the jurisdiction of juvenile matters. Second, Amendment 67 allows the General Assembly to confer the jurisdiction that it defines upon one or more courts, specifically, the chancery, circuit, or probate courts, or upon a court that the General Assembly establishes to act as a juvenile court. Third, Amendment 67 provides that if the General Assembly grants jurisdiction to a court, the General Assembly is required to transfer the jurisdiction over juveniles held by county courts on January 1, 1989, the time Amendment 67 became effective.³⁰

Amendment 67 was adopted two years after the Arkansas Supreme Court had held in its landmark *Walker v. Arkansas Department of Human Services* decision that the General Assembly had only limited authority to define the judiciary's jurisdiction in child-welfare and that the child-welfare system that the General Assembly had created was unconstitutional.³¹ Specifically, the Arkansas Supreme Court held that the county courts designated by the General Assembly to hear child-welfare proceedings as "juvenile courts" in the then-existing juvenile code were unconstitutional because the General Assembly lacked the constitutional authority to vest county courts with the jurisdiction to hear child-welfare proceedings due to the Arkansas Constitution's express allocation of jurisdiction among Arkansas's trial courts.³²

Prior to Amendment 67, the General Assembly lacked the authority to define the child-welfare system and prescribe the judiciary's involvement in that system. And although the Arkansas Supreme Court observed that the General Assembly could address the issue of jurisdiction over child-welfare proceedings—and indeed expressly left the issue unresolved for the General

29. ARK. CONST. amend. 67 (emphasis added).

30. H.R.J. Res. 1001 § 2, 76th Gen. Assemb., Reg. Sess. (Ark. 1987) (providing that Amendment 67 would become effective on January 1, 1989). Voters approved Amendment 67 in the 1988 general election. See Ark. Sec. of State, *Historical Initiatives & Referenda Election Results*, <http://www.sos.arkansas.gov/elections/Documents/Revised%20Initiatives%20and%20Amendments%201938-2014.pdf> (last visited May 30, 2015).

31. *Walker v. Ark. Dep't of Human Servs.*, 291 Ark. 43, 47–52, 722 S.W.2d 558, 560–62 (1987). The Arkansas Supreme Court's decision in *Walker* was consequential not only because it held that the child-welfare system in place at the time was unconstitutional, but also because it expressly abrogated the Arkansas Supreme Court's nearly seventy-year old initial determination in *Ex Parte King* that the General Assembly had constitutionally vested county courts with jurisdiction over child-welfare proceedings. See *id.* at 47–48, 722 S.W.2d at 560, *abrogating Ex Parte King*, 141 Ark. 213, 217 S.W. 465 (1919); DIANE D. BLAIR & JAY BARTH, *ARKANSAS POLITICS AND GOVERNMENT* 225, 227 (2d ed. 2005).

32. *Walker*, 291 Ark. at 47–52, 722 S.W.2d at 560–62.

Assembly to address³³—the undeniable message from the *Walker* decision was that the General Assembly was not free to define jurisdiction over child-welfare proceedings because of the limitations that the state constitution of the day imposed on the General Assembly's authority.³⁴

Even prior to *Walker*, the allocation of jurisdiction in matters related to juveniles among Arkansas's trial courts created numerous problems for the child-welfare system and its effectiveness was the frequent object of criticism by judges and commentators for years prior to the adoption of Amendment 67. Indeed, the concurrent and conflicting jurisdiction of Arkansas's courts related to juveniles prior to the adoption of Amendment 67³⁵

33. *Id.* at 51, 722 S.W.2d at 562 (citing *Dupree v. Alma Sch. Dist.*, 279 Ark. 340, 651 S.W.2d 90 (1983)). The *Walker* court's deference to the legislature in developing a constitutional child-welfare system for the Arkansas Supreme Court to then review is not surprising given the court's citation of *Dupree v. Alma School District*, which was the first in a line of Arkansas Supreme Court decisions that held that the state's public education system was unconstitutional under the Arkansas Constitution. Jerald A. Sharum, *Arkansas's Tradition of Popular Constitutional Activism and the Ascendancy of the Arkansas Supreme Court*, 32 U. ARK. LITTLE ROCK L. REV. 33, 86–94 (2009). *Dupree* was unique in that line of cases—which increasingly recognized the role of the judiciary in state systems and policies—because it announced and employed a narrow judicial role in reviewing state systems and policies much in the same way that the *Walker* court followed a narrow role in evaluating the constitutionality of the child-welfare system and then leaving it to the legislature to create a constitutionally sufficient system. *See id.*; *Dupree*, 279 Ark. at 49–50, 651 S.W.2d at 95.

34. *Walker*, 291 Ark. at 51, 722 S.W.2d at 562.

35. During this time, county court held jurisdiction as “juvenile courts” over statutory proceedings involving juveniles who had been abused, neglected, or otherwise left without a legal caregiver. *See, e.g.*, Act of Apr. 15, 1911, No. 215, § 1, 1911 Ark. Acts 166, 167–69; Ark. Juvenile Code of 1975, No. 451, § 3, 1975 Ark. Acts 1179, 1181 (codified at ARK. CODE ANN. §§ 45-401 to -454 (Repl. 1977 & Supp. 1985)). Arkansas's other trial courts, however, had sufficient overlapping jurisdictions to allow those courts to substantially impact child-welfare proceedings even when those proceedings were ongoing and even as to the same issues that child-welfare proceedings involved. Chancery courts, for example, held equitable jurisdiction over juveniles that allowed chancery courts to “make all orders that will properly safeguard [the rights of juveniles].” *See, e.g.*, *Jones v. Jones*, 13 Ark. App. 102, 105–06, 680 S.W.2d 118, 120 (1984) (citing *Robins v. Ark. Soc. Servs.*, 273 Ark. 241, 617 S.W.2d 857 (1981); *Richards v. Taylor*, 202 Ark. 183, 150 S.W.2d 2 (1941); *Kirk v. Jones*, 178 Ark. 583, 12 S.W.2d 879 (1928); *Ex Parte King*, 141 Ark. 213, 217 S.W. 465 (1919); *State v. Grisby*, 38 Ark. 406, 1882 WL 1481 (1882)) (rejecting the exclusive jurisdiction of juvenile courts over juveniles and reaffirming the long-standing jurisdiction of chancery courts over juveniles as separately sufficient from the special subject-matter jurisdiction afforded juvenile courts to justify the actions of the chancery court in changing custody of the juvenile in the case). Likewise, probate courts held jurisdiction related to juveniles that included jurisdiction over adoptions and guardianships of the persons and estates of juveniles. *See, e.g.*, *Robins*, 273 Ark. at 244–45, 617 S.W.2d at 858–59 (citing *Lee v. Grubbs*, 269 Ark. 205, 599 S.W.2d 715 (1980); *Cude v. State*, 237 Ark. 927, 377 S.W.2d 816 (1964); *Scott v. Brown*, 160 Ark. 489, 254 S.W. 1074 (1923); *Ex Parte King*, 141 Ark. at 213, 217 S.W. at 465). Finally, circuit courts held jurisdiction over juveniles in civil and criminal proceedings. *See, e.g., id.* at 245, 617 S.W.2d at 858–59.

created a well-recognized and “horrendous problem” whereby any juvenile in Arkansas could be “placed in the custody of a divorced parent by the chancery court, placed in the custody of a social services agency by the [county] juvenile court, and subjected to the guardianship of his person by the probate court—all at the same time!”³⁶

Likewise, Arkansas’s child-welfare system prior to Amendment 67 was cited multiple times for failing to meet the legal requirements imposed by increasingly complex federal and state statutory schemes to implement expanding policies and mandates to protect children—in part because of how many different courts needed to know about and apply the requirements in order for the legal requirements to be properly implemented. Throughout the 1980s, for example, numerous Arkansas courts failed to review properly or meaningfully certain types of child-welfare proceedings involving foster care.³⁷ This failure was primarily because the various courts that dealt with such cases, including juvenile and probate courts, were not dedicated to such child-welfare cases and simply did not know about the federal law that prescribed the review required.³⁸ In addition, the child-welfare agency in existence at the time, the Social Services Division, failed to communicate the requirements to the various courts that did need to know.³⁹

Following *Walker*, however, the General Assembly and other entities began to take action to fill the void that *Walker* left. The General Assembly first enacted Act 14 of 1987 in order to create a temporary statutory fix given the jurisdictional options available after *Walker*.⁴⁰ Specifically, Act 14

36. *Dyer v. Ross-Lawhon*, 288 Ark. 327, 331, 704 S.W.2d 629, 631–32 (1986) (Newbern, J., concurring); *Jarmon v. Brown*, 286 Ark. 455, 457–58, 692 S.W.2d 618, 620 (1985) (Newbern, J., concurring) (noting the “horrendous problem of concurrent and conflicting jurisdiction with respect to cases pertaining to juveniles existing in our juvenile, county, and chancery courts”). Although *Walker* represented the first decision that invalidated the jurisdictional authority of county courts to hear juvenile matters, various members of the majority in *Walker* had previously announced their dissatisfaction with the juvenile system in other cases. Justice Steele Hays joined Newbern’s concurrence in *Jarmon*, and both Justice Hays and Chief Justice Jack Holt joined Justice David Newbern in his concurrence in *Dyer*. Chief Justice Holt would later write the majority opinion in *Walker* and be joined by Justices Newbern and Hays in that opinion.

37. See generally Tom Glaze, *Foster Care Reform: A Model for the Nation*, 20 ARK. LAW. 1, 27–34 (1986), available at www.issuu.com/arkansas_bar_association/docs/January-1986 (observing problems in the child-welfare system related to the failure to apply the law governing the review of foster care cases by the various courts in Arkansas that interacted with such cases).

38. See *id.*

39. See *id.*

40. See Act of Feb. 6, 1987, No. 14, §§ 1, 15, 1987 Ark. Acts 24, 24–25, 36; *Walker v. Ark. Dep’t of Human Servs.*, 291 Ark. 43, 47–52, 722 S.W.2d 558, 560–62 (1987); KAY C. GOSS, *THE ARKANSAS STATE CONSTITUTION* 239 (G. Alan Tarr ed., Oxford University Press 2011) (1993). The General Assembly signed Act 14 into law seventeen days after *Walker* was decided; not surprisingly, the General Assembly declared that the *Walker* decision created an

vested jurisdiction over child-welfare proceedings formerly held by county courts into a juvenile division of the circuit courts with respect to juvenile delinquency and into a juvenile division of the probate courts with respect to “juveniles in need of supervision” and dependent-neglected juveniles.⁴¹

Following the adoption of Amendment 67 in January of 1989, the General Assembly enacted a revised juvenile code to govern child-welfare proceedings, the Juvenile Code of 1989.⁴² The 1989 Juvenile Code implemented many of the features of the 1975 Juvenile Code and Act 14 of 1987, but vested jurisdiction over the child-welfare proceedings governed by the 1989 Juvenile Code with the Juvenile Division of Chancery Court,⁴³ which the General Assembly created by Act 294 of 1989.⁴⁴ Under the 1989 Juvenile Code, the Juvenile Division of Chancery Court held “exclusive original jurisdiction of and [was] the sole court for . . . proceedings governed by [the 1989 Juvenile Code],” including proceedings involving dependency-neglect; families-in-need-of-services; paternity, custody, visitation, and support involving illegitimate juveniles; termination of parent rights; as well as adoptions and guardianships arising during such proceedings.⁴⁵ Act 294 further announced that the General Assembly specifically intended

to transfer and vest all powers, functions, and duties now vested by law in the juvenile divisions of the circuit and probate courts [pursuant to Act 14] to juvenile divisions of the chancery courts of this state, with each division to be assigned the jurisdiction over juvenile matters as provided in [Act 294].⁴⁶

This jurisdiction included dependency-neglect, families in need of services, delinquency, bastardy, termination of parental rights, and such other juvenile matters as may be provided by law.⁴⁷

The 1989 Juvenile Code has remained in effect since its adoption, though it has undergone revisions as to the court designated to hear child-welfare proceedings, the jurisdiction of such courts, and the authority of

emergency requiring immediate action to ensure the “orderly and efficient administration of the juvenile justice system.” 1987 Ark. Acts 24–25, 36.

41. 1987 Ark. Acts 25 at §§ 2–3. Interestingly, Act 14’s allocation of jurisdiction between circuit courts and probate courts left chancery courts as the only trial court without jurisdiction over the child-welfare proceedings governed by the juvenile code. *See id.*

42. Arkansas Juvenile Code of 1989, No. 273, 1989 Ark. Acts 486 (codified as amended at ARK. CODE ANN. §§ 9-27-301 to -367 (Repl. 2009 & Supp. 2013)).

43. 1989 Ark. Acts 492 at secs. 3(8), 5(a) (providing that all proceedings prescribed under the juvenile code were to be heard before the Juvenile Division of Chancery Court).

44. Act of Mar. 2, 1989, No. 294, 1989 Ark. Acts 611 (codified at ARK. CODE ANN. §§ 16-13-601 to -608 (Repl. 1999)).

45. 1989 Ark. Acts 499 at § 5(a)–(b).

46. 1989 Ark. Acts 612 at §§ 1(4), 2(b).

47. *Id.*, No. 294, §§ 1(4), 2(b).

such courts to order the Department to take certain actions. Currently, the juvenile code provides that circuit courts have exclusive jurisdiction over child-welfare proceedings governed by the juvenile code,⁴⁸ which specifically authorizes, among other things, a circuit court to order the Department to provide “family services,” take custody of juveniles in certain circumstances, and perform other functions in child-welfare proceedings.⁴⁹ The import of the juvenile code’s jurisdictional framework is described throughout the remainder of this article.

2. *Amendment 67 and the Authority of the General Assembly over Child-Welfare Proceedings*

Amendment 67 provides that the General Assembly defines the judiciary’s jurisdiction over juveniles.⁵⁰ What is not clear is how Amendment 67 and the General Assembly’s authority to define jurisdiction of child-welfare matters impacts the *Shelby* Doctrine and the jurisdiction in equity asserted by the *Shelby* Doctrine over juveniles in child-welfare proceedings that courts of equity in Arkansas have traditionally held over juveniles.⁵¹ This article argues that Amendment 67’s allocation of power to the General Assembly to define jurisdiction over juveniles should be interpreted to have broad application to the judiciary’s jurisdiction in child-welfare proceedings and the viability of the *Shelby* Doctrine. More specifically, this article argues that Amendment 67’s grant of exclusive authority to the General Assembly to define juvenile jurisdiction, along with the General Assembly’s use of that authority through the Arkansas Juvenile Code of 1989, effective-

48. ARK. CODE ANN. § 9-27-306(a) (Supp. 2013).

49. *Id.* §§ 9-27-303(25), 9-27-329 to -335 (Repl. 2009 & Supp. 2013) (providing the dispositions that circuit courts are authorized to order in delinquency, family-in-need-of-services, and dependency-neglect proceedings).

50. *See* ARK. CONST. amend. 67; *Rosario v. State*, 319 Ark. 764, 766, 894 S.W.2d 888, 889 (1995) (“The juvenile court’s jurisdiction derives from Amendment 67 to the Constitution of Arkansas.”); *Ark. Dep’t of Human Servs. v. Clark*, 304 Ark. 403, 407, 802 S.W.2d 461, 463 (1991) (“Following the passage of Amendment 67 to the Arkansas Constitution, the 77th General Assembly in Act 294 of 1989 defined jurisdiction of matters relating to juveniles and conferred such jurisdiction upon a newly created juvenile division of chancery court.”); *Ark. Dep’t of Human Servs. v. Thomas*, 71 Ark. App. 348, 352, 33 S.W.3d 514, 517 (2000) (“Following the passage of Amendment 67, the legislature defined jurisdiction of matters relating to juveniles and bestowed such jurisdiction upon newly created divisions of chancery court.”); *see also* discussion *supra* Part III.A.1.

51. *See* *Ark. Dep’t of Human Servs. v. Shelby*, 2012 Ark. 54, at 3–4, 2012 WL 401615, at *3–4 (rejecting the position that the juvenile code provides a circuit court its only source of jurisdiction over juveniles). Although the majority in *Shelby* did not expressly state that equitable jurisdiction was the only jurisdiction that a circuit court held over juveniles that was not provided by the juvenile code, the majority did not indicate that there were any other jurisdictional bases upon which a circuit court could rely. *Id.*, 2012 WL 401615, at *3–4.

ly rebooted the judiciary's jurisdiction in child-welfare proceedings to include only such jurisdiction and authority as the General Assembly provided by law in the juvenile code. Amendment 67, however, has never been expressly interpreted as having such a broad effect by any court in Arkansas⁵² or by any previous commentator.⁵³ Nevertheless, Amendment 67 should be affirmatively interpreted as rebooting juvenile jurisdiction and extinguishing all judicial jurisdiction over juveniles in child-welfare proceedings because this effect is required by the unambiguous plain text of Amendment 67. Such an interpretation also flows naturally from a reasonable interpretation of Amendment 67 based on standard principles of constitutional interpretation.

- a. The plain text of Amendment 67 reboots the jurisdiction of Arkansas courts in juvenile matters

Amendment 67's plain text supports the interpretation that Amendment 67 rebooted juvenile jurisdiction and extinguished all prior judicial jurisdiction over juveniles in child-welfare proceedings because Amendment 67 expressly gives the General Assembly the exclusive power to change the judiciary's jurisdiction in all juvenile matters. First, Amendment 67 provides the General Assembly with sole constitutional authority to define jurisdiction over juvenile matters. Second, Amendment 67 does not place any meaningful limitation on the General Assembly's power to circumscribe juvenile jurisdiction as to only legal versus equitable jurisdiction. Third, Amendment 67 does not place any limitation at all on the scope of the juvenile jurisdiction subject to the General Assembly's power.

The General Assembly has the sole constitutional authority to define jurisdiction over juvenile matters because that is exactly what Amendment 67 says: "[t]he General Assembly shall define jurisdiction of matters relating to juveniles."⁵⁴ This grant of power is significant because it designates only the General Assembly as the branch of government with the power to set jurisdiction related to juvenile matters and allows for the conclusion that all juvenile jurisdiction shall be defined by the General Assembly. Simply put, if the General Assembly does not provide jurisdiction, the judiciary

52. At the time of this writing, there have only been five appellate decisions that have even mentioned Amendment 67. *See Rosario*, 319 Ark. 764, 894 S.W.2d 888; *Clark*, 304 Ark. 403, 802 S.W.2d 461; *White v. Winston*, 302 Ark. 345, 789 S.W.2d 459 (1990); *Hutton v. Savage*, 298 Ark. 256, 769 S.W.2d 394 (1989); *Thomas*, 71 Ark. App. 348, 22 S.W.3d 514. That said, even the limited treatment that these cases provided on the import of Amendment 67 supports this article's interpretation. *See infra* notes 54, 92–95 and accompanying text.

53. At the time of this writing, none of Arkansas's scholarly journals have published an article focused on Amendment 67 or its implications.

54. ARK. CONST. amend. 67.

does not have it as a matter of constitutional law. In this way, the judiciary does not have any jurisdiction over juvenile matters—including in child-welfare proceedings and equitable jurisdiction that Arkansas courts previously held over juveniles—unless the General Assembly first provides the jurisdiction by law.

Similarly, the judiciary lacks the authority to assert jurisdiction over juveniles beyond what the General Assembly provides because such an assertion would mean that the judiciary would be defining juvenile jurisdiction in contravention to the express allocation of that authority to the General Assembly by Amendment 67.⁵⁵ To construe Amendment 67 to allow the judiciary to make such an assertion would improperly add language to Amendment 67 and expand the amendment's clear assignment of that authority beyond the General Assembly in violation of Arkansas's strong separation-of-powers doctrine.⁵⁶

Further, Amendment 67 does not place any meaningful limitation on the General Assembly's power to circumscribe juvenile jurisdiction because the express terms of the amendment do not limit the General Assembly's power to add or to remove from the judiciary's jurisdiction so long as the court to which the General Assembly grants juvenile jurisdiction retains the juvenile jurisdiction held by county courts at the time Amendment 67 was adopted.⁵⁷ Moreover, even this requirement lacks real significance because county courts did not even possess jurisdiction over child-welfare matters at the time Amendment 67 was adopted and have never possessed jurisdiction in equity.⁵⁸ In addition, the General Assembly does not even appear to be

55. Cf. ARK. CONST. art. IV, §§ 1, 2 (prohibiting any branch of government from exercising any power belonging to another branch of government unless expressly allowed to do so by the Arkansas Constitution).

56. See *id.*; T.J. *ex rel.* Johnson v. Hargrove, 362 Ark. 649, 655–56, 210 S.W.3d 79, 82–83 (2005) (providing that a court lacks the authority to compel an executive or legislative body to act if the duty to act is discretionary); Saunders v. Neuse, 320 Ark. 547, 550, 898 S.W.2d 43, 45–46 (1995) (same); State v. Churchill, 48 Ark. 426, 426, 3 S.W. 352, 360 (1887); Hawkins v. Governor, 1 Ark. 570, 589–96, 1839 WL 103, at *8–13 (1839); see generally L. Scott Stafford, *Separation of Powers and Arkansas Administrative Agencies: Distinguishing Judicial Power and Legislative Power*, 7 U. Ark. Little Rock L.J. 279 (1984).

57. See ARK. CONST. amend. 67. The state of county jurisdiction at the time Amendment 67 was adopted is controlling because Amendment 67 only requires that the General Assembly transfer jurisdiction “*now* vested in county courts.” *Id.* (emphasis added). Consequently, subsequent changes to county court jurisdiction are of no moment to the operation of Amendment 67, as are any changes to county court jurisdiction that may have occurred prior to *Walker* because *Walker* was the last event that addressed the issue of county court jurisdiction prior to the adoption of Amendment 67.

58. See *Walker v. Ark. Dep't of Human Servs.*, 291 Ark. 43, 51, 722 S.W.2d 558, 562 (1987) (holding that county courts do not have jurisdiction over juvenile matters), *overruling Ex Parte King*, 141 Ark. 213, 217 S.W. 465 (1919) (holding that county courts did have jurisdiction over juvenile matters). County court jurisdiction dates back to the Constitution of 1874, which vested jurisdiction over bastardy, the “apprenticeship of minors,” and other

required to transfer such jurisdiction to a court under Amendment 67 and could instead confer all jurisdiction over juvenile matters to a purely administrative system.⁵⁹ This possibility arises from the plain text of Amendment

matters related to the internal improvement and local concerns of the county in which the given county court sat, as well as jurisdiction related to certain probate matters. ARK. CONST. art. 7, §§ 1, 28–31, 33–34, 36–37; *id.* sched. § 23; *King*, 141 Ark. at 213, 217 S.W. at 467–69 (interpreting section 28 of article 7 to the Arkansas Constitution as providing a list of jurisdictional issues related to the local concerns of a specific county in which the given county court sits), *overruled on other grounds*, *Walker*, 291 Ark. at 47, 722 S.W.2d at 560; Goss, *supra* note 40, at 71, 80–83. The 1874 Constitution, however, did not vest any equitable jurisdiction in county courts because that jurisdiction was placed with circuit courts and then with chancery courts. ARK. CONST. art. 7, § 15 (granting to circuit courts equitable jurisdiction until such time that the General Assembly establishes courts of chancery). Nor was the jurisdiction of county courts ever expanded beyond its original designation. In fact, county court jurisdiction became more limited following the 1938 adoption of Amendment 24, which removed all probate jurisdiction from county courts and consolidated that jurisdiction with chancery court jurisdiction over equity. ARK. CONST. amend. 24; Goss, *supra* note 40, at 172–73. The Arkansas Supreme Court’s decision in *Walker*, which held that county courts hold no jurisdiction over juvenile matters, also limited the jurisdiction of county courts. *Walker*, 291 Ark. at 45–51, 722 S.W.2d at 559–62 (finding that county courts do not have jurisdiction over child-welfare matters because juvenile matters are not matters of local concern, but still implicitly upholding the interpretation of section 28 of article 7 in *King* that county courts have jurisdiction over local concerns). Although the Arkansas Supreme Court in *Walker* broadly stated that county courts held no jurisdiction over “juvenile matters” or “jurisdiction over minors,” it seems clear that what the court really meant was that county courts did not hold jurisdiction over juveniles other than the specific designations of jurisdiction over bastardy and juvenile apprenticeship afforded to county courts under the Arkansas Constitution, which were not modified until at least Amendment 67. *See* ARK. CONST. art. 7, § 28. This view is consistent with the specific issue presented on appeal to the court in *Walker* as to whether county courts have jurisdiction over juvenile matters governed by the 1975 Juvenile Code, as well as the court’s holding that courts do not have the jurisdiction because the jurisdiction does not fall within county court’s jurisdiction over matters of local county concern. *See Walker*, 291 Ark. at 49–50, 722 S.W.2d at 561–62. Thus, the only jurisdiction that county courts appear to have retained following *Walker* was jurisdiction related to juvenile bastardy and the “apprenticeship of minors,” each as originally provided under the 1874 Constitution. This view is also consistent with the Arkansas Supreme Court’s cases holding that county courts have jurisdiction over matters related to bastardy, none of which were overruled or otherwise abrogated by the court in *Walker*. *See, e.g.*, *Pucket v. Pucket*, 289 Ark. 67, 67–68, 709 S.W.2d 82, 82–83 (1986) (holding that a chancery court erred in asserting jurisdiction over a paternity issue by reaffirming that county courts have original jurisdiction in all matters relating to bastardy, not just bastardy proceedings themselves); *Stain v. Stain*, 286 Ark. 140, 142–43, 689 S.W.2d 566, 567 (1985) (same). In any event, at the time Amendment 67 was adopted, it seems clear that county court jurisdiction was limited to the jurisdiction over bastardy, paternity, and juvenile apprenticeship that it was originally provided under the 1874 Constitution. *See* BLAIR & BARTH, *supra* note 31, at 233.

59. *See* ARK. CONST. amend. 67 (providing that the General Assembly “may” transfer juvenile jurisdiction to a court). Whether such a grant of authority to address child-welfare issues would be constitutionally permissible, however, is unclear because such an analysis would depend on the administrative system being used and whether, among other things, the administrative system impermissibly intrudes upon the judiciary’s power of deciding cases.

67, which gives the General Assembly the power to define jurisdiction, but does not require the General Assembly to grant that jurisdiction to a court.⁶⁰ The transfer requirement itself could also be illusory because the judiciary may not compel the General Assembly to make that transfer given the Arkansas Supreme Court's jurisprudence on the separation of powers and discretionary actions of the executive and legislative branches.⁶¹

Amendment 67 also does not place any limitation at all on the scope of juvenile jurisdiction subject to the General Assembly's power because Amendment 67 uses the term "jurisdiction" without limitation or qualification.⁶² Indeed, the text of the amendment suggests that the scope of jurisdic-

See ARK. CONST. art. 4, § 2 (prohibiting any branch of state government from exercising any power belonging to either of the other branches unless expressly directed or permitted by the terms of the Arkansas Constitution). The Arkansas Supreme Court has also suggested that a child-welfare system based even on part-executive, part-judicial courts would be insufficient to properly address constitutional issues or provide sufficient "judicial safeguards." *Walker*, 291 Ark. at 51, 722 S.W.2d at 562. A full analysis of an agency-based child-welfare system, however, is beyond the scope of this article.

60. ARK. CONST. amend. 67 (providing that the General Assembly "shall" define jurisdiction over juvenile matters but merely "may" confer such jurisdiction on a chancery, circuit, probate, or juvenile court (emphasis added)). Under this interpretation, the transfer of county court jurisdiction required by the Amendment is only triggered if the General Assembly confers some jurisdiction to a court. *Id.* (conditioning the General Assembly's required transfer of jurisdiction upon the discretionary conferral of jurisdiction on "such" courts as the General Assembly designates). Admittedly, such an interpretation is not the only possible interpretation. An equally valid interpretation could be that the permissive "may" simply means that the General Assembly shall confer juvenile jurisdiction on either existing chancery, circuit, or probate courts, or on such juvenile courts as the General Assembly may establish. This interpretation is supported by the amendment's language indicating that the juvenile jurisdiction defined by the General Assembly should be transferred in its entirety to courts designated by the General Assembly and the mandatory "shall" used by the amendment to require that the General Assembly transfer existing county court jurisdiction over juvenile matters to the courts designated by the General Assembly to receive juvenile jurisdiction.

61. *See, e.g., T.J.*, 362 Ark. at 655–56, 210 S.W.3d at 82–83; *Saunders*, 320 Ark. at 550, 898 S.W.2d at 45–46; *Churchill*, 48 Ark. at 426, 3 S.W. at 360; *Hawkins*, 1 Ark. 570, 1839 WL 103, *8–13. This possibility arises because the transfer of jurisdiction authorized under Amendment 67 was not automatically operative but rather tied to the General Assembly's own action of transferring the jurisdiction as part of the General Assembly's definition of jurisdiction. As the General Assembly's act of legislating is inherently discretionary, it is unclear whether the judiciary could force the General Assembly to effect the transfer or even whether the judiciary would simply find that such jurisdiction was transferred by operation of law and not requiring the General Assembly to actually transfer the jurisdiction. *See, e.g., ARK. CONST. amend. 67* (requiring the General Assembly to transfer jurisdiction but implicitly providing that the transfer be by way of legislation); *Saunders*, 320 Ark. at 550, 898 S.W.2d at 45–46 (observing that a court only has the authority to compel the exercise an executive officer his or her discretion to decide affirmatively to act or not to act when dealing with an issue where the officer has the discretion to act or not act).

62. *See* ARK. CONST. amend. 67.

tion subject to the General Assembly's power is limited only by the requirement that the General Assembly transfer any jurisdiction held by county courts at the time Amendment 67 was adopted. Amendment 67's designation of "jurisdiction" should therefore be given its plain-text meaning and include all jurisdiction over juvenile matters at law and in equity—including the jurisdiction over juveniles in equity asserted by the *Shelby* Doctrine.

The plain-text interpretation of Amendment 67 just described is controlling and requires that a court interpret Amendment 67 just as it reads because the text is not ambiguous and a plain-text interpretation would not produce absurd results.⁶³ First, Amendment 67's text is not ambiguous because the sole grant of power to define juvenile jurisdiction to the General Assembly, the lack of limitations on that power, and the lack of limitations on the jurisdiction subject to the General Assembly's power are not open to multiple reasonable interpretations.⁶⁴ To the contrary, the General Assembly is the only entity given the authority to set jurisdiction "relat[ed] to juveniles" with no bounds of law or equity related to the General Assembly's use of that power or the scope of the jurisdiction subject to that power.⁶⁵ There is no mention of the judiciary's role in establishing juvenile jurisdiction and no mention of any reservations of jurisdiction to the judiciary other than the jurisdiction that the General Assembly establishes pursuant to Amendment 67. Moreover, confusion and ambiguity only arise if one tries to interpret Amendment 67 in order to reach the strained conclusion that the General Assembly cannot in fact limit the involvement and authority of the judiciary in juvenile matters even though the General Assembly is the only branch authorized by Amendment 67 to define the judiciary's jurisdiction.

Second, a literal interpretation of Amendment 67 does not produce absurd results because such an interpretation presents a reasonable approach to developing a comprehensive, consistent, and effective child-welfare system. For example, a literal interpretation places the responsibility and authority for achieving the state's policy objectives for juvenile matters in the General Assembly, which the Arkansas Supreme Court itself recognized is "the body

63. See, e.g., *Curry v. Pope Co. Equalization Bd.*, 2011 Ark. 408, at 6, 10, 385 S.W.3d 130, 134, 136 ("Language of a constitutional provision that is plain and unambiguous must be given its obvious and common meaning."); *Ludwig v. Bella Casa, LLC*, 2010 Ark. 435, at 5, 372 S.W.3d 792, 796 (observing that the first rule in considering the meaning and effect of a law is to construe the law "just as it reads, giving the words their ordinary and usually accepted meaning in common language"); *Brewer v. Fergus*, 348 Ark. 577, 583, 79 S.W.3d 831, 834 (2002) ("Where the meaning of the words is clear and unambiguous, we do not resort to the rules of statutory, or in this case, constitutional interpretation.").

64. See, e.g., *Wickham v. State*, 2009 Ark. 357, at 5–6, 324 S.W.3d 344, 347 (providing that a law may be interpreted when it is "open to two or more constructions" or when its meaning is such that "reasonable minds might disagree or be uncertain as to its meaning").

65. ARK. CONST. amend. 67.

equipped and designed to perform that function.”⁶⁶ Such an interpretation also gives the General Assembly the power to prescribe the appropriate involvement of the judiciary in all juvenile matters by way of setting the judiciary’s jurisdiction and addresses the problems that Amendment 67 was arguably designed to address, including those related to competing jurisdictions between multiple state courts and competing branches of government that characterized and undermined the juvenile system prior to the adoption of Amendment 67. A literal interpretation is also consistent with the General Assembly’s existing power to control state agencies tasked with child welfare and set the responsibilities of those agencies in the child-welfare system. Moreover, the decision of Amendment 67’s framers to give the General Assembly the only authority to define juvenile jurisdiction need not be the best (or even a good) way to design the juvenile system’s jurisdictional framework or the way the judiciary would have provided for juvenile jurisdiction or the judiciary’s role in the child-welfare system; it is sufficient that the decision is unambiguous and does not produce absurd results.⁶⁷

- b. A reasonable interpretation of Amendment 67 reboots the jurisdiction of Arkansas courts in juvenile matters

Even if a plain-text interpretation of Amendment 67 would be so unclear as to require that the amendment be interpreted beyond the plain meaning of the text,⁶⁸ a reasonable interpretation of Amendment 67 yields the same results based on established principles of constitutional interpretation, the circumstances in which Amendment 67 was adopted, the problems that the amendment was designed to fix, and the development of constitutional and statutory law since Amendment 67 was adopted. First, the choice of Amendment 67’s framers to grant the power only to the General Assembly—with no mention or inclusion of the judiciary—indicates Amendment

66. *Walker v. Ark. Dep’t of Human Servs.*, 291 Ark. 43, 51, 722 S.W.2d 558, 562 (1987) (citing *Dupree v. Alma Sch. Dist.*, 279 Ark. 340, 651 S.W.2d 90 (1983)) (“We leave the matter of achieving a constitutional system to the legislature, the body equipped and designed to perform that function.”).

67. As the Arkansas Supreme Court observed six years before the adoption of Amendment 67, “where the meaning of a[] . . . constitutional amendment is clear and unambiguous, this Court is primarily concerned with what the document says, rather than what its drafters may have intended . . . and we have no authority to construe the amendment to mean anything other than what it says.” *Bishop v. Linkway Stores, Inc.*, 280 Ark. 106, 109–10, 655 S.W.2d 426, 428–29 (1983).

68. Although most of the cases cited in this sub-section refer to the interpretation of statutes, their analysis is equally applicable to interpreting constitutional amendments like Amendment 67 because the “rules of statutory construction apply to [the] interpretation of constitutional amendments.” *Brewer*, 348 Ark. at 583, 79 S.W.3d at 834. Therefore, no further attempt will be made to differentiate statutory interpretation from constitutional interpretation other than to accurately reflect what a given case says.

67 should be interpreted to prohibit the judiciary from defining jurisdiction in juvenile matters by asserting jurisdiction not provided by the General Assembly. Under the maxim of statutory interpretation known as *expressio unius est exclusio alterius*, the express designation of the General Assembly may be properly construed to exclude the judiciary from having the power to define juvenile jurisdiction.⁶⁹ In addition, allowing a court to inherit or otherwise retain previously held jurisdiction would improperly create a new, unexpressed exception to Amendment 67's grant to the General Assembly of sole authority to define juvenile jurisdiction.⁷⁰ Had the framers intended for such an additional exception to exist, the framers could have easily drafted such an exception just as the framers specified that juvenile courts under Amendment 67 would retain the juvenile jurisdiction then vested in county courts by Article 7, section 28 of the Arkansas Constitution.

Second, Amendment 67's use of the term "jurisdiction" should be interpreted to include all possible jurisdiction related to juvenile matters, including all jurisdiction cognizable at law or in equity. As suggested above, if the framers had intended for courts to wield jurisdiction beyond that which the General Assembly specified, the framers could have expressly provided for the specific kinds of jurisdiction that the General Assembly had the discretion to define or expressly stated what jurisdiction the courts retained.

69. See, e.g., *Larry Hobbs Farm Equip. v. CNH America, LLC*, 375 Ark. 379, 385, 291 S.W.3d 190, 195 (2009); *Calnan v. State*, 310 Ark. 744, 748, 841 S.W.2d 593, 595 (1992) (applying the doctrine of *expressio unius est exclusio alterius* to resolve an issue of constitutional interpretation). Such an exclusive designation of power to the General Assembly is also consistent with Arkansas's strong separation-of-powers doctrine that prohibits one branch of government from exercising the authority of another branch of government. See *supra* notes 56–57, 59 and accompanying text.

70. See *Calnan*, 310 Ark. at 748, 841 S.W.2d at 595. In *Calnan*, the Arkansas Supreme Court addressed a similar issue of interpretation related to a constitutional amendment. *Id.* at 746–47, 841 S.W.2d at 596. In that case, the court evaluated whether the requirement that a party must object in order to preserve an issue for appeal provides an exception to the right to a jury trial under the Arkansas Constitution where the defendant in the case failed to object to the trial court's failure to honor the defendant's right to a jury trial. *Id.* at 747–48, 841 S.W.2d at 596–97. On that issue, the court found that the defendant did not lose his right to a jury trial by not objecting because the only exception to the right to a jury trial expressed in the Arkansas Constitution was "waiver." *Id.* at 749, 841 S.W.2d at 596. The court held that the expression of "waiver" as the only exception to the general rule that the right to a jury trial was to remain inviolate meant that there were no other exceptions to the right to a jury trial. *Id.* at 748, 841 S.W.2d at 596. *Calnan* is particularly relevant to this article's analysis of Amendment 67 because, in both situations, the analysis pits the judiciary's long history of employing the given requirement or power against the correct interpretation of a specific constitutional provision, specifically the long-standing requirement that objections must be preserved at trial against the right to a jury trial in *Calnan* and the judiciary's long-standing jurisdiction over juveniles against the jurisdictional changes contemplated by Amendment 67.

Either method, if not phrased as a truly open-ended series,⁷¹ could have imposed limits on the scope of juvenile jurisdiction. But that is not what Amendment 67 provides. The maxim of *expressio unius est exclusio alterius* once again suggests that the judiciary did not inherit or otherwise retain previously held jurisdiction over juveniles—including the *Shelby* Doctrine’s jurisdiction in equity over juveniles—because the framers included only one mechanism for a court to inherit or otherwise retain jurisdiction over juveniles, namely, the requirement that the General Assembly transfer juvenile jurisdiction held by county courts at the time Amendment 67 was adopted.⁷² This demonstrates that the framers intended Amendment 67 to give the General Assembly power over all jurisdiction related to juvenile matters other than the one exception to the General Assembly’s power related to county court jurisdiction.

Third, the problems that Amendment 67 was designed to fix and the circumstances in which Amendment 67 was adopted further indicate that the framers intended the General Assembly to have the exclusive authority to prescribe all jurisdiction available to Arkansas courts in child-welfare proceedings.⁷³ Amendment 67 was expressly part of the General Assembly’s solution to the jurisdictional crisis that arose when the Arkansas Supreme Court invalidated Arkansas’s child-welfare system in *Walker*.⁷⁴ Moreover, Amendment 67 was adopted in response⁷⁵ to the broader and well-known dysfunction in the child-welfare system that resulted from overlapping jurisdictions between nearly *all* of Arkansas’s trial courts—including between the courts with statutory jurisdiction over child-welfare cases⁷⁶ and chancery

71. See *Edwards v. Campbell*, 2010 Ark. 398, at 4–5, 370 S.W.3d 250, 253 (describing *ejusdem generis*, the doctrine of interpretation that provides that when general words follow enumerations of particular things, the general words must be interpreted to include only those things of the same kind as those specifically enumerated things); *State v. Oldner*, 361 Ark. 316, 327, 206 S.W.3d 818, 822 (2005) (same); *Ex Parte King*, 141 Ark. 213, 213, 217 S.W. 465, 468–69 (1919) (same).

72. ARK. CONST. amend. 67.

73. See *Brewer*, 348 Ark. at 581, 79 S.W.3d at 833–34 (observing that when interpreting a constitutional amendment, “it is helpful to determine what changes the amendment was intended to make in the existing law”).

74. See, e.g., *Walker v. Ark. Dep’t of Human Servs.*, 291 Ark. 43, 47–52, 722 S.W.2d 558, 560–62 (1987); BLAIR & BARTH, *supra* note 31, at 225, 227; GOSS, *supra* note 40, at 239; *supra* notes 31–39 and accompanying text.

75. GOSS, *supra* note 40, at 239; *supra* notes 31–39 and accompanying text.

76. Prior to *Walker*, county courts held jurisdiction over child-welfare matters governed by the juvenile code. *Walker*, 291 Ark. at 47–52, 722 S.W.2d at 560–62; see also *supra* notes 31–39 and accompanying text. After *Walker*, the General Assembly transferred the jurisdiction formerly held by county courts into a juvenile division of circuit court with respect to juvenile delinquency and into a juvenile division of probate court with respect to “juveniles in need of supervision” and dependent-neglected juveniles. Act of Feb. 6, 1987, Reg. Sess., No. 14, §§ 2, 3, 1987 Ark. Acts 24, 25–27; see also *supra* notes 31–39 and accompanying text.

courts, which held the jurisdiction in equity over juveniles asserted by the *Shelby Doctrine*.⁷⁷ The overlapping jurisdictions directly impacted the effectiveness of the increasingly complex statutory scheme designed by the General Assembly to implement expanding public policies to protect juveniles because, as *Walker* and other cases demonstrated, the General Assembly had limited means to improve the operation of the child-welfare system prior to the adoption of Amendment 67.

These limitations arose from the fact that the Arkansas Constitution's then-existing jurisdictional framework (1) limited what court the General Assembly could designate to be a juvenile court,⁷⁸ (2) created confusion as to the contours of the jurisdictional framework involving juveniles,⁷⁹ includ-

77. See *Goss*, *supra* note 40, at 239; *supra* notes 31–39 and accompanying text.

78. These limitations were based partially on the General Assembly's inability to create a court other than chancery courts, courts of common pleas, and the Court of Appeals of Arkansas. ARK. CONST. art. VII, § 1, 32, *repealed by* ARK. CONST. amend. 80, § 22; ARK. CONST. amend. 24 (permitting the General Assembly to provide for the consolidation of chancery and probate courts); ARK. CONST. amend. 58, *repealed by* ARK. CONST. amend. 80, § 22, subsec. D; *Walker*, 291 Ark. at 47, 722 S.W.2d at 560; *Ward Sch. Bus Mfg., Inc. v. Fowler*, 261 Ark. 100, 120, 547 S.W.2d 394, 405 (1977) (“The powers of the General Assembly to alter the structure of the judicial system [are] very limited.”). The Arkansas Constitution also imposed limitations on what jurisdiction could be exercised by the various courts. ARK. CONST. art. VII, §§ 27, 33, 51–52 (jurisdiction of circuit courts); *id.* §§ 11, 14–15, 35, 45, *repealed by* ARK. CONST. amend. 80, § 22 (same); *id.* § 15, *repealed by* ARK. CONST. amend. 80, § 22 (jurisdiction of chancery courts); *id.* § 34, *repealed by* ARK. CONST. amend. 80, § 22 (jurisdiction of probate courts); *id.* § 28 (jurisdiction of county courts); *id.* § 34, *repealed by* ARK. CONST. amend. 80, § 22 (same); *id.* § 24, *repealed by* ARK. CONST. amend. 80, § 22 (jurisdiction of probate and chancery courts). Admittedly, Amendment 24 and the Arkansas Supreme Court's decision in *Hutton* indicate that the General Assembly did have some ability to designate a juvenile court—but only some authority. Moreover, it is worth noting that the conclusion in *Hutton* that the General Assembly had the authority to expand the jurisdiction of probate court is arguably dicta. First, the issue of the probate court's jurisdiction over dependency-neglect cases was unnecessary to the result reached by the *Hutton* court, particularly given that the court found that the probate court did have jurisdiction over such matters. See, e.g., *Hutton v. Savage*, 298 Ark. 256, 267–68, 769 S.W.2d 394, 400 (1989); *In re Giurbino*, 258 Ark. 277, 281, 524 S.W.2d 236, 238 (1975) (“[T]his court will not decide constitutional questions unless such a decision is necessary to a determination of the pending case.”). Second, the court could have solely relied on the much narrower basis that the actions of the juvenile master in the case exceeded the authority permitted by Arkansas law, which the court found before reaching the issue of probate court jurisdiction; instead, the court went out of its way to address the issue of jurisdiction. See, e.g., *Hutton*, 298 Ark. at 267–68, 769 S.W.2d at 399–400 (holding that the actions of the juvenile court were contrary to the Arkansas Constitution, existing case law, and the Arkansas Rules of Civil Procedure); *Paschal v. State*, 2012 Ark. 127, at 14–15, 388 S.W.3d 429, 437 (declining to reach additional constitutional issues after finding a statute unconstitutional on more direct state constitutional grounds); *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 9, 11, 308 S.W.3d 135, 141–42 (same).

79. One need only look at the legions of cases challenging the jurisdiction of circuit, chancery, probate, and county courts over juvenile matters between 1907 and 1989 to see that

ing as to the extent of probate⁸⁰ and chancery⁸¹ court jurisdiction over juvenile matters; and (3) ensured that the child-welfare system and the juvenile

the proper distribution of juvenile jurisdiction in Arkansas has long been an open question. See, e.g., *Walker*, 291 Ark. at 47–48, 722 S.W.2d at 560 (striking down the 1975 Juvenile Code’s investiture with county courts of jurisdiction over juvenile matters governed by the juvenile code); *Dyer v. Ross-Lawhon*, 288 Ark. 327, 330, 704 S.W.2d 629, 631 (1986) (holding that a probate court has jurisdiction to appoint a guardian even with a pending juvenile court matter); *Jarmon v. Brown*, 286 Ark. 455, 456–57, 692 S.W.2d 618, 619–20 (1985) (invalidating the custody order of a chancery court because county courts had exclusive jurisdiction over bastardy cases); *Robins v. Ark. Soc. Servs.*, 273 Ark. 241, 243–45, 617 S.W.2d 857, 858–59 (1981) (employing the jurisdictional scheme of juvenile, probate, chancery, and circuit courts as provided in the juvenile code and the Arkansas Constitution); *Lee v. Grubbs*, 269 Ark. 205, 206–07, 599 S.W.2d 715, 716 (1980) (finding that juvenile courts do not have the jurisdiction to appoint a guardian for illegitimate juveniles because such jurisdiction was held only by probate courts); *Sargent v. Cole*, 269 Ark. 121, 125–26, 598 S.W.2d 749, 752 (1980) (holding that a juvenile over age fifteen could be tried in juvenile, circuit, and municipal courts as provided by the juvenile code); *Cude v. State*, 237 Ark. 927, 935–36, 377 S.W.2d 816, 820–21 (1964) (finding that the juvenile court could not appoint a guardian because the appointment of a guardian was within the sole jurisdiction of probate courts); *Edwards v. Martin*, 231 Ark. 528, 529–30, 331 S.W.2d 97, 97–98 (1960) (providing that the probate court has no jurisdiction over the custody of juveniles because chancery courts are vested with that jurisdiction); *Underwood v. Farrell*, 175 Ark. 217, 217, 299 S.W. 5, 6 (1927) (holding that a juvenile court did not have the jurisdiction to sentence a delinquent juvenile to prison because that jurisdiction was held by circuit courts); *Scott v. Brown*, 160 Ark. 489, 489, 254 S.W. 1074, 1075–76 (1923) (holding that the juvenile court did not violate the constitutionally prescribed jurisdiction of probate courts over the persons and estates of juveniles); *Ex parte King*, 141 Ark. 213, 213, 217 S.W. 465, 466, 469 (1919) (upholding the 1911 Juvenile Code’s investiture with county courts of jurisdiction over juvenile matters governed by the juvenile code). The determination of what jurisdiction belonged in which court was also compounded by Arkansas’s retention of courts of equity as separate courts from courts of law well past 1989 and the jurisdictional tension that such a system produces. See Morton Gitelman, *The Separation of Law and Equity and the Arkansas Chancery Courts: Historical Anomalies and Political Realities*, 17 U. ARK. LITTLE ROCK L.J. 215, 244–45, 247 (1995); Mark R. Killenbeck, *And Then They Did . . . ? Abusing Equity in the Name of Justice*, 44 ARK. L. REV. 235, 312–37 (1991).

80. At the time Amendment 67 was adopted, the jurisdiction of probate courts related to child-welfare matters was something of open question because of two potentially conflicting authorities in Arkansas: (1) the Arkansas Supreme Court 1919 holding in *King* that probate courts did not have jurisdiction over child-welfare matters contemplated by the juvenile code, *King*, 141 Ark. at 213, 217 S.W. at 467–68, and (2) Amendment 24, which was adopted in 1938 and allowed the General Assembly to revise probate court jurisdiction. ARK. CONST. amend. 24. Indeed, despite the adoption of Amendment 24, *King*’s prohibition appears to have been good law at the time of the adoption of Amendment 67 because neither the court in *Walker* nor any appellate court in Arkansas had abrogated this rule. *Walker*, 291 Ark. at 48–51, 722 S.W.2d at 560–62 (citing cases that approved of *King* but only abrogating *King* to the extent that the *Walker* court held that county courts did in fact lack jurisdiction to hear child-welfare matters because such were not matters only of “local concern”). It was not until 1989—a year after Amendment 67 was passed by voters—that the Arkansas Supreme Court addressed the impact of Amendment 24 on the appropriate jurisdiction of probate courts related to juvenile matters and found that Amendment 24 provided the General Assembly

court were subject to the competing jurisdiction of other courts—most notably the jurisdiction in equity of chancery courts over juveniles that the *Shelby* Doctrine asserts.⁸² It therefore stands to reason that Amendment 67 was adopted to not only put in place a constitutional child-welfare system that complied with *Walker*, but also to eliminate the limitations on what court the General Assembly could designate as the court in child-welfare cases, what jurisdiction the General Assembly could grant to such a court, and the concurrent and competing jurisdiction over juveniles in child-welfare cases held by courts that had undermined the effectiveness of the child-welfare system for so long.

with the constitutional authority to add jurisdiction over juvenile matters to the jurisdiction of probate courts. *Hutton*, 298 Ark. at 267–68, 769 S.W.2d at 400. Even *Hutton*, however, tacitly suggests that Amendment 67 informed the court’s conclusions regarding the impact of Amendment 24 on the General Assembly’s authority because the *Hutton* court noted the existence of Amendment 67 following its formal analysis involving Amendment 24. *See id.*, 769 S.W.2d at 400.

81. Although chancery courts prior to Amendment 67 surely held the jurisdiction over juveniles asserted by the *Shelby* Doctrine, the extent of a chancery court’s jurisdiction was far less settled because even though chancery courts were ostensibly limited to the jurisdiction that chancery courts could have exercised in equity at the time of the adoption of the 1874 Constitution, it was not always clear just what fell within that equitable jurisdiction. *See, e.g.*, Mark R. Killenbeck, *Nothing That We Can Do? Or, Much Ado About Nothing? Some Thoughts on Bates v. Bates, Equity, and Domestic Abuse in Arkansas*, 43 ARK. L. REV. 725, 734 (1990) (arguing that chancery courts were not limited to the jurisdiction in equity cognizable at the time the people adopted the 1874 Constitution). This was because all equitable remedies—including the jurisdiction over juveniles held by a chancery court—were only available if there is not an adequate remedy at law. *See, e.g.*, *Bryant v. Picado*, 338 Ark. 227, 230–231, 996 S.W.2d 17, 18–19 (1999); *American Investors Life Ins. Co. v. TCB Transp., Inc.*, 312 Ark. 343, 345, 849 S.W.2d 509, 511 (1993); *Bates v. Bates*, 303 Ark. 89, 91, 793 S.W.2d 788, 790 (1990) (citing *Patterson v. McKay*, 199 Ark. 140, 134 S.W.2d 543 (1939)). Thus, with the expansion of the jurisdiction and remedies available to courts of law under the various incarnations of Arkansas’s juvenile codes, the equitable jurisdiction over juveniles asserted by the *Shelby* Doctrine would have become increasingly narrow over time because of the expansion of legal remedies limiting the circumstances in which equitable jurisdiction could have been asserted over juveniles. In other words, even though the General Assembly could not expand or contract equitable jurisdiction, the equitable jurisdiction over juveniles became subject to increasingly expansive remedies at law that limited the circumstances in which equity could properly be invoked. Not surprisingly, the court in *Shelby* did not address nor much less conclude that the juvenile code did not provide an adequate remedy at law. *Ark. Dep’t of Human Servs. v. Shelby*, 2012 Ark. 54, at 3–4, 2012 WL 401615, at *3–4.

82. Perhaps the first recognition of the concurrence of these competing and separate jurisdictions came from the Arkansas Supreme Court itself in *King*, where the court held that the 1911 Juvenile Code did not interfere with the jurisdiction of probate courts over the guardianship of the estates of minors, the jurisdiction of criminal courts over the criminal prosecution of juveniles, the jurisdiction of circuit courts over all matters not otherwise prescribed by the Arkansas Constitution to another court, or the “general jurisdiction over the persons and property of minors” held by chancery courts in equity. *King*, 141 Ark at 213, 217 S.W. at 467–70.

Fourth, the General Assembly's decision to respond to the *Walker* decision with a constitutional amendment further demonstrates that the framers intended Amendment 67 to provide the General Assembly the exclusive, constitutional authority to prescribe all jurisdiction available to Arkansas courts in child-welfare proceedings. Specifically, the General Assembly passed Amendment 67 and sent it to the voters for approval after the General Assembly had passed Act 14, its initial emergency response to *Walker*, but before the General Assembly passed the Juvenile Code of 1989, the General Assembly's more comprehensive child-welfare reform effort that vested jurisdiction over child-welfare matters in a single court, the juvenile division of chancery court.⁸³ The adoption of Amendment 67 prior to the enactment of the revised juvenile code was plainly necessary in order to allow the General Assembly to provide chancery courts with jurisdiction over child-welfare matters governed by the juvenile code because the General Assembly was not authorized to modify the jurisdiction of chancery courts as the General Assembly could with probate courts⁸⁴ and chancery courts did not have the catch-all jurisdiction that circuit courts had over matters not otherwise specifically designated to another court by the Arkansas Constitution.⁸⁵ However, the breadth of Amendment 67's broad announcement of the General Assembly's authority would have been unnecessary if all the General Assembly intended to do was simply to allow the General Assembly to modify chancery jurisdiction to include matters governed by the juvenile code.⁸⁶ The adoption of Amendment 67 itself further suggests that the framers believed that the General Assembly's existing powers were not sufficient. Moreover, the General Assembly's decision to vest jurisdiction over child-welfare matters with chancery courts in the 1989 Juvenile Code does not necessarily mean that the General Assembly intended chancery courts to retain equity jurisdiction over juveniles following the adoption of Amendment 67. Again, such an intent is not evidenced anywhere in Amendment 67's text and is contraindicated by the fact that the only jurisdiction that Amendment 67 did carry over was jurisdiction related to county courts, which did not have equity jurisdiction.

Fifth, the specific, exclusive, and *limited* jurisdiction that the General Assembly provided in the Juvenile Code of 1989 to the juvenile courts of

83. Arkansas Juvenile Code of 1989, No. 273, 1989 Ark. Acts 486 (codified as amended at ARK. CODE ANN. §§ 9-27-301 to -367 (Repl. 2009 & Supp. 2013)).

84. Compare ARK. CONST. art. VII, § 15, *repealed by* ARK. CONST. amend. 80, § 22, with ARK. CONST. art. VII, § 34, *repealed by* ARK. CONST. amend. 80, § 22, and ARK. CONST. amend. 24; see *Hutton*, 298 Ark. at 267–68, 769 S.W. at 400.

85. *Robins v. Ark. Soc. Servs.*, 273 Ark. 241, 244–45, 617 S.W.2d 857, 858–59 (1981); *King*, 141 Ark. at 213, 217 S.W. at 466–68 (providing that circuit courts would have jurisdiction over child-welfare matters if such matters were not vested with any other court).

86. Compare ARK. CONST. amend. 24, with ARK. CONST. amend. 67.

the time—then the juvenile division of chancery court—indicates that the General Assembly intended Amendment 67 to reboot the jurisdiction over juveniles held by Arkansas's courts. Consider the following: chancery courts prior to the adoption of Amendment 67 unquestionably had the authority to “make all orders that will properly safeguard the[] rights” of juveniles appearing before them under chancery courts' jurisdiction in equity over juveniles.⁸⁷ Thus, if that jurisdiction had continued, chancery courts and modern circuit courts acting as juvenile courts after them would have the equitable jurisdiction to protect juveniles appearing before them and ensure that “necessary services” were being provided to the juveniles in whatever kind of case the juvenile was involved in, child-welfare or otherwise. And the scope of this jurisdiction would have been limited only by the bounds of equity and not by any limitations made by the General Assembly in law, a fact that the General Assembly was well aware of following *Walker*. Nevertheless, the Juvenile Code of 1989 included specific limitations on the jurisdiction of juvenile courts and the authority of juvenile courts to order the Department to provide services—limitations that would have been meaningless unless the General Assembly had intended the juvenile code to prescribe the whole jurisdiction available to juvenile courts. These specific limitations indicate that the General Assembly did intend to prescribe jurisdiction as described in the Juvenile Code of 1989. This apparent intention supports the conclusion that the framers intended Amendment 67 to reboot the jurisdiction over juveniles held by Arkansas's courts.

Sixth, Amendment 67 itself would be rendered meaningless⁸⁸ if all it did was state that the General Assembly had the power to confer jurisdiction over juvenile matters without the ability to alter existing common law jurisdictions like equitable jurisdiction. Such a reading would effectively render Amendment 67 constitutional surplusage because it would be a mere re-

87. See, e.g., *Jones v. Jones*, 13 Ark. App. 102, 105, 680 S.W.2d 118, 120 (1984) (citing *Richards v. Taylor*, 202 Ark. 183, 150 S.W.2d 32 (1941); *Kirk v. Jones*, 178 Ark. 583, 12 S.W.2d 879 (1928); *State v. Grisby*, 38 Ark. 406, 1882 WL 1481 (1882)).

88. Arkansas's jurisprudence governing the interpretation of statutory and constitutional provisions has long required that such provisions must be interpreted so as not to render the provision meaningless. *Hobbs v. Baird*, 2011 Ark. 261, at 3, 2011 WL 2412740, at *2 (observing that laws must be interpreted “so that no word is left void, superfluous or insignificant, and we give meaning and effect to every word in the statute, if possible”); *Osborn v. Bryant*, 2009 Ark. 358, at 6, 324 S.W.3d 687, 690 (same); *Larry Hobbs Farm Equip. v. CNH Am., LLC*, 375 Ark. 379, 383, 291 S.W.3d 190, 195 (2009) (finding that courts must construe statutes so that “no word is left void, superfluous or insignificant” and so that “meaning and effect” are given to every word in the statute); *McDonald v. Bowen*, 250 Ark. 1049, 1060, 468 S.W.2d 765, 771 (1971) (Fogleman, J., concurring and dissenting) (“In statutory and constitutional construction, if it is possible to do, we are bound to give meaning and effect to every word, phrase and clause, so that no word is rendered void, superfluous or insignificant or discarded as surplusage.”).

statement of Amendment 80, which gives the General Assembly the power to “establish jurisdiction of all courts” unless otherwise provided by the Arkansas Constitution and affords modern circuit courts with the jurisdiction previously held by circuit, chancery, probate, and juvenile courts, including such common law and equitable jurisdiction as may have existed in those courts at the time Amendment 80 was adopted.⁸⁹ Amendment 80 therefore encompasses a broad jurisdictional power that would completely encompass Amendment 67’s power because Amendment 80 is not limited to juvenile matters and Amendment 80 did not repeal Amendment 67 as it had done with Amendment 24, another jurisdictional amendment.⁹⁰ Moreover, Amendment 67 appears to fall within Amendment 80’s exception for other constitutional provisions. Thus, even if the jurisdictional authority contemplated under Amendment 80 includes common law jurisdiction, Amendment 67 overrules that jurisdictional augmentation for child-welfare proceedings because it does not specifically provide for the reservation of common law jurisdiction like Amendment 80 did for all other types of cases.⁹¹ In these ways, it seems that the framers of Amendment 80 intended Amendment 67 to mean something more than even the broad power over jurisdiction provided to the General Assembly under Amendment 80.⁹²

89. ARK. CONST. amend. 80, § 10 (“The General Assembly shall have the power to establish jurisdiction of all courts . . . unless otherwise provided in this Constitution.”); ARK. CONST. amend. 80, §§ 10, 19, subsec. B, ¶ 1.

90. *See* ARK. CONST. amend. 80, § 22. More to the point, even though Amendment 80 was adopted later than Amendment 67, Amendment 80 does not supersede Amendment 67’s specific authorization because Amendment 80 specifically did not supersede Amendment 67 like Amendment 80 did with other constitutional provisions related to jurisdiction, including Amendment 24, and Amendment 80 is not irreconcilable with Amendment 67. *See, e.g.*, ARK. CONST. amend. 80, § 22 (expressly superseding Amendment 24 along with a list of specific constitutional provisions that did not include Amendment 67 and providing that “[n]o other provision of the Constitution . . . shall be repealed by [Amendment 80] unless the provision is in irreconcilable conflict with the provisions of [Amendment 80]”); *Brock v. Townsell*, 2009 Ark. 224, at 16–17, 309 S.W.2d 179, 189 (providing that a law may be deemed repealed by implication where there is either an irreconcilable conflict between the first law and the law adopted subsequent to the first law or the “legislature takes up the whole subject anew and covers the entire ground of the subject matter of a former [law] and evidently intends it as a substitute”).

91. No other applicable provision reserved to any court common law jurisdiction at the time Amendment 80 was enacted except for Amendment 80 itself, leaving Amendment 67 as the only “otherwise provided” source that would impact jurisdiction. *See supra* notes 88–90 and accompanying text. Moreover, even if Amendment 80 were to be interpreted as subsuming and implicitly overruling Amendment 67, no equitable jurisdiction over juveniles existed in child-welfare proceedings at the time that Amendment 80 was adopted.

92. Indeed, a natural reading of Amendments 80 and 67 together preserves the General Assembly’s prerogative under Amendment 67 to prescribe the jurisdiction of modern circuit courts in juvenile matters while allowing Amendment 80 to reserve probate and equity jurisdiction over matters not having to do with juveniles. In addition, such a harmonious reading is in accord with the framers’ intentional omission of Amendment 67 in Amendment 80’s

- c. Arkansas case law supports the interpretation that Amendment 67 rebooted the jurisdiction of Arkansas courts in juvenile matters

Arkansas's case law on the jurisdiction of juvenile courts before and after Amendment 67 is largely in accord with the interpretation that Amendment 67 rebooted the jurisdiction of Arkansas's courts over juveniles and limited the jurisdiction of Arkansas's courts to only that jurisdiction provided by the General Assembly.⁹³ The Arkansas Supreme Court and the Arkansas Court of Appeals have long held that Arkansas's courts have limited authority and jurisdiction in child-welfare proceedings and that the juvenile code imposes limitations on the authority of courts to order the Department to act in child-welfare proceedings.⁹⁴ Reviewing courts have also

repealer even though the framers included other provisions related to modern circuit court jurisdiction such as Amendment 24, which impacted jurisdiction over probate and chancery courts and also included authority for the General Assembly to impact the jurisdiction of a court. *See, e.g.,* Hutton v. Savage, 298 Ark. 256, 267–68, 769 S.W.2d 394, 400 (1989). *But see* Glover v. Henry, 231 Ark. 111, 115–16, 328 S.W.2d 382, 385 (1959) (declining to interpret a constitutional amendment as doing anything more than “reaffirm[ing] the existing [constitutional] law as a basis for the operation of other provisions in the amendment”). Although the Arkansas Supreme Court in *Glover* did find that it was permissible for a constitutional amendment merely to restate existing law, the court based that finding on its conclusion that the restatement was merely the part of the amendment that formed the “basis for the operation of the other provisions in the amendment.” *Id.*, 328 S.W.2d at 385. By contrast, Amendment 67 has no other provisions other than the amendment's grant of power to the General Assembly and the amendment's description of that power. *See* ARK. CONST. amend. 67.

93. Although Arkansas courts do still refer to child-welfare proceedings as “equity matters” after the adoption of Amendment 67 and Amendment 80, the references are limited to the de novo nature of appellate review that the cases were entitled to and never recognized any additional jurisdiction arising under equity. *See, e.g.,* Ark. Dep't of Human Servs. v. A.M., 2012 Ark. App. 240, at 4–5, 423 S.W.3d 86, 88–89; Mahone v. Ark. Dep't of Human Servs., 2010 Ark. App. 819, at 3, 2010 WL 4983009, at *3, *rev'd on other grounds*, Mahone v. Ark. Dept. Human Servs., 2011 Ark. 370, 383 S.W.3d 854; Ark. Dep't of Health & Human Servs. v. C.M., 100 Ark. App. 414, 415–16, 269 S.W.3d 387, 388 (2007); Moiser v. Ark. Dep't of Human Servs., 95 Ark. App. 32, 34–35, 233 S.W.3d 172, 174 (2006); *cf.* Ingle v. Ark. Dep't of Human Servs., 2014 Ark. 53, at 9, 431 S.W.3d 303, 308 (applying an exception to normal de novo review in equity cases where an appeals court can enter an order that the circuit court “should have entered”).

94. *See, e.g.,* Young v. Ark. Dep't of Human Servs., 2012 Ark. 334, at 1, 3–4, 2012 WL 4163177, at *1, *3–4 (holding that a circuit court could not reopen a dependency-neglect case after the court had closed the case because the court's jurisdiction ended pursuant to the juvenile code once the juvenile was no longer dependent-neglected and the case was closed, but affirming the circuit court's order based on the court's separate jurisdiction to hear custody matters); Ark. Dep't of Human Servs. v. Denmon, 2009 Ark. 485, at 7–9, 346 S.W.3d 283, 288 (holding that the trial court did not have jurisdiction to order the Department to use a particular provider because the juvenile code prohibited trial courts from making such orders); Ark. Dep't of Human Servs. v. Collier, 351 Ark. 506, 516–523, 95 S.W.3d 722, 779–

acknowledged that, following the adoption of Amendment 67, the General Assembly's passage of the juvenile code "defined jurisdiction of matters relating to juveniles and conferred such jurisdiction upon [juvenile courts]" and that both the juvenile courts and the Department are "creatures of statute."⁹⁵

782 (2003) (holding that the trial court did not have jurisdiction in a dependency-neglect action over an unborn fetus because the juvenile code's definition of "juvenile" did not include unborn fetuses); Ark. Dep't of Human Servs. v. State, 319 Ark. 749, 750-51, 894 S.W.2d 592, 593 (1995) (holding that the omission of any authority regarding the placement of juveniles in a youth services center precluded the juvenile court from entering an order making such a placement); Rosario v. State, 319 Ark. 764, 767-68, 894 S.W.2d 888, 889-90 (1995) (holding that a juvenile court lacked jurisdiction over a delinquency proceeding that did not fall within the juvenile code's definition of what delinquency proceedings the juvenile court could hear); Ark. Dep't of Human Servs. v. State, 312 Ark. 481, 485-89, 850 S.W.2d 847, 849-51 (1993) (holding that a juvenile court did not have jurisdiction to order the Department to pay restitution for a juvenile in the Department's custody because, *inter alia*, the juvenile code did not provide the court with that authority); *A.M.*, 2012 Ark. App. at 7-8, 423 S.W.3d at 90-91 (holding that a circuit court did not have the authority to order the Department to provide a juvenile maternity clothes or school uniforms because such services did not fall within the juvenile code's definition of "family services"); Ark. Dep't of Human Servs. v. Thomas, 71 Ark. App. 348, 352, 33 S.W.3d 514, 517 (2000) (holding that a juvenile court lacked the jurisdiction to address the placement of names on the Child Maltreatment Central Registry because the jurisdiction was not provided to the juvenile court by statute); Ark. Dep't of Human Servs. v. Southerland, 65 Ark. App. 97, 100, 985 S.W.2d 336, 338 (1999) (holding that a juvenile court did not have the statutory authority to order the Department to pay a foster-care board payment to a person who had not been licensed by the Department to be a foster home and finding such a payment would conflict with Department policy and federal law); *cf.* Ark. Dep't of Human Servs. v. Cir. Ct. of Sebastian Cnty., 363 Ark. 389, 393-94, 214 S.W.3d 856, 859-60 (2005) (declining to issue a writ of certiorari to a circuit court that had ordered physical and legal custody to be split where the juvenile code does not expressly allow custody to be split because the circuit court below had "jurisdiction" under the juvenile code to make custody determinations); Hudson v. Kyle, 352 Ark. 346, 349-52, 101 S.W.3d 202, 205-07 (2003) (holding that a court did not have the authority to terminate parental rights under Ark. Code. Ann. § 9-9-220 despite jurisdiction over "all justiciable matters"); Ark. Dep't of Human Servs. v. Cox, 349 Ark. 205, 210-14, 82 S.W.3d 806, 810-12 (2002) (holding that a probate court had jurisdiction to enter a guardianship order over a juvenile in the custody of the Department pursuant to the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA) because the UCCJEA did not apply to the juvenile); Nance v. Ark. Dep't of Human Servs., 316 Ark. 43, 53-54, 873 S.W.2d 812, 813-14 (1994) (clarifying a prior decision and holding that when the juvenile court took jurisdiction of a child-welfare case, the juvenile code's requirements regarding review hearings became mandatory and the juvenile court was "wrong" to dismiss the case in violation of those requirements); Juvenile H. v. Crabtree, 310 Ark. 208, 211, 833 S.W.2d 766, 768 (1992) (holding that even though the juvenile court had jurisdiction to declare the juvenile mother in need of family services pursuant to the juvenile code, the court had no jurisdiction to prohibit the juvenile from obtaining an abortion); Lewis v. Ark. Dep't of Human Servs., 2012 Ark. App. 154, at 14-15, 391 S.W.3d 695, 704 (holding that a circuit court lacked the authority to terminate a parent's rights except as provided under the juvenile code).

95. Ark. Dep't of Human Servs. v. Clark, 304 Ark. 403, 407-08, 802 S.W.2d 461, 463-64 (1991); *see also* Thomas, 71 Ark. App. at 352, 33 S.W.3d at 517.

Reviewing courts often cite the juvenile code's specific provisions as a court's source of authority even where the reviewing court finds that a lower court did have the authority or jurisdiction to act or order the Department to act.⁹⁶ Perhaps the most frequently invoked of these limitations arises from the definition of "family services," which Arkansas's reviewing courts have consistently found to limit the scope and extent of the services that a modern circuit court has the authority to order the Department to perform.⁹⁷ If the juvenile code did not in fact limit the authority and jurisdiction of modern circuit courts in this way—as the *Shelby* Doctrine implicitly requires—then courts in numerous cases would not have been limited to "family services" in those cases and would have instead been free to order the Department to provide such necessary services as the court believed appropriate under the jurisdiction in equity asserted by the *Shelby* Doctrine. Such a conclusion, however, conflicts with long-standing precedent in Arkansas and would appear to implicitly overrule Arkansas's long-standing recognition of the juvenile code as the source of judicial authority in child-welfare proceedings.

3. *Amendment 67's Impact on the Shelby Doctrine and the Jurisdiction of Circuit Courts in Child-Welfare Proceedings*

The interpretation that Amendment 67 rebooted all jurisdiction related to juveniles and extinguished all judicial jurisdiction over juveniles in child-welfare proceedings is consequential in four related respects. First, the interpretation directly and necessarily invalidates the *Shelby* Doctrine's reliance on jurisdiction that the General Assembly has not provided to modern circuit courts, specifically including the jurisdiction that chancery courts

96. *Cf., e.g., Ark. Dep't of Human Servs. v. T.B.*, 347 Ark. 593, 599–603, 67 S.W.3d 539, 543–46 (2002) (holding that the juvenile court could order the Department to pay for a juvenile's residential treatment because the juvenile code allows the court to order financial assistance and treatment as "family services"); *Ark. Dep't of Human Servs. v. R.P.*, 333 Ark. 516, 529–32, 970 S.W.2d 225, 231–33 (1998) (holding that a juvenile court had jurisdiction to order the Department to pay a family's utility bills because the juvenile code specifically authorized courts to order cash assistance in family-in-need-of-services cases like the one before the court below); *Clark*, 304 Ark. at 407–08, 802 S.W.2d at 463–64 (upholding juvenile court's order for the Department to provide financial and transportation assistance because such assistance was included in the juvenile code's definition of "family services"); *C.M.*, 100 Ark. App. at 416–17, 269 S.W.3d at 389–90 (holding that a juvenile court could order the Department to pay for a juvenile's legal representation in an administrative hearing because the payment would constitute "cash assistance" under the juvenile code's definition of "family services").

97. *See, e.g., A.M.*, 2012 Ark. App. at 7–8, 423 S.W.3d at 90–91; *cf. T.B.*, 347 Ark. at 599–603, 67 S.W.3d at 543–46; *R.P.*, 333 Ark. at 529–32, 970 S.W.2d at 231–33; *Clark*, 304 Ark. at 407–08, 802 S.W.2d at 463–64; *C.M.*, 100 Ark. App. at 416–17, 269 S.W.3d at 389–90.

held in equity over juveniles prior to the adoption of Amendment 67. Second, the interpretation recognizes the juvenile code as the only source of jurisdiction and authority available to modern circuit courts in child-welfare proceedings, which in turn invalidates the *Shelby* Doctrine's express assertion that circuit courts have jurisdiction in child-welfare matters beyond the jurisdiction prescribed by the juvenile code. Third, the interpretation confirms and constitutionalizes Arkansas's long-standing case law that provides that the jurisdiction of modern circuit courts in child-welfare cases is limited to the jurisdiction prescribed in the juvenile code. Fourth, the interpretation does not change what is required to invoke jurisdiction in equity generally or the limitations imposed on the scope of the jurisdiction over juveniles in equity specifically.

The jurisdictional bases of the *Shelby* Doctrine, however, assert that circuit courts hold jurisdiction over juveniles in equity that was held by chancery courts prior to the adoption of Amendment 67 and that this jurisdiction authorizes circuit courts to dictate the Department's internal operations in child-welfare cases.⁹⁸ More specifically, the majority in *Shelby* explained that circuit courts held jurisdiction over juveniles in equity that authorized circuit courts to "make all orders that will properly safeguard the[] rights" of juveniles appearing before it, including orders to protect such juveniles and "assure that . . . necessary services are being delivered."⁹⁹ The majority relied on this specific source of jurisdiction to sanction the circuit court's order that the Department "rectify" the high caseload of the Department's caseworker assigned to the case, which effectively dictated to the Department how it should conduct internal staffing operations.¹⁰⁰

The *Shelby* Doctrine's assertion of such equitable jurisdiction is invalid because Amendment 67 extinguished the jurisdiction over juveniles held in equity by chancery courts when Amendment 67 was enacted in 1989.¹⁰¹ Modern circuit courts therefore cannot exercise this equitable jurisdiction over juveniles unless the General Assembly granted such jurisdiction to circuit courts through the juvenile code or some other law.¹⁰² But as described

98. See *Ark. Dep't of Human Servs. v. Shelby*, 2012 Ark. 54, at 3–5, 2012 WL 401615, at *3–5; *supra* Part II.

99. *Shelby*, 2012 Ark. 54, at 3–4, 2012 WL 401615, at *3–4.

100. See *id.*

101. See *supra* Part III.A.2.

102. See *supra* Part III.A.2. Likewise, even if the General Assembly had at one point legislatively conferred the same jurisdiction over juveniles previously held by chancery courts, the General Assembly would be free to revoke that jurisdiction; the key, in this regard, is whether the General Assembly provided that jurisdiction to a given court at the exact time that the court attempts to use it. See, e.g., *Sands v. Albert Pike Motor Hotel*, 245 Ark. 755, 760, 434 S.W.2d 288, 290 (1968) ("There is no question that the legislature may limit or withdraw judicial jurisdiction conferred by a legislative act, and there is no question that the legislature may amend [statutes] in any manner it deems proper."); James D. Robertson,

above, the General Assembly has never granted or otherwise reserved to any court jurisdiction over juveniles in equity that the *Shelby* Doctrine asserts. The General Assembly also did not do so in Amendment 67 itself, in the 1989 Juvenile Code, or in any of the numerous amendments to the 1989 juvenile code that the General Assembly has enacted in the last two decades.

Jurisdiction over juveniles in equity was also not altered by the adoption of Amendment 80 because such jurisdiction had already been extinguished more than a decade before and would therefore not have been available to be passed to modern circuit courts by Amendment 80.¹⁰³ Thus, Amendment 80 could not reserve to circuit courts the equitable jurisdiction over juveniles asserted by the *Shelby* Doctrine because that jurisdiction simply did not exist at the time Amendment 80 was adopted. Even the majority in *Shelby* did not rely on Amendment 80's consolidation of jurisdiction in circuit courts as the source of the *Shelby* Doctrine's authority and jurisdiction; rather, the majority merely concluded that equitable jurisdiction over juveniles was not altered by Amendment 80.¹⁰⁴

The operation of Amendment 67 to extinguish the equitable jurisdiction asserted by the *Shelby* Doctrine and to afford the General Assembly the unfettered discretion to prescribe the jurisdiction of Arkansas's courts related to juvenile matters also means that the only jurisdiction that modern circuit courts have in child-welfare proceedings is that jurisdiction provided under the juvenile code. Put another way, the juvenile code is the only source of jurisdiction that modern circuit courts have to compel the Department to provide services, take custody (or not) of juveniles, or otherwise act in child-welfare proceedings. Indeed, without the juvenile code, no court in Arkansas could order the Department to provide services, take custody, or otherwise act to provide for the welfare of juveniles. The full significance of this consequence is described in more detail in Part III.B below through the application of the doctrine of sovereign immunity, but for now it is sufficient to observe that Amendment 67 effectively deprives modern circuit courts of jurisdiction over juveniles and the Department sufficient to order the Department to do anything unless authorized by the juvenile code.

Note, Spradlin v. Arkansas Ethics Commission: *A Hard-Line Approach to Separation of Powers*, 48 ARK. L. REV. 755, 770 (1995).

103. See *supra* Part III.A.2. Amendment 80 also did not reserve statutory jurisdiction that was in effect at the time Amendment 80 was adopted, which constituted the only jurisdiction Arkansas's courts held over juveniles at that time. This is because the General Assembly was free to modify this statutory jurisdiction at any time that the General Assembly saw fit—even after Amendment 80 was adopted. See *supra* note 101. More importantly, interpretation of Amendment 80 that reserved the statutory jurisdiction over juveniles in place at the time Amendment 80 was adopted is misplaced because such an interpretation would directly conflict with the General Assembly's continuing authority under Amendment 67. See ARK. CONST. amend. 80, § 22; *id.* amend. 67; *supra* Part III.A.2.b.

104. *Shelby*, 2012 Ark. 54, at 3–4, 2012 WL 401615, at *3–4.

Moreover, the interpretation that Amendment 67 rebooted all jurisdiction related to juveniles and extinguished all judicial jurisdiction over juveniles in child-welfare proceedings accords with—and provides a specific constitutional mandate for—Arkansas’s long-standing case law that limits the jurisdiction of modern circuit courts in child-welfare cases to the jurisdiction prescribed in the juvenile code.¹⁰⁵ Indeed, Arkansas courts have long held that the juvenile code’s specific prescriptions of authority limit what modern circuit courts can order the Department to do in cases involving the welfare of juveniles.¹⁰⁶ More broadly, Arkansas’s appellate courts have held that the authority prescribed in the juvenile code is the extent of modern circuit court jurisdiction over juveniles, that Arkansas courts have limited authority and jurisdiction in child-welfare proceedings, and that the juvenile code imposes limitations on the authority of courts to order the Department to act in child-welfare proceedings.¹⁰⁷ The *Shelby* Doctrine asserts just the opposite, namely, that modern circuit courts hold jurisdiction over juveniles in equity that allows modern circuit courts to act outside the juvenile code and that the juvenile code is “not the extent of circuit court jurisdiction over minors.”¹⁰⁸

Not surprisingly, the majority in *Shelby* cited only cases that predate Amendment 67 to support its position that modern circuit courts have the jurisdiction to act outside the juvenile code and order “necessary services.”¹⁰⁹ This reliance is significant because the majority’s exclusive reliance on this limited swath of case law indicates that the majority did not consider the import of Amendment 67 on the traditional jurisdiction over juveniles asserted by the *Shelby* Doctrine—nor did the majority attempt to distinguish extensive modern case law that circumscribes the authority and jurisdiction of circuit courts. The reason for the majority’s failure to recognize modern case law is, of course, unclear, and whether or not the majority affirmatively decided to ignore modern case law that did not support the

105. See *supra* notes 51, 92–96 and accompanying text.

106. See *supra* notes 51, 92–96 and accompanying text.

107. See *supra* notes 51, 92–96 and accompanying text.

108. See *Shelby*, 2012 Ark. 54, at 3–5, 2012 WL 401615, at *3–5. The majority in *Shelby* acknowledged that the juvenile code does provide the substantive law and procedures applicable to juvenile matters covered by the juvenile code. *Id.* at 3, 2012 WL 401615, at *3 (“Exclusive, original jurisdiction for specified proceedings occurring under the Juvenile Code is conferred on the circuit court.”). This acknowledgement, combined with the *Shelby* Doctrine’s core assertion that the juvenile code is not the only source of a circuit court’s jurisdiction over juveniles, further suggests that the majority interprets the circuit court’s jurisdiction over juvenile code-based proceedings separate from the circuit court’s jurisdiction in equity over juveniles.

109. *Id.*, 2012 WL 401615, at *3 (citing *Jones v. Jones*, 13 Ark. App. 102, 680 S.W.2d 118 (1984); *Richards v. Taylor*, 202 Ark. 183, 150 S.W.2d 32 (1941); *Kirk v. Jones*, 178 Ark 583, 12 S.W.2d 879 (1928); *State v. Grisby*, 38 Ark. 406, 1882 WL 1481 (1882)).

majority's position, the majority in *Shelby* was clearly dissatisfied with the Department's efforts in the case and unquestionably relied on dated cases to support the majority's position.

The *Shelby* Doctrine's assertion of equitable jurisdiction over juveniles is also invalid under Amendment 67 because of what Amendment 67 does not do. Specifically, Amendment 67 does not change the requirement that equitable jurisdiction is only available if there are no adequate legal remedies available¹¹⁰ and does not change the limitation on the exercise of equitable jurisdiction over juveniles to only the person and the estate of the individual juvenile or juveniles before the given court exercising that jurisdiction.¹¹¹ These requirements have governed equity jurisdiction in general since antiquity and over juveniles specifically since before the introduction of the first juvenile codes in Arkansas.¹¹² The majority in *Shelby*, however, did not apply any of these principles in its analysis or otherwise explain how the circuit court below could have exerted equitable jurisdiction over juveniles at all, much less how that jurisdiction could justify the entry of an order against the Department to change the Department's staffing in cases other than the one before the circuit court.¹¹³ Instead, the majority assumed that such jurisdiction was applicable and simply announced that juveniles are "wards of the [circuit court] and [that] it is the duty of those courts to make all orders that will properly safeguard the[] rights [of juveniles],"¹¹⁴ all without mentioning that juvenile jurisdiction in equity has always been lim-

110. See, e.g., *Jegley v. Picado*, 349 Ark. 600, 611, 80 S.W.3d 332, 336 (2002) ("[E]quity jurisdiction exists only when the remedy at law is inadequate."); *Watson v. Henderson*, 98 Ark. 63, 63, 135 S.W. 461, 464 (1911) (noting that even the jurisdiction in equity over juveniles is limited and "sits silent in the courts as long as the law is able to meet the demands of justice"); see also *supra* note 80.

111. See, e.g., *Ex Parte King*, 141 Ark. 213, 213, 217 S.W.465, 470 (1919) ("The jurisdiction of chancery courts, as the jurisdiction of probate courts in matters relating to guardians, deals solely with the person and the estate of the *individual* infant, and has reference to the interests of the particular jurisdiction over *individual* minors.") (emphasis added); *Jones*, 13 Ark. App. at 105, 680 S.W.2d at 120 (providing that constitutionally created courts such as chancery courts held their "traditional jurisdiction over *individual* minors") (emphasis added).

112. See, e.g., *King*, 141 Ark. at 213, 217 S.W. at 470; *Watson*, 98 Ark. at 63, 135 S.W. at 464 (citing *Grisby*, 38 Ark. 406, 1882 WL 1481; *Myrick v. Jacks*, 33 Ark. 425, 1878 WL 1283 (1878)); *Jones*, 13 Ark. App. at 105, 680 S.W.2d at 120.

113. See *Shelby*, 2012 Ark. 54, at 3–5, 2012 WL 401615, at *3–5. Neither the circuit court below nor the majority in *Shelby* provided any analysis as to the availability of an equitable remedy or whether or not the juvenile code provided an adequate remedy at law. And neither the circuit court below nor the majority in *Shelby* addressed the limitation on equitable jurisdiction over juveniles to only the person and estate of the specific juvenile before the circuit court.

114. *Id.* at 3, 2012 WL 401615, at *3 (citing *Jones*, 13 Ark. App. at 105, 680 S.W.2d at 118; *Richards v. Taylor*, 202 Ark. 183, 150 S.W.2d 32 (1941); *Kirk v. Jones*, 178 Ark. 583, 12 S.W.2d 879 (1928); *Grisby*, 38 Ark. 406, 1882 WL 1481).

ited to the specific juveniles appearing before the court of equity or the requirement that the equitable jurisdiction is only available if the remedy at law is insufficient.

Amendment 67's impact on a circuit court's jurisdiction over juveniles in equity, however, is not the only deficiency with the *Shelby* Doctrine's jurisdictional bases. As described below in Part III.B, the *Shelby* Doctrine's framework also violates Arkansas's sovereign immunity doctrine.

B. Sovereign Immunity, the Judiciary's Inherent Powers, and the Jurisdiction of Circuit Courts to Enter *Shelby*-Style Orders

The doctrine of sovereign immunity in Arkansas is as old as the state itself and has long protected the state and state agencies¹¹⁵ from becoming a defendant or otherwise being coerced in any state court except in certain narrow circumstances where a recognized exception to the immunity applies.¹¹⁶ The majority in *Shelby*, however, failed to address the Department's sovereign immunity directly, much less provide any analysis as to why the doctrine of sovereign immunity would not apply to the Department in the case.

This failure is remarkable because, absent the juvenile code and related statutes, there is no other legal authority for any court in Arkansas to order the Department to provide services, take custody of juveniles, or otherwise act to provide for the welfare of juveniles. Although the majority did touch on overlapping principles common to both the separation of powers and sovereign immunity regarding the general prohibition against courts directing the discretionary actions of executive agencies,¹¹⁷ the majority never developed a fully-formed sovereign immunity analysis of the prohibition against any compelled action that sovereign immunity adds to separation-of-powers principles. As a result, the majority in *Shelby* effectively conflated the two doctrines and subsumed sovereign immunity as nothing more than a restatement of separation-of-powers principles that only prohibit one branch

115. Ark. Dep't of Cmty. Corr. v. City of Pine Bluff, 2013 Ark. 36, at 4, 425 S.W.3d 731, 733; Ark. Game & Fish Comm'n v. Eddings, 2011 Ark. 47, at 4, 378 S.W.3d 694, 697 (citing Fireman's Ins. Co. v. Ark. State Claims Comm'n, 301 Ark. 451, 784 S.W.2d 771 (1990)); Short v. Westark Cmty. Coll., 347 Ark. 497, 65 S.W.3d 440 (2002).

116. See, e.g., ARK. CONST. art. 5, § 20 ("The State of Arkansas shall never be made defendant in any of her courts."); Ark. Dep't of Human Servs. v. State, 312 Ark. 481, 487–88, 850 S.W.2d 847, 850–51 (1993); Ark. State Highway Comm'n v. Flake, 254 Ark. 624, 628, 495 S.W.2d 855, 858 (1973) ("Sovereign immunity was a common law doctrine that originated centuries before the Fourteenth Amendment.").

117. *Shelby*, 2012 Ark. 54, at 4–5, 2012 WL 401615, at *4–5.

of government from exercising the powers of another branch of government.¹¹⁸

This article therefore now turns to address these issues and ultimately concludes that the *Shelby* Doctrine violates the Department's sovereign immunity because the Department's sovereign immunity applies to invalidate *Shelby*-style orders, and none of the exceptions to the sovereign immunity doctrine apply. In addition, the broad Inherent Protection Power asserted in *Shelby* should not constitute a new exception to sovereign immunity that would otherwise authorize the entry of *Shelby*-style orders.

1. *Sovereign Immunity Applies to Invalidate the Shelby Doctrine*

The doctrine of sovereign immunity provides state agencies with jurisdictional immunity from suit and prohibits any legal action against a state agency that has the purpose or effect, directly or indirectly, of coercing the state agency to act or not act.¹¹⁹ Coercion to act includes compelling a state agency to spend funds from the State's treasury, subjecting the State to liability, or otherwise controlling the action of a state agency.¹²⁰ The *Shelby* Doctrine therefore triggers the Department's sovereign immunity because the Department is an agency of the State and *Shelby*-style orders sanctioned under the *Shelby* Doctrine coerce the Department to act to affirmatively "fix" problems identified by a court even where the order has the effect of compelling the Department to reduce a caseworker's caseload or otherwise dictating the Department's internal operations in child-welfare cases.

118. *Id.*, 2012 WL 401615, at *4–5 (citing *Villines v. Lee*, 321 Ark. 405, 902 S.W.2d 233 (1995)) (discussing the separation-of-powers doctrine but failing to note that the exceptions to the general prohibition against reviewing discretionary executive functions described in *Villines* are based on sovereign immunity principles).

119. *See, e.g.*, ARK. CONST. art. 5, § 20; *LandsnPulaski, LLC v. Ark. Dep't of Corr.*, 372 Ark. 40, 42, 269 S.W.3d 793, 795 (2007) (observing that sovereign immunity requires the dismissal of a legal action if it "operate[s] to control the action of the State or subject[s] it to liability"); *Travelers Cas. v. State Highway Comm'n*, 353 Ark. 721, 726–28, 120 S.W.3d 50, 52–54 (2003) (same); *State*, 312 Ark. at 487–89, 850 S.W.2d at 850–51 (explaining that sovereign immunity applies to "[a]ny suit, whether in law or equity, which has for its purpose and effect, directly or indirectly, coercing the State"). *See generally* Jack Druff, *State Court Sovereign Immunity: Just When Is the Emperor Armor-Clad?*, 24 U. ARK. LITTLE ROCK L. REV. 255 (2002).

120. *LandsnPulaski*, 372 Ark. at 42, 269 S.W.3d at 795; *Travelers*, 353 Ark. at 727–28, 120 S.W.3d at 52–54; *Short*, 347 Ark. at 504–08, 65 S.W.3d at 445–48 (providing that forcing the State to pay funds from its treasury renders the State a defendant and violates its sovereign immunity); *Dermott Spec. Sch. Dist. v. Johnson*, 343 Ark. 90, 93, 32 S.W.3d 477, 479 (2000) (same); *Pitcock v. State*, 91 Ark. 527, 527, 121 S.W. 742, 745–46 (1909) (providing that suits that compel state officers to "do acts which would impose a contractual pecuniary liability upon the state, or to issue any evidence of debt, in the name of the state, which would have that result, is in fact and legal effect a suit against the state" and therefore prohibited).

In *Shelby*, for example, Judge Brown affirmatively commanded the Department to reduce the caseload of the caseworker involved in the case—an order that clearly seeks to control the Department’s internal and discretionary staffing functions. And notwithstanding Judge Brown’s disclaimer that he did not intend to “micromanage” the Department,¹²¹ Judge Brown effectively required the Department to either hire new caseworkers or transfer existing caseworkers into the county to reduce the Department’s caseload per worker overall by prohibiting the Department from moving the high caseload to another caseworker.¹²² Moreover, because there is no way for the caseworker’s caseload to change without assigning the cases to new or existing caseworkers, the Department would also likely be required to spend funds from the State’s treasury to pay for new salaries, mileage, and other attendant expenses in order to comply with the order in *Shelby* and other *Shelby*-style orders.

And even if the analysis assumes, as the majority in *Shelby* held, that the circuit court was not attempting to control discretionary staffing issues, but rather was merely seeking to obtain a case plan that the Department was “obligated to provide,” the circuit court still ordered the Department to “fix the problems that stopped [the Department] from fulfilling its obligations and duties” and identified the “problem” as being the high caseload of the caseworker.¹²³ The difference between telling a state agency to “fix” some-

121. *Shelby*, 2012 Ark. 54, at 2–4, 2012 WL 401615, at *2–4. As Justice Danielson observed in his forceful dissent in *Shelby*, the transcript of the permanency planning hearing and Judge Brown’s written order expressly designate the caseworker’s caseload as the specific issue that the Department was to rectify within five business days. *Id.*, 2012 WL 401615, at *2–4 (majority opinion) (“Forty-one cases, especially the type of cases she has, is too many and I want that rectified within five business days of today’s court order.”); *id.* at 6, 2012 WL 401615, at *6 (Danielson, J., dissenting).

122. *Id.* at 2, 2012 WL 401615, at *2 (majority opinion) (“Now, somebody’s going to have to split out some of these cases and . . . I don’t want nobody else to get 41 either as a result of it.”); *id.* at 6, 2012 WL 401615, at *6 (Danielson, J., dissenting) (arguing that Judge Brown’s disclaimer that he had no intention to micromanage the Department “makes it more evident that the circuit court wrongly believed it had some sort of management authority” at all). And while there might be some argument that there might be systemic or policy changes that could be implemented to address the caseworker’s high caseload—such as through programs like the Department’s new differential response model aimed at reducing custody cases in favor of alternate, non-custody-based approaches—it is nearly impossible that such broad changes could occur within Judge Brown’s five-day window in which the Department was to “fix” the problem and in any case would still constitute coercion of the Department. *See* ARKANSAS DEPARTMENT OF HUMAN SERVICES, DIVISION OF CHILDREN & FAMILY SERVICES, POLICY & PROCEDURES MANUAL 18–27 (2015), available at <http://humanservices.arkansas.gov/dcf/dcfDocs/Master%20DCFS%20Policy.pdf>. The five-day window, in turn, left redirecting new caseworkers or transferring new existing caseworkers into the county as the only viable option to comply with Judge Brown’s order—with an order compelling the Department to do either clearly constituting an order coercing the Department to act.

123. *Shelby*, 2012 Ark. 54, at 2–4, 2012 WL 401615, at *2–4.

thing to ensure a specific result and telling a state agency exactly how to fix something to ensure a specific result is simply a distinction without a difference, as both coerce the Department to take some action. And as described below, there is no authority for a state court to use the Department's failure to comply with the requirements of the juvenile code to trigger additional jurisdiction over the Department.

2. *The Shelby Doctrine Is Not Saved by Any Recognized Exceptions to Sovereign Immunity*

The *Shelby* Doctrine and all *Shelby*-style orders that coerce the Department to act under the jurisdiction and authority asserted by the *Shelby* Doctrine are invalid under the sovereign immunity doctrine unless an exception to sovereign immunity applies. The only exceptions that the Arkansas Supreme Court has recognized to this immunity are those circumstances in which (1) the General Assembly has created a specific waiver of an agency's sovereign immunity ("the Waiver Exception"), (2) the state agency waives sovereign immunity as the moving party seeking specific relief ("the Moving Party Exception"), (3) the state agency or an officer of a state agency is refusing to do a purely ministerial action required by statute or is acting illegally ("the Ministerial Exception"), or (4) the coercion of a state agency arises from the court's contempt powers ("the Contempt Exception").¹²⁴ As described below, however, the *Shelby* Doctrine is not saved from invalidation by the Department's sovereign immunity because none of these exceptions apply to authorize a circuit court to act beyond the authority conferred by the juvenile code.

- a. The General Assembly did not sufficiently waive the Department's sovereign immunity in child-welfare cases to allow *Shelby*-style orders

The General Assembly did not create a sufficient waiver of the Department's sovereign immunity under the Waiver Exception to allow *Shelby*-style orders. This is because the Waiver Exception applies to a state agency like the Department only if the General Assembly creates a specific waiver by either a statute's express terms or by the necessary implication of a statute's express terms.¹²⁵ The General Assembly, however, has not creat-

124. See, e.g., *Landsnpulaski*, 371 Ark. at 43, 269 S.W.3d at 795–96; *Ark. Dep't of Human Servs. v. R.P.*, 333 Ark. 516, 531, 970 S.W.2d 225, 232 (1998); *State*, 312 Ark. at 488, 850 S.W.2d at 850–51.

125. *Ark. Dep't of Cmty. Corr. v. City of Pine Bluff*, 2013 Ark. 36, at 4–6, 425 S.W.3d 731, 734–35 (providing that the State's sovereign immunity can be waived where the General

ed a sufficient waiver that permits *Shelby*-style orders through either of these modes of operation. First, no statute by its express terms authorizes a circuit court to order the Department to reduce a caseworker's caseload or otherwise dictate the Department's internal operations. Second, the juvenile code should not be interpreted to waive impliedly the Department's sovereign immunity except as specifically waived in the context of the Department's express obligations under the juvenile code, obligations that do not cover the Department's internal operations much less the entry of *Shelby*-style orders.

The question of implied waiver, however, is a tedious one given the juvenile code's numerous and often lengthy sections¹²⁶ and the judiciary's recognition that the roles and responsibilities as between the circuit court and the Department in child-welfare proceedings are not well defined under the juvenile code.¹²⁷ The juvenile code's mandate to protect juveniles also does not clearly specify what roles the judiciary and the Department have with respect to achieving those worthy goals.¹²⁸ Even the specific obligations imposed do not always make clear the allocation of authority and responsibility between the Department and the judiciary. This article therefore now turns to evaluating the propriety of implied waiver by considering existing case law and the juvenile code's statutory scheme.

i. Arkansas law suggests that the juvenile code does not impliedly waive the Department's sovereign immunity

The question of whether or not the juvenile code creates any implied waivers of the Department's sovereign immunity has never been specifically addressed by Arkansas's appellate courts. Arkansas law, however, supports the conclusion that the juvenile code does not create any implied waivers of the Department's sovereign immunity because Arkansas's courts have rec-

Assembly creates "a specific waiver of sovereign immunity," and further providing that a "[a] statutory waiver of sovereign immunity may be express or implied").

126. For the purposes of this subsection, references to the juvenile code include ARK. CODE ANN. §§ 9-27-301 to -367 (Supp. 2013) as well as other sections of the Arkansas Code that impose further obligations on the Department that are part and parcel to most child-welfare proceedings. Most notably, such additional sections include ARK. CODE ANN. §§ 9-28-101 to -120 (Supp. 2013).

127. See, e.g., Ark. Dep't of Human Servs. v. Clark, 304 Ark. 403, 407, 802 S.W.2d 461, 463 (1991) ("The jurisdictions of the juvenile court and DHS overlap in numerous and varied areas."); Bruce Boyer, *Jurisdictional Conflicts Between Juvenile Courts and Child Welfare Agencies: The Uneasy Relationship Between Institutional Co-Parents*, 54 MD. L. REV. 377, 383-84 (1995). Nor is Arkansas different in this regard from other states. See generally *id.*

128. ARK. CODE ANN. § 9-27-302 (Supp. 2013). Other sections also provide that "the state has a responsibility to protect children from abuse and neglect by providing services and supports that promote the safety, permanency, and well-being of the children and families of Arkansas." *Id.* § 9-28-101 (Supp. 2013).

ognized that even though the juvenile code does provide for specific exceptions to sovereign immunity in child-welfare proceedings, the exceptions are limited to the juvenile code's express provisions that allow circuit courts to order "family services."¹²⁹ Notably, this is the main provision in the juvenile code that allows a circuit court to order the Department to take any kind of specific, affirmative action.

As the Arkansas Supreme Court in *Arkansas Department of Human Services v. R.P.* observed, the juvenile code created only a specific waiver to sovereign immunity by allowing circuit courts to order the Department to provide "family services" in child-welfare cases,¹³⁰ but expressly limited the waiver to the "family services" that circuit courts were allowed to order under—and as defined by—the juvenile code.¹³¹ The juvenile code in turn expressly prescribes the services that a circuit court can order the Department to perform to only those services that are (1) relevant, (2) provided to the given juvenile or the juvenile's family, and (3) provided in order to prevent a juvenile from being removed, reunite a juvenile with the person from whom the juvenile was removed, implement a permanent plan of adoption or guardianship in a dependency-neglect case, or rehabilitate a juvenile in delinquency or family-in-need-of-services cases.¹³²

Furthermore, a plain-text reading of the definition of "family services" indicates that "family services" does not encompass *Shelby*-style orders because *Shelby*-style orders that direct the Department to "fix" a problem identified by a court and have the effect of coercing the Department to reduce a caseworker's caseload or otherwise direct the Department's internal operations are simply not a service provided to the juvenile or the juvenile's family as the definition of "family services" requires.¹³³ Rather, such orders are

129. See *R.P.*, 333 Ark. at 531–32, 970 S.W.2d at 232–33.

130. Although *R.P.* dealt with a family-in-need-of-services case governed by the juvenile code, the same limited waiver applies in dependency-neglect cases such as *Shelby* because dependency-neglect cases share disposition limitations that are, in relevant part, identical to family-in-need-of-services cases. Compare ARK. CODE ANN. § 9-27-334 (Repl. 2013) (providing that a circuit court is limited in dependency-neglect cases to ordering the Department to perform "family services"), with *id.* § 9-27-332.

131. *R.P.*, 333 Ark. at 331–32, 970 S.W.2d at 232–33.

132. ARK. CODE ANN. § 9-27-303(25)(B) (Supp. 2013); *R.P.*, 333 Ark. at 331–32, 970 S.W.2d at 232–33 (providing that the definition of "family services" sets the contours of the General Assembly's limited waiver of the Department's sovereign immunity). The definition of "family services" was amended in 2013 to clarify when a circuit court could order the Department to provide services to rehabilitate a juvenile, but the definition provided here matches in relevant part the definition in place at the time the Arkansas Supreme Court decided *Shelby* in 2012. See Act of Apr. 10, 2013, No. 1055, § 5, 2013 Ark. Acts 3963, 3965.

133. ARK. CODE ANN. § 9-27-303(25). An argument could be made that any order related to the Department's caseworker operations would constitute a service to the juvenile or the family through the casework and case management services that the Department provides to families. Under this argument, the order in *Shelby* to modify a caseworker's caseload and the

expressly and exclusively directed to the Department. In addition, interpreting such orders as “family services” would violate the maxim of statutory interpretation known as *eiusdem generis* because the Department’s internal operations do not fit within the category of services specifically listed in the “family services” definition¹³⁴—which all relate to actual services provided to the juvenile or the family and do not include any example services related to the Department’s operations.¹³⁵ By contrast, directly ordering the Department to prepare a case plan, which was not prepared in *Shelby*,¹³⁶ would

Department’s staffing overall would be a service because the order impacts the Department’s operations, which impacts the Department’s casework, which impacts the casework services that the Department provides to the juvenile and the family. Such an interpretation, however, would improperly expand the category of services authorized under “family services” to include any act as long as the act merely relates to the actual services provided to the family. First, the interpretation would read out of the definition the requirement that the act ordered by the court be a service affirmatively provided to the juvenile or the juvenile’s family. *Id.* § 9-27-303(25)(A); *Hobbs v. Baird*, 2011 Ark. 261, at 3, 2011 WL 2412740, at *3 (observing that laws must be interpreted “so that no word is left void, superfluous or insignificant, and we give meaning and effect to every word in the statute, if possible”); *Larry Hobbs Farm Equip. v. CNH Am., LLC*, 375 Ark. 379, 383, 291 S.W.3d 190, 194 (2009) (same); *Ark. Comp. Health Ins. Pool v. Denton*, 374 Ark. 162, 165, 286 S.W.3d 698, 701 (2008) (same). Second, the interpretation would defeat the express terms of the statutory definition by allowing the limited definition of “family services” to be swallowed by an effectively unlimited definition of “family services” that includes any service that merely relates to the actual services provided to the family. *See, e.g., Griffen v. Ark. Jud. Discipline Comm’n*, 355 Ark. 38, 52–53, 130 S.W.3d 524, 533 (2003) (declining to interpret a judicial canon to allow a judge to speak with a legislator about any matter of interest to the judge because that interpretation would swallow the rule that prohibits judges from consulting with bodies or officers of the other branches); *Willett v. State*, 334 Ark. 40, 42–43, 970 S.W.2d 804, 806 (1998) (declining to interpret the rules of attorney practice allowing “nonresident lawyers” to practice in Arkansas *pro hac vice* to allow non-practicing lawyers who are licensed in another state but reside in Arkansas to practice in Arkansas because such an interpretation would swallow the non-resident lawyer rule). Third, the interpretation would be contrary to Arkansas appellate courts’ long-standing interpretation that “family services” was a limited definition that imposes limitation on juvenile courts’ authority to order the Department to act. *See supra* notes 51, 92–96 and accompanying text.

134. *See Edwards v. Campbell*, 2010 Ark. 398, at 4–5, 370 S.W.3d 250, 253 (describing *eiusdem generis*, the doctrine of interpretation that provides that when general words follow enumerations of particular things, the general words must be interpreted to include only those things of the same kind as those specifically enumerated things); *State v. Oldner*, 361 Ark. 316, 327, 206 S.W.3d 818, 822 (2005) (same); *Ex Parte King*, 141 Ark. 213, 213, 217 S.W. 465, 468–69 (1919) (same).

135. The definition of “family services” includes an unbounded list of example services, including child care, homemaker services, crisis counseling, cash assistance, transportation, family therapy, physical, psychiatric, and psychological evaluation, counseling, and treatment. ARK. CODE ANN. § 9-27-303(25)(A) (Supp. 2013).

136. *Ark. Dep’t of Human Servs. v. Shelby*, 2012 Ark. 54, at 2, 4, 2012 WL 401615, at *2, 4.

constitute a direct service provided by the Department to the juvenile and the family that requires the participation of the juvenile and the family.¹³⁷

And even if *Shelby*-style orders were to be deemed a proper service provided to the juvenile or the juvenile's family, the "service" would arguably still not fall within the "family services" portion of the juvenile code's limited waiver because such a "service" would not fall within the limited legitimate purposes that the juvenile code's definition of "family services" requires.¹³⁸ These purposes limit "family services" to only those services that are provided to prevent removal, reunify the juvenile with the person from whom the juvenile was removed, implement a permanency plan of guardianship or adoption in a dependency-neglect case, or rehabilitate a juvenile in a delinquency or family-in-need-of-services case.¹³⁹

For example, the service would not be for the purpose of preventing removal of a juvenile from a home because the Department's failure to reduce a caseworker's caseload or make other changes to the Department's internal operations would not—as the juvenile code requires—constitute an immediate danger to a juvenile where removal would be necessary to prevent serious harm to the juvenile.¹⁴⁰ Likewise, the service would not be for

137. ARK. CODE ANN. §§ 9-27-402, 9-28-111 (Supp. 2013). Case plans are an important element in dependency-neglect cases and require the Department to develop case plans with the family and other interested parties in dependency-neglect cases in order to set out the "plan for services for a juvenile and his or her family" and to let the family know what is required of them in the case. *Id.* §§ 9-27-303(9), -337, -338, -341, -359 to -361, 9-28-111 (Repl. 2009 & Supp. 2013).

138. *See id.* § 9-27-303(25)(B). In addition, the juvenile code also imposes express limitations on the definition of "family services" and a circuit court's ability to enter certain orders related to them. For example, the juvenile code specifically prohibits a circuit court from specifying a specific provider of "family services." *Id.* § 9-27-335(b)(1) (Supp. 2013). Likewise, "cash assistance" is one of the services that a circuit court is empowered to order the Department to provide—but the juvenile code provides a specific definition for cash assistance that excludes certain types of assistance, including long-term financial assistance; financial assistance that is the equivalent of a foster-care board payment, an adoption subsidy, or a guardianship subsidy; and financial assistance for car insurance. *Id.* § 9-27-303(10)(B) (Supp. 2013). Such exclusions accordingly narrow the services that a circuit court could order the Department to perform and narrow the waiver of sovereign immunity that *R.P.* and other cases recognize.

139. *See* Ark. Dep't of Human Servs. v. A.M., 2012 Ark. App. 240, at 7–8, 423 S.W.3d 86, 90.

140. *Id.*, 423 S.W.3d at 90 (holding that an order directing the Department to provide school uniforms to a juvenile was not for the purpose of preventing removal because the lack of school uniforms did not constitute an immediate danger where removal was necessary to prevent serious harm to the juvenile, which are required elements under the juvenile code). The Department's failure to prepare a case plan in *Shelby* would also not meet this requirement for the same reasons: the lack of a case plan would not itself constitute an immediate danger to a juvenile where removal would be necessary to prevent serious harm to the juvenile. *Cf. id.*, 423 S.W.3d at 90. Moreover, in *Shelby*, the juvenile had already been removed at the time of the circuit court's order, so the purpose could not have been to prevent removal.

the purpose of reunifying a juvenile with the person from whom the juvenile was removed because changes to a caseworker's caseload or the Department's other internal operations would not make a juvenile more or less safe if the juvenile were to be returned, which is how the juvenile code evaluates reunification.¹⁴¹ The service would also not be for the purpose of implementing a permanent plan of adoption or guardianship in a dependency-neglect case because changes to a caseworker's caseload or the Department's other internal operations would not implement the adoption or guardianship of a juvenile, prepare a juvenile for adoption or guardianship, prepare a prospective adoptive parent or guardian, or otherwise impact any element of the law governing adoptions or guardianships in Arkansas.¹⁴² Finally, the service would not be for the purpose of rehabilitating a juvenile in a delinquency or family-in-need-of-services case because changes to a caseworker's caseload or the Department's other internal operations in a dependency-neglect case simply do not relate to the rehabilitation of a juvenile.¹⁴³

141. See e.g., ARK. CODE ANN. § 9-27-303(48)(A)(iii) ("In determining whether or not to remove a child from a home or *return a child back to a home*, the child's health and safety shall be the paramount concern.") (emphasis added); *id.* § 9-27-337(e)(1)(C)(iii) (providing that in all review hearings the circuit court shall determine whether the juvenile should be returned to his parents based on the best interests of the juvenile and "whether or not the juvenile's health and safety can be protected by his or her parent or parents if returned home"); *id.* § 9-27-338(c) (providing that the statutory preference at permanency planning hearings is to return a juvenile to a fit parent or to the person from whom custody was removed if it is in the best interests of the juvenile and the juvenile's health and safety can be adequately safeguarded if returned home); see also *id.* § 9-27-302(1)-(2) (Supp. 2013) (providing that the health and safety of the juvenile shall be the measure of when a juvenile must be removed from a home); *id.* § 9-27-328(a)-(b) (providing that a juvenile should not be removed from his or her home unless the health and safety of the juvenile warrant immediate removal in order to protect the juvenile); *id.* § 9-27-332(a)(2) (Supp. 2013) (same); *id.* § 9-27-335(e) (same). The permanency planning statute in fact provides specific conditions for reunification to occur and specific conditions to continue with reunification, none of which involve the Department's staffing operations. *Id.* § 9-27-338(c).

142. See, e.g., *id.* §§ 9-9-201 to -224 (Repl. 2009 & Supp. 2013) (Revised Uniform Adoption Act); *id.* §§ 28-65-101 to -704 (Repl. 2012 & Supp. 2013) ("the Guardianship Code"). The facts in *Shelby* demonstrate even more directly that changes to the Department's internal staffing operations are not provided to implement an adoption or guardianship because there was in fact no permanency plan established in *Shelby* other than reunification, so the purpose could not have been to implement a permanent plan of adoption or guardianship. Ark. Dep't of Human Servs. v. *Shelby*, 2012 Ark. 54, at 2, 2012 WL 401615, at *2 (observing that the circuit court declined to hold a permanency planning hearing, which would have changed the goal in the case from reunification to another permanency plan). When *Shelby* was decided, the purposes sanctioned by the juvenile code were slightly different, but still covered the implementation of adoption and guardianship permanency plans as appropriate purposes. See ARK. CODE ANN. § 9-27-303(25)(B)(iii).

143. *Shelby* was also a dependency-neglect case, a type of case in which the juvenile code—unlike with delinquency or family-in-need-of-services cases—does not provide the rehabilitation of a juvenile as an appropriate disposition. Compare *id.* § 9-27-330 (Supp. 2013) (providing for the rehabilitation of juveniles as a permissible disposition in delinquen-

Furthermore, interpreting *Shelby*-style orders as meeting one of the juvenile code's legitimate purposes would be inappropriate for two additional reasons. First, such an interpretation would improperly expand the category of services authorized under "family services" to allow a court to order the Department to perform any act so long as the act merely relates to actual, legitimately-purposed "family services" that the Department provides to the juvenile or the family.¹⁴⁴ Second, such an interpretation would eviscerate any meaningful separation of powers between the judiciary and the Department in child-welfare cases and empower a circuit court to act as a manager of an executive agency. Indeed, the only connection between one of the limited legitimate purposes for "family services" and ordering the Department to change its internal operations or a court managing the use of the Department's resources is that such orders relate to services that the Department provides insofar as the Department's caseworkers provide the services.

The holding in *R.P.* is also in harmony with numerous cases that recognize that the juvenile code limits the jurisdiction of Arkansas's courts to only that jurisdiction provided by the General Assembly in the juvenile code.¹⁴⁵ For example, in *Arkansas Department of Human Services v. A.M.*, the Arkansas Court of Appeals invalidated an order directing the Department to pay for a juvenile's school uniforms because the lack of school uniforms did not constitute an immediate danger where removal was necessary to prevent serious harm to the juvenile as would be required under the juvenile code to authorize removal.¹⁴⁶ Although *A.M.* was not based on the Department's sovereign immunity per se, it did recognize that the definition of "family services"—and the meaning of the terms in the definition—imposed limitations on what a circuit court could order the Department to do in the same way that the courts in *R.P.* and other cases have evaluated the propriety of court orders against the statutory definition of "family services."¹⁴⁷

cy cases), *and id.* § 9-27-332 (providing for the rehabilitation of juveniles as a permissible disposition in family-in-need-of-services cases), *with id.* § 9-27-334 (Supp. 2013) (omitting the rehabilitation of juveniles from the list of permissible dispositions in dependency-neglect cases); *see Shelby*, 2012 Ark. 54, at 2, 2012 WL 401615, at *2. And even though anyone who has ever practiced in dependency-neglect cases would note that courts routinely address juvenile rehabilitation in dependency-neglect cases, the juvenile code has now been amended to limit "family services" in dependency-neglect cases by excluding services provided for the purpose of rehabilitating juveniles. *Compare* ARK. CODE ANN. § 9-27-303(25)(B)(iii), (iv) (Supp. 2013), *with id.* § 9-27-303(25)(B)(iii) (Supp. 2012).

144. *See supra* note 134 and accompanying text.

145. *Supra* notes 51, 92–96 and accompanying text.

146. *Ark. Dep't of Human Servs. v. A.M.*, 2012 Ark. App. 240, at 7–8, 423 S.W.3d 86, 90.

147. *Compare id.*, 423 S.W.3d at 90, *with* *Ark. Dep't of Human Servs. v. T.B.*, 347 Ark. 593, 601–03, 67 S.W.3d 539, 544–46 (2002) (finding that an order to pay \$48,000 for a juvenile's sex offender treatment did not violate the Department's sovereign immunity because it fell within the "cash assistance" and "treatment" provisions of the "family services" defini-

R.P. and *A.M.* also reflect the limited jurisdiction and authority prescribed by the express terms of the juvenile code itself. Most notably, the juvenile code currently provides circuit courts with only a limited jurisdiction to hear child-welfare proceedings¹⁴⁸ and only a limited authority to act in child-welfare proceedings.¹⁴⁹ For example, the juvenile code provides that modern circuit courts are only empowered to make certain specific dispositions in dependency-neglect cases, namely, ordering the Department to provide family services as discussed above; setting custody of juveniles found to be dependent-neglected, including placing custody of such juveniles with the Department; and ordering parenting classes for the parents¹⁵⁰—with each of those dispositions in turn heavily circumscribed in other sections of the juvenile code.¹⁵¹

tion); Ark. Dep't of Human Servs. v. R.P., 333 Ark. 516, 531–32, 970 S.W.2d 225, 232–33 (1998) (holding that order to pay money to restore a family's utilities did not violate the Department's sovereign immunity because it fell within the "cash assistance" provision of the "family services" definition and the services were offered to prevent the removal of the juvenile); Ark. Dep't of Health & Human Servs. v. C.M., 100 Ark. App. 414, 417, 269 S.W.3d 387, 389–90 (2007) (holding that an order to pay the attorney fees for a juvenile in the Department's custody did not violate the Department's sovereign immunity because it fell within the "cash assistance" provision of the "family services" definition); *supra* notes 51, 92–96 and accompanying text.

148. See ARK. CODE ANN. § 9-27-306(a)(1) (Supp. 2013).

149. See *id.* §§ 9-27-329 to -335, -355 (Repl. 2009 & Supp. 2013) (providing jurisdiction and authority of modern circuit courts to act in child-welfare proceedings); *supra* notes 51, 92–96 and accompanying text; *id.* §§ 9-9-101 to -405 (Repl. 2009 & Supp. 2013) (providing the terms of the Uniform Child-Custody Jurisdiction and Enforcement Act, which imposes limitations on the jurisdiction and authority to act in child-welfare proceedings).

150. See, e.g., *id.* § 9-27-334(a). Although section 9-27-334 applies only to dependency-neglect cases like *Shelby*, the juvenile code provides similar prescriptions of authority in the other two types of child-welfare proceedings governed by the juvenile code, delinquency and families-in-need-of-services cases. See *id.* § 9-27-330 (prescribing disposition limitations in delinquency cases); *id.* § 9-27-331 (same); *id.* § 9-27-332 (Supp. 2013) (prescribing disposition limitations in family-in-need-of-services cases); *id.* § 9-27-333 (same).

151. See, e.g., *id.* § 9-27-334(a)(2) (limiting a circuit court's authority to place custody of a juvenile with the Department only if it is in the best interests of the juvenile and only if the juvenile is physically placed with a licensed or approved foster home, shelter, or facility or exempt child-welfare agency); *id.* § 9-27-335 (limiting the disposition that a circuit court can order, including as to services and placement provided by the Department; prohibiting a circuit from ordering a specific provider for placement or family services except in limited circumstances; prohibiting a court from transferring custody of a juvenile to an individual absent a written home study; prohibiting a court from transferring custody of a juvenile unless the Department used reasonable efforts to provide family services and prevent removal of the juvenile from the home unless the court makes other specific findings; and prohibiting a court from ordering the Department to expend or forward social security benefits when the Department is the payee of the benefits); *id.* § 9-27-355 (limiting a circuit court's authority to make placements involving the Department, including precluding a circuit court from ordering a particular foster care placement).

Further, the narrow limited waiver of the Department's sovereign immunity recognized by Arkansas courts indicates that circuit courts do not necessarily need control over the internal operations of the Department in order to give effect to the juvenile code's statutory scheme. Indeed, if circuit courts did need such control in order to give effect to the juvenile code's statutory scheme, then would not circuit courts have the authority to order the Department to provide any relevant services in child-welfare proceedings that the court found would directly address the issues in a given child-welfare proceeding? Cases like *R.P.* and *A.M.* implicitly reject that conclusion by not recognizing a broad authority that would allow circuit courts to exceed their authority under the juvenile code.

Absent such a broad authority obtaining from the juvenile code's statutory scheme, the only way for circuit courts to have the authority to issue *Shelby*-style orders would be if such authority was allowed based on a specific statutory component of the juvenile code related to obligations imposed on the Department or the judiciary. This article therefore now evaluates whether the juvenile code's statutory scheme creates an implied waiver of the Department's sovereign immunity.

ii. The R.P.-McLemore framework indicates the juvenile code does not create implied waivers of the Department's sovereign immunity

The juvenile code's statutory scheme is broadly purposed for the judiciary to protect juveniles and "assure that all juveniles brought to the attention of the courts receive the guidance, care, and control . . . that will best serve the emotional, mental, and physical welfare of the juvenile and the best interest of the state."¹⁵² To achieve these ends, the juvenile code places

152. *Id.* § 9-27-302(1) (Supp. 2013). The juvenile code also provides other related purposes, such as the following:

To preserve and strengthen the juvenile's family ties when it is in the best interest of the juvenile; . . . [t]o protect a juvenile by considering the juvenile's health and safety as the paramount concerns in determining whether or not to remove the juvenile from the custody of his or her parents or custodians, removing the juvenile only when the safety and protection of the public cannot adequately be safeguarded without such removal; . . . to secure for [juveniles removed from his or her own family] custody care and discipline with primary emphasis on ensuring the health and safety of the juvenile while in the out-of-home placement; . . . [t]o assure, in all cases in which a juvenile must be permanently removed from the custody of his or her parents, that the juvenile be placed in an approved family home and be made a member of the family by adoption; . . . [t]o protect society more effectively by substituting for retributive punishment, whenever possible, methods of offender rehabilitation and rehabilitative restitution, recognizing that the application of sanctions

numerous obligations on the judiciary and the Department.¹⁵³ The question therefore becomes, do any of these purposes or obligations imply a waiver of the Department's sovereign immunity so as to allow a circuit court to order the Department to reduce a caseworker's caseload or otherwise dictate the Department's internal operations?

Arkansas courts have found implied waiver only where the implication of a statute's express terms necessarily requires waiver of an agency's sovereign immunity in order to give effect to the statutory scheme and avoid absurd results related to express provisions. Further, Arkansas case law illustrates a useful four-step framework for determining whether the implication of a statute's express terms necessarily requires the waiver of a state agency's sovereign immunity ("the *R.P.-McLemore* framework"). First, does the given statute impose a non-discretionary¹⁵⁴ obligation on the judiciary or the Department to act for the benefit of another party in the case? If so, second, does the statute specify a remedial mechanism to address a failure of the judiciary or the Department to perform that obligation? If not, third, is there any other remedial mechanism that would give effect to the obligation? If not, fourth, does the agency's sovereign immunity need to be waived in order to give effect to the obligation in the way intended by the statutory scheme?

In *Arkansas Department of Human Services v. R.P.*, for example, the Arkansas Supreme Court addressed the juvenile code's express terms that authorized circuit courts to "order family services" but did not specify who would provide or otherwise pay for such services.¹⁵⁵ The Arkansas Supreme Court nevertheless held that the General Assembly specifically waived the

that are consistent with the seriousness of the offense is appropriate in all cases; and . . . [t]o provide means through which the provisions of this subchapter are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.

Id. § 9-27-302(2)–(3).

153. *E.g.*, *Ark. Dep't of Human Servs. v. Clark*, 304 Ark. 403, 409, 802 S.W.2d 461, 464 (1991) (providing that the juvenile code prescribes affirmative requirements that are designed to achieve the juvenile code's statutory purposes).

154. The nondiscretionary component of the *R.P.-McLemore* framework flows implicitly from the namesake cases described below involving nondiscretionary obligations of state agency, but also reflects the well-established rule in Arkansas that the judiciary does not have the authority to compel an executive or legislative body to perform a discretionary act. *See, e.g.*, *T.J. ex rel. Johnson v. Hargrove*, 362 Ark. 649, 656–57, 210 S.W.3d 79, 82–83 (2005) (providing that a court lacks the authority to compel an executive or legislative body to act if the duty to act is discretionary); *Saunders v. Neuse*, 320 Ark. 547, 550, 898 S.W.2d 43, 45–46 (1995) (same); *State v. Churchill*, 48 Ark. 426, 426, 3 S.W. 352, 360 (1887); *Hawkins v. Governor*, 1 Ark. 570, 587–92, 1839 Ark. LEXIS 29, at *13–15 (1839).

155. *Ark. Dep't of Human Servs. v. R.P.*, 333 Ark. 516, 531–32, 970 S.W.2d 225, 232–33 (1998).

Department's sovereign immunity to being ordered to provide family services in child-welfare proceedings because "[a]ny other interpretation would effectively eviscerate the court's power to order family services," especially given that in certain types of child-welfare proceedings, the proceedings could be initiated by "any adult" and the Department would not even be a party involved in the case at all.¹⁵⁶ The General Assembly, the Arkansas Supreme Court held, could not have intended such a consequence and would have understood that the Department's sovereign immunity would need to be waived as to providing family services in child-welfare proceedings even where the Department was not yet a party.¹⁵⁷

Likewise, in *Weiss v. McLemore* the Arkansas Supreme Court evaluated the sovereign immunity of the state agency responsible for managing the retirement program for the Arkansas State Police against suits brought by retirees to compel the agency to correct errors in retirement payments.¹⁵⁸ In such circumstances, the Court held that the agency's sovereign immunity was waived because the applicable statute expressly directed the agency to adjust errant payments and correct the error that caused errant payments.¹⁵⁹ The Arkansas Supreme Court concluded that even though the statute did not specify a remedial mechanism for an aggrieved retiree to correct an underpayment like the statute provided the agency to collect an overpayment, the General Assembly could not have intended aggrieved retirees to be unable to compel the agency to correct errant payments as required by the statute.¹⁶⁰ Such a result, the Court held, would "eviscerate the purpose of the statute," which was expressly designed to correct errors of payments.¹⁶¹

In the case of the obligations imposed by the juvenile code and the necessity of *Shelby*-style orders to give effect to the obligations and the juvenile code's statutory scheme, the most likely types of obligations that could require that circuit courts have the authority to issue *Shelby*-style orders are

156. *Id.* at 532, 970 S.W.2d at 233. Moreover, even the waiver of sovereign immunity recognized by the Arkansas Supreme Court is limited because the juvenile code also prescribes limitations on the family services that a court can order. For example, the juvenile code's definition of "family services" itself limits the services that a circuit court can order to only such services as are permitted through the definitions, terms, and purposes. *See supra* notes 130–46 and accompanying text. Likewise, section 9-27-335(b)(1) limits the "family services" waiver to only allow circuit courts to order family services that are provided through a provider of the Department's choosing. ARK. CODE ANN. § 9-27-335(b)(1). In sum, these and other limitations narrow the General Assembly's waiver of sovereign immunity.

157. *R.P.*, 333 Ark. at 532, 970 S.W.2d at 233.

158. *Weiss v. McLemore*, 371 Ark. 538, 541–44, 268 S.W.3d 897, 900–02 (2007).

159. *Id.*, 268 S.W.3d at 900–02.

160. *Id.* at 544, 268 S.W.3d at 902.

161. *Id.*, 268 S.W.3d at 902.

the Department's obligation to provide "services"¹⁶² and the circuit court's related power to order the Department to provide "family services" in certain child-welfare proceedings.¹⁶³ The *R.P.-McLemore* framework, however, indicates that the authority to issue *Shelby*-style orders is not required in order to give effect to either obligation. First, the only non-discretionary obligation is the Department's obligation to provide "family services" as ordered by the circuit court because all services that do not fall within the definition of "family services" are within the sole discretion of the Department to provide and are not subject to judicial coercion.¹⁶⁴ Second, at least four remedial mechanisms exist to give effect to the "family services" obligation and eliminate the need for a circuit court to have the authority to issue *Shelby*-style orders.

The first three remedial mechanisms are related to the requirement under federal and state law that the Department provide "reasonable efforts" in child-welfare proceedings and provide significant consequences if the Department fails to provide appropriate services sufficient to meet the "reasonable efforts" standard.¹⁶⁵ For example, the juvenile code provides that if a circuit court finds that the Department has not made "reasonable efforts" to provide services to prevent a juvenile's removal, the circuit court may dismiss the child-welfare proceeding outright, order family services to prevent the juvenile's removal from the home, or transfer custody of the juvenile to

162. See ARK. CODE ANN. § 9-28-103 (Supp. 2013) (providing that the Department must provide "services to dependent-neglected children and their families" and prevent the need to remove a maltreated juvenile from his or her home).

163. See *id.* § 9-27-303(25) (Supp. 2013) (defining "family services" in child-welfare proceedings); *id.* § 9-27-332(a)(1) (Supp. 2013) (authorizing circuit courts to order "family services" in family-in-need-of-services cases); *id.* § 9-27-334(a)(1) (Supp. 2013) (authorizing circuit courts to order "family services" in dependency-neglect cases); see also Ark. Dep't of Human Servs. v. R.P., 333 Ark. 516, 531-32, 970 S.W.2d 225, 232-33 (1998).

164. See *supra* note 154. In this way, the statutory dichotomy between the undefined "services" the Department is required to provide and the limited, narrowly defined "family services" that a circuit court is permitted to order is significant and does not defeat the juvenile code's statutory scheme as to services that do not fall within the definition of "family services" because the juvenile code specifically contemplates that the only services that are enforceable in child-welfare proceedings are "family services." Compare ARK. CODE ANN. § 9-27-332(a)(1), and *id.* § 9-27-334(a)(1), with *id.* § 9-28-103.

165. "Reasonable efforts" are defined by statute as the requirement that the Department "exercise reasonable diligence and care to utilize all available services related to meeting the needs of the juvenile and the family." *id.* § 9-27-303(48)(A)(iv). More specifically, "reasonable efforts" are required under state law in three circumstances in child-welfare proceedings: to prevent removal, to provide family services, and to finalize a permanency plan. See *e.g.*, *id.* § 9-27-303(48)(A)(i); *id.* § 9-27-328(b)(2), (c), (d), (f) (Supp. 2013); *id.* § 9-27-335(a)(2), (e)(1), (e)(2) (Supp. 2013); *id.* § 9-27-337(e)(1)(B)(i)(b) (Supp. 2013); *id.* § 9-27-338(d) (Supp. 2013). For the purposes of this subsection, however, the distinctions between the types of "reasonable efforts" are inconsequential.

the Department despite the lack of “reasonable efforts.”¹⁶⁶ Similarly, if a circuit court finds that the Department has not made “reasonable efforts” to prevent removal or “reasonable efforts” to reunify the family following removal of the juvenile, the circuit court may authorize or continue the juvenile’s removal and shall, in either case, note the Department’s failure on the record.¹⁶⁷ Finally, a failure by the Department to provide “reasonable efforts” in providing services renders any juvenile subject to a circuit court’s finding of “no reasonable efforts” ineligible for federal funding until a court enters a subsequent finding of “reasonable efforts,” which represents a significant incentive to provide appropriate services because federal funding can make up seventy-five cents out of every dollar spent on a juvenile in foster care.¹⁶⁸

The fourth remedial mechanism is the coercive power of the circuit court’s inherent contempt power, which is itself an exception to the Department’s sovereign immunity¹⁶⁹ and can be used to compel the Department to provide any family services that the circuit court may order in an open case before the circuit court. Indeed, a circuit court simply does not need to be able to issue *Shelby*-style orders to give effect to the Department’s obligation to provide “family services” as ordered by a circuit court because all a circuit court would need to do is simply order the Department to perform the given family service deemed by the circuit court to be appropriate and punish the Department if the Department fails to perform the service ordered. In these ways, the circuit court’s contempt power provides a meaningful remedial mechanism that gives sufficient effect to the juvenile code’s statutory scheme by punishing any failure by the Department to provide required “family services.”

By contrast, *R.P.* and *McLemore* both involved cases in which the lack of a sufficient remedial mechanism occurred outside of a court’s contempt authority and outside of an existing court case. In *R.P.*, for example, the Department was not yet a party to the family-in-need-of-services case in

166. *Id.* § 9-27-335(e)(2).

167. *See id.* § 9-27-328(d) (“When the court finds that the department’s preventive or reunification efforts have not been reasonable, but further preventive or reunification efforts could not permit the juvenile to remain safely at home, the court may authorize or continue the removal of the juvenile but shall note the failure by the department in the record of the case.”).

168. *See, e.g.*, Adoption Assistance and Child Welfare Act of 1980 §§ 423(a), 471(a)(15), 472(a)(2)(A), 42 U.S.C. 671 (2013); 45 C.F.R. § 1356.21(b), (d) (2014); U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, CHILD WELFARE POLICY MANUAL §§ 8.3A.5, 8.3A.9, 8.3A.9b, 8.3C.4 (2014), available at www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp_pf.jsp; *Gullick v. Ark. Dep’t of Human Servs.*, 326 Ark. 475, 477–78, 931 S.W.2d 786, 788 (1996) (finding that reasonable efforts findings are not mere formalities because of the impact on the availability of federal matching funds).

169. *See discussion infra* Part III.B.2.d.

which the circuit court had ordered the Department to provide adequate housing and utilities to the family in the case.¹⁷⁰ As a result of the Department's nonparty status, the Arkansas Supreme Court held that a juvenile court's authority in such circumstances would be meaningless unless the Department's sovereign immunity to such an order was waived.¹⁷¹ Similarly in *McLemore*, the waiver of the agency's sovereign immunity found by the Arkansas Supreme Court was based precisely on the fact that there was no ongoing case between the agency and the aggrieved retiree who had sued the state to correct the payments that the agency should have been making to the retiree.¹⁷² Absent a waiver to allow aggrieved retirees to initiate such actions, the Arkansas Supreme Court held, aggrieved retirees would be unable to compel the agency to correct errant payments that the agency was required to provide.¹⁷³ The Arkansas Supreme Court in both cases therefore held that the sovereign immunity of the agencies involved must be waived in order to provide a mechanism to compel the agencies' respective obligations.

The Department's other service-related obligations¹⁷⁴ also do not require that circuit courts have the authority to issue *Shelby*-style orders be-

170. Ark. Dep't of Human Servs. v. R.P., 333 Ark. 516, 531–32, 970 S.W.2d 225, 232–33 (1998).

171. *Id.*, 970 S.W.2d at 232–33.

172. Weiss v. McLemore, 371 Ark. 538, 541–44, 268 S.W.3d 897, 900–02 (2007).

173. *Id.*, 268 S.W.3d 897, 900–02.

174. See, e.g., ARK. CODE ANN. § 9-27-323(k) (Supp. 2013) (requiring the Department to “develop a statewide referral protocol for helping to coordinate the delivery of services to sexually exploited children”); *id.* § 9-27-335(d) (Supp. 2013) (providing that a juvenile may not be placed into the custody of any person unless a home study is performed by the Department or a licensed social worker approved to do home studies); *id.* § 9-27-353(a) (Supp. 2013) (requiring the Department “to care for and maintain [juveniles in the Department’s custody] and to see that the juvenile[s are] protected, properly trained and educated, and [have] the opportunity to learn a trade, occupation, or profession”); *id.* § 9-27-361(a) (Repl. 2009) (requiring the Department to file with the circuit court at least seven business days before a dependency-neglect review hearing a court report that has been distributed to all parties); *id.* § 9-27-361(b) (Repl. 2009) (requiring the Department to file with the circuit court at least seven business days before a dependency-neglect review hearing a permanency planning court report that has been distributed to all parties); *id.* §§ 9-27-363(b) (Supp. 2013), 9-28-114(b) (Supp. 2013) (requiring the Department to develop a transitional plan “with every juvenile in foster care not later than the juvenile’s seventeenth birthday or within ninety (90) days of entering a foster care program for juveniles who enter foster care at seventeen (17) years of age or older); *id.* §§ 9-27-363(c), (e)–(g) (Supp. 2013), 9-28-114(c), (e)–(g) (Supp. 2013) (requiring the Department to assist the juvenile in arranging for the juvenile’s medical, housing, financial, educational, and social needs and to provide to juveniles who reach eighteen years of age certain documents before closing the juvenile’s case); *id.* § 9-28-101 (Supp. 2013) (providing that “the state has a responsibility to protect children from abuse and neglect by providing services and supports that promote the safety, permanency, and well-being of the children and families of Arkansas”); *id.* §§ 9-28-105 (Supp. 2013), 9-28-108(c)(1) (Supp. 2013) (requiring the Department to give preference to adult relatives in

cause sufficient remedial mechanisms exist to address adequately any failure by the Department to perform its service obligations without having to have the circuit court assume control over the Department's internal operations. Indeed, although each of these numerous obligations imposes an obligation on the Department that may or may not be discretionary, the remedial mechanisms arising from the Department's "reasonable efforts" requirement and the circuit court's contempt power are sufficient and applicable¹⁷⁵ to give effect to each obligation by providing meaningful ways to coerce the Department to perform its service obligations and to punish the Department for

certain circumstances involving placement decisions); *id.* § 9-28-106 (Supp. 2013) (requiring the Department to give preference to religious considerations in certain circumstances involving placement decisions); *id.* § 9-28-108(c)(3) (Supp. 2013) (requiring the Department to inform any relative who inquires about being a placement resource for a juvenile about becoming a foster home and about obtaining custody); *id.* § 9-28-109(b) (Supp. 2013) (requiring the Department to conduct a staffing within forty-eight hours of a foster parent's request that a foster child be removed from the foster home); *id.* § 9-28-111 (Supp. 2013) (requiring the Department to develop a case plan for each dependency-neglect and family-in-need-of-service case in which the court places custody of a juvenile with the Department); *id.* §§ 9-28-112, -113(a)(2), (b) (Supp. 2013) (requiring the Department to work with a juvenile's school district to further the juvenile's best interests, provide notice to a juvenile's school district upon taking or receiving emergency custody of a juvenile, provide notice to a juvenile's school upon a change in the juvenile's placement, make educational decisions for juveniles in the Department's custody, work together with other educational resources to ensure continuity of educational services for juveniles in the Department's custody, immediately enroll a juvenile subject to a school enrollment change in the juvenile's new school, and provide all known information related to the health and safety of the juvenile being enrolled or the other children at the school); *id.* § 9-28-118 (Supp. 2013) (requiring the Department's caseworkers, supervisors, and area directors to have one hour of annual training on issues related to foster care placements).

175. *Id.* §§ 9-27-323(k), 9-28-118. The "reasonable efforts" remediation mechanisms are applicable because the Department's service-related obligations relate to the Department's service obligations, and the contempt-power remediation mechanism is applicable because each service-related obligation likely constitutes a limited waiver of the Department's sovereign immunity under *R.P.* and each obligation exists only in the context of an ongoing child-welfare proceeding. The only two exceptions are the juvenile code's requirements that the Department "develop a statewide referral protocol for helping to coordinate the delivery of services to sexually exploited children" and that certain Department employees receive specialized training in issues related to foster care placements. Nevertheless, neither of these provisions would necessarily require that a circuit court have the authority to order the Department to change the caseload of the Department's caseworker, compel the Department to modify the Department's staffing levels or allocations, or otherwise issue *Shelby*-style orders that direct the Department to "fix" problems as identified by a given circuit court. Moreover, a circuit court's contempt power could still be used to give effect to these provisions because the Department's failure to perform these obligations could be raised in a child-welfare proceeding, each obligation would likely constitute a waiver of the Department's sovereign immunity under *R.P.*, and a circuit court could order the Department to perform these obligations under pain of contempt.

failures to provide appropriate services to meet the Department's service-related obligations.

- b. The Department did not waive its sovereign immunity because the Department does not voluntarily seek relief in child-welfare proceedings

The Department does not waive its sovereign immunity to *Shelby*-style orders under the Moving Party Exception by filing or otherwise participating in child-welfare proceedings. Although a state agency usually is deemed to have waived its sovereign immunity when it files a lawsuit to seek affirmative, specific relief,¹⁷⁶ Arkansas's appellate courts have held that a state agency does not waive its sovereign immunity if the agency is required to file a lawsuit and participate in the case.¹⁷⁷

This exception to the exception was expressly recognized in the case of child-welfare proceedings in *Arkansas Department of Human Services v. State* where the Arkansas Supreme Court held that the Department did not voluntarily waive its sovereign immunity to orders not expressly sanctioned by the juvenile code because the Department was required to initiate and appear in child-welfare proceedings due to the juvenile code's mandate that the Department obtain custody of juveniles in dependency-neglect proceedings and appear in juvenile proceedings.¹⁷⁸ The lack of voluntariness arising from the Department's statutory obligation, the Arkansas Supreme Court held, was dispositive.¹⁷⁹

The Department therefore does not waive its sovereign immunity to *Shelby*-style orders by merely filing and participating in the child-welfare proceedings that the *Shelby* Doctrine purports to control precisely because the Department is required by law to do so in order to fulfill the Department's statutory obligation to protect juveniles. And as observed previously,

176. See, e.g., *Ark. Game & Fish Comm'n v. Lindsey*, 299 Ark. 249, 251, 771 S.W.2d 769, 770 (1989); *Ark. Game & Fish Comm'n v. Parker*, 248 Ark. 526, 528–30, 453 S.W.2d 30, 32 (1970).

177. See, e.g., *Ark. Dep't of Human Servs. v. State*, 312 Ark. 481, 488–89, 850 S.W.2d 847, 851 (1993); cf. *Lindsey*, 299 Ark. at 251, 771 S.W.2d at 770 (providing that a state agency had voluntarily waived sovereign immunity by entering an appearance and seeking affirmative relief where it had no obligation to do so) (citing *Ark. Game & Fish Comm'n v. Lindsey*, 292 Ark. 314, 319–20, 730 S.W.2d 474, 478 (1987)).

178. *State*, 312 Ark. at 488–89, 850 S.W.2d at 851.

179. See *id.*, 850 S.W.2d at 851. The Arkansas Supreme Court and the Arkansas Court of Appeals have repeatedly cited *State* favorably. In *Kiesling-Daugherty v. State*, for example, the Arkansas Supreme Court applied *State*'s voluntary waiver requirement to the Office of the Attorney General of Arkansas in denying a motion for costs on appeal against the Office because the Office was required to be involved in the case at issue and therefore did not voluntarily waive its sovereign immunity. 2013 Ark. 281, at 3–4, 2013 WL 3322335, at *3–4.

the General Assembly's decision to require the Department to file and participate in child-welfare proceedings also does not act to waive the Department's sovereign immunity.

- c. The Department cannot be compelled to perform non-ministerial actions required by statute, and *Shelby*-style orders do not enjoin improper actions by the Department

The Department's sovereign immunity to *Shelby*-style orders is not overcome by the Ministerial Exception, which provides that an agency's sovereign immunity may be overcome if the agency is not performing a ministerial action that the agency is required to perform by statute or if the agency is acting improperly.¹⁸⁰ As described below, *Shelby*-style orders exceed the scope of the Ministerial Exception because such orders compel the Department to perform actions that the Department is not required to perform by statute and mandate the internal operations of a state executive agency at the direction of the circuit court. *Shelby*-style orders also arguably do not enjoin the Department from performing illegal actions.

The scope of the Ministerial Exception is limited to two applications. The first limited application is that circuit courts acting through the Ministerial Exception may only mandate a state agency to perform a purely ministerial action that the agency is required to perform by statute ("the Compel Action Application").¹⁸¹ But the Ministerial Exception does not permit a circuit court to order an agency to perform any action under this application unless the action is one that a state officer or employee must perform in a specific manner prescribed by law without any discretion as to how or under what circumstances the action is to be performed.¹⁸² By contrast, the Ministerial Exception does not apply to discretionary actions within the authority of the executive branch that involve "the exercise of reason in the adaptation of means to an end and discretion in determining how or whether an act

180. See, e.g., *LandsnPulaski, LLC v. Ark. Dep't. of Corr.*, 372 Ark. 40, 43, 269 S.W.3d 793, 795 (2007) ("If the state agency is acting illegally or if a state agency officer refuses to do a purely ministerial action required by statute, an action against the agency or officer is not prohibited.").

181. *Id.*, 269 S.W.3d at 795.

182. *Pitock v. State*, 91 Ark. 527, 547, 121 S.W. 742, 750 (1909) (Wood, J., concurring) (defining a ministerial act as an action that "an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act done"). Other jurisdictions have long held similar definitions. See, e.g., *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498 (1866) ("A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in regard to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.").

should be done or course pursued.”¹⁸³ The second limited application is that circuit courts acting through the Ministerial Exception may only enjoin a state agency from acting illegally, beyond the authority of the agency, or otherwise arbitrarily, capriciously, in bad faith, or in a wantonly injurious manner (“the Enjoin Action Application”).¹⁸⁴ But even if an agency’s action is illegal, beyond the authority of the agency, or otherwise arbitrary, capricious, in bad faith, or in a wantonly injurious manner, the only remedy available to the circuit court to address the improper action is to enjoin the agency from performing that action.

The Ministerial Exception therefore does not allow the *Shelby* Doctrine to overcome the Department’s sovereign immunity because *Shelby*-style orders do not satisfy the elements of either of the Ministerial Exception’s two limited applications. In the case of the Compel Action Application, *Shelby*-style orders do not satisfy the Compel Action Application’s two requirements. First, *Shelby*-style orders effectively seek to compel the Department to reduce a caseworker’s caseload or otherwise dictate the Department’s internal operations in child-welfare cases—none of which the Department is required to do by statute. Put another way, the Ministerial Exception did not cover the circuit court’s order in *Shelby* even though the Department was required by statute to create a case plan because the Department was not required to do what the circuit court effectively ordered, to wit, to reduce a caseworker’s caseload or otherwise comport the Department’s internal staffing operations to a statutory requirement. Second, there appears to be no question that the management of the Department’s staffing operations is a discretionary action within the exclusive province of the Department as a state executive agency. Indeed, the Arkansas Supreme Court itself recognized in *Shelby* that “the circuit court is generally without jurisdiction to judicially review the discretionary functions of the executive branch of government” and that staffing operations are a discretionary function of the Department that circuit courts do not have the authority to manage.¹⁸⁵ Moreover, even if the court in *Shelby* had ordered the Department to prepare a case plan directly, such an order would arguably not fall within the

183. *Murray v. Leyschock*, 915 F.2d 1196, 1199 (8th Cir. 1990).

184. *Ark. Lottery Comm’n v. Alpha Mktg.*, 2013 Ark. 232, at 7, 428 S.W.3d 415, 420 (providing that the exceptions to sovereign immunity for unconstitutional, ultra vires, arbitrary, capricious, and bad-faith acts are limited to injunctive relief only); *Ark. Dep’t of Env’tl. Quality v. Oil Producers of Ark.*, 2009 Ark. 297, at 6–7, 318 S.W.3d 570, 573–74 (2009); *Ark. Tech. Univ. v. Link*, 341 Ark. 495, 507, 17 S.W.3d 809, 816 (2000); *Ark. Game & Fish Comm’n v. Lindsey*, 299 Ark. 249, 252, 771 S.W.2d 769, 771 (1989) (citing *Ark. State Game & Fish Comm’n v. Eubank*, 256 Ark. 930, 512 S.W.2d 540 (1974)); *Ark. Game & Fish Comm’n v. Lindsey*, 292 Ark. 314, 319–20, 730 S.W.2d 474, 478 (1987).

185. *Ark. Dep’t of Human Servs. v. Shelby*, 2012 Ark. 54, at 5, 2012 WL 401615, at *5 (concluding that the circuit court was not attempting to control discretionary staffing issues impermissibly).

Compel Action Application because preparing a case plan is not a merely ministerial action, but rather requires the exercise of considerable discretion in the Department's primary expertise in child-welfare proceedings, social work.

Likewise, *Shelby*-style orders do not satisfy both elements of the Enjoin Action Application because such orders do not actually direct the Department to stop acting illegally.¹⁸⁶ Rather, *Shelby*-style orders direct the Department to affirmatively "fix" problems identified by a court by taking certain actions. Thus, although the order in *Shelby* did seek to stop the Department from acting illegally in so far as the Department did not comply with the juvenile code's requirement that the Department prepare a case plan, *Shelby*-style orders exceed the scope of the Enjoin Action Application because such orders purport to authorize a remedy other than the only remedy authorized under the Enjoin Action Application: the injunction of a specific, illegal action being performed by a state agency.

- d. The *Shelby* Doctrine does not invoke a circuit court's inherent contempt powers

The Department's sovereign immunity relative to the *Shelby* Doctrine is not overcome by a circuit court's inherent contempt power because the *Shelby* Doctrine simply does not rely on the circuit court's contempt power. Without question, circuit courts have a broad, inherent authority¹⁸⁷ to compel compliance with court orders and to punish for noncompliance of those orders.¹⁸⁸ Indeed, Arkansas courts have long recognized the judiciary's contempt power as an exception to the sovereign-immunity doctrine that could be used to compel a state agency like the Department to obey a court order or to punish the Department for failing to obey a court order where the coer-

186. See *infra* note 194 and accompanying text.

187. The Arkansas Supreme Court interprets the contempt power extremely broadly and does not recognize limitations on its authority to punish contempt set by statute by the General Assembly even though the General Assembly is empowered to regulate the punishment of indirect contempt. ARK. CONST. art. 7, § 26 (permitting the General Assembly to regulate the punishment of indirect contempt but not direct contempt or indirect contempt from the disobedience of "process"); *Ivy v. Keith*, 351 Ark. 269, 279, 92 S.W.3d 671, 677 (2002) (interpreting statutory limits to be supplemental to a court's authority and not as a limitation on the courts authority because "process" includes the disobedience of any order or similar mandate, whether made in writing or verbally); *Ark. Dep't of Human Servs. v. State*, 312 Ark. 481, 487-88, 850 S.W.2d 847, 851 (1993) ("The power to punish for contempt is an inherent power of the court.").

188. Arkansas courts also have the clear authority to punish for willful misconduct committed before the given court that threatens the orderly procedure of the court or reflects upon the court's integrity and that is separate from the disobedience of a court order. See, e.g., *Ivy*, 351 Ark. at 278-79, 92 S.W.3d at 676-77; *Johnson v. Johnson*, 343 Ark. 186, 197, 33 S.W.3d 492, 499 (2000).

cion of the state agency arises from the court's contempt powers.¹⁸⁹ The *Shelby* Doctrine, however, does not invoke a circuit court's contempt power as the source of a circuit court's authority to enter *Shelby*-style orders. Consequently, the *Shelby* Doctrine does not benefit from the exception to sovereign immunity arising from the contempt power and circuit courts could not justify *Shelby*-style orders based solely on a circuit court's contempt power.

Nevertheless, even if the circuit court in *Shelby* had relied on the court's contempt power, the circuit court could still not have issued *Shelby*-style orders as a sanction for contempt because the contempt power only enforces jurisdiction; it does not create jurisdiction and is subject to constitutional and jurisdictional limitations that preclude the application of the contempt power in the context of *Shelby*-style orders.¹⁹⁰ Arkansas courts have recognized that a court may punish the disobedience of a court order only where that court had the jurisdiction to enter the order.¹⁹¹ Likewise, a court may not impose sanctions in contempt situations that the court does

189. See, e.g., *Ark. Dep't of Health & Human Servs. v. Briley*, 366 Ark. 496, 498–501, 505, 237 S.W.3d 7, 9–11, 13 (2006); *Ark. Dep't of Human Servs. v. R.P.*, 333 Ark. 516, 531–32, 970 S.W.2d 225, 232–33 (1998); *State*, 312 Ark. at 487–88, 850 S.W.2d at 851 (recognizing that trial courts “must have the authority to control the parties and other persons before it” and that this control is effected in the context of the trial court's contempt power); *Ark. Dep't of Human Servs. v. Clark*, 305 Ark. 561, 563–66, 810 S.W.2d 331, 331–34 (1991) (providing that the contempt power is necessary for the purpose of enforcing its orders and ensuring that a party does not disregard orders in the future by having a consequence for failing to comply with the trial court's order); *Ark. Dep't of Human Servs. v. Gruber*, 39 Ark. App. 112, 115–16, 839 S.W.2d 543, 544–45 (1992).

190. See, e.g., *Bennett v. Collier*, 351 Ark. 447, 451–52, 95 S.W.3d 782, 784–85 (2003) (holding that a party in a child-welfare proceeding could not be held in contempt after the court had terminated that party's parental rights to the given juvenile because the court lost jurisdiction of that party after the termination proceedings ended); *Gould v. Gould*, 308 Ark. 213, 217, 823 S.W.2d 890, 893 (1992) (providing that a court has the authority to “enforce an order to compel conduct, even if it is an order to pay money, by the contempt power” in the context of collecting past due child support arrearages, but that contempt power remains subject to the limitations imposed by article 2, section 16 of the Arkansas Constitution); *Criswell v. Office of Child Support Enforcement*, 2014 Ark. App. 309, at 8, 436 S.W.3d 152, 157 (holding that a circuit court lacked jurisdiction to hold a party in contempt where that party was never properly served in the case); *Black v. State*, 2010 Ark. App. 788, at 3, 2010 WL 4880682, at *3; *Brock v. Eubanks*, 102 Ark. App. 165, 168–69, 288 S.W.3d 272, 275 (2008) (holding that a court may not vest with another party the court's power and authority to determine compliance with a court order).

191. *Hilton Hilltop, Inc. v. Riviere*, 268 Ark. 532, 534, 597 S.W.2d 596, 597 (1980) (“Disobedience of any valid judgment, order, or decree of a court having jurisdiction to enter it may constitute contempt.”); *Black*, 2010 Ark. App. 788, at 3, 2010 WL 4880682, at *3 (citing *White v. Taylor*, 19 Ark. App. 104, 717 S.W.2d 497 (1986)) (recognizing that the contempt power “must be premised on the disobedience of a valid order of a court having jurisdiction to enter it”).

not have the jurisdiction to impose.¹⁹² This contempt power therefore does not give a circuit court *carte blanche* to enter whatever order it may feel is needed in a case, nor does it allow a circuit court to use the Department's failure to comply with a court order to trigger additional jurisdiction over the Department or otherwise allow that circuit court to order the Department to do something that is beyond the circuit court's jurisdiction to order.

Given these principles, it seems clear that a circuit court could not use its contempt powers to issue *Shelby*-style orders—either as an order in the first instance or as a sanction for a failure to comply with a previous order—because circuit courts lack the jurisdiction necessary to enter *Shelby*-style orders, and such orders violate the Department's sovereign immunity.¹⁹³ Put another way, although a circuit court could order the Department to perform something the juvenile code requires the Department to do and then rely on the circuit court's contempt power to hold the Department in contempt for failure to comply with that order, a circuit court must not exceed its jurisdiction when doing so.¹⁹⁴

The counterargument to this conclusion arises from the legions of cases that state that the contempt power can be used to “protect the rights of litigants.” The majority in *Shelby* arguably cited this basis for the circuit court's authority to protect the rights of juveniles and other litigants as direct and sufficient support for its holdings.¹⁹⁵ And even though the majority in *Shelby* did not cite specifically to contempt as the basis for such authority, Chief Justice Hannah expressly references in his dissent in *Arkansas Department of Health and Human Services v. Briley*—the first apparent formu-

192. *Bates v. McNeil*, 318 Ark. 764, 768–70, 888 S.W.2d 642, 645–46 (1994) (holding that a trial court improperly imposed sanctions related to contempt because the trial court did not have the jurisdiction to order the alleged contemnor into custody before the hearing to show cause and that such actions were unconstitutional as a violation of due process); *Ex Parte Burton*, 237 Ark. 441, 442–45, 373 S.W.2d 409, 409–11 (1963) (holding that a court could not punish a lawyer with incarceration and disbarment because the court lacked the jurisdiction to do so where the lawyer's conduct was not determined to be contemptuous and the court lacked the authority to disbar the lawyer).

193. *See supra* Parts III.A, III.B.1, III.B.2.a–c.

194. *Ark. Dep't of Human Servs. v. Shelby*, 2012 Ark. 54, at 6–7, 2012 WL 401615, at *6–7 (Danielson, J., dissenting) (citing *Ark. Dep't of Human Servs. v. Denmon*, 2009 Ark. 485, 346 S.W.3d 283) (observing that although the circuit court in *Shelby* could have ordered the Department to prepare the case for a permanency planning hearing and then punished the Department if the Department did not follow that order, the “circuit court must be careful not to exceed its jurisdiction when issuing these orders”).

195. *Id.* at 3–4, 2012 WL 401615, at *3–4. Specifically, the majority in *Shelby* referenced the need to protect the rights of juveniles and other litigants based on the circuit court's jurisdiction over juveniles in equity as well as the circuit court's Inherent Protection Power. *Id.*, 2012 WL 401615, at *3–4.

lation of the *Shelby* Doctrine concept—three contempt cases as justification for the circuit court to enter a *Shelby*-style order in that case.¹⁹⁶

A further review of the contempt power and its requirements,¹⁹⁷ however, indicates that the authority to “protect the rights of litigants” through the contempt power is limited and does not afford circuit courts with the authority to issue *Shelby*-style orders. This authority to “protect the rights of litigants” exists only in the context of a civil contempt sanction that seeks to enforce the rights of a litigant by compelling obedience to orders made for the benefit of that litigant.¹⁹⁸ In this way, the “rights of litigants” contemplated under the contempt power are simply the rights of parties in litigation to receive the benefit and enforcement of court orders imposed in the parties’ individual cases. Thus, the contempt power could not be used to impose a *Shelby*-style order as a sanction to “protect the rights of litigants” precisely because the civil contempt power is predicated on the enforcement of a prior court order; it is not a mechanism by which a court protects a party’s rights directly.

Moreover, none of the contempt cases cited by Chief Justice Hannah in *Briley* provide a sufficient jurisdictional basis for a circuit court to enter a *Shelby*-style order because the trial court in each case had the jurisdiction to enter the orders and sanctions at issue, and none of the cases recognize a separate jurisdictional basis arising through the contempt power. For example, the trial court in *Arkansas Department of Human Services v. R.P.* had the authority to sanction the Department’s representative with incarceration for the representative’s refusal to comply with the court’s valid and then-

196. *Ark. Dep’t of Health & Human Servs. v. Briley*, 366 Ark. 496, 507, 237 S.W.3d 7, 15 (2006) (citing *Ark. Dep’t of Human Servs. v. R.P.*, 333 Ark. 516, 970 S.W.2d 225 (1998); *Ark. Dep’t of Human Servs. v. Gruber*, 39 Ark. App. 112, 839 S.W.2d 543 (1992); *Hart v. McChristian*, 344 Ark. 656, 42 S.W.3d 552 (2001)).

197. The law and practice of contempt is extraordinarily broad, particularly with respect to the nature of the contempt power and the limitations that prescribe when and under what circumstances the contempt power can be employed. *See generally* Terry Crabtree, *Contempt Law in Arkansas*, 51 ARK. L. REV. 1, 2–16 (1998). Fortunately, the only limitation relevant to the analysis of *Shelby*-style orders in this article relate to civil, indirect contempt arising out of the disobedience of a court order, specifically, the requirement that civil contempt sanctions must be for the benefit of a party before the court. *Briley*, 366 Ark. at 499–501, 504–05, 237 S.W.3d at 9–10, 13.

198. *Omni Holding & Dev. Corp. v. 3D.S.A., Inc.*, 356 Ark. 440, 448–49, 454, 156 S.W.3d 228, 234–35, 238 (2004) (providing that civil contempt preserves and enforces the rights of private parties and coerces compliance with an order of the court); *Hart*, 344 Ark. at 670, 42 S.W.3d at 562 (observing that a court’s contempt power may be wielded “to preserve the court’s power and dignity, to punish disobedience of the court’s orders, and to preserve and enforce the parties’ rights,” and that civil contempt sanctions “are to preserve and enforce the rights of private parties to suits and to compel obedience to orders made for the benefit of those parties”); *R.P.*, 333 Ark. at 534 n.2, 970 S.W.2d at 234 (“[C]ivil contempt proceedings are instituted to preserve and enforce the rights of private parties to suits and to compel obedience to orders made for the benefit of those parties.”).

unchallenged order for the Department to pay to restore utilities in a child-welfare proceeding because trial courts may impose criminal penalties such as imprisonment for disobedience of court orders¹⁹⁹ and the trial court's specific, statutory jurisdiction to order the Department to provide cash assistance as a "family service" in the child-welfare proceeding before the trial court.²⁰⁰ Likewise, the trial court in *Arkansas Department of Human Services v. Gruber* had the authority to punitively fine the Department \$150 for the failure of a specific representative of the Department to appear at a juvenile delinquency hearing regarding the placement of a juvenile because trial courts may impose criminal penalties, including fines, for disobedience of court orders²⁰¹ and trial courts have the authority to order non-parties like the Department's representative to appear—even though neither the Department nor the representative was a party to the case—where that nonparty was physically present before the trial court when it ordered the representative to appear at the next hearing.²⁰² Finally, the trial court in *Hart v. McChristian* had the authority to sanction a litigant with the full cost of arbitration between the parties where that litigant violated the trial court's valid and then-unchallenged court order to transfer certain assets to a receiver and not to interfere with the receiver because trial courts may impose such remedial civil penalties for the disobedience of court orders and there was no allegation that the trial court lacked the authority to order parties to transfer assets and not interfere with a receiver.²⁰³

Nevertheless, the nature of the contempt power does leave open the possibility that a circuit court may enter a *Shelby*-style order as a valid civil sanction if the sanction would be for the benefit of one or more of the specific parties before a court in a child-welfare procedure.²⁰⁴ Perhaps the most relevant case on this point is *Briley*, with the majority holding that a circuit

199. See, e.g., *R.P.*, 333 Ark. at 540–41, 970 S.W.2d at 237; *Crabtree*, *supra* note 197, at 1, 4–7 & nn.18–37.

200. *R.P.*, 333 Ark. at 529–32, 970 S.W.2d at 231–33.

201. See, e.g., *Gruber*, 39 Ark. App. at 114–16, 839 S.W.2d at 544–45 (1992); *Omni Holding*, 356 Ark. at 448–49, 454, 156 S.W.3d at 234–35, 238 (discussing the ability of courts to impose fines); *Crabtree*, *supra* note 197, at 4–7 & nn.18–37.

202. *Gruber*, 39 Ark. App. at 115–16, 839 S.W.2d at 544–45 (citing *Gatlin v. Gatlin*, 306 Ark. 146, 811 S.W.2d 761 (1991); *Hilton Hilltop, Inc. v. Riviere*, 268 Ark. 532, 597 S.W.2d 596 (1980); *Dennison v. Mobley*, 257 Ark. 216, 515 S.W.2d 215 (1974)).

203. See, e.g., *Omni Holding*, 356 Ark. at 448–49, 454, 156 S.W.3d at 234–35, 238; *Hart*, 344 Ark. at 670, 42 S.W.3d at 562; *Crabtree*, *supra* note 197, at 4–7 & nn.18–37.

204. See, e.g., *Ark. Dep't of Health & Human Servs. v. Briley*, 366 Ark. 496, 498–501, 505, 237 S.W.3d 7, 9–11, 13 (2006) (citing *Johnson v. Johnson*, 343 Ark. 186, 33 S.W.3d 492 (2000)) ("Civil contempt is instituted to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of those parties."); see *Hart*, 344 Ark. at 670, 42 S.W.3d at 562 ("The purposes of civil contempt are to preserve and enforce the rights of private parties to suits and to compel obedience to orders made for the benefit of those parties.").

court could not order the Department to prepare a “written methodology for responding to future staffing issues”—but only because such an order would not benefit the parent in that case given that the parent’s case had been closed.²⁰⁵ Although the majority arguably rejected the extensive authority asserted in Chief Justice Hannah’s dissent by finding that the written-methodology sanction was not appropriate, the majority’s sole reliance on the lack of benefit to the parent suggests that it might have ruled differently had the parent still been a party.

The Arkansas Supreme Court may therefore find that a *Shelby*-style order could be an appropriate sanction—but only if the circuit court has the jurisdiction to enter such an order. This article now turns to the only jurisdictional basis that has not been addressed—and rejected—thus far: the Inherent Protection Power.

3. *The Inherent Protection Power Does Not Overcome a State Agency’s Sovereign Immunity*

The *Shelby* Doctrine and all *Shelby*-style orders that coerce the Department to act are invalid under the sovereign immunity doctrine despite the broad Inherent Protection Power asserted in *Shelby*. The Inherent Protection Power, however, has never been recognized as an exception to any state agency’s sovereign immunity.²⁰⁶ The only way for the *Shelby* Doctrine’s assertion of the Inherent Protection Power to overcome the sovereign immunity of a state agency like the Department would therefore be if a court were to interpret the Inherent Protection Power as constituting a new exception to sovereign immunity.

The *Shelby* Doctrine’s assertion of the Inherent Protection Power, however, should not be recognized as a new exception to the Department’s sovereign immunity in child-welfare proceedings. First, the *Shelby* Doctrine’s assertion of the Inherent Protection Power lacks sufficient support from Arkansas law to constitute a new exception to the Department’s sovereign immunity. Second, the judiciary lacks a constitutionally sufficient role in child-welfare proceedings that would otherwise support the *Shelby* Doctrine’s application of the Inherent Protection Power as a new exception to the Department’s sovereign immunity.

205. See *Briley*, 366 Ark. at 505, 237 S.W.3d at 13.

206. See *supra* Part III.B.2.

- a. The Inherent Protection Power asserted under the *Shelby* Doctrine is contrary to Arkansas law and does not constitute a new exception to the Department's sovereign immunity

The Inherent Protection Power as asserted by the *Shelby* Doctrine should not be interpreted as constituting a new exception to the Department's sovereign immunity because the actual inherent power invoked by the *Shelby* Doctrine under *City of Fayetteville v. Edmark* relates only to the procedural authority of courts to conduct proceedings and control court operations and records ("the Inherent Procedural Power") and would therefore not be sufficient to overcome the Department's sovereign immunity related to the Department's internal operations. Further, a careful review of the *Shelby* Doctrine's progenitor in *Arkansas Department of Human Services v. Briley* and long-standing precedent highlights the limited application of a subcategory of the Inherent Procedural Power to a court's ability to compel a nonjudicial governmental entity to take certain actions necessary for the court to operate and does not extend to a circuit court's authority to enter *Shelby*-style orders. Yet even this type of the Inherent Procedural Power is limited and would not provide the exception to the Department's sovereign immunity that would be necessary for a court to enter *Shelby*-style orders.

The *Shelby* Doctrine, however, sets out the Inherent Protection Power broadly as the "inherent authority" of a circuit court to protect the integrity of its proceedings and safeguard litigants appearing before it such that a circuit court may compel the Department to fulfill the Department's obligations under the juvenile code and "correct problems that were preventing work and services [from being performed by the Department]."²⁰⁷ This invocation of the Inherent Protection Power, however, is relatively new and underdeveloped analytically, with the *Shelby* majority citing only one case to support it, namely, *City of Fayetteville v. Edmark*, which is a 1990 Arkansas Supreme Court case that held that attorney work product was subject to the Freedom of Information Act (FOIA) absent the application of an exception such as a valid protective order.²⁰⁸

The *Shelby* majority's reliance on *Edmark* is misplaced because the "inherent authority" described in *Edmark* related only to the ability of trial courts to enter protective orders related to FOIA disclosures and to protect a litigant's constitutional fair trial rights.²⁰⁹ And even though dicta in *Edmark*

207. Ark. Dep't of Human Servs. v. *Shelby*, 2012 Ark. 54, at 3–5, 2012 WL 401615, at *3–5.

208. *City of Fayetteville v. Edmark*, 304 Ark. 179, 191–95, 801 S.W.2d 275, 281–83 (1990).

209. See *id.*, 801 S.W.2d at 281–83. Specifically, the *Edmark* court stated that "[a] trial court has the inherent authority to protect the integrity of the court in actions pending before it and may issue appropriate protective orders that would provide FOIA exemption[s] . . . and

more broadly related to protecting the “integrity of the court” and a litigant’s fair trial rights, *Edmark* itself simply does not support a broad “inherent” control over parties such as the control that the *Shelby* Doctrine expressly contemplates. Rather, *Edmark* was specific to the control over the parties expressly provided by statute under FOIA related to the disclosure or non-disclosure of public records.²¹⁰ Moreover, the “inherent authority” relied on in *Edmark* was limited in so far as the court found that a court in a FOIA action—apparently notwithstanding the court’s own “inherent authority” and the request for protection from the parties before the court—did not have the authority to enter a protective order binding on another court with pending litigation related to the FOIA disclosure.²¹¹

The authorities relied on by *Edmark* and other invocations of a court’s “inherent authority” also support the conclusion that the “inherent authority” contemplated by *Edmark* was limited and did not include broad control of parties appearing before the court. For example, although the *Edmark* court cited *Arkansas Newspaper, Inc. v. Patterson* as support for the “inherent authority to secure the fair trial rights of litigants before it,”²¹² *Patterson* only related to fair trial rights granted to litigants under the United States Constitution and the Arkansas Supreme Court’s determination that a court did not have the authority to close the pretrial hearings in the criminal matter at bar because the appropriate constitutional test was not satisfied.²¹³ Like-

always has the inherent authority to secure the fair trial rights of litigants before it.” *Id.* at 191, 194, 801 S.W.2d at 281, 283. The *Edmark* court also referenced, without supporting authority, the “inherent power of a trial court to control actions pending before it.” *Id.* at 194, 801 S.W.2d at 283. The issues in *Edmark*, however, did not pertain to protecting the integrity of the trial court or controlling the action before the trial court, but rather only related to protective orders and protecting the fair trial rights of the litigants, including the litigation rights of the City of Fayetteville under FOIA. *See id.* at 191–94, 801 S.W.2d at 281–83.

210. *Id.* at 191, 194, 801 S.W.2d at 281, 283. Furthermore, the *Edmark* court’s separate reference to “the inherent power of a trial court to control actions pending before it” does not change the limited scope of the “inherent authority” described in *Edmark* because *Edmark* did not involve controlling actions or parties appearing before the trial other than the disclosure or nondisclosure of records under FOIA. *Id.* at 194–95, 801 S.W.2d at 283. The interpretation of *Edmark* by later appellate decisions in Arkansas also bears out the limited nature of *Edmark*’s “inherent authority.” *See, e.g.,* *Ward v. State*, 369 Ark. 313, 313, 253 S.W.3d 927, 927 (2007) (providing that “the inherent authority of the trial court to control court records . . . is not absolute”); *Ark. Dep’t of Human Servs. v. Hardy*, 316 Ark. 119, 124, 871 S.W.2d 352, 355 (1994) (describing the “inherent authority” recognized in *Edmark* as the “authority of a trial court to issue appropriate protective orders to control court records” and noting that this “inherent authority” has limitations).

211. *See Edmark*, 304 Ark. at 191, 801 S.W.2d at 281; *cf. Hardy*, 316 Ark. at 124, 871 S.W.2d at 355.

212. *Edmark*, 304 Ark. at 194, 801 S.W.2d at 283.

213. *Ark. Newspaper, Inc. v. Patterson*, 281 Ark. 213, 214, 662 S.W.2d 826, 827 (1984). Specifically, *Patterson* addressed the application of a state law that provided all state courts

wise, other Arkansas courts have relied on the procedural nature of a court's inherent power to ensure "an orderly, efficient[,] and effective administration of justice,"²¹⁴ control court records,²¹⁵ enforce its orders,²¹⁶ stay an appeal pending further proceedings,²¹⁷ adopt rules of evidence,²¹⁸ adopt rules of procedure,²¹⁹ order remittitur,²²⁰ correct and modify its own judgments,²²¹ address issues incidental to criminal law,²²² appoint a special prosecutor when the prosecuting attorney is implicated in a crime,²²³ establish guidance for court clerks,²²⁴ and direct the manner in which a jury should be selected and summoned.²²⁵

Moreover, only one appellate opinion in Arkansas has ever concluded that *Edmark* represents the broad power over litigants contemplated in *Shelby*—and that was Chief Justice Hannah's previous dissent in *Briley*, which is addressed below separately. Indeed, out of the twenty-five other appellate court opinions that have cited to *Edmark*, other than *Shelby* and Chief Justice Hannah's dissent in *Briley*, no opinion has asserted anything beyond the procedural authority of courts to conduct proceedings and control court operations and records.²²⁶ For example, the Arkansas Supreme Court cited

shall be public and the First Amendment with a criminal defendant's Sixth Amendment rights related to a fair trial. *See id.*, 662 S.W.2d at 827.

214. *Burns v. State*, 300 Ark. 469, 472, 780 S.W.2d 23, 24 (1989); *Coakes v. State*, 2014 Ark. App. 298, at 5 n.1, 2014 WL 2011804, at *5 ("The right to counsel of one's choice is not absolute and may not be used to frustrate the inherent power of the court to command an orderly, efficient, and effective administration of justice.").

215. *Ward v. State*, 2013 Ark. 250, at 3, 2013 WL 2460209, at *3 ("We have recognized the inherent authority of the trial court to control court records."); *Ward*, 369 Ark. at 313, 253 S.W.3d at 927; *Hardy*, 316 Ark. at 123–24, 871 S.W.2d at 355–56.

216. *Kelley v. Hobbs*, 2012 Ark. 402, at 1 n.1, 424 S.W.3d 295, 296 (citing *Ark. Dep't of Human Servs. v. Clark*, 305 Ark. 561, 810 S.W.2d 331 (1991)).

217. *Stratton v. Stratton*, 2014 Ark. App. 292, at 4–5, 2014 WL 1856706, at *4–5 (citing *Clements v. State*, 306 Ark. 596, 817 S.W.2d 194 (1991)).

218. *Ricarte v. State*, 290 Ark. 100, 104–05, 717 S.W.2d 488, 489–90 (1986).

219. *Miller v. State*, 262 Ark. 223, 226, 555 S.W.2d 563, 564 (1977).

220. *Martin v. Rieger*, 289 Ark. 292, 297, 711 S.W.2d 776, 778 (1986).

221. *Blissard Mgm't & Realty, Inc. v. Kremer*, 284 Ark. 136, 139, 680 S.W.2d 694, 696 (1984) (citing *Massengale v. Johnson*, 269 Ark. 269, 599 S.W.2d 743 (1980)); *Cooper v. Cooper*, 2013 Ark. App. 748, at 10, 431 S.W.3d 349, 355 (citing *Harrison v. Bradford*, 9 Ark. App. 156, 655 S.W.2d 466 (1983)).

222. *Schock v. Thomas*, 274 Ark. 493, 498, 625 S.W.2d 521, 523 (1981).

223. *Weems v. Anderson*, 257 Ark. 376, 380–81, 516 S.W.2d 895, 898 (1974).

224. *Christy v. Speer*, 210 Ark. 756, 758, 197 S.W.2d 466, 467 (1946) (noting that courts have the "inherent power to make such rules, not in conflict with the constitution or any valid statute, as the court may deem necessary for the prompt and efficient handling of matters before it").

225. *Norrid v. State*, 188 Ark 32, 32, 63 S.W.2d 526, 527 (1933).

226. In addition to the cases that cite *Edmark* directly, at least 469 Arkansas cases cite to some form of "inherent authority" or "inherent power" at the time of this writing according to the FastCase research system. This article, however, does not purport to have exhaustively

Edmark in *Broussard v. Saint Edward Mercy Health System* regarding the authority of a court to decide who may testify and under what conditions,²²⁷ as well as in *Valley v. Phillips County Election Commission* as support for a circuit court disqualifying an attorney from representing a client in a case before the court.²²⁸ The Arkansas Supreme Court also cited *Edmark* in *Ward v. State* and *Arkansas Department of Human Services v. Hardy* for the authority of a court to control court records and seal portions of the record,²²⁹ as did Justice Karen Baker in her dissent in *McNair v. Johnson* related to sealing court records²³⁰ and in her opinion in *Reid v. Frazee* related to the authority of a trial court to schedule an additional hearing after an adoption hearing but before entry of its adoption decree in order to obtain the consent of the minor being adopted as required by statute.²³¹ Justice Baker has also cited *Edmark* in her concurrence and dissent in *Arkansas Judicial Discipline and Disability Commission v. Simes* as support for a circuit court's authority to determine if sanctions are warranted for a violation of Rule 11 of the Arkansas Rules of Civil Procedure,²³² as well as in her dissent in *Hausman v. Throesch* as support for a trial court's authority to enter an amended order.²³³ The remaining seventeen decisions citing to *Edmark* relate only to either the

reviewed these cases because they are not cited by the majority opinion in *Shelby* or Chief Justice Hannah's dissenting opinion in *Briley* other than his citations to *Edmark* and *Valley v. Phillips County Election Commission*. Nevertheless, even a cursory review of these cases indicates that other Arkansas cases citing to a court's "inherent authority" are consistent with the limitation on the "inherent authority" described in the *Edmark* line of cases as relating only to the procedural authority of courts. *See, e.g.,* *Green v. State*, 2009 Ark. 113, at 8–11, 313 S.W.3d 521, 526–28 (relating to the authority to hold parties to the terms of plea bargains); *Ark. Dep't Human Servs. v. Isbell*, 360 Ark. 256, 258, 200 S.W.3d 873, 875 (2005) (relating to the authority of a court to modify its own order within ninety days of filing); *Ark. Best Corp. v. Gen. Elec. Capital*, 317 Ark. 238, 245–46, 878 S.W.2d 708, 711–12 (1994) (relating to the court's authority to enter appropriate protective orders to control court records); *Warren v. Warren*, 273 Ark. 528, 537, 623 S.W.2d 813, 819 (1981) (relating to the authority of a court to require a bond for payment of child support); *Wade v. Sonic Drive-In*, 42 Ark. App. 260, 261, 856 S.W.2d 630, 630 (1993) (Cooper, J., dissenting) (relating to the authority to institute orderly procedures for situations that arise and are not provided by any rule).

227. *Broussard v. Saint Edward Mercy Health Sys.*, 2012 Ark. 14, at 6–7, 386 S.W.3d 385, 389.

228. *Valley v. Phillips Cnty. Election Comm'n*, 357 Ark. 494, 497–98, 183 S.W.3d 557, 559 (2004).

229. *Ward v. State*, 369 Ark. 313, 313, 253 S.W.3d 927, 927 (2007); *Ark. Dep't of Human Servs. v. Hardy*, 316 Ark. 119, 123–24, 871 S.W.2d 352, 355–56 (1994).

230. *McNair v. Johnson*, 75 Ark. App. 261, 266–67, 57 S.W.3d 742, 746 (2001) (Baker, J., dissenting).

231. *Reid v. Frazee*, 72 Ark. App. 474, 479–80, 41 S.W.3d 397, 400–01 (2001).

232. *Ark. Judicial Discipline & Disciplinary Comm'n v. Sines*, 2011 Ark. 193, at 26, 381 S.W.3d 764, 780 (Baker, J., concurring in part and dissenting in part).

233. *Hausman v. Throesch*, 104 Ark. App. 113, 116–17, 289 S.W.3d 493, 495–96 (2008) (Baker, J., dissenting).

precedential value of Attorney General Opinions²³⁴ or to FOIA matters that do not assert any authority other than the ability of a court to enter orders related to FOIA and its exceptions.²³⁵

The decisions in *Ward*, *McNair*, and *Reid* are particularly salient to understanding *Edmark*'s limited procedural scope because—just as in *Shelby* and Chief Justice Hannah's dissent in *Briley*—the objective in each of the assertions of “inherent authority” in those cases related to protecting juveniles from harm. In *Shelby*, for example, the objective was ensuring that the Department provided juveniles with necessary services by compelling the Department to reduce a caseworker's caseload or otherwise dictate the Department's internal operations,²³⁶ and in *Briley* it was ensuring that the Department would be better able to fulfill its statutory obligations by ordering the Department to prepare a written methodology for responding to future staffing issues.²³⁷ Likewise, the objective in *Ward* was protecting against the disclosure of photographs of nude juveniles,²³⁸ protecting against the disclosure of two juveniles' testimony during an appeal in *McNair*,²³⁹ and protecting the juvenile's statutory rights by requiring evidence of the juvenile's consent to adoption in *Reid*.²⁴⁰

The actual authority described in *Ward*, *McNair*, and *Reid* demonstrates that even when a court's objective is to protect juveniles from harm, the “inherent authority” of a trial court is limited to its procedural authority to conduct proceedings and control court operations and records. The authority asserted in *Ward* and *McNair*, for example, related to the trial court's

234. See, e.g., *White v. Priest*, 348 Ark. 135, 144, 73 S.W.3d 572, 576 (2002); *Ark. Prof. Bail Bondsman v. Oudin*, 348 Ark. 48, 59, 69 S.W.3d 855, 862 (2002); *Willis v. State*, 71 S.W.3d 61, 65–66 (Ark. App. 2002) (Roaf, J., dissenting).

235. See, e.g., *Hopkins v. City of Brinkley*, 2014 Ark. 139, at 12, 432 S.W.3d 609, 617; *Harrill v. Farrar*, 2012 Ark. 180, at 9, 402 S.W.3d 511, 516; *Nabholz Const. v. Contractors for Pub.*, 371 Ark. 411, 418–19, 266 S.W.3d 689, 292–94 (2007); *Pulaski Co. v. Ark. Democrat-Gazette*, 370 Ark. 435, 447–48, 260 S.W.3d 718, 726–27 (2007) (Glaze, J., dissenting); *Harris v. City of Fort Smith*, 359 Ark. 355, 365, 197 S.W.3d 461, 467 (2004); *Fox v. Perroni*, 358 Ark. 251, 257–58, 188 S.W.3d 881, 885–86 (2004); *Holt v. McCastlain*, 357 Ark. 455, 472 n.4, 182 S.W.3d 112, 124 (2004); *Bryant v. Weiss*, 335 Ark. 534, 538–39, 983 S.W.2d 902, 904 (1998); *Swaney v. Tilford*, 320 Ark. 652, 653–54, 898 S.W.2d 462, 463–64 (1995); *Johninson v. Stodola*, 316 Ark. 423, 425, 872 S.W.2d 374, 375 (1994); *Sebastian Co. Chapter of the Am. Red Cross v. Weatherford*, 311 Ark. 656, 658–59, 846 S.W.2d 641, 643 (1993); *Bryant v. Mars*, 309 Ark. 480, 485–86, 830 S.W.2d 869, 872 (1992); *Kristen Inv. Props., LLC v. Faulkner Cnty. Waterworks*, 72 Ark. App. 37, 40–41, 32 S.W.3d 60, 61–62 (2000).

236. *Ark. Dep't of Human Servs. v. Shelby*, 2012 Ark. 54, at 2–5, 2012 WL 401615, at *2–5.

237. *Ark. Dep't of Human Servs. v. Briley*, 366 Ark. 496, 505–08, 237 S.W.3d 7, 13–15 (2006) (Hannah, J., concurring in part and dissenting in part).

238. *Ward v. State*, 369 Ark. 313, 313, 253 S.W.3d 927, 927 (2007).

239. *McNair v. Johnson*, 75 Ark. App. 261, 266–67, 57 S.W.3d 742, 746 (2001) (Baker, J., dissenting).

240. *Reid v. Frazee*, 72 Ark. App. 474, 478–79, 41 S.W.3d 397, 400–01 (2001).

authority to seal court records.²⁴¹ Likewise, the authority asserted in *Reid* related to the trial court's authority to hold a subsequent hearing after an adoption hearing, but prior to the entry of the court's judgment, once the court discovered the lack of evidence on the juvenile's consent to adoption.²⁴² By contrast, the authority asserted in *Shelby* and in Chief Justice Hannah's dissent in *Briley* related to the direct control of the Department's actions and operations and not merely to the court's authority to control its own proceedings.²⁴³

Nevertheless, the reliance of the *Shelby* majority on *Edmark* and the Inherent Protection Power is not surprising because it is not the first time that members of the *Shelby* majority have cited *Edmark* in support of a *Shelby*-like Inherent Protection Power in a child-welfare proceeding. Indeed, Chief Justice Hannah, joined by Justice Jim Gunter, cited *Edmark* in a more detailed and arguably even broader exposition of the Inherent Protection Power in dissent to *Briley* than the power Chief Justice Hannah described almost six years later as the author of the majority opinion in *Shelby*.

The issue in *Briley* was the Department's failure to comply with a circuit court's orders to provide family services and the circuit court's finding that the Department was in contempt as a result of that failure.²⁴⁴ The majority upheld the contempt finding and the circuit court sanction of reimbursing the parent \$160 for out-of-pocket expenses incurred as a result of the De-

241. *Ward*, 369 Ark. at 313, 253 S.W.3d at 927; *McNair*, 75 Ark. App. at 266–67, 57 S.W.3d at 746 (Baker, J., dissenting). Notably, the majority in *McNair* implicitly rejected Justice Baker's concern for protecting the juveniles in favor of following established appellate procedural requirements that required all testimony to be abstracted. *Id.* at 263, 57 S.W.3d at 743 (majority opinion).

242. *Reid*, 72 Ark. App. at 478–79, 41 S.W.3d at 400–01. The Court of Appeals in *Reid* actually cited several bases for the trial court's authority in that case to hold a hearing before the entry of the final adoption decree. First, the court found that trial courts have statutory authority to hold such hearings. *Id.* at 479, 41 S.W.3d at 400 (quoting ARK. CODE ANN. § 9-9-214(b) (Repl. 1993)) (“The court may continue the hearing from time to time to permit further observation, investigation, or consideration of any facts or circumstances affecting the granting of the petition.”). Second, the court found that even without statutory authority the trial court had the “inherent authority” to hold such a hearing, citing for support *Edmark* and *Massengale v. Johnson*, a 1980 Arkansas Supreme Court case affirming the authority of a trial court to vacate its judgment and set a new hearing after the court became aware that it may have made a mistake in its judgment. *Id.*, 41 S.W.3d at 401 (citing *Massengale v. Johnson*, 269 Ark. 269, 599 S.W.2d 743 (1980)).

243. Ark. Dep't of Human Servs. v. *Shelby*, 2012 Ark. 54, at 2–5, 2012 WL 401615, at *2–5; Ark. Dep't of Human Servs. v. *Briley*, 366 Ark. 496, 505–07, 237 S.W.3d 7, 13–15 (2006) (Hannah, J., concurring in part and dissenting in part). Chief Justice Hannah and Justice Gunter, however, may take exception to this characterization given the link drawn in Chief Justice Hannah's dissent in *Briley* between the ability of a trial court to fulfill its responsibilities in child-welfare proceedings and the Department's performance of its statutory obligations and “full cooperation with the juvenile courts.” See *id.*, 237 S.W.3d at 13–15.

244. *Briley*, 366 Ark. at 498–99, 237 S.W.3d at 9 (majority opinion).

partment's contempt, but the majority rejected the sanction of compelling the Department to prepare a "written methodology for responding to future staffing issues" because such a sanction would not benefit the parties in the case as is required for all civil contempt sanctions.²⁴⁵

Chief Justice Hannah in turn concurred with the contempt finding and the \$160 reimbursement sanction, but dissented from the majority's rejection of the "written methodology" sanction because circuit courts, Chief Justice Hannah argued, had the authority to order the Department to provide assurance in the form of a written methodology that the Department would carry out the Department's obligations in child-welfare proceedings in addition to the actual issue of contempt.²⁴⁶ And just as in *Shelby*, Chief Justice Hannah cited in support of this authority the Inherent Protection Power, namely, the "inherent authority" of circuit courts "to protect the integrity of the court in actions before it . . . [and] to protect the integrity of the proceedings and to safeguard the rights of the litigants before it."²⁴⁷

But Chief Justice Hannah did not stop there. In addition to citing *Edmark* and *Valley* as authority for the Inherent Protection Power later articulated in *Shelby*,²⁴⁸ Chief Justice Hannah further argued that circuit courts also have the inherent authority to "control parties who appear before it, especially parties such as [the Department] who appear repeatedly in court on many different cases" based on (1) the "duty" of a circuit court to "put in place a system designed to assure [the Department's] performance in future cases, which benefits all children over whom the court has jurisdiction rather than just the child at issue [in *Briley*], and (2) "the primary responsibility and supervisory control [of the courts] to see that children of this state receive the assistance dictated by the statutes and the care and protection dictated by the judiciary's inherent obligation to serve justice."²⁴⁹

245. *Id.* at 504–05, 237 S.W.3d at 13.

246. *Id.* at 505, 237 S.W.3d at 13–14 (Hannah, C.J., concurring in part and dissenting in part).

247. Compare *Shelby*, 2012 Ark. 54, at 4, 2012 WL 410615, at *4, with *Briley*, 366 Ark. at 507, 237 S.W.3d at 15 (citing *Valley v. Phillips Cnty. Election Comm'n*, 359 Ark. 494, 183 S.W.3d 557 (2004); *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990)).

248. *Briley*, 366 Ark. at 507, 237 S.W.3d at 15. Chief Justice Hannah's citation to *Valley* is in effect merely a second citation to *Edmark* in so far as the *Valley* court cited to *Edmark* and no other authority for the principle that a circuit court has the "inherent authority to protect the integrity of the court in actions before it." *Valley*, 359 Ark. at 498, 183 S.W.3d at 559.

249. *Briley*, 366 Ark. at 506–07, 237 S.W.3d at 14–15. Chief Justice Hannah also cited to the statutory mandate that the juvenile code be liberally construed to "assure that all juveniles brought to the attention of the courts receive the guidance, care, and control . . . [that] will best serve the emotional, mental, and physical welfare of the juvenile and the best interest of the state." *Id.*, 237 S.W.3d at 14–15 (quoting ARK. CODE ANN. § 9-27-302(1) (Repl. 2002)). It is not clear, however, how—or even if—Chief Justice Hannah considered that goal as

In support of the concept that such expansive authority inures to a circuit court as a consequence of the Department's failure to "fulfill its duty under the statutes," Chief Justice Hannah cited to three cases involving the contempt power.²⁵⁰ Specifically, Chief Justice Hannah cited *R.P.* for the propositions that a circuit court cannot fulfill its duty if the Department does not perform its obligations and that the circuit court could order the Department to do the Department's duty, namely, to provide family services.²⁵¹ Chief Justice Hannah likewise cited *Arkansas Department of Human Services v. Gruber* for the proposition that circuit courts cannot fulfill their statutory responsibility without the Department's "full cooperation with the juvenile courts" given the duty placed on the Department as the agency charged with providing or otherwise arranging services.²⁵² Finally, Chief Justice Hannah cited to *Hart v. McChristian* to support the idea that a court's contempt powers were appropriate to compel the Department "to provide assurance that [the Department] would and could carry out its obligations . . . [because a] court's contempt power may be wielded to preserve the court's power and dignity, to punish disobedience of the court's orders, and to preserve and enforce the parties' rights."²⁵³

Chief Justice Hannah's assertion of "inherent authority" fails to support a sufficient jurisdictional basis for *Shelby*-style orders because it conflates the limited jurisdiction afforded to circuit courts by the juvenile code with a circuit court's limited power to control its own proceedings and records and the court's equally limited civil contempt power.²⁵⁴ First, the juvenile code

empowering circuit courts to exercise control over parties, but it is consistent with the oft-cited assertion by circuit courts in child-welfare proceedings that they have the authority to act in a juvenile's "best interests." In any event, for the reasons cited in this article, such authority is inconsistent with Arkansas law.

250. *Id.* at 505–07, 237 S.W.3d at 15. It is also important to note that Chief Justice Hannah's citations to these cases for support of the Inherent Protection Power are entirely comprised of citations to jurisprudential considerations that are at most nonbinding dicta. See generally *Hart v. McChristian*, 344 Ark. 656, 42 S.W.3d 552 (2001); Ark. Dep't of Human Servs. v. R.P., 333 Ark. 516, 970 S.W.2d 255 (1998); Ark. Dep't Human Servs. v. Gruber, 39 Ark. App. 112, 839 S.W.2d 543 (1992).

251. *Briley*, 366 Ark. at 507, 237 S.W.3d at 15.

252. *Id.*, 237 S.W.3d at 15.

253. *Id.*, 237 S.W.3d at 15.

254. That said, there may be at least two votes on the current Arkansas Supreme Court for recognizing "inherent authority" as sufficient to overcome the sovereign immunity of a state agency like the Department. Justice Karen Baker, for example, dissented in *Kiesling-Daugherty v. State* and argued that sovereign immunity may be overcome, or at least avoided, by court rules adopted by the Arkansas Supreme Court. 2013 Ark. 281, at 4–5, 2013 WL 3322335, at *4–5 (Baker, J., dissenting). In the same case, Justice Josephine Linker Hart likewise stated in dissent that the Arkansas Supreme Court's rule-making authority may overcome sovereign immunity based on the Arkansas Supreme Court's constitutional "grant of authority . . . to accomplish its constitutionally mandated functions under amendment 80 and this court's attendant promulgation [of rules]" and that the Arkansas Supreme Court's

only provides circuit courts with a limited jurisdiction to act in child-welfare proceedings and does not provide sufficient authority to enter *Shelby*-style orders because of the impact of Amendment 67.²⁵⁵ Second, the procedural power set out in *Edmark* and its progeny constitutes a source of authority that is (1) separate and distinct from the circuit court's jurisdiction under the juvenile code and its contempt power, and (2) limited in its application to controlling a circuit court's own proceedings and records.²⁵⁶ Third, a circuit court's contempt power is another source of authority that is likewise (1) separate and distinct from the circuit court's jurisdiction under the juvenile code and its procedural power under *Edmark*, and (2) limited in application to imposing sanctions that a circuit court has the jurisdiction to enter and does not provide circuit courts with any such additional jurisdiction.²⁵⁷

Moreover, the majority in *Briley* implicitly rejected Chief Justice Hannah's assertion of such a broad "inherent authority," insofar as the circuit court lacked the authority due to the limitations of the circuit court's contempt power.²⁵⁸ Indeed, had the majority recognized the Inherent Protection Power articulated in Chief Justice Hannah's dissent, the majority arguably would have found that the circuit court did have the authority to address the Department's failure to adequately perform, which, Chief Justice Hannah observed, "is certainly relevant to the integrity of the proceedings before the court" and the "fair administration of justice both in [the case before the circuit court] and in many other cases before the circuit court involving neglected children."²⁵⁹ Instead, the majority in *Briley* did not address at all the joint responsibility between the Department and the judiciary that Chief Justice Hannah argued to exist in the operation of the juvenile system, finding simply that the circuit court exceeded its authority in ordering the Department to prepare a written methodology to address future staffing issues.²⁶⁰

"interest in orderly, expeditious proceedings justifies the imposition of costs, and the power to make an award of costs is incident to our inherent jurisdiction and authority over the orderly administration of justice between all litigants." *Id.* at 5–7, 2013 WL 3322335, at *5–7 (Hart, J., dissenting). Interestingly, Chief Justice Hannah wrote the majority opinion in *Kiesling-Daugherty* that rejected the operation of the Arkansas Supreme Court's appellate rules allowing a litigant to recover the costs of appeal against the state. *Id.* at 2–4, 2013 WL 3322335, at *2–4 (majority opinion).

255. *See supra* Part III.A.

256. *See supra* notes 207–43 and accompanying text.

257. *See supra* Part III.B.2.d. In addition, the Arkansas Supreme Court has held that a court's power to control and protect litigants is actually the contempt power, which this article has already noted is of limited application and does not constitute a separate source of jurisdiction. *Ark. Dep't Human Servs. v. State*, 312 Ark. 481, 487–88, 850 S.W.2d 847, 851 (1993); *see also supra* Part III.B.2.d.

258. *See Briley*, 366 Ark. at 505, 237 S.W.3d at 13 (majority opinion).

259. *Id.*, 237 S.W.3d at 14 (Hannah, C.J., dissenting).

260. *See id.*, 237 S.W.3d at 13 (majority opinion).

That said, the Arkansas Supreme Court has recognized that state courts do have the constitutional authority to order a state governmental entity to take actions that are necessary and essential for the court to operate.²⁶¹ As the Arkansas Supreme Court observed in *Abbott v. Spencer*, for example, state courts have the “inherent power” to order a governmental entity to pay expenses that are necessary and essential for a court to operate based on the doctrine that “there [are] three separate but equal branches of government, and therefore, inherent in the constitution is the principle that when one of the other branches fails to fund a court that court has the power to order those acts done which are necessary and essential for the court to operate.”²⁶² Although Chief Justice Hannah did not cite this specific authority in either *Shelby* or his dissent in *Briley*, Chief Justice Hannah appears to invoke at least the spirit of this doctrine by focusing on (1) how dependent on the Department’s actions the circuit court’s own abilities to fulfill the circuit court’s statutory responsibilities in child-welfare proceedings, and (2) the circuit court’s responsibility to “see that the children of this state receive the assistance dictated by the statutes and the care and protection dictated by the judiciary’s inherent obligation to serve justice.”²⁶³

The limited nature of this power, however, indicates that it is insufficient to overcome the Department’s sovereign immunity and authorize *Shelby*-style orders. First, the doctrine recognized in *Abbott* has only been exercised in the context of a court’s ability to order a governmental entity to pay certain costs and resources and has never been used to justify any broad authority over that governmental entity, much less the entry of *Shelby*-style orders.²⁶⁴ Moreover, the Arkansas Supreme Court itself has admonished that this inherent power must be exercised conservatively and “only in those

261. See, e.g., *Abbott v. Spencer*, 302 Ark. 396, 398–99, 790 S.W.2d 171, 172 (1990); *Venhaus v. State ex rel. Lofton*, 285 Ark. 23, 28–29, 684 S.W.2d 252, 255 (1985); *Turner Ex Parte*, 40 Ark. 548, 551, 1883 WL 1184, at *2 (1883). Many courts have referred to this authority as the “inherent powers doctrine” based on the principles initially articulated in *Turner Ex Parte* in 1883. See, e.g., *Abbott*, 302 Ark. at 398–99, 790 S.W.2d at 172; *Venhaus*, 358 Ark. at 28–29, 684 S.W.2d at 255. Still other courts and commentators have described a related “inherent powers doctrine” regarding the judiciary’s authority to regulate the practice of law in Arkansas and elsewhere. See generally Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV. 1 (1989).

262. *Abbott*, 302 Ark. at 398, 790 S.W.2d at 172 (citing *Turner Ex Parte*, 40 Ark. 548, 1883 WL 1184); *Venhaus*, 285 Ark. at 28–29, 684 S.W.2d at 255.

263. *Briley*, 366 Ark. at 507, 237 S.W.3d at 15 (Hannah, C.J., concurring in part and dissenting in part).

264. See, e.g., *Abbott*, 302 Ark. at 398–99, 790 S.W.2d at 172 (rejecting the application of the power because the issue did not relate to a failure to fund the court); *Turner*, 40 Ark. at 551, 1883 WL 1184, at *1 (providing that a court had the authority to order another governmental entity to pay the costs of a courthouse in which the court could operate).

areas that are vital for the proper functioning of a court.²⁶⁵ Second, the doctrine is limited to only such orders that are necessary for the court to operate and not merely such things that would merely aid a court in carrying out its responsibilities.²⁶⁶ For example, the Arkansas Supreme Court has twice rejected the authority of a circuit court to set the salaries to be paid by other governmental entities for court employees who aid the court in its operation where there was no showing that the court's funding was so low that the court could not operate effectively.²⁶⁷

A court's limited power to order acts to be done that are necessary to the court's operation, therefore, would not apply to save *Shelby*-style orders because such orders do not relate to paying costs or providing necessary resources such as court facilities. Rather, *Shelby*-style orders relate to the Department's operations, not the court's operations. In addition, despite Chief Justice Hannah's assertion that a failure of the Department to perform its own obligations impacts the ability of a circuit court to fulfill its responsibilities under the juvenile code, there has never been a showing that such failures of the Department rise to the level of preventing a court from operating. But even if they could, this article has already described how the circuit court's contempt power and other remedial mechanisms available under the juvenile code would make the exercise of the power unnecessary because sufficient means exist to ensure that the Department fulfills its obligations.²⁶⁸

- b. The judiciary lacks a role in child-welfare proceedings that is constitutionally sufficient to support the Inherent Protection Power as a new exception to the Department's sovereign immunity

The *Shelby* Doctrine may survive if the judiciary has a constitutional role in child-welfare proceedings that would separately allow the broad Inherent Protection Power asserted in *Shelby* to overcome the Department's sovereign immunity as a new exception to the Department's sovereign immunity or otherwise allow a circuit court to enter a *Shelby*-style order. Such a role is in fact presumed both implicitly in Chief Justice Hannah's majority

265. *State v. Post*, 311 Ark. 510, 526, 845 S.W.2d 487, 495 (1993) (dissenting) (citing *Turner Ex Parte*, 40 Ark. 548, 1883 WL 1184).

266. *See Abbott*, 302 Ark. at 398–99, 790 S.W.2d at 172; *Venhaus*, 285 Ark. at 28–29, 684 S.W.2d at 255.

267. *Abbott*, 302 Ark. at 398–99, 790 S.W.2d at 172; *Venhaus*, 285 Ark. at 28–29, 684 S.W.2d at 255.

268. *See supra* Part III.B.2.a. *But see Boyer, supra* note 127, at 385–86 (arguing that juvenile courts must have the powers necessary to discharge their responsibilities effectively).

opinion in *Shelby*²⁶⁹ and explicitly in Chief Justice Hannah's dissenting opinion in *Briley*.²⁷⁰ Chief Justice Hannah specifically argued in *Briley* that the judiciary has a duty and sufficient authority to participate in developing a compliant and proper "system" in child-welfare proceedings that would appropriately benefit juveniles in future cases. "Obviously," Chief Justice Hannah wrote, "the circuit court was attempting to put in place a system designed to assure [the Department's] performance in future cases, which benefits all children over whom the court has jurisdiction rather than just the child at issue in this case. This is the court's duty."²⁷¹

Neither Chief Justice Hannah's majority opinion in *Shelby* nor his dissenting opinion in *Briley*, however, articulates a specific constitutional basis that authorizes such a role or otherwise overcomes the Department's sovereign immunity. To the contrary, the responsibilities cited by Chief Justice Hannah are either statutory²⁷² and, therefore, do not establish a *constitutionally* based role that would be sufficient to authorize a circuit court to violate the Department's sovereign immunity, or, in the case of "the judiciary's inherent obligation to serve justice," are unsupported assertions of authority over the Department that have not been recognized as exceptions to the sovereign immunity doctrine.²⁷³ Thus, although the juvenile code does impose certain responsibilities on circuit courts and generally "recognizes that the state has a responsibility to protect children from abuse and neglect by providing services and supports that promote the safety, permanency, and well-being of the children and families of Arkansas," a circuit court's responsibilities are merely statutory and, therefore, cannot overcome a constitutional barrier like the Department's sovereign immunity unless an appropriate exception applies.²⁷⁴ As described above, no such exception applies.

This article therefore now turns to evaluate two possibly analogous circumstances that may support the entry of *Shelby*-style orders insofar as these circumstances have previously afforded a court with sufficient constitutional authority to control the operations of another branch of government. These circumstances include (1) the *Lake View* line of cases in which the Arkansas Supreme Court found that it had the authority to take active part in the development of an appropriate educational system, and (2) the *Angela R.* line

269. See Ark. Dep't Human Servs. v. *Shelby*, 2012 Ark. 54, at 3–5, 2012 WL 401615, at *4–5 (authorizing circuit courts to order systemic changes to the Department's operations in order to "assure that necessary services are being delivered" in child-welfare proceedings).

270. Ark. Dep't Health & Human Servs. v. *Briley*, 366 Ark. 496, 505–08, 237 S.W.3d 7, 13–15 (2006) (Hannah, C.J., concurring in part and dissenting in part).

271. *Id.* at 506, 237 S.W.3d at 14.

272. See discussion *supra* Parts III.A, III.B.2.a.

273. See discussion *supra* Parts III.B.2, III.B.3.a.

274. See generally ARK. CODE ANN. §§ 9-27-301 to -367, 9-28-101 (Repl. 2009 & Supp. 2013).

of cases in which federal courts became involved in the Department's operations and imposed a "comprehensive revision of the child welfare system."²⁷⁵

In the *Lake View* line of cases, the Arkansas Supreme Court authorized a system of compliance trials that afforded the judiciary with ongoing jurisdiction to actively take part in the development of an appropriate educational system based on the Arkansas Constitution's mandate that "the State shall ever maintain a general, suitable and efficient system of free public schools."²⁷⁶ Although Chief Justice Hannah's dissent in *Briley* does not cite to the *Lake View* doctrine directly, it arguably does invoke the same concept of compliance trials authorized under *Lake View*. As Chief Justice Hannah argued in *Briley*, the circuit court had the authority to mandate the Department to report to the circuit court the Department's "fitness to perform [the Department's] statutorily required function" in future cases—with the evaluation's prospective application strongly echoing the authority recognized in the *Lake View* cases that a circuit court can actively participate in the ongoing development of an appropriate educational system.²⁷⁷

The *Lake View* line of cases, however, is based on a fundamentally different authority than the judiciary's role in child-welfare proceedings provides precisely because of the specific—arguably tenuous²⁷⁸—constitutional basis relied on by the Arkansas Supreme Court in sanctioning the judiciary's involvement in Arkansas's educational system. Indeed, unlike the Arkansas Constitution's multiple provisions related to the educational system,²⁷⁹ there is no current constitutional provision that relates to child-welfare proceedings other than Amendment 67, which provides the General Assembly with exclusive authority to prescribe the judiciary's jurisdiction in child-welfare proceedings.²⁸⁰ There is therefore simply no state constitutional basis to provide circuit courts with the authority to enter *Shelby*-style orders or otherwise participate in *Lake View*-style compliance trials related to the pursuit of

275. See *infra* notes 276–84 and accompanying text.

276. ARK. CONST. art. XIV, § 1 (emphasis added); see Sharum, *supra* note 33, at 86–94; see also Bettina Brownstein, *Lake View—A Roadmap for Asserting the Rights of Jailed Mentally Ill*, 35 U. ARK. LITTLE ROCK L. REV. 525, 530–33 (2013) (describing the *Lake View* analysis for evaluating constitutional mandates on the state).

277. Compare Ark. Dep't of Human Servs. v. Briley, 366 Ark. 496, 505, 508, 237 S.W.3d 7, 14, 15 (2006), with *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 45–46, 51–54, 79, 91 S.W.3d 472, 479, 482–85, 501 (2002), *Lake View Sch. Dist. No. 25 v. Huckabee*, 340 Ark. 481, 492–94, 10 S.W.3d 892, 899–900 (2000), and Sharum, *supra* note 33, at 86–94.

278. Sharum, *supra* note 33, at 90–93.

279. See ARK. CONST. art. XIV (the education article); *id.* amend. 11 (school tax); *id.* amend. 40 (school district tax); *id.* amend. 53 (free school system); *id.* amend. 74 (school tax, budget).

280. See discussion *supra* Part III.A.

an appropriate child-welfare system—a fact that the Arkansas Supreme Court recognized in *Walker* when it rejected a broad role for the judiciary in the development of a constitutional child-welfare system and left “the matter of achieving a constitutional system to the legislature, the body equipped and designed to perform that function.”²⁸¹

Likewise, in the *Angela R.* line of cases federal courts became involved in the operation of the Department’s child-welfare operations after a class of plaintiffs commenced a civil rights case under section 1983 of the United States Code and alleged that Arkansas’s child-welfare system violated the constitutional and federal statutory rights of children.²⁸² Specifically, the allegations were that the Department failed to investigate allegations of child abuse and neglect, failed to make reasonable efforts to keep families together, failed to provide adequate care for juveniles placed in foster homes, and failed to properly train foster parents.²⁸³ The parties in *Angela R.* ultimately settled the lawsuit with the adoption of a detailed settlement plan governing the Department’s child-welfare operations that was also later passed into law and ultimately enforceable through application to federal court as a consent decree.²⁸⁴

281. *Walker v. Ark. Dep’t of Human Servs.*, 291 Ark. 43, 51, 722 S.W.2d 558, 562 (1987) (citing *Dupree v. Alma Sch. Dist.*, 279 Ark. 340, 651 S.W.2d 90 (1983)). It is also interesting to note that one of the principal actors in the *Lake View* appellate and trial court cases was Justice Annabelle Clinton Imber, who also later wrote the majority opinion in *Briley* that implicitly rejected the expansive role in child-welfare proceedings that Chief Justice Hannah’s dissenting opinion advocated. It is even more interesting to note that Chief Justice Hannah himself has consistently recognized limitations to the very model of a compliance trial that Chief Justice Hannah seems to suggest is appropriate in *Briley*, including a hilarious parable involving Humpty Dumpty related to the danger of a court acting in an area simply because the court says it can. See *Lake View Sch. Dist. No. 25 v. Huckabee*, 364 Ark. 398, 420–27, 220 S.W.3d 645, 660–65 (2005) (Hannah, C.J., dissenting); *Lake View Sch. Dist. No. 25 v. Huckabee*, 362 Ark. 520, 527–30, 210 S.W.3d 28, 33–37 (2005) (Hannah, C.J., dissenting); see also *Lake View Sch. Dist. No. 25 v. Huckabee*, 358 Ark. 137, 161–163, 189 S.W.3d 1, 17–18 (2004) (Hannah, J., concurring); *Lake View*, 351 Ark. at 100–08, 91 S.W.3d at 513–18 (Hannah, J., concurring). Moreover, Chief Justice Hannah himself has rejected the core authority relied on by the *Lake View* cases to justify the judiciary’s involvement in the development of an appropriate educational system, namely, that the Arkansas Constitution’s provision designating “the State” as responsible for providing a constitutionally appropriate educational system somehow permits the judiciary to act in any way other than the judiciary’s traditional role of reviewing the actions of the other branches in the context of a specific case challenging the actions of the other branches. See, e.g., *Lake View*, 364 Ark. at 420–27, 220 S.W.3d at 660–65 (Hannah, C.J., dissenting).

282. *Angela R. v. Clinton*, 999 F.2d 320, 322 (8th Cir. 1993).

283. *Id.*

284. *Id.* at 323; see also Martha Matthews, *Stunning Victory for Arkansas Children*, 13:2 YOUTH L. NEWS, March/April 1992, available at <http://www.parentsinaction.net/english/ClassActions/ARK92.pdf>.

Just as with *Lake View*, however, the Arkansas judiciary's role in child-welfare proceedings involves a fundamentally different assertion of authority than the authority relied on in the *Angela R.* line of cases that simply provides no applicable basis to sanction *Shelby*-style orders. Even if one accepts the *Shelby* Doctrine's authority *arguendo*, the Arkansas judiciary's role in child-welfare proceedings lacks the federal-law nexus relied on in *Angela R.* because the Arkansas judiciary's role is entirely based on the statutory and constitutional law of Arkansas.²⁸⁵ Likewise, the *Shelby* Doctrine lacks the adoption of any statutory authority or enforcement mechanism that allows for the enforcement of the "comprehensive revision of the child-welfare system" at issue as a consent decree in *Angela R.*²⁸⁶ Federal courts have further recognized that federal courts should refrain from micromanaging state agencies and involving themselves in purely state law issues.²⁸⁷

For these reasons, the Inherent Protection Power should not be interpreted as creating a new exception to the Department's sovereign immunity because the judiciary holds only a statutory role in child-welfare proceedings. Circuit courts therefore lack a constitutionally sufficient role in child-welfare proceedings sufficient to overcome a constitutional-level barrier such as the Department's sovereign immunity and are, therefore, precluded from entering *Shelby*-style orders that seek to reduce a caseworker's case-load or otherwise dictate the Department's internal operations.

IV. CONCLUSION

Arkansas's child-welfare system is complicated and messy. As Justice Darrell Hickman observed, "[j]uveniles in trouble are one of the most serious concerns for our society, our government, and our judicial system. There are rarely quick, easy, clear answers in juvenile matters."²⁸⁸ To make matters worse, nearly every resource in the child-welfare system—both nationally and in Arkansas—is at its limit. In Arkansas's 2013 state fiscal year, for example, there were only 1,193 foster homes available in the entire state

285. *Angela R.*, 999 F.2d at 322; *see also* discussion *supra* Part III.A.

286. *Angela R.*, 999 F.2d at 322, 325.

287. *See, e.g.*, *United States v. Missouri*, 535 F.3d 844, 851 (8th Cir. 2008) ("The courts, of course, should refrain from micromanaging the state and its agencies."); *Roe v. Crawford*, 514 F.3d 789, 793 (8th Cir. 2008) ("[F]ederal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law."); *Elizabeth v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006); *Miener ex rel. Miener v. Mo. Dep't of Mental Health*, 62 F.3d 1126, 1128 (8th Cir. 1995) ("[F]ederal courts have little interest in enforcing contractual agreements involving only state law issues.").

288. *Walker v. Ark. Dep't of Human Servs.*, 291 Ark. 43, 54, 722 S.W.2d 558, 565 (1987) (Hickman, J., concurring).

for the 7,700 juveniles who were in foster care during that time.²⁸⁹ Likewise, hundreds of caseworkers consistently struggle with caseloads well above recommended levels²⁹⁰ while being tasked with investigating 36,206 allegations of child maltreatment and ensuring the safety and well being of more than 10,000 juveniles every month on an annual budget of only \$47.5 million.

It is therefore little wonder that courts around the state become frustrated with the Department's performance and look to see what they can do to help. And that is exactly what Judge Brown, an experienced juvenile judge, was attempting to do when he ordered the Department to fix the high caseload issue that was preventing a caseworker from providing the services required in her case. Not surprisingly, all but one member of the majority in *Shelby* also had judicial experience in child-welfare proceedings as a juvenile judge or chancery judge and were likely familiar with the service and performance issues that arise in child-welfare proceedings and the resource limitations that Judge Brown was attempting to address.²⁹¹

But the *Shelby* Doctrine is not the solution. As this article has argued, the *Shelby* Doctrine is unconstitutional because it asserts that circuit courts have jurisdiction over juveniles in equity that the General Assembly has not provided by law, assumes authority outside the limited jurisdiction provided to courts in child-welfare proceedings under the juvenile code, and relies on a court's equitable jurisdiction and "inherent authority" to authorize circuit courts to control the Department's internal operations without the benefit of any recognized exception to the Department's sovereign immunity.

289. ARK. DEP'T OF HUMAN SERVS., 2013 STATISTICAL REPORT DCFS-13, DCFS-28 (2014).

290. DIV. OF CHILDREN & FAMILY SERVS., QUARTERLY PERFORMANCE REPORT 3RD QUARTER SFY 2014 28 (2014) ("DCFS 3RD QUARTER REPORT"). The average caseload for caseworkers in Arkansas is above twenty-five cases per caseworker—with some counties averaging as many as eighty cases per caseworker, which is well above the twelve to seventeen cases recommended by national child-welfare organizations and existing research. See generally *id.*; CHILDREN & FAMILY RESEARCH CENTER, CASELOAD SIZE IN BEST PRACTICE LITERATURE REVIEW 1–4 (2002); CHILD WELFARE LEAGUE OF AMERICA, STANDARDS OF EXCELLENCE FOR CHILD WELFARE SERVICES (1999); CHILD WELFARE LEAGUE OF AMERICA, STANDARDS OF EXCELLENCE FOR FAMILY FOSTER CARE SERVICES (1995).

291. Chief Justice Hannah, for example, was a juvenile judge from 1976 to 1978 and a chancery/probate judge from 1979 to 1999. *Chief Justice Jim Hannah*, ARKANSAS JUDICIARY, <https://courts.arkansas.gov/courts/supreme-court/justices/chief-justice-jim-hannah> (last visited May 31, 2015). Justice Karen Baker was a juvenile judge from 1995 to 1996 and a circuit/chancery judge from 1997 to 2000. *Associate Justice Karen R. Baker, Position 6*, ARKANSAS JUDICIARY, <https://courts.arkansas.gov/courts/supreme-court/justices/associate-justice-karen-r-baker-position-6> (last visited August 26, 2015). From the information provided on the Arkansas Supreme Court's website, it is not clear whether any member of the dissent has direct trial court experience in child-welfare proceedings. Likewise, Justice Jim Gunter was a chancellor from 1983 to 1991 and a circuit/chancery judge from 1991 to 1999. *Jim Gunter*, BALLOTPEdia, http://ballotpedia.org/Jim_Gunter (last visited May 31, 2015).

The *Shelby* Doctrine is also symptomatic of the judiciary's increasingly unconstitutional role in child-welfare proceedings. Although numerous appellate decisions recognize the limitations that the juvenile code imposes on the authority of circuit courts to act in child-welfare proceedings, the judiciary as a whole certainly believes it has a role in the development of an appropriate child-welfare system,²⁹² and juvenile judges around the state frequently invoke the "best interests of the child" as a basis for broad authority to make orders and complex social-work decisions in child-welfare proceedings—often regardless of the juvenile code.

These courts, however, lack the constitutional and subject-matter competency to assume such a role because Arkansas law provides that the Department is the state actor charged with providing social work and developing case plans in child-welfare proceedings. Circuit courts are effectively limited to determining if a juvenile is dependent-neglected or otherwise in need of services under the juvenile code and, if so, then ordering limited "family services" based on the recommendations of the Department and other service providers.²⁹³ The only supervisory role that courts have under the juvenile code is to determine whether the Department's social work efforts have been reasonable and ensure the Department does what the juvenile code requires.

The Arkansas Supreme Court must, therefore, repudiate the *Shelby* Doctrine because until it does so, the *Shelby* Doctrine will stand for the proposition that the judiciary can direct a state agency to comply with a given court's determination of what that agency's staffing, internal operations, or services should be. And given the *Shelby* Doctrine's expansion of a court's "inherent authority" and the *Edmark* line of cases, there is no reasoned basis why some form of the *Shelby* Doctrine could not be applied in other types of cases involving other state agencies. The child-welfare system may be only another step for the judiciary's increasing role in public policy.

292. The Arkansas Supreme Court, for example, has created a number of committees and commissions to assess and make recommendations related to the child-welfare system, including the Arkansas Supreme Court Commission on Children, Youth, and Families, *see In Re* Creation of the Ark. Supreme Court Comm'n on Children, Youth and Families, 2011 Ark. 545, and the Arkansas Supreme Court ad hoc Committee on Foster Care and Adoption Assessment, *see In re* Ark. Supreme Court Ad Hoc Comm. on Foster Care & Adoption Assessment, 319 Ark. 835 (1995). Indeed, the Administrative Office of the Courts (AOC), the administrative arm of the Arkansas judiciary, has a Juvenile Division that runs the parent counsel, attorney ad litem, and CASA programs. ARKANSAS JUVENILE DIVISION OF THE COURTS, <http://www.arjdc.org> (last visited August 25, 2015). Ironically, the AOC's Juvenile Division was created by statute. *See* ARK. CODE ANN. § 9-27-401 (Supp. 2013).

293. *But see* Boyer, *supra* note 127, at 383–86 (“[U]ltimate responsibility should rest with the juvenile court for determining when deference to administrative decisionmaking is appropriate.”).