No. CV-20-562

IN THE SUPREME COURT OF ARKANSAS

JOHN THURSTON, in his official capacity as Arkansas Secretary of State; and LESLIE RUTLEDGE, in her official capacity as Arkansas Attorney General,
Appellants,

v.

SAFE SURGERY ARKANSAS, a ballot question committee; and DR. LAURIE BARBER, individually and on behalf of SAFE SURGERY ARKANSAS,
Appellees.

On Appeal from the Pulaski County Circuit Court, Ninth Division
No. 60CV-20-4956 (Hon. Mary S. McGowan)

Appellants' Reply Brief

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This Court should reverse the circuit court's preliminary injunction. The circuit court was required to dismiss this case because Appellees did not present a justiciable controversy. Even if a justiciable controversy were present, the court below erred in finding that compliance is impossible because Appellees have successfully registered paid canvassers in the past. Assuming the circuit court was correct in finding it impossible to obtain a federal background check from the Arkansas State Police ("ASP"), its injunction is still grossly overbroad and cannot stand.

I. The circuit court lacked jurisdiction because there is no justiciable controversy.

The circuit court should have dismissed this case because Appellees merely allege that they must comply with the antifraud requirements when they might engage in the initiative process in a future election cycle. That does not amount to a "present danger or dilemma" sufficient to show a justiciable controversy. *See Baptist Health Sys. v. Rutledge*, 2016 Ark. 121, at 4-5, 488 S.W.3d 507, 510 (no justiciable controversy where only alleged injury is that plaintiffs must comply with challenged standards). Instead, any harm that Appellees might suffer is "speculative and contingent": Until they actually attempt to register paid canvassers for a ballot initiative, there is no way of knowing whether certification would be denied. *See Ark. Dep't of Hum. Servs. v. Ledgerwood*, 2017 Ark. 308, at 8-9, 530 S.W.3d 336, 342. Lastly, reversal is required because the court below inappropriately laid down rules

to guide Appellees through a future initiative-sponsoring effort. *See Dodson v. Allstate Ins. Co.*, 365 Ark. 458, 462, 231 S.W.3d 711, 715 (2006) ("courts do not sit for the purpose of . . . laying down rules for future conduct").

Appellees urge this Court to disregard the same deficiencies that doomed the claims at issue in *Baptist Health*. As here, the only alleged injury there was having to comply with the challenged statutes or standards. *Id*. at 13-14; *see Baptist Health*, 2016 Ark. 121, at 4-5, 488 S.W.3d at 510. Appellees attempt to distinguish *Baptist Health* on the basis that the record here shows Appellees' intention to sponsor an initiative for the 2022 election. App. Br. at 14-15. But Appellees rely on nothing more than self-serving testimony regarding speculative future plans that may never come to fruition. There is still no actual, present controversy because they *have not begun* the initiative process, and they did not present any evidence that they ever will.

Appellees offer two cases for this court's consideration in lieu of *Baptist Health*, but those cases are so distinct from this one that neither is instructive. *Magruder v. Arkansas Game and Fish Commission*, 287 Ark. 343, 698 S.W.2d 299 (1985), only addressed the standing aspect of justiciability. And *Jegley v. Picado*, 349 Ark. 600, 622, 80 S.W.3d 332, 343 (2002), is also easily distinguishable.

In *Jegley*, (1) the plaintiffs admitted to engaging in behavior that violated the challenged statute; (2) the plaintiffs indicated that they intended to engage in the

same behavior in the future; and (3) the state had not disavowed intentions of enforcing criminal penalties. *Id*. The key difference between that case and this one is the fact that if the *Jegley* plaintiffs' behavior would *necessarily* violate the statute. *Id*. (homosexual citizens challenged statute criminalizing sodomy). Here, to be in compliance with Section 601(b), Appellees can submit a specific certification statement—the same one, in fact, that ***they previously*** submitted in *Arkansans for Healthy Eyes v. Thurston*, 2020 Ark. 270, 606 S.W.3d 582, stating that their paid canvassers had passed federal and state background checks. Supp. R. 31-32; *Healthy Eyes*, 2020 Ark. 270, at 2-3, 606 S.W.3d 582, 584 (signatures collected by Appellees' canvassers certified to have passed federal and state background checks were accepted). Another important difference is that Appellants have shown no interest in enforcing Section 601(b)'s punitive provision in the manner Appellees complain of while, in *Jegley*, the State had not written off such enforcement.

Appellees argue that the requirements have been enforced against them because a previous certification of theirs was challenged. *See id*. But lawsuits by third-party groups do not amount to enforcement by Appellants. Looking past Appellees' off-base arguments, this Court should find that the circuit court erred in considering Appellees' claim because there is no justiciable controversy.

II. The circuit court erred in granting a preliminary injunction.

A. The circuit court committed legal error, and Appellees are not likely to succeed on the merits.

This Court and other courts have provided reasonable interpretations of Section 601(b) and given sample certification statements that satisfy the requirements. *See Miller v. Thurston*, 2020 Ark. 267, at 8 n.4, 605 S.W.3d 255, 259 n.4. (defining "passing" a background check); *Miller v. Thurston*, No. 5:20-CV-05163-TLB, 2020 WL 5535017, at *7, — F.Supp.3d. — (W.D. Ark. Sept. 15, 2020) (listing examples of Section 601(b)-compliant certification statements). The testimony and evidence below also demonstrates that initiative sponsors could comply with the law by *making a request* to the ASP for federal background checks on canvassers. Supp. R. 33 (testimony of Appellees' witness); *id*. at 232 (declaration of ASP staff attorney); *id*. at 233-34 (ASP form). Additionally, the fact that other sponsors have previously successfully complied demonstrates that, contrary to the circuit court's conclusion, compliance is far from impossible. *Cf., e.g.*, Vol. 2 of 3, Pet'r Opening Br., Abstract, & Addendum, *Benca v. Martin*, CV-16-785 (Ark. Oct. 5, 2016), ADD143 (showing sponsors of 2016 medical-marijuana amendment certified compliance, got amendment on ballots, and amendment passed).

And even more poignantly, ***Appellees themselves*** have successfully registered paid canvassers. Supp. R. 31-32; *Healthy Eyes*, 2020 Ark. 270, at 2-3, 606 S.W.3d at 584. Courts have rejected claims like Appellees' here and declined to preliminarily

enjoin Section 601(b) when the record shows prior successful compliance. *See Miller*, 2020 WL 5535017, at *8. The circuit court should have done the same. Other courts have also explicitly "disagree[d]" with suggestions that the requirements leave sponsors "only with the 'Hobson's choice' to make no certification or to make a false statement," *id*. at *7, and the court below should have rejected that notion, too. Because the circuit court misinterpreted Section 601(b) in concluding that compliance is impossible, this Court should reverse the preliminary injunction. *See Seeco, Inc. v. Hales*, 334 Ark. 134, 137, 969 S.W.2d 193, 195 (1998) (holding that a circuit court necessarily abuses its discretion when it erroneously interprets the law).

Appellees' attempt to address the myriad interpretations and examples of how compliance is possible is by arguing that the ASP taking canvassers' fingerprints for federal background checks does not satisfy Section 601(b). App. Br. at 25. In so doing, Appellees urge this Court to apply a different standard of review for the constitutionality of statutes, conflating the "strict compliance standard" for sponsors complying with ballot-initiative regulations, App. Br. at 21, 25, with the proper rule that statutes must be interpreted so that "all doubts . . . in favor of the statute's constitutionality," *Tsann Kuen Enters. Co. v. Campbell*, 355 Ark. 110, 116, 129 S.W.3d 822, 826 (2003). Appellees' misplaced reliance on the "strict compliance" language from this Court's case law begs the question of the proper interpretation of the statute with which Appellees must comply. The issue for this Court is not which interpretation

of the statute—Appellees' or any of the examples given above—is the better one. For Appellees to succeed, there must be "a clear incompatibility between [Section 601(b)] and the constitution." *Id.* So long as there is at least one permissible interpretation of Section 601(b) under which certification is possible, the statute must be upheld. Any of the court-endorsed interpretations mentioned above render compliance possible. That Appellees may "strictly comply" with the proper interpretation of Section 601(b) defeats their challenge.

Appellees' remaining arguments miss the mark because they improperly frame the issue as whether the circuit court clearly erred in finding that it is impossible to obtain federal background checks from the ASP under Appellees' erroneous construction of Section 601(b). App. Br. at 18. As explained above, this skips over the crux of this case: whether the circuit court erred in holding *compliance with Section 601(b)* is impossible. Appellees point to *Healthy Eyes* and *Miller* for evidence that it is impossible to obtain a federal background check from the ASP. *Id*. at 21-22. But those findings are inapposite because they rest on an erroneous interpretation of Section 601(b). Turning to the actual question of possibility of compliance, the record here shows that Appellees' previous certification was compliant with Section 601(b). Supp. R. 31-32; *Healthy Eyes*, 2020 Ark. 270, at 2-3, 606 S.W.3d at 584.

Because there are a number of permissible interpretations of Section 601(b) with which compliance is possible, Appellees' challenge must fail. The circuit court erred in concluding otherwise, and the preliminary injunction should therefore be reversed.

B. Appellees failed to demonstrate irreparable harm.

The circuit court clearly erred when it found that Appellees could not register paid canvassers or begin the initiative process with Section 601(b) on the books. R. 168. Appellees can register paid canvassers by making the same certification that ***they previously used***. Supp. R. 31-32, 235; *Healthy Eyes*, 2020 Ark. 270, at 2-3, 606 S.W.3d at 584. That Appellees may hypothetically be denied certification in the future was insufficient grounds for the grant of a preliminary injunction. *See League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174-PKH, 2020 WL 6269598, at *2-*4 (W.D. Ark. Oct. 26, 2020) (denying preliminary injunction because plaintiffs failed to show that their ballots were likely to be rejected, or that their ballots or enough other ballots had been rejected).

The circuit court's findings were also clearly erroneous because there are other steps that Appellees could take to begin the initiative process, such as: (1) filing a draft proposal of their initiative, (2) finding paid canvassers, or (3) enlisting volunteer canvassers to circulate petitions. *See* Ark. Code Ann. 7-9-107, 7-9-601; Supp. R. 38 (testimony of Appellees' witness that they might use volunteer canvassers); *id*.

46 (circuit court acknowledged that Appellees "ha[ve] not begun to try to obtain signatures"). Yet they have done none of those things. Instead, they simply brought a lawsuit.

On this prong of the preliminary injunction inquiry, Appellees largely repeat their meritless merits arguments—claiming it's impossible to obtain a federal background check from the ASP and that they'd have to choose between making a false certification and doing the impossible. App. Br. at 28. Again, the pertinent inquiry is whether *certification* is possible, and Appellees' own past practice and success in registering paid canvassers shows that it is. Supp. R. 31-32; *Healthy Eyes*, 2020 Ark. 270, at 2-3, 606 S.W.3d at 584. As to whether the draft-proposal requirement is concurrent with or a prerequisite to registering paid canvassers that distinction is irrelevant, *see* App. Br. at 28; what matters is Appellees can take *some action* to begin the initiative process with Section 601(b) intact.

In a last-ditch effort to rebut the fact that Appellees could begin the process by enlisting the help of volunteer canvassers, Appellees argue that "forcing" sponsors to use volunteer canvassers violates Amendment 7. App. Br. at 29. That's a red herring. The issue is whether Appellees are irreparably harmed because they cannot begin the petitioning process and, for the reasons stated above, that is not the case. In any event, that issue is not before this Court, as Appellees have *not* challenged Section 601(b) on the basis that it would force them to use volunteer canvassers.

C. At a minimum, the preliminary injunction is overbroad.

While no injunction was warranted, the circuit court's injunction is at a minimum grossly overbroad. Even if the federal-background-check requirement is invalid for the reasons Appellees suggest, the circuit court should have only stricken "and federal" and left the state-background-check requirement or "from the Division of [ASP]" and required that a federal background check be conducted by any entity. *See Ex parte Levy*, 204 Ark. 657, 163 S.W.2d 529, 531 (1942) (striking this Court from list of courts granted original jurisdiction, and sustaining the remainder of the act as to other courts and general purposes). Each of the remaining portions of the Section are not so connected with and dependent on the federal-background-check requirement to suggest that the General Assembly would not have adopted those provisions on their own. *Id*.; *see* Ark. Code Ann. 7-9-601(b)(2)-(b)(4). This Court should at a minimum find that the circuit court's injunction is overbroad and vacate the injunction.

Appellees set out a standard for evaluating whether a single purpose is meant to be accomplished by the statute, App. Br. 30, but make no mention of the analysis "[i]f a statute attempts to accomplish two or more objects," which is the case with Section 601(b). *Ex parte Levy*, 204 Ark. 657, 163 S.W.2d at 531. Appellees themselves acknowledge that, "the General Assembly was concerned not just with Arkansas convictions but with convictions in 'any state of the United States . . . [and

its territories].'" App. Br. 31. For a statute such as Section 601(b) that has more than one object, even if it "is void as to one, it may still be in every respect complete and valid as to the other." *Ex parte Levy*, 204 Ark. 657, 163 S.W.2d at 531. Indeed, had the circuit court just struck "from the Division of [ASP]" the Section would accomplish its other purpose of requiring background checks for convictions outside Arkansas. Appellees also argue that Section 601 lacks a severability clause, App. Br. at 31, but admit that is not determinative. Because the remaining provisions are "complete in [themselves] and capable of carrying out the purpose of the legislature," this Court should nonetheless find that federal-background-check requirement is severable. *Berry v. Gordon*, 237 Ark. 865, 866, 376 S.W.2d 279, 288 (1964) (finding that, in such a case, courts will easily find legislative intent to make provisions separable).

CONCLUSION

For these reasons, this Court should reverse the circuit court's order granting a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Administrative Order No. 19 and that it conforms to the word-count limitations contained in Rule 4-2(d) of this Court's pilot rules on electronic filings. The brief contains 2,324 words.

/s/ *Dylan L. Jacobs*
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CERTIFICATE OF SERVICE

I certify that on January, 14, 2021, I electronically filed this document with the Clerk of Court using the eFlex electronic-filing system, which will serve all counsel of record.

/s/ *Dylan L. Jacobs*
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