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

Arkansas State Board of Election Commissioners' Brief on Counts 1 & 2

LESLIE RUTLEDGE
Arkansas Attorney General

NICHOLAS J. BRONNI (2016097)
Arkansas Solicitor General

VINCENT M. WAGNER (2019071)
Deputy Solicitor General

DYLAN L. JACOBS (2016167)
Assistant Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-2700
vincent.wagner@arkansasag.gov

TABLE OF CONTENTS

POINTS ON APPEAL

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

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

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

TABLE OF AUTHORITIES

Cases

Statutes & Rules

Books & Treatises

JURISDICTIONAL STATEMENT

This Court has original, exclusive jurisdiction over Counts 1 and 2 of Petitioners' Second Amended Complaint, which asks this Court "to determine if the signatures submitted on [a] statewide initiative petition . . . are sufficient." Ark. Code Ann. 7-9-112(a); *see* Ark. Const. art. 5, sec. 1.

/s/ *Vincent M. Wagner*
VINCENT M. WAGNER
Deputy Solicitor General
Counsel for SBEC

STATEMENT OF THE CASE AND THE FACTS

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. 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 antifraud laws. Earlier this year, they sought and failed to obtain a federal-court exemption from the antifraud requirements built into Amendment 7 itself. As the Eighth Circuit did in Petitioners' federal lawsuit, this Court should refuse to exempt Petitioners from valid antifraud requirements on the basis of their own careless noncompliance.

The State Board of Election Commissioners detailed the facts relevant to this lawsuit in its August 14 Brief on Count 3, which will be called the "SBEC Br." from here on. But a few points are worth reemphasizing.

Petitioners are the sponsors of two ballot initiatives, the combined effect of which would be to radically change the electoral process in Arkansas. (*See* SBEC Br. 11-15.) The first proposes a complete shift in Arkansas's redistricting process. Currently elected officials are responsible for redistricting, and they are democratically accountable for their redistricting decisions. (*Id.* 11-12.) Petitioners' redistricting amendment would remove that democratic accountability from the process.

(*Id.*) It would place the responsibility for redistricting into the hands of a commission chosen in a random draw from an applicant pool screened by a panel of retired judges commissioned by the Chief Justice of this Court. (*Id.*) Arkansas would be only the seventh State to have a redistricting process in which the decisionmakers would never answer to the voters for their decisions. (*Id.* 12.)

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. (*See id.* 12-15.) Regarding the primaries, Petitioners wish to replace Arkansas's "open" partisan primaries with a single "top four open" primary for each covered office. (*Id.* 12-13.) The popular name and ballot title don't disclose to voters that voting for this initiative would actually be voting against Arkansas's current open-primary system. (*See id.* 23-26.) Only California and Washington have primaries like those Petitioners wish to see in Arkansas. (*Id.* 13.) Regarding general elections, Petitioners would like Arkansas to become the second State to institute ranked-choice voting in statewide offices. (*Id.* 14.) Although ranked-choice voting has received its share of recent media attention, the popular name and ballot title don't tell voters that they are voting "FOR" or "AGAINST" ranked-choice voting. (*Id.* 14, 26-29). Instead, they use the obscure term "instant runoff" election. (*Id.* 26-29.)

Although Petitioners timely submitted signed petitions for both initiatives, the Secretary's office concluded that Arkansas law prohibited counting any of those signatures. (*See* Second Am. Consol. Orig. Action Compl. (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).

In response to the Secretary's decision, Petitioners brought this lawsuit seeking an exemption from the background-check-certification requirement. 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).

Similar reasoning should apply here. Petitioners have offered no evidence of how it burdens them to certify their paid canvassers passed background checks before collecting signatures. What's more, Petitioners have yet to offer any evidence explaining why they chose not to make that certification. So this Court should follow the Eighth Circuit's reasoning and refuse to grant Petitioners an exemption from the modest antifraud laws that they challenge.

ARGUMENT

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.)[1] 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.

If this Court decides it will no longer follow *Zook II* and *Benca*, Petitioners' claim would still fail. Their certification does not even *substantially* comply with this provision. The statue outlines a two-step process ("obtain[ing]" a background check, Ark. Code Ann. 7-9-601(b)(2), and then "pass[ing]" it, *id.* 7-9-601(b)(3)). But according to Petitioners' certifications, their paid canvassers only completed the first step—having "acquired" a background check. (Petitioners' 8/14 Br. 22.) Complying with precisely one-half of a statute's requirements does not amount to

---

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

substantial compliance. No matter the standard, Petitioners' certifications are insufficient. By law, the Secretary must not count their submitted signatures, and both initiatives must be excluded from the November 3 ballot.

Requiring Petitioners to satisfy the statute's precise language is consistent with this Court's general interpretive approach. It always will "construe the statute just as it reads." *Benca*, 2016 Ark. 359, at 3, 500 S.W.3d at 745. 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).) Therefore, although "it is the province and duty of this Court to determine what a statute means," *Myers v. Yamato Kogyo Co.*, 2020 Ark. 135, at 5, 597 S.W.3d 613, 617, it should not go unnoticed that two Court-selected jurists have both reached the same conclusion to the same statutory question presented in this case, *cf. Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (noting that certain agency "rulings, interpretations and opinions . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," even if "not controlling upon the courts by reason of their authority").

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). (*See* Petitioners' 8/14 Br. 20-29.) 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). (*Id.* 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) ("The canvasser is a paid can-

vasser 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."). 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)). The "residence address" piece of that requirement created three problems for the petition sponsors in *Benca*. Some of their paid canvassers had "failed to identify any addresses at all." 2016 Ark. 359, at 10, 500 S.W.3d at 749. Others "specified a Post Office Box as a residential address." *Id.* And still others "used a business address as a residential address." *Id.* Because the *Benca* sponsor had not strictly complied with subsection 126(b), the Court invalidated the signatures collected by those paid canvassers. It first held that that none of those paid canvassers had satisfied subsection 126(b). *Id.* at 12, 500 S.W.3d at 750. But the sponsors in that case argued that they had nonetheless substantially complied. *Id.* 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) ("Forms herein given are not mandatory, and if substantially followed in any petition it shall be sufficient, disregarding clerical and merely technical errors."). 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).

Without using the term "substantial compliance," *Benca* also rejected an argument that a petition sponsor had substantially complied with the background-check-certification provision. For some of the paid canvassers in that case, "the background check was completed after the sponsor had certified that the background check had already been performed." *Id.* at 8, 500 S.W.3d at 748. The Court made no mention of any allegation that these canvassers had ultimately not passed a background check. *See id.* at 8-9, 500 S.W.3d at 748. Presumably, therefore, the sponsors' error was only one of oversight, which they sought to correct once they discovered it by obtaining a tardy background check. Nevertheless, their failure to strictly comply with "the plain language of the statute" sufficed for this Court to disqualify all the signatures collected by those canvassers. *Id.* at 8, 500 S.W.3d at 748.

Two years after *Benca*, this Court applied its strict-compliance standard in *Zook II*. As in *Benca*, issues related to canvassers' residential addresses arose 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). Some of the canvassers in *Zook II* were confused

about the requirements of those provisions. Whereas the petition sponsor "registered him with a Bentonville address," the canvasser himself "signed an affidavit that his current resident address [was] in Florida." 2018 Ark. 306, at 5, 558 S.W.3d at 390. Those canvassers did not know that their "current residence address" was "the place [they were] staying," not necessarily their "permanent address." *Id.* at 4, 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. And the Court disqualified more than 4,300 signatures from the Secretary's count because the petition sponsor failed to strictly comply with the relevant certification requirement. *Id.*

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. This Court should thus reach the same result it reached in those two recent cases and order the Secretary not to count the affected signatures. *See* Ark. Code Ann. 7-9-126(b), -601(f).

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.

The Court's two separate opinions in *Zook* illustrate the distinction between these standards. On October 18, 2018, the Court considered a claim that the petition in that case did not comply with Amendment 7. *Zook v. Martin* (*Zook I*), 2018 Ark. 293, at 4-5, 557 S.W.3d 880, 883. It required "only substantial compliance with the amendment." *Id.* at 4, 557 S.W.3d at 883. The next day, however, the Court considered the statutory claims that have already been discussed in *Zook II*.

And in that decision, the Court relied on *Benca* to reiterate that "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.

The upshot is that this Court's cases require Petitioners to strictly comply with subsection 126(b). By certifying only that their paid canvassers had acquired background checks, they failed to strictly comply. As a result, the Secretary correctly refused to count Petitioners' signatures. And this Court should exclude their proposed initiatives from the ballot.

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.) If only this Court would "look to the substance" of their certification (rather than the actual words that Petitioners used), their argument goes, it would be clear that their certification gets close enough to the statutory requirements to pass muster.

(*Id.* 26.) But the substance of Petitioners' certification, no less than its literal wording, fulfills only one of the statute's two requirements: It certifies that their paid canvassers obtained background checks but is silent about whether they also passed them. 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. The "do not count" provision at issue here, subsection 126(b), disqualifies any petition part from a canvasser who "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). And section 601 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." *Id.* 7-9-601(b)(2). Second, the sponsor must certify to the Secretary 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 that certificate read as follows:

> 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 provisions of this Court's pilot-project rules regarding certificates of compliance and word counts. 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). The generalized statements of compliance at the beginning and end of Petitioners' certification do not fix that omission. 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.

In fact, one of the key changes made by Act 1104 was to clarify that the background check occur 30 days before the paid canvasser "begins collecting signatures" rather than 30 days "prior to the registration of the paid canvasser." *See id.* Citing Act 1104 may clarify that Petitioners acquired background checks for their paid canvassers within the required 30-day window. But nothing about Act 1104 clarifies whether those paid canvassers *passed* their timely acquired background checks.

Although acquiring a background check is a necessary prerequisite to passing one, the two steps are distinct. Other statutory schemes regarding background checks make the distinction clearer. For instance, just as the General Assembly requires paid canvassers to (1) obtain and (2) pass a background check, funeral directors and embalmers must "[1] [u]ndergo and [2] pass a criminal background check." Ark. Code Ann. 17-29-301(a)(8)(A), -302(a)(6)(A). It would not be

enough for an embalmer simply to undergo a background check if he did not also pass it.

In contrast to those statutory approaches to background checks, the General Assembly has elsewhere required background checks as part of a disclosure process. In such 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.*; *see also id.* 17-3-103(b)(1) ("A licensing entity may require that the applicant undergo a state and federal criminal background check as required by the licensing entity for all applicants for a license.").

The point is ultimately this: 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 the point is not just that Petitioners failed to incant the word "passed." (*See id.* 24.) Petitioners might have satisfied the background-check-certification requirement any number of ways without actually using the word "passed." 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. But Petitioners chose none of them. Instead, they certified only that background checks had been "acquired." Period. Such an incomplete certification inevitably raises a follow-up question: "And did you find out anything disqualifying?"

Because Petitioners' certification language does not answer that follow-up question, the Secretary was left to wonder whether they had complied with Arkansas law. 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.)

Even assuming that's true, it misses the importance of section 7-9-601's timing. That section requires submission of each paid canvasser's name and the necessary certifications to the Secretary "[b]efore a signature is solicited." Ark. Code Ann. 7-9-601(a)(2). 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. The importance of preventing fraud before it happens lies in the responsibility that Arkansas entrusts to canvassers. They are "the sole election officer[s], in whose presence the citizen exercises his right to sign the petition." *Sturdy v. Hall*, 201 Ark. 38, 143 S.W.2d 547, 551 (1940). And if a canvasser abuses Arkansas's trust—especially if a canvasser's abuse harms a particular voter or group of voters—addressing that abuse after the fact cannot completely rectify it. 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)).

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* 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. Because of it, the Secretary was statutorily prohibited from counting the signatures submitted by Petitioners.

REQUEST FOR RELIEF

For these reasons, this Court should hold that the Secretary properly refused to count the signatures submitted by Petitioners and that neither of their initiative petitions qualifies for the 2020 ballot.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

/s/ *Vincent M. Wagner*

NICHOLAS J. BRONNI (2016097)
Arkansas Solicitor General

VINCENT M. WAGNER (2019071)
Deputy Solicitor General

DYLAN L. JACOBS (2016167)
Assistant Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-2700
vincent.wagner@arkansasag.gov

Counsel for SBEC

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 4,813 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*
Vincent M. Wagner