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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' REPLY BRIEF ON COUNT I

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ARGUMENT

The paid-canvasser statute provides that "the sponsor shall certify" that no paid canvasser has disqualifying offenses. Ark. Code Ann. § 7-9-601(b)(3). LVC's argument that a twice-removed independent contractor—not "*the* sponsor"—can satisfy this mandate violates principles of statutory construction. Even if an unaffiliated agent could make the certification for the sponsor, LVC never communicated with, and had no control over, the individuals who purported to make the certifications; thus, they were not LVC's agents. LVC violated the paid-canvasser statute by failing to certify that paid canvassers had no disqualifying offenses.

The paid-canvasser statute was also violated when paid canvassers were systematically offered payment based on the number of signatures obtained. Ark. Code Ann. § 7-9-601(g)(1). To evade these violations, LVC attributes to the Master credibility findings he never made, invents a causation standard absent from the statute, and argues about the constitutionality of outlawing payments Petitioners never complained about.

These three independent reasons require that no votes cast on the Proposed Amendment be counted.

I. LVC's Certification Arguments Fail.

LVC's arguments violate principles of statutory construction. LVC argues that "subsection 601(b)(3) contains no language limiting who can act for the 'sponsor.'" **(Int'rs Br. at 19)**. But the statute says "*the* sponsor *shall* certify …." Ark. Code Ann. § 7-9-601(b)(3) (emphasis added). The definite article *the* has a "singular" meaning. *Stout v. Stinnett*, 210 Ark. 684, 687, 197 S.W.2d 564, 566 (1946) (concluding that *the* preceding *Chief* expressed "clear and certain" legislative intent "to provide for but one office of Chief of Police"); *cf. Cowles v. Thurston*, 2024 Ark. 121, at 7 ("This court has recently explained 'a' as meaning singular rather than plural."). *Certify* connotes a solemn obligation: "[t]o authenticate or verify in writing" or "attest as being true or as meeting certain criteria." *Certify*, *Black's Law Dictionary* (12th ed. 2024). LVC quotes the definitions of *sponsor* and *person*, but neither contains language suggesting that anyone other than the sponsor may make the required certification. **(Int'rs Br. at 24–25)**. The statute mandates that "the sponsor"—and no one else—certify that paid canvassers have no disqualifying offenses.

The broader statutory scheme further undermines LVC's argument for outsourcing its certification obligation. This Court follows the "principle of statutory construction that legislative acts relating to the same subject matter or having the same purpose must be construed together and in harmony if possible."

Johnson v. State, 331 Ark. 421, 425, 961 S.W.2d 764, 766 (1998). The General Assembly, in the subchapter containing subsection 601(b)(3), distinguished a "sponsor" from a "sponsor's agent" when identifying those subject to felony liability for petition fraud. *See* Ark. Code Ann. § 7-9-109(f). "The sponsor" does not mean "the sponsor or its agent." Otherwise, the word *agent* in Ark. Code Ann. § 7-9-109(f) is superfluous, and this Court does not construe statutes in a manner that renders words superfluous. *Gafford v. Allstate Ins. Co.*, 2015 Ark. 110, at 5, 459 S.W.3d 277, 279.

LVC seizes on Petitioners' argument that a member, officer, or employee of the sponsor must make the background certification when these words do not appear in the statute, positing that a sponsor can be an organization "which may have no officers, members, or employees." **(Int'rs Br. at 25)**. What organization has no officer, member, or employee? The answer is *none*, because such an organization does not exist. The point is that someone affiliated with LVC had to make the certification of the sponsor, just like LVC's President executed documents for LVC when submitting the Initiative Petition. *See, e.g.*, **(Int'rs Ex. 15 at 5)**. Requiring certification by "the sponsor," the statute does not permit outsourcing this obligation to someone else.

Contrary to LVC's brief, Petitioners' argument does not require this Court to construe the statute as overruling a common-law principle. **(Int'rs Br. at 26)**. In

the sole case LVC cites, this Court considered whether a defendant in a contract case could raise common-law defenses and counterclaims when "the terms of a contract [were] governed by statute." *Nelson v. Ark. Rural Med. Prac. Loan & Scholarship Bd.*, 2011 Ark. 491, at 9–10, 385 S.W.3d 762, 767. This case is not in the same ballpark. Here, the General Assembly's distinction between a "sponsor" and a "sponsor's agent" in Ark. Code Ann § 7-9-109(f) shows the General Assembly recognizes a difference, knows how to include an agent when it intends to do so, and did not do so in subsection 601(b)(3).

LVC's arguments that canvassing managers were its agents are untenable. The Master's conclusion that canvassing managers were LVC's agents depended solely on his interpretation of the PCI Contract, a legal question on which the Master receives no deference. **(Report ¶¶ 20, 22, 31, 37)**; *Elam v. First Unum Life Ins. Co.*, 346 Ark. 291, 297, 57 S.W.3d 165, 170 (2001). As explained in Petitioners' brief, the PCI Contract shows that LVC did not control PCI, much less the managers PCI hired, so those managers could not have been LVC's agents. **(Pet'rs Br. at 26–29)**.

LVC incorrectly cites paragraphs 32–38 of the Master's report to contend that, in addition to the PCI Contract, the Master "relied on the testimony of Hans Stiritz and LVC's compliance attorney." **(Int'rs Br. at 29)**. These paragraphs cannot support an agency finding:

- Paragraph 32 concerns only LVC's attorney's role in the canvassing campaign, such as drafting sponsor forms. LVC does not even try to defend the clearly erroneous finding that the attorney spoke with "field managers," and that is the only portion of paragraph 32 that could have any bearing on agency. *See* **(Pet'rs Br. at 31–32)**.
- Paragraph 33 says LVC's attorney "sent emails and phone calls with instructions for canvasser training and background checks, and submission to the Secretary of State on behalf of LVC." But the attorney did not sign the background-check certifications. Nor does any of this evidence show that the people hired by LVC's independent contractor, PCI, were somehow agents of LVC when they made the background-check certifications required of "the sponsor."
- Paragraph 34 discusses a meeting the attorney facilitated among representatives of the Secretary and PCI, which is irrelevant to whether the canvassing managers were agents of LVC for purposes of making background-check certifications.
- Paragraph 35 recounts that the attorney told the Secretary's office that PCI would be LVC's canvassing company and a PCI representative would make sponsor submissions. But PCI did not execute any background-check certifications, and nothing about this meeting could

make the canvassing managers agents of LVC for purposes of such certifications.

- Paragraph 36 says a member of the Secretary's office acknowledged receipt of "LVC sponsor submissions" from PCI's representative. That does not bear on whether PCI was LVC's agent or the scope of the agency, much less whether the managers PCI hired were LVC's agents for purposes of background-check certifications.
- Paragraph 37 references the PCI Contract, which belies the agency argument.
- Paragraph 38 notes that Mr. Stiritz testified he understood "PCI would hire whomever it needed in order to carry out the canvassing." This testimony only confirms PCI could hire employees and independent contractors to fulfill its obligations, which did not include background-check certifications. **(Pet'rs Ex. 417 at 3)**.

LVC concedes it had no direct contact with Mr. Dewey, Ms. Erickson, or Ms. Marcynyszyn. **(Int'rs Br. at 30)**. LVC asserts that the PCI Contract "expressly authorized PCI to hire subagents." *Id.* However, "subagents"—as opposed to PCI's own independent contractors and employees—is nowhere to be found in the PCI Contract. A theory of subagency could not carry the day anyway, particularly where a solemn certification is at issue, because the purported subagents (Mr. Dewey, Ms.

Erickson, and Ms. Marcynyszyn) were "too far from the source of the power"—that is, the sponsor, LVC. *Bromley v. Aday*, 70 Ark. 351, 68 S.W. 32, 34 (1902) (rejecting argument that subagent had power to bind principal under doctrine of *delegatus non potest delegare*, which forbids an agent from delegating "important responsibilities").

LVC argues that its attorney "held [canvasing managers] out as LVC's agents." **(Int'rs Br. at 30)**. But the record contains no such evidence. The attorney:

- never mentioned Mr. Dewey, Ms. Erickson, or Ms. Marcynyszyn to anyone;
- never communicated with Mr. Dewey, Ms. Erickson, or Ms. Marcynyszyn, **(RT 690–691)**;
- could not testify when she even learned the names of Mr. Dewey, Ms. Erickson, or Ms. Marcynyszyn, **(RT 690)**; and
- did not submit to the Secretary the Sponsor Affidavits with the background-check certifications herself.

All to say, it is impossible to conclude that the attorney held out Mr. Dewey, Ms. Erickson, and Ms. Marcynyszyn as LVC's agents. She did not even know who they were, and there is no evidence LVC had any control over them.

LVC argues it is irrelevant that PCI and Mr. Dewey, Ms. Erickson, and Ms. Marcynyszyn were independent contractors. **(Int'rs Br. at 31)**. But independent

contractors are not agents. *See Dickens v. Farm Bureau Mut. Ins. Co.*, 315 Ark. 514, 516, 868 S.W.2d 476, 477–78 (1994) (presenting the "question of agency versus independent contractor" as a binary choice; affirming directed verdict for insurer because a contractor the insurer recommended for repairs was an independent contractor, not the insurer's agent). Agents are subject to the control of the principal and can bind the principal. None of that is true of *independent* contractors like PCI and the canvassing managers it hired.

LVC's nonsensical argument is that agency exists by LVC's delegation of its statutory duty to an out-of-state contractor (PCI), which then delegated that duty to other out-of-state contractors (Mr. Dewey, Ms. Erickson, and Ms. Marcynyszyn) with whom LVC had no relationship and over whom LVC had no control. LVC has no path to an agency finding. PCI was not LVC's agent, as the PCI Contract makes clear. Thus, LVC cannot rely on PCI to somehow establish an agency (or subagency) relationship linking LVC with Mr. Dewey, Ms. Erickson, and Ms. Marcynyszyn. LVC's reliance on its attorney's relationship with PCI offers LVC no lifeline; the attorney had no contact with or right to control Mr. Dewey, Ms. Erickson, or Ms. Marcynyszyn, either. And background-check certifications were not even within PCI's scope of work, much less that of the canvassing managers.

Prospective application of the statute is improper. This Court should reject LVC's request to apply the proper statutory interpretation only prospectively. *See*

(Int'rs Br. at 32). LVC requests a free pass, asserting that this Court has occasionally "refused to retroactively apply a new rule of law" and citing a criminal case (where retroactivity is of acute concern). *Id.* Subsection 601(b)(3) has been in place since 2015, and this Court has never addressed the issues presented. 2015 Ark. Acts 1219, § 4. This Court will decide what the law is, not overrule precedent or announce a new rule.

LVC's constitutional concerns are meritless. LVC cites no authority that having its Proposed Amendment on the ballot is a property right triggering due process. *Zook v. Martin*, 2018 Ark. 306, at 13, 558 S.W.3d 385, 394 ("We do not consider an argument, even a constitutional one, when the appellant presents no citation to authority or convincing argument in its support."). If that were not dispositive, allowing LVC to intervene satisfied due process. *Id.* (holding due process satisfied when "intervenor obtained a hearing in front of the special master to address the contested issues").

II. LVC's Arguments Against Enforcement of the Pay-Per-Signature Ban Fail.

LVC contends the Master "clearly deemed" "not credible" videos showing paid canvassers describing offers of additional payment based on the number of signatures obtained. (**Int'rs Br. at 43)**. The Master said no such thing. Instead, the Master opined that 14 instances of paid canvassers explaining that they were collecting signatures under an offer based on the number of signatures obtained was

not enough to establish a violation. **(Report ¶ 61)**. While the Master mentioned an obligation to assess the "credibility" of the evidence "as a whole," he did not find the videos lacked credibility. Instead, he made a legal conclusion about the quantum of evidence required that has no support in the statutory language and receives no deference from this Court.

LVC's selective treatment of Mr. Dewey's testimony exposes the weakness of its pay-per-signature arguments. LVC cites Mr. Dewey's live testimony that canvassers knew they could be eligible to draw a prize from a bucket for a few reasons, including having a "good day" by collecting 100 signatures, and that this practice was not continuous throughout the "whole course of the campaign." **(Int'rs Br. at 43)**; *see also* **(RT 488–489)**. Even this testimony shows flagrant statutory violations. But LVC ignores Mr. Dewey's unequivocal deposition testimony, admitted in evidence, that he gave gift cards to canvassers who collected "75, 100 signatures – plus." **(RT 151–152)**. In that testimony, he did not say that this practice was limited to the early days of the canvassing campaign. *Id.* The Master made no findings regarding Mr. Dewey's testimony or credibility, so this Court is free to weigh all of his testimony and the other evidence and find that he paid canvassers throughout the campaign based, in part, on the number of signatures obtained. **(RT 300, 307–309).**

LVC's argument that no evidence shows that Mr. Dewey's paid canvassers were offered signature-based bonuses throughout the canvassing campaign is wrong. *See* **(Int'rs Br. at 40)**. The videos the Master cited spanned from May 14 to June 6, 2024. **(Report ¶ 59)**. Every canvasser the Master identified by name worked for Mr. Dewey. *Id.*; **(Pet'rs Ex. 434)**. LVC argues that, because canvassers on video did not identify who made the offer of additional payment, Petitioners failed to establish who made the offer. **(Int'rs Br. at 40)**. But the reasonable inference is that Mr. Dewey, the person who managed the paid canvassers and admitted paying them based on the number of signatures obtained, offered the additional payments. In any event, the statute does not require proof of who made the offer, only that paid canvassers were offered payment based on the number of signatures obtained.

LVC further misinterprets the statute by injecting a causation element nowhere in the text. According to LVC, only signatures obtained "*as a result of* an impermissible payment or offer to pay are 'void and shall not be counted for any reason.'" **(Int'rs Br. at 38)** (emphasis added). The statute actually says that "signatures obtained in violation of this subsection" are void. Ark. Code Ann. § 7-9-601(g)(3). The statute did not require Petitioners to establish that, but for impermissible offers of payment, paid canvassers would not have obtained signatures. The mere fact that paid canvassers were offered bonuses based on the

number of signatures obtained disqualifies all signatures they obtained while the offer remained open, which was throughout the canvassing campaign.

Extending its revision of subsection 601(g)(3), LVC claims that Petitioners did not offer "evidence of the affected signatures—namely when the offer was made and the number of signatures that canvasser collected as a result." **(Int'rs Br. at 39)**. Again, LVC's "as a result" language is not in the statute. Petitioners presented evidence that Mr. Dewey's canvassers always operated under an impermissible offer of payment. **(Pet'rs Br. at 15–16)**. None of the videos shows a canvasser describing the bonus scheme as temporally limited. Petitioners also presented evidence of the number of verified signatures Mr. Dewey's canvassers collected—87,182. **(Pet'rs Ex. 434)**. That is enough to show statutory violations to a degree that all of the signatures obtained by Mr. Dewey's paid canvassers must be disallowed, invalidating certification of the Initiative Petition.

LVC offers a red herring that Petitioners' interpretation of the pay-per-signature ban is "likely unconstitutional." **(Int'rs Br. at 45).** LVC does not explain how Petitioners' straightforward position—that signatures obtained by paid canvassers who were offered bonuses based on the number of signatures obtained are disqualified—unconstitutionally broadens the statute. That is precisely what the statute says. And LVC's observations about the difference between impermissible payments based on the number of signatures obtained and permissible payments

based on other criteria are irrelevant. *Id.* at 46–48. Petitioners have never complained about permissible payments based on criteria other than the number of signatures obtained.

LVC cites *Molera v. Hobbs*, which analyzed Arizona's pay-per-signature ban prohibiting signature-based payments (not offers of payment). **(Int'rs Br. at 47)**; *see* Ariz. Rev. Stat. Ann. § 19-118.01. *Hobbs* interpreted "based on" to require a petition challenger to prove that a payment was directly related to the number of signatures gathered—not to more attenuated payments, like productivity-based pay increases. 474 P.3d 667, 677–80 (Ariz. 2020). The court affirmed the disqualification of signatures gathered by canvassers while impermissibly paid and did not require the challenger to identify every signature obtained "as a result of" the impermissible payment. *Id.* If anything, *Hobbs* reinforces Petitioners' position and offers LVC no help.

CONCLUSION

This Court should grant Count I of the Amended Original Action Petition and order that no votes cast on the Proposed Amendment be counted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th 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
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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 2,822 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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