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 Commissioners; 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' Brief in Support of their Motion to Dismiss the Third Amended Consolidated Original Action Complaint; and Consolidated Motion for Expedited Consideration

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STATEMENT OF THE CASE AND THE FACTS

With millions in out-of-state financing, Petitioners want to fundamentally change Arkansas's elections. *See* John Moritz, *Ballot proposals' pro, con groups report finances*, Ark. Democrat-Gazette (July 17, 2020), https://bit.ly/3gT32CD. To that end, they have submitted two initiative petitions to the Secretary of State that they hope to place before the voters in November.

The Secretary rejected both petitions, among other reasons, because Petitioners failed to make a simple—but important—certification when submitting lists of their paid canvassers to the Secretary of State. They did not certify that each of those canvassers had passed criminal background checks. (*See* Second Am. Consol. Orig. Action Compl. (Complaint) ¶¶ 25-49.)[1] Once the Secretary informed them of this failure, they sued for an exemption from the certification requirement. This is not the first exemption that Petitioners have sought from Arkansas's anti-fraud laws. Earlier this year, they sought and failed to obtain a federal-court exemption from the antifraud requirements built into Amendment 7 itself.

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[1] Citations throughout are to the Second Amended Complaint because the Third Amended Complaint incorporates its allegations but does not repeat them.

Then, on July 22, the State Board of Election Commissioners (SBEC) refused to certify the ballot title for one of the two petitions. (*See* ADD1-4.)[2] Petitioners brought this lawsuit challenging the actions of both the Secretary and SBEC, which this Court bifurcated and expedited. Because SBEC correctly determined that the ballot title in question is misleading, this Court should not certify it for the November 3 general election.

A. Petitioners' Two Proposed Amendments

Without identifying any need for change in Arkansas, Petitioners' two initiatives propose using Arkansans to test experimental—and sweeping—electoral reforms. The combined effect of their two initiatives would be to radically change the electoral process in Arkansas.

1. The first proposes a complete shift in Arkansas's redistricting process. Redistricting is currently handled by elected officials, whom Arkansans can hold accountable for their choices. *See, e.g.*, Ark. Const. art. 8, sec. 1 (entrusting aspects of redistricting to the Governor, Attorney General, and Secretary of State).

[2] Citations designated "ADD" are to the addendum to Petitioners' August 7 brief.

Petitioners' redistricting amendment would remove those democratically accountable actors from the redistricting process by creating a new unelected redistricting commission.

The new process would begin with the Chief Justice of this Court appointing a panel of retired judges. (SBEC.ADD9-10.)[3] That panel would then oversee a screening process for applicants to the redistricting commission. (SBEC.ADD10.) The applications that survive the screening process are then divided into three pools: one consisting of applicants from "the political party having the greatest number of representatives in the General Assembly," one of applicants from "the political party having the second-largest number," and one of applicants "affiliated with other political parties or no political party." (SBEC.ADD10.) The redistricting commission is then selected by "randomly draw[ing] three applicants from those remaining in each pool." (SBEC.ADD10.)

Petitioners' redistricting proposal would make Arkansas only the seventh State in the Nation to remove electorally accountable officials from the redistricting process. *See* Justin Levitt, Loyola Law School, *Who draws the lines?*, All

[3] Citations designated "SBEC.ADD" are to the addendum filed with SBEC's August 14 brief.

About Redistricting (accessed Aug. 13, 2020), https://redistricting.lls.edu/who-fed20.php. And it would replace electoral accountability with a random draw.

2. Petitioners' other initiative would dismantle Arkansas's familiar system of primaries, general elections, and runoffs, and replace it with a system nearly without precedent in the United States. It would apply only to elections for a "covered office," which it defines as federal or state legislative office and state executive office. (ADD19.)

The popular name and ballot title for this amendment do not disclose that partisan primaries in Arkansas are currently "open"; *i.e.*, a voter may choose to vote in any party's primary regardless of whether the voter is a registered member of that primary. *See* Ark. Code Ann. 7-7-308(b). Petitioners' proposed amendment would purportedly convert them into "top four open primar[ies]." (ADD19.) Instead of allowing voters to participate in their choice of partisan primary, Petitioners' proposal would create a single primary in which all candidates, regardless of their partisan affiliation, would appear on the ballot. (ADD19.) Each voter would select a single candidate. (ADD19-20.) The four candidates who receive the most votes in the primary would then proceed to the general election, even if all four candidates are from the same political party. (ADD20.) Only California and Washington currently have comparable primary elections. *See State Primary Election Types*, Nat'l Conf. of State Legislatures (Mar. 3, 2020),

https://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx (describing these States' "'top two' primary format"). Neither the popular name nor the ballot title discloses that voting for this amendment would actually repeal Arkansas's current system of open primaries.

Beyond these changes to voters' choices in a primary election, Petitioners' second proposal would also reshape political parties' participation in the primary process. Yet the popular name and the ballot title fail to disclose this fact. Under the proposed amendment, political parties would no longer have any control over which candidates list themselves as affiliated. The candidates themselves would choose whether "their political-party affiliation [is] indicated on the ballot," and if so, what that affiliation is. (ADD20.) Although the proposed amendment claims that a "candidate's designation of such an affiliation will not constitute or imply the nomination, endorsement, or selection of the candidate by the political party designated," it creates no remedy for a political party (or a voter, for that matter) against candidates who misrepresent their party affiliation. (ADD20.)

Regarding the general election, Petitioners' proposal would make different—but no less fundamental—changes. General elections would be conducted through a process that Petitioners call an "instant runoff." (*See* ADD20-22.) Usually referred to by the name "ranked choice voting," the instant-runoff process has received significant media attention recently. *See* Jacey Fortin, *Why Ranked-*

Choice Voting Is Having a Moment, N.Y. Times (Feb. 10, 2020), https://www.nytimes.com/2020/02/10/us/politics/ranked-choice-voting.html; *see also* Annette Meeks, *Minneapolis is adrift, and ranked-choice voting is the culprit*, Minneapolis Star Tribune (Aug. 10, 2020), https://www.startribune.com/minneapolis-is-adrift-and-ranked-choice-voting-is-the-culprit/572066082/. In 2018, Maine became the first State to use ranked-choice voting in a statewide election. *See* Law & Legis. Reference Libr., *Ranked Choice Voting in Maine*, Me. State Legislature (Aug. 3, 2020), https://legislature.maine.gov/lawlibrary/ranked-choice-voting-in-maine/9509. Petitioners' proposed amendment would make Arkansas the second State to use ranked-choice voting statewide. But neither the popular name nor the ballot title disclose the novelty of these proposed new election procedures.

B. Procedural Background

Although Petitioners timely submitted signed petitions for both initiatives, the Secretary's office concluded that Arkansas law prohibited counting any of those signatures. (*See* Complaint ¶¶ 16-18.) The Election Code requires initiative sponsors to "obtain[]" a "criminal record search" in the 30 days prior to when a "paid canvasser begins collecting signatures." Ark. Code Ann. 7-9-601(b)(2). Then, when the sponsor submits a "list of paid canvassers to the Secretary of State, the sponsor shall certify to the Secretary of State that each paid canvasser in the sponsor's employ has passed a criminal background check in accordance with this

section." *Id.* 7-9-601(b)(3). In other words, there are two requirements for each paid canvasser: A criminal background check must be both "obtained" and "passed."

Petitioners certified only that their paid canvassers had obtained a background check—not that they had in fact passed one. To be precise, Petitioners certified that state and federal background checks "have been timely acquired." (Complaint ¶ 31.) They never made a certification about the results of those background checks. And they never explained why their certification refers to acquiring background checks but not to passing them.

Based on Petitioners' incomplete certification, the Secretary concluded that Arkansas law barred his office from counting Petitioners' signatures. His conclusion was based on clear statutory language barring him from "count[ing] for any purpose" all signatures on a petition part 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." Ark. Code Ann. 7-9-126(b)(4)(A); *see id.* 7-9-601(f) ("Signatures incorrectly obtained or submitted under this section shall not be counted by the Secretary of State for any purpose."). Because Petitioners' defective background-check

certification triggered these "do not count" provisions, the Secretary notified Petitioners that their initiative petitions had failed and that they were not entitled to a cure period. (Complaint ¶ 18.) *See* Ark. Code Ann. 7-9-126(d).

On July 17, Petitioners brought this lawsuit seeking an exemption from the background-check-certification requirement. (Complaint ¶ 19.) As already noted, earlier this year, Petitioners asked the federal courts to exempt them from certain other antifraud provisions in Amendment 7 and its facilitating statutes. *See Miller v. Thurston*, — F.3d —, 2020 WL 4218245, at *1 (8th Cir. July 23, 2020). Although the federal district court rewrote portions of Arkansas law, the Eighth Circuit reversed the district court's judgment. *Id.* at *2, 8-9. Because the antifraud provisions Petitioners challenged in that case aren't particularly burdensome, said the court, Petitioners aren't entitled to an exemption from them. *Id.* at *7-8; *see id.* at *6 (holding that Amendment 7's notarization requirement simply doesn't implicate federal rights). Given Petitioners' lack of any evidence of burden here, this Court should follow the Eighth Circuit's reasoning in refusing to grant exemptions to other antifraud requirements.

Less than a week after filing this lawsuit, Petitioners amended their complaint. (Complaint ¶ 20.) That same day the Secretary notified Petitioners of additional reasons his office would not be counting the signatures on their petitions. (Complaint ¶ 21.)

The next day, July 22, SBEC met to fulfill its statutory duty to determine whether the popular name and ballot title for Petitioners' initiatives are misleading. (*See* ADD1-2.) At that meeting, SBEC voted to certify the popular name and ballot title for the redistricting amendment. (SBEC.ADD1-3.) But it voted not to certify the popular name and ballot title for the ranked-choice-voting amendment. (ADD1.) Then, in a July 24 letter to Open Primaries Arkansas, SBEC explained its reasoning. (ADD1-2.)

On July 27, Petitioners filed a second amended complaint that added SBEC as a respondent and sought an order requiring certification of the ranked-choice-voting amendment's popular name and ballot title. (*See* Complaint ¶¶ 57-73.) Despite the expedited nature of this proceeding, Petitioners did not obtain a summons for SBEC until over two weeks later, on August 11. In the meantime, this Court had already ordered SBEC to begin briefing the issues.

ARGUMENT

For at least three reasons, Petitioners' continuously evolving complaints do not "state facts in order to entitle the pleader to relief." *Harmon v. Payne*, 2020 Ark. 17, at 3, 592 S.W.3d 619, 622: (1) Under any applicable standard, they have failed to comply with Arkansas's background-check-certification statute; (2) they have shown no error in SBEC's misleadingness determination; and (3) SBEC's misleadingness review complies with Amendment 7. Therefore, this Court should dismiss Petitioners' complaints.

I. This Court should not exempt Petitioners from certifying that their paid canvassers passed pre-signature-collection background checks.

Much of Petitioners' argument for why their certifications comply with the statute rests on the incorrect claim that this Court will apply a "substantial compliance" standard. (*See* Petitioners' 8/14 Br. 24-26.)[4] But this Court has made clear that Petitioners must strictly comply with other requirements in the same provision at issue here. *See Zook v. Martin* (*Zook II*), 2018 Ark. 306, at 4-5, 558 S.W.3d 385, 390; *Benca v. Martin*, 2016 Ark. 359, at 10-13, 500 S.W.3d 742, 749-50. If this Court applies the same strict-compliance standard that it applied in *Zook II* and *Benca*, then Petitioners' certifications must be insufficient. And even if this Court

[4] Citations to "Petitioners' 8/14 Br." are to Petitioners' Brief on Counts 1 & 2, which they filed August 14, 2020.

decides to apply a "substantial compliance" standard, Petitioners' certifications still fail.

At this point, two Special Masters appointed by this Court have concluded that a certification like Petitioners' certification does not satisfy the background-check-certification statute. (*Compare* Special Master's Rep. at 7-8, *with* Master's Rep. & Findings at 5-9, *Arkansans for Healthy Eyes v. Thurston*, No. CV-20-136 (Ark. July 13, 2020).) This Court should reach that same conclusion and dismiss Petitioners' complaints.

A. Because this Court's precedent requires strict compliance with the background-check-certification statute, Petitioners' certification fails.

In recent years, when this Court has faced the question whether initiative sponsors have complied with subsection 126(b)'s "do not count" provision, it has required them to strictly comply with that provision. *See Zook II*, 2018 Ark. 306, at 4-5, 558 S.W.3d at 390; *Benca*, 2016 Ark. 359, at 10-13, 500 S.W.3d at 749-50. And Petitioners make essentially no effort to show that their background-check certifications strictly comply with paragraph 126(b)(4), which requires the background-check certifications, among other things. *See* Ark. Code Ann. 7-9-126(b)(4)(A), -601(b)(3). Instead, they focus on older cases—some from over 100 years ago—to argue that they need only to substantially comply with paragraph 126(b)(4). (*See* Petitioners' 8/14 Br. 24-26.) Those older cases do not override

this Court's more recent guidance, which requires strict compliance. Because Petitioners did not strictly comply with paragraph 126(b)(4), this Court should require that their initiative petitions be excluded from the ballot.

The need for strict compliance derives directly from the language of subsection 126(b). Signatures "shall not be counted for any purpose" if the petition part is defective in a way described by any of the eight paragraphs in the subsection. Ark. Code Ann. 7-9-126(b). Paragraph 4(A) incorporates the background-check-certification requirement. *See id.* 7-9-126(b)(4)(A). And under that requirement, Petitioners needed to certify both that their paid canvassers "obtained" background checks within 30 days before collecting signatures, and that these canvassers also "passed" their background checks. *Id.* 7-9-601(b)(2) through (3).

Petitioners certified only that their paid canvassers "acquired" a background check (Petitioners' 8/14 Br. 22), the equivalent of having "obtained" one, *see* Ark. Code Ann. 7-9-601(b)(2). Their failure to certify that their paid canvassers also "passed" a background check left the Secretary with no choice but to refuse to count their improperly obtained signatures. *See id.* 7-9-126(b) (providing that such signatures "shall not be counted for any purpose"); *id.* 7-9-601(f) ("Signatures incorrectly obtained or submitted under this section shall not be counted by the Secretary of State for any purpose.").

This Court's recent precedent on subsection 126(b)'s "do not count" provision makes clear that Petitioners' certification fails. In *Benca*, this Court required strict compliance with subsection 126(b). *See* 2016 Ark. 359, at 10-13, 500 S.W.3d at 749-50. There the Court considered the language that is currently codified as paragraph 126(b)(3): Signatures "shall not be counted for any purpose" if "the petition lacks the signature, printed name, and residence address." Ark. Code Ann. 7-9-126(b)(3) (formerly paragraph 126(b)(2)). It was essentially undisputed that the sponsors in *Benca* had not strictly complied with that provision. But the sponsors in that case argued that they had nonetheless substantially complied. *Benca*, 2016 Ark. at 10-11, 500 S.W.3d at 749.

Rejecting that argument, the Court contrasted the mandatory language of subsection 126(b) with the language of other provisions. *Id.* at 13, 500 S.W.3d at 750. For example, other sections expressly require a substantial-compliance standard. *See* Ark. Code Ann. 7-9-109(b). Subsection 126(b), by contrast, contains only the "mandatory" word "shall." *Benca*, 2016 Ark. 359, at 13, 500 S.W.3d at 750. Therefore, "the clerical error exception and substantial compliance cannot be used as a substitute for compliance with the statute." *Id.* And the Court disqualified all the signatures that did not strictly comply with subsection 126(b).

Two years after *Benca*, this Court applied its strict-compliance standard in *Zook II*. Paid canvassers must sign each petition part and state, among other

things, that their "current residence address appearing on the verification is correct." Ark. Code Ann. 7-9-108(b). If the petition part "lacks the . . . residence address of the canvasser," then "all signatures appearing on the petition part shall not be counted." *Id.* 7-9-126(b)(3). Because of canvassers' confusion about whether to write their temporary or permanent residence address, some petitions in *Zook II* did not strictly comply. 2018 Ark. 306, at 4-5, 558 S.W.3d at 389-90. Despite this apparently honest mistake about the required certification, this Court invalidated all the signatures collected by such canvassers. Citing *Benca*, the Court reiterated the need to strictly comply with subsection 126(b): "We specifically noted that the term 'shall' is mandatory and the clerical-error exception or substantial compliance cannot be used as a substitute for fulfillment with the statute." *Zook II*, 2018 Ark. 306, at 5, 558 S.W.3d at 390.

Under the strict-compliance standard applied by this Court in *Benca* and *Zook II*, Petitioners' certification must be insufficient. Subsection 126(b) requires them to do two things: (1) "obtain[]" background checks "within thirty (30) days before the date that the paid canvasser begins collecting signatures"; and (2) certify that each paid canvasser "has passed" his or her background check. Ark. Code Ann. 7-9-601(b)(2) through (3); *see id.* 7-9-126(b)(4)(A). Petitioners' certification satisfies only the first of those conditions. They have no more strictly complied

with subsection 126(b) than the *Benca* or *Zook II* sponsors, whose paid canvassers did not properly indicate their residence address.

None of the old substantial-compliance cases that Petitioners cite change this conclusion. (*See* Petitioners' 8/14 Br. 24-26.) Those cases all stand for the proposition that this Court expects substantial compliance with the text of Amendment 7 itself. *See, e.g.*, *Reeves v. Smith*, 190 Ark. 213, 78 S.W.2d 72, 73-74 (1935). 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." *Benca*, 2016 Ark. 359, at 13, 500 S.W.3d at 750. That distinction explains the different results in *Zook I* and *Zook II*. *Compare Zook v. Martin* (*Zook I*), 2018 Ark. 293, at 4-5, 557 S.W.3d 880, 883 (allowing substantial compliance with Amendment 7), *with Zook II*, 2018 Ark. 306, at 5, 558 S.W.3d at 390 (requiring strict compliance with statute).

By certifying only that their paid canvassers had acquired background checks, Petitioners failed to strictly comply with the statute. As a result, the Secretary correctly refused to count Petitioners' signatures. This Court should therefore dismiss all of Petitioners' continuously evolving complaints for failure to state a claim.

B. Even under a novel "substantial compliance" standard, Petitioners did not certify that their paid canvassers passed background checks.

Even if this Court were to depart from *Benca* and *Zook II* to apply a substantial-compliance standard, Petitioners' certification would still not suffice. As an initial matter, it is unclear what "substantial compliance" means in this context. Either Petitioners acquired background checks for their paid canvassers and certified that they passed those background checks, or they didn't.

Whatever substantial compliance means, Petitioners haven't shown it. By their lights, this controversy is about nothing more than their failure to "us[e] the word 'passed' in [their] certifications to the Secretary." (Petitioners' 8/14 Br. 23.) But "the substance" of Petitioners' certification (*id.* 26), no less than its literal wording, fulfills only one of the statute's two requirements. Even if this Court ignores Petitioners' failure to write a certification that clearly complies with the statute—a failure that they have never explained—Petitioners' certification does not substantially comply with Arkansas law.

It is first helpful to return to the statutory text. Section 601, as incorporated by subsection 126(b), contains the background-check-certification provision. First, a sponsor must "obtain[]" a background check "within thirty (30) days before the date that the paid canvasser begins collecting signatures." Ark. Code Ann. 7-9-601(b)(2); *see id.* 7-9-126(b)(4)(A). Second, the sponsor must certify to the Secre-

tary that "each paid canvasser in the sponsor's employ has passed a criminal background check." *Id.* 7-9-601(b)(3). Unless a sponsor has both obtained a background check for a paid canvasser and certified that the background check was passed, signatures collected by the canvasser "shall not be counted for any purpose." *Id.* 7-9-126(b); *see id.* 7-9-601(f).

Even liberally construed, Petitioners' certification meets only the first of those requirements. It certifies that background checks were "timely acquired" (*i.e.*, "obtained"). (Petitioners' 8/14 Br. 22.) But it says nothing about the results of those background checks. Petitioners try and get around this obvious deficiency by pointing to the opening phrase ("In compliance with Arkansas Code § 7-9-601") and closing phrase ("as required by Act 1104 of 2017") of their certification. (*Id.* 22-23.) Those generalized certifications cannot compensate for Petitioners' particular failures.

Consider a clarifying hypothetical. Appended to this brief is a certificate of compliance. Imagine if it read:

> In compliance with Rule 4-2(a)(10) of this Court's pilot rules on electronic filings this statement serves as certification that the jurisdictional statement, the statement of the case and the facts, and the argument sections altogether contain 8,000 words as required by Rule 4-2(d).

This certificate cites the correct pilot-project rules. And it certifies that the brief complies with this Court's new 8600-word limit. Yet the Clerk's office should nevertheless reject a brief with such a certificate. That's because the pilot project's

rules have *two requirements* for the certificate of compliance: one, compliance with the word limit; and two, compliance "with Administrative Order No. 19's requirements concerning confidential information." Ark. Sup. Ct. Pilot Project R. 4-2(a)(10). Despite certifying compliance with the rules at a general level, the enumeration of the word-count certification and omission of the Administrative Order No. 19–certification implies that the certificate's drafter was unaware of the omitted certification requirement. *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law* 107 (2012) ("The expression of one thing implies the exclusion of others.").

Petitioners' background-check certification suffers a similar flaw. It expressly attests to compliance with the requirement that a "criminal record search shall be obtained within thirty (30) days before the date that the paid canvasser begins collecting signatures." Ark. Code Ann. 7-9-601(b)(2). But it omits any reference to the second statutory requirement—"that each paid canvasser in the sponsor's employ has passed a criminal background check in accordance with this section." *Id.* 7-9-601(b)(3). By expressly attesting to one requirement and not even acknowledging the other, the implication is that they were unaware of the other requirement.

Nor are Petitioners correct that the closing phrase, in particular, makes clear that their paid canvassers "passed" background checks. (*See* Petitioners' 8/14 Br. 23.) That phrase—"as required by Act 1104 of 2017"—they say, actually amounts

to their "certification language [that] the names on the paid-canvasser list are of persons who do not have any disqualifying crimes." (*Id.*) But Petitioners do not explain exactly what language in Act 1104 they think clarifies this. Most of Act 1104 has nothing to do with paid canvassers. The only section that is at all relevant does not contain any list of "certain disqualifying crimes." (Petitioners' 8/14 Br. 23.) Instead, it makes minor technical corrections to the process of submitting a list of paid canvassers to the Secretary's office. *See* 2017 Ark. Act 1104, sec. 6, 91st Gen. Assembly, Reg. Sess. (amending Ark. Code Ann. 7-9-601), https://bit.ly/34aqx6k.

Other statutory schemes regarding background checks make the distinction clearer between acquiring and passing a background check. In some statutes, a criminal history is not immediately disqualifying. The Office of the Arkansas Lottery, for example, is empowered to require its vendors to "*undergo* a state and federal criminal background check." Ark. Code Ann. 23-115-501(b)(5)(B)(i) (emphasis added). But the statute says nothing of *passing* a background check. That's because it is a disclosure provision; the vendor must provide the Arkansas Lottery with a "disclosure of the details of" certain types of criminal history. *Id.* 23-115-501(b)(5)(A). Similarly, the General Assembly requires operators of certain social-service providers "to undergo periodic criminal history records checks." *Id.*

20-38-102(a)(4), (b). But individual agencies may determine whether a particular criminal history disqualifies the operator. *See id.*

Where the General Assembly wishes to mandate that certain people merely acquire a background check, it knows how to do that. Regarding paid canvassers, it has required them to both acquire and pass a background check. Because Petitioners certified that they complied with only one of those two requirements, they have not substantially complied with both.

Petitioners respond primarily with an uncharitable characterization of the Secretary's concerns. They claim that the Secretary will not be satisfied unless an initiative sponsor utters "magic words." (*See* Petitioners' 8/14 Br. 24-29.) But Petitioners might have satisfied the background-check-certification requirement any number of ways: They might have said, "A background check was acquired within 30 days before this canvasser began collecting signatures and no disqualifying information was discovered." Or, "A background check acquired within 30 days before this canvasser began collecting signatures returned no disqualifying criminal history for this paid canvasser." The possibilities are literally endless. Petitioners chose none of them. Instead, they certified only that background checks had been "acquired." Such an incomplete certification inevitably raises a follow-up question: "And did you find out anything disqualifying?"

No matter, according to Petitioners, because they allege *ex post* that none of their paid canvassers in fact had disqualifying convictions. (*See* Petitioners' 8/14 Br. 21-22.) But pre-signature-collection certification furthers Arkansas's interest in rooting out fraud in the initiative process before it begins—not just in policing it on the backend. Fraud in electoral democracy "has a systemic effect": "It 'drives honest citizens out of the democratic process and breeds distrust of our government.'" *Doe v. Reed*, 561 U.S. 186, 197 (2010) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam)). Addressing fraud after the fact cannot completely rectify it.

Finally, Petitioners suggest that because strict compliance with the statute's requirement to obtain a *federal* background check from the Arkansas State Police is impossible, this Court should excuse them from the need for their paid canvassers to both obtain and pass a *state* background check. (*See* Petitioners' 8/14 Br. 27-29.) But Petitioners' faulty certification makes no distinction between federal and state background checks. However this Court resolves the difficulties with the federal-background-check requirement, its resolution will leave the state-background-check requirement untouched. And Petitioners have failed even to substantially comply with the requirement that their paid canvassers pass an Arkansas state background check.

That failure is enough to resolve this case, and this Court should dismiss the complaints.

II. Petitioners show no error in SBEC's refusal to certify their petition, which has a misleading popular name and ballot title.

In 1943, the General Assembly first tasked an Executive Branch official with reviewing proposed popular names and ballot title for initiative petitions. *See* Act 195, sec. 4, 54th General Assembly, Regular Session, Ark. Acts 415, 417 (1943); *see also* Act 208, sec. 1, 71st General Assembly, Regular Session, vol. II (book 1) Ark. Acts 279, 280 (1977). Last session, the General Assembly transferred that review to SBEC. *See* 2019 Ark. Act 376, secs. 6, 9, 92d General Assembly, Regular Session (moving most of the substance of former Ark. Code Ann. 7-9-107(b) through (d), to newly codified Ark. Code Ann. 7-9-111(*i*)).

Although SBEC's role in considering ballot titles is new, it remains clear that "[t]he issue of the sufficiency of a ballot title is a matter of law to be decided by this court." *Wilson v. Martin*, 2016 Ark. 334, at 7, 500 S.W.3d 160, 166. Even so, this Court has always "consider[ed] the fact of [the] Attorney General['s] certification" decision and "attach[ed] some significance to it." *Id.* at 7-8, 500 S.W.3d at 166. That does not mean, of course, that this Court must "defer to" SBEC's interpretation of a legal question. *Id.* at 8, 500 S.W.3d at 166. But it should place on Petitioners the burden of proving that SBEC's decision is incorrect. *Cf. Myers v. Yamato Kogyo Co.*, 2020 Ark. 135, at 6, 597 S.W.3d 613, 617 ("On appeal [from

Workers' Compensation Commission], we view the evidence in the light most favorable to the Commission's decision and affirm that decision if it is supported by substantial evidence.").

Petitioners' contrary claim about the burden of proof is based on a misreading of Amendment 7. (*See* Petitioners' 8/7 Br. 15.)[5] Petitioners cite only precedents applying Amendment 7's standard for a "legal proceeding[] to *prevent* giving legal effect to a[] petition." Ark. Const. art. 5, sec. 1 (emphasis added). This case is just the opposite of the sort of legal proceeding described by Amendment 7: Petitioners have sued SBEC to *require* giving legal effect to their initiatives. Petitioners essentially seek mandamus relief against SBEC. *See Wyatt v. Carr*, 2020 Ark. 21, at 9, 592 S.W.3d 656, 661 ("the purpose of a writ of mandamus in a civil or a criminal case is to enforce an established right or to enforce the performance of a duty"). Because their claim against SBEC sounds in mandamus, Petitioners "must show a clear and certain right to the relief sought." *Id.* In this context, that means Petitioners must show clearly and certainly that the popular name and ballot title of the ranked-choice-voting amendment are not misleading.

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[5] Citations designated "Petitioners' 8/7 Br." are to Petitioners' August 7 brief on Count 3.

A. Petitioners obscure the actual nature of their proposed amendment through technical terminology.

By "obliquely describ[ing] in highly technical terms" the changes that the ranked-choice-voting amendment would make to Arkansas law, the popular name and ballot title "cloak in semantic obscurity the actual nature of the proposed enterprise." *Christian Civic Action Comm. v. McCuen*, 318 Ark. 241, 249, 884 S.W.2d 605, 609-10 (1994).

This flaw is clearest in regard to the popular name: "A Constitutional Amendment Establishing Top Four Open Primary Elections and Majority Winner General Elections with Instant Runoffs if Necessary." (ADD14.) Using the term "Open Primary"—a term that is never defined in the ballot title—will mislead voters. Under the established definition of that term, Arkansas already has "open" primaries, along with 14 other States. *See* Ark. Code Ann. 7-7-308(b); 26 Am. Jur. 2d *Elections*, sec. 224 (Aug. 2020 update) ("The major characteristic of open primaries is that any registered voter can vote in the primary of either party."); *see also State Primary Election Types*, Nat'l Conf. of State Legislatures (Mar. 3, 2020), https://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx.

According to the popular name of the ranked-choice-voting amendment, a vote "FOR" the amendment is a vote for an open primary system in Arkansas. In reality, however, a vote "FOR" the amendment is a vote against Arkansas's currently existing open primary system. So the popular name of the ranked-choice-

voting amendment is "designed in such manner that a vote 'FOR' the issue would be a vote against the matter or viewpoint that the voter believes himself or herself to be casting a vote for." Ark. Code Ann. 7-9-111(*i*)(4)(A). SBEC was therefore statutorily prohibited from certifying it.

This Court has kept initiatives off the ballot for less misleading popular names. In *Roberts*, for example, the popular name described an amendment as "requir[ing] ¾ legislative approval and majority voter approval of any *sales* tax increases." *Roberts v. Priest*, 341 Ark. 813, 819, 20 S.W.3d 376, 379 (2000) (emphasis added). That popular name failed to inform voters that the amendment would apply not just to sales taxes but to *any taxes*. *Id.* at 823, 20 S.W.3d at 381. So this Court held that the popular name was "clearly misleading." *Id.* at 822, 20 S.W.3d at 381. Here, by using the term of art "open primary" in an idiosyncratic way, Petitioners have written a popular name that would leave voters not merely with an incomplete understanding but with a positively incorrect view of the ranked-choice-voting amendment's effects. So if the popular name in *Roberts* was misleading and insufficient, then the popular name here surely is.

The term "open primary" has a well-established meaning. Prefacing "Open Primary" with the modifier "Top Four" does not inform voters that "Open Primary" has been emptied of its conventional meaning and redefined to carry a sense with which they are unacquainted. (*See* Petitioners' 8/7 Br. 17.) "Placing the

voter in a position of either having to be an expert in the subject" of the proposed amendment—here, novel election procedures—or of "having to guess as to the effect his or her vote would have is impermissible." *Kurrus v. Priest*, 342 Ark. 434, 444, 29 S.W.3d 669, 674 (2000). And the ballot title does nothing to remedy voters' confusion because it never uses the term "open primary"—let alone "top four open primary."

Beyond that failure to clarify the popular name, the ballot title is misleading in its own right. Like the popular name, it uses the term "instant runoff" to describe an election system that is novel to most Americans. (ADD14.) As already discussed, however, to the extent Americans have heard of this system at all, they have likely heard it referred to as ranked-choice voting. *See supra* pp. 13-14. To understand that "instant runoff" elections are the same thing as elections conducted by ranked-choice voting, voters considering Petitioners' proposed amendment will need to parse a long, technical description of these elections. Petitioners could have avoided this likely source of voter confusion by using the more familiar term. Their choice not to do so renders the ballot title misleading.

Compare this ballot title with the one in *Christian Civic Action Committee*, 318 Ark. at 248-49, 884 S.W.2d at 609-10. The proposed amendment there would have authorized, among other things, "additional racetrack wagering." *Id.* at 248, 884 S.W.2d at 609. That term was defined as "wagering on games of chance or

skill conducted by mechanical, electrical, electronic or electromechanical devices and table games." *Id.* That definition, said the Court, "obliquely describe[d] in highly technical terms . . . the elements of casino-style gambling." *Id.* at 249, 884 S.W.2d at 609. But voters would not be able "to translate the jargon within a reasonable amount of time" while they stood in the voting booth. *Id.* Finding these "compounded euphemisms [were] designed to cloak in semantic obscurity the actual nature of the proposed enterprise," this Court invalidated the ballot title. *Id.* at 249-50, 884 S.W.2d at 609-10.

The same reasoning invalidates the ballot title here. Although ranked-choice voting may not a *well*-known concept, it is certainly *better* known than the term "instant runoff election." Like the popular name's unconventional use of the term "open primary," the popular name and ballot title's use of an obscure term renders them misleading.

The effect of some of the ballot title's terminology in this case is to give voters an affirmatively false impression of the effect of the ranked-choice-voting amendment on Arkansas's existing election procedures. This obscuring of meaning combined with the length and complexity of this ballot title required SBEC to find it misleading and refuse to certify it for the upcoming election. *See Dust v. Riviere*, 277 Ark. 1, 6, 638 S.W.2d 663, 666 (1982) (holding that although length is not "a controlling factor," "it is a consideration").

B. The proposed amendment will likely lead to election litigation in federal court, which the ballot title does not disclose.

The ballot title of the ranked-choice-voting amendment also fails to disclose essential facts that would give voters "serious ground for reflection." *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994). Chief among these undisclosed essential facts is the risk of litigation in federal court related to changes that the amendment would require to Arkansas's election laws.

One undisclosed source of potential federal litigation regarding the ranked-choice-voting amendment is a 30-year-old federal-court decree. Applying Section 3(c) of the Voting Rights Act, 52 U.S.C. 10302(c), a three-judge district court held in 1990 "that any further statutes, ordinances, regulations, practices, or standards imposing or relating to a majority-vote requirement in general elections in this State must be subjected to the preclearance process." *Jeffers v. Clinton*, 740 F. Supp. 585, 601 (E.D. Ark. 1990); *see* Edward K. Olds, Note, *More than "Rarely Used": A Post*-Shelby *Judicial Standard for Section 3 Preclearance*, 117 Colum. L. Rev. 2185, 2197-99, 2210-12 (2017). And a key feature of the ranked-choice-voting amendment is "to ensure a majority winner." (ADD20-22.) Adopting the amendment without taking it through the preclearance process would raise questions of its validity under the Voting Rights Act.

In this way, this case is similar to *Lange v. Martin*, 2016 Ark. 337, 500 S.W.3d 154. There the Court held that when a ballot title "does not inform the voters that the Amendment violates federal law," the ballot title has omitted information that "would give the voters a serious basis for reflection on how to cast their ballots." *Id.* at 8-9, 500 S.W.3d at 159. Although the question of the ranked-choice-voting amendment's legality under federal law is less clear than the question was in *Lange*, the same principle applies. Knowing that the proposed amendment could lead to reopening *Jeffers* would give voters a serious basis for reflection. The ballot title therefore needed to disclose it. *See id.*

Petitioners' only response on this point proves that they don't understand the federal laws implicated by the ranked-choice-voting amendment. (*See* Petitioners' 8/7 Br. 19-20.) The U.S. Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), is completely beside the point. *Jeffers* relied on Section 3 of the Voting Rights Act. *See* 740 F. Supp. at 601. *Shelby County*, by contrast, considered only Sections 4 and 5 of the Voting Rights Act. Section 4 contains the criteria for determining which States were subject to Section 5. *See* 570 U.S. at 537-38. But Congress had not updated Section 4's criteria for decades. So the Supreme Court found Section 4 an unconstitutional "basis for subjecting jurisdictions to preclearance" under Section 5. *Id.* at 557. *Shelby County*'s majority did not cite

Section 3 even one time. Petitioners similarly misunderstand the federal regulations they cite. (Petitioners' 8/7 Br. 20 (citing 28 C.F.R. 51.22-23).) The U.S. Department of Justice promulgated those regulations as part of its role in enforcing Section 5 of the Voting Rights Act, not Section 3.

By failing to inform voters that the ranked-choice-voting amendment may lead to federal-court litigation, the amendment's ballot title fails to disclose information to voters that would give them a serious basis for reflection.

C. The ballot title fails to disclose the sweeping changes that would be required to Arkansas's political parties.

Separate from the ballot title's failure to inform voters about its possible federal-law implications, it also fails to disclose how it would change the role of political parties, which also renders the ballot title misleading. *See Scott v. Priest*, 326 Ark. 328, 332, 932 S.W.2d 746, 747 (1996); *Bailey*, 318 Ark. at 288, 884 S.W.2d at 944.

Under current law, political parties in Arkansas have significant autonomy in managing their membership and their primaries. *See* Ark. Code Ann. 7-3-101. In fact, under certain circumstances, "a political party can remove a nominee for good and legal cause, but the party is merely required to petition the circuit court in so doing." *Ivy v. Republican Party of Ark.*, 318 Ark. 50, 55-56, 883 S.W.2d 805, 808 (1994). Yet the ranked-choice-voting amendment would mostly remove the political parties from the primary process. (*See* ADD19-20.) And it would apparently

repeal political parties' ability to remove a candidate from the general election ballot for "good and legal cause." (*See id.*)

The ballot title needed to disclose these changes. Petitioners' only response is to wave them away as "speculative detail." (Petitioners' 8/7 Br. 21.) But this Court has made clear in the past that undisclosed repeals of existing statutes can render ballot titles misleading. For example, this Court held a ballot title to be misleading because it did not disclose that the proposed amendment would require workers' compensation laws to be construed liberally, which would repeal a statute requiring strict construction. *See Bailey*, 318 Ark. at 288, 884 S.W.2d at 944. And in another case, the Court considered a ballot title disclosing that a proposed amendment would create a 20% threshold for local-option, casino-gambling elections. *Scott*, 326 Ark. at 332, 932 S.W.2d at 747. Although that much was true, this Court held the title was insufficient because it did not disclose that the threshold was higher than the 15% threshold already in Amendment 7. *Id.*

Because the ballot title for the ranked-choice-voting amendment does not disclose the extent to which it would change Arkansas law regarding political parties, it is misleading.

D. The ballot title does not inform voters of far-reaching electoral consequences, including the need for a complete overhaul of Arkansas's voting equipment.

The ballot title must inform voters of the extent of all its consequences—not just its legal ones. A ballot title is misleading if it "does not inform the voter of the far-reaching consequences of voting for [the] measure." *Kurrus*, 342 Ark. at 443, 29 S.W.3d at 673.

The ballot title for the ranked-choice-voting amendment does not inform voters of the expense of outfitting the entire State with new voting equipment capable of complying with the amendment. "Arkansas's current voting system is not capable of implementing the proposed amendment." (ADD2.) If the amendment were adopted, therefore, it "would likely require the State to procure new voting equipment at a significant expense"—that is, "if such equipment could even be found." (ADD2.)

Although Petitioners again do little more than dismiss this as "speculative detail" (Petitioners' 8/7 Br. 22), this Court has made clear that the failure to disclose the expense of implementing an amendment can render its ballot title misleading. In *Johnson v. Hall*, for instance, the Court considered a constitutional amendment called the "Safety Crossing Amendment – An amendment to require adequate safety devices at all public railroad crossings." 229 Ark. 404, 405, 316

S.W.2d 197, 197 (1958). But that ballot title failed to convey to voters the "additional burden of heavy expense" that the proposed amendment would place "on the railroads," amounting to "millions of dollars to install and maintain such devices, at an estimated 3,600 railroad crossings in Arkansas." *Id.* at 407, 316 S.W.2d at 198. For that and other reasons, this Court held the ballot title misleading in *Johnson*.

Because the ballot title for the ranked-choice-voting amendment does not disclose that it will cause the State to buy an entire fleet of new, expensive voting equipment, it is misleading.

III. The Arkansas Constitution does not require SBEC to certify misleading popular names and ballot titles.

To try and avoid SBEC's misleadingness finding, Petitioners also argue that Amendment 7 permits no one other than this Court to evaluate the sufficiency of a popular name and ballot title. As Petitioners themselves acknowledge (*see* Petitioners' 8/7 Br. 26), the Attorney General long participated in this process. And this Court previously approved of the Attorney General's role in sufficiency review. *See Washburn v. Hall*, 225 Ark. 868, 871, 286 S.W.2d 494, 497 (1956). Contrary to Petitioners' claim (*see* Petitioners' 8/7 Br. 27-31), nothing about the General Assembly's decision last year to transfer the Attorney General's role to SBEC renders *Washburn* inapplicable.

Ultimately, this Court need not reach Petitioners' constitutional claim if it agrees with SBEC that the popular name and ballot title are misleading. It can simply decide as a matter of its own authority under Amendment 7 that the ranked-choice-voting amendment should not appear on the ballot.

A. Standard of Review.—To shore up their constitutional attack on the sufficiency-review process, Petitioners misstate the applicable standard. Without explanation, they claim strict scrutiny applies to any regulation of the initiative process. (*See* Petitioners' 8/7 Br. 23-24.) But this claim does not square with Amendment 7's express instructions to the General Assembly to legislate to facilitate its operation. Amendment 7 grants two types of legislative authority to the General Assembly: mandatory authority to prevent fraud; and permissive authority to "facilitate [Amendment 7's] operation." Ark. Const. art. 5, sec. 1.

In fact, even Petitioners admit that they bear the burden of proving that Act 376 clearly exceeds those grants of legislative authority: "Acts of the legislature are presumed constitutional and Petitioners in this case have the burden to prove otherwise." (Petitioners' 8/7 Br. 23.) And presuming that Act 376 is a constitutionally permissible exercise of an express grant of legislative authority is inconsistent with applying strict scrutiny. In the past, this Court has instead asked whether a challenged law imposes any "burdensome condition," *Pafford v. Hall*,

217 Ark. 734, 738, 233 S.W.2d 72, 74 (1950); or an "unwarranted restriction on Amendment No. 7," *Washburn*, 225 Ark. at 871, 286 S.W.2d at 497.

This amounts to something like rational-basis review: If an act is rationally related to Amendment 7's express grants of legislative authority, then it is permissible. That is why this Court has approved of laws regulating "the validity of individual signatures," when "those individual signatures are called into question," while simultaneously striking down similar laws that "invalidat[e] an entire petition part for issues with individual signatures." *McDaniel v. Spencer*, 2015 Ark. 94, at 18, 457 S.W.3d 641, 654. It is not rationally related to fraud prevention or the facilitation of the initiative process to invalidate one signature on the basis of problems with another signature. *See id.* at 18-19, 457 S.W.3d at 654.

B. The Only Relevant Precedent Defeats Petitioners' Claim.—In 1956, this Court rejected a constitutional challenge to Act 195 of 1943, which was the predecessor to the act vesting SBEC with responsibility to review the sufficiency of a popular name and ballot title. *Washburn*, 225 Ark. at 871-74, 286 S.W.2d at 497-99. In that case, the initiative sponsors failed to submit a popular name or ballot title to the Attorney General. *Id.* at 872, 286 S.W.2d at 497. So the sponsors challenged the act requiring them to seek a sufficiency determination from the Attorney General. *See id.* at 871, 286 S.W.2d at 497.

Holding that the Attorney General's review imposed "no unwarranted restriction on Amendment No. 7," this Court rejected that challenge. *Id.* This holding arose from the conclusion that submitting a proposed popular name and ballot title for review was not a particularly onerous task. *See id.* at 872, 286 S.W.2d at 497-98. Moreover, "[i]t goes without saying that before any one could safely undertake to refer a measure to the people it would be necessary to review the Constitution and the Statutes pertaining to such referendum." *Id.* at 872, 286 S.W.2d at 498. And for anyone aggrieved by the Attorney General's certification decision, "there would be a remedy in the courts." *Id.* at 873, 286 S.W.2d at 498.

This Court's approval of the Attorney General's review procedure in *Washburn* should lead it to reject Petitioners' constitutional challenge to SBEC's role here. Petitioners misunderstand the constitutional analysis by suggesting that any procedures that are not identical to the "baseline" in *Washburn* fail constitutional scrutiny. (Petitioners' 8/7 Br. 30.) Nothing in *Washburn* purported to set a constitutional baseline against which all other regulations of the initiative process must be measured. Instead, the Court analyzed the burdens the statute in that case imposed to determine whether it was an "unwarranted restriction on Amendment 7." *Washburn*, 225 Ark. at 871, 286 S.W.2d at 497. Each law must be measured against Amendment 7—not against all other possible laws the General Assembly might have enacted.

Petitioners do not explain why SBEC's review places any more "burdensome condition[s]" on Amendment 7 than the prior law providing for the Attorney General's review. *Pafford*, 217 Ark. at 738, 233 S.W.2d at 74. First off, Petitioners point to the mere fact that SBEC is not the Attorney General. (*See* Petitioners' 8/7 Br. 30.) But they never explain why it should matter for Amendment 7's purposes if the initial sufficiency review is performed by the Attorney General or SBEC. Petitioners' two other complaints with SBEC's review really amount a single complaint about timing—that SBEC's review comes *after* petitions have been circulated instead of *before*, as under the old statute. (Petitioners' 8/7 Br. 30-31.) But timing was not central to *Washburn*'s analysis. It focused instead on the fact that the review process was not "complicated," and that judicial review was available. *Washburn*, 225 Ark. at 872-73, 286 S.W.2d at 497-98. Those facts remain true under SBEC. *See* Ark. Code Ann. 7-9-112(a). *Washburn* resolves any constitutional question.

C. SBEC Review Facilitates Amendment 7.—SBEC's review ensures that Petitioners cannot place a misleading initiative before the voters this November. But Petitioners claim that keeping misleading initiatives off the ballot "serves no reasonable purpose in furthering the rights of the people to refer and initiate legislation." (Petitioners' 8/7 Br. 12.) Indeed, they claim that Amendment 7 requires

SBEC to certify for the ballot whatever language an initiative's sponsor happens to submit—regardless of how misleading that language might be. (*See id.* 25-26.)

The reasoning beneath this claim proves too much. If it infringes Petitioners' right to the initiative process for SBEC to consider whether their proposal will mislead Arkansas voters, then this Court's own review would also be suspect. Amendment 7 provides no standard for evaluating whether a popular name or ballot title is too misleading for certification, whether by the Attorney General, SBEC, or this Court. *See* Ark. Const. art. 5, sec. 1; *see also* Thomas B. Cotton, *The Arkansas Ballot Initiative: An Overview and Some Thoughts on Reform,* 53 Ark. L. Rev. 759, 761 (2000) ("Amendment 7 provides neither guidelines for drafting nor standards for judging ballot language."). Yet this Court has long refused to allow proposals with misleading ballot titles on the ballot. *See, e.g.*, *Westbrook v. McDonald*, 184 Ark. 740, 43 S.W.2d 356, 359-60 (1931).

Ensuring that misleading initiatives like the ranked-choice-voting amendment stay off the ballot "facilitate[s] [the] operation" of Amendment 7, and also could be viewed as preventing a type of "fraudulent practice[]" in the "filing of petitions." Ark. Const. art. 5, sec. 1. To maintain the democratic legitimacy of the ballot-initiative process, "the people must be asked fair and reasonable questions, from which their answers have clear meanings." Steve Sheppard, *Intelligible, Honest, and Impartial Democracy: Making Laws at the Arkansas Ballot Box*, 2005

Ark. L. Notes 410, at 10 (Oct. 14), http://media.law.uark.edu/arklawnotes/files/2011/03/Sheppard-Intelligible-Honest-and-Impartial-Democracy-Arkansas-Law-Notes-2005.pdf. Otherwise, the initiative would "amount[] to a fraud, or a trick, and there [could] be no basis for believing that the law really represents the will of the people." *Id.*

Petitioners seek license to be free from any check on misleading voters with the popular name and ballot title of their initiatives. But it does not serve democracy to allow misleading initiatives to go before the voters. Because the popular name and ballot title of the ranked-choice-voting amendment are misleading, this Court "must declare the proposed amendment ineligible for consideration at the general election" on November 3, 2020, "to uphold the integrity of the initiative process." *Christian Civic Action Comm.*, 318 Ark. at 250, 884 S.W.2d at 610.

IV. Expedition is warranted.

This Court is already aware of the need for expedition in this matter—as evidenced by this Court's prior orders expediting this lawsuit. Because Petitioners filed their Third Amended Complaint just three days before the deadline for certifying initiatives for the ballot, additional expedition is warranted here.

SBEC requests that this Court order any opposition to this motion be filed by 5:00 PM, Wednesday, August 19, 2020. Petitioners will suffer no prejudice from expedition because the arguments relevant to this motion have already been

extensively briefed. And resolution is needed before the August 20 certification deadline because the issues in this motion are dispositive of Petitioners' claims.

REQUEST FOR RELIEF

For these reasons, this Court should (1) expedite consideration of this motion, ordering any responses due by 5:00 PM, Wednesday, August 19, 2020; and (2) dismiss Petitioners' Third Amended Complaint and all other complaints incorporated into it.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Administrative Order No. 19 and that it conforms to the word-count limitations contained in Rule 4-2(d) of this Court's pilot rules on electronic filings. The jurisdictional statement, the statement of the case and the facts, and the argument sections altogether contain 8,597 words.

/s/ *Vincent M. Wagner*
Vincent M. Wagner

CERTIFICATE OF SERVICE

I certify that on August 18, 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*
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