IN THE SUPREME COURT OF ARKANSAS

JENNIFER MCGILL, INDIVIDUALLY AND ON BEHALF OF THE ARKANSAS CANVASSING COMPLIANCE COMMITTEE; & CHEROKEE NATION ENTERTAINMENT, LLC **Petitioners**

v. **CV-24-492**

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**

BRIEF OF RESPONDENT ON COUNT I

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STATEMENT OF THE CASE AND THE FACTS

Intervenor Local Voters in Charge ("LVC") sponsored an initiative petition ("Petition") that proposes to amend the Arkansas Constitution ("Proposed Amendment"). Between April and July 5, 2024, paid canvassers circulated the Petition throughout the State of Arkansas. At the same time, members of the paid canvassing companies hired by LVC filed affidavits with the Secretary of State, attempting to comply with Ark. Code Ann. § 7-9-601(b)(3), which states that "the sponsor" shall certify to the Secretary that each paid canvasser in the sponsor's employ has no disqualifying offenses in accordance with that section. LVC's affidavits merely stated that the individuals filing them were "Manager[s] for the canvassing effort of Local Voters in Charge." On July 5, 2024, LVC submitted its Petition to the Secretary. The Secretary determined that LVC had no less than 116,200 signatures, which was more than the required 90,704 signatures. As required by statute, the Secretary then provisionally certified the ballot title to appear on the November 2024 ballot. But upon learning that the individuals that filed the § 7-9-601(b)(3) affidavits were not members of LVC but in fact paid canvassers themselves, the Secretary now asks this Court to direct that no votes be counted on the Proposed Amendment on the November 2024 ballot.

ARKANSAS ELECTION STATUTES

This case turns on the interpretation of the Arkansas election statutes found at Ark. Code Ann. § 7-9-101 *et seq*. The relevant definitions and provisions of § 7-9-101 *et seq*. are set forth below.

- "'Sponsor' means 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).

- "As used in this section [§7-9-601], 'paid canvasser' means a person who is paid or with whom there is an agreement to pay money or anything of value before or after a signature on an initiative or referendum petition is solicited in exchange for soliciting a signature on a petition." Ark. Code Ann. § 7-9-601(c).

- "To verify that there are no disqualifying offenses on record, a sponsor shall obtain, at the sponsor's cost, from the Division of Arkansas State Police, a current state criminal history and criminal record search on every paid canvasser to be registered with the Secretary of State." Ark. Code Ann. § 7-9-601(b)(1).

- "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." Ark. Code Ann. § 7-9-601(b)(3).

STANDARD OF REVIEW

The Special Master's factual findings are entitled to a certain degree of deference, but his legal conclusions are not. Specifically, this Court reviews 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*.

Additionally, Arkansas Supreme Court Rule 6-5 provides original jurisdiction in the Supreme Court for this case, and further provides that "[e]vidence upon issues of fact will be taken by a master to be appointed by the Court." Ark. Sup. Ct. R. 6-5(c). Count I of the Petition in this original action "raises issues of fact," so the Court appointed a special master "to resolve the factual disputes raised in the petition." Per Curiam Order, Aug. 9, 2024. In the usual case, the special master would make factual findings that are conditioned on this Court's legal determinations. For instance, a special master would find that if the Court concludes that the statute allows paid canvassers to make the certification on the sponsor's behalf, then the certifications made in the case satisfy the statute. If not, then the certifications do not satisfy the statute.

The Special Master's Report makes several "findings" that go beyond the findings of fact that this Court tasked him with making and are instead conclusions of law. These "findings" should be disregarded. One of those is his "finding" that

LVC properly certified with the Secretary its compliance with Ark. Code Ann. § 7-9-601(b)(3). Report at ¶ 40. That is clearly a question of law for only this Court to answer. The Special Master also found that the paid canvassing companies acted as agents of LVC, and therefore could sign these documents on its behalf. Report at ¶¶ 27–30. That is incorrect. And in any event, it is not the Special Master's prerogative to determine the meaning of § 7-9-601(b)(3). Instead, "it is for this court to determine the meaning of a statute." *City of Helena-W. Helena v. Williams*, 2024 Ark. 102, 7, 689 S.W.3d 62, 66. Finally, the Special Master "found" that the Secretary is "estopped from asserting 'sponsor' within 601(b)(3) does not allow LVC's agents to provide the certification and register paid canvassers." Report at ¶ 54. This is also a conclusion of law improperly drawn by the Special Master, and in any event, this "finding" should be disregarded because it is based on the incorrect legal standard for an estoppel claim against the government.

ARGUMENT

I. LVC failed to certify that its paid canvassers had no disqualifying offenses.

Arkansas law requires "the sponsor" of a petition to certify to the Secretary "that each paid canvasser in the sponsor's employ has no disqualifying offenses" that would prevent them from being a paid canvasser. Ark. Code Ann. § 7-9-601(b)(3). The statute does not say that a third party or an agent of the sponsor may make the certification. Rather, "the sponsor shall certify" that no disqualifying

offenses exist. *Id.* Here, LVC did not certify to the Secretary that it was in compliance with Ark. Code Ann. § 7-9-601(b)(3). Instead, employees of its paid canvassing company, PCI, did so. Report at ¶ 19–20. As such, all signatures "incorrectly obtained or submitted" by LVC "shall not be counted by the Secretary of State for any purpose." Ark. Code Ann. § 7-9-601(f). Absent the signatures obtained by PCI, LVC cannot meet the 90,704-signature threshold. *See* Report at ¶¶ 16, 23–24. Therefore, the Court should direct that no votes be counted on the Proposed Amendment on the November 2024 ballot.

A. The negative implication canon precludes an interpretation of § 7-9-601(b)(3) that would allow anyone other than "the sponsor" to make the certification.

The negative-implication canon precludes the Special Master's legal conclusion (and LVC's argument) that a paid canvasser can make the § 7-9-601(b)(3) certification as an "agent" of the sponsor. The negative implication canon provides: "The expression of one thing implies the exclusion of others (*expressio unius est exclusion alterius*)." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012). The leading treatise on this interpretative canon provides an apt example of its application:

> In one case, the state constitution declared that the judges of superior courts must be elected by both branches of the legislature. Then, later, a legislative act authorized the governor to appoint a temporary superior-court judge. The court applied the negative-implication canon to the constitutional language: "If one having authority prescribe[s] the mode in which a particular act [the naming of judges] is to be done, can

> the agent [the legislature] who executes it substitute any other? Does not the act of prescribing the mode, necessarily imply a prohibition to all other modes?" Hence the statute was held unconstitutional.

A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 109–10 (2012) (quoting *State ex rel. M'Cready v. Hunt*, 2 Hill 1, 171 (S.C. Ct. App. 1834) (per Johnson, J.)).

This Court has recognized and applied the negative-implication canon on numerous occasions. *See Arkansas Parole Bd. v. Johnson*, 2022 Ark. 209, at 7, 654 S.W.3d 820, 824; *State ex rel. Rutledge v. Purdue Pharma L.P.*, 2021 Ark. 133, at 10, 624 S.W.3d 106, 111; *Smith v. State*, 2020 Ark. 410, at 9.

The negative implication canon applies here. Specifically, the statute 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." Ark. Code Ann. § 7-9-601(b)(3) (emphasis added). By specifying who can make the certification (the sponsor), the negative implication is that no one other than the sponsor (such as a paid canvasser) can make this certification.

Like the case cited by Justice Scalia and Professor Garner, here, the General Assembly prescribed "the mode in which a particular act"—the certification that each paid canvasser in the sponsor's employ has no disqualifying offenses—"is to be done." Ark. Code Ann. § 7-9-601(b)(3) states that "the sponsor shall" make the

certification. In this context, could LVC "substitute any other" person to make the certification? A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 109 (2012). It plainly could not. Thus, under § 7-9-601(b)(3), only LVC could make the certification, and LVC could not delegate its authority to a paid canvasser to make this certification on its behalf.

Stated differently, LVC would have this Court read the statute to say that "the sponsor *or its designee or agent* shall" make the certification, but it is a well-settled principle of statutory construction that courts "will not add words to a statute to convey a meaning that is not there." *City of Helena-W. Helena v. Williams*, 2024 Ark. 102, at 9, 689 S.W.3d 62, 68. The Court should not add words to § 7-9-601(b)(3) to convey a meaning that is not there.

Further, LVC's argument that its paid canvassers could make the certification as "agents" of LVC is further undermined by the fact that other sections of the election statutes do not contain the kind of limiting language that is found is § 7-9-601(b)(3). For instance, § 7-9-111(f)(1) doesn't contain such limiting language but merely requires an "affidavit stating the number of petitions and the total number of signatures being filed." Moreover, the fact that other provisions specifically recognize that agents or representatives of sponsors may take certain actions for the sponsor—such as "pay[ing] a canvasser for petition signatures," Ark. Code Ann. 7-9-109(f)(1), and "submit[ting] to the Secretary of State a petition part," *id*. -

109(f)(2)—further underscores that when § 7-9-601(b)(3) says "the sponsor shall" make the certification, it means a certification by the sponsor and no one else.

B. In the alternative, even if the § 7-9-601(b)(3) certification could be made by an agent of the sponsor, it would be absurd to allow the paid canvasser to make that certification about itself.

In the present case, LVC hired PCI, who in turn hired Phil Dewey, Stephanie Marcynyszyn, and Berta Erickson, to handle their paid canvassing efforts. Report at ¶¶ 19–20. These three individuals all manage separate canvassing offices as their form of employment. Therefore, the Special Master's "finding" requires this Court to accept the assertions of individuals who operate paid canvassing companies about the compliance of their own employees. This ignores the legislative intent of the statute.

The Special Master's conclusion (and Intervenors' argument) that paid canvassers can self-certify their compliance with § 7-9-601(b)(3) is "an absurd conclusion that is contrary to legislative intent." *Walden v. State*, 2014 Ark. 193, at 8, 433 S.W.3d 864, 870. Courts adhere to "the basic rule of statutory construction, which is to give effect to the intent of the legislature." *Metzner v. State*, 2015 Ark. 222, at 9, 462 S.W.3d 650, 656. This includes placing the statute "beside other statutes relevant to the subject matter in question" and determining the "meaning and effect derived from the whole." *Id.* For this Court to reach the conclusion that

canvassing companies can self-certify their compliance with Arkansas law would be to reach an absurd conclusion.

Ark. Code Ann. § 7-9-101 *et seq.* carefully delineates the various separate roles that individuals and organizations play in the initiative process. To start, "[s]ponsor" is defined as the "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). By contrast, a "canvasser" is defined as "a person who circulates an initiative . . . petition to obtain the signatures of petitioners thereto." *Id*. §7-9-101(3). And a "paid canvasser" is "a person who is paid or with whom there is an agreement to pay . . . in exchange for soliciting a signature on a petition." *Id*. § 7-9-601(c).

Moreover, Ark. Code Ann. § 7-9-601(b)(5) provides that a "paid canvasser [is] registered by the sponsor" with the Secretary and that the sponsor is responsible for ensuring that their paid canvassers comply with applicable legal requirements. And Ark. Code Ann. §7-9-601(d)(4)-(5) states that the sponsor is required to provide each paid canvasser with a copy of the Secretary's handbook and an explanation of Arkansas law. This Court has previously held that "'shall' means 'shall'" and that the "[s]ponsor" must comply with the election statues. *Benca v. Martin*, 2016 Ark. 359, at 16, 500 S.W.3d 742, 748. Here that means that the sponsor is required to make the certification—not an agent of the sponsor. Similarly, this Court does not

overlook mandatory statutory language regarding Ark. Code Ann. § 7-9-601(b)(3). *See Miller v. Thurston*, 2020 Ark. 267, 9, 605 S.W.3d 255, 260.

The purpose of Ark. Code Ann. § 7-9-601 is to regulate the conduct of paid canvassers by requiring *the sponsor* to verify and certify to the Secretary that its paid canvassers have not been convicted of a violation of the election laws, of a felony, or of fraud, forgery, or identity theft, among other disqualifying offenses. Under the Intervenors' and the Special Master's interpretation, a paid canvasser who has been convicted of a violation of election laws—or of fraud, forgery, or identity theft, among other disqualifying offenses—would be entrusted to self-certify without independent verification or certification from the sponsor whether he has been convicted of such crime.

It would be nonsensical to allow sponsors to abdicate this responsibility to the paid canvassers themselves. But that is precisely what the Special Master's interpretation would require. That is an absurd conclusion that clearly contradicts the General Assembly's intent in enacting § 7-9-601. This is further evidenced when read next to Ark. Code Ann. § 7-9-602, which regulates paid petition blockers. The intent of these sections is to impose regulations on paid canvassers to prevent fraud. Allowing the canvassers themselves to attest that they have never been convicted of fraud undermines the very fraud prevention that was the purpose of these statutes in the first place.

II. The Secretary is not estopped from asserting the correct interpretation of Arkansas law.

This Court recently explained that "even in election matters, the burden of determining what the law requires falls on the filer—not office staff." *Cowles v. Thurston*, 2024 Ark. 121, at 5; *see also Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63 (1984) ("[T]he general rule" is that "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law."). Intervenors would have this Court hold otherwise under a theory of estoppel. Specifically, Intervenors argued (and the Special Master agreed) that the Secretary should be "estopped" from asserting that paid canvassers are not "sponsor[s]" for the purposes of § 7-9-601(b)(3). Report at ¶ 54. Putting aside that it was not the Special Master's role to draw this legal conclusion, the Intervenors and the Special Master are wrong on the law.

There are four elements necessary for a finding of estoppel: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that the conduct be acted on or must act so that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the facts; and (4) the party asserting the estoppel must rely on the other's conduct and be injured by that reliance. *Arkansas Dep't of Hum. Servs. v. Est. of Lewis*, 325 Ark. 20, at 23–24, 922 S.W.2d 712, 713 (1996). Under Arkansas law, the doctrine of estoppel only applies against the State or a State agency "where an affirmative

misrepresentation by an agent or agency of the State has transpired." *Id*., 325 Ark. 20, at 24, 922 S.W.2d at 714. This heightened government-estoppel requirement is consistent with U.S. Supreme Court precedent:

> When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.

Heckler, 467 U.S. at 60.

Intervenors cannot point to an "affirmative misrepresentation" by the Secretary. *Arkansas Dep't of Hum. Servs.*, 325 Ark. 20, at 24, 922 S.W.2d at 713. There hasn't been one. To the contrary, the Special Master found that the Secretary had not received "any questions about the sufficiency of the background check portion of the affidavit" from the Intervenors. Report at ¶ 48. And because of this, the Secretary had no occasion to respond to the Intervenors with an affirmative misrepresentation about the requirements of § 7-9-601(b)(3). Going further, the Special Master made four findings in support of his estoppel finding. Report at ¶ 53. But critically, the Special Master did not point to or "find" any affirmative misrepresentation by the Secretary. No affirmative misrepresentations were ever made. On this record, no evidence supports Intervenors' estoppel theory.

CONCLUSION

This Court should order that the votes on LVC's ballot initiative appearing on the November 5, 2024, ballot not be counted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Justin Brascher, hereby certify that on September 23, 2024, I electronically filed the foregoing with the Clerk of the Court using the eFlex filing system, which notifies eFlex participants.

/s/Justin Brascher
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CERTIFICATE OF COMPLIANCE

This brief complies with Administrative Order No. 19's requirements concerning confidential information, Administrative Order No. 21, § 9's requirement that briefs not contain hyperlinks to external papers or websites, and with the word-count limitation in Arkansas Supreme Court Rule 4-2(d), in that it contains 3,057 words within the statement of the case and the facts, the argument, and the conclusion.

/s/Justin Brascher
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