CV-20-454

In the Arkansas Supreme Court
An Original Action

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

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

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Petitioners' Reply Brief on Counts 1 & 2

Ryan Owsley (2007-151)
Nate Steel (2007-186)
Alex Gray (2008-127)
Alec Gaines (2012-277)
Steel, Wright, Gray, PLLC
400 W. Capitol Ave., Suite 2910
Little Rock, AR 72201
501.251.1587
ryan@capitollaw.com

Adam H. Butler (2003-007)
Robert F. Thompson (97-232)
414 West Court Street
Paragould, AR 72450
870.239.9581
abutler@paragouldlawyer.com
rthompson@paragouldlawyer.com

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The Secretary agrees with Petitioners that this Court should clarify certain legal issues raised in these proceedings. The absence of such clarity tempts some to veer from the real issues in the case, as the opening of Intervenors' brief illustrates. Instead of focusing on the legal issues in this case and the facts and evidence presented over the four-day hearing, Intervenors' brief starts by accusing Petitioners' counsel of being "brazen," having "this case confused with another," and insinuating that they have shirked their "ethical obligations" to this Court. (Int., p. 1.) Petitioners concede defeat in the table-pounding contest and suggest a return to the few facts and relevant law needed to resolve the issues in this proceeding.

AVF certified that all its paid canvassers received state background checks through Arkansas State Police. (Report, ¶ 31–32.) Though they dispute the sufficiency of that certification's wording, Intervenors and the Secretary do not dispute that the certification was made or that background checks were obtained. Further, the special master specifically found that though it was impossible for AVF to obtain a nationwide background search through State Police (Report, ¶ 32), AVF

"tried to comply with the requirement of obtaining a federal background check" by using "a number of private companies, including BeenVerified and SentryLink." (Report ¶ 37.) Intervenors also attempted to go beyond the face of the petition, claiming that four AVF canvassers had disqualifying criminal histories. (Report, pp. 33–34.) When he noted that while each of the four canvassers "might" have a disqualifying criminal history, there was no certified copy of any such conviction, the special master's findings on those claims imply that the "evidence" Intervenors relied on for these claims was insufficient. (Report ¶¶ 51–54.) Therefore, despite Intervenors' protests, the truth is well established: all of AVF's paid canvassers passed state background checks and the federal checks obtained from private parties.

In the end, this Court is presented with two primary issues: (1) whether AVF certified that its paid canvassers passed criminal background checks; and (2) if so, whether the special master clearly erred when he found that the Secretary had wrongly culled 586 signatures from the Open Primaries Petition. Intervenors attempt to raise two additional arguments: (1) whether obtaining a background check directly from the FBI complies with the Ark. Code Ann. § 7-9-601(b); and (2) whether

certain AVF canvassers were not qualified to canvass. Before entertaining the latter argument, this Court must first determine whether arguments that go beyond the face of the petition are permissible when the litigation relates to whether the Secretary should give a cure period.

I. Count 1—certification language

The findings of fact. Intervenors mischaracterize the special master's factual findings. First, they allege he made an unqualified finding that the certification language on the Redistricting Petition and the Open Primaries Petition is inadequate. (Int., p. 5.) Second, they argue the master's finding that a sponsor cannot comply with the federal-background-check requirement of Ark. Code Ann. § 7-9-601 is "clearly erroneous." (Int., p. 12.) Both arguments misrepresent the master's comprehensive findings.

The Intervenors and the Secretary ignore the master's careful discussion of the interplay between factual and legal questions in this case: "If the Supreme Court concludes that there is only one reasonable interpretation that can be drawn from the undisputed facts in regard to the certification, then the question of the adequacy of the certification

appears to be a question of the law for the Court to decide." (Report ¶ 38) The actual language of the certification *was* undisputed. (Report ¶ 30.) The master properly noted that the question could be one of law. *See White County Judge v. Menser,* 2020 Ark. 140, 7, 597 S.W.3d 640, 644 *("*The question of the correct interpretation and application of an Arkansas statute is a question of law, which we decide de novo."). Given the undisputed facts regarding the certification language, this Court, not the special master, should make a legal determination regarding AVF's compliance with § 7-9-601.

The Intervenors also argue the master's multiple findings regarding federal criminal background checks were clearly erroneous. (Report ¶¶ 32–34, 37.) The master's findings on this point can be summarized by a syllogism:

- The statute requires sponsors to "obtain, at its cost, from the Department of the Arkansas State Police, a current state and federal criminal record search" on their paid canvassers.
- *But* the State Police cannot perform the federal criminal record and have never done so (RT 499-500); (Report ¶ 34.);
- *Therefore*, Ark. Code Ann. § 7-9-601(b)(1) cannot be complied with. (Report ¶¶ 32.)

Intervenors offered no evidence–none—that the State Police provide federal background checks for petition canvassers.

Instead, the Intervenors claim AVF should have obtained canvassers' fingerprints from the State Police, taken those fingerprints to the FBI, and requested a federal background search from the FBI. (Int., p. 13–14.) But the statute requires sponsors to obtain such a check "from the Department of the State Police," not the FBI. Given the Intervenors' repeated invocation of the "strict compliance" standard, their attempt to re-write statutory language to require ballot-measure sponsors to obtain canvassers' criminal records a federal agency never mentioned in Ark. Code Ann. § 7-9-601, is inconsistent and conflicts with this Court's approach to statutory interpretation.

This Court will not rewrite statutes and ordinances to resolve problems with the language. *See Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002); *Shoemaker v. State*, 343 Ark. 727, 38 S.W.3d 350 (2001); *Cox v. Commissioners*, 287 Ark. 173, 697 S.W.2d 104 (1985). It is the Intervenors, not AVF, who effectively ask this Court to rewrite § 7-9-601 to insert references to the FBI, fingerprints, and other technical

requirements existing in the Code of Federal Regulations, but not Arkansas law. (Int., p. 12.) This requested re-write should be rejected.

Since there is no factual dispute regarding the wording of AVF's certification, the only question is one of law: does the certification language meet the legal requirements. Since the certification is legally sufficient, the Secretary's decision should be overturned.

Substantial compliance. Given that Ark. Code Ann. § 7-9-601(a)(3) cannot be strictly complied with (as Intervenors nearly admit on page 15 of their brief), the solution is not for this Court to rewrite the statute; rather it is to apply the standard of review historically used in Amendment 7 petition cases—*substantial compliance*. *See Zook I*, 2018 Ark. at 4-5 ("Amendment 7 must be liberally construed in order to effectuate its purposes and only substantial compliance with the amendment is required."); *Johnson v. Munger*, 260 Ark. 613, 616, 542 S.W.2d 753, 755 (1976) (using substantial compliance standard).

Intervenors argue that under this Court's case law, strict-compliance is the standard. *Zook v. Martin*, 2018 Ark. 306, 558 S.W.3d 385 (*Zook II)*; *Benca v. Martin*, 2016 Ark. 359, 500 S.W.3d 742. But these cases are distinguishable. In *Benca*, this Court permitted a challenge to

7,580 signatures on a ballot measure where the sponsor either failed to obtain any criminal background check, or failed to obtain it within the statutory time period. *Benca*, 2016 Ark. at 8. There was no question the sponsor in *Benca* could have complied with the statute, but it did not—strict compliance was possible but lacking. In *Zook II*, the Court upheld approved findings that 5,076 signatures should be excluded because the sponsor failed to provide sworn statements from canvassers or submit timely lists of canvassers, before the canvassers began collecting signatures, as required by statute. *Zook II*, 2018 Ark. at 9-10. In *Zook*, like *Benca*, strict compliance with the statute was doable, but the sponsor came up short. Neither opinion turned on the certification requirement of § 7-9-601(b)(3), and the sponsors in those cases did not face impossibility problem baked into the statutory language.

Insistence on strict compliance here ignores the reality that it was impossible for Petitioners to strictly comply. Worse, a strict-compliance standard, under these circumstances, presents any sponsors with a Catch-22. If AVF had certified on canvasser lists that it complied with § 7-9-601(b)(1), when it could not (because of the impossibility of obtaining the federal search from the State Police), it would have been guilty of a

criminal offense under Ark. Code Ann. § 7-9-601(b)(4). But when AVF used certification language accurately describing substantial attempts to meet statutory requirements, the Secretary alleges failure to strictly comply

National Ballot Access (NBA), the firm retained by AVF to hire canvassers, sought a federal criminal background check for all paid canvassers from the State Police, and the State Police refused to provide one. (RT 425-26); (Report ¶ 34) Attempting to comply with the statute, NBA obtained state background searches from the State Police and nationwide criminal record searches from private firms. (Report ¶ 37.) NBA did not submit any paid-canvasser names to the Secretary of State unless NBA believed the canvasser had no disqualifying conviction. (RT 408, 566.) NBA has a process to satisfy itself that each proposed canvasser has no disqualifying convictions, and it maintains files on all paid canvassers. (RT 428-429.)

Given these undisputed facts, AVF's certification language on the canvasser lists was reasonable. The language does the following: it (1) it cites the relevant statute; (2) it advises the Secretary of State the list includes names of all paid canvassers; and (3) states that a State Police

background check and a second background check were obtained by the sponsor. Certification actually quoting statutory language would be impossible, because the statute requires a "current state and federal criminal record search" from the State Police. Ark. Code Ann. § 7-9-601(b)(3). Because strict compliance was impossible, citation of the statute, plus additional language notifying the Secretary that the list included paid canvassers, should be enough for substantial compliance.

AVF substantially complied with a law that cannot be strictly complied with, and this Court should therefore rule that the certification language, included on its lists of paid canvassers, was sufficient.

II. Count 2—the open primaries signatures

Because Intervenors and the Secretary's briefs take no issue with the 84 signatures the Secretary agreed to throw back into the count and the 14 signatures collected by Jessica Martin the master considered wrongly culled, the only remaining issues regarding Count 2 pertain to other 488 signatures the master found to be wrongly culled. While the Intervenors' brief is silent on the fourth set, it takes issue with the third set (Int. p. 22); the Secretary takes issue with both (Sec., p. 13.)

The 404 signatures. In the third set of signatures, the special master found the secretary wrongly excluded 404 signatures due to at least one signature on a petition part being signed on a date that was impossible. While they both object to these findings, Intervenors and the Secretary do so for different reasons.

Intervenors claim the findings were contrary to Ark. Code Ann. § 7-9-126(b)(6), which requires that a petition part "and all signatures appearing on the petition part shall not be counted for any purpose….if….[t]he canvasser verification date is dated earlier than the date on which the petition signed." (Int., p. 22.)

That argument fails because it ignores the core reason for the special master's decision on these 404 signatures: the master expressly found that the date of the relevant signatures was undetermined. He found that testimony "established that the Secretary of State would not cull a petition at this stage if the date of signing was left blank" because "he could not state that it was signed after the [canvasser's] verification date." (Report, ¶ 43.) The 404 signatures were contained on 64 petition parts. Each petition part was culled due to a petitioner's signing on a date that was impossible. For example, one petition part that bore the

canvasser's verification dated July 5, 2020 was culled because of a single petitioner's signature dated "5-25-88." That same petition listed the petitioner's birthday as "7-5-20." The master found that it was "[i]mpossible to have been signed on "5-25-88." (Report ¶ 43a.) Neither the Intervenors nor the Secretary even claim that the relevant signing dates were possible. Since that this factual basis for each of the master's findings regarding these 404 signatures, the Intervenors' claim of clear error clearly errs.

The Secretary takes a different tack when he objects to the master's findings regarding the 404 signatures as well as the additional 84 signatures culled for essentially the same reasons. He claims the findings were clearly erroneous because they "incorrectly assigned the burden of proof to the Secretary." (Sec., p. 13.) The special master addressed this precise objection when, on August 12, 2020, he responded to Intervenors' motion to reconsider, which (in part) raised the same objection. There, the master found that "the Petitioners' had the burden of proof….to prove that any signatures culled were culled in error" and that Petitioners "produced proof through copies of the relevant petition parts…." If the Secretary had additional evidence on the face the petition part—the only

relevant question at this stage—the Secretary should have produced that evidence. Given the Petitioners' proof, and the absence of any counter-evidence, the special master considered the Petitioners' evidence "sufficient proof to establish by a preponderance of the evidence…." The Secretary's failure to meet proof with proof does not mean the special master flipped the burden of proof.

15 county-requirement. Oddly, the Intervenors claim that *Arkansas Hotels v Martin* requires Petitioners to prove that they met the requirement of having the total signatures needed from 15 counties. (Int., p. 20.) 2012 Ark. 335, 423 S.W.3d 49. On the contrary, *Arkansas Hotels* shows that Petitioners proof was sufficient. In *Arkansas Hotels*, the secretary of state found that sponsor's petition facially insufficient *because it lacked the required county signatures*. *Id.* at 10, 423 S.W.3d at 55. This Court held that, in light of the reason the petition was denied, the sponsors needed to provide some proof to show they met the 15-county requirement. *Id*. Their failure to do that doomed their effort. *Id*.

Therefore, *Arkansas Hotels* stands for the proposition that in a trial on a failure to initiate, the sponsor must produce evidence that refutes the reason the Secretary gave for insufficient signatures. Petitioners did

that. As the special master said when responding to this claim in his supplemental findings on August 12, 2020, "the [p]etitions were not rejected because of any issue related to the number of counties from which the signatures were obtained." This case is not about the 15-county requirement, and as the master found, Petitioners met their burden regarding the total initial count.

III. Intervenors

Scope of arguments. Petitioners have pointed out that, under this Court's decisions, Intervenors cannot attack the Secretary's decision regarding whether to grant a cure by introducing evidence and argument that go beyond the facial review. *Stephens v. Martin*, 2014 Ark. 442, 491 S.W.3d 451; *Zook v. Martin*, 2018 Ark. 293, 557 S.W.3d 880. The special master specifically found that the Intervenors' arguments about individual canvassers went "beyond facial validity." (Report, p. 33.) Intervenors offer two rebuttals, which both fail.

First, Intervenors claim it is unfair to allow Petitioners to attack the Secretary's initial-count decision and not let Intervenors do the same. (Int., pp. 26–27.) Petitioners are not claiming Intervenors have no right to support or attack the Secretary's initial-count decision. But per

Stephens and *Zook*, they just cannot do so by way argument and evidence that goes beyond facial validity.

Second, Intervenors claim that if they are not allowed to attack the Secretary's initial-count decision in their preferred way at this point, then "the initial count can never be challenged." (Int. pp. 27–28.) While the initial count can be challenged by arguments and evidence on the face of the petition, they cannot be challenged—either now or after a cure—by evidence outside the face of the petition. It is Intervenors, not Petitioners, who want to have their cake and eat it too: they want the Secretary's initial-count review to be limited to the petition's face and also be able to challenge that decision by introducing evidence that goes beyond a facial review. *Stephens* and *Zook* do not allow that.

Individual canvassers. Intervenors claim four AVF canvassers had disqualifying criminal convictions and one improperly listed a P.O. box as his domicile. Yet, as Intervenors note, the special master "did not give [] any weight" to the "evidence" Intervenors offered to prove these claims. (Int., p. 25.) Intervenors failed to show that any of AVF's canvassers had disqualifying criminal histories (Report ¶¶ 51–54.) While they claim to have introduced "into evidence the certified criminal

records" or Demetriuse A. Martin, a review of the record and the special master's findings shows that is false. (RT 623–626.) (Report ¶ 53). Instead, Intervenors' introduced a certified copy of a docket sheet, not a conviction. That is why the special master, on reviewing those documents, found that Intervenors' exhibit "appears" to show a conviction. But the records are not entirely clear.

Finally, Intervenors claim another AVF canvasser, Josef Bautista, improperly listed a P.O. Box and that, therefore, his signatures should not be counted. The special master gave no weight to this claim because, as he specifically found based on testimony, Mr. Bautista is homeless. (Report ¶ 59.) This claim, like the others regarding individual canvassers, fails.

Respectfully submitted,

By: /s/ Ryan Owsley

Ryan Owsley (2007-151)
Nate Steel (2007-186)
Alex Gray (2008-127)
Alec Gaines (2012-277)
Steel, Wright, Gray, PLLC
400 W. Capitol Ave., Suite 2910
Little Rock, AR 72201
501.251.1587

ryan@capitollaw.com
nate@capitollaw.com
alex@capitollaw.com
againes@capitollaw.com

and

Adam H. Butler (2003-007)
Robert F. Thompson (97-232)
414 West Court Street
Paragould, AR 72450
870.239.9581
abutler@paragouldlawyer.com
rthompson@paragouldlawyer.com

Certificate of Service

I certify that on 19 August 2020, a copy of the foregoing was filed with this Court's eFlex filing system, which serves all counsel of record.

By: /s/ Ryan Owsley
Ryan Owsley

Certificate 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 argument section of the foregoing brief contains 2,875 words.

By: /s/ Ryan Owsley
Ryan Owsley