IN THE SUPREME COURT OF ARKANSAS

LAUREN COWLES, individually and on behalf of ARKANSANS FOR LIMITED GOVERNMENT, a ballot question committee, **Petitioners**

v. **No. CV-24-455**

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

An Original Action

Respondent's Reply Brief

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Table of Contents

Table of Authorities

Cases

Statutes and Constitutional Provisions

Table of Authorities (cont'd)

Statutes and Constitutional Provisions

Other Authorities

ARGUMENT

AFLG failed to comply with Arkansas law and isn't entitled to any relief. Rather, the Court should dismiss AFLG's petition because its claims fail as a matter of law. To the extent that wasn't already clear, AFLG's opening brief underscores the law isn't on its side. Indeed, AFLG largely avoids discussing statutory text and instead dedicates most of its time to questioning the Secretary's motives, discussing inapposite hypotheticals, misapplying basic First Amendment principles, and misconstruing this Court's decisions.

In short, AFLG's briefing asks for a mulligan on its failure to comply with Arkansas law. This Court should reject that request and, applying the required strict-compliance analysis, deny relief.

I. This Court lacks jurisdiction over the petition.

This Court's original jurisdiction triggers only once "[t]he sufficiency of [a] petition[]" has been "decided in the first instance by the Secretary." Ark. Const. art. 5, sec. 1. Both the number-of-signatures affidavit and, if applicable, the Section 111(f) sponsor statement are mandatory requirements, and without them, the Secretary can't review a petition. *See* Op. Br. 16-17. Here, because AFLG failed to submit the sponsor statement, the Secretary had no duty to issue any sufficiency determination. Without that, this Court lacks jurisdiction and should dismiss this case.

II. The Secretary properly rejected AFLG's petition.

A. AFLG didn't comply with Section 111(f)(2).

AFLG failed to comply with Section 111(f)(2) because it failed to submit with its petition a statement "signed by the sponsor" indicating that the sponsor gave the required information and documentation to "each paid canvasser" who collected signatures. AFLG's arguments to the contrary are unavailing.

To start, AFLG didn't submit a "statement signed by the sponsor." Ark. Code Ann. 7-9-111(f)(2)(B). It submitted an affidavit from Allison Clark, a paid canvasser employed by the canvassing company hired by the sponsor. Those aren't the same thing, and AFLG's contrary arguments fall flat.

In response, AFLG suggests that "the sponsor" really means the sponsor or an agent of the sponsor. *See* Pet. Br. 17. But that's not what Section 111(f)(2)(B) says. It says "the sponsor." And other provisions—including other parts of Section 111(f)—demonstrate that where the General Assembly intends to allow agents or representatives acting on the sponsor's behalf (or anyone else) to fulfill a requirement, it says so. *See, e.g.*, Ark. Code Ann. 7-9-109(f) (a "sponsor, sponsor's agent, or representative"); *id.* -111(f)(1) (a "person filing . . . petitions"); *id.* -111(f)(2) ("the person filing the petitions"). The decision not to include broader language in Section 111(f)(2)(B) controls.

AFLG also conjures a series of outlandish hypotheticals that it says show

Section 111(f)(2)(B)'s text can't mean what it says. Pet. Br. 17-18. Tellingly, however, none of those hypotheticals involve the situation here—a purely paid canvasser employed by a canvassing company hired by the sponsor, and this Court needn't decide the entire universe of actions paid canvassers may take in the context of an initiative effort to resolve this case. Instead, the Court need only apply the plain text and hold that the law distinguishes what canvassers and sponsors do; that Section 111(f)(2)(B) requires action by the sponsor; and that Clark—a paid canvasser, working for a canvassing company hired by the sponsor, and nothing more—didn't submit a "statement signed by the sponsor."

Next, even if AFLG could overcome that hurdle, its claim would still fail because it didn't submit a timely statement that it had provided the required information and documents "to each paid canvasser" that it hired. Ark. Code Ann. 7-9-111(f)(2)(B). Indeed, AFLG doesn't dispute—nor could it—that Clark's June 27 affidavit can't say anything about canvassers hired and who collected signatures after June 27. Pet. Br. 9-10. Nor does it dispute that it didn't file any complete statement on or before the July 5 constitutional submission deadline.

Rather, AFLG says it was entitled to submit such a statement at its leisure. In fact, doubling down on, it argues that regardless of its errors before the July 5 deadline, Cowles's July 11 affidavit fixed all of them. Pet. Br. 24. But it doesn't cite any statutory provision allowing compliance at its leisure, and its bare

assertion that staff said it didn't need to comply with the law (Pet. Br. 9-10) underscores that it knows nothing supports its claim. That's hardly surprising, since such a reading would gut the constitutional deadline and make it all but impossible to ensure compliance with various other deadlines designed to ensure accurate ballots. Moreover, AFLG's claim that it could submit at its leisure conflicts with Section 111(f)'s textual directive that the "person filing statewide initiative petitions . . . shall bundle the petitions by county and shall file an affidavit stating the number of petitions and the total number of signatures being filed," Ark. Code Ann. 7-9-111(f)(1), and, where paid canvassers are used, "the person filing the petitions under [subsection (f)] shall also submit" the sponsor statement required by 111(f)(2), *id.* -111(f)(2). Given those two provisions, AFLG cannot plausibly claim that the sponsor statement can be filed a week later.

At most, AFLG suggests that Section 111(f) doesn't mean what it says because it thinks two other provisions are more explicit about timing. Pet. Br. 18. Neither helps AFLG. The first, Section 126(a), just describes the sequence of the Secretary's review, and it's hard to see how that illustrates anything. And the second, Section 601(a)(3), actually undermines AFLG's argument since its "[u]pon filing the petition" language—which AFLG concedes "explicitly require[s] certain documents to be filed at or before the time of filing the petition," Pet. Br. 18—is functionally equivalent to Section 111(f)'s "being filed" and "shall also submit"

language. AFLG's attempt to excuse its noncompliance thus fails.

B. AFLG's failure means that it is not entitled to relief.

The Secretary was required to reject AFLG's petition in its entirety because it failed to comply with Section 111(f)(2)(B). But even if total rejection weren't required, AFLG's failure means that its paid-canvasser signatures cannot be counted for any reason and that it isn't entitled to any relief because without those signatures it fell short of the statutory threshold for further action.

1. Where a statute regulating the initiative process uses the word "shall," "the legislature intended mandatory compliance." *Benca v. Martin*, 2016 Ark. 359, at 7, 500 S.W.3d 742, 748. In such situations, "a strict-compliance analysis" applies. *Arkansans for Healthy Eyes v. Thurston*, 2020 Ark. 270, at 9, 606 S.W.3d 582, 587. That standard applies here because Section 111(f)(2) provides the sponsor "shall" submit the required statement. And applying it, AFLG isn't entitled to relief because it didn't submit such a timely statement—full stop.

To avoid that straightforward conclusion, AFLG raises a series of meritless objections. *First*, AFLG argues that Section 111(f)'s lack of its own explicit do-not-count provision prevents the Secretary from rejecting noncompliant signatures. But an explicit do-not-count provision isn't required where, like here, a statute makes compliance mandatory by explicitly requiring that something "shall" be done. *See Zook v. Martin*, 2018 Ark. 306, at 8, 558 S.W.3d 385, 392. Indeed, a

contrary conclusion would "absurd[ly]" transform mandatory language into "permissive" language. *Id*. AFLG attempts to distinguish *Zook*, which excluded signatures based on a failure to comply with Section 601(d)(3)'s sworn-canvasser statement requirement, by pointing to the explicit do-not-count language in Section 601(f). Pet. Br. 23. But that badly misses the mark because Section 601(f) didn't exist when *Zook* was decided in 2018. *See Zook*, 2018 Ark. 306, at 8, 558 S.W.3d at 392 ("[S]ection 7-9-601(d) does not state that a failure to obtain a sworn statement will result in the signatures not being counted."); Act 367 of 2019, sec. 11 (adding Section 601(f) after *Zook*). And noncompliance with Section 601(d)(3)'s mandatory language was sufficient for the exclusion of signatures even absent the later-added Section 601(f).

Second, AFLG rehashes its argument that only noncompliance with the explicitly enumerated statutory provisions in Section 126 results in invalidity for all purposes. Pet. Br. 21. That misunderstands Section 126(b)(8)'s nature as a catchall provision excluding material defects similar to the ones explicitly listed. Op. Br. 29. In the same vein, AFLG also argues that the Secretary cannot look beyond the "signature sheet" in determining whether such a material defect exists. Pet. Br. 21. But whether signatures were collected by a paid canvassers is apparent on the face of each petition part, Ark. Code Ann. 7-9-109(a), and the Secretary knows from the earliest stages of the process whether a sponsor has complied with

Section 111(f)(2). And it's not true, as AFLG suggests, that the Secretary can't rely on his knowledge of other submissions in finding a material defect. *See id.* -126(b)(7) (excluding petition parts that don't include "the exact popular name or ballot title" approved by the Attorney General); *id.* -126(b)(4)(A) (excluding signatures collected by "a paid canvasser whose name and [] information" weren't submitted under Section 601). Thus, contrary to AFLG's claims, excluding petition parts where signatures were collected by paid canvassers not covered by a "statement signed by the sponsor" fits neatly within the overall statutory framework.

Third, AFLG repeats its argument that it was entitled to submit a "statement signed by the sponsor" at its leisure and claims that Cowles's submission of an affidavit a week after the constitutional deadline required the Secretary to count paid signatures. Pet. Br. 24-25. But it doesn't cite anything suggesting it was entitled to such an extension or that the Secretary has the authority to waive a constitutional deadline. To the contrary, even an initial-count rejection under Section 126(d) doesn't provide for corrections or additions where "the deadline for filing petitions has passed." Ark. Code Ann. 7-9-126(d).

Fourth, jettisoning any reliance on statutory text, AFLG claims that whatever that text says, the Secretary should be bound by atextual arguments that a previous secretary made and that were rejected in *Benca*, *Zook*, and *Healthy Eyes*. Pet. Br. 21-22. That claim refutes itself; this Court's decisions control.

Fifth, AFLG argues the Secretary is "estopped" from following the law because, it asserts, staff misled it. Pet. Br. 24-26. AFLG argues, for instance, that the Secretary shouldn't have accepted documents signed by Clark and instead was required to explain to AFLG that "statement signed by the sponsor" meant "statement signed by the sponsor." *See id*. AFLG doesn't cite anything for that proposition, and unsurprisingly, that's not the law. Rather, recognizing that many petitions won't garner sufficient signatures and actually be submitted, state law directs the Secretary to review submissions "[u]pon the initial filing of the petition." Ark. Code Ann. 7-9-126(a). That's what the Secretary did here. And more boldly, AFLG also declares that it shouldn't be required to comply with Section 111(f)(2) because staff told it that it didn't have to comply with that provision. It doesn't cite evidence for that claim, and it's hardly plausible given clear statutory and election-handbook language.

AFLG's submission undisputedly falls short because it failed to comply with Section 111(f)(2); its arguments to the contrary don't demonstrate otherwise. Its claims fail as a matter of law, and the Court should reject its request for relief.

2. That isn't the only grounds for denying relief. Instead, it has come to the attention of the Secretary since the onset of this litigation that AFLG also failed to comply with Section 601(b)(3) and, were the Secretary to conduct a full review of AFLG's submission under Section 126, AFLG's failure to comply with that

provision would separately warrant rejecting its submission. Thus, the Court can alternatively deny relief on the ground that AFLG failed to comply with Section 601(b)(3).

Section 601 provides the framework for, among other things, ensuring that paid canvassers don't have disqualifying criminal convictions. Sponsors must obtain a criminal history and criminal record search for every paid canvasser they hire before each canvasser begins collecting signatures. *Id.* -601(b)(2). Before collecting signatures, the sponsor must also "[p]rovide a complete list of all paid canvassers' names and current residential addresses to the Secretary," and it must send updated lists as it hires any additional paid canvassers. *Id.* -601(a)(2)(C). Along with those lists, "the sponsor shall certify to the Secretary . . . that each paid canvasser in the sponsor's employ has no disqualifying offenses in accordance with" Section 601. *Id.* -601(b)(3). And because the sponsor isn't required to submit the actual background-check documentation, that certification is the only assurance the Secretary receives that the sponsor has obtained the required background checks. AFLG didn't comply with that requirement.

Because AFLG didn't submit the required Section 111(f)(2) statement, the Secretary never reached the point in the review process where compliance with Section 601(b)(3) would have been verified. Upon further review, however, it has become clear that AFLG failed to comply with Section 601(b)(3) for the same

reason it failed to comply with Section 111(f): the affidavits signed by Clark—submitted ostensibly to simultaneously fulfill *both* statutory requirements—weren't signed or certified by "the sponsor." *See* Add. 25. Instead, they were signed by a paid canvasser.

Like Section 111(f)(2), Section 601(b)(3) requires "the sponsor" to make the certification. Clark isn't the sponsor—AFLG is. Moreover, it makes sense that only the sponsor can comply with that requirement because it's the sponsor who must obtain a background check. Indeed, in the most basic sense, the sponsor is the only party that can certify, *i.e.*, "attest as being true or as meeting certain criteria," *Certify*, *Black's Law Dictionary* (11th ed. 2019), that "each paid canvasser in the sponsor's employ has no disqualifying offenses," Ark. Code Ann. 7-9-601(b)(3). A single paid canvasser hired by the sponsor cannot make that certification.

AFLG's failure to comply means that none of its paid-canvasser signatures may be counted for any purpose. Section 601(f) provides that "[s]ignatures incorrectly obtained or submitted under [Section 601] shall not be counted by the Secretary of State for any purpose," *id.* -601(f), and on top of that, Section 126(b)(4)(A) separately provides that signatures on petition parts submitted by a paid canvasser "whose name and the information required under [Section 601] were not submitted or updated by the sponsor to the Secretary of State before the" petition part was

signed shall not be counted for any purpose, *id.* -126(b)(4)(A). And such a violation cannot be cured after the fact because the required certification under Section 601(b)(3) must be made before the paid canvasser begins collecting signatures. Even on AFLG's preferred view of Section 126 and do-not-count provisions (*see supra* pp. 10-11), then, these provisions prohibit counting AFLG's paid signatures.

That makes this suit futile. Even if this Court were to order the Secretary to proceed past the initial raw-signature count under Section 126(a) (which was completed per the Court's July 26 Order), the Secretary would still be required to cull signatures excluded by Sections 126(b)-(c) and 601(f). *See Safe Surgery Ark. v. Thurston*, 2019 Ark. 403, at 8, 591 S.W.3d 293, 298 ("supporting signatures still must be reviewed by the Secretary of State before such issues become ripe for judicial consideration"). This provides a separate, alternative grounds to deny the relief AFLG seeks.

III. AFLG's viewpoint-discrimination argument is frivolous.

In a last-ditch effort to avoid the consequences of its own mistakes, AFLG claims that the Secretary violated the First Amendment by engaging in viewpoint discrimination.

That argument badly misses the mark because the Secretary's ministerial duties under Section 111(f), and the other statutory provisions regulating the initiative-and-referendum process, don't implicate a sponsor's speech. As the Eighth

Circuit has explained, while "initiative petition laws that . . . affect the communication of ideas associated with the circulation of petitions . . . implicate the First Amendment," laws "that only make the [initiative] process difficult" by regulating the mechanics of the signature process do not. *Miller v. Thurston*, 967 F.3d 727, 737 (8th Cir. 2020) (cleaned up). For example, regulations concerning the number of signatures required for an initiative to make the ballot don't implicate the First Amendment because they don't "burden the ability of supporters . . . to make their views heard." *Wellwood v. Johnson*, 172 F.3d 1007, 1009 (8th Cir. 1999); *see also Hoyle v. Priest*, 265 F.3d 699, 703-04 (8th Cir. 2001) (Arkansas law counting only registered-voter petition signatures didn't implicate the First Amendment).

That distinction is fatal to AFLG's discrimination claim because Section 111(f)(2) only regulates the mechanics of counting signatures and ballot access—not speech. Indeed, that provision only applies after the sponsor's speech has concluded. Section 111(f)(2) doesn't implicate the First Amendment, and the Court should reject AFLG's argument to the contrary.

Further, even if that weren't the case, AFLG's half-baked allegations of viewpoint discrimination fall flat. For starters, in attempting to demonstrate that AFLG was treated differently than other entities submitting ballot measures, it cites only actions taken by a prior secretary. Pet. Br. 28-29. And AFLG's remaining argument on this point amounts to little more than an assertion that the

Secretary's personal disagreement with a ballot initiative that would legalize late-term abortions somehow harmed AFLG. *Id.* at 30. But the Secretary's duty to administer Section 111(f) is ministerial, and AFLG objectively failed to follow the law. AFLG cannot avoid the consequences of its own failure, and this Court should reject AFLG's argument that it's entitled to a mulligan.

CONCLUSION

The Court should dismiss the petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with Administrative Order No. 19 and that it conforms to the page-count limitations contained in Rule 2-1(h) of this Court's rules. The brief does not contain hyperlinks to external papers or websites.

/s/ *Nicholas J. Bronni*
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CERTIFICATE OF SERVICE

I certify that this brief complies with (1) Administrative Order No. 19's requirements concerning confidential information; (2) Administrative Order 21, Section 9 regarding the removal of any hyperlinks to external papers or websites; and (3) the word limitations under Ark. Sup. Ct. Rule 4-2(d) by containing a total of 2,860 words in the jurisdictional statement, the statement of the case and the facts, and the argument.

/s/ *Nicholas J. Bronni*
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