CV-20-164

IN THE SUPREME COURT OF ARKANSAS

MICHAEL McCARTY, *et al.* **APPELLANTS**

vs.

ARKANSAS STATE PLANT BOARD, *et al.* **APPELLEES**

**ON APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY-SIXTH DIVISION**

THE HONORABLE TIMOTHY D. FOX, CIRCUIT JUDGE

APPELLANTS' ABSTRACT, BRIEF AND ADDENDUM

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INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL? *Monsanto Company v. Arkansas State Plant Board et al*, CV-20-173.

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

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

(1) _X_ Construction of Constitution of Arkansas
(2) ___ Death penalty, life imprisonment
(3) ___ Extraordinary writs
(4) ___ Elections and election procedures
(5) ___ Discipline of attorneys
(6) ___ Discipline and disability of judges
(7) ___ Previous appeal in Supreme Court
(8) ___ Appeal to Supreme Court by law

III. NATURE OF APPEAL?

(1) _X_ Administrative or regulatory action
(2) ___ Rule 37
(3) ___ Rule on Clerk
(4) ___ Interlocutory appeal
(5) ___ Usury
(6) ___ Products liability
(7) ___ Oil, gas, or mineral rights
(8) ___ Torts
(9) ___ Construction of deed or will
(10) ___ Contract
(11) ___ Criminal

This is an appeal of an order entered by the Pulaski County Circuit Court that granted the State's Motion for Judgment on the Pleadings and denied Appellants' Motion for Judgment on the Pleadings. The primary question before the Circuit

Court was whether Arkansas Code Annotated § 2-16-206, which delegates the State's power to appoint the members of a State Agency (The Arkansas State Plant Board) to private business associations, is unconstitutional. In denying Appellants' Motion for Judgment on the Pleadings and Granting the State's Motion, the Circuit Court held that the Arkansas State Plant Board is not organized in violation of Arkansas' State Constitution and effectively ruled that the Arkansas General Assembly may delegate its constitutionally granted public power to private individuals or entities.

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

V. EXTRAORDINARY ISSUES?

(X) appeal presents issue of first impression,

(__) appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,

(__) appeal involves federal constitutional interpretation,

(X) appeal is of substantial public interest,

(X) appeal involves significant issue needing clarification or development of the law, or overruling of precedent.

(X) appeal involves significant issue concerning construction of statute, ordinance, rule, or regulation.

VI. CONFIDENTIAL INFORMATION

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

___ Yes _X_ No

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

___Yes____No

JURISDICTIONAL STATEMENT

1. The issue of law raised on appeal is as follows: Is Arkansas Code Annotated § 2-16-206, which delegates the legislature's authority to appoint the members of a State Agency to private business associations, an unconstitutional delegation of public appointment power to private interests?

2. I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of legal significance for jurisdictional purposes: This case presents a question of first impression regarding the Arkansas General Assembly's authority to delegate its public appointment power to private interests. Article V of the Arkansas Constitution vests legislative and rule-making powers in the Arkansas General Assembly. The question now before the Court is whether Arkansas Code Annotated § 2-16-206 is an unconstitutional delegation, to private industry groups, of the legislature's power to appoint persons to conduct governmental functions as Members of the State Plant Board. The Circuit Courts are split on this issue as the Second Division of the Circuit Court of Pulaski County, Arkansas, has ruled that the portion of Arkansas Code Annotated § 2-16-206 which permits private organizations to elect or appoint members to the State Plant Board is an unconstitutional delegation of public appointment power. See *Monsanto Company v. Arkansas State Plant Board et al*, Case No. 60 CV-17-5964 (2020). This appeal is of substantial public

interest due to the strong interest of the people in keeping public power, including but not limited to the power to appoint public officials, in the *public* domain. The current appointment process most definitely limits genuine opportunity for public interest to assert itself on the members of the State Plant Board, as the majority of appointed members are all entirely reliant on private business associations for their appointments. Finally, the appeal involves significant issues concerning the construction and application of the Arkansas Constitution and state statutes.

/s/ Grant Ballard
J. Grant Ballard
Attorney for Appellants

POINTS ON APPEAL AND PRINCIPAL AUTHORITIES

I. The Circuit Court Erred in Denying Appellants' Claim that the Current Appointment Process for the Majority of Voting-Members of The State Plant Board is Unconstitutional.

Ark. Const. Art. IV.

Ark. Const. Art. V.

a. Standards of Review

Cent. Oklahoma Pipeline, Inc. v. Hawk Field Servs., LLC, 2012 Ark. 157, 400 S.W.3d 701 (2012).

Arnold v. State, 2011 Ark. 395, 384 S.W.3d 488 (2011).

b. The statutory appointment process for members of the ASPB violates the Separation of Powers doctrine.

Leathers v. Gulf Rice Arkansas, Inc., 338 Ark. 425, 994 S.W.2d 481 (1999).

Ark. Const. Art. IV.

c. The statutory appointment process at Arkansas Code Annotated § 2-16-206 unconstitutionally grants public power to private business associations.

Ark. Const. Art. V.

Ark. Const. Art. II.

d. The Arkansas State Plant Board lacks oversight by elected officials.

Ark. Code Ann. § 10-3-309

e. This Court should reverse the Circuit Courts dismissal of the claim of unconstitutional delegation of appointment power.

Ark. Code Ann. § 2-16-206

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Ark. Const. Art. V ..... viii, SoC1, Arg. 5, 7-9

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Miscellaneous

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ABSTRACT

PROCEEDINGS HELD AUGUST 5, 2019

THE COURT: On the Docket is the case of McCarty, et al vs. Arkansas State Plant Board, et al, CV-2017-6359. This case is on remand from the Arkansas Supreme Court and it looks like the only thing that remains is the Plaintiffs' request for declaratory judgment on the alleged violation of separation of powers. Is that correct?

MR. BALLARD: Yes.

THE COURT: Are you folks wanting to continue with that?

MR. BALLARD: Yes. **R. 133.**

THE COURT: I noticed that a couple of witnesses were subpoenaed. It seems to me to be an issue of law. Do you all think there is testimony and evidence that would need to be presented?

MS. MERRITT: No, Your Honor. I believe it is a matter of law.

THE COURT: Are you all thinking that there's factual testimony that needs to be elicited to complete the record on this?

MR. BALLARD: The only testimony we were going to elicit was that the appointment process described in the statute was followed. **R. 134.**

THE COURT: That's not an issue is it?

MS. MERRITT: It is not an issue as far as I'm concerned.

THE COURT: What I would like to do is set up a briefing schedule. **R. 135.**

THE COURT: I'll get an Order out on it. **R. 137.**

(THE PROCEEDINGS WERE CONCLUDED.) **R. 139**.

STATEMENT OF THE CASE

This controversy began as a legal challenge to the State Plant Board's ban on the in-crop use of dicamba-based herbicides after April 15, 2018. **Add 1.** The present Appeal specifically requests review of a Circuit Court Order denying Appellants' claim that Arkansas Code Annotated § 2-16-206, which provides for the appointment of State Plant Board members by private business associations, is an unconstitutional delegation of legislative power to private interests in violation of Articles IV and V of the Arkansas State Constitution. **Add 84.** The Appellants, six Arkansas farmers, have consistently argued that the Arkansas State Plant Board (ASPB) is organized in violation of the Arkansas Constitution since the majority of the voting members of this State Agency are now directly appointed by private business associations, pursuant to Arkansas Code Annotated § 2-16-206. **Add. 1.**

Background. Appellants filed a Complaint and Amended Complaint for declaratory judgment, injunctive relief, and Judicial Review of administrative actions, generally challenging the Arkansas State Plant Board's April 15, 2018 dicamba cutoff rule and the denial of a Petition for Rulemaking submitted to the ASPB by the Appellants. **Add. 1 at pgs. 2-3.** Upon consideration of a Motion to Dismiss Appellant's First Amended Complaint by the State Plant Board, the Circuit Court of Pulaski County declared that the April 15th "cutoff" rule was "void ab initio" and "null and void" as to the individual Appellants before dismissing

Appellant's First Amended Complaint on the basis of sovereign immunity. **Add. 1.** The ASPB appealed the Circuit Court's ruling that the challenged rule was "void ab initio" and "null and void" as to the farmer Plaintiffs and the farmers (the present Appellants) filed a cross-appeal which appealed the Circuit Court's dismissal of their Complaint and allegations of constitutional violations. **Add. 1 at pgs. 4 and 5.** The Supreme Court dismissed the ASPB's appeal as moot and found the farmers' cross appeal partially moot. **Add. 1 at pgs. 5-8.** However, the Supreme Court held that the farmers' claim that Arkansas Code Annotated § 2-16-206 constituted an unconstitutional delegation of legislative appointment power was not moot. **Add. 1 at p. 7.** The Supreme Court then reversed the Circuit Court's Order dismissing the farmers' Constitutional claims and remanded the case for further proceedings on that issue. **Add. 1 at pg. 8.**

The Motions and Circuit Court Ruling on Remand from the Supreme Court.

Upon remand, the Appellants filed a Second Amended Complaint. **Add. 9.** The Circuit Court and Parties agreed that the remaining question in this proceeding was whether Arkansas Code Annotated § 2-16-206 constituted an unconstitutional delegation of legislative power to private interests in violation of the Arkansas State Constitution. **Ab. 1**. The Parties further agreed that this issue presented a question of law. **Ab. 1.** The Parties then submitted this case to the Circuit Court on written briefs. The Appellant farmers submitted a Motion for

Judgment on the Pleadings which requested a Declaratory Judgment declaring Arkansas Code Annotated § 2-16-206 unconstitutional and finding the rules and acts of this unconstitutional State Plant Board to be null and void. **Add. 22 at p. 33.** The ASPB filed a cross-motion for judgment on the pleadings, requesting an Order dismissing Appellants' case with prejudice. **Add. 52 at p. 53.**

The Circuit Court's Ruling.

On December 1, 2019, The Circuit Court denied Appellants' Motion for Judgment on the Pleadings and granted the ASPB's Cross-Motion for Judgment on the Pleadings before dismissing Appellants' action with prejudice. **Add. 84.**

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING APPELLANTS' CLAIM THAT THE CURRENT APPOINTMENT PROCESS FOR THE MAJORITY OF VOTING-MEMBERS OF THE STATE PLANT BOARD IS UNCONSTITUTIONAL.

The Circuit Court erred in dismissing the Appellants' claim that the statute governing appointment of individuals to serve on the State Plant Board constitutes an unconstitutional delegation of power public power. **Add. 84.** Arkansas Code Annotated § 2-16-206 provides private entities the sole authority to appoint half of the State Plant Board's members and the majority of its voting members. Arkansas Code Annotated § 2-16-206(a). This delegation of power to private, unaccountable parties to appoint individuals to conduct governmental functions violates the State Constitution and this Court should enter an Order holding the statutory delegation of appointment power as unconstitutional. See *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 430, 994 S.W.2d 481, 484 (Ark. 1999) (reasoning"'[t]his is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumably disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.'")

a. Standard of Review.

The Appellants present this Court a facial challenge to the constitutionality of a statute which prescribes the manner for appointment of members of the State Plant Board. This case requires statutory interpretation of Arkansas Code Annotated

§ 2-16-206. Any question as to the correct interpretation of an Arkansas Statute is a question of law which this Court considers de novo. *Cent. Oklahoma Pipeline, Inc. v. Hawk Field Servs., LLC,* 2012 Ark. 157, 9–10, 400 S.W.3d 701, 707–08 (2012). When considering the constitutionality of a statute this Court must interpret the constitution as well as the challenged statute, and the Supreme Court's review of a Circuit Court's interpretation of the Arkansas Constitution, just as in the interpretation of an Arkansas Statute, is also de novo. *Arnold v. State,* 2011 Ark. 395, 4, 384 S.W.3d 488, 493 (2011).

Since every statute is given the presumption of constitutionality, the party challenging a statute's constitutionality bears the burden of demonstrating that a statute violates the constitution. *Cent. Oklahoma Pipeline, Inc. v. Hawk Field Servs., LLC,* 2012 Ark. 157, 9–10, 400 S.W.3d 701, 707–08 (2012). A statute should be struck down as unconstitutional where there is a clear incompatibility between the statute and the constitution. *Cent. Oklahoma Pipeline, Inc. v. Hawk Field Servs., LLC,* 2012 Ark. 157, 9–10, 400 S.W.3d 701, 707–08 (2012) citing *Barclay v. First Paris Holding Co.,* 344 Ark. 711, 42 S.W.3d 496 (2001).

b. The statutory appointment process for members of the ASPB violates the Separation of Powers doctrine.

Arkansas Code Annotated § 2-16-206 is an unlawful delegation of public authority in violation of the nondelegation doctrine and the fundamental separation of power principles embodied in the Arkansas State Constitution. This statute

plainly gives private entities authority to appoint the majority of the Plant Board's voting members.[1] In the present case, the Legislature has provided private industry the authority to appoint members of a State Agency, and, at the same time, the legislature has not established clear standards for selection of a board members, no qualifications for plant board members, no knowledge requirements for board members, and set no goals for the overall composition of the Plant Board. As a result, the Plant Board contains few full-time farmers, no minorities, no women, and is instead composed primarily of individuals with vested business and financial interests in the outcome of the Plant Board's rulemaking processes.

By way of background, the appointment process proscribed by Arkansas Code Annotated § 2-16-206(a) appears unique in the context of Arkansas state agencies. While there are boards, commissions, etc. which allow private organizations to nominate members, subject to the approval of the governor, the majority of members of the state plant board are now appointed directly by private business interests with no review by elected representatives of Arkansas citizens. 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. Ark. Attorney General Opinion No. 2005-213, at 1-4 (finding the board may not amend its by-laws to authorize private organizations to appoint board members in a similar manner as

[1] Ark. Code Ann. § 2-16-206.

the county judge and mayors because private organizations may not be given the power to appoint board members). The Appellants now seek an Order from this Court making clear that the Arkansas General Assembly cannot delegate its public authority to private interests which are not accountable to the public.

The State Plant Board has been entrusted with regulatory duties, adjudicatory power, and rule-making authority including the regulation of herbicide use and application by Arkansas farmers. The Board is presently governed by eighteen (18) members, appointed pursuant to Arkansas Code Annotated § 2-16-206. Two of these members are non-voting members, appointed by the Vice President for Agriculture of the University of Arkansas. Seven members are appointed by the Governor, and nine members are appointed by private business organizations. As a result, the majority of voting members are now selected by private business interests. The Arkansas Legislature has undisputedly delegated its authority to appoint members of the State Plant Board to private industry associations, and the Legislature now has no influence over the appointment of Plant Board members. The Appellants assert, as at least one Arkansas Circuit Court has previously ruled, that the Arkansas General Assembly's delegation of its appointment powers to private entities in Arkansas Code Annotated § 2-16-206 is an unconstitutional delegation of public appointment authority to private industry groups which has resulted in a State Plant Board that is unconstitutionally organized.

As both the State and Federal Constitutions specifically delegate certain powers and functions to the different branches of State Government, a Judicial Doctrine of "nondelegation" of these powers has long been recognized by Courts across this nation. The word "nondelegation" may not be specifically stated in the Constitution of the State of Arkansas, or the United States Constitution, but the nondelegation doctrine has long been recognized by Judicial precedent and is based on fundamental principles of separation of powers and good governance.

The Arkansas Constitution provides for a clear separation of powers by the Departments of State Government. *See* Ark. Constitution Art. IV. Article V of the Arkansas Constitution vests legislative and rule-making powers in the Arkansas General Assembly. Arkansas Code Annotated § 2-16-206 is an unconstitutional delegation, to private industry groups, of the legislature's power to appoint persons to conduct governmental functions as Members of the State Plant Board. Any assignment of rule-making or legislative authority to private entities is in violation of the Arkansas Constitution. Arkansas Code Annotated § 2-16-206 should therefore be deemed unconstitutional and the actions of the current State Plant Board should be declared void on the basis that the majority of the State Plant Board were without lawful authority to initiate rulemaking and to disperse public funds.

That the appointment of board members by private entities is unconstitutional is consistent with rulings from jurisdictions around the Country. See *Gamel v. Veterans' Memorial Auditorium Comm'n*, 272 N.W.2d 472, 476 (Iowa 1978) ("private individuals cannot be empowered to select boards to spend public funds, no matter how well qualified they may be"); *Hetherington v. McHale*, 458 Pa. 479, 484, 329 A.2d 250, 253 (Pa. 1974) ("[a] fundamental precept of the democratic form of government imbedded in our Constitution is that people are to be governed only by their elected representatives); and *Sedlak v. Dick*, 256 Kan. 779, 887 P.2d 1119 (Kan. 1995) (Workers' Compensation Act provision requiring selection of Workers Compensation Board members by committee consisting of representatives chosen by labor union and business association was unconstitutional delegation of legislative power to private organizations, even though actual appointment to committee was made by Secretary of Human Resources; only one name was submitted for each vacancy and Secretary had no discretion to reject or substitute for persons selected by union and association.). Arkansas law is no different and even refers to this type of private delegation as obnoxious. *Leathers,* 338 Ark. at 430 994 S.W.2d at 484.

While there is case law providing that certain legislative functions may be delegated where the legislature has established a clear purpose for the delegation of a legislative function and effectively proscribed "the standards by which that

purpose is to be worked out with sufficient exactness to enable those affected to understand these limits," the Legislature has no authority to provide a blanket delegation of its authority to appoint members of state agencies. Id.

Not only does Article IV of the Arkansas State Constitution require a clear separation of powers by the Departments of State Government, but Article V of the Arkansas Constitution specifically vests legislative powers in the Arkansas General Assembly. Included in the legislative power is the power of appointment. See Arkansas Constitution, Art. 5, § 14; see also *Cox v. State,* 72 Ark. 94 (1904) (holding appointment by the Legislature of a State Capitol Commission is valid as the Constitution contemplates appointment by the Legislature of officers other than those necessary to discharge its own duties). It has long been well settled that legislative powers cannot be delegated, *even to other branches of state government*, except within "certain limits." *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 429, 994 S.W.2d 481, 483 (1999); see also *City of Harrison v. Snyder*, 217 Ark. 528, 531, 231 S.W.2d 95, 97 (1950). Those "limits" may include delegation of rulemaking authority to "other branches of state government," where the legislature provides clear and definite standards as to how those "other branches of state government" are to execute the delegated powers. However, these "limits" do not include the absolute delegation of appointment power to private business associations. There is no authority to support such a delegation of public authority

to private entities, and Appellants ask that the Supreme Court issue an Order affirming the long-standing principle that a branch of government may not delegate its public authority to private entities. Article V of the Arkansas Constitution does not grant the General Assembly the authority to delegate its appointment power to private entities. The court will not find such authority in the Constitution or any applicable case law.

c. The statutory appointment process at Arkansas Code Annotated § 2-16-206 unconstitutionally grants public power to private business associations.

Article V, Section 1, of the Arkansas Constitution provides that "**the legislative power of the people of this State shall be vested in a General Assembly**." Pursuant to the Arkansas Constitution, "**all political power is inherent in the people** and government and 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." See Article II, Section 1 of the Arkansas Constitution (emphasis added). This provision of the Constitution, when read with Article V of the State Constitution, requires that all public power, including but not limited to the power to appoint public officers, remain in the *public* domain. The Arkansas Legislature derives its authority from Article V of the Constitution, which is limited by the section of Article II referenced above, and the legislature may not exceed its authority by delegating its *public* power to <u>private</u> interests, including but

not limited to the private business associations which presently appoint the majority of voting members of the State Plant Board.

Fundamental principles of our State Constitution require that the people control their government, and the appointment process outlined in Arkansas Code Arkansas Code Annotated § 2-16-206 has robbed the regulated citizenry of this State of public power and the related opportunity to affect their destiny. The current appointment process most definitely limits genuine opportunity for public interest to assert itself on the members of the State Plant Board, as the majority of appointed members are all entirely reliant on private business associations for their appointments.

The Supreme Court of Georgia has had the opportunity to address a situation similar to that presently before this Court. In the case of *Rogers v. Medical Association of Georgia*, a practicing Georgia physician challenged a statute which required that the Governor of the State of Georgia must appoint the nominees of the Medical Association of Georgia, which represented approximately two-thirds of the doctors licensed to practice in Georgia, to the Georgia State Board of Medical Examiners. *Rogers v. Medical Ass'n of Georgia*, 244 Ga. 151, 153, 259 S.E.2d 85, 87 (1979). Dr. Rogers alleged this was an unconstitutional delegation of legislative appointment power in that a private industry association had the exclusive right to nominate members of the Board of Medical Examiners. The Supreme Court of

Georgia agreed, citing provisions of the Georgia State Constitution which are very similar to portions of the Arkansas State Constitution which have been referenced above, writing that

> **The General Assembly may, within constitutional limitations, establish qualifications for public office and designate a governmental appointing authority. But it cannot delegate the appointive power to a private organization. Such an organization, no matter how responsible, is not in the public domain and is not accountable to the people as our constitution requires**. It represents and is accountable to its membership. Here the Medical Association of Georgia, a private organization, controls the appointment of the members of the State Board of Medical Examiners under the 1971 Act which provides that the Governor must appoint from its nominees. This is violative of our Constitution.
>
> *Id at* 153, 087..

More recently, in 2018, the Supreme Court of Georgia was once-again called on to consider whether a statute, allowing private entities to appoint four (4) board members to the DeKalb County Board of Ethics, was unconstitutional. The Court noted that the individuals appointed by private entities were wielding government power and that the private appointment process delegates the power of appointment "to private organizations that are not accountable to the people as our constitution requires." *Delay v. Sutton*, 304 Ga. 338, 341, 818 S.E.2d 659, 661–62 (2018). In its opinion, the *Delay* Court referenced a provision of the Georgia Constitution which provides that:

> All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public

> officers are the trustees and servants of the people and are at all times amenable to them.
>
> GA Const. Art. 1, § 2, ¶ 1.

The Court went on to cite the *Rogers v. Med. Ass'n of Georgia* opinion, referenced above, for the proposition that "fundamental principles embodied in our constitution dictate that the people control their government. "All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole" . . . This is accomplished through elected representatives to whom is delegated, subject to constitutional limitations, the power to regulate and administer public affairs, including the power to provide for the selection of public officers." *Delay v. Sutton*, 304 Ga. 338, 340–41, 818 S.E.2d 659, 661 (2018) quoting R*ogers v. Med. Ass'n of Georgia*, 244 Ga. 151, 259 S.E.2d 85 (1979). Appellants' Counsel suggests to the Court that this reasoning is directly applicable to their case before this Court.

Article II, Section 1 of the Arkansas Constitution is very similar to the portions of the Georgia Constitution, which were relied upon in the aforementioned cases, in that the Arkansas Constitution plainly provides that "all political power is inherent in the people and government and 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." Arkansas Code Annotated § 2-16-206, on the other hand, allows for private business associations to wield the legislative appointment powers

of the public which has been vested in the legislature through Article V of the Arkansas Constitution. The constitutional problem with the statutory appointment process for members of the State Plant Board is two-fold: first, the Legislature has no constitutional authority to delegate its appointment power to private entities and, second, these private entities which are now wielding *public*, governmental power do not answer to the people as required by Article II of our Constitution.

Appellants' Counsel does not believe this exact issue has been previously addressed by the Supreme Court of Arkansas, but respectfully suggests to the Court there is a reason that Arkansas has no other State Agency where private business associations directly appoint members of a rule-making, adjudicatory, and permitting arm of the State Executive Branch. The appointment process for the State Plant Board is not only highly irregular, it is patently unconstitutional.

d. The Arkansas State Plant Board lacks oversight by elected officials.

In defense of the highly irregular appointment process for members of the State Plant Board, the State has previously argued that review by the Arkansas Legislative Council and a discretionary "Proclamation" from the Governor's office may somehow cure an unconstitutional delegation of public appointment power. **Add. 55 at pg. 7-8.** The Appellants disagree. While the State may point out that Executive Order No. 15-02 requires gubernatorial review and approval of agency rules and regulations, and that Arkansas Code Annotated § 10-3-309 requires the

Rules and Regulations Subcommittee to approve all rules proposed by state boards, there is no authority to indicate that oversight of the Board's actions may cure the unconstitutional delegation of appointment power.

Moreover, there is simply no review for many of the actions the Plant Board is authorized to take, as the Plant Board's adjudicatory and permitting roles are not subject to any legislative or executive branch review. Further still, the review of Plant Board rulemaking is very limited in scope. With respect to regulations adopted by the Plant Board, Arkansas Code Annotated § 10-3-309 does not require the Rules and Regulations Subcommittee to vote to approve a regulation before it takes effect. Arkansas Code Annotated § 10-3-309(c)(3)(B)(i)(a) (the subcommittee does not vote on rules and regulations unless a majority of a quorum of the subcommittee requests that the subcommittee take a vote). Additionally, the Rules and Regulations Subcommittee may reject a rule only if it violates state or federal law or is inconsistent with legislative intent. Arkansas Code Annotated § 10-3-309(f)(1). The Legislative Council cannot stop a rule because they disagree with it or think it is harmful to the citizens of Arkansas or Arkansas' economy. There is not a true "review" of rulemaking by the State Plant Board.

The legislative review available for Plant Board rules is minimal, does not appear to reach to the merits of the proposed rules, fails to address the adverse consequences of proposed rules, and cannot be said to amount to publicly

accountable oversight. The legislative council and the Governor certainly lack the authority to remedy an unconstitutional delegation of the appointment power to private entities. The legislative council and the Governor can take no action to compel the Plant Board to make certain rules. With respect to executive oversight, the Governor is not bound to review the Board's rules and may do so at his own discretion.

There is no legislative oversight as to how the privately appointed members of the State Plant Board are selected. The private industry organizations which have the statutory authority to appoint members to the State Plant Board include The Arkansas Agricultural Aviation Association, the Arkansas Oil Marketers Association, the Arkansas Seed Dealers' Association, the Arkansas Seed Growers Association, the Arkansas Pest Management Association, Inc., the Arkansas Crop Protection Association, the Arkansas Forestry Association, the Arkansas Green Industry Association, and the Arkansas State Horticultural Society. It is not apparent to the Appellants how many individuals or businesses each of these private organizations represent, nor is there any degree of transparency as to how each organization determines who it will appoint as a member of the State Plant Board, which has significant power over Arkansas' farm families.

e. This Court should reverse the Circuit Courts dismissal of the claim of unconstitutional delegation of appointment power.

Put simply, this Court should make clear that the legislature may not delegate the authority to appoint members of a State agency to private organizations. 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. There is no genuine opportunity for public interest to assert itself in the appointment of the majority of voting members of the State Plant Board.

For example, the Arkansas Legislature cannot pass a statute allowing Budweiser or InBev to appoint the members of the Arkansas Alcohol Beverage Control Board. Arkansas Code Annotated § 2-16-206 was an unconstitutional delegation of legislative authority in violation of the nondelegation doctrine and the fundamental separation of powers principles embodied in the Arkansas State Constitution. Appellants brought a meritorious claim for unlawful delegation of appointment power in violation of the Arkansas Constitution, and the Circuit Court erred in dismissing this claim.

CONCLUSION

The Supreme Court of Arkansas may not have previously had the chance to consider the constitutionality of an absolute delegation of legislative appointment power to private business entities. Nevertheless, other jurisdictions have, and those

jurisdictions are consistent in finding that "the power to appoint public officers is the sovereign power of the State." *People ex rel. Rudman v. Rini*, 356 N.E.2d 4, 64 Ill.2d 321, (1976). "The sovereign power of the State cannot be conferred upon a private person or group." Id. "Constitutional provisions mandate that public affairs shall be managed by public officials who are accountable to the people. As important as any other governmental power is the power to appoint public officials. They are the persons who control so much of our lives.... In our opinion, it is clear that the constitutional provisions cited above demand that the power to appoint public officers remain in the public domain." *Delay v. Sutton*, 304 Ga. 338, 341, 818 S.E.2d 659, 661 (2018) quoting *Rogers v. Med. Ass'n of Georgia*, 244 Ga. 151, 259 S.E.2d 85 (1979). The Appellants ask that this Court reverse the Circuit Court's determination denying their Motion for Judgment on the Pleadings and enter an Order finding that Arkansas Code Annotated § 2-16-206 is an unconstitutional delegation of legislative appointment power in violation of the nondelegation doctrine and the Arkansas Constitution.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, J. Grant Ballard, do hereby certify that I have sent via the state Courts' E-Filing System this 21st day of April, 2020 a true and complete copy of the forgoing to the following:

Jennifer Merritt
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/s/Grant Ballard
J. Grant Ballard

Case Name: *Michael McCarty, et al. vs. Arkansas State Plant Board*

Docket Number: CV-20-164

Title of Brief: Appellants' Brief

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted and served on opposing counsel an unredacted PDF document that complies with the Rules of the Supreme Court and Court of Appeals. The PDF document is identical to the corresponding parts of the paper document from which it was created as filed with the Court. To the best of my knowledge, information, and belief formed after scanning the PDF document for viruses with an antivirus program, the PDF document is free from computer viruses. A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties.

Identification of paper documents not in PDF format:

The following original paper documents are not in PDF format and are not included in the PDF document: None.

/s/ Grant Ballard
(Signature of filing party)

J. Grant Ballard
(Printed name)

Ark Ag Law, PLLC
(Firm)

April 21, 2020
(Date)

SUPREME COURT OF ARKANSAS

No. CV-18-309

Opinion Delivered: June 13, 2019

ARKANSAS STATE PLANT BOARD AND TERRY WALKER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ARKANSAS STATE PLANT BOARD APPELLANTS/CROSS-APPELLEES	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. 60CV-17-6539] HONORABLE TIMOTHY D. FOX, JUDGE
V.	
MICHAEL MCCARTY, PERRY GALLOWAY, MATT SMITH, GREG HART, ROSS BELL, AND BECTON BELL APPELLEES/CROSS-APPELLANTS	DISMISSED AS MOOT ON DIRECT APPEAL; DISMISSED IN PART AS MOOT AND REVERSED IN PART ON CROSS-APPEAL; AND REMANDED.

COURTNEY HUDSON GOODSON, Associate Justice

Appellants/cross appellees Arkansas State Plant Board and Terry Walker, in his official capacity as the director of the Arkansas State Plant Board (the Board), appeal the Pulaski County Circuit Court's April 3, 2018 order declaring that the Board's April 15, 2018, dicamba cutoff rule is "void ab initio," and "null and void." Appellees/cross appellants, who are farmers Michael McCarty, Perry Galloway, Matt Smith, Greg Hart, Ross Bell, and Becton Bell (the Farmers), appeal the same order's dismissing with prejudice their first amended complaint on the basis of the Board's sovereign immunity. We dismiss the direct appeal as moot and dismiss as moot in part and reverse in part on cross appeal, and remand for further proceedings.

I. *Background*

The Board approves and regulates herbicides that Arkansas farmers may use to combat invasive plant species. Arkansas row crop farmers struggle with competition from Palmer amaranth, which is commonly known as pigweed. Over the years, pigweed has developed a resistance to traditional herbicides. Dicamba-based herbicides effectively control pigweed but may only be used on plants grown from seed produced specifically to resist dicamba.

Dicamba is highly volatile, meaning that it has a tendency to evaporate and fall off-target and damage other plants that are not dicamba resistant. Dicamba was not approved for in-crop application in 2016. In 2017, the Board approved the use of what were believed to be less volatile formulations of dicamba-based herbicides for in-crop application. However, in 2017, the Board began investigating an unprecedented number of complaints of off-target dicamba herbicide injury. There was some dispute as to whether the improved dicamba-based herbicides were properly applied, or even if other dicamba-based herbicides were used. The Board therefore appointed a "Dicamba Task Force" to address the increased number of complaints and to propose rules for the use of dicamba by Arkansas farmers for the 2018 crop year. Pursuant to the task force's recommendations, the Board proposed a new rule that would prohibit the use of dicamba from April 16 through October 31 of each year.

The Farmers used dicamba-based herbicide in 2017 and wished to use herbicide formulations containing dicamba in 2018. On September 29, 2017, the Farmers filed a petition for rulemaking. In their petition, the Farmers sought (1) the implementation of a

May 25 cutoff date for dicamba application, (2) a requirement that there be a one-mile buffer between a dicamba application and any growing crop that is susceptible to dicamba injury, unless the applicator receives a written waiver for the application, (3) the creation of a special application permit for the growing season use of dicamba in circumstances of severe pigweed infestation; and (4) the instatement of a requirement that any individual or entity applying dicamba after April 15 must carry a mandatory liability insurance policy in the amount of $500,000. The Board denied the petition on October 19, 2017.

On November 9, 2017, the Board voted to ban the in-crop use of dicamba-based herbicides after April 15, 2018.[1] On November 10, 2017, the Farmers filed suit in the Pulaski County Circuit Court seeking declaratory and injunctive relief and judicial review of administrative acts. The Farmers subsequently filed an amended complaint alleging that (1) Arkansas Code Annotated § 2-16-206 is an unconstitutional delegation of legislative appointment power to private industry, (2) Board members violated Arkansas Code Annotated § 25-15-209(a) by having unannounced meetings and communicating with third parties about the proposed dicamba ban, (3) the Board's refusal to initiate rule-making as requested in their petition and the Board's proposed April cutoff date were arbitrary and capricious, and (4) third-party contacts and procedural irregularities provided grounds for them to conduct discovery and present additional evidence to the trial court.

On January 19, 2018, the Arkansas Legislative Council approved the rule prohibiting dicamba usage from April 16 through October 31, and the new rule took effect ten days

[1] The parties at times refer to both April 15 and April 16 as the cutoff date. There is no dispute that in-crop application of dicamba-based herbicides were prohibited after April 15 under the 2018 rule.

later. On February 15, 2018, the Board filed a motion to dismiss the Farmers' amended complaint, arguing that (1) the Farmers lacked standing, (2) the Farmers' claims were not ripe, (3) the Farmers failed to perfect service of process on the Board, and (4) the Farmers' claims were barred by sovereign immunity. Notably, the Board conceded that *Andrews* did not "explicitly or implicitly overrule the line of cases that allow lawsuits for injunctive relief where a state official or agency is acting unlawfully, unconstitutionally, or otherwise outside the scope of his/its authority (ultra vires)." *See Bd. of Trs. of Univ. of Ark. v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616. However, the Board argued that the Farmers' complaint failed to allege sufficient facts to plead any unlawful or unconstitutional violation. The circuit court granted the Board's motion to dismiss on the basis of the asserted sovereign immunity defense. The circuit court dismissed with prejudice the Farmers' constitutional claims regarding the selection and procedures of the Board. The circuit court also determined that the Farmers alleged no facts with respect to their administrative rulemaking appeal that would establish an exception to sovereign immunity. The circuit court then determined that the Board's sovereign immunity resulted in a violation of the Farmers' due process rights, because the Farmers lacked any way to challenge the Board's actions. Therefore, on April 3, 2018, the circuit court ruled that the Board's rule was "void ab initio" and "null and void" as to the Farmers. The Board filed a notice of appeal as to the finding that the Board's rule was "void ab initio," and "null and void." The Farmers filed a cross appeal in

which they appealed the circuit court's with prejudice dismissal of their complaint and the dismissal with prejudice of their allegations of constitutional violations.[2]

II. *Standard of Review*

In reviewing a circuit court's decision on a motion to dismiss, we treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff. *Hodges v. Lamora*, 337 Ark. 470, 989 S.W.2d 530 (1999). Furthermore, we look only to the allegations in the complaint and not to matters outside the complaint. *Id.* However, we treat only the facts alleged in the complaint as true but not a plaintiff's theories, speculation, or statutory interpretation. *Id.*

III. *Direct Appeal*

The Board appealed that portion of the circuit court's order declaring void and without effect the Board's rule establishing the April 2018 cutoff date for the in-crop application of dicamba herbicides. We have consistently held that we will not review issues that are moot because to do so would be to render an advisory opinion. *Keep our Dollars in Independence Cty. v. Mitchell*, 2017 Ark. 154, 518 S.W.3d 64. A case generally becomes moot when any judgment rendered would have no practical effect on a then existing legal controversy. *Id.* When a challenged statute is amended or repealed so as to eliminate the controversy between the parties while the appeal is pending, the appeal is rendered moot. *Ark. St. Plant Bd. v. Bell*, 2019 Ark. 164. These mootness principles equally extend to agency regulations that are repealed while an appeal is pending. *Id.*

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[2] On April 13, 2018, we granted the Board's motion for a stay of the circuit court's order pending the appeal.

While this appeal was pending, the Board promulgated a new rule that repealed the April 15 cutoff date. The new rule took effect March 9, 2019, and in-crop dicamba application is now allowed through May 25 of each year. Ark. Code R. 209.02.4-XIII(B)(1)-(2). We may take judicial notice of this new rule. *Bell*, 2019 Ark. 164. As a threshold matter, we must determine whether the Board's appeal is moot in light of the new rule.

The Farmers alleged in their complaint that if they were not allowed to use dicamba herbicides after the April cutoff date, they would suffer actual injury to their crops as well as financial injury. In its order, the circuit court ruled that

> [t]he State Plant Board Rule establishing an April 16, 2018, cutoff date for in-crop application of dicamba herbicides is void and not applicable to Plaintiffs: Greg Hart, Becton Bell, Michael McCarty, Perry Galloway, Ross Bell, and Matt Smith. The State Plant Board Rule is null and void as if it had never been enacted as to these individuals.

The circuit court noted that the case was not brought as a class action and that the rule establishing the April cutoff date is "only applicable to the Plaintiffs in the present case." The Farmers' complaint was based on injury that they alleged they would sustain if the April cutoff date was implemented. The circuit court specifically referenced the April cutoff date in its order. Because the new rule provides that dicamba may now be used through May 25 of each year, the controversy between the parties has been eliminated as to the circuit court's order regarding the April cutoff date. We therefore dismiss the Board's appeal as moot.

IV. *Cross-Appeal*

The Farmers appealed the circuit court's order dismissing their constitutional claims and their administrative appeal because of the State's sovereign immunity. Just as the Board's promulgation of the new dicamba cutoff rule renders the Board's direct appeal moot, the Farmers' cross appeal is moot with respect to their administrative appeal of the denial of their petition for rulemaking, as well as their claims regarding improper communications or procedural irregularities associated with that denial. However, the Farmers have also alleged that Arkansas Code Annotated § 2-16-206, which provides for the appointment of Board members from various private groups, is an unconstitutional delegation of legislative-appointment power to private industry. This claim is not moot. The circuit court noted that the Board raised the affirmative defense of sovereign immunity, cited *Andrews*, and dismissed the Farmers' constitutional claims with prejudice.

The circuit court's reliance on *Andrews* to find that the Farmers' complaint was barred by sovereign immunity is misplaced. *Andrews* held only that legislative waivers of the State's sovereign immunity are unconstitutional. After we decided *Andrews*, we concluded that the defense of sovereign immunity was inapplicable in a lawsuit seeking only declaratory and injunctive relief and alleging an illegal, unconstitutional, or ultra vires act. *Martin v. Haas*, 2018 Ark. 283, 556 S.W.3d 509. In *Haas*, a voter alleged that new voting verification requirements violated the Arkansas Constitution. Although the State raised sovereign immunity as a defense, we stated that

> [b]ecause appellee has asserted that Act 633 violates qualified voters' constitutional right to vote and seeks declaratory and injunctive relief, not money damages, this action is not subject to the asserted sovereign-immunity defense.

Id. at 8, 556 S.W.3d at 515.

Because the Farmers here alleged that the process by which Board members are appointed violates the constitution, and because the Farmers sought only declaratory and injunctive relief, their constitutional claims are not subject to the sovereign immunity defense. Accordingly, the circuit court's order dismissing the Farmers' constitutional claims is reversed, and this matter is remanded for further proceedings consistent with this opinion.

Dismissed as moot on direct appeal; dismissed in part as moot and reversed in part on cross-appeal; and remanded.

BAKER, J., concurs in part and dissents in part.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

MICHAEL MCCARTY; PERRY GALLOWAY; MATT SMITH; GREG HART; ROSS BELL; and BECTON BELL — **PLAINTIFFS**

v. — **Case No. 60CV-17-6539**

ARKANSAS STATE PLANT BOARD & TERRY WALKER, in his official capacity as DIRECTOR of THE STATE PLANT BOARD — **DEFENDANTS**

SECOND AMENDEDCOMPLAINT

COME NOW the Plaintiffs, Michael McCarty, Perry Galloway, Becton Bell, Matt Smith, Greg Hart and Ross Bell, by and through the undersigned Counsel, and for their Second Amended Complaint do state as follows:

I. INTRODUCTION

1. The Plaintiffs have amended their Complaint to allege additional violations of Constitutional and Statutory Provisions that occurred during the State Plant Board's adjudication of Plaintiffs' Petition for Rule-making and the Board's considerationof its final rule which imposes an April 16, 2018, cutoff date for the in-crop use of dicamba herbicides during the 2018 crop year.

2. The Plaintiffs bring this Second Amended Complaint for Declaratory Judgement because the Arkansas State Plant Board is currently organized in violation of the Arkansas Constitution and has consistently acted in violation of Arkansas Law. The Plaintiffs seek an Order that Arkansas Code Annotated § 2-16-206, as it existed at the time of the initial filing of this action and as currently amended, which provides for the appointment of State Plant Board

members by private individuals and associations, is an unconstitutional delegation of legislative power to private interests in violation of Articles 4 and 5 of the Arkansas State Constitution.

3. The practical impact of Arkansas Code Annotated § 2-16-206 is that a majority of Arkansas' voting State Plant Board members are now directly appointed by private individuals and associations. The regulated citizens of the State of Arkansas have no voice in the appointment of these controlling members of the State Plant Board and there is no genuine opportunity for public interest to assert itself in the appointment of these members.

4. On November 9, 2017, the State Plant Board voted in support of an April 16, 2018, cutoff date for the in-crop use of dicamba herbicides. Such action will cause irreparable harm to the Plaintiffs. The Plaintiffs ask the Court to render this action void as the power of the currently seated State Plant Board is not constitutionally valid. The positions of members of the board who have been directly appointed by private groups or private individuals should be declared vacant.

5. The Plaintiffs request declaratory judgment and injunctive relief under Arkansas Rules of Civil Procedure 57 (Declaratory Judgments) and 65 (Injunctions and Temporary Restraining Orders) as well as Arkansas Code Annotated section 16–111–101 et seq. (The Arkansas Declaratory Judgment Act). The Plaintiffs also seek judicial review of the Defendants' actions, brought pursuant to Arkansas Code Annotated § 25-15-212.

6. In accordance with Ark. Code Ann. § 25-15-212, the Plaintiff specifically argues that the administrative hearing procedures employed by the Arkansas State Plant Board were made upon unlawful procedure, in violation of constitutional and statutory provisions, violated basic principles of due process, and that the Plant Board's findings and rulings in regard to the

2018 use of dicamba herbicides were in excess of the agency's statutory authority and not supported bysubstantial evidence of record. The Agency's actions in denying the Plaintiffs' formal petition for rule-making, as outlined in the attached letter, werearbitrary, capricious and characterized by an abuse of discretion.

II. JURISDICTION AND PARTIES

7. The Plaintiffs are farmers and residents of Arkansas who intended to use dicamba herbicides during the 2018 crop year. The Plaintiffs used Dicamba herbicides during the 2017 crop year. The Plaintiffs did suffer actual injury to their crops as well as financial injury if they are not allowed to use Dicamba herbicides, in-crop, after April 16, 2018.

8. Plaintiffs Michael McCarty, Perry Galloway, Matt Smith, Greg Hart, and Becton Bell have previously petitioned the Arkansas State Plant Board to initiate administrative rule-making to allow limited growing season applications of dicamba herbicide products including formulations such as XtendiMax, FeXapan, and Engenia for the 2018 crop year. The Defendants arbitrarily denied the Plaintiffs' Petition on October 19, 2017, and the Plaintiffs have exhausted their administrative remedies.

9. The Defendant, Arkansas State Plant Board, is an Arkansas State Agency[1] subject to the Arkansas Administrative Procedure Act, found at Ark. Code Ann. § 25-15-201 *et seq*. The State Plant Board is a regulatory body which has been entrusted with duties and powers,[2] including the regulation of herbicide use and application, which have significant impact upon Arkansas farmers. The Plant Board is governed by eighteen (18) members appointed pursuant to

[1] Ark. Code Ann. § 25-15-202(2)(A).
[2] The State Plant Board's powers are defined by statute including Ark. Code Ann. § 2-16-201-401.

Arkansas Code Annotated § 2-16-206. The Director and Members of the State Plant Board are Defendants in their official capacity only.

10. While the Plant Board exercises significant regulatory control over Arkansas farmers and other regulated individuals, this Agency is unresponsive and unaccountable to the majority of individuals it regulates due to the fact that half of its governing members are directly appointed by private interests. The Plaintiffs believe that the Arkansas legislature's delegation of its appointment powers to private entities is an unconstitutional delegation of legislative authority to private industry groups and has resulted in a State Plant Board that is not focused on public interest.

11. Jurisdiction and venue are proper in this court under Arkansas Code Annotated § 20-20-221, Arkansas Code Annotated § 25-15-214, and Arkansas Code Annotated § 25-15-207. The decision of the Defendant State Plant Board was issued on October 19, 2017. A copy of the Findings of Fact and Order was received on or about October 20, 2017. This Petition is timely filed, within thirty (30) days thereof.

III. BACKGROUND & HISTORY

12. Arkansas row crop farmers have struggled for years with competition from palmer amaranth, commonly referred to as pigweed, on their farms. Pigweed is a highly competitive weed species which can and does result in significant yield loss for Arkansas' row crop farmers on an annual basis.

13. In recent years, pigweed has developed significant resistance and tolerance to the chemicals traditionally used by Arkansas farmers to control pigweed populations and reduce negative yield impacts. There is now no effective alternative to Dicamba based herbicides, for

the control of resistant pigweed populations. The members of the Arkansas State Plant Board are well-aware of the fact that pigweed is a significant economic problem for Arkansas' row crop farmers and have recognized there is no good alternative to Dicamba, for Arkansas farmers.

14. The Arkansas State Plant Board exercises authority over the approval and use of herbicides by Arkansas Farmers. Dicamba based herbicides have been allowed for limited use in Arkansas for years but, prior to 2017, had not been approved for in-crop applications on soybeans. However, in previous years, there have been Complaints that Arkansas farmers have been using dicamba based herbicides in an effort to control otherwise resistant pigweeds.

15. For the 2017 crop year, the State Plant Board approved *Engenia*, a dicamba based herbicide for in-crop use and application. Engenia has been called a "low-volatility" dicamba herbicide as it was designed with the intent to reduce off-target injury to vegetation near to the application area (field).

16. The Plaintiffs herein used Engenia, in their farming operations, during the 2017 crop year.

17. The State Plant Board staff also receives and investigates complaints about improper use of pesticides. Every year, numerous complaints concerning off-target pesticide damage or improper pesticide application are made to the State Plant Board Staff. In 2016 when Dicamba herbicides were not approved for in-crop use, the State Plant Board received and investigated claims of dicamba injury to susceptible crops and there were allegations that some Arkansas farmers were applying volatile formulations of dicamba improperly.

18. There have always been chemical drift issues in Arkansas' farming areas. Despite complaints regarding dicamba injury in 2016, the State Plant Board approved a dicamba based herbicide, Engenia, for in-crop use by Arkansas Farmers for the 2017 crop year.

19. In mid-to late June of 2017, the State Plant Board began receiving an unprecedented number of complaints of off-target dicamba herbicide injury. There is wide disagreement as to whether the increased number of pesticide injury complaints resulted from improper use of the product, environmental conditions, or simply the volatility of the Engenia product itself. There is also much disagreement as to whether the Engenia product was the cause of the off-target injury or whether certain producers and pesticide applicators were using unapproved, more volatile dicamba herbicides.

20. The State Plant Board appointed a "Dicamba Task-Force" to address the increased number of Complaints and propose rules for the use of dicamba by Arkansas Farmers for the 2018 crop year. This Task-Force was lauded as a collaborative effort to avoid off-target dicamba injury in 2018. However, Freedom of Information Act requests have revealed repeated suggestions that there was an intentional effort by members and staff of the State Plant Board to prevent farmers from becoming members of the "Task-Force" and to limit their input in regard to the 2018 rules. In the end, the input of Arkansas row crop farmers (those primarily affected by the issue at hand) were placed second to industry groups including the Arkansas Poultry industry.

21. The Plaintiffs believe that members of the State Plant Board actively attempted to suppress the input of Arkansas Farmers.

22. The bizarre nature of the State Plant Board's appointment of Dicamba Task-Force members is readily apparent in the appointment of James King, to the Task-Force. James King was appointed to represent the "Arkansas Green Industry," yet it is not apparent that anyone from the State Plant Board ever spoke to Mr. King, Mr. King did not participate in the Task-Force meetings, and was even quietly removed from the final Task-Force report. Quite frankly, Mr. King does not appear to exist, yet he was appointed to a Task-Force of utmost importance to Arkansas row crop farmers. Please refer to the Announced List of Task Force Members attached to Plaintiff's First Amended Complaint as Exhibit 1.

23. The above-referenced Dicamba Task-Force originally attempted to reach an 85% consensus on proposals for 2018 dicamba use. The Task-Force could not reach such a consensus, so the Task-Force determined to reach 75% consensus. The Task-Force did not reach a 75% consensus, yet a package of proposals, in the form of a report, resulted from the Task-Force meeting. These proposals included an April 15th cutoff date for the use of dicamba herbicides in Arkansas. The Plaintiffs herein argue that an April 15th cutoff date is not a cutoff date but an arbitrary ban on in-crop use of dicamba herbicides because only a minor percentage of Arkansas' soybean crop is planted by April 15th.

24. The April 15th cutoff date and associated proposals were recommended to the State Plant Board by members of its pesticide committee. The Plant Board Staff and certain members suggested that there was a consensus by the Task-Force. This was not true and was misleading. The Task-Force report itself states that it takes 14 members to reach a 75% consensus and only 13 Task-Force members were in support of an April 15th cutoff date.

25. Nevertheless, the misrepresentation of this alleged Task-Force "consensus" was used as a basis for the State Plant Board to proceed with instituting an April 16th ban on the use of dicamba herbicides for the 2018 crop year, making Arkansas the only state in the South to presently ban in-crop use of dicamba for 2018.

26. The Plaintiffs and other interested farmers responded to the arbitrary actions of the State Plant Board by organizing an informal petition which was supported by over 330 Arkansas Farmers (representing over 1.33 million Arkansas cropland acres) who opposed the April 15th cutoff date and suggested that a May 25th cutoff date would prevent off-target injury and allow Arkansas farmers use of dicamba herbicides in 2018. The Plant Board initially would not allow this group time to present their petition to the State Plant Board.

27. As a result of the State Plant Board's refusal to listen to Arkansas producers, the Plaintiffs herein were forced to file a formal "Petition for Rule-Making" with the State Plant Board so that they could express their concerns to State Plant Board members. The Plaintiffs pointed out that the proposed dicamba ban was going to have a significant and negative financial impact on Arkansas Farmers and that restricted used of the product could avoid off-target and unintended injury to susceptible crops and plants. The Petition is attached to Plaintiff's First Amended Complaint as Exhibit 2.

28. On October 19, 2017, The Defendant, Arkansas State Plant Board, held a special meeting to consider the Plaintiffs' Petition to Initiate Rule-making. The Plaintiff's Petition for Rule-making was arbitrarily denied on the basis that it "could cause confusion."[3] Again, the interests of Arkansas farmers were summarily dismissed due to arbitrary concerns not based on

[3] Please refer to the October 20th Letter from Plant Board Director Terry Walker attached hereto as Exhibit 3.

substantial evidence but, instead, an apparent unwillingness to find answers to relevant questions concerning the potential use of dicamba during the 2018 crop year.

29. Since the date of the Hearing, it has become evident that members of the State Plant Board have been personally advocating for a total ban on dicamba use in Arkansas and against the Plaintiffs' Petition for Rule-making, specifically. Good government, based on reasonably objective decision-making, has been sacrificed by vested private interests that are entrenched on the State Plant Board due to an unlawful delegation of Plant Board appointment authority to private industry. The Plaintiffs have also been denied an impartial adjudicator as required by the Administrative Procedure Act.

30. Ark. Code. Ann. § 25-15-212 affords the Plaintiff a right to judicial review of the record and decision made by the Arkansas State Plant Board as stated in its letter of October 20, 2017.

31. The State Plant Board's November 9, 2017, approval of an April 16, 2018, cutoff date for the in-crop use of dicamba herbicides in Arkansas Row Crops has since been approved by the Arkansas Legislative Council and has taken effect.

32. As a result of the denial of Plaintiffs' Petition for Rulemaking and the Plant Board's imposition of an April 16th cutoff date for in-crop use of dicamba based herbicides in 2018, the Plaintiffs have been forced to alter their means of doing business for the 2018 crop year, which will result in injury to growing crops, decreased yields, and increased expenses including but not limited to the hiring of hoe crews to combat the presence of pigweed in their fields. This is the direct result of the Plant Board's denial of Plaintiffs' Petition for Rulemaking and adoption of a rule which is inconsistent with the rules proposed by the Plaintiffs.

33. All Arkansas farmers have been prejudicially impacted by the Plant Board's prohibition on the application of dicamba herbicides in the 2018 crop year. Arkansas is the only State in the Nation, of which Plaintiffs are aware, where there has been an all out prohibition on the in-crop use of dicamba.

34. A reversal or invalidation of the Plant Board's 2018 dicamba ban would redress the Plaintiffs' injury.

IV. CAUSES OF ACTION

A. Unlawful Delegation of Legislative Authority to Private Interests

35. The Plaintiffs hereby appeal the State Plant Board's decision in regard to their Petition for Rule-Making. Plaintiffs also seek an Order declaring the State Plant Board's vote on the Plaintiff's Petition, as well as subsequent votes relating to the 2018 in-crop use of dicamba, to be deemed void and unlawful. The Plaintiffs seek declaratory and injunctive relief, barring the State Plant Board from banning in-crop use of dicamba for the 2018 crop year, on the grounds that Arkansas Code Annotated § 2-16-206 is unlawful and unconstitutional as it allows the majority of voting members of the State Plant Board to be directly appointed by private interests who are not accountable to the people of Arkansas, the Legislature, or the Governor.

36. Specifically, Arkansas Code Annotated § 2-16-206 is an unconstitutional attempt by the Legislature to delegate legislative appointment power to private industry. This statute established a state plant board composed of members "elected by" a list of private interests as set forth by the code as amended and as it existed prior to the 2019 amendment.

37. These aforementioned members are not subject to any elected officials' approval. While they do not receive compensation, they direct the use of Arkansas' funds and receive

expense reimbursements from the State Treasury. The Plaintiffs are not aware of another State Agency whose members are directly appointed by private interests.

38. The Arkansas Constitution provides for a clear separation of powers by the Departments of State Government. See Article 4 of the Arkansas State Constitution. Arkansas Code Annotated § 2-16-206 is an unconstitutional delegation, to private industry groups, of the legislature power to appoint persons to conduct governmental functions as Members of the State Plant Board.

39. Article 5 of the Arkansas Constitution vests legislative and rule-making powers in the Arkansas General Assembly. Any assignment of rule-making or legislative authority to private entities is in violation of the Arkansas Constitution.

40. Arkansas Code Annotated § 2-16-206 should be deemed unconstitutional, the actions of the State Plant Board in regard to its 2018 pesticide rules and dicamba use should be enjoined, and the actions of the current State Plant Board should be declared void on the basis that the majority of the State Plant Board were without lawful authority to initiate rule-making and to disperse public funds.

41. Put simply, the legislature may not delegate the authority to appoint members of a State agency to private organizations. Arkansas Code Annotated § 2-16-206 was an unconstitutional delegation of legislative authority in violation of the nondelegation doctrine and the fundamental separation of powers principles embodied in the Arkansas State Constitution.

42. Under our constitutional doctrine of separation of powers the functions of the Legislature must be exercised by it alone.*Walden v. Hart,* 243 Ark. 650, 652, 420 S.W.2d 868, 870 (1967). That power cannot be delegated to another authority. *Id.* (citing Ark. Const. art. 4;*Oates v. Rogers,* 201 Ark. 335, 144 S.W.2d 457 (1940)). In this case, the Arkansas Legislature

has unlawfully attempted to delegate its functions to the private entities that are listed in Arkansas Code Annotated § 2-16-206.

43. States around the nation have held that "private individuals cannot be empowered to select boards to spend public funds." *Gamel v. Veterans' Memorial Auditorium Commission*, 272 N.W.2d 472, 476 (Iowa Sup. 1978). The Plaintiffs have brought their request for a declaratory Judgment, which seeks a ruling, that the current make-up of the State Plant Board is unlawful and unconstitutional, in an effort protect the basic principle that Americans "are to be governed by our elected representatives in accordance with the Constitution." *Hetherington v. McHale*, 458 Pa. 479, 329 A.2d 250, 253 (1974).

VI. CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully requests that this Court declare Arkansas Code Annotated § 2-16-206 an unconstitutional delegation of legislative authority to private interests, The Plaintiffs ask that the Court render the regulatory and rule-making actions by this Plant Board, concerning the 2018 use of dicamba unlawful and void. The seats of State Plant Board members who were appointed by private interests should be deemed vacant, and this Court should reverse and vacate the Defendant's proposed 2018 dicamba ban. Similarly, the Plant Board's decision of October 20, 2017, denying the attached Petition for Rule-making should be reversed, as an action not supported by substantial evidence of record; characterized by arbitrary and capricious action; and made upon unlawful procedure in violation of the Plaintiffs' constitutional rights. Finally, the Plaintiffs ask that this Court enter an injunction, barring the State Plant Board from banning the in-crop use of dicamba herbicides for the 2018 crop year.

DATED: January 26, 2018

Respectfully Submitted,

Michael McCarty, Perry Galloway,
Ross Bell,
Matt Smith, Greg Hart, and Becton Bell

PETITIONERS

By: /S/ Grant Ballard

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CERTIFICATE OF SERVICE

The undersigned Counsel hereby certifies that this document has been provided to the following individuals on this 26th day of January, via Submission to the Court's E-Filing System.

Jennifer Merritt
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s/ David Gershner
David Gershner

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

MICHAEL MCCARTY; PERRY GALLOWAY; MATT SMITH; GREG HART; ROSS BELL; and BECTON BELL **PLAINTIFFS**

v. **Case No. 60CV-17-6539**

ARKANSAS STATE PLANT BOARD & TERRY WALKER, in his official capacity as DIRECTOR of THE STATE PLANT BOARD **DEFENDANTS**

PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS WITH INTEGRATED BRIEF IN SUPPORT

COME NOW the Plaintiffs, by and through the undersigned Counsel and for their Motion for Judgment on the Pleadings do state as follows:

1. This is an action challenging the constitutionality of Arkansas Code Annotated § 2-16-206.
2. Plaintiffs seek a declaratory judgment that the above referenced statute unconstitutionally delegates authority to private individuals and that rules put into place and actions taken by the State Plant Board be declared null and void as a result.
3. The Defendants admit in their pleadings that the State Plant Board was constituted according to A.C.A. § 2-16-206.
4. There are no material facts in dispute with respect to this action.
5. The pleadings show on their face that there is no defense to Plaintiffs' complaint and Plaintiffs are entitled to judgment granting their desired relief as a matter of law.
6. In further support of this motion, Plaintiffs incorporate the following brief in support of this motion:

BRIEF

I. Introduction

The Plaintiffs have requested a Declaratory Judgement that the Arkansas State Plant Board is currently organized in violation of Arkansas' State Constitution. At the last Hearing in this matter, Counsel for the Plant Board agreed that the members of the board were appointed in accordance with Arkansas Code Annotated § 2-16-206. Additionally, the Defense admits this to be the case in their answer to Plaintiffs' First Amended Complaint in response to paragraph 10.[1] The Plaintiffs now seek an Order finding that Arkansas Code Annotated § 2-16-206, which provides for the appointment of State Plant Board members by private individuals and associations, is an unconstitutional delegation of legislative power to private interests in violation of Articles 4 and 5 of the Arkansas State Constitution. The Plaintiffs now seek judgment on the pleadings as to their request for a Declaratory Judgment as there exists no genuine dispute of fact and this case is ripe for judgment as a matter of law.

II. Background

A. The Arkansas State Plant Board

The Arkansas State Plant Board is an Arkansas State Agency,[2] which has been entrusted with regulatory duties and powers[3] including the regulation of herbicide use and application by Arkansas farmers. While there are multiple Arkansas state agencies, boards, and commissions which allow private organizations to nominate members, subject to the approval of the governor,

[1] It should be noted that the Defendants have not filed an Answer to Plaintiff's Second Amended Complaint.
[2] Ark. Code Ann. § 25-15-202(2)(A).
[3] The State Plant Board's powers are defined by statute including Ark. Code Ann. §§ 2-16-201-401.

the State Plant Board is unique in that the majority of its members are appointed directly by private business interests with no review or oversight by elected representatives of Arkansas citizens.

The Plant Board is presently governed by eighteen (18) members, appointed pursuant to Arkansas Code Annotated § 2-16-206. Two of these members are non-voting members, appointed by the Vice President for Agriculture of the University of Arkansas. Seven members are appointed by the Governor, and Nine members are appointed by private business organizations. As a result, the majority of voting members are selected by private business interests. There is no legislative oversight as to how the privately appointed members of the State Plant Board are selected. The private industry organizations which have the statutory authority to appoint members to the State Plant Board include The Arkansas Agricultural Aviation Association, the Arkansas Oil Marketers Association, the Arkansas Seed Dealers' Association, the Arkansas Seed Growers Association, the Arkansas Pest Management Association, Inc., the Arkansas Crop Protection Association, the Arkansas Forestry Association, The Arkansas Green Industry Association, and the Arkansas State Horticultural Society. It is not apparent to the Plaintiffs how many individuals or businesses each of these private organizations represent, nor is their any degree of transparency as to how each organization determines who it will appoint as a member of the State Plant Board, which has significant power over Arkansas' farm families.

While the Plant Board exercises significant regulatory control over Arkansas farmers and other regulated individuals, the Plaintiffs brought the present action because the Agency is unresponsive and unaccountable to the majority of individuals and businesses that it regulates. The Arkansas Legislature has undisputedly delegated its authority to appoint members of the State Plant Board to private industry, and the Legislature now has no influence over the appointment of Plant Board members. The Plaintiffs believe that the Arkansas legislature's delegation of its

appointment powers to private entities is an unconstitutional delegation of legislative authority to private industry groups and has resulted in a State Plant Board that is not focused on public interest or accountable to the voting public.

A. Unlawful Delegation of Legislative Authority to Private Interests

By way of background, the Plaintiffs' claim that Arkansas Code Annotated § 2-16-206 is an unlawful delegation of authority is premised on the fundamental concept of Separation of Powers. As both the State and Federal Constitutions specifically delegate certain powers and functions to the different branches of State Government, a Judicial Doctrine of "nondelegation" of these powers has long been recognized by Courts across this nation. The word "nondelegation" may not be specifically stated in the Constitution of the State of Arkansas, or the United States Constitution, but the nondelegation doctrine has long been recognized by Judicial precedent and is based on fundamental principles of separation of powers and good governance.

The Arkansas Constitution provides for a clear separation of powers by the Departments of State Government. *See* Article IV of the Arkansas State Constitution. Article V of the Arkansas Constitution specifically vests legislative and rule-making powers in the Arkansas General Assembly. "The doctrine prohibiting delegation of legislative power has long been recognized" by Arkansas Courts. *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 429, 994 S.W.2d 481, 483 (1999). While there is case law providing that certain legislative functions may be delegated where the legislature has established a clear purpose for the delegation of a legislative function and effectively proscribed "the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits," the Legislature has no authority to provide a blanket delegation of its authority to delegate rule-making power or to delegate the power to appoint members of state agencies to private interests. Id.

Arkansas Courts have clearly recognized that a delegation of public authority or power to private parties violates our Arkansas State Constitution.[4] In *Leathers*, the Arkansas Supreme Court noted that "in determining whether an unconstitutional delegation has been made, the Court considers whether Congress "has attempted to abdicate, or to transfer to others, the essential legislative functions with which it is vested by the Constitution." *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 429, 994 S.W.2d 481, 483 (1999). Following this reasoning, the Arkansas Attorney General's Office has previously issued an Opinion that private organizations may not be given the power to appoint members to governmental boards.[5] This is exactly the situation that faces the Court today, where the Arkansas General Assembly has granted private organizations the power to appoint members of a State Board which creates rules and regulations which are enforced as Law. The practical impact of Arkansas Code Annotated § 2-16-206 is that a majority of Arkansas' voting State Plant Board members are now directly appointed by private individuals and associations. The regulated citizens of the State of Arkansas have no voice in the appointment of these controlling members of the State Plant Board and there is no genuine opportunity for public interest to assert itself in the appointment of these members.

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[4] See *Leathers v. Gulf Rice Arkansas, Inc.*, 994 S.W.2d 481, 484 (Ark. 1999) ("'[t]his is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumably disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.'") See also Gamel v. Veterans' Memorial - 26 - Auditorium Comm'n, 272 N.W.2d 472, 476 (Iowa 1978) ("private individuals cannot be empowered to select boards to spend public funds, no matter how well qualified they may be"); Hetherington v. McHale, 329 A.2d 250, 253 (Pa. 1974) ("[a] fundamental precept of the democratic form of government imbedded in our Constitution is that people are to be governed only by their elected representatives); Sedlak v. Dick, 887 P.2d 1119 (Kan. 1995) (Workers' Compensation Act provision requiring selection of Workers Compensation Board members by committee consisting of representatives chosen by labor union and business association was unconstitutional delegation of legislative power to private organizations, even though actual appointment to committee was made by Secretary of Human Resources; only one name was submitted for each vacancy and Secretary had no discretion to reject or substitute for persons selected by union and association.).

[5] Ark. Attorney General Opinion No. 2005-213, at 1-4, attached hereto as Exhibit A, (finding the board may not amend its by-laws to authorize private organizations to appoint board members in a similar manner as the county judge and mayors because private organizations may not be given the power to appoint board members).

III. Argument

Arkansas Code Annotated § 2-16-206 is an unconstitutional delegation of legislative authority in violation of the nondelegation doctrine and the fundamental separation of power principles embodied in the Arkansas State Constitution. This statute plainly gives private entities authority to appoint the majority of the Plant Board's voting members.[6] In the present case, the Legislature has provided private industry the authority to appoint members of a State Agency, and, at the same time, the legislature has not established clear standards for selection of a board members, no qualifications for plant board members, no knowledge requirements for board members, and set no goals for the overall composition of the Plant Board. As a result, the Plant Board contains few full-time farmers, no minorities, no women, and is instead composed primarily of individuals with vested business and financial interests in the outcome of the Plant Board's rulemaking processes. As is clear from the filing of this action, the interests of the individual members of the State Plant Board, and the interests of the private industry organizations appointing members to the Plant Board, sometimes conflict with those of the individuals regulated by the Board.

The delegation of power to private, unaccountable parties to appoint individuals to conduct governmental functions violates the State Constitution. See *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 430, 994 S.W.2d 481, 484 (Ark. 1999) (reasoning"'[t]his is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumably disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.'") Private organizations may not be given the power to appoint members to governmental boards. Ark. Attorney General Opinion No. 2005-213, at 1-4 (finding

[6] Ark. Code Ann. § 2-16-206.

the board may not amend its by-laws to authorize private organizations to appoint board members in a similar manner as the county judge and mayors because private organizations may not be given the power to appoint board members).

Any assignment of rule-making or legislative authority to private entities is in violation of the Arkansas Constitution. Arkansas Code Annotated § 2-16-206 should be deemed unconstitutional, the actions of the State Plant Board in regard to its pesticide rules and dicamba use should be enjoined, and the actions of the current State Plant Board should be declared void on the basis that the majority of the State Plant Board were without lawful authority to initiate rule-making and to disperse public funds.

A. The Statutory Appointment Process For The State Plant Board violates the Separation of Powers doctrine.

It cannot be disputed that the Arkansas Constitution provides for a clear separation of powers by the Departments of State Government. *See* Ark. Constitution Art. IV. Article V of the Arkansas Constitution clearly vests legislative and rule-making powers in the Arkansas General Assembly. As a result, Arkansas Code Annotated § 2-16-206 is an unconstitutional delegation, to private industry groups, of the legislature's power to appoint persons to conduct governmental functions as Members of the State Plant Board.

That the appointment of board members by private entities is unconstitutional is consistent with rulings from multiple jurisdictions across this nation. See *Gamel v. Veterans' Memorial Auditorium Comm'n*, 272 N.W.2d 472, 476 (Iowa 1978) ("private individuals cannot be empowered to select boards to spend public funds, no matter how well qualified they may be"); *Hetherington v. McHale*, 458 Pa. 479, 484, 329 A.2d 250, 253 (Pa. 1974) ("[a] fundamental precept of the democratic form of government imbedded in our Constitution is that people are to be governed only by their elected representatives); and *Sedlak v. Dick*, 256 Kan. 779, 887 P.2d

1119 (Kan. 1995) (Workers' Compensation Act provision requiring selection of Workers Compensation Board members by committee consisting of representatives chosen by labor union and business association was unconstitutional delegation of legislative power to private organizations, even though actual appointment to committee was made by Secretary of Human Resources; only one name was submitted for each vacancy and Secretary had no discretion to reject or substitute for persons selected by union and association.). Arkansas law is no different and, as is previously stated, the Supreme Court of Arkansas has even referred to this type of private delegation as obnoxious. *Leathers,* 338 Ark. at 430 994 S.W.2d at 484.

B. The Plant Board Lacks oversight by Elected Officials.

In defense of the statute at hand, and the unconstitutional appointment process prescribed by this statute, Counsel for the Board is expected to argue that the the statute has been in effect for many years and that there is legislative oversight of the plant board's rule-making authority. These arguments do not cure the unconstitutionality of the challenged statute. The Arkansas State legislature has granted private businesses the authority to control the State Plant Board and established no clear guidance as to how these business associations select members of this state Agency and exercise their authority in the use of state funds and in rule-making. There is no genuine dispute as to this fact. The members of the state plant board, appointed by private interests, are presently making discretionary decisions concerning the use of Arkansas' taxpayer dollars with no legislative oversight, administrative standards, safeguards, or accountability to the electorate. Arkansas Code Annotated § 2-16-206 is an unconstitutional delegation, to private industry groups, of the legislature's power to appoint persons to conduct governmental functions. Arkansas Code Annotated § 2-16-206 should be deemed unconstitutional by this Court.

It has been argued, previously, that review by the Arkansas Legislative Council and a discretionary "Proclamation" from the Governor's office may somehow cure a constitutional appointment power violation. This argument must be disregarded. While the State may point out that Executive Order No. 15- 02 requires gubernatorial review and approval of agency rules and regulations, and that Arkansas Code Annotated § 10-3-309 requires the Rules and Regulations Subcommittee to approve all rules proposed by state boards, there is no authority to indicate that oversight of the Board's actions may cure the unconstitutional delegation of *appointment* power.

Moreover, there is simply no review for many of the actions the Plant Board is authorized to take, as the Plant Board's adjudicatory role is not subject to any legislative or executive branch review. The denial of the Plaintiffs' Petition for Rulemaking, which served as a precursor to the filing of this litigation, was not subject to legislative or executive branch review. Further still, the executive legislative review of Plant Board rulemaking is very limited in scope. With respect to regulations adopted by the Plant Board, § 10-3-309 does not require the Rules and Regulations Subcommittee to vote to approve a regulation before it takes effect. Ark. Code Ann. § 10-3-309(c)(3)(B)(i)(a) (the subcommittee does not vote on rules and regulations unless a majority of a quorum of the subcommittee requests that the subcommittee take a vote). Additionally, the Rules and Regulations Subcommittee may reject a rule only if it violates state or federal law or is inconsistent with legislative intent. Ark. Code Ann. § 10-3-309(f)(1). The Legislative Council cannot stop a rule because they disagree with it or think it is harmful to the citizens of Arkansas or Arkansas' economy. There is not a true "review" of the merit of actions taken by the State Plant Board.

The legislative review available for Plant Board rules is minimal, does not appear to reach to the merits of the proposed rules, fails to address the adverse consequences of proposed rules,

and cannot be said to amount to publicly accountable oversight. The legislative council and the Governor certainly lack the authority to remedy an unconstitutional delegation of the appointment power to private entities. The legislative council and the Governor can take no action to compel private industry to appoint qualified members to the State Plant Board, nor can they influence the Plant Board to make certain rules. With respect to executive oversight, the Governor is similarly not bound to review the Board's rules and may do so at his own discretion.

It is true that certain Courts around the Nation have held that a delegation of legislative appointment power may not violate the nondelegation doctrine and the constitutional principle of separation of powers where a State legislature has placed "sufficient statutory standards and safeguards and administrative standards and safeguards, in combination, to protect against unnecessary and uncontrolled exercises of discretionary power." *Cottrell v. City & County of Denver*, 636 P.2d 703, 709 (Colo. 1981). However, in the case at hand, there are no safeguards and there is no statutory guidance in place to protect against abuses of the discretionary power of State Plant Board members. The Legislative Council cannot stop a rule because they disagree with it or think it is harmful to the citizens of Arkansas or Arkansas' economy. There is not a true "review" of the merit of actions taken by the State Plant Board. The legislature has simply delegated its authority while providing no guidance or standards for the use of that authority.

C. The State Plant Board is Not an Example of Good Government.

Private business associations that are currently appointing the members of the State Plant Board include but are not limited to the Arkansas Seed Growers Association, the Arkansas Seed Dealer's Association, and the Arkansas Crop Protection Association, Inc. The membership and financial backing of these private business associations is unclear, but, it would seem that seed growers and dealers, who market and sell seed varieties that are not resistant to dicamba based

herbicides, would certainly have a financial interest in the Plant Board's rule-making process as it concerns the use of dicamba on Arkansas row crops. The current appointment process, as provided in Arkansas Code Annotated § 2-16-206, allows these private interests to exercise a degree of control over the State agency, which regulates their business, that is unprecedented elsewhere in Arkansas State Government.

In addition, it should not be forgotten that the Plaintiffs, Arkansas farmers, were forced to retain a lawyer and file a formal Petition for Rulemaking so that they could express their concerns to the members of the Plant Board, regarding its regulation of dicamba based herbicides. This Plant Board is not responsive to the individuals it regulates. Moreover, the Plant Board went so far as to appoint an individual, that apparently does not exist, to the "Dicamba Task-Force," rather than appoint another farmer to the Task-Force. (Please refer to the allegations in Plaintiffs' Complaint and Amended Complaints). There should be no question as to why Arkansas farmers are skeptical of the Plant Board's actions, and the undersigned Counsel respectfully suggests that this Court should find that the Plant Board's existence violates Arkansas Constitution as it is constituted via an improper delegation of authority.

IV. Conclusion

The Supreme Court of Arkansas has not previously had the chance to consider the constitutionality of an **absolute** delegation of legislative power to private business entities. However, many other jurisdictions have. Other jurisdictions that have reviewed the question of whether a delegation of legislative power is lawful have stated that "**the power to appoint public officers is the sovereign power of the State.**" *People ex rel. Rudman v. Rini*, 356 N.E.2d 4, 64 Ill.2d 321, 1 Ill.Dec. 4 (Ill., 1976). "**The sovereign power of the State cannot be conferred upon a private person or group.**" Id.

Arkansas' own Attorney General's office has agreed with the proposition that private organizations may not be given the power to appoint members to governmental boards, until the present case. Ark. Attorney General Opinion No. 2005-213, at 1-4. As the Arkansas Constitution provides for a clear separation of powers by the Departments of State Government, this Court should declare the delegation of appointment power, as established by Arkansas Code § 2-16-205, to be unconstitutional. *See* Ark. Constitution Art. IV.

WHEREFORE, the Plaintiffs pray this Honorable Court grant their motion for judgment on the pleadings and enter an order declaring that Arkansas Code Annotated § 2-16-206 is unconstitutional and declaring rules and actions of the State Plant Board null and void, and for all other just and proper relief.

Respectfully Submitted,

Michael McCarty, Perry Galloway,
Ross Bell, Matt Smith, Greg Hart, and
Becton Bell

PETITIONERS

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CERTIFICATE OF SERVICE

The undersigned Counsel hereby certifies that this document has been provided to the following individuals on this 23rd day of August, 2019, via Submission to the Court's E-Filing System.

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s/ David Gershner
David Gershner

Opinion No. 2005-213

October 24, 2005

Ms. Robin F. Green, Prosecuting Attorney
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Bentonville, Arkansas 72712

Dear Ms. Green:

I am writing in response to your request for an opinion concerning the composition of the board of the "Benton County Solid Waste Management District." You have attached correspondence with your request that indicates that the Benton County Solid Waste Management District was formed by interlocal agreement pursuant to A.C.A. § 8-6-723(a)(1). Although you have not enclosed a copy of the interlocal agreement for my review, the correspondence indicates that the interlocal agreement currently provides that the board is to consist of the county judge and the appropriate mayors[1] in the county unless the county judge and the mayors "appoint[] representatives to serve in their stead." The correspondence you have enclosed also notes that the board has adopted "by-laws" that reflect the membership of the board and these by-laws contain a method of selection identical to that contained in the interlocal agreement. The by-laws provide that any change in the by-laws must be made by a two-thirds vote of the entire board membership.

The correspondence you have enclosed also notes that in Benton County, the Bella Vista Property Owners Association ("POA"), has a certified membership greater

[1] Reference is made in the correspondence to municipalities in the county with a population of over 2,000. *Cf.*, A.C.A. § 8-6-703(b)(1) (providing in the general portion of the subchapter for each board to be composed of representatives of the counties within the district and representatives of all first class cities, of all cities with a population of over two thousand (2,000) . . . and of the largest city of each county within the district."

than 15,000 members, and the Benton County Farm Bureau ("Farm Bureau") is a non-governmental, voluntary organization governed by and representing farm and ranch families with a certified membership greater than 8,500 members. The correspondence indicates that "these two organizations desire membership on the board with full voting rights" and that "Benton County would pay their local contributions to the district."

You pose four questions relating to these facts, as follows:

1. May the board amend the by-laws to permit representatives other than the county and the municipalities to serve as voting members of the board?

2. Would the county and the municipalities need to amend the interlocal agreement, if such broader representation is possible?

3. Would any change in the interlocal agreement require a unanimous vote of the signatories thereto?

4. If such representation is permitted, may the county pay the local contributions of the POA and the Farm Bureau?

RESPONSE

It is my opinion that the answer to your first question is generally "no." Your first question is somewhat unclear in how the representation of these private entities would be implemented. You do not specify whether these private entities would be responsible for actually appointing members to serve on the board to represent their interests or whether some other method of representation would be employed. In my opinion, however, the by-laws may not simply be amended to permit representatives of the Bella Vista POA and the Farm Bureau to serve as voting members of the Board for two reasons: 1) these private organizations may not be given the power to appoint board members; and 2) amendment of the by-laws alone would not suffice to change the board's membership. Although responses to your remaining questions may be unnecessary in light of my response above, in my opinion the answer to your second question is "yes," any change in the composition of the board would require amendment of the interlocal agreement. In response to your third question, in my opinion the answer is "yes,"

a change in the interlocal agreement requires unanimous vote of the signatories. With regard to your fourth question, it is unclear what is meant by the term "local contributions." I thus cannot analyze this issue. I will note, however, that public funds may only be expended for public purposes and the Arkansas Constitution prohibits a county from "obtain[ing] or appropriate[ing] money for . . . any corporation, association, institution or individual."

Question 1-- May the board amend the by-laws to permit representatives other than the county and the municipalities to serve as voting members of the board?

In my opinion the answer to this question is "no."

The relevant statute, assuming the Board was in fact created as specified in the correspondence, is A.C.A. § 8-6-723. That statute appears in a subchapter largely consisting of the codification of Act 752 of 1991. That Act transformed the eight "regional solid waste planning districts" created two years earlier into "regional solid waste management districts" and provided that each shall be governed by a regional solid waste management board. A.C.A. § 8-6-703(a)(1)(A) and (B). The general provisions governing the composition of such boards are found at A.C.A. § 8-6-703(b) and (c), which provide in pertinent part as follows:

> (b)(1) Each regional solid waste management board shall be composed of representatives of the counties within the district and representatives of all first class cities, of all cities with a population over two thousand (2,000) according to the latest federal decennial census, and of the largest city of each county within the district.
>
> (2) The county judge of each county within the district and the mayor of each city entitled to a representative in the district shall serve on the board, unless the county judge or mayor elects instead to appoint a member as follows:
>
> (A) The county judge, with confirmation by the quorum court of each county within the district, shall appoint one (1) member to the board; and

> (B) The mayor, with confirmation by the governing body of each city entitled to a representative in the district, shall appoint one (1) member.
>
> (c)(1) Each board shall have a minimum of five (5) members.

Your question, however, refers to a more specialized provision for board composition, found in the same subchapter and also passed as part of Act 752 of 1991. Section § 8-6-723 (a)(1) provides as follows:

> (a)(1) In lieu of forming a regional solid waste management district under any other provision of this subchapter, a regional solid waste management district may be created by interlocal agreement of the local governments in any county with a population of at least ninety thousand (90,000) persons and in which there is a permitted landfill on January 1, 1991. The regional solid waste management board of the district shall be established by interlocal agreement.

There is no further guidance on the composition of a board created under this provision, only that it be "established by interlocal agreement." Your question is whether the *by-laws* of the Benton County Solid Waste Management District may be amended to permit representatives other than the county or municipalities (representatives of the two private organizations mentioned), to serve as voting members of the board.

As an initial matter, the correspondence you have enclosed does not indicate the exact manner in which the by-laws would be amended. It is therefore difficult to analyze the legality of such hypothetical action. To the extent the by-laws would be amended to authorize the private organizations mentioned to appoint board members in a similar manner as the county judge and mayors are authorized to do, in my opinion the answer to your question is "no."

As an initial matter, it is unclear whether the County and cities have been delegated the power to include private entities in the representation of the board. The applicable statute (A.C.A. § 8-6-723(a)(1)), does not indicate any such authority, providing only that the board may be formed by "interlocal agreement." It is axiomatic, however, that cities and counties may only undertake actions through an interlocal agreement that they are authorized to undertake singly. *See*

A.C.A. § 25-20-104 ("[a]ny governmental power, privileges, or authority exercised or capable of exercise by a public[2] agency of this state alone may be exercised and enjoyed jointly with any other public agency of this state which has the same powers, privileges, or authority under the law. . . "). Some question exists as to whether the County and cities have been delegated the power by the State to provide for the representation of private entities on the board.

More importantly, although the courts are not in complete agreement, it is often held that "private individuals cannot be empowered to select boards to spend public funds, no matter how well qualified they may be." *Gamel v. Veterans' Memorial Auditorium Commission*, 272 N.W.2d 472, 476, (Iowa Sup.1978), *relying on Hetherington v. McHale*, 458 Pa. 479, 329 A.2d 250 (1974) (which stated that: "[a] fundamental precept of the democratic form of government imbedded in our Constitution is that the people are to be governed only by their elected representatives"). In *Hetherington*, "some (but not all) members of a committee which allocated funds for agricultural research projects were selected by three agriculture-oriented organizations." *Gamel, supra* at 476. The court in *Hetherington* struck down the statute, stating: "Appellees contend, however, that because they represent a large number of Pennsylvania farmers, they are more aware of the needs of agriculture than are the popularly selected branches of government. No doubt the organization that designated appellees does have an understanding of farm problems. Nevertheless, claims of expertise do not sap the vitality of the fundamental principle that we are to be governed by our elected representatives in accordance with the Constitution." *Id.* at 253.

Various constitutional provisions are invoked to challenge private appointive authority. *See Gamel, supra* at n.2. Chief among them is the concept of an "unlawful delegation" of legislative authority to private entities. *See e.g., Sedlak v. Dick*, 256 Kan. 779, 887 P.2d 1119 (1995) (Workers' Compensation Act provision requiring selection of Workers Compensation Board members by committee consisting of representatives chosen by labor union and business association was unconstitutional delegation of legislative power to private organizations, even though actual appointment to committee was made by Secretary of Human Resources; only one name was submitted for each vacancy and Secretary had no discretion to reject or substitute for persons selected by union and association). Courts in some instances distinguish statutes providing for

[2] I assume that the private entities you mention would not actually be parties to the interlocal agreement. The applicable subchapters governing interlocal agreements restrict membership to public entities. *See* A.C.A. § 25-20-104 and § 14-14-910.

nomination by private entities, of several persons, in a process which leaves discretion in the appointing officers. *Id. See also State ex rel. James v. Schorr*, 45 Del. 18; 65 A.2d 810 (1948). *See also generally*, *McCarley v. Orr*, 247 Ark. 109, 445 S.W.2d 65 (1969)(holding inapplicable to all but initial appointments a statute requiring Governor to make appointments to Real Estate Commission from list submitted by Real Estate Association, but stating that even if it was applicable it did not specify the number of names to be submitted and only one name could not be inferred because "in that view the appointment would be made by the Association rather than by the Governor"); *Ellis v. Rockefeller*, 245 Ark. 53, 431 S.W.2d 848 (1968)(stating that: "[t]he law generally is that the choice of a person to fill an office is the essence of an appointment and that the selection must be the discretionary act of the officer or board clothed with the power to do the appointing"); and *Validity of Delegation to Private Persons or Organizations of Power to Appoint or Nominate to Public Office*, 97 A.L.R.2d 361 (1964).

Again, you have not specified the exact method by which these private entities would be afforded representation on the board. To the extent the current interlocal agreement or an amendment to the agreement gives the County Judge and mayors authority to appoint members of their communities to serve on the board, there may well be no prohibition against the selection of persons keenly connected to the organizations you mention. In my opinion, however, the answer to your first question concerning service of representatives of "other than the county and the municipalities" is "no" based both upon the discussion above, and on the fact that any such change could not be effected by a simple amendment of the by-laws as your first question suggests. This issue is discussed in my response to your second question below.

Question 2-- Would the county and the municipalities need to amend the interlocal agreement, if such broader representation is possible?

My answer to your first question above may render this question moot. I will note, however, that the applicable statute, A.C.A. § 8-6-723(a)(1), states that the "board of the district shall be established by interlocal agreement." Any change in the composition of the board must therefore be reflected in the interlocal agreement.

Question 3-- Would any change in the interlocal agreement require a unanimous vote of the signatories thereto?

Again, this question may be moot in light of my answer to your first question. I will note, however, that although the statutory provisions governing interlocal agreements do not expressly address their amendment (see A.C.A. §§ 25-20-101—108 and A.C.A. § 14-14-910), general principles of contract law would dictate that any change in such an agreement either be as provided for in the existing document, or agreed to by all signatories. *See e.g. Van Camp v. Van Camp,* 333 Ark. 320, 969 S.W.2d 184 (1998) ("fundamental principles of contract law require that both parties to a contract agree to any modification of the contract"). Again, additionally, the relevant statute provides that the board shall be established by interlocal agreement "of the local governments . . . ." *See* A.C.A. 8-6-723(a)(1). In my opinion, therefore, the answer to this question is generally "yes."

Question 4-- If such representation is permitted, may the county pay the local contributions of the POA and the Farm Bureau?

I am uncertain what is meant by "local contributions," as used in your question. This term is not used in the applicable subchapter and as such I am unable to analyze this issue. I will note, however, that Arkansas Constitution, art. 12, § 5 provides as follows:

> No county, city, town or other municipal corporation shall become a stockholder in any company, association or corporation; or obtain or appropriate money for, or loan its credit to, any corporation, association, institution or individual.

This provision must be borne in mind when addressing any such issue.

Deputy Attorney General Elana C. Wills prepared the foregoing opinion, which I hereby approve.

Sincerely,

MIKE BEEBE
Attorney General

MB:ECW/cyh

IN THE CIRCUIT COURT OF PULASKI COUNTY, OF ARKANSAS
SIXTH DIVISION

MICHAEL MCCARTY; PERRY GALLOWAY; MATT SMITH; GREG HART; ROSS BELL; AND BECTON BELL — PLAINTIFFS

v. CASE NO. 60CV-17-6539

ARKANSAS STATE PLANT BOARD & SCOTT BRAY, in his official capacity as DIRECTOR of THE STATE PLANT BOARD — DEFENDANTS

DEFENDANTS' ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT

COME NOW Defendants, by and through their attorneys, Attorney General Leslie Rutledge and Senior Assistant Attorney General Jennifer L. Merritt, and for their Answer to Plaintiffs' Second Amended Complaint, state:

1. Defendants admit that Plaintiffs have amended their complaint but deny that they are entitled to any of the relief they seek. Pleading affirmatively, Defendants state that Plaintiffs' claims regarding their petition for rule-making and the April 2018 cutoff date for the in-crop use of dicamba herbicides during the 2018 crop year are moot.

2. Defendants deny the allegations in Paragraph 2 of Plaintiffs' Second Amended Complaint that the Arkansas State Plant Board is currently organized in violation of the Arkansas Constitution and has consistently acted in violation of

Arkansas law. Defendants admit that Plaintiffs seek an order declaring that Ark. Code Ann. § 2-16-206 is an unconstitutional delegation of legislative power to private interests, but Defendants deny that Plaintiffs are entitled to the relief they seek.

3. In response to Paragraph 3 of Plaintiffs' Second Amended Complaint, Defendants state that Ark. Code Ann. § 2-16-206 speaks for itself, and Defendants deny any allegations that are inconsistent with the plain language of the statute. Defendants deny the allegations in the second sentence in Paragraph 3.

4. Defendants deny that the currently-seated State Plant Board is not constitutionally valid and that the positions of members of the board who have been appointed by private groups or individuals should be declared vacant as alleged in Paragraph 4 of Plaintiffs' Second Amended Complaint. The remaining factual allegations in Paragraph 4 relate to claims that are now moot, and no affirmative response is required.

5. Defendants admit that Plaintiffs request declaratory judgment and injunctive relief but deny that they are entitled to any of the relief they seek. Defendants admit that Plaintiffs also seek judicial review of their actions under the Administrative Procedures Act, Ark. Code Ann. § 25-15-212, but state affirmatively that such claim is now moot and should be dismissed with prejudice.

6. Defendants deny the allegations in Paragraph 6 of Plaintiffs' Second Amended Complaint. Pleading affirmatively, Defendants state that Plaintiffs' claim under the Administrative Procedures Act, Ark. Code Ann. § 25-15-212, is now moot.

7. The allegations in Paragraph 7 of Plaintiffs' Second Amended Complaint are not directed towards Defendants, and no affirmative response is required.

8. In response to Paragraph 8 of Plaintiffs' Second Amended Complaint, Defendants state that Plaintiffs' claim regarding their 2018 petition to initiate administrative rule-making is now moot, and no affirmative response is required.

9. Defendants admit the allegations in Paragraph 9 of Plaintiffs' Second Amended Complaint. Pleading affirmatively, Defendants state that Ark. Code Ann. § 2-16-206(a) was amended by the Arkansas General Assembly by Act 1056 of 2019, which recently took effect. Further, Defendants state that Terry Walker is no longer the Director of the Arkansas State Plant Board. Scott Bray became Director in June 2019 and is automatically substituted as a party herein pursuant to Ark. R. Civ. P. 25(d)(1). Defendants have revised the caption of this case accordingly.

10. Defendants deny the allegations in Paragraph 10 of Plaintiffs' Second Amended Complaint.

11. Paragraph 11 of Plaintiffs' Second Amended Complaint states legal conclusions to which no affirmative response is required.

12. The allegations in Paragraph 12 of Plaintiffs' Second Amended Complaint are not directed at Defendants and relate to moot claims and, therefore, no affirmative response is required.

13. The factual allegations directed towards the Defendants in Paragraph 13 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

14. The factual allegations directed towards the Defendants in Paragraph 14 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

15. The factual allegations directed towards the Defendants in Paragraph 15 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

16. The allegations in Paragraph 16 of Plaintiffs' Second Amended Complaint are not directed towards Defendants and, therefore, no affirmative response is required.

17. The factual allegations directed towards the Defendants in Paragraph 17 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

18. The factual allegations directed towards the Defendants in Paragraph 18 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

19. The factual allegations directed towards the Defendants in Paragraph 19 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

20. The factual allegations directed towards the Defendants in Paragraph 20 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required. Pleading affirmatively, Defendants state that the Governor appointed the members of the Dicamba Task Force, not the members of the State Plant Board.

21. The factual allegations directed towards the Defendants in Paragraph 21 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

22. The factual allegations directed towards the Defendants in Paragraph 22 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

23. The factual allegations directed towards the Defendants in Paragraph 23 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

24. The factual allegations directed towards the Defendants in Paragraph 24 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

25. The factual allegations directed towards the Defendants in Paragraph 25 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

26. The factual allegations directed towards the Defendants in Paragraph 26 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

27. The factual allegations directed towards the Defendants in Paragraph 27 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

28. The factual allegations directed towards the Defendants in Paragraph 28 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

29. Defendants deny that the Plant Board operates under an unlawful delegation of authority as alleged in Paragraph 29 of Plaintiffs' Second Amended Complaint. The remaining allegations in Paragraph 29 relate to moot claims and, therefore, no affirmative response is required.

30. In response to Paragraph 30 of Plaintiffs' Second Amended Complaint, Defendants state that Ark. Code Ann. § 25-15-212 speaks for itself. The factual allegations directed towards the Defendants in Paragraph 30 relate to moot claims and, therefore, no affirmative response is required.

31. The factual allegations directed towards the Defendants in Paragraph 31 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

32. The factual allegations directed towards the Defendants in Paragraph 32 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

33. The factual allegations directed towards the Defendants in Paragraph 33 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

34. The factual allegations directed towards the Defendants in Paragraph 34 of Plaintiffs' Second Amended Complaint relate to moot claims and, therefore, no affirmative response is required.

35. Defendants deny the allegation in Paragraph 35 of Plaintiffs' Second Amended Complaint that Ark. Code Ann. § 2-16-206 is unlawful and unconstitutional. The remaining allegations in Paragraph 35 relate to moot claims and, therefore, no affirmative response is required.

36. In response to Paragraph 36 of Plaintiffs' Second Amended Complaint, Defendants state that Ark. Code Ann. § 2-16-206, as amended, speaks for itself. Defendants deny the remaining allegations in Paragraph 36.

37. Upon information and belief, Defendants admit the allegations in the first two sentences of Paragraph 37 of Plaintiffs' Second Amended Complaint. The remaining allegations are not directed at Defendants and, therefore, no affirmative response is required. Pleading affirmatively, Defendants state that any rule adopted by the Plant Board pursuant to the Administrative Procedures Act must be approved by both the Governor and the General Assembly.

38. In response to Paragraph 38 of Plaintiffs' Second Amended Complaint, Defendants state that Article 4 of the Arkansas Constitution speaks for itself. Defendants deny the remaining allegations contained in Paragraph 38.

39. In response to Paragraph 39 of Plaintiffs' Second Amended Complaint, Defendants state that Article 5 of the Arkansas Constitution speaks for itself. Defendants deny the remaining allegations contained in Paragraph 39.

40. Defendants deny that Ark. Code Ann. § 2-16-206 should be deemed unconstitutional and that the actions of the current State Plant Board should be declared void as alleged in Paragraph 40 of Plaintiffs' Second Amended Complaint. The remaining allegations in Paragraph 40 relate to moot claims and, therefore, no affirmative response is required.

41. Defendants deny the allegations in Paragraph 41 of Plaintiffs' Second Amended Complaint.

42. In response to Paragraph 42 of Plaintiffs' Second Amended Complaint, Defendants state that the cited authorities speak for themselves. Defendants deny the remaining allegations in Paragraph 42.

43. In response to Paragraph 43 of Plaintiffs' Second Amended Complaint, Defendants state that the cited cases speak for themselves. Defendants deny the remaining allegations in Paragraph 43.

44. Defendants deny that Plaintiffs are entitled to any of the relief they seek in their WHEREFORE clause and prayer for relief in their Second Amended Complaint.

45. Defendants deny each and every allegation in the Second Amended Complaint that is not specifically admitted herein.

Defenses and Affirmative Defenses

46. Plaintiffs have not been deprived of any right or interest protected by the Arkansas Constitution, state statutes, or common law.

47. The Second Amended Complaint is barred by sovereign immunity.

48. The Second Amended Complaint as asserted against the Plant Board should be dismissed for lack of personal jurisdiction due to Plaintiffs' failure to serve its Chairman.

49. The Second Amended Complaint as asserted against the Plant Board should be dismissed for insufficiency of process and insufficiency of service of process.

50. The Second Amended Complaint fails to state facts upon which relief can be granted.

51. Plaintiffs' claims regarding Plaintiffs' 2017 petition for rule-making, the 2018 dicamba rule, and the 2018 crop year are moot.

52. Defendants reserve the right to amend this answer and to assert any additional defenses or affirmative defenses that discovery may reveal to be appropriate.

WHEREFORE, Defendants pray that the Court dismiss Plaintiffs' Second Amended Complaint with prejudice and for all other relief to which they may be entitled.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Jennifer L. Merritt, hereby certify that on August 26, 2019, I electronically filed the foregoing with the Clerk of the Court using the eFlex electronic filing system, which shall send notification of the filing to all participants.

/s/Jennifer L. Merritt
Jennifer L. Merritt

IN THE CIRCUIT COURT OF PULASKI COUNTY, OF ARKANSAS
SIXTH DIVISION

MICHAEL MCCARTY; PERRY GALLOWAY; MATT SMITH; GREG HART; ROSS BELL; AND BECTON BELL — PLAINTIFFS

v. CASE NO. 60CV-17-6539

ARKANSAS STATE PLANT BOARD & TERRY WALKER, in his official capacity as DIRECTOR of THE STATE PLANT BOARD — DEFENDANTS

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants, for their response in opposition to Plaintiffs' motion for judgment on the pleadings and cross-motion for judgment on the pleadings, state:

1. The sole remaining issue in this case is the constitutionality of Ark. Code Ann. § 2-16-206(a).

2. Plaintiffs' argument that the statute is an unconstitutional delegation of legislative power in violation of Articles 4 and 5 of the Arkansas Constitution is without merit and should be rejected.

3. The statute includes appropriate standards by which members of the Plant Board are to be selected and sets certain statutory requirements for membership. As a result, it is a valid delegation of legislative authority and meets constitutional muster.

4. Because the statute is constitutional as a matter of law, the Court should deny Plaintiffs' motion for judgment on the pleadings and instead enter judgment in favor of Defendants.

5. A brief in support is being filed with this response and cross-motion and is incorporated by reference.

WHEREFORE, Defendants pray that the Court deny Plaintiffs' motion for judgment on the pleadings, grant their cross-motion for judgment on the pleadings, enter an order dismissing this case with prejudice, and for all other relief to which they may be entitled.

Respectfully submitted,

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Attorney General

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Jennifer L. Merritt, hereby certify that on September 19, 2019, I electronically filed the foregoing with the Clerk of the Court using the eFlex electronic filing system, which shall send notification of the filing to all participants.

/s/Jennifer L. Merritt
Jennifer L. Merritt

IN THE CIRCUIT COURT OF PULASKI COUNTY, OF ARKANSAS
SIXTH DIVISION

MICHAEL MCCARTY; PERRY GALLOWAY; MATT SMITH; GREG HART; ROSS BELL; AND BECTON BELL — PLAINTIFFS

v. CASE NO. 60CV-17-6539

ARKANSAS STATE PLANT BOARD & TERRY WALKER, in his official capacity as DIRECTOR of THE STATE PLANT BOARD — DEFENDANTS

BRIEF IN SUPPORT OF DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants respectfully submit this brief in support of their response in opposition to Plaintiffs' motion for judgment on the pleadings and cross-motion for judgment on the pleadings. Plaintiffs' argument that Ark. Code Ann. § 2-16-206(a) is an unconstitutional delegation of legislative power in violation of Articles 4 and 5 of the Arkansas Constitution is without merit and should be rejected. Because the statute includes appropriate standards by which members of the Plant Board are to be selected, it meets constitutional muster. The Court should deny Plaintiffs' motion for judgment on the pleadings and instead enter judgment in favor of Defendants.

DISCUSSION

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). It reflects a desire to include a wide range of stakeholders on the board and specifies the requirements for its members as well as the persons or entities with appointment authority.

Plaintiffs' contention that the statute unconstitutionally delegates legislative and rule-making powers fails as a matter of law. All statutes are presumed constitutional, and the Court must resolve all doubts in favor of constitutionality. *Landmark Novelties, Inc. v. Ark. State Bd. of Pharmacy*, 2010 Ark. 40, at 12, 358 S.W.3d 890, 898. Because statutes are presumed to be framed in accordance with the Constitution, courts do not invalidate them unless there is a "clear and unmistakable" conflict with constitutional requirements. *Hobbs v. McGehee*, 2015 Ark. 116, 458 S.W.3d 707. The party challenging a statute's constitutionality has the burden of providing that the act is unconstitutional. *Landmark Novelties*, 2010 Ark. 40, at 12, 358 S.W.3d at 898.

In *Hobbs v. McGehee*, the Arkansas Supreme 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 at 713. The *Hobbs* court confirmed that the legislature may delegate discretionary authority to the other branches 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*, the Supreme Court upheld the constitutionality of Act 139 of 2013, which delegated discretionary authority to the Arkansas Department of Correction 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 giving it

certain options to choose from (any drug within the class of barbiturates) and also provided criteria to guide that choice (must be sufficient to cause death). *Id.* at 14, 458 S.W.3d at 716. Because the legislature provided criteria to guide the ADC's exercise of discretion and limited the ADC to selecting only from the legislatively-approved options, 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*, the Arkansas Supreme 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, the Arkansas Supreme 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 the Plaintiffs' 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 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, qualifications of members, persons/entities with appointment authority, and term of service—and only provides limited discretion to the appointing persons/entities to select one someone who meets the statutory qualifications, it fully comports with articles IV and V of the Arkansas Constitution.

The primary authority relied upon by Plaintiffs, *Leathers v. Gulf Rice Arkansas*, 338 Ark. 425, 994 S.W.2d 481 (1999), does not support their position in this case. *Leathers* was an action brought by rice buyers against the Commissioner of Revenues and directors of the Rice Research and Promotion Board, which was comprised solely of rice producers, alleging that a statute empowering the board to transfer producers' 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 that failed to provide rice buyers any safeguards or standards by which an assessment referendum could be measured—was an unconstitutional delegation of taxing authority. That case had nothing to do with the composition of the Rice Research and Promotion Board or how its members (all of whom were representatives of private business interests) were appointed. Instead, it was a challenge to a statute that, without restriction, bestowed private rice producers with the power to shift their existing burden to pay assessments to rice buyers. The theory of the rice buyers' case was that an unlawful delegation of legislative authority existed because the act gave the rice producers complete, unfettered discretion to levy an assessment against the rice buyers without giving the buyers a

vote, much less a hearing or review, on the assessment. The Arkansas Supreme Court agreed with the rice buyers and held that the act 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 Plaintiffs' argument in their brief, *Leathers* did not turn on the fact that private interests had rule-making authority under the challenged act. To the contrary, the *Leathers* court recognized that as long as the challenged statute provides "sufficient standards and safeguards set up by the Legislature . . . there is no improper delegation of authority." *Id.* at 432, 994 S.W.2d at 485. The *Leathers* court went on to explain that even a statute vesting rule-making authority in private persons or entities "is not constitutionally suspect if [the rule] 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)).

That is precisely the case here. The Plant Board cannot adopt rules or regulations without the approval of 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) (attached as Exhibit A to

Defendants' motion to dismiss); Ark. Code Ann. § 10-3-309 (requiring all rules proposed by state boards be reviewed and approved by the Administrative Rules and Regulations Subcommittee of the Legislative Council). As discussed above, the statute at issue here does contain standards and factors that must be considered before a person may be appointed to the Plant Board. Thus, Plaintiffs' claim that the Board is an unconstitutional delegation of legislative authority fails as a matter of law, and the Court should enter judgment on the pleadings in favor of Defendants.

Plaintiffs also rely heavily upon a 2005 opinion by the Attorney General which they maintain "has agreed with the proposition that private organizations may not be given the power to appoint members to governmental boards[.]" Pls.' Mot. J. on the Pldgs. at 12 (citing Ark. Att'y Gen. Op. No. 2005-213, *available at* 2005 WL 2822920). A review of that Attorney General opinion demonstrates that it does not stand for that broad proposition and, in any event, does not apply here. The Attorney General opinion relates to a statute that delegates 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 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—which are not present here—the Attorney General opined that the board could not amend its bylaws to authorize the private organizations to appoint board members in a similar manner as the county judge and mayors were authorized to do. *Id.* That opinion is not relevant authority in this case. The statute here, Ark. Code Ann. § 2-16-206(a), specifically delegates authority to legislatively-approved industry and trade groups to appoint one of their members to represent them on the Plant Board. Because it was well within the province of the General Assembly to delegate appointment power in this manner, the statute here survives constitutional scrutiny.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for judgment on the pleadings and instead enter judgment in favor of Defendants and dismiss this case with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jennifer L. Merritt, hereby certify that on September 19, 2019, I electronically filed the foregoing with the Clerk of the Court using the eFlex electronic filing system, which shall send notification of the filing to all participants.

/s/Jennifer L. Merritt
Jennifer L. Merritt

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

MICHAEL MCCARTY; PERRY GALLOWAY; MATT SMITH; GREG HART; ROSS BELL; and BECTON BELL — **PLAINTIFFS**

v. — **Case No. 60CV-17-6539**

ARKANSAS STATE PLANT BOARD & TERRY WALKER, in his official capacity as DIRECTOR of THE STATE PLANT BOARD — **DEFENDANTS**

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

COME NOW the Plaintiffs, by and through the undersigned Counsel and for their Reply to Defendant's Response in Opposition to their Motion for Judgment on the Pleadings and Response in Opposition to Defendant's Cross-Motion do state as follows:

I. Introduction

Defendants' Response in Opposition to Plaintiffs' Motion for Judgment on the Record fails to address two (2) important points:

1) The Defendants' have conceded that Arkansas Code Annotated § 2-16-206 is a legislative delegation of ***appointment power*** to **private entities**; and

2) All of the cases cited by Defendants, for the proposition that the legislature may delegate its constitutional powers, deal with delegation to **other branches of state government**, not to private entities.

Put simply, Defendants' arguments miss the Plaintiffs' most basic point - that the legislature cannot delegate its constitutional powers to private individuals or entities. These constitutional powers arise from the public and, therefore, cannot be removed from the public domain. There is no Arkansas case law or other authority which allows the Arkansas General

Assembly to delegate or assign its constitutional powers to private entities. The allegedly "binding precedents"[1] cited by the Defendants do not deal with the delegation of legislative appointment power to private entities and, as a result, these opinions are not relevant to the issue before the Court. The Legislature cannot allow Murphy Oil Corporation to appoint the members of the Arkansas Oil and Gas Commission, and our Legislature similarly cannot delegate public power to other private industry interests. The Arkansas Code provision which allows private entities to appoint the majority of voting members of the Arkansas State Plant Board is unconstitutional as it provides for a delegation of Legislative power to private industry, in violation of the nondelegation doctrine which has been recognized by Courts across this Nation.

Article V of the Arkansas Constitution vests certain powers in the Arkansas General Assembly, including a legislative power of appointment. See Art. 5, § 14 of the Arkansas Constitution. It has long been well settled that legislative powers cannot be delegated, *even to other branches of state government*, except within "certain limits." *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 429, 994 S.W.2d 481, 483 (1999); see also *City of Harrison v. Snyder*, 217 Ark. 528, 531, 231 S.W.2d 95, 97 (1950). Those "limits" may include delegation of rulemaking authority to "other branches of state government," where the legislature provides clear and definite standards as to how those "other branches of state government" are to execute the delegated powers. However, these "limits" do not include the absolute delegation of appointment power to private business associations. There is no authority to support such a delegation of public authority to private entities, and the Plaintiffs ask this Court to grant Plaintiffs' Motion for Judgment on the Pleadings.

[1] Please refer to Defendants' Response in Opposition to Plaintiffs' Motion for Judgment on the Pleadings, see page 5.

II. ARGUMENT

A. The Cases Cited by the Defendants are Not Relevant to the Controversy Before This Court.

The primary thrust of Defendants' argument in opposition to Plaintiffs' Motion and in support of Defendants' Cross-Motion for Judgment on the Pleadings is the argument that Arkansas Code § 2-16-206 includes "appropriate standards" and "reasonable guidelines." Defendants' Counsel cites two (2) primary cases in support of this argument, they are *Hobbs v. McGehee*[2] and *Abraham v. Beck.*[3] Neither of these cases is applicable to the issue before the Court as neither case deals with the delegation of constitutionally created appointment power to private entities.

The *Hobbs* and *Abraham* cases simply do not stand for the proposition that the legislature can delegate its appointment power to private entities, if the legislature provides "appropriate standards" or "reasonable guidelines" for the appointment process. Instead, these cases stand for the proposition that "discretionary power [as to a law's execution] may be delegated by the legislature **to a state agency** as long as reasonable guidelines are provided." Abraham v. Beck, 2015 Ark. 80, 14–15, 456 S.W.3d 744, 754 (2015) (emphasis added) citing *Hobbs v. Jones,* 2012 Ark. 293, at 10, 412 S.W.3d 844, 852. Today, this Court is not faced with the question of whether "discretionary power as to a law's execution" may be delegated by the legislature to a state agency, and, as such the cases cited by Defendants' Counsel are not "binding precedent" on the question of whether the legislature may delegate its powers to private entities.

The *Hobbs* and *Abraham* cases cited by Defendants' Counsel do involve a separation of powers issue, but the issue is clearly different than the issue presented in the current case before the Court. The issue in both *Hobbs* and *Abraham* was whether the legislature, by granting broad

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[2] *Hobbs v. McGehee*, 2015 Ark. 116 (2015).
[3] *Abraham v. Beck*, 2015 Ark. 80 (2015).

statutory decision-making powers to certain state agencies, had granted "unbridled discretion" to the Executive branch of State Government (the Department of Correction in *Hobbs* and the Arkansas State Medical Board in *Abraham).* The Parties that alleged violations of the separation of powers doctrine based their argument on Arkansas case law which provides that "a statute that, in effect, reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative powers." *Abraham v. Beck*, 2015 Ark. 80, 15, 456 S.W.3d 744, 754 (2015). The opinions in these cases recognized that "the doctrine of separation of powers is a basic principle upon which our government is founded, and should not be violated or abridged." *Hobbs v. McGehee*, 2015 Ark. 116, 8, 458 S.W.3d 707, 713 (2015). The *Hobbs* Court also held that the legislature " can delegate some discretionary authority to the other branches" such as "the Legislature may delegate to executive officers the power to determine certain facts, or the happening of a certain contingency, on which the operation of the statute is, by its terms, made to depend." Id. The problem for the Defendants in the present case is that neither *Hobbs* or *Abraham* say that the legislature may delegate appointment power to private entities.

The take-away from both *Hobbs* and *Abraham* is that "discretionary power may be delegated by the legislature to a state agency as long as reasonable guidelines are provided." *Hobbs v. McGehee*, 2015 Ark. 116, 9, 458 S.W.3d 707, 713 (2015) (Emphasis Added). In *Hobbs*, the statute which provided the Department of Corrections (ADC) authority to carry out the death penalty was challenged on the alleged basis that the statute unlawfully delegated to the ADC "standardless discretion" with regard to the selection and training of the members of the execution team and with regard to the method by which the execution drugs were to be injected. The *Hobbs* Court held that the challenged statute did not grant ADC "unbridled discretion" in that it

> (1) It provides a general policy with regard to the lethal injection procedure; (2) It requires the sentence of death to be carried out by lethal injection rather than by other methods; (3) It mandates that the lethal injection be intravenous, as opposed to a direct cardiac infusion, intramuscular injection, or other injection procedure that does not involve injection into a vein; (4) It requires the ADC to carry out the procedure by using a barbiturate in an amount sufficient to cause death and limits the ADC's discretion to selecting from a single class of drugs; (5) It mandates that, before the lethal dose of a barbiturate is injected, the ADC must intravenously administer a benzodiazepine, and; (6) It uses the terms "shall" and "must" six different times, including with regard to mandating that the ADC follow the manufacturer's mixing instructions, sterilization of equipment, and the pronouncement of death.
>
> *Hobbs v. McGehee*, 2015 Ark. 116, 12–13, 458 S.W.3d 707, 715–16 (2015).

Clearly, in *Hobbs*, the statute provided standards by which ADC was to carry out an execution and did not offer ADC unbridled authority to execute an inmate without reasonable guidance from the legislature. Similarly, in the *Abraham* case, a statute was challenged which provided the State Medical Board the authority to determine "need" for the issuance of a permit to distribute legend drugs. The *Abraham* Court found that the statue listed "nine factors" which provided reasonably guidelines by which the Board was directed to exercise its authority to issue permits. *Abraham v. Beck*, 2015 Ark. 80, 15, 456 S.W.3d 744, 754 (2015). In conclusion, these cases are not relevant to the question of whether the Legislature can delegate its appointment power to private entities, as these cases never address such facts. The Court should disregard these cases, as they are not binding or persuasive authority relevant to the Plaintiffs' Motion for Judgment on the Pleadings. The cases cited by the Defendants' Counsel do not identify, define, or describe any standards or factors for this Court to consider, in deciding whether a delegation of legislative power to private interests is permissible under the Arkansas Constitution.

B. <u>Arkansas Code § 2-16-206 is an Unconstitutional Delegation of Authority, Is Not Subject to Legislative Oversight, and Contains No "Appropriate Standards" Which Could Cure the Unconstitutional Delegation of Authority Proscribed Thereunder.</u>

Even if this Court were to decide that the Arkansas Legislature may delegate its constitutional granted powers to private interests so long as the Legislature provided "appropriate standards and guidelines" for the exercise of this appointment power, Arkansas Code § 2-16-206 would fail this test. What "reasonable guidelines" or "standards" does Arkansas Code § 2-16-206 place on the private entities that are currently appointing the voting members of the State Plant Board? Unlike the *Hobbs* and *Abraham* cases cited above, the statute contains no list of "standards" for a plant board member, nor is there a list of "factors" that must be considered when a private entity determines who it will appoint to the State Plant Board.

In fact, the Arkansas Oil Marketers Association, the Arkansas Agricultural Aviation Association, and the Arkansas Forestry Association are each currently appointing a member to the State Plant Board with absolutely no statutory conditions on who these organization appoint. See Arkansas Code Annotated § 2-16-206(a). The only statutory requirement placed on appointments by the Arkansas State Horticultural Society, the Arkansas Green Industry Association, the Arkansas Seed Grower's Association, the Arkansas Pest Management Association, Inc., the Arkansas Seed Dealers' Association, and the Arkansas Crop Protection Association, Inc. is that these appointees be "actively engaged" in the business represented by each private industry association (seed dealer, nurseryman, pest control operator, etc). Id.

Plaintiffs' Counsel respectfully suggests that this "actively engaged" in the business requirement is meaningless and it is certainly unclear as the terms contained in the statute are vague, broad, and undefined. See Arkansas Code Annotated § 2-16-206(a). The Arkansas Legislature has not placed "reasonable guidelines" on appointees or any discernible "standards" for appointees to the Plant Board. As a result, Arkansas has a plant board selected by a few vested industry groups, which does not adequately represent Arkansas farmers and contains no members

who are women or minorities. Even if an unconstitutional delegation of legislative power to private business associations could be cured if the legislature provided "reasonable guidelines" for the use of this power, the statute at hand would fail to pass constitutional muster as it fails to provide the guidance or "factors" which would prevent these private entities from using their "unbridled discretion" in the appointment of members to the relevant state agency, the State Plant Board.

The lack of appropriate legislative guidance carries over into the rulemaking authority of the Plant Board. While the State may point out that Executive Order No. 15- 02 requires gubernatorial review and approval of agency rules and regulations, and that Arkansas Code Annotated § 10-3-309 requires the Rules and Regulations Subcommittee to approve all rules proposed by state boards, there is no authority to indicate that oversight of the Board's actions may cure the unconstitutional delegation of appointment power. The requirement is for reasonable guidelines on rulemaking and not oversight after the fact.

As previously briefed, the legislative review available for Plant Board rules is minimal, does not reach the merits of the proposed rules, fails to address the adverse consequences of proposed rules, and cannot be said to amount to publicly accountable oversight. The legislative council and the Governor certainly lack the authority to remedy an unconstitutional delegation of the appointment power to private entities. The legislative council and the Governor can take no action to compel the Plant Board to make certain rules. With respect to executive oversight, the Governor is not bound to review the Board's rules and may do so at his own discretion.

C. Why Can't the Arkansas Legislature Delegate its Appointment Authority to Private Business Associations?

First and foremost, Article IV of the Arkansas State Constitution requires a clear separation of powers by the Departments of State Government, and Article 5 of the Arkansas Constitution

specifically vests legislative powers in the Arkansas General Assembly. Included in the legislative power is the power of appointment. See Arkansas Constitution, Art. 5, § 14; see also *Cox v. State,* 72 Ark. 94 (1904) (holding appointment by the Legislature of a State Capitol Commission is valid as the Constitution contemplates appointment by the Legislature off officers other than those necessary to discharge its own duties). Arkansas Courts have allowed delegation of such powers by the legislature in only certain situations and within defined "limits." See *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 429, 994 S.W.2d 481, 483 (1999). Article 5 of the Arkansas Constitution does not grant the General Assembly the authority to delegate its appointment power to private entities. The court will not find such authority in the Constitution or any applicable case law.

Article 5, § 1, of the Arkansas Constitution also provides that "**the legislative power of the people of this State shall be vested in a General Assembly**." Pursuant to the Arkansas Constitution, "**all political power is inherent in the people** and government and 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." See Article 2, § 1 of the Arkansas Constitution (emphasis added). This provision of the Constitution, when read with Article 5 of the State Constitution, requires that all public power, including but not limited to the power to appoint public officers, remain in the *public* domain. The Arkansas Legislature derives its authority from Article 5 of the Constitution, which is limited by the section of Article 2 referenced above, and the legislature may not exceed its authority by delegating its *public* power to private interests, including but not limited to the private business associations which presently appoint the members of the State Plant Board.

As referenced in the Plaintiffs' Second Amended Complaint, fundamental principles of our State Constitution require that the people control their government, and the appointment process outlined in Arkansas Code § 2-16-206 has robbed the regulated citizenry of this State of public power and the related opportunity to affect their destiny. The current appointment process most definitely limits genuine opportunity for public interest to assert itself on the members of the State Plant Board, as the majority of appointed members are all entirely reliant on private business associations for their appointments.

The Supreme Court of Georgia has had the opportunity to address a situation similar to that presently before this Court. In the case of *Rogers v. Medical Association of Georgia,* a practicing Georgia physician challenged a statute which required that the Governor of the State of Georgia must appoint the nominees of the Medical Association of Georgia, which represented approximately two-thirds of the doctors licensed to practice in Georgia, to the Georgia State Board of Medical Examiners. *Rogers v. Medical Ass'n of Georgia*, 244 Ga. 151 (1979). Dr. Rogers alleged this was an unconstitutional delegation of legislative appointment power in that a private industry association had the exclusive right to nominate members of the Board of Medical Examiners. The Supreme Court of Georgia agreed, citing provisions of the Georgia State Constitution which are very similar to portions of the Arkansas State Constitution which have been referenced above, writing that

> **The General Assembly may, within constitutional limitations, establish qualifications for public office and designate a governmental appointing authority. But it cannot delegate the appointive power to a private organization. Such an organization, no matter how responsible, is not in the public domain and is not accountable to the people as our constitution requires.** It represents and is accountable to its membership. Here the Medical Association of Georgia, a private organization, controls the appointment of the members of the State Board of Medical Examiners under the 1971 Act which provides that the Governor must appoint from its nominees. This is violative of our Constitution.

Rogers v. Med. Ass'n of Georgia, 244 Ga. 151, 153, 259 S.E.2d 85, 87 (1979).

More recently, in 2018, the Supreme Court of Georgia was once-again called on to consider whether a statute, allowing private entities to appoint four (4) board members to the DeKalb County Board of Ethics, was unconstitutional. The Court noted that the officials appointed by private entities were wielding government power and that the private appointment process delegates the power of appointment "to private organizations that are not accountable to the people as our constitution requires." *Delay v. Sutton*, 304 Ga. 338, 341, 818 S.E.2d 659, 661–62 (2018). In its opinion, the *Delay* Court referenced a provision of the Georgia Constitution which provides that:

> All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them.
>
> GA Const. Art. 1, § 2, ¶ 1.

The Court went on to cite the *Rogers v. Med. Ass'n of Georgia* opinion, referenced above, for the proposition that "fundamental principles embodied in our constitution dictate that the people control their government. "All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole" . . . This is accomplished through elected representatives to whom is delegated, subject to constitutional limitations, the power to regulate and administer public affairs, including the power to provide for the selection of public officers." *Delay v. Sutton*, 304 Ga. 338, 340–41, 818 S.E.2d 659, 661 (2018) quoting R*ogers v. Med. Ass'n of Georgia*, 244 Ga. 151, 259 S.E.2d 85 (1979). Plaintiffs' Counsel suggests to the Court that this reasoning is directly applicable to the Plaintiffs' case before this Court.

Article 2, § 1 of the Arkansas Constitution is very similar in that it reads "all political power is inherent in the people and government and 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." Arkansas Code § 2-16-206 allows for private entities to wield the legislative powers of the people which has been vested in the legislature through Article V of the Arkansas Constitution. The constitutional problem with the statutory appointment process for members of the State Plant Board is two-fold: first, the Legislature has no constitutional authority to delegate its appointment power to private entities and, second, these private entities, which are now wielding *public* power do not answer to the people as required by Article 2 of our Constitution.

Plaintiffs' Counsel does not believe this exact issue has been previously addressed by the Supreme Court of Arkansas, but respectfully suggests to the Court there is a reason that Arkansas has no other State Agency where private business associations directly appoint members of a rule-making, adjudicatory, and permitting arm of the State Executive Branch. The appointment process for the State Plant Board is not only highly irregular, it is patently unconstitutional.

III. CONCLUSION

The Supreme Court of Arkansas may not have previously had the chance to consider the constitutionality of an **absolute** delegation of legislative appointment power to private business entities. Nevertheless, other jurisdictions have and those jurisdictions are consistent in finding that "**the power to appoint public officers is the sovereign power of the State.**" *People ex rel. Rudman v. Rini*, 356 N.E.2d 4, 64 Ill.2d 321, 1 Ill.Dec. 4 (Ill., 1976). "**The sovereign power of the State cannot be conferred upon a private person or group.**" Id. "Constitutional provisions mandate that public affairs shall be managed by public officials who are accountable to the people. *As important as any other governmental power is the power to appoint public officials.* They are the persons who control so much of our lives.... In our opinion, it is clear that the constitutional provisions cited above demand that the power to appoint public officers remain in the public

domain." *Delay v. Sutton*, 304 Ga. 338, 341, 818 S.E.2d 659, 661 (2018) quoting R*ogers v. Med. Ass'n of Georgia*, 244 Ga. 151, 259 S.E.2d 85 (1979).

The Plaintiffs ask that this Court grant their Motion for Judgment on the Pleadings and that the Court deny the Defendants' Cross-Motion for Judgment on the Pleadings. The Plaintiffs' specifically request that the Court enter an Order finding that Arkansas Code Annotated § 2-16-206 is an unconstitutional delegation of legislative appointment power in violation of the nondelegation doctrine and the Arkansas Constitution. Members of the State Plant Board appointed by private entities should be removed from the State Plant Board, as they lack constitutional authority to perform governmental actions, these Plant Board members' positions should be declared vacant, and all votes of this unconstitutionally configured State Agency should be rendered void.

DATED: September 26, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned Counsel hereby certifies that this document has been provided to the following individuals on this 26th day of September, via Submission to the Court's E-Filing System.

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IN THE CIRCUIT COURT OF PULASKI COUNTY, OF ARKANSAS
SIXTH DIVISION

MICHAEL MCCARTY; PERRY GALLOWAY; MATT SMITH; GREG HART; ROSS BELL; AND BECTON BELL — PLAINTIFFS

v. CASE NO. 60CV-17-6539

ARKANSAS STATE PLANT BOARD & TERRY WALKER, in his official capacity as DIRECTOR of THE STATE PLANT BOARD — DEFENDANTS

REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants respectfully submit this reply to Plaintiffs' response to their cross-motion for judgment on the pleadings. Plaintiffs' response fails to demonstrate that that Ark. Code Ann. § 2-16-206(a) is an unconstitutional delegation of legislative power. As a result, the Court should grant Defendants' cross-motion for judgment on the pleadings and dismiss this case with prejudice.

DISCUSSION

I. The appointment power belongs to the People, not to any specific branch of government.

There is no merit to Plaintiffs' argument that our Constitution vests "a legislative power of appointment" solely in the General Assembly. Pls.' Br. at 2 (citing Ark. Const. art. 5, § 14). Article 5, section 14 of the Arkansas Constitution

pertains only to the *manner* of vote whenever a state officer is appointed by the General Assembly. It says nothing about *who* else may have appointment powers, *when* the General Assembly has the power to appoint State officers, or *whether* the General Assembly may delegate its authority to others. Because there is no authority for Plaintiffs' position, this Court should reject it. Indeed, the Supreme Court of Arkansas, in a decision handed down over a century ago, rejected the same argument Plaintiffs make here, holding: "In 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. The Arkansas Supreme 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. 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 in the Defendants' opening brief, the Legislature is free to delegate its own 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 in the Defendants' opening brief. There is simply no authority that supports Plaintiffs' argument otherwise, and the Court should reject it.

II. Plaintiffs' nondelegation argument is not supported by any controlling authority and is, in fact, precluded by *Cox*.

Plaintiffs' response to the State's motion for judgment on the pleadings continues to make the bald assertion—without citation to any controlling authority—that "the legislature cannot delegate its constitutional powers to private individuals or entities." Pls.' Resp. at 1. That is simply not the law in Arkansas, which is evidenced by the fact that Plaintiffs have not and cannot cite one single controlling precedent to support their argument. Indeed, under the *Cox* case discussed above, the Legislature may choose the method of selecting members of the Plant Board, and because there is no "general or express prohibition" against the delegation of the appointing power in our Constitution, then the Legislature may delegate that power just as it can any other legislative power. *See Cox*, 72 Ark. 94, 78 S.W. at 756.

III. The challenged statute provides sufficient guidance for the appointment of members of the Plant Board.

In adopting Ark. Code Ann. § 2-16-206(a), the Legislature identified seven members representing various agricultural interests to be appointed by the Governor (such as a practical cotton grower and practical rice grower) and two to be selected by the University of Arkansas's Vice President for Agriculture. Plaintiffs take no issue with these provisions of the statute. The Legislature also identified nine additional members of the Plant Board by the interests each would represent and provided only minimal discretion to the various industry associations to choose their representatives. Contrary to Plaintiffs' argument, the industry associations cannot appoint anyone they want to the Plant Board. Instead, the Legislature specified the qualifications of each member and identified who would appoint them. This is adequate to support the Legislature's delegation of appointment authority for the Plant Board.

For example, the Arkansas State Horticultural Society has the power to appoint a member to the Plant Board. But that authority is not "unfettered" or entirely discretionary within that society. Instead, it must "elect" a "practical horticulturist" who is "actively engaged in the business" to represent its members. Ark. Code Ann. § 2-16-206(a)(5). Likewise, the Arkansas Green Industry Association must "elect" a "nurseryman" who is "actively engaged in the business." *Id.* subsec. (a)(6). The Arkansas Seed Growers Association must "elect" a "practical seed grower" who is "actively engaged in the business." *Id.* subsec. (a)(7). The Arkansas Oil Marketers Association must "appoint" a "member representing the

Arkansas Bureau of Standards." *Id.* subsec. (a)(10). And so on. There is nothing in the Constitution that clearly and unambiguously prohibits such a delegation of appointment power by the General Assembly. *See Hobbs v. McGehee*, 2015 Ark. 116, at 8, 458 S.W.3d 707, 712; *Landmark Novelties, Inc. v. Ark. State Bd. of Pharmacy*, 2010 Ark. 40, at 12, 358 S.W.3d 890, 898. And, as with any administrative agency, the Plant Board as a whole, the rules it adopts, and the adjudications it performs are subject to judicial review under the provisions of the Administrative Procedures Act, Ark. Code Ann. §§ 25-15-201 *et seq.*, in addition to the gubernatorial and legislative oversight outlined in the State's opening brief. *See* Ark. Code Ann. §2-1-203(b)(1)(A)(i). Thus, there is no merit to Plaintiffs' argument that the Plant Board operates outside of the governance of the people.

For all of these reasons, along with the additional reasons explained in Defendants' opening brief, the Court should uphold the constitutionality of Ark. Code Ann. § 2-16-206(a) in its entirety. In the alternative, and in the event the Court disagrees with Defendants and finds that certain subsections of the statute are unconstitutional, the Court should strike only those provisions and sustain the remaining, valid provisions. *Hobbs v. Jones*, 2012 Ark. 293, at 18, 412 S.W.3d 844, 856.

CONCLUSION

Because Plaintiffs have failed to carry their burden of proving that Ark. Code Ann. § 2-16-206(a) clearly and unmistakably conflicts with constitutional

requirements, the Court should enter judgment as a matter of law in favor of Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jennifer L. Merritt, hereby certify that on October 3, 2019, I electronically filed the foregoing with the Clerk of the Court using the eFlex electronic filing system, which shall send notification of the filing to all participants.

/s/Jennifer L. Merritt
Jennifer L. Merritt

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

MICHAEL MCCARTY; PERRY GALLOWAY; MATT SMITH; GREG HART; ROSS BELL; and BECTON BELL **PLAINTIFFS**

VS. **CASE NO. 60CV-17-6539**

ARKANSAS STATE PLANT BOARD & TERRY WALKER, in his official capacity as DIRECTOR of THE STATE PLANT BOARD **DEFENDANTS**

ORDER

On the 15 day of ~~November~~ December, 2019, the Plaintiffs' *Motion for Judgment on the Pleadings*, filed August 23, 2019, and Defendants' *Cross-Motion for Judgment on the Pleadings*, filed September 19, 2019, came on for consideration. Based upon the pleadings and all other matters before the court, the court hereby finds:

1. Plaintiffs' *Motion for Judgment on the Pleadings* should be and hereby is denied.
2. Defendants' *Cross-Motion for Judgment on the Pleadings* should be and hereby is granted.
3. The above-styled matter is dismissed with prejudice.

IT IS SO ORDERED.

TIMOTHY DAVIS FOX
CIRCUIT COURT JUDGE

12/11/19
DATE

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SIXTH DIVISION

MICHAEL MCCARTY; PERRY GALLOWAY; MATT SMITH; GREG HART; ROSS BELL; and BECTON BELL — **PLAINTIFFS**

v. — **Case No. 60CV-17-6539**

ARKANSAS STATE PLANT BOARD & TERRY WALKER, in his official capacity as DIRECTOR of THE STATE PLANT BOARD — **DEFENDANTS**

NOTICE OF APPEAL

COME NOW the Plaintiffs, Michael McCarty, Perry Galloway, Becton Bell, Matt Smith, Greg Hart and Ross Bell, by and through the undersigned Counsel, and hereby give notice of their appeal to the Arkansas Supreme Court:

1. **Appealing Parties.** The Parties taking this appeal are the Plaintiffs, Michael McCarty, Perry Galloway, Matt Smith, Greg Hart, Ross Bell, and Becton Bell.

2. **Orders Being Appealed.** The Plaintiffs appeal from the Circuit Court's December 1, 2019, dismissal of the Plaintiff's above-referenced case, with prejudice, specifically including the Court's Order denying Plaintiffs' Motion for Judgment on the Pleadings, and the Court's Order granting Defendants' Cross-Motion for Judgment on the Pleadings.

3. **Designation of Record.** The Plaintiffs designate the entire record in this matter as the record on appeal including all of the pleadings, exhibits, briefs, and the transcript of the hearings held in this case on March 30, 2018, and August 5, 2019.

4. **Certificate of Transcript.** Plaintiffs have made arrangements with the Court Reporter to secure the transcript of the hearings and the preparation of the record, and have made financial arrangements for the same, as required by Ark. Code Ann. § 16-13-510(c).

5. **Jurisdiction of the Arkansas Supreme Court.** The Plaintiffs take this appeal to the Arkansas Supreme Court, which has appellate jurisdiction concerning issue of constitutionality, namely the constitutionality of the appointment of the members of the State Plant Board. *See* Ark. Sup. Ct. R. 1-2(a)(1) ("All appeals involving the interpretation or construction of the Constitution of Arkansas"); Ark. Sup. Ct. R. 1-2(b) (providing that the Supreme Court has jurisdiction to hear issues of first impression, issues of substantial public interest, significant issues needing clarification or development of the law, and appeals involving substantial questions of law concerning the validity, construction, or interpretation of an act of the General Assembly).

6. **Abandonment of Claims.** The Appealing party abandons any pending but unresolved claims and suggests to the Court that all claims were resolved by the Circuit Court in its December 1, 2019, Order denying Plaintiffs' Motion for Judgment on the Pleadings and granting Defendant's Cross-Motion for Judgment on the Pleadings.

DATED: December 18, 2019

Respectfully Submitted,

Michael McCarty, Perry Galloway,
Ross Bell, Matt Smith, Greg Hart, and
Becton Bell

PETITIONERS

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CERTIFICATE OF SERVICE

The undersigned Counsel hereby certifies that this document has been provided to the following individuals on this 18th day of December, via Submission to the Court's E-Filing System.

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/S/ Grant Ballard
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