CV-24-13

IN THE ARKANSAS SUPREME COURT

CONRAD REYNOLDS, Arkansas Voter Integrity, Inc., individually and on behalf of RESTORE ELECTION INTEGRITY ARKANSAS, a ballot question committee — Petitioners

vs.

JOHN THURSTON, in his official capacity as Secretary of State; and the STATE BOARD OF ELECTION COMMISSIONERS — Respondents

Respondents' Brief

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POINTS FOR REVIEW

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III. If so, whether Petitioners' should receive their requested relief on the merits.

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Respondents contest Petitioners' assertion that this Court has original jurisdiction over any of Petitioners' claims.

Respondents agree that, after a sponsor gathers signatures on its petition and files them with the Secretary of State, this Court has original jurisdiction to consider the sufficiency of that petition. *Armstrong v. Thurston*, 2022 Ark. 167, 652 S.W.3d 167 (a post-signature case considering the sufficiency of the sponsors' ballot title). Likewise, Respondents agree that, in such a post-signature case, this Court has original jurisdiction to consider the constitutionality of state statutes when that consideration is necessary to provide appropriate relief. *Id*., 652 S.W.3d 167; *Safe Surgery Ark. v. Thurston*, 2019 Ark. 403, 591 S.W.3d 293 (post-signature cases considering the constitutionality of a statute).

But in cases—such as this one—where the sponsor has not submitted any signatures to the Secretary of State for counting and verification, this Court's jurisdiction is appellate, not original.

Therefore, Respondents' respectfully maintain that this Court lacks jurisdiction over Petitioners' claims and that this case should be dismissed.

STATEMENT OF THE CASE & THE FACTS

Petitioners have been in the process of getting two separate ballot titles approved by the Attorney General's office since November 9, 2023. Petitioners' original proposals were rejected on November 29, 2023, in Opinion 2023-108, which included a detailed analysis outlining the misleading aspects of Petitioners' submissions. *See* Compl., Ex. 2. Petitioners then resubmitted their proposals on December 26, 2023. On January 11, 2024, the Attorney General approved one of Petitioners' two proposals, while again rejecting the other in a six-page response explaining why the proposal was still misleading. *See* Ark. Att'y Gen. Ops. 2023-132 and 2023-133 (Jan. 11, 2024).

However, prior to that approval, Petitioners filed this current lawsuit on January 9, 2024. Respondents filed a Motion to Dismiss on January 16, 2024, which this Court ordered taken with the case. *See* Order dated February 8, 2024. Petitioners asked for and were granted placement on the expedited docket, over the objection of Respondents. However, Petitioners were unable to meet the deadline for their opening brief on the expedited docket, and this case was removed from the expedited docket and placed on the regular docket. *See* Letter Order dated February 8, 2024. Petitioners filed their opening brief on February 9, 2024. They raise a myriad of arguments that are not properly before this Court, variously

bringing claims outside this Court's original jurisdiction, against the wrong parties, and prior to their claims bring ripe for review.

Respondents now file the following responsive brief.

STANDARD OF REVIEW

All statutes are "presumed constitutional" and courts in this state resolve all doubts in favor of constitutionality. *Landmark Novelties, Inc. v. Ark. State Bd. of Pharmacy*, 2010 Ark. 40, at 12, 358 S.W.3d 890, 898. The party challenging a statute's constitutionality has the burden of proving that the act is unconstitutional. *Abraham v. Beck*, 2015 Ark. 80, at 14, 456 S.W.3d 744, 753.

ARGUMENT

This case is about whether this Court is the first stop in the process to get a statewide measure to the ballot. Petitioners sent separate emails to each of the Respondents asking them to certify Petitioners' two popular names and ballot titles. As soon as Respondents indicated that they have no authority to take any action on the proposed measures, Petitioners knocked on this Court's door. Yet Petitioners have not cited a single constitutional provision, statute, or case that says Respondents have *any* authority to certify or reject Petitioners' ballot titles before they file signatures with the Secretary of State. And despite repeatedly claiming that they have a right to a pre-signature review of their ballot title and popular name, Petitioners have failed to cite a single provision of law to support that claim. Instead, they rely on this Court's caselaw stating that a (now repealed) statutory procedure that once provided for such a pre-signature review did not conflict with the constitution. That is not sufficient to support the weight of Petitioners' claim that Respondents have a constitutional duty to certify or reject Petitioners' ballot titles and popular names. Therefore, Petitioners' claims should be denied and this case dismissed.

I. Petitioners' complaint should be dismissed because this Court has appellate, not original, jurisdiction over Petitioners' claims.

None of Petitioners' claims fall within this Court's original jurisdiction. First, this Court lacks jurisdiction over Count 1, which asks this Court to declare

Petitioners' ballot measures sufficient. This Court's original jurisdiction to determine the sufficiency of ballot measures arises only following the Secretary of State's sufficiency determination. *See* Ark. Const. art. 5, § 1 ("The sufficiency of all state-wide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court…."). Because the Secretary has not made a sufficiency determination as to Petitioners' ballot measures, there is no decision for this Court to review.

Indeed, this Court's decision in *Armstrong v. Thurston* confirms that the Secretary's sufficiency determination is a jurisdictional prerequisite to this Court's review. *See* Per Curiam Order dated Sept. 12, 2022, 2022 Ark. 154 (issuing as "necessary in aid of [this Court's] jurisdiction" "a writ of mandamus to the Secretary of State to decide the sufficiency of the proposed initiative petition at issue in this action pursuant to article 5, section 1 of the Arkansas Constitution."); *see also Armstrong v. Thurston*, 2022 Ark. 167, at 7, 652 S.W.3d 167, 174 ("We now turn to the sufficiency of the ballot title, *which we can review because the Secretary of State determined that the proposed ballot measure was insufficient*.") (emphasis added). Because Secretary Thurston has not issued a determination as

to the sufficiency of Petitioners' ballot measures, this Court lacks jurisdiction over the sufficiency claim made in Count 1.

Second, this Court has appellate—not original—jurisdiction over the constitutionality, application, and construction of state statutes in a pre-signature challenge. Ark. Const. amend. 80, § 2; *McDaniel v. Spencer*, 2015 Ark. 94, 457 S.W.3d 641 (providing appellate, not original, review of the constitutionality of a state statute in a pre-signature challenge). But that isn't the case for post-signature challenges when a state official has applied a law in a way that prevents the counting of certain signatures or hinders the measure from otherwise being certified to the ballot. *Safe Surgery Ark. v. Thurston*, 2019 Ark. 403, at 2, n.1, 591 S.W.3d 293, 295 (noting, in a post-signature challenge, that this Court has original jurisdiction over the constitutionality of a state statute that is used to reject signatures).

Since this case is a pre-signature challenge, Petitioners' attacks on the constitutionality of Ark. Code Ann. §§ 7-9-107 and 7-9-126(e) have been filed in the wrong court. Petitioners should have filed those claims in circuit court.

Therefore, Counts 1, 2, 3, and 4 should be dismissed for lack of jurisdiction.

II. Petitioners' complaint also fails to state a claim.

A. Respondents have no authority to certify or reject Petitioners' ballot titles and popular names before signatures have been submitted for verification.

Petitioners sue Respondents for failing to take an action they have no authority to take. A brief rundown of the steps to get statewide measures to the ballot makes this lack of authority clear.

The first step in the process is to obtain a certification from the Attorney General's office that the Petitioners' popular names and ballot titles are not "misleading." Ark. Code Ann. § 7-9-107. At the time Petitioners filed this petition, they had applied for, but not yet received, that certification. Compl., ¶ 18. If sponsors "feel aggrieved" by the Attorney General's action or inaction on their certification requests, they can file a "petition" with "the Supreme Court for proper relief." Ark. Code Ann. § 7-9-107(f). But that's not what Petitioners have done here, nor have they even purported to do that. Instead, Petitioners have skipped that step. That alone is grounds for dismissal.

The second step in the process is for sponsors to "file a printed petition part with the Secretary of State in the exact form that will be used for obtaining signatures." Ark. Code Ann. § 7-9-104(c)(2). Petitioners are free to gather as many valid signatures as they can before the constitutional deadline to submit their signatures to the Secretary of State for verification. That deadline is Friday, July 5,

2024. *See* Ark. Const. art. 5, § 1 ("Initiative") ("Initiative petitions for state-wide measures shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon…."). The Secretary then counts the number of signatures submitted and verifies that they are all from legal voters.

The state constitution also requires that "[a]t the time of filing the petitions," the sponsors must submit "the exact title to be used on the ballot…to the State Board of Election Commissioners." *Id*. ("Title")

Under current law, this is the first point at which the State Board is required to act on a ballot title. Once the ballot title has been submitted to the State Board alongside the "filing [of] the petitions," the State Board "shall certify such title to the Secretary of State, to be placed upon the ballot." *Id*. This duty is ministerial. *Armstrong*, 2022 Ark. 167, at 7, 652 S.W.3d 167, 173.

Nothing in our state constitution or in statute requires or allows the Secretary to certify or reject a popular name and ballot title. And nothing requires or allows the State Board to certify or reject a popular name and ballot title before "the time of filing the petitions." Ark. Const. art. 5, § 1 ("Title").

Petitioners have skipped all those required steps. Worse, they have failed to provide a single citation to a constitutional provision, statute, or case stating that Respondents have any authority to act on their pre-signature certification request. The closest Petitioners come to providing a legal argument consists of their

citations to this Court's case law applying now-repealed Act 877 of 1999, which allowed the Secretary of State to provide a pre-signature certification of popular names and ballot titles. But that Act didn't give the State Board authority to act on a pre-certification request. Instead, even under Act 877, only the Secretary's decision was reviewable by this Court. *See Stilley v. Priest*, 341 Ark. 329, 332, 16 S.W.3d 251, 253 (2000). So it's hard to see how Petitioner's citations to Act 877 help them.

In *Stilley v. Priest*, this Court held that the sort of pre-signature review allowed by Act 877 was not unconstitutional under Amendment 7. *Id*. at 337, 16 S.W.3d at 256–57. But, contrary to Petitioners' claims, this Court has never said that such a review is *required* under the constitution. In fact, *Stilley* (and prior cases *Stilley* cited) say the opposite. *Stilley* describes how this Court "urged the enactment of a procedure" that would prevent last-minute ballot title challenges and "provide some mechanism for" a review of the ballot title's validity before signatures were gathered and submitted to the Secretary of State for verification. *Id*. at 336, 16 S.W.3d at 256. Act 877 of 1999 responded to that request, providing the "mechanism" for the Secretary of State to determine the full legal sufficiency of the popular name and ballot title that could then be reviewed by this Court. *Id*.

Act 877, however, was repealed in 2013. Act 1413 of 2013, § 20. And under current law, neither the State Board nor Secretary Thurston has any authority to

provide a pre-signature review of the popular name and ballot title. Petitioners' entire legal argument for such review rests on *Stilley*'s holding regarding Act 877 not being contrary to the constitution. But Act 877 no longer exists, Petitioners' argument fails for that reason alone.

Moreover, if anything *Stilley* undercuts Petitioners' arguments because it makes clear that in the absence of a statute that allows the State Board or the Secretary of State to review the legal sufficiency of a popular name and ballot title, there is no "mechanism" to seek this Court's pre-signature review. 341 Ark. at 336, 16 S.W.3d at 256. Indeed, the only statute that provides such review is Ark. Code Ann. § 7-9-107, which requires the Attorney General to certify that the ballot title and popular name are not "misleading." This Court upheld that statute in *Washburn v. Hall,* 225 Ark. 868, 286 S.W.2d 494 (1956), which this Court relied on in *Stilley* as support for the constitutionality of a pre-signature review. *Stilley*, 341 Ark. at 334–35, 16 S.W.3d at 254–55.

But the whole point of Act 877, and of this Court's requests that the legislature provide a mechanism for early review, is that the constitution doesn't require such a review. If it did, then Act 877 wouldn't have been necessary and this Court's requests for it would have been misplaced. Thus, *Stilley* doesn't support Petitioners' argument and their first claim should be dismissed.

Further, Petitioners have likewise failed to state a claim against Respondents with their attack on the constitutionality of Ark. Code Ann. § 7-9-107. That statute governs the Attorney General's review of ballot titles. Respondents do not participate in that process and have no duties or authority under section 7-9-107. Therefore, Petitioners' second claim should be dismissed.

Respondents take no position on the legal validity of Petitioners' popular names and ballot titles. That's not their job. Indeed, permitting Petitioners' claim to proceed beyond the motion to dismiss would encourage other sponsors of statewide measures to flood this Court with similar requests seeking to force the Board to do what it lacks the legal authority to do. That would clog this Court's docket and waste judicial resources.

B. Petitioners' attack on the constitutionality of Ark. Code Ann. § 7-9-107 should be dismissed for failure to state a claim because Respondents have no role in that statutory process.

Petitioners' attack on the constitutionality of Ark. Code Ann. § 7-9-107, which concerns the Attorney General's pre-signature review of popular names and ballot titles for statewide measures, should be dismissed for failure to state a claim against Respondents. Petitioners have not sued the Attorney General, and Respondents—the Secretary of State and the State Board of Election Commissioners—do not participate in the pre-signature review process that section 7-9-107 establishes. Indeed, Respondents are not clothed with any duty or

authority under that section. *See* Ark. Code Ann. § 7-9-107. Nor do Petitioners plead otherwise. *See* Compl. Even assuming the truth of the few facts pled in the complaint, *Ark. Dep't of Env't Quality v. Brighton Corp.*, 352 Ark. 396, 403, 102 S.W.3d 458, 462 (2003), Petitioners have failed to state a claim against Respondents, and their challenge to section 7-9-107 should be dismissed.

C. Petitioners' attack on the constitutionality of Ark. Code Ann. § 7-9-126(e) should be dismissed because it is not ripe.

Finally, Petitioners challenge the constitutionality of the requirement that the Secretary of State must review petitions for a ballot measure to verify that they are filed from at least 50 counties and bear the required number of signatures. Ark. Code Ann. § 7-9-126(e). But Petitioners have not begun gathering signatures to say nothing of having submitted them to the Secretary of State for review. Before that review of signatures is complete, any challenge to the statute remains unripe. *See Safe Surgery Ark.*, 2019 Ark. 403, at 8, 591 S.W.3d at 298 (declining to address the propriety of a referendum's popular name and ballot title because "the supporting signatures still must be reviewed by the Secretary of State before such issues become ripe for judicial consideration, and that . . . review process has not yet been completed"). Because Petitioners' constitutional challenge to Ark. Code Ann. § 7-9-126(e) is not ripe, it should be dismissed.

III. If the Court reaches the merits, Petitioners' requests should be denied.

A. Petitioners' request that this Court certify popular names and ballot titles should be denied because they fail to meet the legal standards required for popular names and ballot titles.

Respondents did not review Petitioners' popular names and ballot titles under Section 107, and the Secretary has not made a determination of sufficiency under Amendment 7. The Attorney General, who is responsible for making that determination, is not a party to this lawsuit. As noted above, Respondents have not taken any position on the sufficiency of Petitioners' popular name and ballot title, nor could they do so here. To the extent a response is warranted to Petitioners' attempt to end-run around Section 107(f)'s review mechanism, Respondents incorporate by reference Attorney General Opinions 2023-108, 2023-132, and 2023-133, which provide the bases for the Attorney General's decisions with respect to Petitioners' two submitted ballot measures.

B. This Court should decline Petitioners' invitation to overturn *Washburn v. Hall*.

Since 1943 (save between 2019-2023), the Attorney General has been tasked with reviewing the popular names and ballot titles of ballot measures. *See* Act 195 of 1943; Act 376 of 2019 (removing the Attorney General's role in the initiative and referendum process); Act 194 of 2023 (reinstating the Attorney General's role). This Court blessed the Attorney General's review authority in *Washburn v.*

Hall, 225 Ark. 868, 286 S.W.2d 494 (1956), and has never retreated from that holding. It should decline to do so now.

Amendment 7 sets out the general process and rules for initiative petitions, but leaves the details of regulating the process to the General Assembly. The legislature is tasked with "enact[ing] laws to facilitate" the "operation" of Amendment 7, but may not "enact[]" legislation "to restrict, hamper, or impair the exercise of" initiative-and-referendum rights. Ark. Const. art. 5, § 1. Requiring an initiative's popular name and ballot title to be reviewed and approved by the Attorney General is one of the legislature's most longstanding regulations of the process.

In *Washburn* this Court unequivocally explained that providing for the Attorney General's review "is no unwarranted restriction on Amendment [] 7." 225 Ark. 868, 871, 286 S.W.2d 494, 497. "There is nothing complicated about [it]; it is not difficult to follow; it is not calculated to make troublesome the right to take advantage of" Amendment 7. *Id.* at 872, 286 S.W.2d at 497-98. The Court's observations remain true today.

Petitioners raise two complaints they claim warrant abandoning decades of settled law. First, Section 107 places review authority with "a politician with political interests." Pets.' Br. at 28. Second, Section 107 is "used to slow the process." *Id.*at 29. *Washburn* answered both of those complaints: If a ballot

sponsor is "aggrieved" by the actions of the Attorney General, "they would have the right to apply to the Supreme Court for proper relief." *Washburn*. 225 Ark. at 872, 286 S.W.2d at 497; Ark. Code Ann. 7-9-107(f) (providing for Supreme Court review). If a sponsor's submission is rejected and the sponsor accepts the Attorney General's critique and resubmits, the initiative-and-referendum process has been helped, not hampered. And if the sponsor disagrees, he or she has an avenue for appeal. This was true when the Court handed down *Washburn*, it remains true today, and Petitioners have provided no convincing reason for this Court to part ways from this settled understanding. Indeed, the fact that the Attorney General has approved fifteen ballot measures in the past year alone underscores that the review process does not hamper the initiative-and-referendum right.[1]

Petitioners additionally attempt to bring what they describe as an "as-applied" challenge to the constitutionality of Section 107. Pets.' Br. at 29-32. At bottom, these arguments simply allege that the Attorney General erred in his review of Petitioners' submissions, not that there is anything constitutionally defective about Section 107. The remedy for challenging the Attorney General's

[1] *See* Ark. Att'y Gen. Ops. 2023-038, 2023-092, 2023-132, 2024-004, 2024-005, 2024-006, 2024-007, 2024-008, 2024-017, 2024-020, 2024-028, 2024-033, 2024-037, and 2024-046.

rejection or substitution of a popular name or ballot title is to petition this Court for relief under Section 107(f), not to sue the Secretary of State in an original action in this Court. *See supra* § II.B.

Petitioners' first complaint is that Opinion 2023-133 rejected Petitioners' submission due to its definition of "disabled voter." *See* Ark. Att'y Gen. Op. 2023-133 at 3-5 (Jan. 11, 2024); *see also* Ark. Att'y Gen. Op. 2023-108 (Nov. 29, 2023). The opinion then goes on to suggest additional clarifications, including noting that the measure's definition of "human intelligence" was unclear. Ark. Att'y Gen. Op. 2023-133 at 6. The opinion noted that this language was "borderline" "confusing or misleading," but the Attorney General could not say so "definitively" because that would depend on how the text is actually interpreted, which is outside the scope of the Attorney General's review. *Id.*

Petitioners' complaint on this point is ironic in two respects. First, the Attorney General was not required to point out (for the second time) that this language could be problematic, nor was this the basis for the submission's rejection. Second, the purpose of highlighting this potentially problematic language was to *help* Petitioners, providing them with an opportunity to address that language prior to submitting their popular name and ballot title to the Secretary of State and collecting signatures. After all, even if the Attorney General fails to identify an aspect of a submission as misleading, this Court retains the

authority to invalidate the measure later. Gratuitously pointing out potential problems that a sponsor may want to fix while they still have the chance in no way hampers the sponsors rights under Amendment 7.

Next, Petitioners disagree with the Attorney General's opinion that Amendment 7's requirement that initiative petitioners "include the full text of the measure" precludes defining terms by simply referencing other statutes. Ark. Const. art. 5, § 1 ("Initiative"). The Attorney General noted that this Court had not had occasion to interpret this phrase in the Arkansas Constitution, but observed that the North Dakota Supreme Court had recently interpreted similar language to this effect. Ark. Att'y Gen. Op. 2023-133 at 3 (citing *Haugen v. Jaeger*, 948 N.W.2d 1 (2020)). Petitioners argue that there are many amendments in the Constitution that cite other provisions of law, and this Court did not invalidate those ballot measures. Pets.' Br. at 31. Setting aside whether any of those amendments faced the exact problem that the Attorney General identified in Petitioners' submission, it is nevertheless the duty of the Attorney General to apply the law as he believes this Court would. Faced with an issue of first impression, the Attorney General believes that—if presented with the question in a proper Section 107(f) proceeding—this Court would agree with the reasoning and conclusion of the North Dakota Supreme Court. *See Martin v. Humphrey*, 2018 Ark. 295, 16, 558 S.W.3d 370, 380 (Wood, J., concurring) ("I am cognizant that

many other legislatively initiated acts that would have failed this test in the past are now part of the constitution. They simply were not timely challenged. This court cannot look retrospectively at a proposed constitutional amendment it never had the opportunity to review.").

Finally, Petitioners claim that substituting more appropriate language in a ballot title violates Petitioners' "right to political speech." Pets.' Br. at 31. They cite only federal constitutional cases for this point, despite their brief framing their argument on state constitutional grounds. But their Complaint does not challenge the application of Section 107 as a restriction of "political speech," whether under the Arkansas or federal constitution. This argument is therefore not properly before the Court. And in any event, substitution cannot restrict anyone's political speech because a sponsor may still challenge the decision before this Court.

C. Ark. Code Ann. § 7-9-126(e) is consistent with Amendment 7.

Amendment 7 provides that in addition to the total signature requirement, "it shall be necessary to file from *at least* fifteen counties of the State, petitions bearing the signature of not less than one-half of the designated percentage of the electors of such county." Ark. Const. art. 5, § 1 (emphasis added). Section 126(e) provides that petitions shall be filed from at least fifty counties of the State. Fifty or more is "at least fifteen." There is no conflict between Section 126(e) and Amendment 7.

Petitioners argue that Amendment 7's language creates both a floor and a ceiling; sponsors may submit signatures from no fewer than fifteen counties, and the General Assembly through enacting legislation require signatures from no more than fifteen counties. But the text of Amendment 7 does not bear out that interpretation, especially when reading the amendment as a whole.

This Court interprets legal text "just as it reads, giving the words their ordinary and usually accepted meaning in common language." *Thompson v. State*, 2014 Ark. 413, 5, 464 S.W.3d 111, 114. Where the text "is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion to resort to" interpretive rules. *Id.* Here, the ordinary meaning of "at least fifteen counties" is just that—at least. The text sets a floor and does not purport to limit the General Assembly's power to separately provide for an additional county requirement by statute. This Court need not go any further to uphold the statute.

Interpretive canons further support the ordinary understanding of the text. "At least," as used in Amendment 7, cannot be read in a vacuum. Rather, one must look to all the language the drafters of the amendment used when setting numerical requirements. *See Schnarr v. State*, 2018 Ark. 333, 4, 561 S.W.3d 308, 311 ("[I]t is a fundamental canon of construction that when interpreting or construing a statute the court may consider the text as a whole to derive its meaning or purpose.") (citation omitted). The drafters of Amendment 7 used multiple phrases

when setting numerical floors and ceilings, each of which must bear their own meaning. Consider the following Amendment 7 provisions:

- "**Eight per cent** of the legal voters **may** propose any law and **ten per cent may** propose a constitutional amendment . . .";
- "Initiative petitions for state-wide measures shall be filed with the Secretary of State **not less than four months** before the election . . .";
- "provided, that **at least thirty days before** the aforementioned filing, the proposed measure shall have been published once . . ."
- "**any number not less than six per cent** of the legal voters **may**, by petition, order the referendum . . .";
- "Such petition shall be filed with the Secretary of State **not later than ninety days after** the final adjournment . . .";
- "it shall be necessary to file **from at least fifteen of the counties** of the State, petitions bearing the signature of **not less than one-half of the designated percentage** of the electors of such county.";
- "**Fifteen per cent of the legal voters** of any municipality or county **may** order the referendum . . .";
- In municipalities and counties the time for filing an initiative petition **shall not be fixed at less than sixty days nor more than ninety days before the election** at which it is to be voted upon; for a referendum petition at **not less**

than thirty days nor more than ninety days after the passage of such measure by a municipal council; nor **less than ninety days** when filed against a local or special measure passed by the General Assembly.

- the Secretary of State . . . shall without delay notify the sponsors of such petition, and **permit at least thirty (30) days** from the date of such notification, in the instance of a state-wide petition, **or ten (10) days** in the instance of a municipal or county petition, for correction or amendment.";
- " . . . **At least seventy-five percent** (75%) of the number of state-wide signatures of legal voters required.";
- " . . . **At least seventy-five percent** (75%) of the required number of signatures of legal voters from each of at least fifteen (15) counties of the state.";

The drafters' various textual methods of providing for numerical requirements underscore that "at least" is used in its ordinary meaning—as a floor. When the drafters meant to place both a floor and a ceiling, they did so explicitly. For example, the amendment provides that county or municipal petitions "shall not be fixed at less than sixty days nor more than ninety days before the election at which it is to be voted upon." Ark. Const. art. 5, § 1 ("Local Municipalities and Counties"). Under the ordinary meaning of that provision the General Assembly may by statute set the filing date anywhere between sixty and ninety days, but not

fifty-nine days before or ninety-one days after. The text thus leaves a thirty-day gap for the legislature to fill by providing both a floor and a ceiling. The drafters did not include such a ceiling where they merely used "at least."

The structure of Amendment 7 further underscores that "at least" is used as a floor, not a ceiling. Where the drafters used "at least," "not less than," or "no later than" to denote numerical requirements or periods, they did so in provisions dealing with the mechanics of the initiative-and-referendum process—such as submission and publication deadlines—rather than denoting the percentage of voters who may propose initiatives and referenda. These phrases place a bookend on one side of a numerical requirement or period, but they do not constrain legislation on the other end. On the other hand, where the drafters meant to constrain legislation, as they did in the six percent requirement for initiating a referendum, they added the modifier "any number" to the beginning. For example, if the legislature provided that at least five percent of voters may propose a referendum, that would conflict with Amendment 7's provision that "any number not less than six per cent of" voters may do so. So would a statutory requirement that sponsors collect signatures of at least seven percent of voters. Five is "less than six," and the seven-percent requirement would exclude many numbers "not less than six percent."

And when the drafters intended numerical requirements to not be modifiable by legislation, they used definite language, such as "eight percent may," "ten percent may," "fifteen percent may," and "any number not less than six percent may." Ark. Const. art. 5, § 1. If the General Assembly were to provide by statute that only nine percent of voters or more may propose an initiated act, that would certainly conflict with the text of Amendment 7, just as a statute that provided that seven percent may also conflict. The text in these provisions leave no gaps for legislation to fill, which is unsurprising because those provisions dictate who has the right to propose an initiative or referendum, *i.e.*, a given collective percentage of voters.

Petitioners would have the Court interpret "at least fifteen" identically to "any number not less than fifteen." But the drafters of Amendment 7 used those phrases differently, and this Court must ascribe different meaning to them. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) (describing the "presumption of consistent usage" canon, including that "a material variation in terms suggests a variation in meaning").

As used in the fifteen-county requirement, "at least" simply means "at least." There is thus no conflict between Amendment 7 and Section 126(e). Amendment 7's fifteen-county requirement is "self-executing" and "mandatory." Ark. Const. art. 5, § 1. But the General Assembly, in enacting laws to "facilitate [the]

operation" of the initiative-and-referendum process, may provide for separate statutory requirements where the drafters of Amendment 7 did not use language clearly foreclosing that ability. *Id*. Here, the ordinary meaning of "at least" merely sets a floor on the number of counties from which sponsors must collect signatures. The text does not put a ceiling on the legislature's ability to separately require signatures from a higher number of counties.

CONCLUSION AND REQUEST FOR RELIEF

Petitioners' original action Complaint jumps the gun. Their pre-signature challenge fails to state any claim against Respondents, and their attacks on the constitutionality of state statutes have been filed in the wrong court. Therefore, Counts 1–4 should all be dismissed. Since Petitioners' entire Complaint should be dismissed, their request in Count 5 for expedited proceedings should also be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on March 25, 2024, I electronically filed this document with the Clerk of the Court using eFlex electronic-filing system, which will serve all counsel of record.

/s/ Justin Brascher
Justin Brascher

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies 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 5,344 words in the jurisdictional statement, the statement of the case and the facts, and the argument.

/s/ Justin Brascher
Justin Brascher