CV-20-164

IN THE ARKANSAS SUPREME COURT

MICHAEL McCARTY, *et al.* APPELLANTS

v. No. CV-20-164

ARKANSAS STATE PLANT BOARD, *et al.* APPELLEES

ON APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS

THE HONORABLE TIMOTHY D. FOX

BRIEF OF APPELLEES ARKANSAS STATE PLANT BOARD AND TERRY WALKER, DIRECTOR OF ARKANSAS STATE PLANT BOARD

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For over a century, the Arkansas State Plant Board has worked tirelessly to protect and serve citizens and agricultural and business communities by providing information and unbiased enforcement of laws and regulations affecting agriculture in Arkansas. *See* https://www.agriculture.arkansas.gov/boards-commissions/ (last accessed June 28, 2020). Since its inception, the Plant Board has been comprised of members appointed by the Governor, elected by various agricultural trade associations, and non-voting members from the University of Arkansas's research facility who together are uniquely qualified to regulate and control plant diseases and pests in Arkansas. *See* Ark. Code Ann. 2-16-206(a); *see generally* Rothrock, Thomas, "The Arkansas State Plant Board: A Half Century of Service," *The Arkansas Historical Quarterly*, vol. 26, no. 1, at 49-74 (1967), *available at JSTOR*, www.jstor.org/stable/40018966 (last accessed June 28, 2020). From the very first meeting of the Plant Board in 1917, the Board has adopted rules and regulations for the inspection and control of diseases and insect pests in Arkansas. Rothrock, *supra*, at 50-51. The Plant Board has successfully countered threats to Arkansas farmers and businesses including cedar apple rust, boll weevils, pink bollworms, Mediterranean fruit flies, on a shoestring budget and without compensation for its members. *Id.* at 49, 51, 53, 57, 66.

This dispute originated with a challenge to the Plant Board's decisive action to protect Arkansas farmers from crop damage caused by dicamba-based herbicides in 2018. (Add. 1). Recognizing the Board's broad authority to regulate pesticide application, opponents of the Board's dicamba regulations took another approach: they attacked the legitimacy of the Board itself by challenging the constitutionality of the statute governing the appointment of its members, Ark. Code Ann. § 2-16-206, which was first adopted as the law in Arkansas in 1917. As discussed below, the statute does not clearly run afoul of any constitutional provisions regarding the appointment of members of state boards and commissions, and it includes appropriate standards by which members of the Plant Board are to be selected. As a result, this Court should affirm the judgment of the circuit court and hold that the Plant Board's appointment statute is constitutional.

I. The Appointment Process for Plant Board Members is Constitutional.

A. Standard of review

This Court reviews issues of law, including a circuit court's substantive interpretations of law, *de novo*. *Hobbs v. Jones*, 2012 Ark. 293, at 8, 412 S.W.3d 844, 850. In considering any constitutional challenge to a statute, this Court "begins with the axiom that every act carries a strong presumption of constitutionality." *Ark. Dep't of Corr. v. Bailey*, 368 Ark. 518, 523, 247 S.W.3d

851, 855 (2007). This presumption places the burden of proof squarely on the party challenging a statute's constitutionality to prove its unconstitutionality, and this Court resolves "all doubts" in favor of upholding the constitutionality of the statute, if possible. *Id.*; *City of Cave Springs v. City of Rogers*, 343 Ark. 652, 658-59, 37 S.W.3d 607, 611 (2001). This Court will only strike down a statute when there is a "clear and unmistakable" conflict between the statute and the constitution. *Bailey*, 368 Ark. at 523-24, 247 S.W.3d at 855.

B. The statutory appointment process for Plant Board members does not violate separation of powers principles.

The challenged statute creates and establishes a State Plant Board composed of eighteen (18) members as follows:

> (1) Two (2) nonvoting members designated by the Vice President for Agriculture of the University of Arkansas or his or her designee;
>
> (2) A practical cotton grower, actively engaged in the business, to be appointed by the Governor;
>
> (3) One (1) member to represent the Arkansas Plant Food Association, actively engaged in the business, to be appointed by the Governor;
>
> (4) A practical rice grower, actively engaged in the business, to be appointed by the Governor;
>
> (5) A practical horticulturist, actively engaged in the business, to be elected by the Arkansas State Horticultural Society;
>
> (6) A nurseryman, actively engaged in the business, to be elected by the Arkansas Green Industry Association;

(7) A practical seed grower, actively engaged in the business, to be elected by the Arkansas Seed Growers Association;

(8) A pest control operator, actively engaged in the business, to be elected by the Arkansas Pest Management Association, Inc.;

(9) A seed dealer, actively engaged in the business, to be elected by the Arkansas Seed Dealers' Association;

(10) One (1) member representing the Arkansas Bureau of Standards to be appointed by the Arkansas Oil Marketers Association;

(11) A pesticide manufacturer, actively engaged in the business, to be elected by the Arkansas Crop Protection Association Inc.;

(12) One (1) member to represent the Arkansas Agricultural Aviation Association, to be elected by the Arkansas Agricultural Aviation Association;

(13) One (1) member to represent the Arkansas Forestry Association, to be elected by the Arkansas Forestry Association;

(14) Two (2) farmers actively and principally engaged in farming in this state, appointed by the Governor;

(15) One (1) representative of the livestock industry, actively engaged in the business, to be appointed by the Governor; and

(16) One (1) representative of the forage industry, actively engaged in the business, to be appointed by the Governor.

Ark. Code Ann. § 2-16-206(a). Subsection (a) was last amended in 2019 and reflects a longstanding public policy objective to include a wide range of agricultural interests and stakeholders on the Plant Board. The statute contains a number of other provisions regarding Board members' terms of office, election of officers, expense reimbursements, and other matters, but Appellants do not

challenge any of those provisions. *See* Ark. Code Ann. §§ 2-16-206(b)-(f). Nor do Appellants challenge the provision that allows the Vice President for Agriculture to appoint two non-voting members to the Plant Board. Appellants thus only challenge the sub-sections of the statute that permit industry associations to elect or appoint one of their members to represent their interests on the Board. *See* Ark. Code Ann. §§ 2-16-206(a)(5)-(13).

Appellants' contention that those provisions violate separation of powers fails as a matter of law. In *Hobbs v. McGehee*, 2015 Ark. 116, 458 S.W.3d 707, this Court conducted an in-depth analysis of separation of powers principles. The Court explained that the legislative branch has the power and responsibility to proclaim the law through statutory enactments, the judicial branch has the power and responsibility to interpret the legislative enactments, and that the executive branch has the power and responsibility to enforce the laws as enacted and interpreted by the other two branches. 2015 Ark. 116, at 8, 458 S.W.3d 707, 713. The *Hobbs* Court confirmed that the Legislature may delegate discretionary authority to state boards and commissions as long as "reasonable guidelines are provided." *Id.* at 9, 458 S.W.3d at 713. "This guidance must include appropriate standards by which the administrative body is to exercise this power." *Id.* "If the law is mandatory in all it requires and all it determines, it is a legislative act, although it is put into operation by officers or administrative boards selected by the

Legislature." *Id.* (quoting *State v. Davis*, 178 Ark. 153, 156, 10 S.W.2d 513, 514 (1928)). The Court explained "that the true distinction is between the delegation of power to make the law, which necessarily involves the discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law." *Id.* While "[t]he first cannot be done," "[t]o the latter no valid objection can be made." *Id.* Only a statute that delegates "an absolute, unregulated, and undefined discretion of legislative powers" violates separation of powers. *Id.*

In *McGehee*, this Court upheld the constitutionality of Act 139 of 2013, which delegated discretionary authority to the Arkansas Department of Correction (ADC) to select a lethal-injection drug from a broad class of barbiturate drugs and otherwise delegated discretion to ADC in carrying out the sentence of death. The Court reasoned that Act 139 provided sufficient guidance to ADC by identifying certain options to choose from (any drug within the class of barbiturates) and also provided criteria to guide that choice (must be in an amount sufficient to cause death). *Id.* at 14, 458 S.W.3d at 716. Because the Legislature limited the ADC to selecting only from the legislatively-approved options and provided criteria to guide the ADC's exercise of discretion, the Court held that it did not violate the separation-of-powers doctrine. *Id.* at 14-17, 458 S.W.3d at 716-18.

Similarly, in *Abraham v. Beck*, this Court held that a statute that listed nine (9) factors for the Arkansas State Medical Board to consider when determining whether to allow a physician to dispense legend drugs was a lawful delegation of legislative powers because it provided reasonable guidelines by which the Board was to exercise its authority to carry out the law. 2015 Ark. 80, at 14-15, 456 S.W.3d 744, 754. Importantly, this Court has repeatedly rejected challenges to statutes that delegate decision-making authority regarding training and qualifications of personnel involved with carrying out the law. *McGehee*, 2015 Ark. 116, at 17-18, 458 S.W.3d at 718; *Hooker v. Parkin*, 235 Ark. 218, 222-23, 357 S.W.2d 534, 538 (1962).

In light of these binding precedents, there is no merit to Appellants' contention that Ark. Code Ann. § 2-16-206(a) is an unconstitutional delegation of legislative authority. The statute not only provides "reasonable guidelines" as to the composition of the Plant Board, it absolutely mandates that various stakeholders *who are actively engaged in the relevant business* are included as both nonvoting and voting members of the Plant Board and identifies each person or entity with appointment authority. Because the statute fixes the composition of the Plant Board in all material respects—*i.e.*, number of members, persons/entities with appointment authority, industry group represented by each position on the Board, and term of service—and only provides limited discretion to the appointing

persons/entities to select a representative who meets the legislatively-defined qualifications, this Court should conclude that it fully comports with articles IV and V of the Arkansas Constitution.

This Court has already rejected the proposition that rule-making powers may not be delegated to representatives of private industry groups. *See* Appellants' Br. at Arg. 1 and 5. The primary authority relied upon by Appellants, *Leathers v. Gulf Rice Arkansas*, 338 Ark. 425, 994 S.W.2d 481 (1999), does not support their position in this case and, in fact, compels this Court to affirm. *Leathers* was an action brought by rice buyers against the Commissioner of Revenues and the directors of the Rice Research and Promotion Board. The Rice Research and Promotion Board was comprised solely of private rice producers, and the rice buyers alleged that a statute empowering the board to transfer producers' preexisting burden to pay an assessment for a rice promotion and marketing program on to rice buyers—without specifying any standards or factors that would be considered, and which failed to provide rice buyers any safeguards or standards by which an assessment referendum could be measured—was an unconstitutional delegation of taxing authority.

The theory of the rice buyers' case was that the delegation of legislative authority to the Rice Research and Promotion Board was unlawful because Act 344 empowered the rice producers with the sole discretion of levying an

assessment against the rice buyers without giving the buyers a vote, much less a hearing or review, on the assessment—which violated due process. In support of their argument, the rice buyers cited *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), for the proposition that the exclusion of an affected group (here, the rice buyers) from the referendum was a federal constitutional defect founded on the lack of due process given those adversely affected by the referendum. In *Carter*, the U.S. Supreme Court held that a federal statute delegating "power to regulate the affairs of an unwilling minority"—not "to an official or an unofficial body, presumptively disinterested"—but "to private persons whose interests may be and often are adverse to the interests of others in the same business" was "legislative delegation in its most obnoxious form[.]" 298 U.S. at 311. Because regulating coal production is "necessarily a government function," the Supreme Court explained that "one person may not be intrusted with the power to regulate the business of another, and especially of a competitor." *Id.* "And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Id.*

In *Leathers*, this Court followed the reasoning of the U.S. Supreme Court in *Carter* and held that Act 344 was an unconstitutional delegation of legislative authority because it failed to specify "any standards or factors that *anyone* (including the Board) must consider before imposing the assessment; nor does the

act afford the buyers any notice, hearing, or review before such an assessment is imposed on them." *Leathers*, 338 Ark. at 433-34, 994 S.W.2d at 486. Contrary to Appellants' argument, *Leathers* did not turn on the fact that private parties had power "to conduct governmental functions" under the challenged act. *See* Appellants' Br. at Arg. 1. Indeed, the *Leathers* Court took no issue with the composition of the Rice Research and Promotion Board—which was comprised entirely of representatives of private business interests—and repeatedly recognized that as long as the challenged statute provides "sufficient standards and safeguards set up by the Legislature," like the appointment statute at issue here along with the other statutes and regulations governing the operations of the Plant Board, then "there is no improper delegation of authority." *Leathers*, 338 Ark. at 432, 994 S.W.2d at 485. The *Leathers* Court went on to expressly hold that a rule proposed by a private party "is not constitutionally suspect if it is adopted by an administrative agency that has power to accept, reject, or modify the rule." *Id.* (quoting Arthur E. Bonfield & Michael Asimow, *State and Federal Administrative Law* § 7.3, at 460 (1989)).

As discussed *infra* Part I.D, that is precisely the case here. The members of the Plant Board who are elected or appointed by industry associations join other voting and non-voting members who are appointed by the Governor and the Vice President for Agriculture of the University of Arkansas. Ark. Code Ann. § 2-16-

206(a). They must work together to carry out the functions of the Board, which include rulemaking and inspections to "[i]nvestigate, control, eradicate, and prevent the dissemination of insect pests, diseases, and noxious weeds" in Arkansas. Ark. Code Ann. § 2-16-207. Appellants have not (and cannot) cite to any provision of the Arkansas constitution that exclusively vests the appointment power in the General Assembly or that limits the Legislature's discretion to delegate its appointment power, with reasonable guidelines and standards as it has done in § 2-16-206(a) since the founding of the Plant Board over a century ago. No such provision exists.

Indeed, over a century ago, this Court rejected the same argument Appellants make here, holding that, "[i]n the United States the general power to appoint officers is not inherent in the executive ***or in any other branch of the government***. It is a prerogative of the people, to be exercised by them . . . ." *Cox v. State*, 72 Ark. 94, 78 S.W. 756, 756 (1904). In *Cox*, the issue was whether the Legislature had any appointment power at all, or whether that power was vested solely in the Governor. This Court found that, because our Constitution contains no "general or express prohibition against the exercise of the appointing power," then such power exists in the Legislature as well as the Governor. Indeed, the Court found that "[t]he method of selecting the members of [State] boards is a matter to be determined by the Legislature, which can leave it to the Governor to

make the appointments, or can, if deemed safe, make them itself." *Id.* at 757. And, under the delegation doctrine outlined above, the Legislature is free to delegate its own appointment authority as long it provides "reasonable guidelines" for the exercise of that power.

In this case, the people, acting through their duly elected representatives in the General Assembly, elected to delegate the power to appoint members of the Plant Board to the Governor, various industry groups representing a wide range of agricultural interests in the State, and the Vice President for Agriculture of the University of Arkansas. Ark. Code Ann. § 2-16-206(a). The Legislature acted fully within its constitutional authority in adopting this appointment method under *Cox* and the precedents detailed above. There is simply no authority that supports Plaintiffs' argument otherwise, and the Court should reject it. The only provision in Article V that governs the appointment power provides only for the *mode* of taking votes and contains no prohibition whatsoever against the exercise of the appointment power by the Legislature or the delegation of that power. *See* Ark. Const. art. 5, § 14.

Appellants misleadingly state that the "Arkansas Attorney General's Office has previously taken the position that private organizations may not be given the power to appoint members to governmental boards." Appellants' Br. at Arg. 3 (citing Ark. Att'y Gen. Op. No. 2005-213, *available at* 2005 WL 2822920). A

review of that Attorney General opinion, however, demonstrates that it is both factually and legally distinguishable from the present case and, in fact, suggests the Legislature's delegation of appointment authority in § 2-16-206(a) is appropriate. The Attorney General was asked to give an opinion on a statute that delegated authority to appoint members of a regional solid waste management board to the county judges and mayors within the regional solid waste management district. The statute also allowed a regional solid waste management district to be created by interlocal agreement of the local governments and provided that the management board of the district could also be established by interlocal agreement.

An issue arose with the Benton County Solid Waste Management District when two private entities—the Bella Vista Property Owners Association and the Benton County Farm Bureau—desired membership on the management board with full voting rights. The question before the Attorney General was whether the board could amend its bylaws to permit representatives other than the county and municipalities to serve as voting members of the board. The Attorney General's opinion on that question was "no" because the interlocal agreement that created the board limited its members to the county judge and local mayors unless those elected officials "appoint[ed] representatives to serve in their stead." Ark. Atty Gen. Op. No. 2005-213, at 1. The board's bylaws contained the same appointment method for board members. *Id.* Thus, by statute, interlocal agreement, and the

board's own bylaws, appointment authority to the board at issue was vested solely in the county judge and mayors. *Id.* The controlling statute, moreover, did not delegate the power to include private entities in the representation of the board. *Id.* at 3. Under those specific circumstances—none of which are present here—the Attorney General opined that the board could not amend its bylaws to authorize the private organizations to appoint members to the board of the Benton County Solid Waste Management District. *Id.* That opinion does not help Appellants in this case because the statute at issue here, Ark. Code Ann. § 2-16-206(a), contains an express delegation of authority to specific legislatively-approved industry and trade groups to elect or appoint a representative to the Plant Board. Because it was well within the province of the General Assembly to delegate appointment power to the Plant Board in this manner, the statute here withstands constitutional scrutiny.

As shown, Appellants have failed to satisfy their burden of proving a clear and unmistakable conflict between the Arkansas Constitution and Ark. Code Ann. § 2-16-206(a). This Court should affirm the judgment of the circuit court and uphold the constitutionality of the statute governing the composition of the Plant Board.

C. Article II, § 1 does not limit legislative power.

Appellants next argue that Article II, § 1 and Article V, § 1 of the Arkansas Constitution, when read together, require that "all public power," including "the

power to appoint public officers, remain in the *public* domain." Appellants' Br. at Arg. 8. This argument is foreclosed by longstanding controlling precedent. Section 1 of Article 2 of the Arkansas Constitution of 1874 provides: "All political power is inherent in the people, and government is instituted for their protection, security and benefit; and they have the right to alter, reform or abolish the same in such manner as they may think proper." Ark. Const. art. II, § 1. Article V relates to the legislative department and, as discussed above, there is nothing in Article V that limits the Legislature's ability to delegate that power to others. *See* Ark. Const. art. V, § 14 (governing the mode of taking votes for legislative appointments).

As discussed above, the legislative appointment power may be delegated to industry associations as long as the Legislature provides reasonable guidelines for the exercise of that power, as it did with the Plant Board in Ark. Code Ann. § 2-16-206(a). *See Cox*, 72 Ark. 94, 78 S.W. at 756-57. In *State v. Ashley*, 1 Ark. 513 (1839), this Court expressly held, "A State Legislature can exercise all power that is not expressly or impliedly prohibited by the Constitution; for whatever powers are not limited or restricted they inherently possess as a portion of the sovereignty of the State." This Court long ago rejected the argument Appellants make here that a provision of the Bill of Rights limits the General Assembly's power to enact statutes like one establishing the Plant Board in § 2-16-206(a). *See Peugh v. Oliger*, 233 Ark. 281, 285, 345 S.W.2d 610, 613 (1961) (holding that Article II, §

13 "is a guarantee of rights, and not a *restriction* on the power of the Legislature to enact remedial laws"), *overruled in part on other grounds by Fountain v. Chicago, R.I. & P. Ry.*, 243 Ark. 947, 422 S.W.2d 878 (1968); *see also Hardin v. City of DeValls Bluff*, 256 Ark. 480, 485, 508 S.W.2d 559, 563 (1974) (reaffirming that the Bill of Rights in the Arkansas Constitution does not serve as a limitation on legislative power). There is no express or implied limitation on the General Assembly's power to delegate appointment authority to the State Plant Board anywhere in the Arkansas Constitution. Accordingly, the Court should conclude that the Legislature inherently possesses such authority and uphold the constitutionality of § 2-16-206(a).

Ignoring controlling precedent, Appellants rely heavily on two inapposite Georgia cases and argue that "the Legislature has no constitutional authority to delegate its appointment power to private entities[.]" Appellants' Br. at Arg. 9-12. This argument misses the mark because the Legislature need not have an express constitutional *grant* of authority in order to delegate appointment power to industry and trade groups. Under this Court's longstanding precedent, because there is no express or implied *prohibition* on such a power embodied in any of the provisions of Article V, the Legislature inherently possesses that power as a matter of law, and the Court should reject Appellants' argument otherwise.

D. The Plant Board is subject to extensive oversight by the Governor, the General Assembly, and the Judiciary.

Appellants incorrectly argue that the Plant Board wields extensive legislative and adjudicatory power with little to no oversight by the elected branches of State government. Nothing could be further from the truth. As explained above, almost half of the voting members of the Plant Board are appointed by the Governor and can be expected to keep him apprised of the Board's activities. *See* Ark. Code Ann. § 2-16-206(a) (delegating authority to the Governor to appoint various people who are "actively engaged in the business" to the Plant Board including a practical cotton grower, a practical rice grower, two "farmers actively and principally engaged in farming in this state," and representatives of the livestock and forage industries and the Arkansas Plant Food Association).

The Plant Board cannot adopt rules or regulations without the prior approval of both the Governor *and* the Legislature. *See* Governor's Executive Order No. 15-02 (Jan. 14, 2015) (requiring gubernatorial review and approval of state agency rules and regulations prior to submission to a legislative committee of the General Assembly); Ark. Code Ann. § 10-3-309(c) (requiring all rules proposed by state agencies to be reviewed and approved by the Administrative Rules and Regulations Subcommittee of the Legislative Council, with a reasonable opportunity for public comment); Ark. Code Ann. § 10-3-309(d) (requiring state agencies to file proposed emergency rules with the Executive Subcommittee of the

Legislative Council and to obtain approval from that subcommittee). Recognizing that administrative agencies are better equipped by specialization and insight through experience to determine and analyze the legal issues affecting their agencies, *Staton v. Ark. State Bd. of Collection Agencies*, 372 Ark. 387, 390, 277 S.W.3d 190, 192 (2008), the General Assembly will only disapprove a proposed rule if it is inconsistent with state or federal law or legislative intent. Ark. Code Ann. § 10-3-309(f)(1). But this statute ensures that the rulemaking activities of all state agencies undergo legislative review and oversight in every case.

The Arkansas Administrative Procedure Act (APA) also contains detailed provisions to further cabin the discretion of the Plant Board, govern the procedures for its rulemaking and licensing decisions, and provide a means for judicial review of all adjudication orders. Ark. Code Ann. §§ 25-15-201 *et seq.* The judicial review provision in the APA ensures that the Plant Board's adjudications are not in violation of constitutional or statutory provisions, in excess of the agency's statutory authority, made upon unlawful procedure, affected by other error of law, unsupported by substantial evidence of record, or arbitrary, capricious, or characterized by abuse of discretion. Ark. Code Ann. § 25-15-212(h). The APA likewise vests the judicial branch with jurisdiction to determine the "validity or applicability of a rule" "in an action for declaratory judgment," and the plaintiff need not first request the agency to rule on the matter. Ark. Code Ann. § 25-15-

207. The APA also provides a remedy to an injured party if the Plant Board ever unlawfully, unreasonably, or capriciously fails, refuses, or delays to act in any case of rulemaking or adjudication. *See* Ark. Code Ann. § 25-15-214.

All of these provisions together ensure that the Plant Board exercises the regulatory authority delegated to it by the General Assembly in a manner that comports with all constitutional requirements and with significant oversight by the elected branches of state government. Appellants' argument otherwise is simply incorrect as a matter law. But the Court need not reach this issue to resolve this appeal. The issue currently before the Court is whether Plant Board's appointment statute, Ark. Code Ann. § 2-16-206(a), is constitutional, and it is for all of the reasons discussed above.

E. The Plant Board's appointment statute ensures stakeholder input.

For their last point on appeal, Appellants assert that the "practical effect of legislative delegations of appointment power is that the regulated citizens of the State of Arkansas have no voice in the appointment of these controlling members of State Agencies." Appellants' Br. at Arg. 15. This argument fails for several reasons. First, the constitution does not require that the regulated citizens have a direct voice in the appointment process of Plant Board members. As discussed above, under our constitution, the appointment power belongs to the people through their elected representatives or their designees, and § 2-16-206(a) is a valid

delegation of the people's appointment power. *See Cox*, 72 Ark. 94, 78 S.W. at 756-57; *McGehee*, 2015 Ark. 116, at 8-9, 458 S.W.3d at 713. Second, the relevant inquiry here is whether the constitution has an express or implied *limitation* on the Legislature's appointment power and, as discussed in detail above, it does not. Third, Appellants' argument ignores that Arkansas citizens *do* have a voice in the appointment process for Plant Board members through the Governor and through the various industry and trade groups who have appointment authority. Indeed, the people who arguably are *most* impacted by regulatory activities of the Plant Board are the same people who have a seat at the Board table and a vote in its affairs under § 2-16-206(a). So far from leaving regulated citizens in the dark, the challenged statute actually ensures stakeholder participation and input and furthers the Plant Board's goal of providing information and unbiased regulatory enforcement. This has been the Legislature's intent and plan for the Plant Board since its inception in 1917, and this Court will not interfere with the Legislature's policy decisions, as evidenced by its statutes, absent "palpable errors" not present here. *See State Farm Mut. Auto. Ins. Co. v. Henderson*, 356 Ark. 335, 342, 150 S.W.3d 276, 280 (2004).

For these and all of the foregoing reasons, this Court should affirm the circuit court's ruling upholding the constitutionality of Ark. Code Ann. § 2-16-206(a).

F. In the alternative, the acts of the Plant Board are valid under the *de facto* officer doctrine.

In the alternative, even if the Court disagrees with the foregoing arguments and reverses the ruling of the circuit court on the merits, the Court should nevertheless deny Appellants' request to deem all acts of the current Plant Board void as a result. *See* Appellants' Br. at Arg. 5. Appellants cite ***no authority*** for their argument, and it is foreclosed by controlling precedent.

As a matter of law, the Plant Board's actions were lawful under the *de facto* officer doctrine and cannot be collaterally attacked in this declaratory-judgment action regarding the constitutionality of the appointment statute. The members of the Plant Board were appointed pursuant to a statute that was presumed to be constitutional at the time, Ark. Code Ann. § 2-16-206(a), and carried out their duties accordingly. In *Brown v. Anderson*, this Court explained that a *de facto* officer is one whose "color of right may come from an election or appointment made by some officer or body having colorable but no actual right to make it," such as the alleged private appointments here, or "made in such disregard of legal requirements as to be ineffectual in law[.]" 210 Ark. 970, 976-77, 198 S.W.2d 188, 191 (1946). Under these definitions, the Plant Board members appointed by industry associations were, at a minimum, *de facto* public officers when they adopted rules and regulations and otherwise performed their duties, even if the Court finds that the statute under which they were appointed is unconstitutional.

"[F]or the sake of order and regularity and to prevent confusion in the conduct of public business and insecurity of private rights," the law does not allow the acts of *de facto* public officers to be questioned because of the lack of actual legal authority "except by some direct proceeding instituted for the purpose by the state or by some one claiming the office *de jure*, or except when the person himself attempts to build up some right, or claim some privilege or emolument, by reason of being the officer which he claims to be." *Brown*, 210 Ark. at 976-77, 198 S.W.2d at 191. "In all other cases the acts of an officer *de facto* are as valid and effectual, while he is suffered to retain the office, as though he were an officer by right, and the same legal consequences will flow from them for the protection of the public and third parties." *Id.* at 977, 198 S.W.2d at 191; *see also Forrest City Grocer Co. v. Catlin*, 193 Ark. 148, 97 S.W.2d 910, 913 (1936) (holding that, under the *de facto* officer doctrine, the authority of "one who exercises an office either by virtue of some appointment or election; or of such acquiescence of the public as will authorize the presumption, at least, of a colorable appointment or election" to act "cannot be inquired into in a collateral proceeding").

This is not a direct proceeding instituted by the State for the purpose of questioning the legal authority of the Plant Board members appointed by the industry groups or by someone claiming the seats held by the private appointees *de jure*. Nor is this a case where the *de facto* officers themselves are attempting to

claim a privilege, benefit, or right as a result of holding the Board positions. Accordingly, in this case, even if the Court were to conclude that the subsections of § 2-16-206(a) that permit private industry groups to appoint Plant Board members are unconstitutional, the Court should hold that the acts of the *de facto* Plant Board members are "as valid and effectual" as though they held the seats by right, and that the same legal consequences flow from them, for the protection of the public and third parties. *See Brown*, 210 Ark. at 976-77, 198 S.W.2d at 191.

Conclusion

There is no express or implied limitation on the Legislature's appointment power in the Arkansas Constitution, and this Court should affirm the General Assembly's delegation of that power to agriculture industry associations in Ark. Code Ann. § 2-16-206(a).

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 29th day of June, 2020, I electronically filed the foregoing via the eFlex electronic filing system, which shall send notification of the filing to any participants. I also certify that, if paper copies are required, I will serve them in the time and manner required by the Court upon the following:

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Certificate of Compliance

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

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