

Case No. 1120465

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IN THE SUPREME COURT OF ALABAMA

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HUGH McINNISH, et al.,

Appellants,

v.

BETH CHAPMAN, in her capacity as Secretary of State,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY,  
ALABAMA  
CV 2012-1053

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RESPONSE OF AMICUS CURIAE  
ALABAMA DEMOCRATIC PARTY TO MOTION TO STRIKE

COMES NOW *amicus curiae* Alabama Democratic Party ("ADP"), and pursuant to Ala.R.App.P. 27(a), responds in opposition to the Appellants' Motion to Strike the ADP's brief, as follows:

1. After receiving this Court's permission to submit an *amicus* brief, the ADP filed its brief on April 23, 2013, the same day on which the Appellees' brief was due and filed.

2. On May 14, 2013, the Appellants filed their Reply Brief, filling only 9 of the 35 allotted pages and citing not a single Alabama case.<sup>1</sup> Curiously, despite having the ADP's brief for several weeks, the Appellants' Reply Brief failed to address any of ADP's arguments or authorities, deciding instead to completely ignore it.

3. That same evening the Appellants filed their Motion to Strike the ADP's brief ostensibly because it attached documents that are not in the record on appeal. Incredibly, the Motion to Strike included as an attachment a 57-page, 207-paragraph "affidavit" that was clearly not in the record on appeal since it was not even cobbled

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<sup>1</sup> Indeed, the Appellants' Reply Brief comes perilously close to citing no legal authority whatsoever, in violation of Ala.R.App.P. 28(a)(1)). See *Braden Furniture Co., Inc. v. Union State Bank*, 109 So.3d 625, 631 (Ala. 2012) ("Rule 28(a)(10) requires that arguments in briefs contain discussions of facts and relevant legal authorities that support the party's position. If they do not, the arguments are waived. This is so, because it is not the function of this Court to do a party's legal research or to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument." (Citations and internal quotation marks omitted)); *PC & All, Inc. v. Maxie*, 66 So.3d 796 (Ala.Civ.App. 2011) (Appellate court would decline to consider argument where plaintiff cited no legal authority supporting the proposition).

together until the day before it was filed. (Motion to Strike, Exhibit 1).

4. As an initial matter, the Appellants' Motion to Strike misrepresents to this Court that the ADP "had failed to take any action in this matter until now, despite the fact that this litigation has been ongoing." (Motion to Strike at 3). Contrary to the Appellants' claim, the ADP formally sought leave to intervene in the Circuit Court one week after this action was filed (R. 91), and expressly joined in and supported the Motion to Dismiss filed by the Secretary of State and which was ultimately granted by the Circuit Court. (R. 139).<sup>2</sup>

5. The Appellants' Motion to Strike contends that the ADP's *amicus* brief should be summarily stricken because it attached copies of items which were not presented to the Circuit Court. This Court has previously recognized, however, that the inclusion of matters outside the record on appeal does not merit the striking of a brief. See, e.g., *King v. Smith*, 259 So.2d 244, 246 (Ala. 1972) ("As referred to above, 'purported affidavits of various

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<sup>2</sup> In fact, the Appellants expressly consented to the ADP's joinder in the Circuit Court (R. 146). Judge Reese did not rule on the ADP's intervention prior to the case being appealed to this Court.

persons' and other documents not shown by the record to have been before the trial court were affixed to the brief and in the text of the brief references are made to such material. But we will not strike the brief because of the presence of such documents. We will ignore them." ).<sup>3</sup>

6. Only 5 pages of the ADP's brief discusses or cites the attached exhibits. (See ADP Brief at pp. 10-15). The remaining pages of the brief support and bolster the Secretary of State's dispositive arguments regarding the absence of subject-matter jurisdiction (pp. 3-7), mootness (pp. 7-10), and the failure of the Appellants to establish that any legitimate "official source" had presented any credible information to Secretary Chapman in the course of her performing her "official duties prescribed by law."

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<sup>3</sup> See also *Kennesaw Life & Acc. Ins. Co. v. Old Nat. Ins. Co.*, 287 So.2d 869, 871 (Ala. 1973) ("[W]hile new issues cannot be raised for the first time in a reply brief, raising of such issues is not a ground for dismissal of the appeal or striking of the entire brief in which such issues appear. This Court will simply treat such issues as not before the Court."); *Roussel v. Payne*, 352 So.2d 1364, 1370 (Ala.Civ.App. 1977) ("The appellant Roussel through able counsel has filed with this court a motion to strike appellee's brief. The basis of this motion is that certain portions of appellee's brief contain matters *dehors* the record. This court in this instance, as in all instances, only considers relevant matters as shown by the record. The motion is therefore denied." ).

(pp. 15-20). These arguments in the ADP brief were conveniently ignored by the Appellants in their Reply Brief and in their Motion to Strike.

7. The ADP does not dispute that the exhibits attached to its *amicus* brief were not before the Circuit Court at the time that Judge Reese granted the motion to dismiss. Indeed, because of the procedural posture of this matter, there was no evidence at all presented to the Circuit Court. Contrary to the assertion in the Appellants' Motion to Strike, "the issue of President Obama's eligibility to be President" was absolutely NOT a part of the case below and is most assuredly NOT an issue before this Court. The only issue before this Court is whether to reverse the Circuit Court's legal conclusion that the Alabama Secretary of State is not required by Alabama law to independently investigate the eligibility of Presidential nominees prior to permitting their names to appear on the ballot. It would obviously be improper in the context of this narrow legal issue for this Court to offer any opinion about President Obama's eligibility.

8. The ADP also takes serious issue with the Appellants' suggestion that the ADP was attempting to

improperly introduce "evidence" through its *amicus* brief, "including a 'new' version of a birth certificate." (Motion to Strike at 3-4). Although a certified copy of the President's birth certificate is self-authenticating under Ala.R.Evid. 902, the scanned photocopy of the President's birth certificate attached to the ADP brief was downloaded from the Internet, without seeking any certification from Hawaiian officials. It was attached for educational rather than evidentiary purposes. As the Appellants expressly recognize, this Court is without jurisdiction to offer any opinion about the President's eligibility or the authenticity of his birth certificate.<sup>4</sup>

9. All that being said, the ADP assumes that it is unnecessary to further address whether this Court should consider the rambling screed that passes for an "affidavit" attached to the Appellants' Motion to Strike. Virtually none of the information contained in the affidavit is admissible or credible, except where the affiant admits

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<sup>4</sup> The curious suggestion that the copy of the President's birth certificate attached to ADP's brief is somehow a "new version" reflects a fundamental misunderstanding of the difference between a document and a scanned photocopy of that document. Just like a photograph of a baby is not a "new version" of the real baby, a scanned photocopy of a document is not a "new version" of that document.

that he is "former" law enforcement officer and not acting with any legitimate legal authority.<sup>5</sup> The Appellants have gone from relying on the unsubstantiated, unverified and politically-biased beliefs of one county sheriff out of the 3,000 such sheriffs in America, to relying on the unsubstantiated, uncorroborated, politically-biased beliefs of one private citizen out of the 313 million such private citizens in this country. The "affidavit" is inadmissible on its face and is composed of hearsay, speculation, and unsupported conclusions. Virtually none of the information in the "affidavit" could possibly be within the affiant's personal knowledge and serves merely to demonstrate the depths to which these conspiracy theorists have resorted to try to de-legitimize a President that they quite obviously despise. The "affidavit" should be disregarded in its entirety.

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<sup>5</sup> The ADP notes that the affiant signed the "affidavit" solely in his personal capacity and without any title, even an imaginary one.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May, 2013, I electronically filed the foregoing with the Clerk of the Supreme Court using the ACIS system, and mailed a copy to all counsel in this matter as follows:

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