CV-24-492

IN THE ARKANSAS SUPREME COURT

JENNIFER MCGILL, individually and on behalf of the ARKANSAS CANVASSING COMPLIANCE COMMITTEE; & CHEROKEE NATION ENTERTAINMENT, LLC — **PETITIONERS**

V.

JOHN THURSTON, in his capacity as ARKANSAS SECRETARY OF STATE — **RESPONDENT**

LOCAL VOTERS IN CHARGE, A BALLOT QUESTION COMMITTEE; and JIM KNIGHT, individually and on behalf of LOCAL VOTERS IN CHARGE — **INTERVENORS**

INTERVENORS' BRIEF ON COUNT I

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TABLE OF CONTENTS

POINTS ON REVIEW AND PRINCIPAL AUTHORITIES

I. LVC COMPLIED WITH THE SPONSOR-CERTIFICATION REQUIREMENT IN 601(B)(3).

II. PETITIONERS FAILED TO SATISFY THEIR BURDEN OF PROVING BOTH VIOLATIONS OF THE PAY-PER-SIGNATURE BAN AND SIGNATURES OBTAINED AS A RESULT OF THE VIOLATIONS.

TABLE OF AUTHORITIES

Cases

Statutes and Rules

STATEMENT OF THE CASE AND THE FACTS

Local Voters in Charge ("LVC") is the sponsor of a proposed constitutional amendment to require local voter approval for certain new casino licenses, repeal authority to issue a casino license in Pope County, and revoke any license issued for a casino in Pope County, Arkansas (the "Proposed Amendment").

On July 5, 2024, LVC timely submitted its petition to the Secretary of State. (Pets. Ex. 11). Out of more than 33,000 petition parts and 162,000 signatures submitted, Respondent's office initially culled 72 signatures—fewer than ten petition parts—*total*. (Intvs. Ex. 62 at 39-23) (Bridges Dep. Tr.). Josh Bridges, Respondent's assistant director of elections, testified he had never seen a petition with so few culled parts. (*Id*. at 6-8, 39-40).

On July 31, 2024, Respondent's office sent LVC a letter, stating it "had verified no less than 116,200 signatures" and had certified the proposed measure as sufficient for placement on the November general election ballot. (Intvs. Ex. 17) (letter).

The very next day, on August 1, 2024, Petitioners filed this Original Action against Respondent. Jim Knight, individually and on behalf of

LVC ("Intervenors"), filed a motion to intervene on August 5, 2024, which this Court granted in a per curiam Order on August 9, 2024. In the same Order, the Court appointed the Honorable Randy Wright as Special Master to resolve factual disputes in Petitioners' signature challenge and file a report by September 9, 2024.

Over a four-day period, the Master conducted hearings on the seven claims brought by Petitioners in Count I. In his detailed, 40-page final Report, the Master found against Petitioners on their claims that LVC did not provide the required certifications under subsection 601(b)(3) and that LVC violated the pay-per-signature ban in subsection 601(g). He also found for Intervenors on their affirmative defense of estoppel. While the Master largely found against Petitioners on their claim that dozens of paid canvassers did not provide their "current residence addresses," the Master disqualified 5,966 signatures for that reason. (Report at ¶¶ 71-72). At the conclusion of the Report, the Master found "that any other claims made by the Petitioners should be denied for lack of proof," leaving "no less than 110,234 validated signatures." (Report at ¶¶ 72-73).

In their opening brief to this Court, Petitioners challenge only the Master's findings on the sponsor-certification and pay-per-signature

claims, thereby abandoning all other claims not raised and for which the Master denied for a "lack of proof." The relevant portions of the record and the Master's findings as it pertains to the two remaining claims are as follows.

I. The Special Master's Findings that LVC's Agents' Certifications Complied with Subsection 601(b)(3).

On March 22, 2024, LVC executed a contract with PCI Consultants, Inc. ("PCI") to gather signatures. (Report at ¶ 19); (Pets. Ex. 417) (contract). Among other things, the contract required: LVC to provide each petition circulator and/or petition circulator manager with approved educational talking points for use in describing the Ballot Measure; PCI to obtain a 65% validity rate, including checking signatures against voter files supplied by LVC; and PCI to submit a weekly report to LVC. (Report at ¶ 31) (Pets. Ex. 417). The contract also expressly authorized PCI to hire "employees and/or contract with independent contractors to assist [PCI] in the performance of its duties under this Agreement." (Report at ¶ 37) (Pets. Ex. 417 at ¶ 2(a)). Indeed, LVC committee member Hans Stiritz testified that he understood PCI would hire whomever it needed in order to carry out the canvassing. (Report at ¶ 38) (RT603).

Accordingly, PCI entered into separate contracts with three entities: 1) Florida Petition Management ("FPM"); 2) Cape Campaigns; and 3) Engage the Voter. (Report at ¶ 22). FPM hired Phil Dewey to run an office in North Little Rock. (*Id.*) Stephanie Marcynyszyn of Cape Campaigns managed another canvassing office. (*Id.*) Berta or "Ashley" Erickson of Engage the Voter managed an office in Northwest Arkansas. (*Id.*)

These three canvassing managers—Dewey, Marcynyszyn, and Erickson—signed the sponsor affidavits submitted by LVC in order to register its paid canvassers. Each affidavit states, "I am providing this affidavit on behalf of and at the direction of Local Voters in Charge, a duly formed Arkansas Ballot Question Committee and Sponsor . . . ." *See, e.g.*, Pets. Ex. 7 (composite of Dewey affidavits).

LVC hired Nicole Gillum, an Arkansas attorney, to provide legal compliance related to the signature gatherers. (Report at ¶ 32) (RT661). At the hearings, Gillum explained how LVC operated. She testified that PCI's CEO contracted with three LLCs (the three canvassing managers with whom he had 20-plus year relationships) to be "managers on the ground here for this campaign." (RT664). Gillum served as LVC's day-to-

day contact with PCI, and PCI was the "conduit" that relayed to the canvassing managers Gillum's instructions on behalf of LVC. (Report at ¶ 32) (RT661-665). Gillum provided PCI with best practices for the managers who were onboarding and training canvassers on LVC's behalf, including step-by-step instructions on how LVC wanted the process to go. (*Id.*) She also sent emails and had phone calls, providing instructions for canvasser training, background checks, and submissions to Respondent's office on behalf of LVC. (Report at ¶ 33) (RT661-665). Gillum and others also drafted the contractually required fact sheet that the canvassing managers used. (RT666). She spoke with Dana Alpin-Gonzalez of PCI three-to-four times a day regarding background checks, and Gillum personally cleared canvassers to be registered. (RT663, 673).

Notably, Gillum also drafted the sponsor affidavits used by Dewey, Marcynyszyn, and Erickson, and she directed that the three canvassing managers sign them on behalf of LVC. (Report at ¶ 32) (RT664, 679). Gillum also checked all sponsor affidavits emailed to Respondent's office to make sure they were correct. (RT673).

Gillum facilitated a meeting with Respondent's office on April 12, 2024, before any signatures were collected on behalf of LVC. (Report at ¶

34) (RT673-679). Gillum attended that meeting along with Alpin-Gonzalez of PCI, PCI's CEO Angelo Paparella, Mr. Bridges from Respondent's Office, and Leslie Bellamy, Director of Elections for Respondent. (Report at ¶ 35) (RT673-679). At the meeting, Gillum informed Bridges and Bellamy that PCI was LVC's canvassing company and that Alpin-Gonzales of PCI would be making the sponsor submissions. (Report at ¶ 35) (RT675-676). Thereafter, Bridges accepted all of the sponsor submissions made by Alpin-Gonzales on LVC's behalf, just as he had accepted submissions by canvassing companies in past cycles dating back to 2016. (Report at ¶ 36) (Intvs. Ex. 62 at 33-34).

Petitioners asked no questions of Gillum at the hearing. (RT691).

The Special Master also heard testimony from Mr. Dewey. Dewey understood that PCI hired his employer, FPM, to "manage a petition drive for Local Voters in Charge" and specifically to "hire, train canvassers to go out and collect signatures on the petition drive itself." (RT475). He hired his own set of canvassers, which amounted to about 250, down from a thousand after vetting by PCI and Gillum. (RT476, 496). Dewey testified in detail about the training process that canvassers underwent first when they were onboarded, and then again when their

background checks cleared and they were hired. (RT477-484). This training included using that fact sheet that was created by LVC. (RT481-482) (Intvs. Ex. 3) (fact sheet); *see also* (RT135) (Marcynyszyn testimony that she received the same fact sheet from LVC through PCI and used it as part of canvasser training). Dewey also executed the sponsor affidavits at the direction of Alpin-Gonzalez on behalf of Local Voters in Charge. (RT472-473).

Based on the foregoing, the Master found that "the evidence presented by all parties mandates the finding that LVC, the sponsor, used as agents others working under the sponsorship of LVC, to collect signatures to be presented to the Respondent." (Report at ¶ 27). Further, he concluded that "LVC authorized PCI to act on its behalf and subject to its control and that LVC authorized the three canvassing managers to act on its behalf and subject to its control." (Report at ¶ 30).

As to the language of Ark. Code Ann. § 7-9-601(b)(3), the Master noted that it "does not address or state that 'sponsor' is limited to a ballot question committee member or that certification is non-delegable," and "no evidence was introduced to show how a sponsor, such as LVC, could fulfill its duties . . . without doing so through an agent." (Report at ¶ 29).

The Report concludes, "[i]t would be impractical to find that the named sponsor, LVC, could not use authorized persons or entities to do the actual canvassing and managing of the petition question." (*Id.*) Accordingly, the Master found that "LVC did properly 'certify to the Secretary of State that each paid canvasser in the sponsor's employ has no disqualifying offenses . . . .' pursuant to Ark. Code Ann. Section 7-9-601(b)(3)." (Report at ¶ 40).

II. The Special Master's Findings that Intervenors Did Not Violate Subsection 601(g).

Petitioners claim that LVC's pay-per-signature violations were so systemic that all signatures collected must be disqualified. In support of that theory, Petitioners were allowed to introduce numerous videos in which their hired investigators interrogated paid canvassers and surreptitiously recorded them. In three videos, the purported canvassers was never identified. (Report at ¶ 60) (Pets. Exs. 176, 203, & 225). In one video, the purported canvasser says her name is "Veronica," but as the Master noted, the final list of LVC's paid canvassers who submitted petition parts does not contain a canvasser named "Veronica." (Report at ¶ 60) (Pets. Ex. 158).

In other videos, the canvasser purports to say they "might" get a gift card if they get 100 or 200 signatures or get their name entered into a raffle to win a TV. (Report at ¶ 58). In at best 14 videos, the canvasser mentions getting, or being eligible for, $100 for 100 signatures or getting paid $4 or $5 per signature. (Report at ¶ 58). In the same videos, though, at least five of the paid canvassers also state they are being paid hourly. (*Id.*)

After pages of findings on the various videos, the Master concluded:

> It is incumbent upon the master to consider as a whole the credibility of the facts contained in the above described exhibits and what each exhibit purports to prove as to the paid canvassers method of payment. The master took into account that there were 338 paid canvassers who submitted signatures to the Respondent for this ballot measure, and the above described exhibits would at best only be 14 paid canvassers. (There were not totals of signatures collected of the 14 paid canvassers listed in the videos.) The master does not find that the Intervenors were in violation of Section 7-9-601(g)(1). It is further found the Petitioners did not meet their burden of proof of showing that the Intervenors, in their collection of signatures, conducted such with a wanton disregard for the provisions of Section 7-9-601(g)(1) that would require all signatures collected to be disqualified.

(Report at ¶ 61). Petitioners did not introduce evidence of who made the offer to pay $100 for 100 signatures, when it was purportedly made to any of the canvassers, or the number of signatures the canvassers collected as a result of the alleged offer.

While not specifically cited by the Master, Dewey testified that he paid canvassers by the hour and denied offering to pay $100 for 100 signatures. (RT488). He had a bucket of different gift cards ranging in value from $25-$100 that canvassers might draw out of for several reasons, including working seven days in a row, working a holiday, if they provided a referral, and so forth. (RT488-489). Canvassers could also draw on a "good day," but as Dewey explained, "[i]t was really - - wasn't really assigned to a number because somebody could have brought in 150 and then drew and somebody could have brought in 75 and drew out of it." (RT489). And even then, getting 75 or 100 hundred signatures did not guarantee a canvasser would get to draw. (RT489-490). Further, the gift-card drawing was only used in the beginning of the campaign for morale purposes, "just to get people excited about doing the job." (RT490). Petitioners did not introduce any evidence of when a particular canvasser

drew from the bucket or how many signatures they collected on a drawing day.

ARGUMENT

Petitioners' argument that an entity sponsor cannot authorize an agent to make the 601(b)(3) certification must fail. It is inconsistent with both the statutory text and basic principles of agency law. As to the former, subsection 601(b)(3) contains no language limiting who can act for the "sponsor," which, under the General Assembly's definitions, can include almost every type of entity and organization from a "corporation" to a "syndicate." As to the latter, it is black letter law that entities can only act through their agents. As the Master found, Petitioners have not shown how entities like LVC can fulfill their duties if they cannot use authorized agents. Petitioners' position is impractical, legally unsound, and cannot be sustained.

Perhaps recognizing this, in their brief to this Court, Petitioners now "of course" acknowledge that LVC can only act through its agents, but they argue that *only certain agents* are permissible—namely, "an officer, member, or employee of the sponsor." Pets. Br. at 21. This even narrower limitation is created completely out of whole cloth. In reading

Ark. Code Ann. § 7-9-601(b)(3) and the attendant definitions, how would LVC—or anybody else—know that some agents, but not others, can act for an entity sponsor? The answer is simple: they cannot because the text does not say that. If the General Assembly wanted to override common law rules of agency it could have easily done so by expressly making the certification requirement non-delegable or qualifying who can be a sponsor. Because the legislature chose not to do so, Petitioners' interpretation of 601(b)(3) must be rejected.

Likewise, Petitioners' assertion of error in the Master's findings on agency must be rejected. As they did below, Petitioners argue that the canvassing managers are independent contractors, not agents of LVC. While they devote a substantial part of their brief to proving independent-contractor status, Petitioners fail to explain why that distinction matters. This is not a tort case, where an actor's status as independent contractor is relevant for purposes of the principal's liability to an injured third party. Here, there is no logical or legal reason to differentiate between types of agents when it comes to the subsection 601(b)(3) certification. A contractor is still an agent in the same way that an officer, director, employee, member, or some other representative

acting on the principal's behalf is. Petitioners have cited zero authority to the contrary.

In this case, the only relevant facts are that LVC authorized the canvassing managers to make the certifications on its behalf, and they acted accordingly. The record on this point is uncontroverted. Accordingly, the Master's findings should be affirmed.

As to the pay-per-signature ban, all of Petitioners' arguments fail for one reason—lack of proof. The Master correctly found that Petitioners' videos were not credible evidence of violations of subsection 601(g)(1). The testimony of Mr. Dewey supports this finding. Petitioners fail to provide convincing argument or authority as to why the Master erred.

Furthermore, even assuming *arguendo* that the Master did err, the statute does not end there. Subsection 601(g)(3) is very specific and states: "a signature obtained in violation of this subsection is void and shall not be counted." *See* Ark. Code Ann. § 7-9-601(g)(3). According to the plain language of this provision, proof of a violation is not enough; rather, there must also be proof linking an impermissible payment, or offer to pay, to a signature obtained as a result. Because Petitioners did

not introduce any evidence of affected signature totals, their petition on this point still fails.

Petitioners' interpretation of 601(g) conveniently does away with their burden of proof. Indeed, Petitioners want the Court to infer that the provision of some gift cards to boost morale and videos of 14 canvassers (at best) mentioning that they "might" get a bonus of $100 for 100 signatures means that all signatures ever collected by all paid canvassers are void. Or, that all of Mr. Dewey's canvassers were always "laboring under the offer to receive bonuses if they obtained a certain number of signatures." Pets. Br. at 41. Not only does the record provide zero support for such a conclusion, it cannot be squared with subsection 601(g)(3).

Lastly but importantly, Petitioners' reading of the statute opens the door to a constitutional challenge. It is settled law that a state cannot ban the use of paid canvassers, as the circulation of a petition involves "core political speech." *Meyer v. Grant*, 486 U.S. 414, 422 (1988). While Petitioners correctly point out that other states pay-per-signature bans have been upheld, they omit the fact that these states' courts have adopted a narrow construction that only bans what the statutes expressly proscribe: payment per signature. Incentives for morale, validity,

working on a weekend, and even signature minimums have all been deemed permissible. The same narrow construction should be adopted here, and the Petition should be denied.[1]

Standard of Review

In an original action such as this one, the Court "will accept the special master's finding of fact unless they are clearly erroneous." *Stilley v. Thurston*, 2024 Ark. 124, at 3, 2024 WL 4048025, at **2 (citing *Roberts v. Priest*, 334 Ark. 503, 975 S.W.2d 850 (1998)). "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 special master has made a mistake." *Id.* Issues of statutory interpretation are reviewed de novo. *Zook v. Martin*, 2018 Ark. 306, at 3, 558 S.W.3d 385, 389 (citing *State v. Ledwell*, 2017 Ark. 252, 526 S.W.3d 1).

[1] Respondent's brief is due at the same time as Intervenors' brief. To the extent that Respondent adopts Petitioners' arguments or makes similar points, the arguments herein apply equally to Respondent.

I. LVC Complied with the Sponsor-Certification Requirement in 601(b)(3).

A. Petitioners' interpretation of "sponsor" is not supported by the statutory text and contravenes rules of construction.

According to Petitioners, LVC could not delegate its certification obligation "to an agent outside of the LVC—that is, someone who is not an officer, member, or employee of the sponsor." Pets. Br. at 20-21. But the statutory language is plain and unambiguous and does not contain these limitations on "sponsor."

Ark. Code Ann. § 7-9-601(b)(3) provides: "Upon submission of the sponsor's list of paid canvassers to the Secretary of State, the sponsor shall certify to the Secretary of State that each paid canvasser in the sponsor's employ has no disqualifying offenses in accordance with this section." Petitioners fail to mention that "sponsor" is a defined term. The General Assembly defined "sponsor" as "a person who arranges for the circulation of an initiative or referendum petition or who files an initiative or referendum petition with the official charged with verifying the signatures." Ark. Code Ann. § 7-9-101(10). The term "person" is also defined; it means "any individual, business, proprietorship, firm, partnership, joint venture, syndicate, business trust, labor organization,

company, corporation, association, committee, or any other organization or group of persons acting in concert." Ark. Code Ann. § 7-9-402(11)(A); *see also Arkansas Hotels & Ent., Inc. v. Martin*, 2012 Ark. 335, at 4, 423 S.W.3d 49, 52 (noting the Arkansas Code sections that "govern Initiatives, Referenda, and Constitutional Amendments[,] . . . provide the procedures for initiative approval and placement on the ballot[,]. . .[and] define the parties and persons involved in ballot initiatives.").

Nowhere in these sections is "sponsor" limited to an officer, member, or employee of an entity. Indeed, those words—"officer," "member," "employee"—do not appear anywhere in the applicable text. And for good reason. The language employed by the legislature allows a sponsor to be an "association" or a "joint venture" or a "firm" or "any other organization" which may have no "officers, members, or employees." If the General Assembly had intended to restrict "sponsor" in the way that Petitioners suggest, it could have done so. It could have simply changed the definition of "person" to mean "any individual or any officer, member, or employee of a business, company, corporation, association, or committee." Or, it could have expressly stated that the certification requirement is non-delegable—just as it has done in other subchapters

within the election code. *See, e.g.*, Ark. Code Ann. § 7-4-122(c) ("A county board of election commissioners may not change a duty delegated to a county employee if that duty is expressly governed by state or federal law."). The fact that the General Assembly did neither is dispositive. The Court should decline Petitioners' invitation to supplant the legislature's language with their own, thereby defying basic rules of statutory construction. *See, e.g.*, *Our Cmty., Our Dollars v. Bullock*, 2014 Ark. 457, at 18-19, 452 S.W.3d 552, 563 ("In construing statutes, this court will not add words to a statute to convey a meaning that is not there. . . . . Furthermore, we will not read into a statute a provision not put there by the General Assembly. . . .") (internal citations omitted).

While the Court need not resort to interpretative rules, if it were to do so, one such rule takes on added significance. "It has long been the rule in Arkansas that, although the General Assembly has the power to alter the common law, a legislative act will not be construed as overruling a principle of common law unless it is made plain by the act that such a change in the established law was intended." *Nelson v. Arkansas Rural Med. Prac. Loan & Scholarship Bd.*, 2011 Ark. 491, at 9-10, 385 S.W.3d 762, 768. Here, there is no language from which to infer that the General

Assembly intended to overrule common law principles of agency. It is hornbook law that an entity—whether it be a ballot question committee, a corporation, or a firm—can only act through its agents. *El Dorado Baking Co. v. City of Hope*, 193 Ark. 949, 103 S.W.2d 933, 934–35 (1937) ("It is elementary that corporations can act only through their officers and agents and the acts of such . . . will be deemed those of the corporation."). By broadly defining "person" and "sponsor," the General Assembly necessarily left open who can act on behalf of a sponsor entity, and the common law rules of agency apply.

Lastly, it must be noted that Petitioners' rationale is fundamentally flawed. They contend that allowing the sponsor to appoint an "outside" agent to make the 601(b)(3) certifications means "the sponsor could evade accountability by pointing the finger at the unrelated agent, leading to an absurd result inconsistent with the plain statutory language." Pets. Br. at 23. This argument is nonsensical.

Regardless of whether an "inside" or "related" agent or an "outside" or "unrelated" agent is acting on the sponsor's behalf, the sponsor still bears the ultimate responsibility for ensuring that Arkansas law is followed. This is because the plain text of the statute provides that

signatures incorrectly obtained or submitted under subsections § 7-9-601(a)-(e) cannot be counted by the Secretary of State for any purpose, thereby putting the sponsor's spot on the ballot in jeopardy. *See* Ark. Code Ann. § 7-9-601(f). In other words, the legislature has ensured that the sponsor is held accountable no matter the type of agent acting on its behalf. Indeed, LVC is not in any way attempting to distance itself from its agents, nor can it.

For all of these reasons, Petitioners' statutory interpretation is simply wrong. The Court should hold that subsection 601(b)(3) does not preclude an agent from making the required certifications on the sponsor's behalf.

B. The Master's findings that LVC authorized the three canvassing managers to act on its behalf and make the 601(b)(3) certifications should be affirmed.

Petitioners also challenge the Special Master's finding that an agency relationship existed between LVC and PCI and between LVC and the three canvassing managers who made the required certifications. Petitioners urge the Court, just as they did the Master, to instead find that PCI and the three canvassing managers were independent contractors. Thus, even if the Court finds that an agent can act for the

sponsor, Petitioners contend that LVC still did not comply because it used independent contractors. Pets. Br. at 26-32.

The existence of an agency relationship in this case is a question of fact and thus fell within the purview of the Special Master. *See Hardin v. Bishop*, 2013 Ark. 395, at 7, 430 S.W.3d 49, 54 (citing *Campbell v. Bastian,* 236 Ark. 205, 365 S.W.2d 249 (1963)). Petitioners have failed to show any clear error made by the Master.

It must be pointed out that Petitioners misstate the Master's findings and the supporting evidence in the record. Contrary to Petitioners' assertion, the Master did not rely solely on the PCI contract to conclude that the three canvassing managers acted as agents of LVC. *See* Pets. Br. at 26. The Master made it quite clear that he also relied on the testimony of Hans Stiritz and Nicole Gillum. (Report at ¶¶ 32-38). Indeed, Gillum testified that she directed that the canvassing managers to submit the sponsor certifications on LVC's behalf. (RT664, 679). The affidavits themselves, which Gillum drafted for their use, evidence this fact. (RT664, 679) (Pets. Ex. 7). Gillum's testimony and the related evidence in the record are unrebutted, as Petitioners did not even

endeavor to pose a single question to Ms. Gillum at the hearings. Their brief to the Court is equally silent on this point.

Unlike the Master, Petitioners are the ones relying solely on the contract—even though this Court has reiterated numerous times that contract language is not dispositive of an agency relationship. *See, e.g.*, *ConAgra Foods, Inc. v. Draper*, 372 Ark. 361, 366, 276 S.W.3d 244, 249 (2008).

Further, it is long-settled law that an agent can employ a subagent to assist the agent in conducting the principal's affairs and that "an agency may be implied where one by his conduct holds out another as his agent." *See De Camp v. Graupner*, 157 Ark. 578, 249 S.W. 6 (1923) (noting authority to employ subagents); *Schuster's, Inc. v. Whitehead*, 291 Ark. 180, 181-82, 722 S.W.2d 862, 863 (1987) (stating rule that agency may be implied by holding out one as an agent). Here, it is undisputed that the contract between PCI and LVC expressly authorized PCI to hire subagents and LVC through Gillum—who drafted the affidavits, directed their submission, and reviewed them when submitted—held them out as LVC's agents. Thus, Petitioners' assertion that LVC had no direct contact

with Dewey, Marcynyszyn, or Erickson, is of no moment. Petitioners have shown no error in the Master's findings.

There is another reason the Court should affirm on this point—namely, the designation of the canvassing managers as "independent contractors" is irrelevant. While it may fit Petitioners' narrative to use that label—or the label of "outside" or "unrelated" agent—there is no legal reason to differentiate between types of agents when it comes to who can act for the sponsor under subsection 601(b)(3); they are all agents. Petitioners fail to provide any argument or explanation to the contrary. The only case cited by Petitioners—*D.B. Griffin Warehouse, Inc. v. Sanders*, 336 Ark. 456, 986 S.W.2d 836 (1999)—is a tort case. *See* Pets. Br. at 29. Of course in tort, whether someone is an agent or independent contractor matters for purposes of vicarious liability. But this is not a tort case. Here, an "outside agent" (like Dewey) owes a fiduciary duty to the principal, just like an officer or director or member (like Jim Knight). And, it makes more sense for the canvassing managers to make the required certifications since they are the ones hiring, training, and overseeing the paid canvassers. That is borne out by the fact that LVC's

petition was the cleanest one received by Respondent's office in years. (Intvs. Ex. 62 at 39) (Bridges Dep. Tr.).

In short, it does not matter how the three canvassing managers are classified. The evidence establishes that they are all LVC's authorized agents. Petitioners have provided no argument or authority as to why independent-contractor status matters. As such, the entirety of Petitioners' brief on this point need not be considered, and the petition should be denied.

C. Even if the Court adopts Petitioners' interpretation of 601(b)(3), it should be applied prospectively only.

Notwithstanding, if the Court agrees with Petitioners' construction of the statute, it should not result in the Proposed Amendment's removal from the ballot.

On more than one occasion, this Court has refused to retroactively apply a new rule of law out of concern for even-handed treatment of litigants. *See State v. Herndon*, 365 Ark. 185, 190, 226 S.W.3d 771, 775 (2006) (overruling prior case law but not applying new law to the appellant who was entitled to rely on old law in effect at the time of his citation for violating a regulation, reasoning that it would be "fundamentally unfair" and citing cases). While this case does not

concern a new legislative enactment or involve overruling prior case law, the same rationale should apply to prevent retroactive application. The evidence in the record establishes that Respondent has consistently accepted certifications of paid canvassers by sponsors' agents, including this year and years before. (Intvs. Ex. 62 at 33-34). Just as in the cases cited *supra*, imposing a new standard now, after all is said and done, would be fundamentally unfair.

What is more, allowing the eleventh-hour about face on who can act for the "sponsor" will prevent the Proposed Amendment from reaching the ballot in November, thereby restricting the fundamental right of the people to procure petitions. *See* Ark. Const., art. 2, § 8 ("No person shall be . . . deprived of life, liberty or property, without due process of law."); Ark. Const. art. 5, § 1 ("No law shall be passed to prohibit any person or persons 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[.]").

And because a fundamental right is involved, it would also violate due process. *See McDaniel v. Spencer*, 2015 Ark. 94, at 24, 457 S.W.3d

641, 657, *as revised* (Mar. 11, 2015) (Hart, J., concurring in part) (noting that the power retained by the citizens to initiative and referendum are fundamental rights guaranteed by the constitution).

"Procedural due process guarantees that a state proceeding which results in deprivation of property is fair, while substantive due process guarantees that such state action is not arbitrary and capricious." *Parker v. BancorpSouth Bank*, 369 Ark. 300, 307, 253 S.W.3d 918, 923 (2007) (citing *Arkansas Dep't of Correction v. Bailey,* 368 Ark. 518, 247 S.W.3d 851 (2007)). As to substantive due process, this Court has "defined the term 'arbitrary' as decisive but unreasoned action . . . and as an act arising from unrestrained exercise of will, caprice or personal preference, based on random or convenient choice rather than on reason or nature." *City of Lowell v. M & N Mobile Home Park, Inc.*, 323 Ark. 332, 348, 916 S.W.2d 95, 103 (1996) (citing *City of Little Rock v. Pfeifer,* 318 Ark. 679, 887 S.W.2d 296 (1994); *Smith v. City of Little Rock,* 279 Ark. 4, 648 S.W.2d 454 (1983)) (Jesson, C.J., dissenting).

Unquestionably, the absence of reason pervades Petitioners' and Respondent's position on 601(b)(3). Additionally, notice and opportunity to be heard—the minimal guarantees of procedural due process—were

not provided. *See Parker*, 369 Ark. 300 at 307, 253 S.W.3d at 923 (citing *Tsann Kuen Enters. Co. v. Campbell,* 355 Ark. 110, 129 S.W.3d 822 (2003)). The procedure employed by Respondent for reviewing the sufficiency of signatures submitted by LVC provided no notice that Respondent would endorse a new, non-delegable-duty view of 601(b)(3)'s certification requirements—that is, until it was too late to correct the alleged deficiencies.

If the Court agrees with Petitioners' interpretation of section 601(b)(3), it should only apply that interpretation after the 2024 election cycle. That is the only way to avoid an unconstitutional deprivation of due process and the people's right to the initiative.

D. The Master's findings on estoppel should be affirmed.

Consistent with the foregoing, estoppel plays a role. "Estoppel is governed by fairness." *Foote's Dixie Dandy, Inc. v. McHenry*, 270 Ark. 816, 822, 607 S.W.2d 323, 326 (1980). While the Court has limited estoppel to situations "where an affirmative misrepresentation by an agent or agency of the State has transpired," the Court has never required the sort of malign intent suggested by Petitioners. *See* Pets. Br. at 33-34. Instead, the Court has reiterated "the need for some affirmative

act as a prerequisite to a judicial finding of estoppel" so as to avoid the extension of the doctrine to "nebulous and indefinite" situations. *See Arkansas Dep't of Hum. Servs. v. Est. of Lewis*, 325 Ark. 20, 25, 922 S.W.2d 712, 714 (1996) (discussing cases).

On this record, it cannot be seriously questioned that Respondent's office acted affirmatively when it accepted each of LVC's paid canvasser registrations and registered its canvassers or that LVC relied on those registrations. All of the elements of estoppel are met, just as the Master found. Out of fairness, the Court should not allow Petitioners to sneak in the back door at the last minute and do what Respondent cannot.

II. PETITIONERS FAILED TO SATISFY THEIR BURDEN OF PROVING BOTH VIOLATIONS OF THE PAY-PER-SIGNATURE BAN AND THE SIGNATURES OBTAINED AS A RESULT OF THE ALLEGED VIOLATIONS.

Petitioners contend that the Master erred in finding that they did not carry their burden of establishing violations of the pay-per-signature prohibition in Ark. Code Ann. § 7-9-601(g)(1). In particular, they cite: 1) Dewey's "admission" that he paid canvassers "additional money" when they had a "good day"; 2) videos of different canvassers a who mentioned eligibility for a $100 bonus if they got 100 signatures and the like; and 3) evidence of gift-card purchases. Pets. Br. at 35-36. According to

Petitioners, these "violations"—without more—require disqualification of all validated signatures obtained by all paid canvassers in Dewey's employ. The Court should reject Petitioners' arguments for several reasons.

A. Petitioners did not prove what signatures were affected by an alleged improper offer to pay under 601(g)(3).

First, as noted *supra*, the plain language of subsection 601(b)(3) requires proof of a causal link between the alleged violation and the signatures obtained. Petitioners provided no evidence regarding the affected signatures; thus, even assuming for the sake of argument that there were violations of the pay-per-signature ban, the petition must be denied on this point for failure of proof.

The pay-per-signature ban reads in whole:

> (g)(1) It is unlawful for a person to pay or offer to pay a person, or receive payment or agree to receive payment, on a basis related to the number of signatures obtained on a statewide initiative petition or statewide referendum petition.
>
> (2) This subsection does not prohibit compensation for circulating petitions but only compensation for obtaining signatures when the compensation or compensation level is impacted by or related to the number of signatures obtained.

> (3) A signature obtained in violation of this subsection is void and shall not be counted.
>
> (4) A violation under this subsection is a Class A misdemeanor.

Ark. Code Ann. § 7-9-601(g).

Under this Court's oft-cited rules of statutory construction, the cardinal rule is "to construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language." *McMillan v. Live Nation Ent., Inc.*, 2012 Ark. 166, at 4, 401 S.W.3d 473, 476. Further, statutes are to be construed "so that no word is left void, superfluous, or insignificant, and we give meaning to every word in the statute, if possible. *Williams v. St. Vincent Infirmary Med. Ctr.*, 2021 Ark. 14, at 9, 615 S.W.3d 721, 727. Statutory provisions are construed so as to make them consistent, harmonious, and sensible in an effort to give effect to every part. *Arkansas Parole Bd. v. Johnson*, 2022 Ark. 209, at 5, 654 S.W.3d 820, 823.

Subsection 601(g)(3) plainly states that "a signature obtained in violation of this subsection is void and shall not be counted." Construing subsection 601(g)(3) just as it reads, only signatures obtained as a result of an impermissible payment or offer to pay are "void and shall not be

counted." For example, if an impermissible offer to pay a canvasser $100 for 100 signatures was made on a Monday, but, if the same paid canvasser also worked Tuesday, and was paid her usual hourly rate with no other offer of payment, any signatures collected on Tuesday would be counted. This is the only way to interpret 601(g)(3) that gives it meaning and effect.

Below, Petitioners relied heavily on their videos as proof of an unlawful offer to pay under subsection 601(g)(1) and completely disregarded subsection 601(g)(3). They never offered evidence of the affected signatures—namely, when the offer was made to a canvasser and the number of signatures that canvasser collected as a result. An improper offer without more, is not enough. To agree with Petitioners on this point would require reading subsection 601(g)(3) out of the statute. Such a result cannot be sustained. *See Walther v. FLIS Enterprises, Inc.*, 2018 Ark. 64, at 11, 540 S.W.3d 264, 270 ("We do not interpret language to render one section dispensable.") (citing *Ozark Gas Pipeline Corp.*, 342 Ark. 591, 29 S.W.3d 730 (2000); Surplusage Canon, Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 174-79 (2012)).

Notably, Petitioners do not deny that they failed to provide the required proof under subsection 601(g)(3). Instead, they now want the Court to conclude that all of Dewey's paid canvassers were always "laboring under an offer to receive bonuses if they obtained a certain number of signatures." *See* Pets. Br. at 41. Yet, there is no evidence in the record to support such a finding. And, Mr. Dewey testified to the contrary. He testified that he never offered to pay a canvasser $100 for 100 signatures and that he only paid them hourly. (RT488). Of the videoed canvassers that Petitioners associate with Dewey, none identified when they were offered $100 for 100 signatures or who made them the offer. To side with Petitioners and conclude that it was Mr. Dewey, that he offered it to all of his canvassers, and that he offered it to every single canvasser every day, would be allowing speculation and conjecture to take the place of proof—a practice this Court has repeatedly admonished against. *See, e.g.*, *Mangrum v. Pigue*, 359 Ark. 373, 386, 198 S.W.3d 496, 503 (2004) ("Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof.") (citation omitted); *see also Yancey v. State*, 345 Ark. 103, 115, 44 S.W.3d 315, 322-23 (2001) ("It

is not allowable under the rules of evidence to draw one inference from another or to indulge presumption upon presumption to establish a fact.")

Having admittedly failed to meet the statutory requirements, Petitioners spend several pages arguing why they could not meet them. Pets. Br. at 38-41. These arguments do not merit consideration.

Petitioners chose to develop their evidence by hiring private investigators to record canvassers. In so doing, Petitioners could have simply instructed their investigators to ask canvassers who offered them $100 for 100 signatures and when, and Petitioners could have tallied signature totals for those canvassers by the date. They did not even attempt to do so. And while it may be true that Petitioners could not have deposed hundreds of canvassers, Petitioners did not even notice the deposition of a single one. They also did not call a canvasser to testify at trial either.

Signature challenges by their very nature are time intensive and do require a level of precision not normally seen in many other areas of litigation. But that has never excused a challenger from meeting their burden of proof. *See Zook*, 2018 Ark. 306, at 13, 558 S.W.3d at 394 (rejecting the sponsor's argument that the procedures were unfair

because it only had 11 days to defend the certification, noting that the sponsor was given a fair hearing to address the contested issues and no authority supported the argument that the time allowed was insufficient). Here, Petitioners chose—of their own volition—to file their lawsuit less than 24 hours after Respondent's certification of sufficiency and then asked the Court to expedite the proceedings. Petitioners cannot now be heard to complain or be relieved of their burden of proof.

B. The Special Master's findings that Intervenors did not violate the pay-per-signature ban should be affirmed.

Even though the petition fails for lack of proof under 601(g)(3), the Special Master's finding that Intervenors were not in violation of subsection 601(g)(1) should also be affirmed. (Report at ¶ 61). Petitioners cite Mr. Dewey's testimony, evidence of provision of gift cards, and the videos as "voluminous evidence" that the Master erred by deeming insufficient. Petitioners also improperly cite an exhibit outside of the record that the Master did not consider. None of the reasons offered by Petitioners establishes any error by the Master.

Petitioners take Mr. Dewey's testimony out-of-context. He never "admitted that he paid canvassers additional money when they had a 'good day,' defined as a day when a canvasser obtained 100 signatures."

Pets. Br. at 36. Instead, Dewey testified that he sometimes (but not always) allowed canvassers to draw gift cards out of a bucket for any number of reasons, none of which were tied to a specific signature requirement. (RT488-490). Further, the gift-card drawing was only used in the beginning of the campaign for morale purposes, "just to get people excited about doing the job." (RT490).

As to the videos, the Master clearly deemed them not credible, as it was within his purview to do. *See Benca v. Martin*, 2016 Ark. 359, at 14, 500 S.W.3d 742, 751 (stating that the master is in the superior position to make creditability determinations). With regard to the 14 videos offered into evidence on this issue, the Master stated that he considered "as a whole the credibility of the facts contained in the above described exhibits and what each exhibit purports to prove as to the paid canvassers method of payment." (Report at ¶ 61). Petitioners have not provided the Court with any argument or convincing authority for error.

Instead, the Master's credibility determination should be affirmed. In many of the videos, it is hard to hear and the speakers' faces are not seen. Several purported canvassers also stated they were being paid hourly—which aligns with Dewey's testimony. Petitioners also fail to

acknowledge that in at least four of the videos the alleged canvassers are never identified. In one video, the speaker purports to be "Veronica," but as the Master noted, there is no "Veronica" on the paid canvasser list turned into Respondent's office by LVC. (Report at ¶ 60). Even so, Petitioners still cite it as part of the "voluminous evidence" of pay-per-signature violations. *See* Pets. Br. at 14 (citing Pets. Ex. 158).

Petitioners are correct that "[t]his is not a criminal case requiring proof beyond a reasonable doubt[.]" Pets. Br. at 37. But this is a case about the first power reserved by the people in our state's constitution. Before tens of thousands of voters are disenfranchised and the Proposed Amendment is removed from the ballot, more must be—and is required—than a video with an unidentified "Veronica."

Lastly, Intervenors' Exhibit 9 does not help them chin the bar. This exhibit was not admitted into evidence and appears nowhere in the record. As a result, the Master in no way relied on it in making his findings. Furthermore, because the exhibit was not admitted into evidence, there is no foundation for it, and one cannot be laid for it now. In short, Petitioners' reliance on Intervenors' Exhibit 9 is improper, and the Court should disregard it or strike it from the brief. *See, e.g.*, *Ligon v.*

Rees, 2010 Ark. 225, at 15, 364 S.W.3d 28, 40 (stating that a litigant's invitation "to look outside the record to matters not before the factfinder was improper argument" and had the litigant wished to present that evidence, "the time to do so was at the hearing . . . ."); *see also Clark v. Pine Bluff Civ. Serv. Comm'n*, 353 Ark. 810, 812, 120 S.W.3d 541, 543 (2003) (striking extra-record document, refusing to consider any point on appeal based on it, and stating, "This court does not consider matters outside the record.").

Nonetheless, if the Court were to consider Intervenors' Exhibit 9, Petitioners still failed to introduce evidence of the signature totals obtained "over the weekend" when the alleged improper "80=$80" or any other purported offer was made. Because Petitioners did not introduce evidence tying any canvassers' signature totals to the offer, their challenge must still fail for the reason cited *supra*—lack of proof under subsection 601(g)(3).

C. Petitioners' broad interpretation of subsection 601(g) likely renders it unconstitutional.

Finally, because this Court has not yet had the opportunity to construe subsection 601(g), it must be noted that Petitioners' interpretation is likely unconstitutional.

Limiting how circulators may be paid restricts what the Supreme Court has deemed to be "core political speech." *See Meyer*, 486 U.S. at 422. Thus, other states have adopted a narrow interpretation of their statutes to avoid a constitutional conflict. *See, e.g.*, *Prete v. Bradbury*, 438 F.3d 949, 962 (9th Cir. 2006) (distinguishing *Meyer* because the per-signature ban simply "prohibit[ed] one method of payment"); *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141, 143 (2d Cir. 2006) (to similar effect); *see also Citizens for Tax Reform v. Deters*, 518 F.3d 375, 386-87 (6th Cir. 2008) (striking down an Ohio statute, reasoning, "'[w]hile petitioners are not constitutionally guaranteed an endless variety of means, when their means are limited to volunteers and to paid hourly workers who cannot be rewarded for being productive and arguably cannot be punished for being unproductive, they carry a significant burden in exercising their right to core political speech.'").

The Arizona Supreme Court's reasoning in *Molera v. Hobbs*, 250 Ariz. 13 (2020) is especially instructive because Arizona's statute is nearly identical to Arkansas's. The Arizona statute provides: "A person shall not pay or receive money or any other thing of value based on the number of signatures collected on a statewide initiative or referendum

petition." 250 Ariz. 13 (2020) (citing Ariz. Rev. Stat. Ann. § 19-118.01(A))." In *Molera*, the challengers alleged that the canvassing company's spin-the-wheel program and other financial bonuses violated the pay-per-signature statute. In addition to earning an hourly wage, canvassers could earn additional money each week through incentive programs. They were permitted to spin a wheel for prizes each Monday when they turned in collected signatures. The prizes ranged from $10 to $100, an extra hour of pay, or double these spins. *Id*. at 24.

The Arizona Supreme Court held that none of this violated the statute. The court rejected the argument that the statute prohibited any "broad connection" between compensation and the number of signatures, as such an interpretation would prevent awarding productivity altogether. Instead, the court adopted a narrower interpretation, stating, "§ 19-118.01(A) prohibits a circulator from being paid per signature, per completed signature sheet, or by an hourly, daily, or weekly rate that is contingent on collecting a specified number of signatures." *Id*.; *see also AZ Petition Partners LLC v. Thompson*, 255 Ariz. 254 (2023) (the pay-per-signature statute "solely prohibit[s] compensation that can be determined only by counting the number of signatures already

collected").

Thus, other productivity-based forms of compensation and incentives are permissible. *Thompson*, 255 Ariz. at ¶ 25 (reaffirming and clarifying holding in *Molera*); *see also Prete*, 438 F.3d at 952, n.1 ("Allowable practices include: paying an hourly wage or salary, establishing either express or implied minimum signature requirements for circulators, terminating circulators who do not meet the productivity requirements, adjusting salaries prospectively relative to a circulator's productivity, and paying discretionary bonuses based on reliability, longevity and productivity, provided no payments are made on a per signature basis").

Similarly, the Arizona Supreme Court stated that "only signatures gathered when the circulator was paid in violation of the statute are disqualified." *Molera*, 250 Ariz. at 26. Adopting this narrow interpretation—rather than disqualifying all signatures collected by those circulators even when they were paid in compliance with the statute—"serves the legislative purpose in reducing fraud in the signature collection process . . . while imposing a lesser burden on core political speech." *Id*

Here, subsection 601(g) should likewise be interpreted as forbidding "only per-signature compensation, leaving other productivity-based compensation intact," and voiding only those signatures gathered when the canvasser was improperly paid. This narrow construction is necessary "to minimize any First Amendment infringement on core political speech." *Thompson*, 255 Ariz. at ¶ 25.

REQUEST FOR RELIEF

Pursuant to the foregoing authorities and arguments, Intervenors respectfully request that the Court deny the Petition on Count I.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Elizabeth Robben Murray, hereby certify that on this 23rd day of September, 2024, I filed the foregoing using the Court's electronic filing service, which will serve notice of same on the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I, the undersigned attorney, hereby certify that the foregoing Intervenors' Brief on Count I complies with Administrative Order No. 19 in that all "confidential information" has been excluded from the "Case Record" by (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal, as applicable.

I further certify that this Brief satisfies Administrative Order 21, Section 9 which states that briefs shall not contain hyperlinks to external papers or websites.

Further, the undersigned states that the foregoing brief conforms to the word-count limitation identified in Rule 4-2(d). According to Microsoft Word (Office 365), this brief contains 8,181 words.

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