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 — 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

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Informational Statement

I. Any related or prior appeal?

No.

II. Basis of Supreme Court jurisdiction?

(_) Check here if no basis for Supreme Court jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court jurisdiction is asserted.

(1) ___ Construction of the Constitution of Arkansas
(2) ___ Death penalty, life imprisonment
(3) _x__ Extraordinary writs
(4) _x__ Elections and election procedures
(5) ___ Discipline of attorneys
(6) ___ Discipline and disability of judges
(7) ___ Previous appeal in Supreme Court
(8) ___ Appeal to Supreme Court by law

III. Nature of Appeal?

(1) ___ Administration or regulatory action
(2) ___ Rule 37
(3) ___ Rule on Clerk
(4) ___ Interlocutory appeal
(5) ___ Usury
(6) ___ Products liability
(7) ___ Oil, gas, or mineral rights
(8) ___ Torts
(9) ___ Construction of deed or will
(10) ___ Contract
(11) ___ Criminal

IV. Is the only issue on appeal whether the evidence is sufficient to support the judgment?

No.

V. Extraordinary issues?

(___) appeal presents issue of first impression
(___) appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court
(___) appeal involves federal constitutional interpretation
(_x_) appeal is of substantial public interest
(_x_) appeal involves significant issue needing clarification or development of the law, or overruling of precedent
(___) appeal involves significant issue concerning construction of a statute, ordinance, rule or regulation

VI. Confidential Information?

(1) Does this appeal involve confidential information as defined by Section III(a)(11) and VII(A) of Administrative Order 19?

__ Yes _x_ No

(2) If the answer is "yes," then does this brief comply with Rule 4-1(d)?

__ Yes __ No

Jurisdictional Statement

1. At this stage, this case is about whether Arkansas Voters First (AVF) has a sufficient number of total signatures on the initial count of its petitions to qualify for a cure. To make a determination on this main question, there are four subsidiary issues: (1) whether AVF properly certified pursuant to A.C.A. § 7-9-601(b) that its paid canvassers had passed background checks; (2) whether the special master properly found that 586 signatures were wrongly excluded from the initial count of the Open Primaries Petition; (3) whether Intervenors' may present arguments outside the face of the petition and if so the merits of those arguments; and (4) whether AVF substantially complied with Arkansas law.

2. I express a belief, based on a reasoned and studied professional judgment, that this original action presents the following questions of legal significance for jurisdictional purposes: the issues identified above involve substantial public interest. This case is also jurisdictionally significant because it arises under article 5, section 1 of the Arkansas Constitution, which gives this Court jurisdiction. *See also* Ark. Sup. Ct. R. 6-5.

Issues and Principal Authorities

1. Under Count 1, and on de novo review, AVF's certification language is sufficient.

   - Ark. Code Ann. § 7-9-601(b)

   - *Leigh v. Hall*, 232 Ark. 558, 339 S.W.2d 104 (1960)

2. Under Count 2, the special master correctly found that the open primaries petition had a sufficient number of signatures to meet the total-signatures required for the initial count.

   - Ark. Code Ann. § 7-9-126

3. Intervenors' additional arguments are procedurally improper and wrong on the merits.

   - *Stephens v. Martin*, 2014 Ark. 442, 491 S.W.3d 451, 457.

4. Alternatively, AVF substantially complied with all requirements.

   - *Leigh v. Hall*, 232 Ark. 558, 339 S.W.2d 104 (1960).

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Statement of the Case and the Facts

On July 6, 2020, Arkansas Voters First (AVF), a ballot question committee registered with the Arkansas Ethics Commission, filed two proposed initiative petitions with the Secretary of State: the "Redistricting Petition" and the "Open Primaries Petition." (Report ¶¶ 1–4.) The constitutional amendment proposed by the Redistricting Petition would create an independent redistricting commission, for purposes of drawing boundaries for state legislative and congressional districts. The constitutional amendment proposed by the Open Primaries Petition would alter the manner in which general and primary elections are conducted.

After the petitions were filed, the Secretary of State began the intake process, which involved reviewing signatures on petition parts and determining whether signatures should be "culled," or removed from the petition for facial deficiencies. (Report ¶¶7–8.) Pursuant to the Arkansas Constitution, the Secretary of State required more than 89,151 valid signatures to be filed on the July 6 deadline, before AVF could receive a "cure" period to submit more signatures. (Report ¶ 19.) Each petition bore more than 89,151 signatures on its face.

Yet, on July 14, 2020, the Secretary notified AVF he would not continue the intake on either petition because, in his view, AVF had failed to comply with Ark. Code Ann. § 7-9-601(b), a statute imposing criminal-record-search requirements for paid canvassers. Report ¶¶ 15–16.) Arkansas law requires sponsors to "obtain" a "criminal record search" within "thirty (30) days before the date that the paid canvasser begins collecting signatures." Ark. Code Ann. § 7-9-601(b)(2). After completing this search, the sponsor must certify to the Secretary of State "that each paid canvasser in the sponsor's employ has passed a criminal background check . . . ." Ark. Code Ann. § 7-9-601(b)(3).

When AVF submitted its lists of paid canvassers to the Secretary of State for the Redistricting Petition, the lists included the following certification language addressing criminal-background checks:

> In compliance with Arkansas Code § 7-9-601, please find the list of paid canvassers that will be gathering signatures on the Redistricting Commission Constitutional Amendment. On behalf of the sponsors, Arkansas Voters First, this statement and submission of names serves as certification that a statewide Arkansas State Police background check, as well as, a 50-state criminal background check have been timely acquired in the 30 days before the first day the Paid canvasser begins to collect signatures as required by Act 1104 of 2017.

The language for the Open Primaries Petition referenced open primaries but was otherwise identical. (Report ¶ 30); (Petitioners' Exhibit 12.) The Secretary of State, in letters to AVF dated July 14, 2020 stated that the petitions were insufficient because of the certification language. (Report ¶¶ 15–18.) According to the Secretary of State, "it has been determined that acquiring a criminal background check is not the same as passing a criminal background check." (Petitioners' Exhibits 6 & 7.)

On July 17, 2020, the plaintiff Bonnie Miller filed this original action on behalf of AVF, under Ark. R. Civ. P. 65, seeking an injunction requiring the Secretary of State to begin the verification process and allow the 30-day cure period. AFV also sought an expedited review by this Court. The intervenor, Arkansans for Transparency, filed a motion to intervene on July 23, 2020, arguing the Redistricting and Open Primaries Petitions did not comply with the criminal-record-check and certification provisions of Ark. Code Ann. § 7-9-601(b). This Court, in a per curiam order on July 24, 2020, granted expedited review and appointed a special master to make factual findings, granted Intervenors' motion to intervene, ordered the Secretary of State to begin verifying

signatures on the Redistricting Petition and the Open Primaries Petition, and granted a provisional 30-day cure period.

On July 21, 2020, and July 23, 2020 the Secretary notified AVF that notwithstanding his July 17, 2020 letters, he had indeed continued the initial intake of the Open Primaries Petition and the Redistricting Petition, respectively. (Report ¶ 17–18.) The letters indicated that, on the initial review, the Open Primaries Petition was 528 signatures short of the 89,151 needed (Report ¶ 17); and the Redistricting Petition exceeded the total needed by 1,342 (Report ¶ 20).

The Petitioners filed a second amended complaint on July 27, 2020, dividing the claims into three counts: Count 1 pertains to the certification language; Count 2 pertains to additional signatures culled from the Open Primaries Petition; and Count 3 pertains to the ballot title for the Open Primaries Petition. On July 28, 2020, this Court expanded the special master's authority to include Count 2. Count 3 is on a separate briefing track.

The special master conducted a four-day hearing on July 28–31, 2020. At the hearing, it was undisputed that National Ballot Access actually obtained state and federal criminal background checks on all

paid canvassers. Heidi Gay, president of National Ballot Access, testified her company obtained state criminal background checks on all canvassers from the Arkansas State Police, and obtained federal background checks from private companies. (RT 407, 425–26, 447–48.) Mary Claire McLauren, an attorney with the Arkansas State Police, testified that the State Police cannot and does not provide federal criminal background checks on canvassers to petition sponsors. (RT 499-500.)

After receiving testimony from witnesses and multiple exhibits, the special master issued his Report and Findings on August 10, 2020. In his report, with regard to the criminal-record search requirement of Ark. Code Ann. § 7-9-601(b), the special master wrote, "The proof established clearly that the Arkansas State Police cannot obtain a federal background check for purposes of the statute." (Report ¶ 32.) According to the special master, it is impossible to comply with the statute as written: "The Arkansas State Police cannot provide federal background checks for sponsors of statewide initiative or referenda and has never done so." (Report ¶ 34.) The State Police does not provide federal criminal background checks to petition sponsors; therefore, "the requirement . . .

that a sponsor obtain from . . . the Arkansas State Police . . . a federal background check *is a requirement that a sponsor cannot meet*." (Report ¶ 32) (emphasis added).

The special master also noted that AVF's certification language was undisputed by the parties. (Report ¶38.) He ruled that if there was only one reasonable interpretation that could be drawn from undisputed facts regarding certification, then the case presents a legal question for this Court. He also held that if the certification language was subject to multiple interpretations, the case presents a factual issue, the Redistricting Petition and the Open Primaries Petitions' certification language was inadequate, and the petitions therefore lacked facially valid signatures. (Report ¶ 38.)

Regarding Count 2, the special master found that the Secretary had erroneously excluded 586 signatures from the initial count of the Open Primaries Petition. (Report ¶ 48.) Therefore, the master found that if this Court determines that the certification language in Count 1 is legally sufficient, he specifically found that "both petitions…have a sufficient number of facially valid signatures for the Secretary to verify those

signatures to determine if either petition is entitled to a cure period." (Report p. 35.)

On August 11, 2020, Intervenors objected to several of the master's findings and asked for reconsideration. The next day, the special master entered an order, denying the motion for reconsideration and making additional factual determinations. Specifically, the master found that "Petitioners' had the burden of proof…to prove that any signatures were culled in error" and that Petitioners carried this burden. (Order, ¶¶ 1–4.) He also found that, since the Secretary had not rejected any signatures on the basis of the 15-county requirement, that matter was not part of these proceedings. (Order, ¶¶ 6–7.)

Argument

I. Procedural Posture & Standards of Review

A. At this stage of the proceedings, the question before this Court is whether AVF's petitions meet the initial-count threshold to qualify for a cure.

The issue before the Supreme Court in this original action is not whether the two proposed constitutional amendments sponsored by Arkansas Voters First ("AVF") should be certified to the ballot as a final matter. Rather, the issue is whether the two proposed measures have met, what this Court has called, the "initial count," which is "just that—an initial count of the signatures submitted at the time of filing and prior to any signature verification." *Stephens v. Martin*, 2014 Ark. 442, 12, 491 S.W.3d 451, 457. The initial count determines whether a measure's sponsor qualifies for a cure period. As *Stephens* makes clear, the Court's "only concern when examining the propriety of the Secretary of State's decision **to grant or not grant the cure period** is whether, on the face of the petition, the signatures were of a sufficient number." *Id.*, 491 S.W.3d at 457 (emphasis added.) This Court reaffirmed *Stephens* as recently as 2018 in *Zook v. Martin*, 2018 Ark. 293, 7, 557 S.W.3d 880,

885. These proceedings should be limited in the manner prescribed in *Stephens* and *Zook*.

B. Standards of Review

As explained more fully under each respective heading below, a de novo standard of review governs the legal sufficiency of AVF's certification language (section II, below) and a clearly erroneous standard governs the factual determinations about the additional signatures that should have been included in the initial count for the Open Primaries Petition (section III, below). To the extent this Court entertains Intervenors' arguments that go beyond the face of the petition, the standard of review is discussed in section IV, below.

II. Under Count 1, and on de novo review, AVF's certification language is sufficient.

A. Standard of review

Because there was no factual dispute as to what certification language was included on the canvasser lists, the certification issue is a question of law. When the essential facts underlying a legal claim are undisputed, the question turns to the legal conclusions that can be drawn from the undisputed facts. *Commercial Nat. Bank of Shreveport v. McWilliams*, 270 Ark. 826, 827, 606 S.W.2d 363, 363 (1980) ("The

question to us is purely one of law, the essential facts being undisputed."); *Winkle v. Grand Nat. Bank,* 267 Ark. 123, 139, 601 S.W.2d 559, 574 (1980) (concurrence, Justice George Rose Smith) ("That issue is purely one of law, presented in this case upon undisputed facts."). Respondent's and Intervenors' claim that AVF's certification language was insufficient. Since the content of that certification language for both petitions was undisputed before the special master, the only remaining question is the legal conclusion to be drawn from the undisputed facts, which is a question of law for this Court.

B. AVF's certification language, when viewed as a whole, certifies that its canvassers passed background checks.

The paid canvassers for the petition sponsors all passed state and federal background checks; and no party demonstrated otherwise. AVF also obtained the sworn statements from every canvasser swearing that the canvasser had never been convicted of a disqualifying crime and filed these sworn statements with the Secretary—something else no party disputes. Indeed, in order to be a registered canvasser, AVF's canvassers had to have their sworn statements on file with the Secretary. The

question is, therefore, simply whether AVF certified that its paid canvassers passed background checks. The Secretary said "no," due to his excessive focus on the absence of the word "passed." But this misses the forest for the trees because, on a review of the entire and undisputed certification language, AVF certified its canvassers passed.

The statute required a certification by the petition sponsor that the paid canvassers used to gather petition signatures passed a criminal background check as required by Ark. Code Ann. § 7-9-601. The statute reads as follows:

> 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.

Ark. Code Ann. § 7-9-601(b)(3).

The special master found, and it was undisputed by the parties that AVF's canvasser lists all used the following certification language:

> ***In compliance with Arkansas Code § 7-9-601***, please find the list of paid canvassers that will be gathering signatures on the Redistricting Commission Constitutional Amendment. On behalf of the sponsor, this statement and submission of names serves as certification that the statewide Arkansas State Police background check, as well as a 50-state criminal background check, have been timely acquired in the 30 days before the first day the paid canvasser begins to collect signatures ***as required by Act 1104 of 2017***.

(Report ¶ 30) (emphasis added). (The Open Primaries Petition used identical language but referenced the Open Primaries Amendment.)

The Secretary of State should not have rejected the certification language because, when reviewing it in its entirety, it complied with the law. By referencing the statute and one of its amendatory acts, the certification language made clear the paid canvassers met the requirements of Ark. Code Ann. § 7-9-601. Thus, AVF's certification language made clear the persons whose names were being transmitted to the Secretary of State had met all the requirements of section 7-9-601 in order to be paid canvassers. The certification language also referenced that it was in compliance with "Act 1104 of 2017." Act 1104 requires that paid canvassers not have certain disqualifying crimes. AVF's certification language represents the names on the paid-canvasser list are of persons who do not have any disqualifying crimes.

This entire dispute centers not on whether AVF's paid canvassers had disqualifying crimes or whether criminal background checks had actually been performed, but on AVF not using the word "passed" in its certifications to the Secretary of State. Indeed, the sworn statements of all AVF's canvassers were on file with the Secretary, as this was a

requirement for a canvasser to even be registered. These important ballot measures should not turn on "magic words," especially when the sponsors went out of the way to cite the relevant code section and amendatory act when issuing its certification. The sponsors' certification language was sufficient as a matter of law.

C. Arkansas law does not require sponsors to use magic words, especially when strict compliance with the statute is impossible.

The Secretary of State's reliance on "magic words," including a precise requirement of use of the word "passed" despite specific statutory references in the certification, is without basis in the Arkansas Constitution or Amendment 7 case law. This Court has been clear in explaining the purpose behind Amendment 7 served by the power of the People to propose constitutional amendments and legislation. Amendment 7 places the ultimate lawmaking power in this State with the People through powers reserved by the People to themselves. *See Leigh v. Hall*, 232 Ark. 558, 566, 339 S.W.2d 104, 109 (1960); *Reeves v. Smith*, 190 Ark. 213, 78 S.W.2d 72 (1935). *Ferrell v. Keel*, 105 Ark. 380, 385, 151 S.W. 269 (1912). "That object and purpose was to increase the sense of responsibility that the lawmaking power should feel to the people

by establishing a power to initiate proper, and to reject improper legislation." *Leigh*, 232 Ark. at 566 (citing *Reeves*, 190 Ark. at 215-16).

Attempts to curtail the direct-democracy powers of initiative and referendum the People reserved to themselves have historically faced difficult interpretive impediments by this Court. This Court has been consistent – the standard is that of substantial compliance. "[S]ince that residuum of power remains in the electors, their acts should not be thwarted by strict or technical construction." *Reeves*, 190 Ark. at 215-16, 78 S.W.2d at 73. To the contrary, "Amendment No. 7 must be construed with some degree of liberality, in order that its purposes may be well effectuated. Strict construction might defeat the very purposes, in some instances, of the amendment." *Id.* at 215, 78 S.W.2d at 73. Thus, "Amendment No. 7 contemplates a liberal construction and, if substantially complied with, the proposition should be submitted to the vote of the electors." *Coleman*, 189 Ark. at 847, 75 S.W.2d at 250. This Court applies the substantial-compliance standard to ballot-sponsor process. *See Zook v. Martin*, 2018 Ark. 293, 557 S.W.3d 880 (holding sponsor of minimum wage measure substantially complied with the signature cure provisions); *Johnson v. Munger*, 260 Ark. 613, 616, 542

S.W.2d 753, 755 (1976)(holding sponsors complied substantially complied with publication requirement); *Leigh v. Hall, supra* (applying substantial compliance standard to publication of initiative proposal).

This Court has not traditionally found a way to invalidate a ballot measure and thwart the People's reservation of the powers of initiative and referendum; rather, it has done the opposite. A strict constructionist approach to ballot-measure cases would have the effect of undercutting the legislative power of the People protected by Amendment 7. And it would, as a result, disenfranchise thousands of Arkansans who express their desire to vote on the ballot measure.

The Secretary of State took the opposite approach by focusing on a single magic word "passed" rather than "acquired"—to reject the petitions. The approach is hyper-technical and inconsistent with this Court's traditional approach to "magic words." In different contexts, Arkansas courts have consistently rejected the idea that legal conclusions should turn on the use of technical phrasing in documents meant to meet a particular legal standard. Instead, the cases look to the substance, meaning and message conveyed by language relevant to the legal conclusion to be reached. *See, e.g., Baber v. Baber*, 2011 Ark. 40, 378

S.W.3d 699 (2011)(absence of magic words "best interests of the children" in a court order unnecessary when considering modification of child custody); *Curtis v. Patrick*, 237 Ark. 124, 371 S.W.2d 622 (1963)(failure to use specific words like "husband and wife" will not defeat a tenancy by the entirety); *Faughn v. Kennedy*, 2019 Ark. App. 570, 590 S.W.3d 188 (2019)(specific words not required to bring suit against individual defendants under the Arkansas Civil Rights Act); *Minor Children v. Ark. Dept. of Human Servs.*, 2019 Ark. App. 588, 589 S.W.3d 495, 501 (2019)("The Juvenile Code does not require 'magic words' to be in the order to satisfy a 'best interest' inquiry."); *Wilson v. Wilson*, 2013 Ark. App. 759, at 9, 431 S.W.3d 369, 374 (2019) ("magic words" not needed to make findings under Arkansas' guardianship statutes).

The insistence on using the exact word "passed" is especially inappropriate where, as here, it is impossible to strictly comply with the statute. Section 7-9-601(b)(3) requires the sponsor to make the certification at issue here. That certification itself rests on the requirement in 601(b)(1) that sponsors "shall obtain…from the Division of Arkansas State Police, a current…federal criminal record search on every paid canvasser…." Ark. Code Ann. § 7-9-601(b)(1). The special

master specifically found that subsection 601(b)(1) contains a "requirement that a sponsor cannot meet." (Report ¶ 32.) Because it is impossible to strictly comply with section 601(b)(1), this Court should not require strict compliance with 601(b)(3). While this Court has held that sponsors must strictly comply with statutes passed in furtherance of Amendment 7, those cases did not address situations where compliance with the statute was impossible. *Benca v. Martin*, 2016 Ark. 359, 3, 500 S.W.3d 742; *Zook v. Martin*, 2018 Ark. 306, 5, 558 S.W.3d 385, 390. Therefore, in situations such as this where strict compliance is impossible, this Court should follow its earlier precedents regarding substantial compliance is required and should reject the Secretary's reliance on magic words.

In other contexts, Arkansas courts have consistently rejected the need for magic words in statutory interpretation, court orders, and pleadings. It is therefore more important that this Court reject the use of technical language requirements under Amendment 7, given the historical application of the substantial-compliance standard. The Constitution reserves the important and final lawmaking power with the

People. The Secretary of State should not be permitted to invalidate that power because of a preference for technical language and magic words.

III. Under Count 2, the special master correctly found that the open primaries petition had a sufficient number of signatures to meet the total signatures required for the initial count.

The special master found that, when conducting the initial count on the Open Primaries Petition, the Secretary of State improperly culled at least 586 signatures. When these signatures were added back to the open primaries total count, the petition met the total, facial count required to qualify for the cure. Having heard extensive testimony and having received and reviewed hundreds of petition parts on this matter, the special master made correct and detailed findings of fact. (Report, ¶¶ 39–49, 61)

The master's findings regarding these 586 signatures fall into four categories (Report, ¶ 48).

First, the Secretary stipulated at the final day of the hearing that 84 signatures had been improperly culled and that they would be added back to the count. (RT 598–600). Since the Secretary stipulated to these signatures being thrown back into the initial count, the burden is on the Intervenors to show from the face of the petition parts that they should

not be thrown back. Since there is no evidence for such an argument, the special master's findings regarding these 84 signatures should be affirmed.

Second, the Secretary excluded 14 signatures gathered by Jessica Martin, whom the Secretary mistakenly thought was not a registered canvasser due to a scrivener's error on the paid-canvasser list. (Report ¶ 47). The master specifically, and correctly, found that Jessica Martin's name was on the canvasser list. (Report ¶ 47.) But her last name appeared as "Martinez" due to a scrivener's error. *Id*. The master's finding of fact that Ms. Martin was properly registered is not clearly erroneous and should be affirmed.

Third, the master found that the Secretary improperly culled 404 signatures across 64 petition parts because the Secretary considered each petition part to have at least one signature dated before the canvasser's verification. (Report ¶¶ 43–44.) But an official from the Secretary's office testified that, at the initial-count stage, the Secretary does not cull an entire petition part when the date of the signature is undetermined. (RT 147–48, 150, 159) (Report ¶ 43). The master reviewed each of these petition parts, examining the signatures that caused the petition part to

be culled. The review revealed that each of the flagged signatures on these 64 petition parts were dates on which it was impossible for the petitioner to have signed. *Id*. The master correctly found that the date of signing on these signatures was undetermined and that, therefore, the petition parts should not have been culled. The master's findings regarding these petition parts should be affirmed.

Finally, the master found that the Secretary improperly culled 84 signatures across 10 petition parts because the Secretary considered each petition part to contain a signature made before the date of the canvasser's verification. (Report ¶¶ 45–46.) The master reviewed each of these petition parts and each of the flagged signatures. *Id*. The master correctly found that for each flagged signature the date of signing was either left blank or was illegible. Therefore, the master correctly found that there was no evidence that the signature was made before the date of the canvasser's verification. The master's finding should be affirmed.

IV. Intervenors' additional arguments are procedurally improper and wrong on the merits.

A. Intervenors' additional arguments are procedurally improper at this stage of the proceedings.

Intervenors have attempted to attack the Secretary's decision with arguments that go beyond the face of the petition, an attempt that exceeds the scope of the proceedings at this stage. In *Stephens v. Martin*, this Court explained the permissible scope of arguments at this initial-count stage. 2014 Ark. 442, 12, 491 S.W.3d 451, 457.

In *Stephens*, a ballot question committee formed to attack a statewide measure (like Intervenors have done here). The Secretary of State had granted the measure's sponsor a cure period, during which the sponsor submitted additional signatures that the Secretary considered in reaching his decision to certify the measure to the ballot. The attacking group filed suit, arguing, among other things, the Secretary of State had wrongly granted the cure because of various claims the attackers made about the insufficiency of signatures and petition parts submitted *before the final count*. This Court, as here, appointed a special master to hear any factual disputes. At the hearing, the attacking group put on testimony alleging that certain notary seals had been forged and even put on a handwriting expert—all in attempt to argue that the initial count and cure were improperly granted.

This Court made clear such an attempt is improper and wholly outside the scope of the proceedings at the initial-count stage:

> "Indeed, **the very fact that testimony and evidence were required** to determine Stephens's claims of fraud and forgery **belies any notion that such a consideration is relevant at the initial-count stage. Such an inquiry would far exceed the level of scrutiny appropriate** for a determination of whether the petition on its face contained the sufficient number of signatures at the time of filing. That is not to say that such claims cannot be made to challenge the final determination by the Secretary of State of the petition's sufficiency for placement on the ballot, as we have certainly entertained such challenges in the past. Be that as it may, **they cannot be raised to challenge the Secretary of State's initial-count determination**."

Stephens v. Martin, 2014 Ark. 442, 12, n7, 491 S.W.3d 451, 457 (emphases added).

Yet Intervenors have attempted to raise at least two sets of affirmative claims at the hearing, both of which the special master noted required evidence that went beyond the face of the petition. (Report, p. 33.) Intervenors (1) made extensive arguments about the federal-background check issue and (2) raised questions about whether certain canvassers had disqualifying criminal histories. Since neither was a basis on which the Secretary set aside signatures from the initial count,

and since both go beyond a facial review, both arguments are outside the scope of these proceedings. To the extent this Court reviews Intervenors' arguments, Petitioners address them below.

B. Intervenors' arguments are also wrong on the merits.

i. Obtaining a federal background check on paid canvassers from State Police was impossible.

Standard of review. The special master found that the "proof established clearly that the Arkansas State Police cannot obtain a federal background check for the purposes of the statute [Ark. Code Ann. §7-9-601(b)(1)]" and that the State Police "has never done so" for sponsors of statewide measures. (Report, ¶¶ 32, 34.) Intervenors claim the Secretary should have refused to certify AVF's petitions for a reason the Secretary did not rely on: namely, that AVF did not obtain each paid canvassers' federal background check from State Police. The standard of review on this claim depends on its nature, which Intervenors have yet to make clear.

On the one hand, if Intervenors are claiming that it was, in fact, possible for AVF to obtain a federal background check from State Police, that is a question of fact subject to the clearly erroneous standard of view.

On the other hand, to the extent Intervenors are claiming that obtaining federal background checks directly from the FBI instead of from the State Police meets the requirements of Ark. Code Ann. § 7-9-601(b)(1), that is a question of law.

The master's finding regarding this factual dispute is reviewed under the clearly-erroneous standard. This Court will uphold a special master's finding unless it is "clearly erroneous." *Benca v. Martin*, 2016 Ark. 359, 3, 500 S.W.3d 742, 744; Ark. R. Civ. Pro. 53(e)(2). A finding of fact is "clearly erroneous" when, even though there is evidence to support it, the Court on review of all the evidence is left with the definite and firm conviction that the master has made a mistake. *Roberts v. Priest*, 334 Ark. 503, 511, 975 S.W.2d 850, 853 (1998). In matters under Amendment 7, this Court "generally" will "adopt and affirm the master's findings of fact." *Roberts v. Priest*, 334 Ark. 503, 511, 975 S.W.2d 850, 853 (1998).

To the extent Intervenors argue that obtaining federal background checks directly from the FBI instead of from the State Police meets the requirements of Ark. Code Ann. § 7-9-601(b)(1), that is a question of law.

The question of fact. The special master did not clearly err when he found that it is impossible for sponsors to comply with the part of Ark.

Code Ann. § 7-9-601(b) requiring sponsors to obtain federal background checks from State Police.

Under Arkansas law, a "sponsor shall obtain, at the sponsor's cost, ***from the*** Division of Arkansas State Police, a current state and federal criminal record search on every paid canvasser to be registered with the Secretary of State." Ark. Code Ann. § 7-9-601(b)(1) (emphasis added). Because the evidence before the special master fully supported his finding that it is impossible for sponsors to obtain federal background checks *from* State Police, the special master did not clearly err and his finding should be upheld.

The special master received testimony that established the following facts:

- The Arkansas State Police cannot provide federal background checks for sponsors of statewide initiative or referenda and have never done so. (Report ¶ 33)

- Before National Ballot Access, AVF's canvassing firm, began collecting signatures, the firm called State Police to confirm its understanding that State Police still are unable to provide federal background checks. (RT 425, 436.)

- A staff attorney with State Police testified the State Police are unable to provide federal background checks on paid canvassers. (RT 499–500); (Report ¶ 34)

- National Ballot Access attempted to comply with the federal-background-search requirement by actually obtaining federal background searches from private firms. (Report ¶ 37)

Intervenors did not even proffer any evidence that sponsors could obtain federal background checks on their paid canvassers *from* the State Police. Rather, Intervenors argued that paid canvassers could obtain such a record directly from the FBI. This claim is addressed in section below.

Since several lines of evidence support the special master's finding of fact that it is impossible for AVF to obtain federal backgrounds from State Police, and since Intervenors did not introduce any evidence at all to show that State Police could provide such checks, the special master's finding is not clearly erroneous, and it should be upheld.

Any other ruling would require sponsors to do the impossible. Yet it is an ancient legal maxim that the law does not require an impossibility. *See Burbridge v. Arkansas Lumber Co.*, 118 Ark. 94, 178 S.W. 304, 309 (1915) ("The impossible is not required by law, not expected to be performed."); *Cowling v. Muldrow* 71 Ark. 488, 76 S.W. 424 (1903) ("The law is reasonable, and does not require an absurd or impossible

thing."); *Kight v. Arkansas Dept. of Human Servs.*, 94 Ark. App. 400, 411, 231 S.W.3d 103, 112 (2006) ("[I]t is a familiar maxim of the law that *lex non cogit ad impossibilia*.").

Compelling sponsors to do the impossible violates Amendment 7, rendering the statute unconstitutional. Article 5, section 1 of the Arkansas Constitution carefully articulates the scope of the legislature's authority in the initiative and referenda ("I&R") area. The Constitution removes from the legislature the power to enact legislation that has the effect of interfering with the peoples' I&R rights "[n]o law shall be passed to prohibit any person … from giving or receiving compensation for circulating petitions, nor to prohibit the circulation of petitions, *nor in any manner interfering with the freedom of the people in procuring petitions*." Ark. Const., art. 5, § 1 ("Unwarranted Restrictions Prohibited") (emphasis added). Nor may the legislature enact any legislation that restricts, hampers, or impairs citizens I&R rights: "No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people." Ark. Const., art. 5, § 1 ("Self-Executing").

This is a textbook example of a statute that restricts, hampers, or impairs Arkansans I&R than one—like the federal-background check requirement (as interpreted by Intervenors)—with which compliance is impossible. If AVF were required to do so, such a requirement would violate the constitution.

The question of law. The claim that one can go directly to the FBI for a background check would not comply with the Arkansas law. Intervenors argued before the special master that a paid canvasser can obtain an FBI background check by going directly to the FBI and then handing the report to the sponsor. Intervenors suggest this convoluted process satisfies the requirement in Ark. Code Ann. § 7-9-601(b)(1) that the sponsor obtain the federal check "from the Division of the Arkansas State Police."

Intervenors' theory would not comply with the foregoing statute because the check and the results would not be "from the Division of the Arkansas State Police" but from the FBI. Apparently recognizing this, Intervenors tried to save their theory by claiming that because the State Police will help take people's fingerprints, that connection is sufficient. But that is irrelevant because the statute requires the "criminal record

search on every paid canvasser" be "obtain[ed], at the sponsor's cost, from the Division of the Arkansas State Police." Ark. Code Ann. § 7-9-601(b)(1). Even if sponsors were to follow the procedure Intervenors suggest, sponsors would still be unable to certify that they had obtained background checks "from" State Police and that their canvassers had passed those background checks.

Intervenors' theory does not comport with the statute. Whether the statute should be amended in the way Intervenors suggest is a question for the legislature. Intervenors' theory should be disregarded.

ii. Intervenors' failed to prove any canvassers had disqualifying criminal histories.

While Intervenors attempted to argue that certain AVF canvassers had disqualifying criminal histories, Intervenors never provided sufficient evidence to prove these claims. Instead, Intervenors introduced what the special master called "some documents" to show that certain canvassers "might have" certain disqualifying criminal histories. (Report ¶¶ 51–54.) No certified copies of any convictions were offered at trial. *Id*. Since Intervenors failed to carry their burden of proof, there claims regarding criminal histories fail.

Requests for Relief

AVF respectfully asks this Court to:

(1) hold that AVF certified its canvassers passed state background checks;

(2) affirm the special master's finding that the Open Primaries Petition has a sufficient number of signatures to meet the initial-count requirement; and

(3) require the Secretary to count additional signatures gathered during the provisional cure period and certify the proposals for the ballot.

Respectfully submitted,

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Certificate of Service

I certify that on 14 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
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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 5,834 words.

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