

CV-20-454

IN THE ARKANSAS SUPREME COURT
AN ORIGINAL ACTION

ARKANSAS VOTERS FIRST, A BALLOT
QUESTION COMMITTEE; BONNIE MILLER,
INDIVIDUALLY AND ON BEHALF OF
ARKANSAS VOTERS FIRST; AND OPEN
PRIMARIES ARKANSAS, A BALLOT QUESTION
COMMITTEE

PETITIONERS

v.

JOHN THURSTON, IN HIS OFFICIAL CAPACITY
AS SECRETARY OF STATE; THE STATE BOARD
OF ELECTION COMMISSIONERS

RESPONDENT

ARKANSANS FOR TRANSPARENCY, A BALLOT
QUESTION COMMITTEE; AND JONELLE
FULMER, INDIVIDUALLY AND ON BEHALF OF
ARKANSANS FOR TRANSPARENCY

INTERVENORS

PETITIONERS' PETITION FOR REHEARING
AND MOTION TO RECALL MANDATE

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Petitioners petition this Court to rehear this case due to errors of law and fact contained in the Court's opinion and to recall the mandate.

PETITION FOR REHEARING

1. This Court's Rules allow for rehearing when "specific errors of law or fact" are contained within the opinion deciding the case. Ark. R. S.Ct. 2-3(g). Respectfully, the opinion deciding this case, *Miller v. Thurston*, 2020 Ark. 267 (August 27, 2020) (hereafter Slip op.), contains errors of law and fact causing conclusions it reaches to be incorrect. Specifically, the opinion turns on the determination that the only assurance the people have that the paid canvassers circulating the petitions at issue met the standard for having "passed" criminal background checks is a strictly-compliant certification under Ark. Code Ann. § 7-9-601(b)(3). That is factually incorrect under the circumstances of this case, and it leads to a legal conclusion that is inconsistent with the opinion's very logic. This error of both fact and law infects the entire opinion and necessitates rehearing.

2. The question addressed by the Court was whether the sponsor of the two initiative petitions met the requirement to "certify to the Secretary of State that each paid canvasser in its employ has passed a criminal background check in accordance with this section" before the paid

canvassers collected any signatures on any petition parts. Ark. Code Ann. § 7-9-601(b)(3). The Court held the sponsor did not meet the statutory requirement. In doing so, the Court held in essence that strict compliance with the statute's command is necessary. Slip op. at 8-9.

3. The Court explained the reasons for its strict-compliance requirement. "The results of the background checks," the Court noted, "are not required to be filed with the Secretary of State, and the certification is the only assurance the public receives that paid canvassers 'passed' background checks." Slip op. at 6-7. This statement, one on which the conclusion in the opinion turns, is factually incorrect in this case and led to an error of law. Here is how.

4. In a footnote immediately following the statement quoted above, the Court, correctly, notes:

Before obtaining a signature on an initiative or referendum petition as a paid canvasser, the prospective canvasser is required to submit to the sponsor, among other things, "[a] signed statement taken under oath or solemn affirmation stating that the person has not pleaded guilty or nolo contendere to or been found guilty of a criminal felony offense or a violation of the election laws, fraud, forgery, or identification theft in any state of the United States, the District of Columbia, Puerto Rico, Guam, or any other United States protectorate." Ark. Code Ann. § 7-9-601(d)(3). Thus, the standard for having "passed" a criminal background check

appears to be having no criminal conviction for a felony offense or a violation of the election laws, fraud, forgery, or identification theft as stated in section 7-9-601(d)(3).

Slip op. at 8, n.4. As a matter of fact in this particular case, the “signed statement[s] taken under oath” from each paid canvasser affirming that he or she had none of the enumerated criminal or election law violations were submitted to the Secretary of State along with each Ark. Code Ann. § 7-9-601(b)(3) certification submitted by the sponsor. The Court’s opinion does not mention this critical fact.

5. Therefore, contrary to the critical statement made above, the Ark. Code Ann. § 7-9-601(b)(3) certifications submitted by the sponsor in this case *are not* the only “assurance the public receives that paid canvassers” met the “standard for having ‘passed’ a criminal background check.” The sworn statements of each paid canvasser, filed with the Secretary of State in this case, meet the standard.

6. This Court’s Amendment 7 jurisprudence empowers the initiative and referendum process and eschews approaches that undercut them. See, e.g., *Leigh v. Hall*, 232 Ark. 558, 339 S.W.2d 104, (1960); *Coleman v. Sherrill*, 189 Ark. 843, 75 S.W.2d 248 (1934); *Reeves v. Smith*, 190 Ark. 213, 78 S.W.2d 72 (1935); *Ferrell v. Keel*, 105 Ark. 380, 151 S.W. 269 (1912). Where, as

here, the “assurance” meant to be given to the people is in fact given, and the “standard” established by statute is actually met, disenfranchising the approximately 90,000 Arkansans who signed each of these petitions runs exactly counter to this established approach.

8. If this logic is not recognized and the current holding is allowed to stand, it can no longer legitimately be said that initiative and referendum measures “should not be thwarted by strict or technical construction.” *Reeves*, 190 Ark. at 215-16, 78 S.W.2d at 73. It cannot be said that initiative and referendum efforts “must be construed with some degree of liberality, in order that [Amendment 7’s] purposes may be well effectuated.” *Id.* at 215, 78 S.W.2d at 73. And, it cannot be said that Amendment 7 contemplates “a liberal construction and, if substantially complied with, the proposition should be submitted to the vote of the electors.” *Coleman*, 189 Ark. at 847, 75 S.W.2d at 250. Instead, sponsors would be forced to live with a “strict construction” that would “defeat the very purposes ... of the amendment.” *Reeves*, 190 Ark. at 215, 78 S.W.2d at 73.

MOTION TO RECALL MANDATE

9. As is common in cases of this sort, the Court directed that the mandate should issue immediately with the issuance of its opinion rather

than after the time for rehearing passed, which is the typical case. Ark. R. S.Ct. 5-3(a),(b). Issuance of the mandate makes the opinion final. Ark. R. S.Ct. 5-3(a).

10. Therefore, the mandate must be recalled as authorized by Ark. R. S.Ct. 5-3(d) in order to rehear the case. The petition for rehearing states adequate cause for recalling the mandate as it is filed well before the time established by this Court's rules, Ark. R. S.Ct. 2-3(a), and is based on well-founded reasoning and argument.

Conclusion

Rehearing is required to correct the errors of law and fact set forth in this petition. The mandate should be recalled and the case reheard to correct these errors.

Certificate of Merit

I hereby certify that this petition is not filed for the purpose of delay.

Respectfully submitted,

/s/ Adam H. Butler

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CERTIFICATE OF SERVICE

I certify that the forgoing was submitted for filing electronically under the eFlex filing system and served upon all counsel of record mail this 28th day of August, 2020:

/s/ Adam H. Butler