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IN THE ARKANSAS SUPREME COURT

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

v. No. CV-24-455

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

PETITIONERS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS

On July 10, 2024, respondent, Arkansas Secretary of State John Thurston ("Secretary"), rejected petitioners' submission to certify the Arkansas Abortion Amendment of 2024 ("Amendment") on the November ballot. The Secretary continues to search for a rationale in support of his decision. His newfound arguments for dismissal of this action are contrary to law, his office's own legal interpretations, and his office's representations to petitioners. The Secretary does not dispute that his office misled petitioners—by accepting sponsor affidavits and assuring petitioners they had met the requirements for submitting a ballot initiative petition—but he nevertheless wants to throw out their petition before counting the 101,525 signatures submitted. This Court should not countenance those actions.

I. This Court Has Original Jurisdiction Because the Secretary Made a Sufficiency Determination

The Secretary incorrectly argues that this Court lacks jurisdiction because his July 10, 2024, rejection of petitioners' submission was not a sufficiency

determination. Motion to Dismiss ("Mot.") at 4-5. It was. When a petition is submitted, the Secretary "shall ascertain and declare the sufficiency or insufficiency of the signatures submitted." Ark. Code Ann. § 7-9-111(a); *see* Ark. Const. art. 5, § 1 ("Sufficiency"). The law gives the Secretary no other options.

The Secretary argues that, despite the constitutional and statutory command to determine sufficiency or insufficiency, he can make another kind of determination—what he terms a rejection for "want of initiation"—even after a petition is submitted with an affirmation that it contains more than the required number of signatures. Mot. at 4. The Secretary's cited support comes not from the statute but from *Dixon v. Hall*, 210 Ark. 891, 893, 198 S.W.2d 1002, 1003 (1946). *Dixon* involved a petition submitted with 3,664 signatures, far below the requisite 21,685. *Id.* at 892, 198 S.W.2d at 1002-03. For that reason, the Court held that there was no 30-day cure period. *Id.* at 893, 198 S.W.2d at 1003 ("To be a petition, it must, prima facie, contain at the time of filing the required number of signatures. Correction and amendment go to form and error, rather than to complete failure."); *see Stephens v. Martin*, 2014 Ark. 442, at 12, 491 S.W.3d 451, 457 ("[O]ur only concern when examining the propriety of the Secretary of State' s decision to grant or not grant the cure period is whether, on the face of the petition, the signatures were of a sufficient number." (emphasis added)). Here, the Secretary's duty to make a sufficiency determination was triggered when petitioners submitted over 101,000

signatures on July 5. His July 10 rejection therefore constituted a declaration of insufficiency reviewable by this Court.

Moreover, even in *Dixon* there was no argument over the Court's jurisdiction. The Court ruled that the petition was not entitled to a cure period, *Dixon*, 210 Ark. at 892-93, 198 S.W.2d at 1002-03, which in the current statutory scheme would be dealt with by a determination of insufficiency at the initial-count stage. Ark. Code Ann. § 7-9-126(d). This Court has repeatedly reviewed challenges to the Secretary's rejection of petitions, at the facial-validity stage or beyond. *See, e.g.*, *id.*; *Stephens*, 2014 Ark. 442, 491 S.W.3d 451; *Ark. Hotels & Entm't, Inc. v. Martin*, 2012 Ark. 335, 423 S.W.3d 49; *Ellis v. Hall*, 219 Ark. 869, 245 S.W.2d 223 (1952).

If the Secretary were right that this Court lacked jurisdiction, then his decision to throw out any petition at the newly created "want of initiation" phase could be unreviewable. Such jurisdictional gymnastics is antithetical to this Court's right of original review and the liberal interpretation in favor of the people that such a review entails. *See Richardson v. Martin*, 2014 Ark. 429, at 8, 444 S.W.3d 855, 860; *Porter v. McCuen*, 310 Ark. 674, 677, 839 S.W.2d 521, 522 (1992); *Thompson v. Younts*, 282 Ark. 524, 530-31, 669 S.W.2d 471, 474-75 (1984). Even the Secretary seems to hedge on this point, as he acknowledges that if no jurisdiction exists for a sufficiency determination, the Court still has authority to issue a writ of mandamus against the Secretary. Mot. at 4; *see Armstrong v. Thurston*, 2022 Ark. 154, at 2 (issuing a writ

of mandamus in an original action).

II. Noncompliance with § 7-9-111(f)(2) Alone Does Not Invalidate an Entire Petition or any Part Thereof

The Secretary invents an entirely new standard for a "completed petition" that appears nowhere in the Constitution or in statute. In addition to the requirement that a petition have the requisite number of signatures—which is the "only" concern of the Court at the initial-count stage, *see Stephens*, 2014 Ark. 442, at 12, 491 S.W.3d at 457—the Secretary states that § 7-9-111(f)(1) and (2) are also *prima facie* requirements for a completed petition. This interpretation contradicts the statute and the Secretary's office's own practice in this Court.

First, noncompliance with § 7-9-111(f)(2) does not allow the Secretary to reject petition parts or signatures. Only § 7-9-126 does. That section, as the Secretary's and Attorney General's offices have emphasized, provides the exclusive list of reasons for not counting petition parts or signatures. *See* Respondent's Brief and Supplemental Addendum at Arg. 6-7, *Benca v. Martin*, No. CV-16-785 (Ark. Oct. 12, 2016) ("*Benca* Brief"); Respondent's Brief and Supplemental Addendum at Arg. 12-13, *Ross v. Martin*, No. CV-16-776 (Ark. Oct. 12, 2016) ("*Ross* Brief"); Ark. Op. Atty. Gen. No. 2006-097 ("By statute, the Secretary of State is only authorized not to count signatures for specific reasons . . . ."). The legislature added both § 7-9-111(f)(2) and § 7-9-126 as part of Act 1413 of 2013. If the legislature intended noncompliance with § 7-9-111(f)(2) to lead to any kind of rejection, it would have

said so. Indeed, § 7-9-126 incorporates by reference four other statutory sections for which the failure to comply creates a "do not count" penalty—§§ 7-9-104, 105, 107, and 601. Section 7-9-111(f) is not among them. This Court does not read words into a statute. *See, e.g.*, *MacSteel Div. of Quanex v. Ark. Okla. Gas Corp.*, 363 Ark. 22, 30, 210 S.W.3d 878, 883 (2005). It is "a fundamental principle of statutory construction that the express designation of one thing may be properly construed to mean the exclusion of another." *Larry Hobbs Farm Equip., Inc. v. CNH Am., LLC*, 375 Ark. 379, 384-86, 291 S.W.3d 190, 194-96 (2009).

The Secretary, in another first-time argument, states that a violation of § 7-9-111(f)(2) is simultaneously a violation of § 7-9-126(b)(8)—which occurs when a "petition part has a material defect that, on its face, renders the petition part invalid"—and therefore renders all petition parts invalid. This argument contradicts the plain language of the statute in two ways. First, as discussed above, § 7-9-111(f)(2) cannot be read into § 7-9-126 where the legislature intended only certain statutes to be incorporated by reference. Second, the law defines "petition part" as a "signature sheet" with the required information. Ark. Code Ann. § 7-9-101(7). The Secretary cannot look to the existence or nonexistence of other documents in determining whether a petition part "on its face" has a material defect.

The Secretary's practice in this Court also supports petitioners' conclusion that § 7-9-111(f)(2) is not fatal. In fact, the Secretary's office has twice argued to this

Court petitioners' exact position. In *Ross v. Martin*, the sponsor did not comply with § 7-9-111(f)(2). *Ross* Brief at R. Ab. 5, Arg. 12. The appointed Special Master did not throw out the entire petition, as the Secretary's newfound interpretation would have him do. The Master did not even reduce the signature count, since a failure to strictly comply with § 7-9-111(f)(2) is not a "do not count" offense. *Id.* at Arg. 12-14. The Secretary's office asserted that the Master's finding was "correct and should be accepted." *Id.* at Arg. 12; *see also Benca* Brief at Arg. 5-7.

The Secretary's argument that "shall" turns § 7-9-111(f)(2) into a "do not count" provision—or a reason to invalidate an entire petition—violates basic rules of statutory interpretation and would lead to an absurd result. Other provisions in the statute include "shall" plus a "do not count" penalty. *See* Ark. Code Ann. §§ 7-9-126(b)-(c), 7-9-601. The Secretary's interpretation would render "do not count" superfluous, since the same effect would occur with or without that term. *See MacSteel Div. of Quanex*, 363 Ark. at 30, 210 S.W.3d at 883 ("We construe the statute so that no word is left void, superfluous, or insignificant . . . ."). The Secretary relies on *Zook*, *Arkansans for Healthy Eyes*, and *Benca* to argue that "shall" in § 7-9-111(f)(2) mandates a "do not count" directive, but such reliance is misplaced. Those cases dealt with provisions in § 7-9-601, and noncompliance with § 7-9-601 is expressly included in § 7-9-126 as a reason to reject. *See* Ark. Code Ann. §§ 7-9-126(b)(4); 7-9-601(f). That is not the case here.

Second, the remedy for noncompliance with § 7-9-111(f)(2) cannot be outright rejection because any such noncompliance is correctable. Section 7-9-111 is titled, "Determination of sufficiency of petitions--Corrections," which shows that it is dealing with correctable actions related to the Secretary's determination of sufficiency. The word "shall" in this section is a directive to the sponsor, not the Secretary, contrary to § 7-9-126, where "shall" directs action by the Secretary. The "shall" direction to the sponsor, under a section titled "Corrections," makes the legislative intent of the directive clear. If the sponsor does not comply, the sponsor can correct, as it undisputedly did here. The Secretary's remaining arguments about timing of the correction fail for the same reason. Moreover, § 7-9-111(f) does not contain a timing requirement, unlike other provisions added to the statute in Act 1413. *Compare* Ark. Code Ann. § 7-9-111(f) *with id.* § 7-9-126(a). To accept the Secretary's interpretation would lead to an absurd result, namely, the rejection of over 101,000 signatures. *See Sykes v. Williams*, 373 Ark. 236, 240, 283 S.W.3d 209, 213-14 (2008) (explaining that the Court will not allow an interpretation that "leads to absurd consequences").

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

The Secretary's arguments for dismissal are based on alleged noncompliance with § 7-9-111(f)(2). But petitioners complied with that provision in a manner already endorsed by the Secretary's office.

The Secretary does not dispute that, on June 27, 2024, Allison Clark sent a Sponsor Affidavit to the Secretary's office, that the Sponsor Affidavit attested to the information requested in § 7-9-111(f)(2), or that the Sponsor Affidavit was signed by Clark as an agent of Arkansans for Limited Government ("AFLG"). The Secretary argues, citing no authority, that because Clark also worked for the company that hired paid canvassers (and because she was listed as a paid canvasser), she could not also be a sponsor or agent of a sponsor. Clark was acting as an agent of AFLG. Nothing in the statute prohibits a canvasser, paid or unpaid, from acting as an agent of a sponsor (or, for that matter, acting as another sponsor). To follow the Secretary's logic would mean that no sponsor, as an individual or individual working on behalf of a sponsor entity, could also be a paid canvasser. Such an interpretation limits that individual's "core political speech" and likely violates the First Amendment to the U.S. Constitution. *See Meyer v. Grant*, 486 U.S. 414, 420-25 (1988) (limitations on ability to circulate petitions are reviewed under strict scrutiny); *see also* Ark. Const. art. 2, § 4. If possible, statutes are to be interpreted consistently with constitutional mandates. *See ACW, Inc. v. Weiss*, 329 Ark. 302, 310, 947 S.W.2d 770, 774 (1997).

The Secretary's office represented to this Court in *Ross* that its understanding of compliance with § 7-9-111(f)(2) is identical to petitioners' here. His office stated:

> § 7-9-111(f) places further requirements on the Sponsor of an initiated measure. Admittedly, [sponsors] submitted

> their petition with [Secretary] on July 8, 2016. Sponsor provided [Secretary] with a completed Receipt for Initiative Petition and an attached Appendix that contained the information required under [] § 7-9-111(f)(1). Sponsor further provided [Secretary] statements identifying paid canvassers by name in the form of canvasser lists as required by [] § 7-9-111(f)(2)(A). Lastly, as apparent from testimony, Sponsors gathered Sworn Statements of Eligibility from paid canvassers, for its records, that contain the information required under [] § 7-9-111(f)(2)(B). The Court can determine Sponsor's compliance as to each paid canvasser on a case by case analysis. Petitioners' claim that [sponsors] did not intend, and indeed, did not attempt, to comply, paints an unrealistic picture of what took place regarding Sponsor's Petition, on [Secretary's] facial review.

Ross Brief at Arg. 5-6 (internal citations omitted). Here, petitioners' compliance undisputedly exceeded the compliance in *Ross*. The Secretary does not dispute that AFLG asked the Secretary's office what it would need to sign and submit on the day of filing and that his office responded only with the Receipt for Initiative or Referendum Petition, Compl., ¶ 22; that, at the filing, the Secretary's attorneys and representatives assured petitioner Lauren Cowles that she had filed the necessary paperwork with her submission, *id.*; that no Sponsor Affidavit was turned in with the complete list of paid canvassers on July 4 because his office told Clark that it was not required, Compl., ¶ 18; Motion to Expedite, Ex. 2, ¶ 6; or that he has in his office all of the information required by the statutes, provided by AFLG. Petitioners continually tried to follow the correct procedures and the Secretary's office repeatedly told them they were doing so, before the Secretary abruptly rejected their

petition. This bait and switch was unfair, and the Secretary should be estopped from rejecting petitioners' submission. *See Foote's Dixie Dandy, Inc. v. McHenry*, 270 Ark. 816, 824-25, 607 S.W.2d 323, 326-27 (1980) (applying equitable estoppel where "only a form was not filed which would have been routinely approved if it had been filed; that there was not a scintilla of evidence of bad faith; and that an important agent of the State of Arkansas, clothed with considerable authority, had told [plaintiff] that it did not have to file any further documentation").

Because the people's initiative power "is a cornerstone of our state's democratic government," *Parker v. Priest*, 326 Ark. 123, 133, 930 S.W.2d 322, 328 (1996), courts resolve any doubtful interpretation in favor of the popular will. *Thompson v. Younts*, 282 Ark. 524, 530, 669 S.W.2d 471, 475 (1984). Thus, the people's acts "should not be thwarted by strict or technical construction." *Reeves v. Smith*, 190 Ark. 213, 214, 78 S.W.2d 72, 73 (1935). The Secretary's actions have thwarted the will of the people. AFLG is a grassroots group, with hundreds of volunteers collecting the vast majority of the 101,525 signatures submitted for the Amendment. Petitioners, and the people they represent, exemplify the very spirit of the initiative process the Constitution protects. Substantial compliance controls. *See, e.g.*, *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990); *Leigh v. Hall*, 232 Ark. 558, 566, 339 S.W.2d 104, 109 (1960).

For these reasons, the Secretary's motion to dismiss should be denied.

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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/ Peter Shults
Peter Shults

CERTIFICATE OF SERVICE

I certify that, on July 22, 2024, I filed the foregoing using the electronic filing system, which shall send notification to all counsel of record.

/s/ Peter Shults
Peter Shults