IN THE ARKANSAS SUPREME COURT
ORIGINAL ACTION

BONNIE MILLER, individually and on behalf of ARKANSAS VOTERS FIRST and OPEN PRIMARIES ARKANSAS, BALLOT QUESTION COMMITTEES	**PETITIONERS**
v.	**CASE NO. CV-20-454**
JOHN THURSTON, in his capacity as Arkansas Secretary of State	**RESPONDENT**
ARKANSANS FOR TRANSPARENCY, A BALLOT QUESTION COMMITTEE, and JONELLE FULMER, individually and on behalf of ARKANSANS FOR TRANSPARENCY	**INTERVENORS**

INTERVENORS' OBJECTIONS TO AND MOTION FOR RECONSIDERATION OF CERTAIN FINDINGS OF FACT IN THE SPECIAL MASTER'S REPORT

Intervenors Arkansans for Transparency, a ballot question committee, and Jonelle Fulmer, individually and on behalf of Arkansans for Transparency, respectfully object to, and request reconsideration on, certain findings of fact in the Special Master's Report as identified herein. Both Petitioners challenged the Secretary of State's findings related to the initial count and sought to introduce extrinsic evidence concerning background checks as well as to "add back" signatures to the initial count for the Open Primaries Petition. Intervenors sought to

demonstrate that additional signatures (beyond those culled by the Secretary of State) should have been culled (removed) from inclusion in the initial count. Indeed, Intervenors made clear at the hearing and in their initial Motion to Intervene that they intended to present such arguments and evidence, and the Court permitted them to Intervene. *See* Mot. Intv. (July 23, 2020); Reply Mot. Intv. (July 24, 2020).

1. Burden of Proof on the Culling of Petition Parts and Signatures from the Open Primaries Petition

Although the Petitioner-Sponsor bears the burden of proof, it was improperly shifted to Respondent/Intervenors to present evidence as to why petition parts were *properly culled* from the the Open Primaries Petition initial count. Yet Petitioners failed to submit, introduce, or even have available for inspection the original petition parts, notwithstanding Josh Bridges' testimony (for the Secretary of State) that the original petition parts would, at least in some instances, be more legible than the copies introduced at the hearing, particularly where "illegibility" is the issue.

For example, the Report acknowledges that petition parts were culled by the Secretary of State (hereinafter "Secretary") pursuant to Arkansas Code Annotated § 7-9-126(b)(6) because the canvasser verification date was before the petitioner (signer) signed the petition. Report at pgs. 10-11, ¶ 43. Notwithstanding, the Report then concludes that certain petition parts were improperly culled by the Secretary because the actual date of signing is "undetermined and therefore there is no evidence that it was signed after the verification date." *Id.* at pg. 11, ¶ 43; *see also*

id. at pg. 28 ¶ 46 ("It is found that the following petition parts were culled and should not have been because the date of signing was illegible, the date of signing was undetermined and there was insufficient evidence that the petition was signed after the verification date.")

However, the Sponsor-Petitioner filed suit challenging the Secretary's decision to cull petition parts and signatures from the initial count; thus, the Sponsor-Petitioner bears the burden of proof. In *Arkansas Hotels and Entertainment, Inc. v. Martin* – the only recent case of a sponsor-petitioner challenge like the one here – the Arkansas Supreme Court dismissed a sponsor's writ of mandamus because the sponsor-petitioner "failed to provide the court with any evidence of the validity of its petition." 2012 Ark. 335, at 11, 423 S.W.3d 49, 55. Under *Arkansas Hotels*, the burden of proof at this stage of the case is on the Sponsor-Petitioner to show that it has met the initial count after the Secretary performs his duties under section 7-9-126. Requiring Respondent/Intervenors to come forward with evidence to support the culling of petition parts, at the initial count stage, from Open Primaries runs counter to *Arkansas Hotels* and Arkansas law.

Further, the Arkansas Supreme Court has never gone beyond the plain language of the statute to determine, for example, whether the date a petitioner signed was impossible to determine and thus tantamount to no signature date at all. *See, e.g.*, Report at pgs. 10-11 ("On the following petition parts, the date listed as

having been signed, is a date the petition could not possibly have been signed" and citing testimony from the Secretary that they do not cull if the date of signing is left blank). Rather, the dates are what they are. *See, e.g.*, *Benca v. Martin*, 2016 Ark. 359, 13, 500 S.W.3d 742, 750–51 ("Ark. Code Ann. § 7-9-126 states that signatures shall not be counted if 'the canvasser verification is dated earlier than the date on which a petitioner signed the petition.' Here, the statute was not complied with; therefore, we disqualify the 155 signatures addressed in point four.")

In addition, the undisputed proof showed that the voter, canvasser, or sponsor can cross out a line containing signatures and preserve the remaining signatures on each petition part at least for the initial count. (RT 270-271; 282; 483-485)

Accordingly, Intervenors object to the Special Master's findings that 586 signatures were improperly culled and should have been included in the initial count and respectfully request reconsideration on that issue in light of the applicable burden of proof and the plain language of the applicable statutes.

2. Lack of Evidence on the 15-Counties Requirement

Related to the foregoing, to have a *prima facie* valid petition, the Sponsors-Petitioners must, at a minimum, make evidentiary showings that they submitted petitions with a sufficient number of signatures from 15 counties. This is a threshold requirement pursuant to the state constitution and the Arkansas Supreme Court. Ark. Const., Art. 5, § 1; *Arkansas Hotels*, 2012 Ark. at 9-11, 423 S.W.3d at 54-55. At the

hearing in this matter, the Sponsors-Petitioners did not introduce any evidence that the subject petitions met the county-level signature requirement. This is not disputed. As such, Intervenors object to the lack of a no-evidence finding in the Report as asserted in their bench brief and as requested by Intervenors in paragraph 14 of their proposed findings of fact. (Attached hereto as Exhibits 1 and 2 respectively) Intervenors respectfully request that the Special Master reconsider the decision to exclude the finding.

3. Evidence Disqualifying Certain Canvassers

Additionally, the Report states that Intervenors' evidence on certain canvassers' criminal histories and on one canvasser's false address are outside the scope of the Secretary's initial count and the Special Master's authority to examine; consequently, the Report includes no findings on the disqualification of those canvassers' signatures. Report at pgs. 33-34.

Under Arkansas law, however, this evidence must be considered for purposes of determining the initial count. *See* Ark. Code Ann. § 7-9-601(a)(2)(D), (d)(3) (requiring a sponsor to submit a sworn statement by the canvasser the he or she has not been convicted or pleaded guilty or nolo contender to certain felonies and misdemeanors); *id.* at § 7-9-601(f) ("Signatures incorrectly obtained or submitted under this section shall not be counted by the Secretary of State *for any purpose.*") (emphasis added); *id.* at § 7-9-126(b)(2) ("A petition part and all signatures

appearing on the petition part shall not be counted for any purpose . . . including the initial count of signatures, if . . .[t]he petition lacks the . . . residence address of the canvasser[.]"); *Id.* at § 7-9-126(b)(4)(A) ("A petition part and all signatures appearing on the petition part shall not be counted for any purpose . . . including the initial count of signatures, if . . . [t]he canvasser is a paid canvasser whose name and the information required under § 7-9-601 were not submitted or updated by the sponsor to the Secretary of State before the petitioner signed the petition."); *see also Benca*, (affirming the special master's disqualification of signatures, stating "[t]he signatures were not in compliance with the statute because a P.O. Box is not a residence address").

As previously argued in Intervenors' supplemental bench brief, the General Assembly's changes to sections 126 and 601 in 2019 must be read to allow for consideration of such evidence at this stage of a sponsor challenge. *See* Intv. Supp. Bench Br., attached hereto as Exhibit 3. Further, it is inequitable to allow Petitioners to enter extrinsic evidence into the record to add to the initial count, while disallowing Intervenors to take away from it. Relevant evidence is admissible. Ark. R. Evid. 401; 402. The Court has "long recognized the propriety of 'fighting fire with fire' when one of the parties opens the door . . ." to admission of evidence. *King v. State*, 338 Ark. 591, 599, 999 S.W.2d 183, 187-188 (1999).

Accordingly, Intervenors object and respectfully request that the Special Master make a finding that canvasser Demetriuse A. Martin has misdemeanor fraud convictions pursuant to the certified records entered into evidence by Intervenors and uncontroverted by Petitioners. Although Intervenors requested certified copies on the other canvassers, those records were not received in time to enter into the the record, save for Mr. Martin's certified records. The Special Master should also find that the convictions disqualified all of Mr. Martin's signatures – 96 for the Open Primaries Petition and 72 for the Redistricting Petition – which the Secretary incorrectly included in the initial count.

Intervenors also request that the Special Master make a finding that canvasser Josef Bautista's listing of a United States Post Office in Clackamus, Oregon, as his permanent domicile address on all submissions disqualifies the 1,787 signatures collected by him for the Open Primaries Petition and the 2,294 signatures collected by him for the Redistricting Petition. They also object to the finding that Mr. Bautista is homeless. Report at pg. 34. The evidence in the record is clear that Mr. Bautista has a corporation, receives W-9's, and has a California driver's license. (RT 571-574) With that in mind, it is not reasonable to infer that he is homeless. And even assuming (without conceding) that Mr. Bautista is homeless, that would not save his signatures from disqualification.

4. Additional Findings on Certification

With regard to the Special Master's findings related to the Sponsors-Petitioners' obligation to certify that their paid canvassers passed both state and federal criminal background check, Intervenors respectfully request that the Report include additional findings. In particular, it is undisputed that the Sponsor-Petitioner did not certify that their canvassers passed an Arkansas State Police background check. Additionally, Ms. Gay discussed all options to comply with the certification of the federal criminal background check with the Sponsor's representative. These options included having the canvassers go directly to the FBI – and obtain a federal records check and provide it to the Sponsor. NBA sometimes used other Internet services to determine background checks. (RT 442-445) If the canvassers submitted the fingerprints to the FBI, there would be an additional fee which would be reimbursed by the Sponsor. (RT 450) It is not disputed that the Sponsor knew this option was available but chose not to use it. Accordingly, Intervenors object to the lack of findings on these issues and respectfully request that the Special Master include them in the Report.

Respectfully submitted,

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I, Elizabeth Robben Murray, hereby certify that on this 11th day of August, 2020, I filed the foregoing with the Clerk of the Court's e-filing system, which will serve the foregoing on the following counsel of record:

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INTERVENORS' BENCH BRIEF ON THE LACK OF EVIDENCE IN THE RECORD THAT PETITIONERS MET THE 15-COUNTY SIGNATURE REQUIREMENT AND REQUEST FOR A FACTUAL FINDING ON THE LACK OF EVIDENCE IN THE RECORD

Petitioners have failed to make any evidentiary showing that they submitted petitions with a sufficient number of signatures from 15 counties, which is a threshold requirement pursuant to the state constitution and the Arkansas Supreme Court. Under Article 5, § 1 (Amendment 7), a proposed constitutional amendment must contain: 1) signatures equal to at least 10 percent of the total number of votes cast for the governor in the last election statewide (here 89,151); and 2) signatures of at least half of the qualified electors from 15 different counties. The burden of proving compliance with these two requirements is squarely on the sponsor-

EXHIBIT 1

petitioner. *Arkansas Hotels & Entm't, Inc. v. Martin*, 2012 Ark. 335, 423 S.W.3d 49.

This factual issue is squarely before this tribunal as well. Petitioners acknowledge their burden in the Second Amended Consolidated Original Action Petition. *See* Pets. Sec. Am. Compl. at ⁋ 44 (quoting *Stephens v. Martin* and acknowledging that the 15-county requirement must be met); *id.* at ⁋⁋ 45 & 46 (pleading that Arkansas Voters First "filed petitions that met all the facial validity requirements in Arkansas law" and are thus entitled to an extra 30 days to cure). Petitioners, however, have offered evidence and testimony in an attempt to show *only* that they met the *statewide requirement* of 89,151 signatures. They, however, have offered no evidence and no proof whatsoever on the *15-county requirement*. Because the Court appointed the Special Master to make factual findings, and the county-level signature requirement is an essential issue for the Supreme Court's determination on the sufficiency of the petitions, the Special Master's report should contain a factual finding that the record is devoid of evidence on whether the petitions contain the requisite number of signatures from 15 counties. *See* p. 8 Jt. Ex. 1, Handbook, excerpt attached hereto as Ex. 1; *see* Handbook at pp. 62-63, Table showing number of required signatures per county, attached hereto as Ex. 2.

A. The Sponsors-Petitioners Must Present Evidence to the Court that They Satisfied the 15-County Signature Requirement

For a voter-initiated constitutional amendment, the Arkansas Constitution sets out two categories of signatures – statewide and county level – and the percentage of signatures needed in each category to initiate the process:[1]

> **Initiative.** The first power reserved by the people is the initiative. Eight per cent of the legal voters may propose any law and *ten per cent may propose a constitutional amendment by initiative petition* and every such petition shall include the full text of the measure so proposed. . . .
>
> ***
>
> Upon all initiative or referendum petitions provided for in any of the sections of this article, *it shall be necessary to file from at least fifteen of the counties of the State, petitions bearing the signature of not less than one-half of the designated percentage of the electors of such county*.

Art. 5, § 1 (emphasis added) (attached hereto as Ex. 3).

[1] Nothing herein is an admission, or should be construed as an admission, that Arkansas law only requires a sponsor to meet the signature-count requirements on the face of the petition and that no one, including the Secretary of State and a challenging party, is permitted to look behind the bare number of signatures to determine facial validity and/or the initial count. Intervenors expressly reject Petitioners' arguments on what constitutes "facial validity" and the initial count, as well as their arguments as to how both are determined and relate to a cure. Intervenors also reject Petitioners' interpretation of *Arkansas Hotels*. Intervenors are not waiving any arguments related to facial validity, the initial count, or any other arguments made in these proceedings or their pleadings either. Intervenors' argument here is merely that Petitioners have the burden of proving that they met the 15-county requirement and that they offered no evidence on this requirement. Accordingly, the lack of evidence is a factual finding that the Special Master should make in his report to the Supreme Court.

The Arkansas Supreme Court considered who had the burden of proving these requirements in *Arkansas Hotels & Entm't, Inc. v. Martin*, 2012 Ark. 335, 423 S.W.3d 49 ("*Arkansas Hotels*") (attached hereto as Ex. 4). In that case, the sponsor Arkansas Hotels and Entertainment, Inc. ("AHE") brought an original action seeking a writ of mandamus to order the Secretary of State to accept its petition as containing the required number of signatures and in turn, grant it a 30-day cure-period. 2012 Ark. at 1, 423 S.W.3d at 51. The Secretary of State had deemed the petition "a complete failure" because AHE had not met the county-signature requirement, thereby prohibiting any chance to further correct or amend the petition. *Id.* at 2, 423 S.W.3d at 51 (citing *Dixon v. Hall*, 210 Ark. 891, 198 S.W.2d 1002 (1946)). In its writ action, AHE argued to the Court that it only had to meet one of the signature requirements – either the statewide or 15-counties to get the extra 30-day cure period. *Id.* at 7, 423 S.W.3d at 54. The Court firmly rejected this argument and denied the writ. *Id.* at 9-10, 423 S.W.3d at 54-55 (discussing *Dixon*).

For the purposes of this brief and the forthcoming report, it is significant that the Court put the burden on the sponsor-petitioner to make a showing of compliance with the county-level signature requirement in order to have a valid petition and trigger the cure. As the Court explained, AHE was required to present evidence that it submitted a petition containing a sufficient number of signatures from 15 counties: "[I]n order to trigger the additional thirty days to cure its petition, AHE was required

to present a facially valid petition. . . . [B]esides AHE's arguments in its briefs to the court, AHE has failed to provide any documentation regarding the prima facie sufficiency of its petition. . . . AHE has failed to provide the court with any evidence of the validity of its petition." *Id.* at 10-11, 423 S.W.3d at 55. Due to the lack of evidence on the county-level requirement, the Court concluded that AHE had not met its burden for a writ of mandamus, which requires demonstration of "a clear and certain right to the relief requested." *Id.* at 11 n. 2, 423 S.W.3d at 55 (citing *Manila School Dist. No. 15 v. Wagner*, 357 Ark. 20, 159 S.W.3d 285 (2004)).

The Secretary of State's 2020 Initiatives and Referenda Handbook reflects these requirements and the holding of *Arkansas Hotels*. It provides that "[a]fter all of the Petition Parts and signatures have been culled. . . , the remaining signatures will be counted to determine whether the Sponsor submitted sufficient signatures to meet the initial count requirement and the fifteen (15) designated county requirement." Ex. 1. If they fail to meet those requirements, the petition will be deemed invalid and will be rejected without verifying that the signatures are those of legal, registered voters. *Id.* The Handbook also provides sponsors with a table of the specific number of signatures per county that they must obtain. Ex. 2.

B. Petitioners Presented No Evidence on Compliance with the 15-County Signature Requirement, and the Special Master's Report Should Include a Factual Finding that the Record Lacks Such Evidence

In this case, Petitioners plead in the operative complaint that they submitted "facially valid" petitions while recognizing that they have the burden to meet both the statewide and county-level signature requirements.[2] *See* Pet. Sec. Am. Compl. at ⁋ 44 (quoting *Stephens v. Martin* for the proposition that in determining qualification for a cure, the Court's "only concern" is "whether the petition, on its face, contains 'a sufficient number of signatures pursuant to both the state-wide and fifteen-county requirement'"); *id.* at ⁋⁋ 45 & 46 (pleading that Arkansas Voters First "filed petitions that met all the facial validity requirements in Arkansas law" and are thus entitled to an extra 30 days to cure). Despite recognizing the twin signature requirements and their burden of proving compliance, however, Petitioners did not attach evidence of compliance with the county-signature requirement to any of their pleadings. They presented no documents and no witness testimony at the hearing in this matter with regard to the county requirement either. The only evidence offered pertained to the statewide requirement of 89,151 signatures, not the county-level signatures. As a result, there is a complete lack of evidence in the record that Petitioners have a sufficient number of signatures from 15 counties as required by Article 5, § 1 of the

[2] Both the Intervenors and Respondent Secretary of State denied the facial validity allegations.

Arkansas Constitution. Because the record is devoid of evidence on this essential matter that the Supreme Court must decide, the Special Master should so report this factual finding of no evidence to the Court in his final report.

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2020 Initiatives and Referenda Handbook

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EXHIBIT 1

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NOTE: Nothing herein should be considered a legal opinion. This short synopsis is meant to be informational only. If the reader has questions concerning any provision of the Constitution or statutes concerning initiatives and referenda, the reader should contact his or her own attorney for a legal opinion as to specific facts. Court cases can affect the law and how it is applied. Please consult with an attorney to advise you and answer questions. In the event of a conflict with this synopsis, statutory and case law control the outcome.

******Suggestions for corrections, additions, or other changes should be made to the Legal Division, Arkansas Secretary of State, Suite 256 – 500 Woodlane Street, Little Rock, AR 72201.***

******For the most recent version of this handbook, please check online at www.sos.arkansas.gov/elections***

required numbers from each of at least fifteen (15) counties. See pages 60-61 for exact county numbers.

14. When the petition is submitted to the Secretary of State for determination of the sufficiency of the signatures, the Secretary of state will submit the ballot title and popular name to the State Board of Election Commissioners, who will determine whether to certify the ballot title and popular name within thirty (30) days.

15. Prior to counting the signatures to determine the initial count, the Secretary of State reviews each Petition Part and rejects any Petition Part (and all of the signatures on the Petition Part) that contains one of the errors listed in § 7-9-126 (b).

None of the signatures on any of the Petition Parts rejected by the Secretary of State will be counted for any purpose, including the initial count and the determination as to whether the Sponsor submitted sufficient signatures from the fifteen (15) designated counties.

16. For the remaining Petition Parts, the Secretary of State reviews each part and rejects or culls any individual signature that contains one of the errors listed in § 7-9-126 (c).

None of the signatures that have been rejected or culled for any of the above reasons will be counted by the Secretary of State for any purpose, including the initial count and the determination as to whether the Sponsor submitted sufficient signatures from the fifteen (15) designated counties.

17. After all of the Petition Parts and signatures have been culled due to the reasons listed in paragraphs 14 and 15 above, the remaining signatures will be counted to determine whether the Sponsor submitted sufficient signatures to meet the initial count requirement and the fifteen (15) designated county requirement. If the Sponsor submitted a sufficient number of signatures, then the petition will be accepted and the signature verification process will begin.

If the petition does not contain the requisite number of signatures in the initial count or the requisite number of signatures in the designated fifteen (15) counties, the petition will be determined to be facially invalid and rejected without verifying any signatures.

18. The Secretary of State will not accept additional signatures after the initial submission until a determination of sufficiency is made.

19. If a petition is submitted for signature verification and it is determined that the petition does not contain the requisite number of valid signatures of registered voters, the Secretary of State will advise the Sponsor of the deficiency.

If the initial submission contains valid signatures of registered voters equal to at least

1. Seventy-five percent (75%) of the required number of overall state-wide signatures; AND
2. Seventy-five percent (75%) of the required number from at least fifteen (15) counties,

the Sponsor may submit additional signatures. Within thirty (30) days of notification of the insufficiency, the Sponsor may do any or all of the following:

SIGNATURE NUMBERS

County	TOTAL VOTES CAST for 2018 GOVERNOR'S RACE	Constitutional Amendment		Initiated Act		Referendum	
	VOTE	10%	5%	8%	4%	6%	3%
STATE	**891,509**	**89,151**	**44,576**	**71,321**	**35,661**	**53,491**	**26,746**
Arkansas	4962	497	249	397	199	298	149
Ashley	6155	616	308	493	247	370	185
Baxter	14351	1436	718	1149	575	862	431
Benton	77534	7754	3877	6203	3102	4653	2327
Boone	11623	1163	582	930	465	698	349
Bradley	2854	286	143	229	115	172	86
Calhoun	1791	180	90	144	72	108	54
Carroll	8968	897	449	718	359	539	270
Chicot	3551	356	178	285	143	214	107
Clark	6731	674	337	539	270	404	202
Clay	4132	414	207	331	166	248	124
Cleburne	9624	963	482	770	385	578	289
Cleveland	2589	259	130	208	104	156	78
Columbia	6342	635	318	508	254	381	191
Conway	6465	647	324	518	259	388	194
Craighead	26078	2608	1304	2087	1044	1565	783
Crawford	16860	1686	843	1349	675	1012	506
Crittenden	11918	1192	596	954	477	716	358
Cross	5794	580	290	464	232	348	174
Dallas	2115	212	106	170	85	127	64
Desha	3469	347	174	278	139	209	105
Drew	5397	540	270	432	216	324	162
Faulkner	38559	3856	1928	3085	1543	2314	1157
Franklin	5295	530	265	424	212	318	159
Fulton	3832	384	192	307	154	230	115
Garland	31767	3177	1589	2542	1271	1907	954
Grant	5549	555	278	444	222	333	167
Greene	10953	1096	548	877	439	658	329
Hempstead	4971	498	249	398	199	299	150
Hot Spring	8739	874	437	700	350	525	263
Howard	3519	352	176	282	141	212	106
Independence	10145	1015	508	812	406	609	305
Izard	4471	448	224	358	179	269	135
Jackson	4171	418	209	334	167	251	126
Jefferson	19820	1982	991	1586	793	1190	595

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Johnson	7477	748	374	599	300	449	225
Lafayette	2131	214	107	171	86	128	64
Lawrence	4669	467	234	374	187	281	141
Lee	2119	212	106	170	85	128	64
Lincoln	3039	304	152	244	122	183	92
Little River	3925	393	197	314	157	236	118
Logan	5528	553	277	443	222	332	166
Lonoke	20613	2062	1031	1650	825	1237	619
Madison	5576	558	279	447	224	335	168
Marion	5163	517	259	414	207	310	155
Miller	11431	1144	572	915	458	686	343
Mississippi	10455	1046	523	837	419	628	314
Monroe	2640	264	132	212	106	159	80
Montgomery	2831	284	142	227	114	170	85
Nevada	2516	252	126	202	101	151	76
Newton	3091	310	155	248	124	186	93
Ouachita	7386	739	370	591	296	444	222
Perry	3701	371	186	297	149	223	112
Phillips	5444	545	273	436	218	327	164
Pike	3358	336	168	269	135	202	101
Poinsett	6109	611	306	489	245	367	184
Polk	6056	606	303	485	243	364	182
Pope	17956	1796	898	1437	719	1078	539
Prairie	2860	286	143	229	115	172	86
Pulaski	134667	13467	6734	10774	5387	8081	4041
Randolph	5662	567	284	453	227	340	170
Saline	41578	4158	2079	3327	1664	2495	1248
Scott	2879	288	144	231	116	173	87
Searcy	3194	320	160	256	128	192	96
Sebastian	33165	3317	1659	2654	1327	1990	995
Sevier	3202	321	161	257	129	193	97
Sharp	5670	567	284	454	227	341	171
St. Francis	5811	582	291	465	233	349	175
Stone	4442	445	223	356	178	267	134
Union	12502	1251	626	1001	501	751	376
Van Buren	6296	630	315	504	252	378	189
Washington	65863	6587	3294	5270	2635	3952	1976
White	21993	2200	1100	1760	880	1320	660
Woodruff	2086	209	105	167	84	126	63
Yell	5331	534	267	427	214	320	160

West's Arkansas Code Annotated
Constitution of the State of Arkansas of 1874
Article 5. Legislative Department

AR Const. Art. 5, § 1

§ 1. Initiative and Referendum

Currentness

The legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly; and also reserve the power, at their own option to approve or reject at the polls any entire act or any item of an appropriation bill.

Initiative. The first power reserved by the people is the initiative. Eight per cent of the legal voters may propose any law and ten per cent may propose a constitutional amendment by initiative petition and every such petition shall include the full text of the measure so proposed. Initiative petitions for state-wide measures shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon; provided, that at least thirty days before the aforementioned filing, the proposed measure shall have been published once, at the expense of the petitioners, in some paper of general circulation.

Referendum. The second power reserved by the people is the referendum, and any number not less than six per cent of the legal voters may, by petition, order the referendum against any general Act, or any item of an appropriation bill, or measure passed by the General Assembly, but the filing of a referendum petition against one or more items, sections or parts of any such act or measure shall not delay the remainder from becoming operative. Such petition shall be filed with the Secretary of State not later than ninety days after the final adjournment of the session at which such Act was passed, except when a recess or adjournment shall be taken temporarily for a longer period than ninety days, in which case such petition shall be filed not later than ninety days after such recess or temporary adjournment. Any measure referred to the people by referendum petition shall remain in abeyance until such vote is taken. The total number of votes cast for the office of Governor in the last preceding general election shall be the basis upon which the number of signatures of legal voters upon state-wide initiative and referendum petitions shall be computed.

Upon all initiative or referendum petitions provided for in any of the sections of this article, it shall be necessary to file from at least fifteen of the counties of the State, petitions bearing the signature of not less than one-half of the designated percentage of the electors of such county.

Emergency. If it shall be necessary for the preservation of the public peace, health and safety that a measure shall become effective without delay, such necessity shall be stated in one section, and if upon a yea and nay vote two-thirds of all the members elected to each house, or two-thirds of all the members elected to city or town councils, shall vote upon separate roll call in favor of the measure going into immediate operation, such emergency measure shall become effective without delay. It shall be necessary, however, to state the fact which constitutes such emergency. Provided, however, that an emergency shall not be declared on any franchise or special privilege or act creating any vested right or interest or alienating any property of the State. If a referendum is filed against any emergency measure such measure shall be a law until it is voted upon by the people, and if it is then rejected by a majority of the electors voting thereon, it shall be thereby repealed. The provision of this sub-section shall apply to city or town councils.

Exhibit 3

Local for Municipalities and Counties. The initiative and referendum powers of the people are hereby further reserved to the legal voters of each municipality and county as to all local, special and municipal legislation of every character in and for their respective municipalities and counties, but no local legislation shall be enacted contrary to the Constitution or any general law of the State, and any general law shall have the effect of repealing any local legislation which is in conflict therewith.

Municipalities may provide for the exercise of the initiative and referendum as to their local legislation. General laws shall be enacted providing for the exercise of the initiative and referendum as to counties. Fifteen per cent of the legal voters of any municipality or county may order the referendum, or invoke the initiative upon any local measure. In municipalities the number of signatures required upon any petition shall be computed upon the total vote cast for the office of mayor at the last preceding general election; in counties upon the office of circuit clerk. In municipalities and counties the time for filing an initiative petition shall not be fixed at less than sixty days nor more than ninety days before the election at which it is to be voted upon; for a referendum petition at not less than thirty days nor more than ninety days after the passage of such measure by a municipal council; nor less than ninety days when filed against a local or special measure passed by the General Assembly.

Every extension, enlargement, grant, or conveyance of a franchise or any rights, property, easement, lease, or occupation of or in any road, street, alley or any part thereof in real property or interest in real property owned by municipalities, exceeding in value three hundred dollars, whether the same be by statute, ordinance, resolution, or otherwise, shall be subject to referendum and shall not be subject to emergency legislation.

GENERAL PROVISIONS

Definition. The word "measure" as used herein includes any bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment of any character.

No Veto. The veto power of the Governor or mayor shall not extend to measures initiated by or referred to the people.

Amendment and Repeal. No measure approved by a vote of the people shall be amended or repealed by the General Assembly or by any city council, except upon a yea and nay vote on roll call of two-thirds of all the members elected to each house of the General Assembly, or of the city council, as the case may be.

Election. All measures initiated by the people whether for the State, county, city or town, shall be submitted only at the regular elections, either State, congressional or municipal, but referendum petitions may be referred to the people at special elections to be called by the proper official, and such special elections shall be called when fifteen per cent of the legal voters shall petition for such special election, and if the referendum is invoked as to any measure passed by a city or town council, such city or town council may order a special election.

Majority. Any measure submitted to the people as herein provided shall take effect and become a law when approved by a majority of the votes cast upon such measure, and not otherwise, and shall not be required to receive a majority of the electors voting at such election. Such measures shall be operative on and after the thirtieth day after the election at which it is approved, unless otherwise specified in the Act.

This section shall not be construed to deprive any member of the General Assembly of the right to introduce any measure, but no measure shall be submitted to the people by the General Assembly, except a proposed constitutional amendment or amendments as provided for in this Constitution.

Canvass and Declaration of Results. The result of the vote upon any State measure shall be canvassed and declared by the State Board of Election Commissioners (or legal substitute therefor); upon a municipal or county measure, by the county election commissioners (or legal substitute therefor).

Conflicting Measures. If conflicting measures initiated or referred to the people shall be approved by a majority of the votes severally cast for and against the same at the same election, the one receiving the highest number of affirmative votes shall become law.

THE PETITION

Title. At the time of filing petitions the exact title to be used on the ballot shall by the petitioners be submitted with the petition, and on state-wide measures, shall be submitted to the State Board of Election Commissioners, who shall certify such title to the Secretary of State, to be placed upon the ballot; on county and municipal measures such title shall be submitted to the county election board and shall by said board be placed upon the ballot in such county or municipal election.

Limitation. No limitation shall be placed upon the number of constitutional amendments, laws, or other measures which may be proposed and submitted to the people by either initiative or referendum petition as provided in this section. No petition shall be held invalid if it shall contain a greater number of signatures than required herein.

Verification. Only legal votes shall be counted upon petitions. Petitions may be circulated and presented in parts, but each part of any petition shall have attached thereto the affidavit of the person circulating the same, that all signatures thereon were made in the presence of the affiant, and that to the best of the affiant's knowledge and belief each signature is genuine, and that the person signing is a legal voter and no other affidavit or verification shall be required to establish the genuineness of such signatures.

Sufficiency. The sufficiency of all state-wide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State, which shall have original and exclusive jurisdiction over all such causes. The sufficiency of all local petitions shall be decided in the first instance by the county clerk or the city clerk as the case may be, subject to review by the chancery court.

Court Decisions. If the sufficiency of any petition is challenged such cause shall be a preference cause and shall be tried at once, but the failure of the courts to decide prior to the election as to the sufficiency of any such petition, shall not prevent the question from being placed upon the ballot at the election named in such petition, nor militate against the validity of such measure, if it shall have been approved by a vote of the people.

Amendment of Petition. (a)(1) If the Secretary of State, county clerk or city clerk, as the case may be, shall decide any petition to be insufficient, he or she shall without delay notify the sponsors of such petition, and permit at least thirty (30) days from the date of such notification, in the instance of a state-wide petition, or ten (10) days in the instance of a municipal or county petition, for correction or amendment.

(2) For a state-wide petition, correction or amendment of an insufficient petition shall be permitted only if the petition contains valid signatures of legal voters equal to:

(A) At least seventy-five percent (75%) of the number of state-wide signatures of legal voters required; and

(B) At least seventy-five percent (75%) of the required number of signatures of legal voters from each of at least fifteen (15) counties of the state.

(b) In the event of legal proceedings to prevent giving legal effect to any petition upon any grounds, the burden of proof shall be upon the person or persons attacking the validity of the petition.

Unwarranted Restrictions Prohibited. No law shall be passed to prohibit any person or persons from giving or receiving compensation for circulating petitions, nor 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.

Publication. All measures submitted to a vote of the people by petition under the provisions of this section shall be published as is now, or hereafter may be provided by law.

Enacting Clause. The style of all bills initiated and submitted under the provisions of this section shall be, "Be It Enacted by the People of the State of Arkansas, (municipality or county, as the case may be)." In submitting measures to the people, the Secretary of State and all other officials shall be guided by the general election laws or municipal laws as the case may be until additional legislation is provided therefor.

Self-Executing. This section shall be self-executing, and all its provisions shall be treated as mandatory, but laws may be enacted to facilitate its operation. No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people.

Credits

Acts of 1909, S.J.R. 1, p. 1238, approved Feb. 19, 1909; amended by Const. Amend. 7, approved at Nov. 2, 1920, election; Const. Amend. 93, § 1, proposed by Acts of 2013, S.J.R. 16, § 1, approved at Nov. 4, 2014, election.

Const. Art. 5, § 1, AR CONST Art. 5, § 1

The constitution and statutes are current through the 2020 First Extraordinary Session and the 2020 Fiscal Session of the 92nd Arkansas General Assembly and changes made by the Arkansas Code Revision Commission received through July 10, 2020.

End of Document

2012 Ark. 335
Supreme Court of Arkansas.

ARKANSAS HOTELS AND ENTERTAINMENT, INC., Petitioner
v.
Mark MARTIN, Arkansas Secretary of State, in his Official Capacity, Respondent
v.
Bill Walmsley, Darrell Meyer, and Bill McDowell, Individually and on Behalf of The Arkansas Racing Alliance, Intervenors/Respondents.

No. 12–647.
|
Sept. 20, 2012.

Synopsis

Background: Texas corporate sponsor of proposed ballot initiative to amend Arkansas Constitution to permit corporation to operate seven casinos in Arkansas filed petition for writ of mandamus to require Secretary of State to accept its petition for ballot initiative on proposed constitutional amendment and to order Secretary of State to grant it thirty days to cure any shortcomings in its petition. Secretary of State filed motion for appointment of special master.

Holdings: The Supreme Court, Karen R. Baker, J., held that:

corporation had standing to petition Supreme Court, pursuant to its original jurisdiction, for writ of mandamus, and

petition was facially invalid, and thus, corporation was not entitled to additional 30 days to cure deficiencies in petition.

Petition denied; Secretary of State's motion dismissed as moot.

Jim Hannah, C.J., filed concurring opinion in which Brown, J., joined.

Attorneys and Law Firms

**50 John T. Harmon, for petitioner.

A.J. Kelly, Deputy Secretary of State, and Martha Adcock, Associate Counsel, for respondent.

Friday, Eldredge & Clark, LLP, Little Rock, by: Elizabeth Robben Murray and Robert S. Shafer, for intervenors/respondents.

Opinion

KAREN R. BAKER, Justice.

*1 Petitioner, Arkansas Hotels and Entertainment, Inc. ("AHE"), brings this original action seeking a writ of mandamus requiring the Secretary of State to accept its petitions for an initiated constitutional amendment to be placed on the November 6, 2012 ballot. Petitioner seeks a writ of mandamus against Respondent Mark Martin, in his official capacity as Arkansas's Secretary of State, requiring him to accept AHE's petition as timely filed containing, prima facie, the required number of signatures **51 for an initiated constitutional amendment, and further ordering the Secretary of State to permit AHE thirty days to cure any shortcomings in its petition. We deny AHE's petition for writ of mandamus.

*2 I. *Jurisdiction*

This court has original jurisdiction of this case pursuant to Arkansas Supreme Court Rule 6–5(a) and 1–2(a)(3)(2011). Rule 6–5(a) provides this court has original jurisdiction in "extraordinary actions required by law, such as suits attacking the validity of statewide petitions filed under Amendment 7 of the Arkansas Constitution." [1] Rule 1–2(a)(3) allows this court to exercise jurisdiction over this petition for writ of mandamus.

Facts

AHE, a for profit corporation, filed its Articles of Incorporation with the Respondent, the Secretary of State, on January 12, 2009. AHE's President and sole shareholder, Michael Wasserman, resides in Texas. On February 10, 2010, AHE registered as a "Ballot Question Committee" with the Secretary of State. On July 6, 2012, AHE filed a petition under Amendment 7 seeking to place a proposed amendment to the Arkansas Constitution on the November 6, 2012 general-election ballot. The proposed amendment would allow AHE to operate seven casinos in the state. On July 11, 2012,

EXHIBIT 4

the Secretary of State notified AHE that its petition failed to satisfy the Ark. Const. Art. 5, § 1 requirements. On July 18, 2012, AHE responded to the Secretary of State's finding and requested thirty days to correct or amend its petition based on Ark. Const. Art. 5, § 1 and *Dixon v. Hall,* 210 Ark. 891, 198 S.W.2d 1002 (1946). On July 20, 2012, the Secretary of State issued a formal Certification to AHE, stating that the petition submitted for a proposed constitutional amendment sponsored by AHE ***3** "failed to submit sufficient signatures from at least (15) separate counties and thus did not meet the requirements as established by Ark. Const. Art. 5 § 1 of the Arkansas Constitution in order to place a measure on the Arkansas General Election Ballot on November 6, 2012." In a letter dated July 20, 2012, the Secretary of State informed AHE that the petition did not meet "prima facie" signature requirements, the petition was a "complete failure," and no correction or amendment was permitted under *Dixon.* On August 3, 2012, AHE filed this petition seeking a writ of mandamus requiring the Secretary of State to accept the petitions as timely filed containing, prima facie, the required number of signatures for an initiated constitutional amendment, and further ordering the Secretary of State to permit AHE thirty days to cure any shortcomings in its petition. On August 13, 2012, the Secretary of State responded to the petition, and Intervenors, Arkansas Racing Alliance ("ARA"), filed a motion to intervene. On August 13, 2012, the Secretary of State also filed a Motion for Appointment of Special Master to resolve any outstanding issues of material fact. On August 14, 2012, this court granted ARA's Motion to Intervene and held in abeyance the Secretary of State's Motion for Appointment of Special Master.

II. *Points on Appeal*

A. Whether AHE has Standing to Invoke this Court's Jurisdiction Pursuant to Rule 6–5(a) and Apply for a Writ of Mandamus.

Initially, we must determine if AHE has standing to invoke this court's jurisdiction. ****52** AHE asserts that this court has original jurisdiction pursuant to Rule 6–5 of the Rules of the Supreme Court and Const. art. 5, section 1 of the Arkansas Constitution. The Secretary of ***4** State responds that AHE lacks standing to bring this action because AHE is a for-profit corporation and not a registered voter, not the sponsor of the petition, and no legal voters were joined to invoke the court's jurisdiction. ARA agrees. AHE did not reply to the Secretary of State's or ARA's arguments that it lacks standing to bring this action.

The question of standing is a matter of law for this court to decide, and this court reviews questions of law de novo. *Farm Bureau v. Running M Farms, Inc.,* 366 Ark. 480, 237 S.W.3d 32 (2006).

Arkansas Supreme Court Rule 6–5 provides this court with original jurisdiction "in extraordinary actions as required by law, such as suits attacking the validity of statewide petitions filed under Amendment 7 of the Arkansas Constitution, or where the Supreme Court's contempt powers are at issue." Amendment 7 provides that "the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly ... **Initiative.** The first power reserved by the people is the initiative. Eight per cent of the legal voters may propose any law and ten per cent may propose a constitutional amendment by initiative petition." Ark. Const. art. 5, § 1, amended by amend. 7.

Arkansas Code Annotated sections 7–9–101 to –506 (Repl.2011) govern Initiatives, Referenda, and Constitutional Amendments and provide the procedures for initiative approval and placement on the ballot. The statutes define the parties and persons involved in ballot initiatives. First, Arkansas Code Annotated section 7–9–125(8) (Repl.2011) provides that a "sponsor" means a person or persons who arrange for the circulation of initiative, ***5** referendum, or constitutional amendment petitions or who file an initiative, referendum, or constitutional amendment with the Secretary of State or other authorized recipient of the petitions. Second, Ark.Code Annotated section 7–9–402(9)(A) defines a person as any individual, business, proprietorship, firm, partnership, joint venture, syndicate, business trust, labor organization, company, corporation, association, committee, or any other organization or group of persons acting in concert. Third, Arkansas Code Annotated section 7–9–402(2)(A) defines a Ballot Question Committee as any person, located within or outside Arkansas, that receives contributions for the purpose of expressly advocating the qualification, disqualification, passage, or defeat of any ballot question, or any person, other than a public servant, a governmental body expending public funds, or an individual, located within or outside Arkansas, that makes expenditures for the purpose of expressly advocating the qualification, disqualification, passage, or defeat of any ballot question.

Finally, Arkansas Code Annotated section 7–9–111(d)(1) sets forth the procedures for the determination of the sufficiency of the petitions once the initiative is filed with the Secretary of State and provides that if the petition is found to be insufficient, the Secretary of State must notify the petition's "sponsor."

In *Committee to Establish Sherwood Fire Dep't v. Hillman,* 353 Ark. 501, 109 S.W.3d 641 (2003), we addressed the issue of standing to intervene in a ballot-title challenge. In *Hillman,* the Committee circulated a petition to place an ordinance on the ballot. The City Clerk, Virginia ****53** Hillman, certified the petition to the county-election commission. Two voters, separate from the Committee, filed suit against Hillman in circuit court challenging the ***6** constitutionality of the ballot title. The Committee, acting as an unincorporated nonprofit organization, intervened in the action at the circuit court level. This court reversed because the Committee lacked standing to intervene because it was not joined by a local voter, and it did not purport to represent local voters. *Hillman,* 353 Ark. at 513, 109 S.W.3d at 647.

The Secretary of State and ARA both assert that AHE lacks standing to invoke this court's jurisdiction because AHE is not a legal voter and does not represent a legal voter, which they maintain *Hillman* requires to establish standing. We disagree. *Hillman* can be distinguished from this case on four grounds. First, AHE is not an unincorporated nonprofit committee of people. AHE is an incorporated sponsor with an identified purpose to place a ballot initiative regarding casino operations on the ballot. Second, AHE is not attempting to intervene in litigation involving the constitutionality of a ballot title. As a sponsor of a "failed" initiative, AHE is seeking a writ of mandamus in an attempt to cure its own initiative's deficiencies. Third, in *Hillman,* the Committee failed to present proof that the initiative was presented through a Ballot Question Committee. Here, AHE is a registered Ballot Question Committee, asking this court for a certification of its petition or time to correct. Fourth, in *Hillman,* the Committee did not have a connection to the voters, but, here AHE is a sponsor of a ballot initiative creating a nexus to the voters on whose behalf it presented the petition. Although AHE did not join a legal voter in this action, as a sponsor of the petition, AHE has a connection to thousands of voters as it represents their interests in filing its initiative.

***7** Additionally, our conclusion that AHE has standing is not contradicted by the holding in *Committee for Utility Trimming, Inc. v. Hamilton,* 290 Ark. 283, 718 S.W.2d 933 (1986). In *Hamilton,* a Committee collected signatures to place a proposal on the general-election ballot. The county clerk rejected the petition due to signature deficiencies. The Committee filed a petition for review in circuit court. The circuit court dismissed the Committee's petition finding that the Committee had not been incorporated under the law, was not in existence, and could not initiate a lawsuit. We affirmed, explaining that "the simple fact is that the [Committee] elected to proceed as a corporation and failed to perform the most elementary act necessary to become a corporation—file its articles.... Since the corporation did not exist legally, it could not file a complaint in court under our law, and such a complaint was properly dismissed." *Hamilton,* 290 Ark. at 285, 718 S.W.2d at 934. In *Hamilton,* the unincorporated Committee could not initiate its lawsuit because it was not qualified to assert standing; but here, AHE is an incorporated sponsor.

The record demonstrates that AHE, as a corporate sponsor, has orchestrated the effort to place this initiative on the ballot for approximately two years. We hold, pursuant to the enabling legislation, sections 7–9–111, 7–9–125(8), 7–9–402(2)(A)(9) of the Arkansas Code, that AHE as sponsor has standing to invoke this court's jurisdiction.

B. Whether the Secretary of State Failed to Act in Conformity with Amendment 7 of Article 5, § 1 and Arkansas Code Annotated Section 7–9–111(d)

The second issue before the court is whether the Secretary of State's office acted in conformity with Amendment 7 of ****54** Article 5, § 1 and Arkansas Code Annotated section 7–9–111(d).8 The parties disagree as to the correct interpretation of article 5, § 1 and section 7–9–111. AHE asserts that article 5, § 1 and section 7–9–111(d) require a petition for a constitutional amendment to be presented with either (1) the statewide-signature requirement or (2) the county-signature requirement for the petition to be facially valid. Once either of the signature requirements has been met, AHE asserts, the Secretary of State is required to provide thirty days for the sponsor to cure its petition's insufficiencies. The Secretary of State and ARA both maintain that Amendment 7 of Article 5, § 1 and Arkansas Code Annotated section 7–9–111(d) require that a petition for a constitutional amendment must contain, prima facie, both the overall statewide-signature requirement and the county signature requirement in order to qualify for the additional thirty days to remedy any deficiencies.

When interpreting statutes, our review is de novo, as it is for this court to decide what a constitutional and statutory provision mean. *Fitton v. Bank of Little Rock,* 2010 Ark. 280, 365 S.W.3d 888 (2010).

When interpreting a statute, "we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. We construe the statute so that no word is left void, superfluous, or insignificant, and we give meaning and effect to every word in the statute, if possible." *DaimlerChrysler Corp. v. Smelser,* 375 Ark. 216, 222, 289 S.W.3d 466, 472 (2008) (internal citations omitted). When interpreting the constitution, "our task is to read the laws as they are written, and interpret them in accordance with established principles of constitutional construction.... Language of a constitutional provision that is plain and unambiguous must be given its obvious and common meaning." ***9** *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.,* 353 Ark. 701, 720, 120 S.W.3d 525, 537 (2003) (internal citations omitted).

Amendment 7 provides that "the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly ... **Initiative.** The first power reserved by the people is the initiative. Eight per cent of the legal voters may propose any law and ten per cent may propose a constitutional amendment by initiative petition...." Ark. Const. art. 5, § 1. Amendment 7 further provides that, in addition to the statewide requirement, "it shall be necessary to file from at least fifteen of the counties of the State, petitions bearing the signature of not less than one-half of the designated percentage of the electors of such county." *Id.* In other words, for a petition to amend the constitution, the petition must bear signatures meeting the statewide requirement, ten percent, and the county requirement, five percent. *Id.* Once the petitions are submitted, section 7–9–111 of the Arkansas Code provides for the determination of the sufficiency of the petition and allows the sponsor thirty additional days to provide sufficiency of signatures.

In *Dixon v. Hall,* 210 Ark. 891, 198 S.W.2d 1002 (1946), the parties agreed that the sponsors's petition was short on the required number of signatures on the face of its petition. The sponsors asserted that, upon presenting its petition, even though its petition was deficient in signatures, Amendment 7 required the Secretary of State to provide the sponsors thirty days to gather additional signatures. In *Dixon,* this court rejected the argument that a petition did not have to meet the prima facie constitutional requirements to ****55** qualify for the additional ***10** thirty days, explaining that "An elastic construction would be the result if we should say that the right to correct and amend means that proponents may file an obviously deficient petition—containing, for example, one name from each of 15 counties—and upon notification by the Secretary of State that 20,000 or more additional names were needed it would become mandatory that time be extended 30 days from the so-called 'dead line.' " *Id.* at 893, 198 S.W.2d. at 1003. This court went on to hold that "under any rational construction, it was intended that a petition be filed within the time fixed by Amendment No. 7. To be a petition, it must, prima facie, contain at the time of filing the required number of signatures. Correction and amendment go to form and error, rather than to complete failure." *Id.* Thus, *Dixon* makes clear that a petition must on its face contain, at the time of the filing, the required signatures. In interpreting Article 5, § 1 (Amendment 7) and Ark.Code Ann. § 7–9–111, we hold that, in order to qualify for additional time, the petition must first, on its face, contain a sufficient number of signatures pursuant to both the state-wide and fifteen-county requirement, before the thirty-day provision to correct deficiencies applies. *Id.*

Here, in order to trigger the additional thirty days to cure its petition, AHE was required to present a facially valid petition. Once the Secretary of State found that, on its face, AHE's petition was lacking the requisite number of county signatures, it deemed AHE's petition a "complete failure." Although the Secretary of State and ARA have presented evidence as to the number of signatures required and presented, besides AHE's arguments in its briefs to the court, AHE has failed to provide any documentation regarding the prima facie ***11** sufficiency of its petition. The Secretary of State requested a special master be appointed to determine the number of signatures required and submitted. However, we find such an appointment unnecessary because AHE has failed to provide the court with any evidence of the validity of its petition. [2]

Thus, we hold that AHE failed to submit a facially valid petition and did not qualify for the additional thirty days to cure deficiencies. We dismiss the Secretary of State's motion to appoint a special master as moot and deny AHE's petition for writ of mandamus.

HANNAH, C.J., and BROWN, J., concur.

JIM HANNAH, Chief Justice, concurring.

I concur in the conclusion that the petition for writ of mandamus must be denied. However, I disagree with the majority's analysis. This petition must be dismissed because Arkansas Hotels and Entertainment, Inc. (AHE) lacks standing. Amendment 7 reserves to "the people ... the power to propose legislative measures, laws and amendments to the Constitution." Ark. Const., art. 5, § 1. "[T]he people" is a reference to "the People of the State of Arkansas." *See* Ark. Const. pmbl. The subject initiative is proposed by the "Arkansas Hotels and Entertainment Ballot Committee," P.O. Box 997, Gainesville, Texas. The Ballot Question Committee Statement of Organization lists Michael Wasserman of the same address in Texas as the president and sole member of the Committee. While AHE is an Arkansas corporation, there is no evidence ***12** that ****56** there are any Arkansas directors or shareholders. Rather, the evidence we have is that Michael Wasserman, a Texas resident, is the sole director and shareholder of the corporation.

Therefore, the initiative is proposed by a resident of Texas. The creation and use of this Arkansas corporation to serve as the initiating person fails. While a corporation may be considered a person under the statutes, to even potentially satisfy the requirement of amendment 7 that a law be proposed by the people of Arkansas, it would have to include Arkansas residents as directors or shareholders. The use of an Arkansas corporation in this case was a ruse to permit a resident of Texas to propose the law; this is not permitted under amendment 7. Therefore, I conclude that AHE lacks standing to propose the law or petition this court and agree that the petition must be dismissed.

BROWN, J., joins.

All Citations

2012 Ark. 335, 423 S.W.3d 49

Footnotes

1 Amendment 7 to the Constitution is codified in Article 5, § 1 of the Arkansas Constitution and is referred to as Amendment 7.

2 In requesting a writ of mandamus, AHE must show a clear and certain right to the relief requested. *Manila School Dist. No. 15 v. Wagner,* 357 Ark. 20, 159 S.W.3d 285 (2004).

IN THE ARKANSAS SUPREME COURT
ORIGINAL ACTION

BONNIE MILLER, individually and on behalf of ARKANSAS VOTERS FIRST and OPEN PRIMARIES ARKANSAS, BALLOT QUESTION COMMITTEES	**PETITIONERS**
v.	**CASE NO. CV-20-454**
JOHN THURSTON, in his capacity as Arkansas Secretary of State	**RESPONDENT**
ARKANSANS FOR TRANSPARENCY, A BALLOT QUESTION COMMITTEE, and JONELLE FULMER, individually and on behalf of ARKANSANS FOR TRANSPARENCY	**INTERVENORS**

INTERVENORS' PROPOSED FINDINGS OF FACT

After the presentation of evidence, including exhibits and witness testimony, and considering arguments of counsel and the applicable constitutional, statutory, and case law, Intervenors submit the following as proposed findings of fact:

1. Petitioner Arkansas Voters First is an Arkansas ballot question committee as defined in Ark. Code Ann. § 7-9-402(2)(A) and registered with the Arkansas Ethics Commission ("AVF").

2. AVF is the sponsor of a petition for a constitutional amendment creating a "Citizens' Redistricting Commission" for state legislative and congressional redistricting ("Redistricting Petition").

EXHIBIT 2

3. AVF also initially sponsored a petition for a proposed constitutional amendment requiring open primary elections and instant runoff general elections ("Open Primaries Petition").

4. Following the submission of both the Open Primaries and Redistricting Petitions to the Secretary of State, Open Primaries Arkansas was formed as an Arkansas ballot question committee as defined in Ark. Code Ann. § 7-9-402(2)(A) and registered with the Arkansas Ethics Commission ("OPAR").

5. OPAR is a sponsor of the Open Primaries Petition.

6. Petitioner Bonnie Miller is an Arkansas resident and registered voter.

7. Respondent John Thurston is the Arkansas Secretary of State ("Secretary").

8. Intervenor Arkansans for Transparency is an Arkansas ballot question committee as defined in Ark. Code Ann. § 7-9-402(2)(A) and registered with the Arkansas Ethics Commission. Arkansans for Transparency exists to advocate the defeat of both the Redistricting Petition and Open Primaries Petition.

9. Intervener Jonelle Fulmer is an Arkansas resident and registered voter. She is also the Co-Chair of Arkansans for Transparency.

10. A hearing on Counts I and II in Petitioners' Second Amended Consolidated Original Action Complaint (the "Complaint") was held from July 28 through July 31, 2020.

11. At the hearing, Adam Butler and Robert Thompson appeared for the Petitioner AVF on behalf of the Redistricting Petition. Alex Gray, Ryan Owsley, and Nate Steel appeared for AVF and Petitioner OPAR on behalf of the Open Primaries Petition. Gary Sullivan appeared for the Secretary, and Elizabeth Robben Murray, Kevin Crass, and AJ Kelly appeared for Intervenors.

12. To get on the ballot in the November 2020 general election, a statewide voter-initiated petition proposing a constitutional amendment must have at least 89,151 valid signatures of registered voters in Arkansas. A petition must also meet that 89,151 threshold in unverified signatures in the initial count performed by the Secretary after the petition is filed. Ark. Const., Art. 5, §1; § 7-9-126(a); Jt. Ex. 1 at 2-4, 60.

13. To get on the ballot, a petition must also have the requisite number of signatures for at least 15 counties per Article 5, §1 of the Arkansas Constitution. *See also* § 7-9-126(a); Jt. Ex. 1 at pgs. 60-61; *Arkansas Hotels & Entm't, Inc. v. Martin*, 2012 Ark. 335, 423 S.W.3d 49.

14. Petitioners offered no evidence that the Redistricting Petition and Open Primaries Petition met the 15-county requirement. Ark. Const., Art. 5, §1; § 7-9-126(a); *Arkansas Hotels & Entm't, Inc. v. Martin*, 2012 Ark. 335, 423 S.W.3d 49.

15. AVF submitted the Redistricting Petition and the Open Primaries Petition to the Secretary on July 6, 2020.

16. On July 14, 2020, the Secretary sent a letter to AVF, declaring the Redistricting Petition insufficient due to the insufficiency of the language used in relation to the background-check certifications for paid canvassers. (Pet. Ex. 5).

17. On the same day, July 14, 2020, the Secretary sent a nearly identical letter to AVF, declaring the Open Primaries Petition insufficient due to the insufficiency of the same certification language. (Pet. Ex. 6).

18. Later on July 21, 2020, the Secretary sent another letter to AVF, declaring the Open Primaries Petition insufficient for the additional reason that it did not have enough signatures to meet the statewide initial count requirement. (Pet. Ex. 7) The Secretary determined that 10,208 signatures had to be culled pursuant to Arkansas Code Annotated §§ 7-9-126 and 7-9-601. (Pet. Ex. 7)

19. The Secretary concluded that the Redistricting Petition had enough signatures to make the statewide initial count (90,493) but for the certification language. (Pet. Ex. 11)

20. Petitioners attacked the Secretary's statewide initial count determinations on both petitions, thus opening the door to Intervenors' evidence on the statewide initial count. In other words, because Petitioners were permitted to introduce evidence to add to the statewide initial count, Intervenors were permitted to introduce evidence to take away from it.

COUNT I

21. In Count I of the Complaint, Petitioners claim that the Secretary erroneously decided that the language certifying that they had "acquired" "statewide" and "50-state background checks" on their paid canvassers, rather than that they passed statewide and federal background checks, did not meet the requirements of Arkansas Code Annotated § 7-9-601(b)(3), such that none of the signatures for either the Redistricting or Open Primaries Petitions could be counted for any purpose under section § 7-9-601(f).

22. Petitioners used the following certification language:

> In compliance with Ark. Code Ann. § 7-9-601, please find the list of paid canvassers that will be gathering signatures on the [initiative] on behalf of the sponsor, this statement and submission of names serves as a certification that the statewide Arkansas State Police background check, as well as a 50 state criminal background check, have been timely acquired in the 30 days before the first day the paid canvasser begins to collect the signatures as required by Act 1104 of 2017.

23. At trial, Josh Bridges, the Elections Systems Analyst at the Secretary's Office, testified regarding the paid canvasser registration process and the certification language. (RT 31)

24. Mr. Bridges testified that as of the 2016 election cycle, a sponsor must register paid canvassers with the Secretary before those canvassers can collect signatures. (RT 87-88, 97) To register a paid canvasser, the sponsor must submit a sworn affidavit from the paid canvasser along with a list of paid canvassers' names

and current addresses (an Excel spreadsheet). (RT 87) The canvasser is not registered until both are received and cannot collect valid signatures before that date. It is the sponsor's responsibility to ensure that its canvassers are properly and timely registered. (RT 72-73, 87-88)

25. In each paid canvasser affidavit required for registration, the canvasser swears: "I have not pleaded guilty or nolo contendere or been found guilty of a criminal felony, offense, or a violation of the election laws, fraud, forgery, or identification theft in any state of the United States, District of Columbia, Puerto Rico, Guam, or any other United States protectorate." (RT 74-75; Pet. Ex. 15) The Secretary does not look behind this certification to determine its veracity. (RT 75)

26. During the signature-gathering process, sponsors register canvassers as they are hired. (RT 34-35) Mr. Bridges is on the email list group to receive paid canvasser lists canvasser affidavits, and he received numerous emails on a rolling basis in connection with the Redistricting Petition and the Open Primaries Petition. (RT 33)

27. Upon receipt, the emails and spreadsheets of paid canvassers from AVF were printed and file-stamped by the Secretary. (RT 56)

28. AVF hired National Ballot Access (NBA) for the purposes of supplying paid canvassers to obtain signatures from Arkansas citizens for both the Redistricting and Open Primaries Petitions. Representatives of NBA submitted the

paid canvasser registration lists with the certification language on the canvasser spreadsheets to the Secretary. (RT 96-97)

29. Heidi Gay is the co-founder of NBA. NBA pays its canvassers a fee per signature. (RT 462) NBA works with the sponsor of the initiated acts to comply with all state law requirements. In this case, Ms. Gay discussed with sponsor's representative, David Couch, all options to comply with the certification of the federal criminal background check. These options included having the canvassers go directly to the FBI – and obtain a federal records check and provide it to the sponsor. NBA sometimes used other Internet services to determine background checks. (RT 444-45) These included Been Verified and Sentry Link, which provide public records searches. (RT 447) According to Ms. Gay, the Arkansas State Police offered to help NBA get fingerprints for the canvassers. If the canvassers submitted the fingerprints to the FBI, there would be an additional fee which would be reimbursed by the sponsor. (RT 450)

30. Heidi Gay has long been involved in the signature-gathering process. She instructs her canvassers not to start their day by filling in the dates on each petition or to list P.O. Boxes as the address of paid canvassers, as she knows this will jeopardize the entirety of a petition part and the petition itself. (RT 482, 573) She also knows, as do her canvassers, that mistakes can be crossed out by the

canvasser, petitioner (signer), and sponsor to avoid petition part invalidation. (RT 483-84)

31. Ms. Gay was also involved in the gathering of signatures for another Arkansas referendum involving optometrists and ophthalmologists. During the submission of the paid canvassers' statements in that matter, the certification language changed from the sponsor certifying its paid canvassers had "passed" a federal background check to stating the sponsor had "obtained" a federal background check. Ms. Gay had a conversation with Alex Gray, a lawyer involved for the sponsor in that matter, and the certification language was changed based on their conversations. When NBA began collecting signatures in 2020 for the Redistricting and Open Primaries Petitions, the certification language used on the list of paid canvassers submitted to the Secretary before the paid canvassers submitted signatures on the paid canvassers' statements was taken from the second certification used in the eye doctor case. This was based on a discussion Ms. Gay had with David Couch in 2019. (RT 488-89)

32. Petitioner as sponsor was required to obtain a criminal records search on every paid canvasser to be registered with the Secretary under Arkansas Code Annotated § 7-9-601(b)(1), and upon submitting a list of paid canvassers to the Secretary, "the sponsor shall certify to the Secretary of State that each paid canvasser in its employee has passed a criminal background check in accordance with this

section." Ark. Code Ann. § 7-9-601(b)(3). The sponsor must submit the list of paid canvassers before paid canvassers solicit signatures. Ark. Code Ann. § 7-9-601(a)(2)(C).

33. NBA submitted lists of Redistricting Petition paid canvassers to the Secretary beginning on May 22, 2020. NBA submitted lists of Open Primaries Petition paid canvassers to the Secretary beginning on June 2, 2020.

34. The Secretary maintains a file of the paid canvasser list submissions.

35. The lists of paid canvassers used when registering the paid canvassers with the Secretary did not certify that the canvassers listed had passed a criminal background check notwithstanding the statutory requirement. Instead, the certification stated:

> In compliance with Ark. Code Ann. § 7-9-601, please find the list of paid canvassers that will be gathering signatures on the [initiative] on behalf of the sponsor, this statement and submission of names serves as a certification that the statewide Arkansas State Police background check, as well as a 50 state criminal background check, have been timely acquired in the 30 days before the first day the paid canvasser begins to collect the signatures as required by Act 1104 of 2017.

36. Arkansas Code Annotated § 7-9-601(b)(1) requires the sponsor to obtain both a state and federal background check through the Arkansas State Police and certify the paid canvassers passed.

37. The sponsors admit that they did not obtain a federal criminal background check for any paid canvasser.

38. The sponsors did not certify that the paid canvassers passed the Arkansas criminal background check even though the sponsors claim to have obtained reports. The sponsors did not tell the Secretary that the paid canvassers had successfully "passed" state background checks.

39. Petitioners called a staff attorney and legislative liaison of the Arkansas State Police, Ms. Mary Clare McLaurin. (RT 498) Ms. McLaurin testified that the Arkansas State Police provides background checks under the automated fingerprint identification system and the criminal background system that is part of the regular division. According to Ms. McLaurin, the only background checks that the Arkansas State Police can perform for a sponsor seeking background checks are Arkansas State background checks. She stated that this is because the wording of the statute is not sufficient to grant the sponsors authority under the Department of Justice guidelines. (RT 498-99) Ms. McLaurin stated that the Arkansas statute does not fulfill the requirements set forth by the Department of Justice because it does not mandate the taking of fingerprints by the sponsor. (RT 500) She testified that because the statute does not meet the requirements, the Arkansas State Police is unable to obtain an ORI, an originating agency, which would allow sponsors to themselves obtain federal criminal records for paid canvassers. She stated that the national crime information system is not a fingerprint-based system and that the State Police cannot access it unless it has an ORI. (RT 501) Ms. McLaurin did not

know whether a canvasser could submit fingerprints to the FBI and get a federal background check. (RT 532)

40. On cross-examination, Ms. McLaurin identified and the Court admitted, for some limited purpose, exhibits which reflect documents and Internet websites of the Arkansas State Police. These documents and websites addresses show processes by which persons can obtain state and federal criminal background checks. Intervenors Exhibit 17 is Arkansas State Police Form ASP 122, which provides an individual record check request form for state background checks. (RT 507) On the second page of Exhibit 17, the following provision appears:

> Applicant Record Notice.
>
> **Obtaining Copy**: Procedures for obtaining a copy of the FBI criminal history record as set forth in Title 28, Code of Federal Regulations (CFR) §16.30 through §16.33 or the FBI website at http://www.FBI.gov/about-us/siegejis/background-checks
>
> **Change Correction or Updating**: Procedures for obtaining a change, correction or updating an FBI criminal history record as set forth in Title 28, Code of Federal Regulations CFR §16-34.

41. Intervenors Exhibit 18 is an Internet page on the Arkansas State Police website that addresses frequently asked questions in the request for a criminal background check. (RT 511) Intervenors Exhibit 19 is an Arkansas State Police website screenshot that identifies a welcome to the Arkansas State police online criminal background check system. (RT 513) This section states:

> National FBI fingerprint-based background checks are available for persons with specific access authorization to National/FBI record checks under state or federal law.

42. Intervenors Exhibit 20 represents the Arkansas State Police website identifying how the criminal background check system works. (RT 515) Intervenors Exhibit 21 is a copy of the relevant Code of Federal Regulations cited in Intervenors Exhibit 17. Intervenors Exhibit 22 is a printout of a section of the FBI website which explains how one may obtain a criminal history record from the FBI through the submission of fingerprints. This would allow a paid canvasser to obtain his or her federal background check which could be submitted to the sponsor and certified to the Secretary of State. (RT 529-531; later admitted)

43. Arkansas State Police (ASP) Form 122, which is the form used by the sponsor, contains information that alerts the sponsor to other means of obtaining a federal criminal history, yet the sponsors did not pursue them.

44. ASP Form 122 is a criminal history request by the individual paid canvasser. Any individual can request his or her federal criminal history from the FBI, and this is expressly stated on ASP Form 122. This ASP Form states that the procedure for obtaining a copy of the FBI criminal history are set forth in Title 28, Code of Federal Regulations, CFR § 16.30 through 16.33 on the FBI website.

45. The Arkansas State Police fingerprints people all the time and can do so at multiple locations. (RT 510)

46. Thus, through the Arkansas State Police process, which links to the FBI processes via the Internet, a sponsor of a ballot initiative can, with the consent of the paid canvassers, obtain a federal background check. In fact, the ASP is willing to facilitate that effort by obtaining the canvasser's fingerprints. (RT 510) Indeed, the paid canvasser can also obtain a federal background check through various other means and provide it to the sponsor.

47. The sponsors did not ever challenge the position of the ASP on federal criminal background checks by mandamus or other legal process to protect the rights of the people under Amendment 7.

48. The Secretary presumes sponsor compliance with mandatory requirements for ballot measures and does not independently audit or verify compliance. The sponsors had an obligation as ballot measure sponsors to comply with all requirements of Sections 601 and 126. The sponsors did not even attempt substantial compliance with federal criminal background check requirement.

49. The sponsors did not certify that they had obtained from the State Police and that the canvassers had passed an Arkansas state background check.

50. Intervenors presented evidence of multiple instances where canvassers on the sponsors' paid canvassers lists had criminal history that would foreclose any certification that they had passed a federal criminal background check.

51. Intervenors Exhibit 3 is a BeenVerified report for paid canvasser Anthony Newkirk. Mr. Newkirk solicited signatures on behalf of both petitions although he has numerous criminal charges, including a felony charge for carrying a concealed firearm to which he pleaded guilty. Intervenors Exhibit 4 is from the Broward County, Florida Clerk showing a conviction for a third degree felony. Because the Secretary relies on the sponsor to obtain the required background checks and certify each paid canvasser's passage, the Secretary did not know of Mr. Newkirk's criminal history. Mr. Newkirk collected 209 signatures for the Open Primaries Petition and 300 signatures for the Redistricting Petition that were improperly included in the initial statewide counts. (Intv. Exs. 30 & 31)

52. Intervenors Exhibit 5 is a BeenVerified report for paid canvasser Tyler Dale Merkle. Intervenors Exhibit 6 is a docket report from a Missouri Court's website. Mr. Merkle solicited signatures on behalf of the Open Primaries Petition although he has numerous criminal charges, including felony charges for the offense of "Fugitive from Out of State" and for the offense of possession of a controlled substance. Because the Secretary relies on the sponsor to obtain the required background checks and certify each paid canvasser's passage, the Secretary did not know of Mr. Merkle's criminal history. Mr. Merkle collected 20 signatures for the Open Primaries Petition that were improperly included in the statewide initial count. (Intv. Ex. 36)

53. Intervenors Exhibit 7 is a BeenVerified report for paid canvasser Demetriuse A. Martin. Intervenors Exhibits 8 and 9 are York County, Pennsylvania criminal dockets of cases against Mr. Martin. Mr. Martin solicited signatures on behalf of both petitions although he has numerous criminal charges, including two charges for theft by deception-false impression to which he pleaded guilty. Because the Secretary relies on the sponsor to obtain the required background checks and certify each canvasser's passage, the Secretary did not know of Mr. Martin's criminal history. Mr. Martin collected 96 signatures for the Open Primaries Petition and 72 signatures for the Redistricting Petition that were improperly included in the statewide initial counts. (Intv. Exs. 32 & 33)

54. Intervenors Exhibit 10 is a BeenVerified report for paid canvasser Shaquetta S. Lee (also known as Shaqwetta Lee, same addresses and birthdates). Intervenors Exhibit 12 is a docket report from Broward County Florida for a criminal case against Ms. Lee. Ms. Lee solicited signatures on behalf of both petitions although she has numerous criminal charges, including a felony grand theft charge to which she pleaded nolo contendere. Because the Secretary relies on the sponsor to obtain the required background checks and certify each paid canvasser's passage, the Secretary did not know of Ms. Lee's criminal history. Ms. Lee collected 115 signatures for the Open Primaries Petition and 69 for the Redistricting Petition that were improperly included in the statewide initial counts. (Intv. Exs. 34 & 35)

55. Ms. Gay had access to criminal background information pertaining to Anthony Newkirk, Tyler Merkle, Demetriuse Martin, and Shaquetta Lee. Each of their canvasser files contains BeenVerified reports, and in some instances docket reports, showing felony criminal histories. The canvasser files do not contain documentation of any investigation by NBA or the sponsors into these canvassers' criminal records. (RT 541- 551; Intv. Exs. 12-15)

56. Because these canvassers have disqualifying criminal records, 441 signatures were improperly included in the Secretary's statewide initial count for the Redistricting Petition and 440 signatures were improperly included in the Secretary's statewide initial count for the Open Primaries Petition.

COUNT II

57. In Count II, Petitioner OPAR claims that the Secretary improperly culled petition parts and signatures from the initial count such that the Open Primaries Petition actually meets the statewide signature requirement.

58. The parties stipulated that the Secretary determined that the Open Primaries Petition failed the statewide initial count by 528 signatures.

59. At the hearing, Petitioners called Josh Bridges and Peyton Murphy from the Secretary's office, who testified as to the detailed, "assembly line" process developed and used by the Secretary over the course of years to process petitions, including the Open Primaries Petition.

60. The process begins when the petition is filed. The Secretary's office has several different stations setup where different reviewers are charged with evaluating different requirements for each petition part in compliance with Arkansas Code Annotated § 7-9-126.

61. To aid in that process, the Secretary uses a "Petition Intake Procedure Checklist." (Pet. Ex. 2) Reviewers at different stations first ensure that the petition part is an original, the entire text of the measures is attached and legible, and that the ballot title and popular name are attached. (Pet. Ex. 2, Lines 3-5) Reviewers at different stations then evaluate petition parts to confirm that certain criteria is met with regard to the canvasser, including that the paid canvasser is registered prior to collection signatures and the notarization date is after the dates the petitioners signed. (Pet. Ex. 2, Lines 6-11) Finally, the petition parts are reviewed for required notary signatures and seals. (Pet. Ex. 2, Lines 12-14).

62. If one of these criteria is not met, a "cull coversheet" is attached to the petition part. Later, a supervisor from the Secretary's office reviews each part and each cull coversheet to determine the propriety of the cull. (RT 51-53) If it was properly culled, that part is put in a "culled file" and those signatures are not counted for purposes of determining the initial count per Ark. Code Ann. § 7-9-126. (RT 51-53)

63. To aid in the petition intake process, the Secretary's staff hires temporary workers. Mr. Bridges trains each worker and goes over the process with them in detail, as he has been a supervisor of, and involved with, statewide initiative petitions since 2014. Reviewers are not only trained on the intake procedures but on other details, such as taking into account that some petitioners may use the military's date and time notification system. (RT 169-70) The Secretary's office tracks which reviewer completes each part of the intake process as well. (RT 168)

64. Mr. Bridges testified that the Secretary has developed and employed a "two-sets-of-eyes" review standard, meaning that no one person makes the ultimate decision to cull a petition part. (RT 167) It goes first through a temporary worker at one of the designated stations and is then reviewed by staff of the Secretary's office. 167. Each worker, and then SOS staff, scrutinizes the original petition parts. It then goes through one more layer of review by SOS staff, triple-checking the culled parts and the reasons for culling. (RT 224)

65. Over time, the Secretary's staff has developed particular ways of dealing with certain issues, like legibility, as well. Mr. Bridges explained that if the date of signing is scratched through or a determination of the exact date cannot be made because it is wholly illegible, the Secretary does not cull the petition part. The Secretary does not cull if the date of signing is blank either. The Secretary does cull

if the date the petitioner signed is after the notarization date or before the paid canvasser was registered. (RT 137)

66. The Secretary has the benefit of reviewing original petition parts, which show different colors of ink which can help determine whether a petition part meets necessary criteria, including whether it is an original and when a canvasser or petitioner actually signed. Petitioners did not introduce into evidence original petition parts for any purpose, only copies were introduced into evidence and reviewed by Mr. Bridges and Mr. Murphy at the hearings in this matter.

67. At the hearing, Mr. Bridges reviewed a spreadsheet created and maintained by the Secretary's office. (RT 197-99) Based on the spreadsheet, Mr. Bridges testified that the following number of signatures were culled for the following reasons on the Open Primaries Petition:

Cull Reason	**Number of Signatures**
Canvasser verification is before petitioner signed	1,210
Canvasser was not on the paid canvasser list	2,858
Canvasser not registered	2,464
Notary failed to sign the petition part, canvasser failed to sign the petition part, or the notary seal was missing or illegible	134
No canvasser signature or more than one signature	160

Canvasser's printed name and signature do not match	18
Date of signing	94
Signatures from Redistricting Petition parts turned in with Open Primaries Petition	4,378
Wrong petition	278
Missing or illegible text	6

68. Mr. Bridges and Mr. Murphy also reviewed the Secretary's process in relation to paid canvassers, including a handwritten document that lists particular canvassers whose petition parts were culled. (RT 223-24, 337-40) The list is generated during the Secretary's "triple-check" of culled petition parts. The Secretary's staff reviews each paid canvasser to make sure that they met the statutory requirements and that each piece of required information was submitted, including signature cards and sworn statements. If a missing piece of information is found during this process, the canvasser notes it as a "throw back," and his or her signatures are added back into the initial count unless they were excluded for other reasons. (RT 223-24, 337-40)

69. After reviewing the list of canvasser culls and conducting an additional review, the Secretary stipulated that canvassers Whitney Tullgren, Carolyn Brinnon,

Ronae Walton, and Jorge Argeta were "throwbacks." They respectively had: 33, 2, 48, and 1 signatures (84 total). (RT 598-99)

70. Petitioners contested that canvasser Molly Cason's petition parts were improperly culled. However, Mr. Murphy testified that her signature card for the Open Primaries Petition was incorrectly submitted by the sponsor with the Redistricting Petition documents. (RT 369-70) There was no card for her in the Open Primaries Petition. (RT 366-67) If it is found that the Secretary improperly culled her signatures, an additional 26 signatures would be added to the statewide initial count for the Open Primaries Petition. Petitioners offered no evidence that the cull pursuant to the statute was improper.

71. Petitioners contested that canvasser Jessica Martin's parts were improperly culled. However, Mr. Murphy testified that "Jessica Martin" did not appear on the paid canvasser list, only a "Jessica Martinez." (RT 343-46) If it is found that the Secretary improperly culled her signatures, an additional 14 signatures would be added to the statewide initial count for the Open Primaries Petition. (Pets. Ex. 22) Petitioners offered no evidence that the cull pursuant to the statute was improper.

72. Petitioners contend that the Secretary culled 22 signatures pursuant to Ark. Code Ann. § 7-9-126(b)(3) because the paid canvasser did not print his or her name on the petition part. (Pet. Ex. 25) If the cull is found to be improper, 22

signatures would be added to the statewide initial count for the Open Primaries Petition. (Pets. Ex. 25) Petitioners offered no evidence that the cull pursuant to the statute was improper.

73. Petitioners contend that the Secretary culled 73 signatures pursuant to Ark. Code Ann. § 7-9-126(b)(4)(A) because the canvassers' sworn statements were not submitted before they started canvassing. If the cull is found to be improper, 73 signatures would be added to the statewide initial count for the Open Primaries Petition. (Pets. Ex. 25) Petitioners offered no evidence that the cull pursuant to the statute was improper.

74. The Secretary also culled 1,190 signatures pursuant to Ark. Code Ann. § 7-9-126 (b)(6) because the canvasser verification date was before the date the petitioner signed, as well as other date issues that Petitioners categorized under "wrong date," such as a petitioner signed using their birthdate. (Pet. Ex. 22 & 25). Specifically, 661 of the challenged signatures appeared on pages with a voter signing date after the canvasser verification date. If the cull of these signature is found to be improper, Petitioners and Intervenors stipulated that another 1098 signatures would be added to the statewide initial count for the Open Primaries Petition. While Petitioners proposed that the added signatures for this category total 1,190, Intervenors objected to the inclusion of 92 signatures based on other grounds. (Pet.

Ex. 22 & 25). Petitioners, however, offered no evidence that the culls were improper pursuant to the statutes.

75. Josef Bautista was a paid canvasser for both petitions. Mr. Bautista has worked on signature drives for NBA for a long time. (RT 551) His fees for signature collection are paid to his corporation Global Political Strategies. (RT 570)

76. Mr. Bautista's permanent domicile address on Respondent's Exhibits 1 and 2 is listed as 9009 S.E. Adams Street, #1144, Clackamus, Oregon. His sworn canvasser statement lists that same address as his permanent domicile. (Intv. Ex. 24)

77. NBA's canvasser file lists the same address for Mr. Bautista's Company Global Political Strategies, Inc. on the W-9. (RT 570)

78. Intervenors introduced photos of the building at 9009 S.E. Adams Street, Clackamus, Oregon. It is a United States Post Office in all photos. Other information in the exhibit also establishes that fact. (Intv. Ex. 23)

79. Heidi Gay acknowledged that absolutely a canvasser cannot use a P.O. Box as an address under Arkansas law. (RT 554-55) Ark. Code Ann. § 7-9-601.

80. Mr. Bautista attempted to avoid Arkansas law. As demonstrated by Intervenors Exhibit 28, Mr. Bautista's petitions included in the initial statewide count for the Redistricting Petition contained 2,294 signatures.

81. Intervenors Exhibit 29 establishes Mr. Bautista's petitions in the initial statewide count for the Open Primaries Petition contained 1,787.

82. Under Arkansas Code Annotated §§ 7-9-126(b)(4)(A), 7-9-601(d), and 7-9-601(f), these signatures obtained by Mr. Bautista are to be excluded for all purposes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kevin A. Crass, hereby certify that on this 5th day of August, 2020, I emailed the foregoing to the following counsel of record:

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IN THE ARKANSAS SUPREME COURT
ORIGINAL ACTION

BONNIE MILLER, individually and on behalf of ARKANSAS VOTERS FIRST and OPEN PRIMARIES ARKANSAS, BALLOT QUESTION COMMITTEES	**PETITIONERS**
v.	**CASE NO. CV-20-454**
JOHN THURSTON, in his capacity as Arkansas Secretary of State	**RESPONDENT**
ARKANSANS FOR TRANSPARENCY, A BALLOT QUESTION COMMITTEE, and JONELLE FULMER, individually and on behalf of ARKANSANS FOR TRANSPARENCY	**INTERVENORS**

INTERVENORS' SUPPLEMENTAL BRIEF IN SUPPORT OF INTERVENORS' RESPONSE TO PETITIONERS' BENCH BRIEF REGARDING SCOPE OF REVIEW AND BURDEN OF PROOF

This Court has jurisdiction to hear the entirety of the case presented to the Special Master,[1] including Intervenors' assertions that entire petition parts should be culled for failure to meet the requirements of Arkansas constitutional and statutory

[1] Intervenors dispute that Petitioners' constitutional claim made in their Supplement to the Second Amended Original Action Complaint is properly before the Special Master and the Supreme Court. Intervenors object to the Special Master and Court's review of claims regarding the constitutionality of statutes.

EXHIBIT 3

law. This case is a Sponsor's challenge to the Secretary of State's determination that both petitions failed for want of initiation. It is procedurally distinct from both *Stephens* and *Zook*. The legislative change in the law, Act 376 of 2019, addresses the 2018 decision in *Zook*, in accordance with constitutional dictates to enact laws to prevent fraud and to enable the operation of Amendment 7, codified at AR Const. Art. 5, § 1 (as amended by Amendment 93). In accordance with the case law set forth by the Sponsor, "Arkansas Voters First," a case like this may be the **only time** when certain sections of Arkansas law can apply; Intervenors are the only parties who can bring these challenges. The Master should sustain Intervenors' objections, disallow this petition, and uphold the Secretary of State's determinations that both petitions fail for want of initiation.

Sponsors, Petitioners here, challenge the Secretary of State's determination that both petitions at issue fail because the initial count of signatures is insufficient (below 89,151 signatures). *Dixon v. Hall*, 210 Ark. 891, 198 S.W.2d 1002 (1946) (failure to meet statewide initial count signature requirement); *Arkansas Hotels & Entertainment, Inc. v. Martin*, 2012 Ark. 335 (2012) (failure to meet 15 county initial count signature requirement). Both petitions failed, initially, because the sponsor's "canvasser background check" certifications failed to state that their proposed

canvassers had "passed" a state police criminal background check. Jungle Primary-Ranked choice elections also failed for want of initiation when it failed to meet the statewide initial count requirement at all, after Secretary of State "culls" of certain petition parts during the intake process.

Petitioners, both sponsors, have gone to some lengths to introduce evidence extrinsic to their petitions to support their positions concerning SOS determinations of the initial count. They have introduced evidence from Heidi Gay, co-President of National Ballot Access, one of the primary contractors providing paid canvassers for these two petitions. Further, they have both introduced evidence from Mary Clair McLaurin, an attorney with the Arkansas State Police, concerning the difficulty with obtaining federal criminal background checks. Jungle Primary/Ranked Choice voting has also attempted to rehabilitate certain petition parts, and has introduced other evidence in their effort to show that the Secretary should not have culled certain petition parts in the initial count.

Yet both sponsors erroneously claim that Intervenors are prohibited from introducing evidence extrinsic to the Secretary's file during the course of this litigation, that is, evidence of like tenor and tone.

Petitioners are wrong. The cases they cite are distinguishable. The Arkansas legislature addressed these issues in the 2019 legislative session. Amendment 7 of the Arkansas Constitution, Art. 5, § 1, as amended by Amendment 93, specifically allows for this type of legislative enactment to protect the initiative process. The legislation addressing these issues can only be read to allow Intervenors to introduce evidence extrinsic to the petition during a challenge to the Secretary's decision to declare that petitions like those at issue have failed entirely for want of initiation pursuant to *Dixon* and *Arkansas Hotels & Entertainment*.

LEGISLATIVE ACTION

The Arkansas General Assembly passed Act 376 of 2019, Senate Bill 346, and it was signed into law by the Governor on March 8, 2019. It took effect 90 days after *sine die*, on July 24, 2019. *Safe Surgery Arkansas v. Thurston*, 2019 Ark. 403, at 6 (2019). Act 376 makes substantial changes to petition law. A complete copy is attached hereto.

For demonstrative purposes, Act 376 amended several sections of Arkansas Code, including Section 7-9-126 concerning the count of signatures on a petition. As amended, and as relevant here, Section 7-9-126 now states that:

A petition part and all signatures appearing on the petition part shall not be counted for any purpose by the official charged with verifying the signatures, including the initial count of signatures, if one (1) or more of the following is true:

. . . .

(4)(A) The canvasser is a paid canvasser whose name and the information required under § 7-9-601 were not submitted or updated by the sponsor to the Secretary of State before the petitioner signed the petition.

Section 7-9-601, as amended, and as relevant here, now states:

Hiring and training of paid canvassers – Definition.

(a)(1) A person shall not provide money or anything of value to another person for obtaining signatures on a statewide petition . . . unless the person receiving the money or item of value meets the requirements of this section.

(2) Before a signature is solicited by a paid canvasser, the sponsor shall:

* * *

(D) Submit to the Secretary of State a copy of the signed statement provided by the paid canvasser under subdivision (d)(3) of this section.

* * *

(d) Before obtaining a signature on an initiative or referendum petition as a paid canvasser, the prospective canvasser shall submit in person or by mail to the sponsor:

(1) the full name and any assumed name of the person;

(2) the current residence address of the person and the person's permanent domicile address if the person's permanent domicile address is different from the person's current residence address;

(3) A signed statement taken under oath or solemn affirmation stating that the person has not pleaded guilty or nolo contendere to or been found guilty of a criminal felony offense or a violation of the election laws, fraud, forgery, or identification theft in any state of the United States, the District of Columbia, Puerto Rico, Guam, or any other United States protectorate;

(4) A signed statement that the person has read and understands the Arkansas law applicable to obtaining signatures on an initiative or referendum petition; and

(5) A signed statement that the person has been provided a copy of the most recent edition of the Secretary of State's initiatives and referenda handbook by the sponsor.

(f) Signatures incorrectly obtained or submitted under this section shall not be counted by the Secretary of State for any purpose.

Ark. Code Ann. § 7-9-601 (as amended by Act 376 of 2019).

As the Court has said, in an earlier review of this statute (prior to Act 376), "the first rule of statutory construction is to apply a plain reading of the statute, construing it just as it reads, by giving the words their ordinary and usually accepted meaning in common language." *Benca v. Martin*, 2016 Ark. 359, 7 (2016) (citations and quotation marks omitted). "Further, the word 'shall' when used in a statute

means that the legislature intended mandatory compliance with the statute unless such an interpretation would lead to an absurdity." *Benca*, id, at 7-8 (citations and some internal quotation marks omitted).

As shown at the hearing, the information concerning Mr. Josef Bautista is that he provided a fraudulent street address, the street address of the federal Post Office where he apparently maintains a PO box, as his permanent domicile, and in a manner which was designed to deceive anyone looking at the way he listed his permanent domicile address. It is well understood that a Post Office Box address is not a residence and does not meet the statutory requirements of providing the place where Mr. Bautista lives, that is, the place where he may be found in the event that he is found to have committed petition fraud. *Benca* (reversing Special Master's determination that a Post Office Box address could be corrected after initial submission). "Shall" is mandatory statutory language, "and the clerical error exception and substantial compliance cannot be used as a substitute for compliance with the statute." *Benca*, at *12-13.

The legislature was clear when it amended Section 601, by adding new subsection (f): "Signatures incorrectly obtained or submitted under this section shall not be counted by the Secretary of State ***for any purpose.***" Ark. Code Ann. § 7-9-

601(f) (as amended by Act 376) (emphasis added). In enacting this change to Section 601, the legislature is presumed to have enacted it "with the full knowledge of the constitutional scope of its powers and … prior legislation on the same subject." *Young v. Energy Transp. Systems Inc. of Ark.*, 278 Ark. 146, 150, 644 S.W.2nd 266 (1983). The "for any purpose language" added in subsection 601(f) means just what it says: those signatures obtained by Mr. Bautista cannot be used for the initial count, for the "cure count" if a petition had not failed for want of initiation, and certainly not for the overall total valid signature count if a petition is certified to the ballot.

Petitioners would have this Court (and the Special Master) read the "for any purpose" language out of the amended statute. In other words, Petitioners' erroneously argue that *Stephens* and *Zook* preclude any challenge to the initial count at any stage; this argument would preclude the legislature from enacting laws to prevent signatures obtained by a paid canvasser using a fraudulent address ***in the initial count***. But this is contrary to the plain language of the statute; and language in new subsection 601(f) which mirrors prior language used in Section 7-9-126.

Their argument is also contrary to the plain language of Article 5, Section 1, otherwise known as Amendment 7: "… 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…. laws may be enacted to facilitate its operation…."

Assuming, without conceding, that Petitioners' are correct about any challenge to the initial count ***after the Secretary concludes that a cure period is allowed,*** and ***after determining that a petition has met the total signature requirement and so can be certified to the ballot***, it may be that such a future challenge to the initial count is "too late." See *Zook [Wage]*, 2018 Ark. 293, at 8. But this case is not a challenge to the Secretary's final decision; this is the ***sponsors' challenge*** to the Secretary's determination that both of their petitions failed the initial count, and so failed for want of initiation, that is, a far different place in the overall petition process.

Neither *Stephens*, nor *Zook [Wage]* made the conclusion that the *legislature* could not legislate in this area, i.e., how the initial count may be determined or affected during a challenge to the Secretary's determination that a petition fails for want of initiation. To give the new language in Section 601(f) meaning, Intervenors' challenge to the petitions of Mr. Bautista have to be made in precisely this proceeding, where extrinsic evidence must be part of the proceedings challenging the Secretary's initial count determinations, ***assuming without conceding*** that

Stephens and ***Zook*** [Wage] might preclude later review of the initial count (an issue not before this Court). Information extrinsic to the petition, like the proof submitted by Intervenors concerning Mr. Bautista, can only be received during a sponsor's challenge to the Secretary's initial count determination, to give meaning to the words "for any purpose." Petitioners would erroneously preclude any review of the Secretary's initial count, even where the legislature has acted, contrary to the plain language of the constitution and Act 376.

CONCLUSION

This Court, and the Special Master, have jurisdiction to consider all of Intervenors' proof and arguments because the Legislature has made a change in statutory law. Act 376 of 2019. The new law prohibits the use of signatures obtained by a paid canvasser providing a fraudulent PO Box address as his permanent domicile*, inter alia*. Ark. Code Ann. § 7-9-601(d) and (f); *Benca,* at 12-13. Neither *Stephens* nor *Zook* [Wage] prohibit the legislature from making this type of legislative change to the law. To the contrary, Amendment 7 explicitly allows for the legislature to act.

Dated this 31st day of July, 2020.

Respectfully submitted,

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By: /s/ Kevin A. Crass
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CERTIFICATE OF SERVICE

I do hereby certify that I have filed the foregoing in open Court on this 31st day of July, and hand-delivered a copy to all counsel of record, as well as to the Special Master, this even date herewith.

/s/ Kevin Crass

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Kevin Crass