

# SUPREME COURT OF ARKANSAS

No. CV-18-369

ARKANSAS STATE PLANT BOARD;  
TERRY WALKER, IN HIS OFFICIAL  
CAPACITY AS DIRECTOR OF THE  
ARKANSAS STATE PLANT BOARD; OTIS  
HOWE, IN HIS OFFICIAL CAPACITY AS  
CHAIR OF THE ARKANSAS STATE  
PLANT BOARD; AND MEMBERS OF THE  
ARKANSAS STATE PLANT BOARD  
APPELLANTS

V.

NICKIE BELL; BRITT BLACKBURN;  
JUSTIN BLACKBURN; DOIN BOWERS,  
JR.; LISA BOWERS; JOEL BROWN; LANCE  
BRADLEY; TANAYA CARLTON; SCOTTY  
CATT; CHAD COSTNER; BRAD  
DAVAULT; DANNY ELLIS; DANNY ELLIS,  
JR.; DUSTIN ELLIS; CHAD FULLERTON;  
MARY GALLOWAY; ROBERT GAMMILL;  
SCOTT GEORGE; MARK GRAHAM; MIKE  
GRAHAM; ALLEN GRIFFIN; KIMBERLY  
HART; CHRIS LEIBLE; DUSTIN LITTLE;  
NATHAN LITTLE; ZACK MCMILLON;  
BRADLEY MCPHERSON; CHARLES  
MARTIN; KEITH MIKEL; SHANE MIKEL;  
ROGER REDDICK; TERRY ROBINSON;  
BENJAMIN C. SEXTON; CLYDE B.  
SEXTON, JR.; JOEY SELLMAYER;  
DOUGLAS THRELKELD; AND MARK  
WILLIAMS

APPELLEES

**Opinion Delivered:** May 23, 2019

APPEAL FROM THE CLAY  
COUNTY CIRCUIT COURT  
[NO. 11PCV-2018-76]

HONORABLE RANDY F. PHILHOURS,  
JUDGE

APPEAL DISMISSED.

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**RHONDA K. WOOD, Associate Justice**

The Arkansas State Plant Board, Terry Walker, in his official capacity as Director of the Arkansas State Plant Board, Otis Howe, in his official capacity as Chair of the Arkansas State Plant Board, and members of the Arkansas State Plant Board (collectively, the “Plant

Board”) appeal the circuit court’s temporary restraining order that enjoined the Plant Board from enforcing its agency rule limiting the use of dicamba herbicides after April 16, 2018. Because the Plant Board has since repealed and replaced this rule, we dismiss the appeal as moot.

### *I. Background*

The Arkansas State Plant Board approves and regulates which herbicides Arkansas farmers may employ to combat invasive plant species. In recent years, Arkansas soybean farmers have experienced considerable difficulty in combatting the invasive plant species commonly known as pigweed. To assist soybean farmers in this struggle, beginning in 2017, the Plant Board approved the in-crop application of improved, low-volatility forms of dicamba-based herbicides.

During the 2017 crop season, soybean farmers planted dicamba-resistant soybeans and treated their crops with these dicamba-based herbicides. Although it proved effective against pigweed, the use of dicamba also resulted in numerous complaints relating to off-target dicamba herbicide injury. In response, the Plant Board appointed a dicamba task force to address dicamba related complaints and propose new rules for dicamba use in the 2018 crop year. Based on the task force’s recommendation, the Plant Board proposed a new rule prohibiting the use of dicamba from April 16 through October 31 of each year. Farmers opposing the April 15 cutoff date suggested that the date should be extended to May 25, which would allow Arkansas farmers to use dicamba while still preventing off-target injury. Notwithstanding these contentions, on January 19, 2018, the Arkansas Legislative Council

approved the rule prohibiting the use of dicamba in Arkansas from April 16 through October 31. Ten days later, the rule took effect.

## II. *Temporary Restraining Order*

On April 16, 2018, appellees—thirty-seven Arkansas farmers who intended to use dicamba herbicides in 2018—filed a complaint against the Plant Board for declaratory judgment and injunctive relief. Contemporaneous with their complaint, appellees filed a motion for temporary restraining order asking the circuit court to enjoin the Plant Board from enforcing its April 15 cutoff date. Specifically, the motion asserted that an injunction was necessary because appellees had already planted dicamba-resistant beans for the 2018 growing season, and without the use of dicamba herbicides after April 15, 2018, appellees’ soybean crops would be damaged in a way that cannot be “unwound.”

The circuit court granted the *ex parte* TRO and enjoined the Plant Board from enforcing its April 15 cutoff date. Importantly, the court’s order expressly stated that “[t]he basis for the emergency nature of the motion stems from the Arkansas State Plant Board placing an April 15, 2018, cutoff date for the spraying of dicamba herbicides.” On April 18, 2018, the Plant Board filed a motion to dissolve the temporary restraining order. One day later, it filed a notice of appeal to this court.<sup>1</sup>

The notice of appeal solely identified the circuit court’s April 16 TRO as the order being appealed. As an interlocutory appeal, our jurisdiction is appropriate under Arkansas Rule of Appellate Procedure –Civil 2(a)(6). We note that although the Plant Board raises

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<sup>1</sup>The Plant Board also filed a motion for stay of the circuit court’s order pending the appeal, which our court granted on April 30, 2018.

the additional issue of sovereign immunity on appeal, the circuit court rendered no ruling on that issue, or for that matter, any other aspect of the underlying cause of action. Indeed, the issue of sovereign immunity was not raised to the circuit court until the Plant Board filed its motion to dismiss on April 18. Our review is limited to the propriety of the April 16 TRO.

### III. Mootness

Generally, this court will not review issues that are moot. *E.g.*, *Weaver v. City of W. Helena*, 367 Ark. 159, 161, 238 S.W.3d 74, 76 (2006). A case becomes moot when any judgment rendered would have no practical legal effect upon 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. *E.g.*, *Kiesling v. Ark. Prof'l Bail Ass'n*, 2017 Ark. 346, at 5, 532 S.W.3d 567, 569; *Weiss v. Chavers*, 357 Ark. 607, 617, 184 S.W.3d 437, 443 (2004). Likewise, these mootness principles equally extend to agency regulations that are repealed while an appeal is pending. *Warren Wholesale Co. v. McLane Co., Inc.*, 374 Ark. 171, 173, 286 S.W.3d 709, 710 (2008).

During the pendency of this appeal, the Plant Board promulgated a new rule that repealed the April 15 cutoff date. The new rule was filed with the Secretary of State's office on February 27, 2019, and took effect beginning March 9, 2019. Under the new rule, in-crop dicamba application is extended until May 25 of each year.<sup>2</sup> Ark. Code R. 209.02.4-XIII (B)(1)–(2). Although the new rule is not part of the record, “[t]his court has historically

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<sup>2</sup> [https://www.agriculture.arkansas.gov/Websites/aad/files/Content/5942664/Arkansas\\_Regulation\\_on\\_Pesticide\\_Classification\\_\(Acts\\_389\\_410\)\\_Orange\(Rev.4-19\)\\_Emergency\\_Rule.pdf](https://www.agriculture.arkansas.gov/Websites/aad/files/Content/5942664/Arkansas_Regulation_on_Pesticide_Classification_(Acts_389_410)_Orange(Rev.4-19)_Emergency_Rule.pdf).

and consistently taken judicial notice of rules and regulations promulgated by administrative agencies.” *Warren, supra*. Thus, as a threshold matter, we must determine whether the instant appeal is moot given the rule’s recent revision. *E.g., Jefferson Cty. Election Comm’n v. Hollingsworth*, 2014 Ark. 431, at 5, 445 S.W.3d 504, 507.

Appellees founded their motion for TRO on the harm that their 2018 soybean crops would experience as a result of the Plant Board’s April 15, 2018 cutoff date. And the circuit court specifically stated that its basis for granting the TRO “stem[med] from the Arkansas State Plant Board placing an April 15, 2018, cutoff date for the spraying of dicamba herbicides.” Under the new rule, however, in-crop dicamba application may continue until May 25 of each year. Ark. Code R. 209.02.4-XIII (B)(1)–(2). Thus, the basis for the TRO—the April 15, 2018 cutoff date—is no longer in effect. Because judgment on this appeal would have no practical legal effect upon the TRO’s enforceability, we dismiss this interlocutory appeal as moot.

Appeal dismissed.

*Leslie Rutledge*, Att’y Gen., by: *Gary Sullivan*, Ass’t Att’y Gen., for appellants.

*Branch, Thompson, Warmath & Dale, P.A.*, by: *Robert F. Thompson* and *Kimberly B. Dale*, for appellees.