CV-24-455

IN THE ARKANSAS SUPREME COURT

LAUREN COWLES, individually and on behalf of ARKANSANS FOR LIMITED GOVERNMENT, an Arkansas ballot question committee **PETITIONERS**

v.

JOHN THURSTON, in his official capacity as Arkansas Secretary of State **RESPONDENT**

ORIGINAL ACTION

PETITIONERS' REPLY BRIEF

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ARGUMENT

Respondent, Secretary of State John Thurston ("Secretary"), originally rejected the Arkansas Abortion Amendment of 2024 ("Amendment") because, he alleged, petitioners did not submit two statements. Now he admits they submitted the statements. But he argues that 102,000 signatures should be rejected because one statement was initially submitted incorrectly. Petitioners lawfully submitted that statement and, even if they did not, the Secretary cannot reject petition parts or signatures for noncompliance.

At every juncture, the Secretary has treated petitioners' submission differently from other submissions. He argues here that an agent of a sponsor or a paid canvasser cannot sign a sponsor affidavit, despite accepting this practice for years, including from the other two submissions this year. He argues here that a sponsor affidavit listing most, but not all, of the paid canvassers should disqualify the entire petition, despite his consistent past practice of simply culling petition parts submitted by unlisted canvassers. And, even though this Court ordered the Secretary to complete his initial count of petitioners' submitted signatures, if petitioners succeed in this action, he wants to redo that count to cull more signatures. He is determined to keep the Amendment off the ballot, regardless of the facts or law.

I. Standard of Review and Jurisdiction

This Court has original jurisdiction because the Secretary made an insufficiency determination, and the Court reviews that determination liberally in favor of ensuring that Arkansans exercise their power to vote on the Amendment. Petitioners' Brief ("Pet. Br.") at 7, 14-15. The Secretary does not dispute that, if he made an insufficiency determination, the standard of review is what petitioners assert and this Court has jurisdiction. Instead, he revives his defunct argument that he did not make an insufficiency determination, arguing that he can throw out petitioners' submission before performing an initial count. The Court rejected that argument by ordering the Secretary to finish his initial count, which he has done. Pet. Br. at 13.

Even if he could resurrect this argument, it would fail for the reasons explained in petitioners' response to his motion to dismiss ("Pet. Resp.") and petitioners' brief. Pet. Resp. at 1-4; Pet. Br. at 7.

II. Petitioners Complied with § 7-9-111(f)(2)

The Secretary no longer disputes that petitioners complied with Ark. Code Ann. § 7-9-111(f)(2)(A) or that they submitted multiple Sponsor Affidavits affirming the information required in § 7-9-111(f)(2)(B). Instead, he erroneously argues that those statements were submitted incorrectly.

A. The Sponsor Affidavits Were "Signed by the Sponsor"

The Secretary argues that the Sponsor Affidavits, which were signed by Allison Clark on behalf of AFLG, were not "signed by the sponsor." According to the Secretary, Clark could not sign on AFLG's behalf because she was a paid canvasser and because an agent of a sponsor entity cannot sign on behalf of that entity. This is incorrect for multiple reasons.

1. The statute's text and structure show that a "sponsor" can also be a paid canvasser.

A "sponsor" includes any "person who arranges for the circulation of an initiative or referendum petition." Ark. Code Ann. § 7-9-101(10). A "canvasser" also includes any "person who circulates an initiative or referendum petition . . . to obtain the signatures of petitioners thereto." *Id.* § 7-9-101(3); *see id.* § 7-9-601(c) (defining "paid canvasser" as a person who is paid or has an agreement to be paid for soliciting signatures on a petition). According to the Attorney General, anyone who collects signatures as part of their employment becomes a paid canvasser. Op. Ark. Att'y Gen. No. 53 (2024). Under the Secretary's interpretation, anyone working for an organization advocating for a petition cannot also collect signatures to support the petition. This interpretation prohibits the people most supportive of a petition from collecting signatures. No evidence exists that the legislature intended such a prohibition.

In fact, the legislature significantly broadened the definition of "sponsor"

when it adopted the paid canvasser laws at issue here. Act 1413 of 2013 added § 7-9-601, which requires sponsors to take certain precautionary measures with paid canvassers. Before Act 1413, only a person filing a petition was a "sponsor." *Id.* Act 1413 significantly broadened this definition by adding "a person who arranges for the circulation" of a petition, seemingly intending that anyone managing paid canvassers, as well as paid canvassers themselves who "arrange" for petition circulation, are also sponsors of the petition, subject to the anti-fraud requirements of Act 1413. *Id.*

Moreover, because the definitions of "sponsor" and "canvasser" or "paid canvasser" are so broad and overlap so much, any attempt to say that one cannot be the other impermissibly restricts individuals' free speech rights, as petitioners have explained. Pet. Br. at 18; *see Meyer v. Grant*, 486 U.S. 414, 420-25 (1988) ("the circulation of a petition" is "core political speech" and limitations are reviewed under strict scrutiny).[1]

[1] If the Court finds that Clark cannot sign sponsor statements because she was a paid canvasser, the appropriate remedy is to remove petition parts submitted by Clark as a paid canvasser, not to reject the entire submission.

2. A representative or agent of a sponsor entity may sign on behalf of that entity.

The Secretary does not dispute that Clark had authority to sign on behalf of AFLG. Instead, he argues that she could not sign because she was not "the sponsor." It is basic agency law that an agent with authority to act on an organization's behalf may do so. *Evans v. White*, 284 Ark. 376, 378, 682 S.W.2d 733, 734 (1985). The Secretary cites no authority to the contrary. Moreover, his argument that §§ 7-9-103 and 109 reference an agent of a sponsor is irrelevant. Those sections explain that an agent of a sponsor can be held individually criminally liable for certain actions. They do not rewrite agency law to disallow agents of a sponsor entity from signing on the entity's behalf. Section 109(f)(2) even expressly contemplates that a "sponsor's agent" will submit petition parts directly to the Secretary.

3. The Secretary has consistently accepted and approved sponsor affidavits from employees of paid canvassing companies.

The Secretary's new delineation between a sponsor, paid canvasser, and sponsor's agent is inconsistent with his longstanding, consistent practice of accepting and approving sponsor affidavits and certifications from paid canvassers and agents of sponsors. Addendum ("Add.") 84, 92-93 (¶¶ 22, 28). This includes acceptance of sponsor affidavits to satisfy § 7-9-111(f)(2), Add. 113-14, 118 (showing that the § 7-9-111(f)(2)(B) statement signatory, Frances DeMont, was on the accompanying paid canvasser list of Arkansas Wins in 2020), and to satisfy § 7-

9-601, Add. 84, 92-93 (¶¶ 22, 28), 126-30.[2]

In this election cycle, the Secretary accepted and certified sponsor affidavits and certifications signed by employees of paid canvassing companies for every other petition (besides petitioners' submission) to submit sufficient signatures for placement on the ballot.

A sponsor of the Arkansas Medical Marijuana Amendment of 2024 ("Marijuana Amendment"), Arkansans for Patient Access ("APA"), submitted information required by § 7-9-601 through employees of Nationwide Ballot Access ("NBA"), a paid canvassing company. Add. 126-30. NBA employees emailed the Secretary paid-canvasser lists that contained the "certification" statement required by § 7-9-601(b)(3). *Id.* On several occasions, these submissions were accompanied by a "Sponsor Affidavit"—identical to those submitted by AFLG—signed by the manager of NBA. *Id.* A sponsor of the Pope County Casino Amendment of 2024 ("Casino Amendment"), Local Voters in Charge, used the same methods. Add. 139

[2] Section 601(b)(3) requires a sponsor to "certify" to the Secretary every time it updates its paid-canvasser list "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). Failure to comply results in a "do not count" penalty. *Id.* § 7-9-126(b)(4)(A).

(¶ 40), 200-06. Paid canvassers from PCI Consultants, Inc. ("PCI"), not Local Voters in Charge, submitted the certifications and sponsor affidavits. *Id.*

Under the Secretary's logic here, he would have found all NBA and PCI submissions invalid for noncompliance with § 7-9-601 and would not have counted those signatures. Instead, he granted the Marijuana Amendment a cure period and certified the Casino Amendment for the ballot. Add. 241-42. And he admits counting those paid-canvasser signatures. In a letter sent yesterday to APA, the Secretary wrote that his office "discovered" that APA "failed to comply with Ark. Code Ann. § 7-9-601(b)(3)" because "the manager of a canvassing company attempted to make the certification." Add. 243. The Secretary confirmed to APA that the paid-canvasser signatures submitted for the Marijuana Amendment will continue to count. *Id.* (explaining that, only for new signatures gathered during the cure period, such certifications will no longer count).

As shown, the Secretary has always permitted agents of sponsors and paid canvassers to submit sponsor affidavits and certifications. He reverses course now only to reject the Amendment.

B. Petitioners Correctly Submitted Sponsor Affidavits

The Secretary argues that Clark's June 27 Sponsor Affidavit did not list "each" paid canvasser, allowing him to reject the entire petition. As AFLG has explained, and the Secretary has not rebutted, Clark did not submit a Sponsor Affidavit with the

final July 4 list because the Secretary's office told her it was not required. Add. 39.

Nevertheless, the effect of using Clark's June 27 Sponsor Affidavit as the § 7-9-111(f)(2)(B) statement would be to cull petition parts submitted by paid canvassers who do not appear on the list. *See* Ark. Code Ann. § 7-9-126(b)(4)(A). That is, in fact, the Secretary's practice. During the culling process, he directs his staff to check the "Paid Canvasser List," cull petition parts submitted by unlisted paid canvassers, and then select "**Paid Canvassers**: Canvasser not on Paid Canvasser List" as the reason for rejection. Add. 244-45. Again, the Secretary is treating petitioners differently from everyone else.

The Secretary also argues that Clark's June 27 Sponsor Affidavit does not count because it was submitted too early. As petitioners have explained, there is no timing requirement for filing a § 7-9-111(f)(2) statement, in contrast to specific timing requirements for other submissions. Pet. Br. at 18. The Secretary also has a duty to file and preserve such statements as evidence of steps taken in submitting the petition. Ark. Code Ann. § 7-9-123.

III. Noncompliance with § 7-9-111(f)(2) Does Not Allow the Secretary to Reject Petitions or Refuse to Count Signatures

Even if petitioners failed to comply with § 7-9-111(f)(2), the Secretary cannot reject petitions or refuse to count signatures for such noncompliance.

The Secretary does not dispute that, on July 11, petitioners corrected any perceived noncompliance. But he argues that, because petitioners did not submit the

statement on July 5, their entire petition is rejected. Even if there were a timing requirement (as explained, there is not, Pet. Br. at 18), the consequence of such failure is to have an opportunity to correct it. The Secretary is right that "[f]ailure to comply with the law has consequences"—but not all of those consequences are the same.

In this statute, the legislature has carefully delineated specific consequences for noncompliance with specific provisions. As the Secretary's office, Attorney General, and petitioners agree, when the legislature wanted to attach a "do not count" penalty to noncompliance with a requirement, it did so. Pet. Br. at 19-21; Pet. Resp. at 4-5.

In contrast, the legislature made clear that noncompliance with § 7-9-111(f)(2) is correctable. Pet. Br. at 23-24. The legislature created a section titled "Corrections" and put § 7-9-111(f)(2) in that section through Act 1413. These "corrections" include "[s]ubmit[ting] proof to show that the rejected signatures or some of them are good and should be counted," Ark. Code Ann. § 7-9-111(d)(1)(B), which is exactly what petitioners did through petitioners Lauren Cowles's July 11 statement. The Secretary understands this delineation, because he argues that noncompliance with § 7-9-111(f)(2) is actually noncompliance with § 7-9-126(b)(8). Petitioners have explained the fallacies in that argument, which is contrary to the text of the statute and to the careful delineation between "do not count" and "correctable" actions. Pet. Br. at 21;

Pet. Resp. at 5.

The delineation between "do not count" and "correctable" actions also makes practical sense. Act 1413 of 2013 added § 7-9-111(f)(2), § 7-9-601, and § 7-9-126 (the provision containing the "do not count" directives). Petition parts not in compliance with § 7-9-601 are culled. Ark. Code Ann. § 7-9-126(b)(4)(A). Section 7-9-601 requires the sponsor to do the things listed in the § 7-9-111(f)(2)(B) statement. *Id.* § 7-9-601(a)(2)(A)-(B) (requiring a sponsor to provide paid canvassers with a copy of the Secretary's initiatives and referenda handbook and explain applicable laws before they collect signatures). Paid canvassers must sign a statement saying the sponsor did those things and the sponsor must submit those statements to the Secretary. *Id.* §§ 7-9-601(a)(2)(D), (d)(4)-(5). Act 1413 made clear that failure to do those things is what results in a "do not count" penalty under § 7-9-126—not failure to submit the statement reiterating that they were done.

This is why the Secretary's legitimate concern about the risk of fraud with paid canvassers is a red herring when applied to petitioners. Act 1413 dealt with this exact concern, and it delineated the penalties for noncompliance—failure to provide canvassers and the Secretary with the required information in § 7-9-601 resulted in the harshest penalty ("do not count"); failure to submit a statement reiterating that those things were done resulted in a less-harsh penalty (ability to correct). The Secretary does not dispute that petitioners did what was required under § 7-9-601 or

that he has evidence of such compliance in his possession. That undisputed evidence includes at least thirteen Sponsor Affidavits attesting to the information required in §§ 7-9-111(f)(2)(B) and 7-9-601, individual affidavits from each paid canvasser attesting that they were provided the required information, the names and addresses of each paid canvasser, signatures cards of the paid canvassers, and Cowles's July 11 statement attesting to the information required in § 7-9-111(f)(2)(B).

IV. The Secretary Pulled a Bait and Switch on Petitioners

Petitioners have argued throughout this action that the Secretary assured petitioners that they submitted correct paperwork and that their submission included all necessary documentation. Pet. Br. 24-26; Pet. Resp. at 8-10. Thus, petitioners argue, the Secretary is estopped from rejecting petitioners' submission. *Id.* So far, the Secretary has not engaged these arguments or rebutted these facts, and petitioners' assertions stand uncontested.

V. The Secretary Treats Petitioners Differently

The Secretary repeatedly has treated petitioners differently from similarly situated petitioners. He rejected petitioners' Sponsor Affidavits from an alleged paid canvasser and agent of AFLG but accepted the same affidavits and § 7-9-601 certifications from paid canvassers and agents of sponsors for other petitions. *See supra* Section II.A.3. He rejected petitioners' entire submission because a Sponsor Affidavit covered most, but not all, of the paid canvassers, contrary to his practice

of culling only unlisted paid canvasser petitions. *See supra* Section II.B. And he rejected petitioners' submission for noncompliance with § 7-9-111(f)(2), despite his office's uniform practice of not attaching a "do not count" penalty to such noncompliance. Pet. Br. at 22. His office even twice argued to this Court that noncompliance with § 7-9-111(f)(2) did not result in a rejection of petition parts or signatures. *Id*. Such differential treatment constitutes unlawful viewpoint discrimination. *Id.* at 26-31.

Three actions in the last week highlight the Secretary's differing treatment of petitioners. First, his opening brief hinted that, even if petitioners succeed in this action, he will redo his initial count—which he only completed the first time under this Court's order—to cull more signatures. Resp. Br. at 30. There is no legal basis for redoing an initial count and no evidence that the Secretary has done that before. This Court should ensure that, if it rules in petitioners' favor, the Secretary cannot redo the initial count.

Second, in an action challenging his certification of the Casino Amendment, the Secretary denied that (1) a canvassing company and its employees cannot provide a § 7-9-601(b)(3) certification on behalf of a sponsor, especially not regarding paid canvassers, (2) the General Assembly assigned the duty to certify under § 7-9-601(b)(3) "to the sponsor and no one else," and (3) the "statute does not provide any authority for the sponsor to delegate this responsibility to another person

or entity." Add. 140 (¶ 45), 226 (¶ 45). He denied there the same arguments he makes here to reject petitioners' submission. This further demonstrates his viewpoint discrimination against petitioners, Pet. Br. at 26-31; *Frederick Douglass Found., Inc. v. D.C.*, 82 F.4th 1122, 1144-47 (D.C. Cir. 2023), and violates Arkansas's doctrine against inconsistent positions, *Dupwe v. Wallace*, 355 Ark. 521, 531-32, 140 S.W.3d 464, 470-71 (2004).

Finally, yesterday he "discovered" that the Marijuana and Casino Amendments also submitted sponsor affidavits and certifications by managers of paid canvasser companies just as petitioners did. Add. 243. Nevertheless, signatures gathered by paid canvassers for the Marijuana and Casino Amendments will count, but signatures gathered by paid canvassers for the Abortion Amendment will not count. There is no better example of viewpoint discrimination. Three Amendments took the same actions, and the Secretary penalized only petitioners' Amendment.

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For the reasons stated, this Court should rule in favor of petitioners, grant the relief requested in their opening brief, and provide any other proper relief.

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CERTIFICATE OF SERVICE

I certify that, on August 9, 2024, I filed this Petitioners' Reply Brief with the Clerk of Arkansas Supreme Court using the electronic filing system, which shall send notification to all counsel of record.

/s/ Amanda Orcutt
Amanda Orcutt

CERTIFICATE OF COMPLIANCE

I certify that this Petitioners' Reply Brief complies with Administrative Order No. 19 and Administrative Order 21, Section 9, and conforms to the word count limitations contained in Rule 4-2(d), containing 2,859 words. This brief was prepared utilizing Microsoft Word and Times New Roman 14-point font.

/s/ Amanda Orcutt
Amanda Orcutt

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