

2021 Ark. 105  
622 S.W.3d 162

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

v.

ARKANSAS STATE PLANT BOARD and Terry  
Walker, in His Official Capacity as Director  
of the Arkansas State Plant Board,  
Appellees

No. CV-20-164

Supreme Court of Arkansas.

Opinion Delivered: May 6, 2021

ARK AG LAW, PLLC, by: J. Grant Ballard, Little  
Rock; and Davidson Law Firm, Little Rock, by:  
David L. Gershner, for appellants.

Leslie Rutledge, Att'y Gen., by: Jennifer L.  
Merritt, Sr. Ass't Att'y Gen., for appellees.

BARBARA W. WEBB, Justice

The Pulaski County Circuit Court found Arkansas  
Code Annotated § 2-16-206(a) (Supp. 2019),  
which sets forth the appointment process for  
members of the Arkansas State Plant Board  
(ASPB), constitutional. McCarty appeals the  
constitutionality finding. We reverse and remand  
with instructions.

### I. Background

In 2017, McCarty filed a complaint and an  
amended complaint for declaratory judgment,  
injunctive relief, and judicial review of  
administrative actions, generally challenging the  
ASPB's April 15, 2018, dicamba cutoff rule and  
the denial of a petition for rulemaking submitted  
by the appellants. McCarty also sought a  
declaration that Arkansas Code Annotated §  
2-16-206(a) is unconstitutional. The ASPB moved  
to dismiss McCarty's amended complaint and the  
circuit court declared that the April 15 "cutoff"  
rule was "void ab initio" and "null and void" as to

the individual appellants before dismissing the  
case on the basis of sovereign immunity.

The ASPB appealed the circuit court's ruling that  
the challenged rule was "void ab initio" and "null  
and void" as to McCarty. McCarty cross-  
appealed the dismissal of their complaint and  
allegations of constitutional violations. We  
dismissed the ASPB's appeal as moot and found  
McCarty's cross-appeal partially moot. *Ark. State  
Plant Bd. v. McCarty*, 2019 Ark. 214, 576  
S.W.3d 473. We held that McCarty's claim that  
Arkansas Code Annotated § 2-16-206 was an  
unconstitutional delegation of legislative  
appointment power was not moot. *Id.* We  
reversed and remanded for further proceedings  
on that issue. *Id.* On remand,

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the circuit court found that Arkansas Code  
Annotated § 2-16-206(a) was constitutional and  
never reached McCarty's requested relief.  
McCarty now appeals the circuit court's finding  
that the statute was constitutional.

### II. Standard of Review

This court reviews issues of statutory  
construction under a *de novo* standard. *Bullock's  
Kentucky Fried Chicken, Inc. v. City of Bryant*,  
2019 Ark. 249, 582 S.W.3d 8. In considering any  
constitutional challenge to a statute, this court  
"begins with the axiom that every act carries a  
strong presumption of constitutionality." *Ark.  
Dep't of Corr. v. Bailey*, 368 Ark. 518, 523, 247  
S.W.3d 851, 855 (2007). This presumption  
places the burden of proof squarely on the party  
challenging a statute to prove its  
unconstitutionality, and this court resolves "all  
doubts" in favor of upholding the  
constitutionality of the statute, if possible. *Id.*; *City of Cave Springs v. City of Rogers*, 343 Ark.  
652, 658-59, 37 S.W.3d 607, 611 (2001). This  
Court will only strike down a statute when there  
is a "clear and unmistakable" conflict between  
the statute and the constitution. *Bailey*, 368  
Ark. at 523-24, 247 S.W.3d at 855.

### III. Constitutional Challenge

Within our state constitution is a specific separation-of-powers provision, providing:

§ 1. The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.

§ 2. No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

*Hobbs v. Jones* , 2012 Ark. 293, 8, 412 S.W.3d 844, 850 (citing Ark. Const. art. 4, §§ 1, 2 ). In *Department of Human Services v. Howard* , we explained the specific powers delegated to each branch. *Id.* (citing 367 Ark. 55, 238 S.W.3d 1 (2006) ). The legislative branch of the state government has the power and responsibility to proclaim the law through statutory enactments. *Id.* The judicial branch has the power and responsibility to interpret the legislative enactments. *Id.* The executive branch has the power and responsibility to enforce the laws as enacted and interpreted by the other two branches. *Id.* The doctrine of separation of powers is a basic principle upon which our government is founded and should not be violated or abridged. *Id.*

The doctrine prohibiting delegation of legislative power has long been recognized, in Arkansas. *Leathers v. Gulf Rice Ark., Inc.* , 338 Ark. 425, 429, 994 S.W.2d 481, 483 (1999). In determining whether an unconstitutional delegation has been made, we consider whether the legislature "has attempted to abdicate, or to transfer to others, the essential legislative functions with which it is vested by the Constitution," noting that "legislation must often be adapted to conditions involving details with which it is impracticable for the legislature to deal directly." *Id.* , 994

S.W.2d at 483 (citing *Currin v. Wallace* , 306 U.S. 1, 15, 59 S.Ct. 379, 83 L.Ed. 441 (1939) ).

Arkansas Code Annotated § 2-16-206(a) permits the appointment of a Plant Board member by the Arkansas State Horticultural Society, the Arkansas Green Industry Association, the Arkansas Seed Growers Association, the Arkansas Pest Management Association, the Arkansas

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Seed Dealers' Association, the Arkansas Oil Marketers Association, the Arkansas Crop Protection Association, Inc., the Arkansas Agricultural Aviation Association, the Arkansas Forestry Association, and two non-voting members from the University of Arkansas. This means there are nine seats on the eighteen-member board appointed solely by private industry. "This 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." *Leathers* , 338 Ark. at 430, 994 S.W.2d at 484.

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. *Leathers* , 338 Ark. at 430, 994 S.W.2d at 484 (citing *Carter v. Carter Coal Co.* , 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936) ). We have held that in Arkansas, legislative powers cannot be delegated, even to other branches of state government, except within "certain limits." *Id.*

Similar cases from other States have held that private entities may not appoint members to a governmental board without offending the constitution as it is an unconstitutional delegation of legislative power to a non-governmental entity. *Delay v. Sutton* , 304 Ga. 338, 341, 818 S.E.2d 659, 661-62 (2018) (citing *Rogers v. Medical Ass'n of Georgia* , 244 Ga. 151, 153, 259 S.E.2d 85, 87 (1979) ) (it is an unconstitutional delegation of legislative appointment power when private industry has the exclusive right to nominate board members

because it places power in private organizations that are not accountable to the people as required by the constitution); *Gamel v. Veterans Memorial Auditorium Comm'n* , 272 N.W.2d 472, 476 (Iowa 1978) ("[P]rivate 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 (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 (1995) (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 notwithstanding government oversight).

Thus, we hold that the circuit court erred in

ruling that Arkansas Code Annotated § 2-16-206(a) is constitutional. In a case where there is an unconstitutional delegation of legislative power to a private entity, there can only be one remedy--the removal of unconstitutionally appointed board members. Accordingly, we reverse and remand with specific instructions for the circuit court to remove the unconstitutionally appointed Board members.

Reversed and remanded with instructions.

BAKER, J., dissents

Karen R. Baker, Justice, dissenting.

I dissent from the majority opinion for the reasons explained in my opinion in *Arkansas State Plant Board v. McCarty* , 2019 Ark. 214, at 8, 576 S.W.3d 473, 477 (Baker, J., concurring in part; dissenting in part), and would affirm the circuit court.