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CV-24-492

IN THE SUPREME COURT OF ARKANSAS

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

v.

JOHN THURSTON, in his official 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

AN ORIGINAL ACTION

PETITIONERS' BRIEF ON COUNT I

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POINTS ON REVIEW

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II. PAID CANVASSERS WERE OFFERED PAYMENT AND ACTUALLY PAID BASED ON THE NUMBER OF SIGNATURES OBTAINED.

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JURISDICTIONAL STATEMENT

Under Article 5, section 1 of the Arkansas Constitution, incorporating Amendment 7, "[t]he sufficiency of all state-wide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State, which shall have original and exclusive jurisdiction over all such causes." Ark. Const. art. 5, § 1, *amended by* Ark. Const. amend. 7; *see also* Ark. Sup. Ct. R. 6-5(a) ("The Supreme Court shall have original jurisdiction in extraordinary actions as required by law, such as suits attacking the validity of statewide petitions filed under Amendment 7 of the Arkansas Constitution.").

STATEMENT OF THE CASE AND FACTS

Intervenor Local Voters in Charge ("LVC") sponsored an initiative petition (the "Initiative Petition") for a proposed amendment (the "Proposed Amendment) to Amendment 100 to the Arkansas Constitution. **(Int'rs Ex. 15 at 2)**. Between April and late June 2024, paid canvassers circulated the Initiative Petition throughout Arkansas to attempt to obtain enough signatures of registered voters to have the Proposed Amendment placed on the ballot for the November 2024 General Election. *See* **(Pet'rs Ex. 63 at 25)** (Petition 731 dated April 28, 2024); *id.* at 30 (Petition 3751 dated June 25, 2024). The Respondent Secretary of State determined that LVC submitted no less than 116,200 signatures, exceeding the required 90,704, and certified the Proposed Amendment to appear on the November 2024 ballot. **(Int'rs Ex. 17)**.

Petitioners challenge the Secretary's certification of the Proposed Amendment because Arkansas laws governing paid canvassers were violated in the Initiative Petition effort. First, LVC failed to satisfy the statutory requirement of Ark. Code Ann. § 7-9-601(b)(3) that "the sponsor" certify to the Secretary that no paid canvassers had disqualifying criminal offenses. Second, contractors who hired paid canvassers to circulate the Initiative Petition violated Ark. Code Ann. § 7-9-601(b)(3) by offering to pay, and actually paying, canvassers based on the number of signatures obtained.

FACTUAL BACKGROUND

I. Sponsor Certification Under Ark. Code Ann. § 7-9-601(b)(3)

In March 2024, Hans Stiritz, a member of LVC acting on LVC's behalf, executed a contract with PCI Consultants, Inc. for PCI to obtain signatures for the Initiative Petition (the "PCI Contract"). **(Pet'rs Ex. 417)**. The PCI Contract is the only written agreement between LVC and PCI, and PCI had no other obligations to LVC beyond those set forth in the PCI Contract—namely, obtaining signatures. **(RT 596)**.

The PCI Contract expressly required that PCI act as an independent contractor, not an employee, servant, partner, or joint venture of LVC:

> Nothing contained in this Agreement shall constitute or be deemed to constitute a relationship of employer/employee, master/servant, franchisor/franchisee, partners or joint ventures between [PCI] and [LVC], and it is expressly understood and agreed that the only relationship between any of the Parties hereto shall be that of an independent contractor and its client ….

(Pet'rs Ex. 417 at 10–11). The PCI Contract provided that PCI "shall exercise independent business judgment concerning the time, place and manner of carrying out its Engagement." *Id.* at 2. The PCI Contract allowed PCI, "as an independent contractor, … to work on one or more simultaneous engagements, whether" for LVC or any third party. *Id.* at 3.

The PCI Contract authorized PCI to "hire employees and/or contract with independent contractors to assist [PCI] in the performance of its duties…." *Id.* PCI

contracted with three out-of-state entities to hire, train, and manage paid canvassers: Florida Petition Management ("FPM"), Cape Campaigns, and Engage the Voter. **(Int'rs Resp. to Am. Pet. ¶¶ 24, 25)**. Phillip Dewey worked for FPM and "managed a canvassing office in North Little Rock." **(RT 496)**. Stephanie Marcynyszyn is the owner and sole employee of Cape Campaigns. **(RT 132)**. Berta Erickson is the owner and an employee of Engage the Voter who managed a canvassing office in Northwest Arkansas. **(Int'rs Resp. to Am. Pet. ¶ 24)**; **(RT 496)**.

None of these individuals and no one else affiliated with their companies had any contact with LVC or received any payment from LVC. *See* **(Pet'rs Ex. 27)** (LVC financial reporting showing no expenditures to FPM, Cape Campaigns, or Engage the Voter); **(RT 597)** (Mr. Stiritz admitting no knowledge of Mr. Dewey, Ms. Marcynyszyn, or Ms. Erickson); **(RT 690–691)** (LVC's compliance attorney testifying that she did not interact with Mr. Dewey, Ms. Marcynyszyn, or Ms. Erickson); **(RT 152)** (Mr. Dewey admitting that he did not know any of LVC's members).

Mr. Dewey, Ms. Marcynyszyn, and Ms. Erickson executed affidavits titled "Sponsor Affidavit Regarding Additional Paid Canvassers" that purported to certify for LVC that no paid canvasser had any disqualifying criminal history. **(Pet'rs Exs. 7, 8, 9)**. Each affidavit contained the following language:

- I am a Manager for the canvassing efforts of Local Voters in Charge. My responsibilities include hiring and managing the paid canvassers.

- The Sponsor certifies that no paid canvasser listed in Exhibit A has pleaded guilty or nolo contendere to or been found guilty of any disqualifying offense as defined by A.C.A. § 7-9-601(d)(3)(B) in any state of the United States, the District of Columbia, Puerto Rico, Guam, or any other United States protectorate.

See, e.g., **(Pet'rs Ex. 9 at 79)**. These affidavits state that LVC—not the affiants—is the sponsor of the Initiative Petition. *Id.* A PCI representative included these affidavits when submitting to the Secretary of State paid-canvasser lists and paid-canvasser affidavits required by statute. *See, e.g.*, **(Int'rs Ex. 14)** (email transmitting "Canvasser List," "Scans of Canvasser Affidavits," and "Sponsor Affidavit").

Of the 385 paid canvassers on LVC's final canvasser list, Mr. Dewey executed this form affidavit for 287 paid canvassers who obtained 87,182 verified signatures, and Ms. Erickson executed this form affidavit for 85 paid canvassers who obtained 19,692 verified signatures. **(Pet'rs Exs. 434, 435)**. In total, paid canvassers Mr. Dewey and Ms. Erickson purported to certify as not having disqualifying offenses obtained 107,144 verified signatures.

II. Pay-Per-Signature Violations Under Ark. Code Ann. § 7-9-601(b)(3)

In addition to compensating canvassers on an hourly basis, Mr. Dewey gave gift cards to paid canvassers who collected 75–100 signatures in a day. **(RT 151)**; *see also* **(Pet'rs Ex. 32)** (summary of gift-card purchases). Mr. Dewey admitted that

canvassers knew that they could be eligible to draw a prize from a bucket for a few reasons, including having a "good day" by collecting 100 signatures. **(RT 488).** Moreover, voluminous video evidence shows Mr. Dewey's paid canvassers describing bonuses offered based on the number of signatures obtained. For example:

- **Pet'rs Ex. 106** (May 14, 2024, video showing Joy Fischer saying that, "if you get 100 or more signatures, you get a hundred dollar card")
- **Pet'rs Ex. 157** (May 25, 2024, video showing a paid canvasser saying that, "if you get 200 [signatures], you . . . might get an extra $200")
- **Pet'rs Ex. 158** (May 27, 2024, video showing a paid canvasser saying that you may get a gift card if you get 100 or 200 signatures)
- **Pet'rs Ex. 162** (May 26, 2024, video showing Dustin Brown saying that, "you get 100 [signatures], you get $100 bonus" and if "you get 75 [signatures] you get your name put in for . . . an 85-inch TV")
- **Pet'rs Ex. 163** (May 29, 2024, video showing Iverson Moore saying that he receives $4 per signature)
- **Pet'rs Ex. 166** (May 28, 2024, video showing Tanisha Harris saying that "you get $100 bonus" for collecting 100 signatures)
- **Pet'rs Ex. 169** (May 29, 2024, video showing De'Landrea Jones saying that she received $5 per signature)
- **Pet'rs Ex. 170** (June 3, 2024, video showing a paid canvasser saying that, "if you get a 100 [signatures], you get a[n] extra $100 on your check")

- **Pet'rs Ex. 176** (May 29, 2024, video showing paid canvasser saying that "you get 100 [signatures] you get an extra $100 on your check")

- **Pet'rs Ex. 201** (May 23, 2024, video showing Nathan Earls saying that, "you get 100 signatures, at the end of the day you get $100 bonus for that")

- **Pet'rs Ex. 203** (May 22, 2024, video showing a paid canvasser saying that he receives a Visa gift card for collecting a good number of signatures)

- **Pet'rs Ex. 204** (May 22, 2024, video showing a paid canvasser saying that, if "you get 100 [signatures], you get a $100 bonus" and, if "you get 75 [signatures], then you get your name put into a bowl, then you have a chance to win a[n] 85-inch TV")

- **Pet'rs Ex. 221** (June 21, 2024, video showing Kane Jones saying that canvassers get $100 bonuses for 100 signatures)

- **Pet'rs Ex. 224** (May 23, 2024, video showing paid canvasser saying that, "if you get 100 signatures or more throughout the day, you get an extra $100 bonus")

- **Pet'rs Ex. 225** (May 23, 2024, video showing a paid canvasser saying that canvassers receive a $100 bonus for collecting over 100 signatures in a day)

- **Pet'rs Ex. 329** (June 2, 2024, video showing canvasser Reuben Estrada saying that "100 signatures" made him eligible to receive $100 and that he would receive a "$400 bonus" for collecting enough signatures to close out a county)

- **Pet'rs Ex. 376** (June 6, 2024, video showing a paid canvasser referring to Mr. Dewey's North Little Rock office and saying that, in addition to an hourly rate, he receives $100 for 100 signatures).

See also **(Pet'rs Ex. 433)** (identifying videos showing canvassers discussing bonuses and providing names of canvassers).

Intervenors' Exhibit 9 contains messages Ms. Erickson sent to the "Entire Team at Florida Petition Management" offering financial incentives to paid canvassers based on the number of signatures obtained. *See* **(Ex. B to Pet'rs Mot to Supplement)** (May 16, 2024, notice stating that there will be a "Signature Bonus" over the weekend where "80=$80"); *id.* (May 23, 2024, notice telling canvassers that, if they "[g]o above and beyond with 75+ signatures per day," they will "get $70 PLUS a spin on the Jackpot Wheel"); *id.* (June 18, 2024, notice offering opportunities to earn spins on little and big wheels based on the number of signatures collected). Intervenors' Exhibit 9 also explains Intervenors' admission that, "on two occasions, bonuses were made available to canvassers in Northwest Arkansas that included a component of a specified number of signatures." **(Int'rs Pretrial Br. at 10)**. Petitioners' motion to supplement the record to include Intervenors' Exhibit 9 is pending. This exhibit was admitted in evidence, and it should be in the record.

PROCEDURAL HISTORY

On August 1, 2024, Petitioners filed their Original Action Petition and moved to bifurcate Counts I and II and appoint a special master. In short order, Intervenors moved to intervene, and this Court granted intervention, bifurcated Counts I and II, and appointed the Honorable Randy Wright as Special Master.

The Special Master held a hearing on Count I from August 27–30, 2024. On September 9, 2024, the Special Master filed his Report and Findings of Fact. The Special Master concluded that Mr. Dewey, Ms. Marcynyszyn, and Ms. Erickson, as agents of LVC, properly made the required certifications that no paid canvasser had a disqualifying offense. **(Report ¶¶ 20, 30, 40)**. The Special Master found that the evidence showed that 14 paid canvassers described pay-per-signature bonuses and that this evidence was insufficient to establish a violation of Ark. Code Ann. § 7-9-601(g)(1). *Id.* ¶ 61. The Special Master found that 5,966 signatures should be disqualified because paid canvassers provided incorrect residence addresses on petition-part affidavits. *Id.* ¶ 72.

ARGUMENT

For three independent reasons, votes cast on the Proposed Amendment in November 2024 should not be counted or certified. First, LVC, the Initiative Petition sponsor, violated Ark. Code Ann. § 7-9-601(b)(3) by failing to satisfy the statutory requirement that "the sponsor" certify that paid canvassers had no disqualifying criminal offenses and instead relying on certification by out-of-state individuals who were not affiliated with or beholden to LVC. Second, assuming that the sponsor can properly outsource the statutorily required certification to an agent who is not an officer, member, or employee of the sponsor, the individuals who purported to make the certifications on LVC's behalf were not LVC's agents; instead, they were

independent contractors of PCI, itself an independent contractor of LVC, and LVC had no relationship with them and no control over them. Third, the evidence establishes beyond legitimate dispute that canvassing managers paid and offered to pay canvassers based on the number of signatures obtained in violation of Ark. Code Ann. § 7-9-610(b)(3). Any of these three reasons requires disqualification of enough signatures that the Secretary should not have certified the Proposed Amendment for the 2024 General Election ballot. Ark. Code Ann. §§ 7-9-601(f), 7-9-601(g)(3).

STANDARD OF REVIEW

This Court review issues of law de novo. *City of Helena-West Helena v. Williams*, 2024 Ark. 102, at 5, 689 S.W.3d 62, 65. This Court also reviews issues of statutory interpretation de novo, "as it is for this court to decide the meaning of a statute." *Zook v. Martin*, 2018 Ark. 306, at 3, 558 S.W.3d 385, 389. This Court accepts the Special Master's "findings of fact unless they are clearly erroneous." *Id.* A finding of fact is "clearly erroneous, even if there is evidence to support it, when, based on the evidence, the court is left with the definite and firm conviction that the master has made a mistake." *Id.*

I. LVC FAILED TO COMPLY WITH THE MANDATORY REQUIREMENT THAT THE SPONSOR CERTIFY THAT PAID CANVASSERS HAD NO DISQUALIFYING OFFENSES.

Ark. Code Ann. § 7-9-601(b)(3) requires that the sponsor of an initiative petition certify that paid canvassers have no disqualifying criminal offenses before

they may solicit signatures. It is undisputed that no member, officer, or employee of LVC, the petition sponsor, made the required certification. Instead, LVC relied on the purported certification by out-of-state individuals working for out-of-state companies hired by LVC's out-of-state independent contractor who had no contact or relationship at all with LVC and over whom LVC had no control.

A. The Sponsor—and No One Else—Must Make the Certification

The paid-canvasser statute requires "the sponsor" to comply with certain requirements to use paid canvassers. Pertinent here, "[b]efore a signature is solicited by a paid canvasser, *the* sponsor shall ... [p]rovide a complete list of all paid canvassers' names to the Secretary of State." Ark. Code Ann. § 7-9-601(a)(2)(C)(i) (emphasis added). "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 …." *Id.* § 7-9-601(b)(3) (emphasis added). This "certification is the only assurance the public receives that the paid canvassers" have no disqualifying offenses. *Miller v. Thurston*, 2020 Ark. 267, at 8, 605 S.W.3d 255, 259. The statutory scheme will not tolerate a violation of this requirement: "Signatures incorrectly obtained or submitted under this section shall not be counted by the Secretary of State for any purpose." *Id.* § 7-9-601(f). The statute did not allow LVC, the petition sponsor, to outsource this solemn obligation of the sponsor to anyone else. As a result, all signatures

supporting the Initiative Petition should be disqualified. The Secretary of State and the Attorney General of Arkansas agree with Petitioners on this point. **(Resp.'s Answer to Am. Orig. Action Pet. ¶¶ 8–9)**; **(Int'rs Ex. 22 at 3)**.

"In reviewing [a] statute, 'the first rule of statutory construction is to apply a plain meaning to the statute, construing it just as it reads, by giving the words their ordinary and usually accepted meaning in common language." *Benca v. Martin*, 2016 Ark. 359, at 7, 500 S.W.3d 742, 748 (quoting *Cave City Nursing Home, Inc. v. Ark. Dep't of Human Servs.*, 351 Ark. 13, 21, 89 S.W.3d 884, 889 (2002)). "Further, the word 'shall' when used in a statute means that the legislature intended mandatory compliance with the statute unless such an interpretation would lead to an absurdity." *Id.* at 7–8, 500 S.W.3d at 748 (internal quotations omitted) (citation omitted). When interpreting "laws enacted by our General Assembly," "'shall' means 'shall' …." *Miller*, 2020 Ark. 267, at 9, 605 S.W.3d at 259 (holding that a ballot-question committee's failure to comply with the certification requirement meant that "the initiative petition[] at issue [was] insufficient"); *see also Cowles v. Thurston*, 2024 Ark. 131, at 9 (rejecting petition because the sponsor failed to submit a different certification properly and observing that "the ordinary meaning of the word 'shall' is obvious"). This Court has "specifically noted that the term 'shall' is mandatory and the clerical-error exception or substantial compliance cannot be used as a substitute for fulfillment with the statute." *Zook*, 2018 Ark. 306, at 5, 558 S.W.3d at

390 (citing *Benca*, 2016 Ark. 359 at 12–13, 500 S.W.3d 742, 750). Strict compliance is required.

The argument that LVC could delegate the certification obligation of "the sponsor" to an agent outside of LVC—that is, someone who is not an officer, member, or employee of the sponsor—ignores the text and structure of Ark. Code Ann. § 7-9-601(b)(3) and the strict-compliance requirement. Ark. Code Ann. § 7-9-601(b)(3) says that "*the* sponsor *shall* certify" (emphasis added). This language says unambiguously that the sponsor itself must make the certification. *See McMillan v. Live Nation Entm't, Inc.*, 2012 Ark. 166, at 6, 401 S.W.3d 473, 477 ("[W]hen a statute is unambiguous, the rules of statutory construction do not permit us to read into it words that are not there."). Of course, the sponsor has to act through an officer, member, or employee, but the statute does not allow outsourcing this mandatory obligation beyond "the sponsor." "'The' is the word used before nouns, with a specifying or particularizing effect, opposed to the indefinite or generalizing force of 'a' or 'an.'" *Cherokee Nation Businesses, LLC v. Gulfside Casino P'ship*, 2021 Ark. 183, 10, 632 S.W.3d 284, 290 (citing *United States v. Hudson*, 65 F. 68, 71 (W.D. Ark. 1894)). "The" is a word of limitation and indicates one. *Id.* "The sponsor" is a known entity—here, LVC—and the entity on which the statutory obligations fall.

Other subparts of Ark. Code Ann. § 7-9-601 confirm that only direct representatives of the sponsor may make the background-check certification. Under Ark. Code Ann. § 7-9-601(b)(1), the sponsor must obtain "at the sponsor's cost, … a current state criminal history and criminal record search on every paid canvasser to be registered with the Secretary of State." This provision is part and parcel of the background-check certification. But if outsourcing the certification obligation were allowed, one agent could obtain the background check while another, with no knowledge of what that check reveals, could certify that paid canvassers do not have disqualifying offenses. That is an absurd result the statutory language will not allow.

The General Assembly passed the paid-canvasser statute and related amendments to mandate sponsor accountability. *See* 2013 Ark. Act 1413, §1(a)(2) (finding that the "citizens of this state have an expectation that their right of initiative … will be respected and that the process of gathering signatures of registered voters will be free of fraud, forgery, and other illegal conduct by sponsors, canvassers, notaries, and petitioners"); *Cowles*, 2024 Ark. 121, at 10 (highlighting the "substantial duties" the General Assembly places on "the sponsor," explaining the General Assembly's "clear legislative intent to protect the petition gathering process from fraud," and holding that "the General Assembly has determined that the sponsor's certification is mandatory"). The statute cannot be construed to allow one hand not to know what the other is doing when it comes to ensuring that "the sole

election officer in whose presence the citizen exercises his/her right to sign the petition" has not committed disqualifying offenses. *See Porter v. McCuen*, 310 Ark. 674, 677, 839 S.W.2d 521, 522 (1992) (citing *Sturdy v. Hall*, 201 Ark. 38, 143 S.W.2d 547 (1940)). Indeed, the statute imposes criminal liability for "willful violations." Ark. Code Ann. § 7-9-601(b)(4). Under Intervenors' reading, unrelated agents could falsely submit certifications without facing criminal sanctions, and the sponsor could evade accountability by pointing the finger at the unrelated agent—another absurd result inconsistent with the plain statutory language.

The Special Master opined that Petitioners' text-based interpretation "is not a functioning one for the scope of a ballot question [committee]" and said that the record lacked evidence "to address how a sponsor, such as LVC[,] could fulfill its duties under Section 7-9-601(b)(3) without doing so through an agent." **(Report ¶¶ 26, 29)**. This reasoning is wrong on both fronts.

First, only the sponsor, LVC, has the burden of complying with the statute. *Cowles*, 2024 Ark. 121, at 5 ("[W]e have explained that even in election matters, the burden of determining what the law requires falls on the filer—not office staff."); *cf. Roberts v. Priest*, 334 Ark. 503, 516–17, 975 S.W.2d 850, 855–56 (1998) ("strongly advis[ing] sponsors of initiated constitutional amendments that the onus of complying with the simple and straightforward procedural requirements of Ark. Const. amend. 7 lies solely with the sponsor of the proposed constitutional

amendment"); *see also* Int'rs Ex. 1 (2024 Initiatives and Referenda Handbook directing the reader to consult with its "own legal counsel" because the Secretary's office "is unable to provide legal advice"). It was not incumbent on Petitioners or the Secretary to tell LVC how to comply with its statutory duties.

Second, the record does, in fact, show how LVC could have complied with the certification requirement. When LVC submitted the Initiative Petition to the Secretary of State on July 5, 2024, LVC's President, Jim Knight, executed all documents on LVC's behalf. *See, e.g.*, (**Int'rs Ex. 15 at 4–6)**; **(Report ¶ 7)**. That was undeniably proper. He could have done the same with respect to LVC's obligation as "the sponsor" to certify that paid canvassers had no disqualifying offenses. The certification requirement obviously was not beyond LVC's grasp. For added measure, Mr. Knight's successful submission of affidavits with the Initiative Petition belies Intervenors' argument that Petitioners, the Secretary of State, and the Arkansas Attorney General have interpreted the statute in a way that turns agency law on its head and leads to absurd results. *See* Int'rs Joint Br. at 16, 19–22, *Cowles v. Thurston*, No. CV-24-455 (Ark. Aug. 13, 2024). It is not a great mystery how LVC, as the sponsor, could have made the required certification that paid canvassers had no disqualifying offenses: LVC could have just had its President sign the affidavit, as he did other submissions.

Ark. Code Ann. § 7-9-601(b)(3) unambiguously obligates "the sponsor" to certify that no paid canvassers have disqualifying offenses, leaving no room for anyone but LVC to make the certification on the sponsor's behalf. The policy behind the law is clear: A sponsor must actively oversee paid canvassers circulating its initiative petition, unlike what happened here, where LVC attempted to outsource its statutory obligations. Without question, the plain language and legislative history do not support out-of-state paid canvassing companies and out-of-state individuals (themselves not even qualified to be paid canvassers) certifying election officers. Had the General Assembly intended to allow the sponsor to delegate its statutory duties, including but not limited to certifying paid canvassers, it would have said so. Instead, the General Assembly placed the duties upon the sponsor, and the sponsor here, LVC, failed to fulfill those statutory duties.

LVC's failure to follow Ark. Code Ann. § 7-9-601(b)(3) means that all signatures collected by paid canvassers cannot be counted. Ark. Code Ann. § 7-9-601(f). Paid canvassers collected no less than 107,144 of the 116,200 signatures verified by the Secretary of State. **(Report ¶¶ 14, 23–24)**. Without those signatures, the Initiative Petition does not meet the signature requirement of 90,704 verified signatures. Therefore, no votes cast on the Proposed Amendment can be counted or certified.

B. Even if the Statute Allows Outsourcing the Certification Obligation, Canvassing Managers Were Not LVC's Agents

The Special Master relied solely on the PCI Contract to conclude that Mr. Dewey, Ms. Marcynyszyn, and Ms. Erickson acted as agents of LVC when they purported to certify that no paid canvassers had disqualifying offenses. **(Report ¶¶ 20, 22, 31, 37)**. "As Justice George Rose Smith explained, '[t]he construction and legal effect of written contracts are matters to be determined by the court, not by the jury, *except when the meaning of the language depends upon disputed extrinsic evidence*.'" *Elam v. First Unum Life Ins. Co.*, 346 Ark. 291, 297, 57 S.W.3d 165, 170 (2001) (emphasis original). In other words, contract construction presents a question of law for this Court, not a question of fact for the Special Master, and this Court reviews his finding on the agency issue de novo because it turned exclusively on contract construction.

Even if an agent outside "the sponsor" may, under the right circumstances, certify that paid canvassers have no disqualifying offenses, that did not happen here, because those who made the purported certifications were not LVC's agents as a matter of law. The PCI Contract on which the Special Master relied explicitly disclaimed an agency relationship between LVC and PCI:

> Nothing contained in this Agreement shall constitute or be deemed to constitute a relationship of employer/employee, master/servant, franchisor/franchisee, partners or joint ventures between [PCI] and [LVC], and it is expressly understood and agreed that *the only*

> *relationship between any of the Parties hereto shall be that of an independent contractor* and its client ….

(Pet'rs Ex. 417 at 10–11) (emphasis added). Under the PCI Contract, "[PCI], *as an independent contractor*, shall be free to work on one or more simultaneous engagements, whether for [LVC] or any third party." *Id.* at 3 (emphasis added). The Special Master totally ignored these provisions, and they fatally undermine any argument that there was an agency relationship between PCI and LVC, much less between LVC and the independent contractors hired by PCI who purported to make the certifications.

What is more, the PCI Contract—the only agreement between PCI and LVC—does not even suggest that PCI would submit certifications to the Secretary of State. To the contrary, it narrowly described the "Engagement" as limited to gathering signatures: "[LVC] hereby engages [PCI] to gather signatures of registered voters …." *Id.* at 2. It did not permit, much less obligate, PCI to submit certifications to the Secretary of State. Indeed, it only required PCI to "cooperate fully with [LVC] as necessary for purposes of *providing to* [LVC] any and all information that may be required to comply with campaign disclosure and record keeping requirements." *Id.* (emphasis added). The PCI Contract makes clear that PCI was not LVC's agent as a matter of law. Thus, PCI's independent contractors were not LVC's agents as a matter of law either.

There is no evidentiary support for the Special Master's statement that the PCI Contract "provides the control that LVC had over PCI and also over" Mr. Dewey, Ms. Marcynyszyn, and Ms. Erickson. *See* **(Report ¶¶ 31, 37)**. Below are the provisions he cited:

- "[PCI] will provide each petition circulator and/or petition circulator manager that [PCI] retains with approved educational talking points, which shall be provided by [LVC] …."

- "[PCI] warrants that a minimum of 65% of the signatures collected by [PCI] shall be of valid, non-duplicated, registered voters of the contemplated jurisdiction."

- "During the Term of this Agreement, [PCI] shall prepare and provide to [LVC] a weekly report in a format typically used by [PCI]."

- "[PCI] may hire employees and/or contract with independent contractors to assist [PCI] in the performance of its duties under this Agreement.

See id.; **(Pet'rs Ex. 417 at 2, 6)**.

These provisions gave LVC no control over PCI. The first three contractual obligations provide no support for the conclusion that LVC had control over PCI. They are details geared toward the result—the collection of sufficient signatures—and do not show that LVC had any control over how the result was achieved on a day-to-day basis. *See ConAgra Foods, Inc. v. Draper*, 372 Ark. 361, 366, 276 S.W.3d 244, 249 (2008) ("[I]f control of the means be lacking, and the employer does not undertake to direct the manner in which the employee shall work in the discharge of his duties, then the relation of independent contractor exists."). The

fact that the PCI Contract allowed PCI to hire employees or independent contractors actually undermines Intervenors' argument about agency, because it even further attenuates the people who purported to make the certifications from the actual sponsor, LVC. The PCI Contract did not give LVC control over specific people or entities PCI hired, and the scope of this provision allowed PCI to hire employees and independent contractors to fulfill its duties under the contract, which did not include submitting certifications to the Secretary of State.

"[T]he right of control is the principal factor in determining whether the relationship is one of agency or independent contractor." *D.B. Griffin Warehouse, Inc. v. Sanders*, 336 Ark. 456, 461, 986 S.W.2d 836, 838 (1999). Through the PCI Contract, LVC explicitly disavowed any control it might have had over PCI: "[PCI] shall exercise independent business judgment concerning the time, place, and manner of carrying out its Engagement on Committee's behalf and of otherwise acting in conformity with this Agreement." **(Pet'rs Ex. 417 at 2)**; *see also D.B. Griffin*, 336 Ark. at 461, 986 S.W.3d at 838 (identifying as an agency factor "the extent of control which, *by the agreement*, the master may exercise over the details of the work") (emphasis added). And there is no evidence that LVC had any control over the contractors PCI hired.

Because the Special Master interpreted the PCI Contract to conclusively establish an agency relationship flowing from LVC through PCI and ultimately to

PCI's independent contractors (an extraordinarily attenuated link), he did not even cite, much less make factual findings about, the other agency factors this Court considers. In any event, not one of those factors tilts in favor of an agency relationship between LVC and PCI. PCI, as a canvassing company, was "engaged in a distinct occupation." *Id.* Canvassing companies, by and large, are "specialist[s]" that perform canvassing efforts "without supervision." *See id.* Running a statewide initiative campaign involves a particular skill. *See id.* Aside from providing to PCI certain educational materials (as was required under the PCI Contract), LVC provided no "instrumentalities, tools, [or] the place of work" for PCI. *See id.* PCI was engaged for a matter of months. *See id.* PCI did not receive a salary but was paid a consulting fee. *See id.* Canvassing was not "part of the regular business" of LVC. *See id.* The PCI Contract makes clear that LVC and PCI could not have believed they were "creating the relation of master and servant." *See id.* Finally, LVC is a ballot-question committee and is "not in business." *See id.* PCI itself was not LVC's agent, so Mr. Dewey, Ms. Marcynyszyn, and Ms. Erickson, out-of-state sub-contractors of PCI, surely were not LVC's agents.

Beyond the PCI Contract, the Special Master's factual findings on the agency issue have no support in the evidence. The Special Master cited no evidence to support his finding that "LVC authorized PCI to act on its behalf subject to its control and that LVC authorized the three canvassing managers to act on its behalf subject

to its control." *See* **(Report ¶ 30)**. The Special Master cited no evidence to support his finding that "LVC, the sponsor, used as agents others working under the sponsorship of LVC, to collect signatures to be presented to Respondent." *Id.* ¶ 27.

The Special Master cited no evidence to support these findings because there is none. None of the individuals who submitted background certifications had any contact with LVC or received payment from LVC. *See* **(Pet'rs Ex. 27)** (LVC financial reporting showing no expenditures to FPM, Cape Campaigns, or Engage the Voter); **(RT 597)** (Mr. Stiritz testifying to having no knowledge of Mr. Dewey, Ms. Marcynyszyn, or Ms. Erickson); **(RT 690–691)** (LVC's compliance attorney testifying that she did not directly deal with Mr. Dewey, Ms. Marcynyszyn, or Ms. Erickson); **(RT 152)** (Mr. Dewey testifying that he did not know any of the LVC committee members).

The Special Master found that LVC's compliance attorney "personally called field office managers who were onboarding canvassers of LVC." **(Report ¶ 32)**. But the testimony the Special Master cites does not support his finding:

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13 Q.    But as far as any orientation and training, who
14 was that handled by?
15 A.    It was handled by the managers here.  I would
16 call them the field office managers who were
17 onboarding canvassers personally.
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(RT 665). The witness said that she referred to the managers in Arkansas as "the field office managers." *Id.* She did not say that she communicated with the field office managers. Linking LVC's attorney with Mr. Dewey, Ms. Erickson, and Ms. Marcynyszyn was clear error unsupported by the evidence.

Given the evidence, it is impossible to find that Mr. Dewey, Ms. Marcynyszyn, and Ms. Erickson, all out-of-state residents, had any agency relationship with LVC. They were independent contractors of LVC's independent contractor (PCI). LVC did not control them. LVC's members did not even know who they were. To the extent this Court determines that the Special Master's agency findings were factual, as opposed to legal and based on contract construction, this Court should reject them as clearly erroneous.

Even if outsourced agents could provide the background certification on a sponsor's behalf, that did not happen here because the people who made the certifications were not agents of LVC, and all verified signatures obtained by paid canvassers must be disqualified.

C. Estoppel Plays No Role in the Enforcement of a Statute Designed to Safeguard the Arkansas Constitution

Intervenors assert that "the Secretary of State's office should be estopped from applying a new interpretation of the term 'sponsor.'" **(Int'rs Opp'n to Pet'rs Am. Orig. Action Pet. ¶ 177)**. The Special Master found that the Secretary of State "is estopped from asserting 'sponsor' within 601(b)(3) does not allow LVC's agents to

provide the certification and register paid canvassers." **(Report ¶ 54)**. This finding is both immaterial and legally unsound.

First, Petitioners—not the Secretary of State, who is the Respondent—filed this action to disqualify the Initiative Petition for LVC's failure to comply with Ark. Code Ann. § 7-9-601(b)(3). Petitioners are not estopped by anything the Secretary of State's office did. The mere fact that the Secretary of State's office has changed its past practice of accepting background certifications submitted by one other than the sponsor does not change the fact that the Secretary of State has already certified the Proposed Amendment to the 2024 ballot. *Id.* ¶¶ 14, 43–49. The damage is done. The Secretary of State cannot now undo actions he has already taken, and no mechanism exists for the Secretary of State to remove the Proposed Amendment from the ballot. The question is not whether the Secretary has to accept the certifications but whether the votes cast in November 2024 on the Proposed Amendment should be counted. *McCuen v. McGee*, 315 Ark. 561, 564, 868 S.W.2d 503, 505 (1994) ("[W]e do not render advisory opinions.").

In any event, the Special Master was wrong to conclude that the Secretary of State is estopped from asserting his interpretation of Ark. Code Ann. § 7-9-601(b)(3). This Court will recognize estoppel against the State only "where an affirmative misrepresentation by an agent or agency of the State has transpired." *Ark. Dep't of Human Servs. v. Lewis*, 325 Ark. 20, 24, 922 S.W.2d 712, 714 (1996).

The Special Master never found that the Secretary of State's office made an affirmative misrepresentation to LVC. The Special Master did not find, for example, that anyone told LVC that background-check certifications submitted by LVC's purported agents complied with Ark. Code Ann. § 7-9-601(b)(3) while secretly believing otherwise. The Special Master's findings support, at most, that both LVC and the Secretary of State labored under a mistake of law when the Secretary accepted the certifications by someone other than LVC, the sponsor, and a mistake of law will not support estoppel against the State. *See Roberts*, 334 Ark. at 516–17, 975 S.W.2d at 855–56 (placing "the onus of complying with the simple and straightforward procedural requirements of Ark. Const. amend. 7" on the sponsor); *Cowles*, 2024 Ark. 121, at 2 ("[T]he burden of determining what the law requires falls on the filer—not office staff."); *see also* Int'rs Ex. 1 (2024 Initiatives and Referenda Handbook directing the reader to consult with its "own legal counsel" because the Secretary's office "is unable to provide legal advice"). The defense of estoppel is not available to Intervenors as a matter of law.

II. PAID CANVASSERS WERE OFFERED PAYMENT AND ACTUALLY PAID BASED ON THE NUMBER OF SIGNATURES OBTAINED.

In 2021, the General Assembly amended the paid-canvasser statute to include a provision that prohibited paying or offering to pay a canvasser based on the number of signatures obtained. 2021 Ark. Act 951. Specifically, Ark. Code Ann. § 7-9-

601(g)(1) makes it "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 …." Ark. Code Ann. § 7-9-601(g)(1). "[P]er-signature payment arrangements encourage, and are 'regularly stung' by, fraud." *Pierce v. Jacobsen*, 44 F.4th 853, 866 (9th Cir. 2022). Arkansas is not alone in proscribing payment to canvassers based on the number of signatures collected. *See, e.g.*, Ariz. Rev. Stat. Ann. § 19-118.01 (prohibiting payment or receipt of money based on the number of signatures collected); Mont. Code Ann. § 13-27-102 ("A person gathering signatures for a petition may not be paid anything of value based upon the number of signatures collected."). But the Arkansas General Assembly outlawed not only "payment[s]" based on the number of signatures obtained but also "offer[s]" of such payments. Ark. Code Ann. § 7-9-601(g)(1). The offer of payment alone incentivizes fraud.

Every affidavit submitted by Mr. Dewey contains the following attestation: "The Sponsor agrees that it will not pay or offer to pay a paid canvasser on the basis of the number of signatures obtained on a statewide initiative petition or statewide referendum petition." (**Pet'rs Ex. 7**). As set forth below, these sworn statements to the Secretary of State, which also attempted to certify paid canvassers and comply with other requirements of the paid-canvasser statutes, were indisputably false.

Contrary to his affidavits submitted to the Secretary and the statutory mandate, Mr. Dewey admitted that he paid canvassers additional money when they had a "good day," defined as a day when a canvasser obtained 100 signatures. **(RT 151–152)**. Several of Mr. Dewey's paid canvassers admitted, throughout the canvassing campaign, that they were offered bonuses related to the number of signatures they collected. **(Pet'rs Ex. 106)** (May 14, 2024, video showing Joy Fischer saying that, "if you get 100 or more signatures, you get a hundred dollar card"); **Pet'rs Ex. 221** (June 21, 2024, video showing Kane Jones saying that canvassers get $100 bonuses for 100 signatures); *see also* **(Pet'rs Ex. 434)** (listing Mr. Dewey's paid canvassers).

In his report, the Special Master did not mention Mr. Dewey's unqualified admission that he paid canvassers based on the number of signatures, nor did the Special Master question the credibility of the canvassers in the videos or the videos themselves. To the contrary, the Special Master highlighted no less than 14 instances of paid canvassers boasting, on video, that they were eligible for bonuses if they obtained a certain number of signatures. **(Report ¶ 61)**. (The Special Master failed to cite three additional videos admitted in evidence, so the count is actually 17.) *See* **(Pet'rs Exs. 106, 204, 376)**. The Special Master made no finding about whether Mr. Dewey or others offered paid canvassers bonuses based on a number of signatures obtained, but Mr. Dewey's own admission, the evidence of gift-card

purchases, and the videos of canvassers describing pay-per-signature incentives leave no room for doubt about the fact that Mr. Dewey and others did so.

Despite making no finding about whether paid canvassers were offered bonuses based on the number of signatures obtained, the Special Master concluded that the number of canvassers on video describing the bonus scheme was too low, in comparison to the total number of paid canvassers, to find a violation of Ark. Code Ann. § 7-9-601(g)(1). **(Report ¶ 61)**. That is a legal conclusion that is irreconcilable with the Special Master's finding that at least 14 paid canvassers admitted that they were offered bonuses based on signatures. *See id.* And it ignores Mr. Dewey's admission that he offered financial incentives based on the number of signatures obtained.

This is not a criminal case requiring proof beyond a reasonable doubt, although the evidence would satisfy that standard. Petitioners put on testimony from Mr. Dewey admitting he employed a bonus scheme. Petitioners introduced numerous videos describing a nearly uniform bonus scheme tied to the number of signatures gathered. The dates of the videos span the entire canvassing campaign. Other testimony establishes that paid canvassers were offered bonuses for signatures throughout the canvassing campaign. **(RT 300, 307–309)**. The testimony and video evidence clearly establish a violation of Ark. Code Ann. § 7-9-601(g)(1). In other

words, Petitioners carried their burden of establishing violations of the pay-per-signature prohibition.

Accepting the Special Master's reasoning that more evidence is required to show a violation would render the pay-per-signature prohibition a dead letter. Arbitrary enforcement of this crucial safeguard enacted by the General Assembly to deter fraud and maintain the sanctity of the ballot will encourage others to violate it with the knowledge that, if only a few get caught, no violation will be found and all signatures, even though illegally obtained, will count.

If an initiative petition challenger must establish the date, time, and location of every offer or payment based on signatures and tie those to specific signatures obtained, this statute provides no deterrence. This Court has "long observed that [it] does not enjoy being in the 'last minute' of review." *Roberts*, 334 Ark. at 516, 975 S.W.2d at 855. This observation underscores the frantic pace of petition challenges. Professional canvassing companies know that petition challenges happen in a matter of weeks, as here. The discovery window was open for about two weeks. **(Scheduling Order at 1)** (stating that the Special Master held a hearing on August 10, 2024, and that discovery closed on August 23, 2024). On such a timeframe, it is impossible to depose hundreds of canvassers.

Making it all the more difficult, many sponsors, like LVC, use out-of-state canvassing companies, which makes it nearly impossible to compel those companies

to timely produce documents that may hold critical evidence of unlawful signature-based payments. For instance, Petitioners attempted to obtain PCI's banking records in California by subpoena. Under California law, however, the minimum response time for a subpoena is 20 days after its issuance or 15 days after service, whichever is longer. Cal. Civ. Proc. § 2020.410(c). Petitioners still have received no response. What is more, PCI (not LVC) paid FPM, Cape Campaigns, and Engage the Voter. So even had Petitioners received a response to its PCI bank-records subpoena, that would have only provided information Petitioners needed to get banking information for PCI's subcontractors. Pursuing that paper trail would have taken more time than any petition challenger would ever have. Allowing LVC to capitalize on truncated discovery to evade the statute, even in the face of compelling video evidence, renders the pay-per-signature prohibition meaningless. The Special Master's conclusion that showing a statutory violation requires even more evidence than Petitioners submitted encourages fraud.

The Special Master's note that "there were no totals of signatures collected of the 14 paid canvassers listed in the videos" is just as problematic. This observation previews Intervenors' arguments. They will likely ignore that any signature collected under an *offer* of payment based on the number of signatures obtained violates the statute. Ark. Code Ann. § 7-9-601(g)(1). Instead, Intervenors will contend that Petitioners' burden was to show (1) each canvasser's receipt of

payment, (2) the petition parts the canvasser submitted on the day of the payment, (3) and the number of signatures on each petition part. Only then, Intervenors will maintain, could a violation and the requisite disqualification obtain. If they choose to confront the statute's use of "offer," Intervenors will claim that Petitioners had to prove the same three elements above, substituting the offer of payment for receipt of payment.

Such an interpretation demands a level of pinpoint precision no petition challenger could meet and the statute does not demand. That cannot be the law. *See Molera v. Hobbs*, 474 P.3d 667, 680 (Ariz. 2020) (holding that all signatures "gathered when the circulator was paid in violation of the statute" were properly disqualified).[1] Adopting Intervenors' interpretation would vitiate a key provision the General Assembly enacted to safeguard elections by curbing fraud in the

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[1] Unlike some states, such as Arizona, where substantial compliance suffices, Arkansas requires strict compliance. *Compare McGee v. Sec'y of State*, 896 A.2d 933, 938 (Me. 2006) (collecting cases from Arizona, California, and Colorado that "have adopted a substantial compliance standard" in cases involving direct initiative measures), *with Zook*, 2018 Ark. 306, at 5, 558 S.W.3d at 390 (rejecting substantial compliance as an appropriate standard for evaluating compliance with Ark. Code Ann. § 7-9-126).

petition-gathering process. *See, e.g.*, *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 618 (8th Cir. 2001) (rejecting First Amendment challenge to pay-per-signature ban because it was "necessary to insure the integrity of the initiative process"). It would also inspire those engaging paid canvassers to implement wide-scale per-signature bonus schemes because that would be the best way to insulate signatures from disqualification.

The General Assembly believed that pay-per-signature would encourage paid canvassers to commit fraud on a singular mission to maximize their pay. The ban promotes the important state interest of preventing just that type of fraud. *See Prete v. Bradberry*, 438 F.3d. 949, 971 (9th Cir. 2006) (upholding Oregon's ban on per-signature payments because it served "the important regulatory interest in preventing fraud and forgery in the initiative process"). To that end, the General Assembly banned not only the actual payment for signatures but also the offer of pay by signature, obviously recognizing that it is the incentive that is the root cause of the ill to be avoided. Ark. Code Ann. § 7-9-601(g)(1).

The evidence shows with no room for disagreement that Mr. Dewey's paid canvassers were at least offered payment based on the number of signatures obtained. Mr. Dewey's paid canvassers—all submitted and certified with false affidavits—obtained 87,182 verified signatures while laboring under an offer to receive bonuses if they obtained a certain number of signatures. *See* **(Report ¶ 23)**

(finding that Mr. Dewey's paid canvassers collected 87,182 verified signatures). The evidence also shows that Ms. Erickson's paid canvassers worked under similar offers of signature-based payments during the canvassing campaign. **(Int'rs Ex. 9)**. Her paid canvassers obtained 19,692 verified signatures. **(Report ¶ 24)**. Every signature Mr. Dewey's and Ms. Erickson's canvassers collected is a "signature obtained in violation of" the pay-per-signature prohibition and is "void and shall not be counted." Ark. Code Ann. § 7-9-601(g)(3). Without the signatures obtained by Mr. Dewey's paid canvassers alone, LVC falls woefully short of the constitutionally required 90,704 verified signatures.

REQUEST FOR RELIEF

With the statutorily required disqualifications, LVC did not obtain sufficient signatures to qualify the Initiative Petition for the November 2024 General Election ballot. This Court should grant Count I of the Amended Original Action Petition and order that no votes cast on the Proposed Amendment be counted or certified.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September 2024, I electronically filed the foregoing with the Clerk of Court using the AOC eFlex electronic filing system, which shall send notification of such filing to counsel of record.

/s/ John E. Tull III
John E. Tull III

CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE ORDER NO. 19, ADMINISTRATIVE ORDER NO. 21, SECTION 9, AND WITH WORD-COUNT LIMITATIONS

Certification: I hereby certify that:

This brief complies with (1) the confidentiality requirements set forth in Administrative Order 19 of the Administrative Orders of the Supreme Court of Arkansas; (2) Administrative Order 21, Section 9, which states that briefs shall not contain hyperlinks to external papers or websites; and (3) the word-count limitations identified in Rule 4-2(d). Per Rule 4-2(d), there are 7,920 words in Petitioners' brief.

Identification of paper documents not in PDF format:

The following original paper documents are not in PDF format and are not included in the PDF document(s) file with the Court: None.

/s/ John E. Tull III
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