

No. CV-20-454

IN THE SUPREME COURT OF ARKANSAS

BONNIE MILLER, individually and on behalf of ARKANSAS VOTERS FIRST and OPEN
PRIMARIES ARKANSAS, ballot question committees,
Petitioners,

v.

JOHN THURSTON, in his official capacity as Arkansas Secretary of State and in his
official capacity as Chairman of the Arkansas State Board of Election Commis-
sioners; and the ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS,
Respondents.

ARKANSANS FOR TRANSPARENCY, a ballot question committee; and JONELLE
FULMER, individually and on behalf of ARKANSANS FOR TRANSPARENCY,
Intervenors.

An Original Action

**State Board of Election Commissioners' Response in
Opposition to Petition for Rehearing and Motion to Recall the Mandate**

This Court has done nothing to “disenfranchise” Arkansans. Petitioners simply failed to follow Arkansas’s reasonable antifraud rules and had hoped this Court would fix their mistakes. They still don’t explain their choice not to comply with two simple steps: “*obtain* a criminal record search,” and “certify to the Secretary of State that each paid canvasser *passed*” it. *Miller v. Thurston*, 2020 Ark. 267, 2020 WL 5050355, at *3. Instead, they ask yet again that this Court bail them out. But they offer no “specific errors” to justify rehearing. Rule 2-3(g). Far from it—Petitioners point to a *correct* factual statement by the Court (Pet. 2-3), and then make *their own error* of law (Pet. 3-4). Petitioners’ inexplicable failure to follow

Arkansas's simple background-check law justified this Court's decision, and nothing they say now justifies rehearing.

First, Petitioners try and fail to manufacture a factual error in this Court's opinion. As Petitioners note (Pet. 2), this Court correctly stated that "[t]he results of the background checks are not required to be filed with the Secretary of State." 2020 WL 5050355, at *3. Petitioners don't cite a statute that requires filing background-check results with the Secretary. For good reason: There is no such statute. As a general matter, therefore, "the only assurance the public receives that the paid canvassers 'passed' background checks" is a sponsor's background-check certification. *Id.* In other words, sponsors are legally required to file only a certification—not the results of paid canvassers' background checks.

It makes no difference whether Petitioners in fact submitted the results here. (*See* Pet. 3.) This Court's accurate description of what information Arkansas law requires to be submitted is not somehow rendered inaccurate because Petitioners submitted different information than Arkansas law requires. Besides, without a certification by Petitioners, it's unclear how the Secretary was to determine that any allegedly submitted results were complete. If Petitioners submitted incomplete results—but no certification—then the public has received no assurance that all their paid canvassers passed background checks. This Court correctly described

the requirements of Arkansas law and the need for those requirements. There was no factual error.

Second, while faulting this Court's reading of its Amendment 7 jurisprudence, Petitioners commit their own error of law. (*See* Pet. 3-4.) Petitioners still offer no explanation for why they chose to submit noncompliant background-check certifications. But they do offer an excuse for their noncompliance: this Court's old substantial-compliance precedent. (Pet. 3-4.)

Relying largely on this same precedent, they pressed this same argument in their main briefing. This argument fails now for the same reasons it failed then: "Those cases all stand for the proposition that this Court expects substantial compliance *with the text of Amendment 7 itself*." (SBEC Aug. 18 Br. on Counts 1 & 2, at 19 (citing, *e.g.*, *Reeves v. Smith*, 190 Ark. 213, 78 S.W.2d 72, 73-74 (1935) (emphasis added).) "By contrast, when considering statutory claims like those here, this Court has expressly said that 'substantial compliance cannot be used as a substitute for compliance with the statute.'" (*Id.* (quoting *Benca v. Martin*, 2016 Ark. 359, at 13, 500 S.W.3d 742, 750).) "[M]ere repetition" of legally erroneous arguments doesn't justify rehearing. Rule 2-3(g).

Finally, regarding the motion to recall the mandate, Petitioners offer no independent justification for that relief. It is premised entirely on the success of their petition for rehearing. Correct factual statements by the Court and repeated legal

errors by Petitioners do not justify rehearing. Neither do they justify recalling the mandate.

CONCLUSION

For these reasons, this Court should deny the petition for rehearing and motion to recall the mandate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 4, 2020, I electronically filed this document with the Clerk of Court using the eFlex electronic-filing system, which will serve all counsel of record.

/s/ Vincent M. Wagner

Vincent M. Wagner