CV-20-454

In the Arkansas Supreme Court
An Original Action

Arkansas Voters First, a ballot question committee; Bonnie Miller, individually and on behalf of Arkansas Voters First; and Open Primaries Arkansas, a ballot question committee — Petitioners

v — CV-20-454

John Thurston, in his official capacity as Secretary of State; the State Board of Election Commissioners — Respondents

Arkansans for Transparency, a ballot question committee; and Jonelle Fulmer, individually and on behalf of Arkansans for Transparency — Intervenors

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Reply to SBEC's Response on the Motion to Strike

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1. SBEC offers three feeble responses for why it should be excused from attempting to weigh in on a part of the case in which no claims are made against it and in which it lacks statutory or constitutional authority to make any decisions.

2. First, SBEC claims Petitioners misunderstand "basic civil procedure"[1] and that its motion to dismiss is not a "pleading" under ARCP Rule 12(f). They claim Rule 12(f) is a "mechanism for striking a 'pleading'—not a legal argument." (Response, p. 2.)

3. This is simply mistaken. As to SBEC's motion to dismiss under Rule 12(b)(6), that motion sets forth a defense to a plaintiff's claim, and "[a] motion to strike…is the appropriate remedy for the elimination of redundant, immaterial, impertinent, or scandalous matter in any pleading, *and is the primary procedure for objecting to an insufficient defense*. Wright & Miller's *Federal Prac. & Proc.* § 1380 (emphasis added) (referencing federal rule 12(f), which is substantially similar to ARCP Rule 12(f)); *City of Fort Smith v. Carter*, 364 Ark. 100, 107, 216 S.W.3d 594, 598 (2005) ("Based upon the similarities of our rules with the Federal

[1] This is in addition to SBEC's prior assertions in its Brief on Counts 1 and 2 that Petitioners misunderstand both "federal regulations" and this Court's constitutional analysis in *Washburn v. Hall*, 225 Ark. 868, 286 S.W.2d 494 (1956).

Rules of Civil Procedure, we consider the interpretation of these rules by federal courts to be of a significant precedential value.").

4. The 12(b)(6) motion is redundant since it simply cuts-and-pastes from the existing briefs on issues that are already fully briefed.

5. And the 12(b)(6) motion is insufficient because Counts 1 and 2 contain no claims against SBEC.

6. It would also prejudice Petitioners by forcing them to respond to a party who hasn't been sued in Counts 1 and 2.

7. What is truly remarkable is for an entity, who was not party to a trial to move to dismiss the matters *after* the trial and *before* appellate review. Notably, SBEC fails to cite any cases that provide for such a procedure.

8. With regard to SBEC's brief on counts 1 and 2, a motion to strike is the standard practice to strike either *entire briefs* or arguments in those briefs that were improperly raised. *Ark. Cty. v. Desha Cty.*, 342 Ark. 135, 139–40, 27 S.W.3d 379, 382 (2000) (striking appellee's entire brief because it failed to file either a notice of appeal or a notice of cross-appeal); *Boyle v. A.W.A., Inc.*, 319 Ark. 390, 392–93, 892 S.W.2d 242, 244

(1995) (same); *see also Canerday-Banks v. Barton*, 2018 Ark. App. 523 (grating motion to strike portions of appellant's a reply brief).

9. With regard to SBEC's motion to dismiss, a motion to strike is also appropriate. SBEC claims their lack of participation in the trial on Counts 1 and 2 is because the board did not receive a summons until after the trial concluded. SBEC would not have even been allowed to participate in the trial because, again, no claims are being made against it with respect to Counts 1 and 2, and it has no legal standing to make any arguments in that regard. With regards to Count 3, this Court set a briefing schedule and all issues have been fully briefed.

10. Third, SBEC claims Petitioners' motion to strike is inconsistent with a position it took in CV-20-136. SBEC claims that "[d]espite not even being a party to that lawsuit, Petitioners—represented by the same lawyers who represented in the intervenors in *Healthy Eyes*—filed an amicus brief…."

11. This objection proves the point Petitioners make in the motion to strike—namely, that SBEC is trying to file an amicus. If they wanted to do that, there was a procedure for doing so. They should not be

permitted to criticize AVF for failing to strictly follow a statute in a motion that itself violates the rules.

12. Finally, the claim that Petitioners "have no response to SBEC's arguments and are desperate to avoid responding" is an absurd attempt at arm-chair psychology. The issues SBEC raises have already been raised and responded to. SBEC's arguments simply attempt to pile on and in doing so break the rules regarding motion practice, and its attempt should be firmly rebuffed by this Court.

13. The State Board's brief on Counts 1 and 2 and their motion to dismiss should, therefore, be struck.

Respectfully submitted,

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Certificate of Service

I certify that on 19 August 2020, a copy of the foregoing was filed with this Court's eFlex filing system, which serves all counsel of record.

By: /s/ Alec Gaines
Alec Gaines