

# SUPREME COURT OF ARKANSAS

No. CV-20-454

BONNIE MILLER, INDIVIDUALLY  
AND ON BEHALF OF ARKANSAS  
VOTERS FIRST AND OPEN  
PRIMARIES ARKANSAS, BALLOT  
QUESTION COMMITTEES  
PETITIONERS

V.

JOHN THURSTON, IN HIS  
CAPACITY AS ARKANSAS  
SECRETARY OF STATE, AND 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

Opinion Delivered: August 27, 2020

AN ORIGINAL ACTION

DISSENTING OPINION.

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**JOSEPHINE LINKER HART, Justice**

Today, the majority has disenfranchised more than 90,000 citizens. By signing the petition, these registered voters clearly manifested their desire to have these issues placed on the ballot. While I am not unmindful that the sponsor of an initiative is keenly interested in a proposed constitutional amendment, it is ultimately up to the qualified electors in this state to decide whether that measure is voted on. Ark. Const. art. 5, § 1. The legislative article

of our constitution calls initiative “the first power reserved by the people.” *Id.* Our constitution expressly prohibits laws that impinge on the right of the people to access and sign initiative petitions. It could not be more clearly stated:

Unwarranted Restrictions Prohibited. No law shall be passed to prohibit any person or persons from giving or receiving compensation for circulating petitions, not to prohibit the circulation of petitions, nor in any manner interfering with the freedom of the people in procuring petitions; but laws shall be enacted prohibiting and penalizing perjury, forgery, and all other felonies or other fraudulent practices, in the securing of signatures or filing of petitions.

Given the express language in our constitution, to the extent that Arkansas Code Annotated section 7-9-601(b) acts to prohibit “any person” from being a paid canvasser or interferes with the “freedom of the people in procuring petitions,” it is obviously unconstitutional.

I do not mention the plain language of article 5, section 1, because we have a challenge to the constitutionality of section 7-9-601. I mention this only because in construing section 7-9-601, this court must be guided by the mandate to construe the section to be constitutional, if possible. *3 Rivers Logistics, Inc. v. Brown-Wright Post No. 158 of Am. Legion, Dep’t of Ark., Inc.*, 2018 Ark. 91, 548 S.W.3d 137. The majority has failed to follow this mandate.

In the first place, the concept of “passing” a background check is not firmly rooted in fact. A State Police background check merely shares the content of one or more databases. The State Police do not “pass” or “fail” the subject of a background check. Accordingly, certifying that a paid canvasser has “passed” a background check leaves the sponsor with the Hobson’s choice of not quite truthfully claiming that a canvasser “passed” a background check, which exposes him or her to potential criminal penalties under section 7-9-601(b)(4), or the more similarly unpalatable prospect of having all the petition parts rejected. Secondly,

appearing on a database as having a criminal conviction is not conclusive of the question of whether a paid canvasser committed or did not commit a criminal offense. *See, e.g., Trammell v. Wright*, 2016 Ark. 147, 489 S.W.3d 636. As with any electronic database, the time-honored maxim “garbage in/garbage out” applies. Thirdly, not all criminal convictions are positively correlated with a proclivity to commit perjury, forgery, or fraud. The Arkansas Rules of Evidence acknowledge this fundamental fact. *See Ark. R. Evid. 609.*

Contrary to the majority’s assertion, there is no evidence that the disputed certification resulted in a single signature be “incorrectly obtained or submitted.” Under the Arkansas Constitution, “incorrectly obtained” can only mean as a result of “perjury, forgery, or fraud.” Likewise, there is no evidence that the certification language directly affected the validity of even a single petition part. The validity of each petition part, which was evaluated by the Special Master, depends on entirely separate criteria. Accordingly, in my view, the Secretary of State improperly excluded petitions circulated by paid canvassers with the disputed certification language. I would order those signatures to be counted.

I dissent.