

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' RESPONSE IN OPPOSITION TO PETITION FOR
REHEARING AND MOTION TO RECALL MANDATE**

Intervenors respectfully request that the Court deny the petition for rehearing and motion to recall mandate (the "Petition"). The Court correctly concluded that both initiative petitions failed because the sponsor's language did not certify its paid canvassers passed state and federal background checks as required by Arkansas Code Annotated § 7-9-601(b)(3). This conclusion is consistent with precedent and well-settled principles of statutory construction. No rehearing or mandate recall is warranted or justified in this case.

Argument

A. Petitioners' Arguments Have Already Been Rejected by the Court.

In reaching its holding, the Court had all necessary facts and law before it and considered them correctly. Petitioners' argument for rehearing is essentially the same one already rejected by the Court – that the sponsor substantially complied with the certification requirements of section 7-9-601(b) and requiring the sponsor to certify passage to the Secretary of State is too technical. *See, e.g.*, Pet. Rehearing at 3, ¶ 5 (asserting that the paid canvassers' sworn statements satisfy the background-check requirement broadly); *id.* at 4, ¶ 8 (“If this logic is not recognized and the current holding is allowed to stand, it can no longer legitimately be said that initiative and referendum measures ‘should not be thwarted by strict or technical construction.’”). That Petitioners have now emphasized the sponsor's submission of the paid canvassers' sworn statements to the Secretary of State is of no moment. They noted as much in their original brief in arguing that their certification language evidenced substantial compliance with the whole of section 7-9-601. *See, e.g.*, Pets. Br. at 23 (“Indeed, the sworn statements of all AVF's canvassers were on file with the Secretary, as this was a requirement for a canvasser to even be registered.”).

Rehashing the substantial compliance argument is not appropriate for a petition for rehearing. Ark. R. Sup. Ct. 2-3(g) (“[T]he brief on rehearing is not intended to afford an opportunity for a mere repetition of the argument already

considered by the Court.”); *see also* *Barnett v. Arkansas Transp. Co.*, 303 Ark. 491, 499–C, 800 S.W.2d 429, 431 (1990) (denying petition for hearing and stating that “arguments that are merely repetitious of those already considered by the court are inappropriate subjects for a petition for rehearing”); *Butler Manufacturing Co. v. Hughes*, 292 Ark. 198, 731 S.W.2d 214 (1987) (same). The Petition should be denied for this reason alone.

B. The Petition Should Be Denied on Other Procedural Grounds.

Likewise, to the extent Petitioners seek rehearing based on the Court having overlooked the “critical fact” that they turned in their paid canvassers’ sworn statements, their Petition is procedurally barred. Pet. Rehearing at 3, ¶ 4 (stating that the Opinion does not mention the “critical fact” that the sponsor turned in the paid canvassers’ sworn statements). Supreme Court Rule 2-3(h) states, “In no case will a rehearing petition be granted when it is based upon any fact thought to have been overlooked by the Court, unless reference has been clearly made to it in the statement of the case and the facts prescribed by Rule 4-2.” 2019 Ark. 213 (per curiam).

Here, no “critical fact” was overlooked by the Court. And, no reference to the paid canvassers’ sworn statements is contained in the required portion of Petitioners’ original brief; it is only referenced in argument (and without citation to or support in the record). Procedurally, the Petition should be denied for this reason as well.

C. The Paid Canvassers' Sworn Statements Do Not Satisfy the Separate Statutory Requirement that the Sponsor Certify Passage of Background Checks.

Lastly, the request for rehearing and motion to recall should be denied because it is not based on a specific error of law or fact as required by Rule 2-3(g). Rather, it is based on yet another red herring. Here, Petitioners contend that the Court's adherence to the plain language of section 601(b)(3) stems from an incorrect factual determination – namely, that “the certification is the only assurance the public receives that paid canvassers ‘passed’ background checks.” According to Petitioners, this constitutes error because the sponsor provided the Secretary of State with its paid canvassers' sworn statements in which each canvasser attested to having no disqualifying criminal convictions. Relying on the canvassers' sworn statements, Petitioners argue “the ‘assurance’ meant to be given to the people [was] in fact given” and the “standard” for passage of a background check was met. Pet. Rehearing at 2-3, ¶¶ 3-5.

Yet, the sworn statement requirements in Arkansas Code Annotated § 7-9-601 were not the issue before the Court. Instead, the issue was whether the certification used by the sponsor complied with the plain language of Arkansas Code Annotated § 7-9-601(b)(3). Whether the paid canvassers swore to the sponsor that they had no disqualifying convictions as required by section 601(d)(3), or whether the sponsor turned those sworn statements into the Secretary as required by section 601(a)(2)(D),

is wholly irrelevant to determining whether the sponsor's certification language complied with section 601(b)(3). These sections are separate and distinct, both in the organization of the statute and also in substance. The sponsor, for example, is only charged with turning in the paid canvassers' statements to the Secretary on time. And, the provisions on sworn statements do not require any independent verification of the paid canvassers' own attestations – attestations that are not always accurate as the Intervenor's evidence demonstrated with respect to some paid canvassers on these petitions. *See, e.g.,* Intvs. Br. at Arg. 24; Intvs. Exs. 14, 26-27. The 601(b) sponsor requirements serve to fill these gaps.

In sum, the Court's opinion contains no error and is rightly based on the plain language of the statute. Like their original brief, Petitioners' argument for rehearing ignores the certification component of section 601(b)(3) entirely, not to mention section 601(f)'s do-not-count mandate. The Court correctly refused this result before and should do so again by denying the current Petition. *Miller v. Thurston*, 2020 Ark. 267, at 4 (“We cannot ignore the mandatory statutory language requiring certification that the paid canvassers passed criminal background checks, nor can we disregard section 7-9-601(f)'s prohibition on the Secretary of State counting incorrectly obtained signatures ‘for any purpose.’”).

Conclusion

Pursuant to the foregoing authorities and analysis, Intervenors respectfully request that the Court deny the petition for rehearing and motion to recall mandate.

Respectfully Submitted,

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Certificate of Service

I, Kevin A. Crass, hereby certify that on this 4th day of September, 2020, I electronically filed the foregoing using the AOC eFlex-filing system, which will serve all counsel of record.

By: /s/ Kevin A. Crass
KEVIN A. CRASS