CV-20-454

IN THE ARKANSAS SUPREME COURT

ARKANSAS VOTERS FIRST, a ballot question committee; BONNIE MILLER, individually and on behalf of Arkansas Voters First; and OPEN PRIMARIES ARKANSAS, a ballot question committee **PETITIONERS**

v. **No. CV-20-454**

JOHN THURSTON, in his official capacity as SECRETARY OF STATE, the 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**

ORIGINAL JURISDICTION

RESPONDENT SECRETARY OF STATE'S RESPONSE BRIEF

COUNTS I and II

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Issues and Principal Authorities

1. AVF's certification language did not comply with statutory requirements.

    - Ark. Code Ann. § 7-9-601(b)

    - *Benca v. Martin,* 2016 Ark. 459, 500 W.3d 742 (Ark. 2016)

2. Whether the special master correctly or incorrectly found that the open primaries petition had a sufficient number of signatures to meet the total-signatures required for the initial count is no longer relevant because the Secretary has now checked the validity of the signatures and determined that the petition lacked the requisite number of signatures from registered voters to qualify the petition for a 30-day cure period.

    - Ark. Code Ann. § 7-9-126

3. Intervenors' arguments are no longer relevant because the Secretary has now checked the validity of the signatures and determined that the petition lacked the requisite number of signatures from registered voters to qualify the petition for a 30-day cure period.

    - Ark. Const. art. 5, § 1

4. Substantial compliance is not the standard and AVF did not comply with the statutes.

    - *Zook v. Martin*, 2018 Ark. 306, 558 S.W. 3d 385

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STATEMENT OF THE CASE

The Master's Report and Findings of Fact succinctly lays out the basic facts in this matter. (**Report, pp. 1 – 35**.) In the interest economy, the Secretary will not repeat those facts. The Secretary has no objection, and agrees with the statements made in the Master's Report in the unnumbered paragraphs as well as all numbered paragraphs with the exception of paragraphs 43, 44, and 46 – 50, which will be discussed in the Argument section herein.

Petitioners' Statement of the Case and the Facts, for the most part, is accurate, with the exception of the assertion that, "Each petition bore more than 89,151 signatures *on its face*. (emphasis added)(**Petitioners' Brief, p. 12**.) The term "on its face" is defined in Ark. Code Ann. § 7-9-126, and refers to the number of signatures remaining after the culling of disqualified petition parts. Only the redistricting petition bore more than 89,151 signatures "on its face" after the statutory culls.

As ordered by this Court, the Secretary checked the validity of the original signatures submitted for both petitions. It has been determined that the redistricting petition does not contain the required 66,864 signatures of registered Arkansas voters and thus it does not qualify for

a 30-day cure period. (**Exhibit A to Motion to Vacate filed August 11, 2020**.) Regarding the open primaries petition, it has been determined that it too does not contain the required 66,864 valid signatures, even if all of the throw-backs recommended by the Master are considered. (**Exhibit A to Second Motion to Vacate filed August 18, 2020**.)

Although the failure of the two petitions renders the issues of law moot, the issues are capable of repetition evading review, and thus the Secretary, as well as the public, would benefit from conclusive rulings thereon.

ARGUMENT

The sufficiency of all state-wide petitions is decided in the first instance by the Secretary of State, subject to review by this Court. Ark. Const. Art. 5, §1 ("Sufficiency"); *See* Amendments 7 and 80, § 2(D)(4); *See also, Zook v. Martin*, 2018 Ark. 306 at 3, 558 S.W. 3d 385, 389 (citing *Benca v. Martin*, 2016 Ark. 359 at 3, 500 S.W.3d 742, 744.) Review by this Court is "original and exclusive." *Id*. The special master's findings of fact are accepted unless they are clearly erroneous. *Zook, supra.* at 3 (citing *Benca* and Ark. R. Civ. P. 53(e)). "A finding of fact is clearly erroneous, even if there is evidence to support it, when, based on the entire evidence, the court is left with the definite and firm conviction that the master has made a mistake." *Zook*, *supra.* at 3, 558 S.W.3d (citing *Roberts v. Priest*, 334 Ark. 503, 511, 975 S.W.2d 850, 853 (1998)). Issues of statutory interpretation are reviewed *de novo*. *State v. Ledwell*, 2017 Ark. 252, 526 S.W.3d 1. A statute is construed just as it reads, with words given their ordinary and usually accepted meaning. *Benca, supra.* at 3. If possible, every word is given meaning and effect. *Id*.

The Petitioners have the burden of proof. "In the event of legal

proceedings to prevent giving legal effect to any petition upon any grounds, the burden of proof shall be upon the person or persons attacking the validity of the petition." Ark. Const. art. 5, § 1; *See also Donovan v. Priest*, 326 Ark. 353, 357, 931 S.W.2d 119 (1996) (where "Amendment 7 places the burden of proof 'upon the person or persons attacking the validity of the petition.'"); *Crochet v. Priest,* 326 Ark. 338, 931 S.W.2d 128, 130 (1996).

Criminal Background Check Certification. The two petitions at issue herein are a redistricting petition and an open primaries petition. The Secretary determined that both petitions were insufficient because the sponsor's criminal background certifications of its paid canvassers did not comply with Ark. Code Ann. § 7-9-601(b)(3). The sponsor petitioned this Court for an injunction requiring the Secretary to verify and count the valid signatures on both petitions, which was granted. The Secretary verified and counted the signatures on both petitions and determined that neither petition contained the number of signatures required by Ark. Const. art. 5, § 1 to qualify for a 30-day cure period.

This Court appointed a special master to make findings of fact and a

trial was held. The Master concluded,

> I find that in the event the court finds that the application of Ark. Code Ann. § 7-9-601(b)(3) to the undisputed language of the certification is subject to more than one reasonable interpretation and is a question of fact, I find the language of the certification does not certify that the canvasser has "passed" a background check and does not comply with Arkansas law. I further find that if the certification is inadequate, as I have found, then neither petition has enough facially valid signatures to require the Secretary of State to move to the second phase of his review in verifying signatures to determine if the petitions qualify for a "cure."

Report, p. 35.

It is undisputed that the sponsor of the two petitions at issue certified that its canvassers "acquired" a criminal background check. It is also undisputed that Ark. Code Ann. § 7-9-601(b)(3) requires the sponsor to certify that its canvassers "passed" a criminal background check. ("Upon submission of its list of paid canvassers to the Secretary of State, the sponsor *shall* certify to the Secretary of State that each paid canvasser in its employ has passed a criminal background check in accordance with this section." (emphasis added.) "The word 'shall' when used in a statute means that the legislature intended mandatory compliance with the statute unless such an interpretation would lead

to an absurdity." *Benca v. Martin*, 2016 Ark. 359, 7–8, 500 S.W.3d 742, 748 (2016)(citing *Ark. State Highway Comm'n v. Mabry*, 229 Ark. 261, 315 S.W.2d 900 (1958); *Loyd v. Knight*, 288 Ark. 474, 477, 706 S.W.2d 393, 395 (1986)).

Petitioners herein seek an end-around the mandatory language of the statute by arguing that the sponsor's certification that it met the requirements of § 7-9-601 was sufficient. But that argument fails to recognize that the word "acquired" is fundamentally different from the word "passed" as those words are used in ordinary and accepted meanings. It simply cannot be disputed that one can "acquire" a criminal background check that reveals past criminal history. One can only "pass" a criminal background check when one obtains a report that reveals no past criminal history. Petitioners' attempt at linguistic gymnastics falls flat.

Petitioners go on to argue that "magic words" are not required by Arkansas law. The cases cited, however, are not persuasive. They cite a family law case where this Court held that the words "best interest of the children" in a court order were unnecessary. *Baber v. Baber*, 2011 Ark. 40, 378 S.W.3d (2011). They cite cases holding 1) that the words

"husband and wife" are not required on a deed; 2) that specific words are not required to bring individual capacity claims under the Arkansas Civil Rights Act; 3) that no magic words are required to satisfy a best interest inquiry in a juvenile matter; and 4) that there are no required words needed to make findings in guardianship cases. *Curtis v. Patrick*, 237 Ark. 124, 371 S.W.2d 622 (1963); *Faughn v. Kennedy*, 2019 Ark. App. 570, 590 S.W.3d 188 (2019); *Minor Children v. Ark. Dept. of Human Servs.*, 2019 Ark. App. 588, 589 S.W.3d 495, 501 (2019); *Wilson v. Wilson*, 2013 Ark. App. 759, at 9, 431 S.W.3d 369, 374 (2019). That argument fails because in none of the situations in those cases was there a statute mandating the use of specific words. Petitioners' "magic words" argument is another flop.

Petitioners go on to argue that because it is, in their view, impossible obtain a *federal* criminal background check *from* the Arkansas State Police, they have substantially complied with § 7-9-601 and thus they should get a pass on the mandatory language in that statute. It is interesting that Petitioners want to place emphasis on the word "from" but deny that that word "shall" is essential. They cannot have their cake and eat it too, thus that argument fails to land.

It cannot be disputed that strict compliance with the statute is required. *Benca v. Martin*, *supra*.; *Zook v. Martin*, *supra*. The sponsor of both petitions failed to certify that its paid canvassers passed a background check, thus the petitions should not be certified to the ballot.

This issue is moot, however, because it has now been determined that neither petition contained enough signatures to advance to the cure-period stage. The "capable of repetition yet evading review" exception to the mootness doctrine applies though. The Secretary, as well as the public, should have a final decision on this issue in order to handle future petitions.

Open Primaries Petition. The Master incorrectly found that the open primaries petition had a sufficient number of signatures to meet the total signatures required for the initial count. The Master was incorrect in his findings in paragraphs 43, 44, and 46 – 49 because he incorrectly assigned the burden of proof to the Secretary. The Master's findings on each of these was that, "The petition was signed on an undetermined date and there is no evidence that it was signed after the verification day." The problem with those findings is that the

Petitioners offered no evidence of when the questioned signatures were signed, only their speculation. Without a legible, possible date listed when a voter signs, the Secretary cannot discern whether or not a petitioner signed after a petition part was notarized or if the petitioner signed before the canvasser was registered with the Secretary of State's Office. Furthermore, the Secretary did not have the burden of proof at trial, yet the Master based his finding on the Secretary's lack of evidence. Thus, the Master's findings regarding the culled signatures was clearly erroneous and the culled signatures should not be thrown-back to be verified.

Like the issue in Count I, this issue is also moot. The Secretary has now determined that even if every one of the culled signatures that the Master recommended be thrown-back were to be verified as from a timely registered voter, the petition still failed to meet the constitutionally required number to qualify for a cure period. The open primaries petition is dead.

At this stage in the proceedings, the Secretary takes no position either way on the Intervenors' additional arguments attempting to add to the culled signatures based upon the criminal histories and domicile

of some of the canvassers. Like the other issues, it is moot because the Secretary has determined that the open primaries petition does not contain enough valid signatures to qualify for a cure period.

Request for Relief. The Secretary respectfully asks this Court to:

(1) Hold that the sponsor's criminal background check certifications did not comply with Ark. Code Ann. § 7-9-601(b)(3);

(2) Overrule the Master's finding that the open primaries petition has a sufficient number of signatures to meet the initial-count requirement; and

(3) Hold that the Secretary should not waste the taxpayers' money to verify/count any signatures submitted pursuant to the provisional cure for either of the doomed petitions.

Respectfully submitted this 18th day of August, 2020,

JOHN THURSTON,
SECRETARY OF STATE

By: /s/ Gary L. Sullivan _____

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 18th day of August, 2020, the foregoing document was filed via the Court's eFlex filing system, which shall serve all counsel of record.

/s/ Gary L. Sullivan
Gary L. Sullivan

CERTIFICATION OF COMPLIANCE

I certify that the foregoing 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 state, statement of the case and the facts, and the argument sections altogether contain 1,852 words.

/s/ Gary L. Sullivan
Gary L. Sullivan