

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 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

**PETITIONERS’ RESPONSE TO INTERVENORS’ MOTION TO
EXCLUDE PETITIONERS’ EXHIBIT 25**

Intervenors miss the mark on their Rule 401 argument. For starters, Rule 401 defines what relevant evidence is and is not an exclusionary rule. In any event, Intervenors’ claim that the letters Petitioners mailed to paid canvassers and that were returned by the United States Post Office for varying reasons are irrelevant. This is so, Intervenors assert, because the letters were sent about 20 days after Intervenor Local Voters in Charge submitted its Initiative Petition to the Secretary of State. This 20-day gap, to the Intervenors, makes the letters irrelevant.

Relevance is not a high bar, and the letters chin it. “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ark. R. Evid. 401. Petitioners allege that numerous paid canvassers listed invalid or nonexistent “residence address[es]” on petition-part affidavits. Am. Pet. ¶¶ 65–68. That the Post Office could not deliver 31 letters addressed to the “residence address[es]” listed on canvassers’ petition-part affidavits within a month of the canvassing campaign makes it more probable that the affidavits are invalid.

The Special Master should ignore Intervenors’ unadorned reference to Rule 403. Intervenors make no argument that the letters’ “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues,” or any other Rule 403 consideration. Ark. R. Evid. 403. And given that the hearing in this case is more akin to a bench trial, Rule 403’s jury-focused safeguards hold little weight even if Rule 403 were applicable.

Intervenors’ reliance on the hearsay rule does not work and is premature. Intervenors have no idea how Petitioners intend to use the letters. Until such time as Petitioners seek to introduce the letters, any hearsay ruling is premature.

If the letters were hearsay, however, at least two exceptions apply. First, the public records exception excludes from the hearsay rule “records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities” Ark. R. Evid. 803(8).

The Post Office is a public agency. And the Post Office's statements on the letters are those setting forth "its regularly conducted and regularly recorded activities." *Id.* The public-records exception thus applies.

The Rule 803(24) exception applies, too. This exception applies to statements "not specifically covered" by other hearsay exceptions but that have "equivalent circumstantial guarantees of trustworthiness." For this exception to apply, the Special Master must determine that "(i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence." *Id.* Additionally, the proponent of hearsay evidence must "make known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare and meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant." *Id.*

Petitioners meet these standards. The varying reasons the Post Office listed for not delivering the letters will be offered as evidence of a material fact; that is, that certain canvassers listed invalid residence addresses on petition-part affidavits. The Post Office's written reasons for returning the envelopes are more probative than any other evidence Petitioners' could have gathered in this fast-tracked case.

And statements by the Post Office carry a level of trustworthiness that does not offend the hearsay rule. Further, Petitioners produced and identified the letters to Intervenors. And the part of the rule requiring Petitioners to provide the name and address of the declarant is either met or not applicable. Intervenors had the opportunity to reach out to the Post Office for clarification on the statements on the letters. All to say, if the Special Master determines that the letters are hearsay, Rule 403(24) provides another applicable exception.

Finally, receiving a letter back from the Post Office is an act, not a statement. That is at least one non-hearsay purpose of the letters.

CONCLUSION

In this bench trial, the Special Master can evaluate the validity and admissibility of the letters after Petitioners are afforded the opportunity to lay a foundation and establish the genuineness of the letters. For these reasons, Intervenors' Motion to Exclude Petitioners' Exhibit 25 must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John E. Tull III, hereby certify that on August 27, 2024, the foregoing pleading was filed with the Court's electronic filing system, which shall cause notification to be sent to all counsel of record.

/s/ John E. Tull III

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