

Hugh Jazz Supports the Scholarship Lottery: The Arkansas General Assembly Wrecks the Right to Ballot Initiative with Act 1413*

I. INTRODUCTION

In 2013, the Arkansas General Assembly controversially changed the law governing initiatives and referenda with the passage of Act 1413.¹ The significant changes to existing law raised suspicions that ulterior motives prompted the Arkansas General Assembly to pass the legislation.² The legislature cited fraudulent practices as the motivation and justification for the changes,³ but opponents argue that Act 1413 is an unnecessary restriction on the rights of Arkansans to participate in the direct democracy guaranteed by the Arkansas Constitution.⁴

This note suggests that, although Act 1413 was carefully crafted to comply with the Arkansas Constitution, its provisions imposing new requirements on paid canvassers and a moratorium on the collection of signatures during review renders Act 1413 unconstitutional. Part II explores amendment 7 itself, explaining the history of the initiative and referendum process in Arkansas. Part III discusses the changes made by Act 1413 and considers the Arkansas General Assembly's motivation for making those changes. Part IV evaluates claims brought against the validity of the Act under the Arkansas

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1. Act 1413, 2013 Ark. Acts 6084 (codified in scattered sections of ARK. CODE ANN. §§ 7-9-101 to -601 (Supp. 2013)).

2. Max Brantley, *A Call to Arms on Initiative Legislation*, ARK. BLOG (Mar. 18, 2013, 5:30 PM), <http://www.arktimes.com/ArkansasBlog/>.

3. See Act 1413, § 1, 2013 Ark. Acts 6084, 6085-86 (listing several legislative findings).

4. See ARK. CONST. art. 5, § 1, *amended by* ARK. CONST. amend. 7 (“[T]he people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly . . .”).

Constitution and plausible claims against its validity under the United States Constitution.

II. HISTORICAL SIGNIFICANCE

In the *Federalist Papers*, James Madison distinguished American democracy from its Athenian counterpart, writing that the American strain “lies in the total exclusion of the people, in their collective capacity.”⁵ This quote reflects the view that the people as a whole should not be empowered to have a significant effect on the law. Accordingly, initiative and referendum procedures were created by state law, not the United States Constitution.⁶ Spurred by the common perception that money and corporations controlled legislators, some came to view initiatives and referenda as avenues for citizens to bypass the corruption and exclusivity of the American political process.⁷ Despite the founders’ ardent belief that representative democracy was preferable to direct democracy, several states implemented mechanisms by which their citizens could participate directly in the lawmaking process.⁸

The initiative and referendum process in Arkansas traces its beginnings to the populist movement of the late nineteenth century.⁹ Together, the Arkansas State Federation of Labor and the Arkansas Farmers’ Union lobbied legislators to consider an amendment creating such a process.¹⁰ The Arkansas Bar Association, prominent Democrats, and the influential *Arkansas Gazette* heavily opposed the concept of direct democracy.¹¹ Nevertheless, the people adopted amendment 7 on November 2,

5. THE FEDERALIST NO. 63, at 329 (James Madison) (George W. Carey & James McClellan eds., Gideon ed. 2001) (emphasis omitted); see also Peter Bozzo & Andrew Irvine, *The Dangers of Direct Democracy*, HARV. POL. REV., Summer 2010, at 15, 15, available at <http://harvardpolitics.com/united-states/the-dangers-of-direct-democracy/>.

6. *Hoyle v. Priest*, 265 F.3d 699, 702 (8th Cir. 2001).

7. John M.A. DiPippa, *The Constitutionality of the Arkansas Ballot Question Disclosure Act*, 12 U. ARK. LITTLE ROCK L.J. 481, 481 (1990).

8. Bozzo & Irvine, *supra* note 5, at 15.

9. STEVEN L. PIOTT, *GIVING VOTERS A VOICE* 126 (2003).

10. *Id.* at 127.

11. *Id.* at 128-29. One of the more vocal opponents of direct democracy was Uriah M. Rose, a prominent Arkansas jurist and former president of the American Bar Association. *Id.* at 129.

1920, and the Arkansas Supreme Court had formally recognized its adoption by 1925.¹²

Amendment 7 to the Arkansas Constitution reserves for the people the power to propose legislative measures, laws, and constitutional amendments and to enact or reject them by ballot independent of the Arkansas General Assembly.¹³ During the twentieth century, Arkansas voters used this power extensively with respect to the operation of Arkansas's public schools. They banned the teaching of evolution, implemented compulsory reading of the Bible, and blocked integration.¹⁴ However, voters also used the amendment as a vehicle for progressive reform. Arkansans directly increased workers' compensation benefits and abolished the state's poll tax.¹⁵ More recently, Arkansas voters approved a measure prohibiting individuals cohabiting outside of a valid marriage from adopting or serving as foster parents to a minor child.¹⁶ Though this measure became law, the Arkansas Supreme Court later invalidated it as an unconstitutional burden on a family's right to privacy.¹⁷

A. Early Arkansas Opinions

Case law recounts the spirit of the initiative and referendum process. During the amendment's infancy, the Arkansas Supreme Court repeatedly emphasized its fundamental importance.¹⁸ The court also liberally construed the amendment's text:

Amendment No. 7 necessarily must be construed with some degree of liberality, in order that its purposes may be well effectuated. Strict construction might defeat the very purposes, in some instances, of the amendment. . . . Amendment No. 7 permits the exercise of the power

12. See *Cobb v. Burress*, 213 Ark. 177, 180, 209 S.W.2d 694, 696 (1948). At the time of its adoption, the initiative and referendum amendment was styled as amendment 13, but it was later restyled as amendment 7 in subsequent issues of Pope's Digest of the Statutes of Arkansas. *Id.* at 181 n.3, 209 S.W.2d at 696-97 n.3.

13. ARK. CONST. art. 5, § 1, amended by ARK. CONST. amend. 7.

14. DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 221-22 (1989).

15. *Id.* at 222.

16. See Initiated Act No. 1, 2009 vol. II Ark. Acts 14, 15, repealed by Act 1152, § 3, 2013 Ark. Acts 4654, 4655-56.

17. Ark. Dep't of Human Servs. v. Cole, 2011 Ark. 145, at 25, 380 S.W.3d 429, 442.

18. See, e.g., *Reeves v. Smith*, 190 Ark. 213, 215-16, 78 S.W.2d 72, 73 (1935) (noting that the power reserved to the people by amendment 7 should be closely guarded).

reserved to the people to control, to some extent at least, the policies of the state . . . as distinguished from the exercise of similar power by the Legislature, and since that residuum of power remains in the electors, their acts should not be thwarted by strict or technical construction.¹⁹

When deciding the constitutionality of legislation affecting amendment 7 in 1948, the court reasoned in *Cobb v. Burress*²⁰ that the constitutional right to engage in direct democracy transcended any attempt by the legislature to restrict those rights.²¹ This reasoning was based on amendment 7 itself, which states, “[n]o legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people.”²² Arkansas law recognizes one notable exception to this legislative limitation—if the purpose is to prevent fraudulent practices.²³ The *Cobb* court used *Webster’s Dictionary* to define the primary meaning of “restrict” as “to limit” and invalidated a law that limited the time for filing referendum petitions on municipal legislation.²⁴

The *Cobb* court also addressed fraud. Opponents of a local referendum attempted to persuade the court that, because certain canvassers gathered fraudulent signatures, it should strike all other signatures gathered by those canvassers.²⁵ Supporters of the legislation presented some proof demonstrating that the canvassers acted in good faith.²⁶ The court noted the proof demonstrated “an honest effort . . . to obtain a referendum election, and it concluded that it would defeat the very purpose of the Constitutional Amendment to allow vague presumptions of fraud to overcome tangible evidence of good faith.”²⁷ Interestingly, the presumptions of fraud that the court called “vague” were in fact quite specific. For example, opponents of the referendum knew the names of the individuals who

19. *Id.*

20. 213 Ark. 177, 209 S.W.2d 694 (1948).

21. *Id.* at 186, 209 S.W.2d at 699.

22. ARK. CONST. art. 5, § 1, amended by ARK. CONST. amend. 7.

23. ARK. CONST. art. 5, § 1, amended by ARK. CONST. amend. 7 (“[L]aws shall be enacted prohibiting and penalizing perjury, forgery, and all other felonies or other fraudulent practices . . .”).

24. *Cobb*, 213 Ark. at 181-82, 209 S.W.2d at 697.

25. *Id.* at 187, 209 S.W.2d at 700.

26. *Id.*

27. *Id.* at 188, 209 S.W.2d at 700.

fraudulently signed for various family members.²⁸ But the court characterized the fraud as “vague” due to the seriousness required to outweigh the legitimate efforts of canvassers.²⁹

Two years later, in *Pafford v. Hall*,³⁰ the court upheld the constitutionality of a law requiring canvassers to file with the Secretary of State a certified poll tax list for each county in which they obtained signatures.³¹ The court upheld the statute because the purpose of the requirement was to facilitate the exercise of the people’s initiative power.³² The court stated, “for that reason alone the act is constitutional.”³³ After finding that the requirement did indeed facilitate the initiative and referendum process, the court determined that the requirement was not burdensome and that it helped the Secretary of State efficiently determine whether submitted signatures were sufficient.³⁴ In the court’s view, efficiency was in the best interests of both sponsors and petitioners.³⁵

Historically, dissenting opinions articulated a more cautious view of the collective power of the people. In *Ellis v. Hall*,³⁶ the majority declined to rule that the presence of forged signatures on a petition nullified the signatures of other signers and instead held that the burden shifted to the sponsor to establish the authenticity of each signature.³⁷ Justice Ward dissented, noting an earlier opinion by the majority.³⁸ In *Sturdy v. Hall*,³⁹ the court, referring to the powers vested in the public by amendment 7, stated, “[t]he law must, therefore, be, and is, that if a power so great may be exercised by a number so small, a substantial compliance with the provisions of the Constitution conferring these powers should be required.”⁴⁰

28. *Id.* at 186-87, 209 S.W.2d at 699.

29. *Cobb*, 213 Ark. at 188, 209 S.W.2d at 700.

30. 217 Ark. 734, 233 S.W.2d 72 (1950).

31. *Id.* at 738, 233 S.W.2d at 74.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Pafford*, 217 Ark. at 738, 233 S.W.2d at 74.

36. 219 Ark. 869, 245 S.W.2d 223 (1952).

37. *See id.* at 873, 245 S.W.2d at 225.

38. *See id.* (Ward, J., dissenting).

39. 201 Ark. 38, 143 S.W.2d 547 (1940).

40. *Id.* at 42, 143 S.W. at 550.

In 1956, *Washburn v. Hall*⁴¹ presented a situation where the Secretary of State refused to certify a referendum petition because the Attorney General had not approved the ballot title as required by Act 195 of 1943.⁴² The court held Act 195 was a permissible constitutional restriction on amendment 7.⁴³ It relied on the following facts to rationalize its holding: (1) it was apparent that the Arkansas General Assembly recognized that the signer of a petition should have the benefit of a popular name and ballot title in order to gain more information on which to base his or her decision; (2) the legislature identified what it believed was the safest method to ensure that the petition received a proper popular name and ballot title; (3) the statute did not impede the operation of amendment 7; (4) the legislation was not difficult to follow; and (5) “it [was] not calculated to make troublesome the right to take advantage of the [Initiative and Referendum] Amendment.”⁴⁴

B. Recent Arkansas Opinions

Recent cases decided by the Arkansas Supreme Court involve the sufficiency of ballot titles. Apparently, challenging the ballot title has become the path of least resistance for opponents of a ballot initiative or referendum. In 1990, the Arkansas Supreme Court reviewed the validity of Act 280 of 1989 in *Finn v. McCuen*.⁴⁵ Act 280 permitted the Arkansas Supreme Court to conduct piecemeal review by requiring individuals contesting the terms of a ballot title to file a petition within forty-five days of publication of the proposed amendment.⁴⁶ The court concluded amendment 7 only permitted the court to review petitions already certified by the Secretary of State.⁴⁷ Therefore, the Act’s forty-five-day requirement was struck down because it restricted the initiative and referendum process and expanded the court’s jurisdiction beyond the text of amendment 7.⁴⁸

41. 225 Ark. 868, 286 S.W.2d 494 (1956).

42. *Id.* at 871-72, 286 S.W.2d at 497.

43. *Id.* at 871, 286 S.W.2d at 497.

44. *Id.* at 871-72, 286 S.W.2d at 497-98.

45. 303 Ark. 418, 798 S.W.2d 34 (1990), *overruled by* *Stille v. Priest*, 341 Ark. 329, 16 S.W.3d 251 (2000).

46. *Id.* at 420-21, 798 S.W.2d at 35.

47. *Id.* at 425, 798 S.W.2d at 38.

48. *Id.*

Ten years later, the Arkansas Supreme Court overruled the holding in *Finn in Stilley v. Priest*.⁴⁹ In that case, legislation that allowed the Arkansas Supreme Court to review challenges to the sufficiency of a ballot title or popular name before signatures were gathered was upheld.⁵⁰ The court concluded that amendment 7 did not prohibit review of a popular name, ballot title, or validity of a petition before signatures were collected.⁵¹ The court based its conclusion on the fact that amendment 7 explicitly provides that “laws may be enacted to facilitate its operation.”⁵² Allowing the court to resolve challenges to a popular name, ballot title, or validity of an initiative petition facilitated the process and was not an unwarranted restriction prohibited by amendment 7.⁵³ The court noted seven specific instances over the previous ten years where a measure was removed from the ballot immediately before the election because of a deficiency—a waste of money, time, and effort on the part of petition sponsors.⁵⁴

The court found that the “ultimate purpose” of amendment 7 was to establish an avenue through which the people could adopt legislative measures.⁵⁵ If a law furthers this purpose in any meaningful way,⁵⁶ then the law is constitutional.⁵⁷ Today, cases such as *Stilley* and *Washburn* serve as guides for judicial interpretation of Act 1413. In both cases, the court determined whether a legislatively enacted law facilitated the amendment process or instead functioned as an unwarranted restriction. When charged with evaluating claims involving amendment 7, the Arkansas Supreme Court appears to ultimately look to the

49. 341 Ark. 329, 337-38, 16 S.W.3d 251, 256-57 (2000).

50. *Id.* at 332, 337, 16 S.W.3d at 253, 256.

51. *Id.* at 334, 16 S.W.3d at 254.

52. *Id.* (quoting ARK. CONST. art. 5, § 1, amended by ARK. CONST. amend. 7).

53. *Id.*

54. *Stilley*, 341 Ark. at 335-36, 16 S.W.3d at 255-56. The seven instances of flawed petitions led to six reported decisions by the Arkansas Supreme Court. See *Parker v. Priest*, 326 Ark. 386, 931 S.W.2d 108 (1996); *Crochet v. Priest*, 326 Ark. 338, 931 S.W.2d 128 (1996); *Scott v. Priest*, 326 Ark. 328, 932 S.W.2d 746 (1996); *Page v. McCuen*, 318 Ark. 342, 884 S.W.2d 951 (1994); *Bailey v. McCuen*, 318 Ark. 277, 884 S.W.2d 938 (1994); *Christian Civic Action Comm. v. McCuen*, 318 Ark. 241, 884 S.W.2d 605 (1994).

55. *Stilley*, 341 Ark. at 335, 16 S.W.3d at 255.

56. For example, delayed review could impede the process, whereas the early review permitted by Act 877 “facilitat[es] a smoother operation of Amendment 7.” *Id.*

57. See *id.*

amendment's purpose—the creation of a process by which the people can adopt legislative measures.

III. ACT 1413

An overview of the initiative and referendum process provides context for a discussion of the changes made by Act 1413. The current process imposes several general requirements. Prior to gathering signatures, a petition sponsor must submit a proposed ballot title to the Attorney General for approval.⁵⁸ A sponsor also must obtain the requisite number of valid signatures on a petition.⁵⁹ For initiatives, the required number is eight percent of the population that voted in the previous gubernatorial election.⁶⁰ To propose a constitutional amendment, ten percent is required.⁶¹ Referenda need only six percent.⁶² After the signatures have been gathered, the sponsor must submit the petition to the Secretary of State, who then determines whether the signatures are valid.⁶³ If the petition and ballot title are sufficient, voters approve or reject the proposed measure on election day.⁶⁴

A. Changes

Act 1413 contained an emergency clause that made the law effective when Governor Mike Beebe signed it on April 22, 2013.⁶⁵ Secretary of State Mark Martin, in a pamphlet designed as a guide to the new law, referred to the changes as “significant” and “extensive.”⁶⁶ The Act made several additions

58. ARK. CODE ANN. § 7-9-107(a) (Supp. 2013).

59. ARK. CONST. art. 5, § 1, *amended by* ARK. CONST. amend. 7.

60. ARK. CONST. art. 5, § 1, *amended by* ARK. CONST. amend. 7.

61. ARK. CONST. art. 5, § 1, *amended by* ARK. CONST. amend. 7.

62. ARK. CONST. art. 5, § 1, *amended by* ARK. CONST. amend. 7.

63. ARK. CONST. art. 5, § 1, *amended by* ARK. CONST. amend. 7.

64. ARK. CONST. art. 5, § 1, *amended by* ARK. CONST. amend. 7.

65. *See* Act 1413, § 22, 2013 Ark. Acts 6084, 6107.

66. ARK. SEC'Y OF STATE, 2013-14 INITIATIVES AND REFERENDA: FACTS AND INFORMATION FOR THE 2014 GENERAL ELECTION, Sept. 2013, at 3, *available at* http://www.sos.arkansas.gov/elections/Documents/2013%20IR%20Handbook_September%20Edition.pdf (“The 89th General Assembly made significant changes to the statutory law governing initiatives and referendum with the passage of Act 1413 of 2013. The Secretary of State’s Office has attempted to incorporate the changes made by Act 1413 into the procedures that follow. However, since the changes in the law were extensive, it may be helpful to review Act 1413 of 2013.”).

to the requirements for producing a sufficient petition.⁶⁷ The Act also repealed portions of the old law.⁶⁸ Though this note does not articulate each and every change incorporated within Act 1413, it provides a general idea of the magnitude of the changes and surveys the legislation from beginning to end.

First, Act 1413 created additional criminal penalties applicable to paid canvassers and sponsors.⁶⁹ Previously, the law merely addressed criminal penalties in a general manner, without specifying to whom the penalties applied.⁷⁰ Now, the relevant provision outlines several situations in which “the person, acting as a canvasser, notary, sponsor, or agent of a sponsor” commits a Class A misdemeanor.⁷¹ For example, a sponsor who uses paid canvassers commits a crime if he or she knowingly submits certain fraudulent information to the Secretary of State.⁷² Also, Arkansas law now requires the official charged with verifying signatures of statewide petitions to report suspected forgery “and the basis for suspecting forgery” to the Arkansas State Police or the local prosecuting attorney.⁷³

Additionally, the Arkansas General Assembly added new provisions to the sections concerning the form of initiative and referendum petitions and the sufficiency of signatures.⁷⁴ Now, a sponsor of an initiative must file a printed petition with the Secretary of State in the exact form to be used before circulating a statewide petition.⁷⁵ The same requirement applies to referendum petitions.⁷⁶

67. *See, e.g.*, Act 1413, § 18, 2013 Ark. Acts 6084, 6100-102 (codified at ARK. CODE ANN. § 7-9-126 (Supp. 2013)) (creating new requirements for sponsors employing paid canvassers).

68. *See, e.g.*, Act 1413, § 9, 2013 Ark. Acts 6084, 6094-96 (repealing ARK. CODE ANN. § 7-9-107(e)-(f) (Supp. 2011)).

69. Act 1413, § 3, 2013 Ark. Acts, 6084, 6089-90 (codified at ARK. CODE ANN. § 7-9-103(b) (Supp. 2013)).

70. *See* ARK. CODE ANN. 7-9-103(b) (Repl. 2011), *amended by* Act 1413, § 3, 2013 Ark. Acts 6084, 6089-91.

71. ARK. CODE ANN. 7-9-103(b) (Supp. 2013).

72. ARK. CODE ANN. 7-9-103(b)(6).

73. ARK. CODE ANN. 7-9-103(c).

74. Act 1413, § 5, 2013 Ark. Acts 6084, 6092 (codified at ARK. CODE ANN. § 7-9-104(d) (Supp. 2013)) (prescribing signature format for initiative petitions); Act 1413, § 7, 2013 Ark. Acts 6084, 6094 (codified at ARK. CODE ANN. § 7-9-105(d) (Supp. 2013)) (prescribing signature format for referendum petitions).

75. ARK. CODE ANN. § 7-9-104(d) (Supp. 2013).

76. ARK. CODE ANN. § 7-9-105(d) (Supp. 2013).

Act 1413 also repealed two subsections of the statute governing the approval and publication of ballot titles and popular names before circulation.⁷⁷ One of these subsections had created an expedited process for sponsors who submitted the popular name and ballot title to the Attorney General prior to September 30 of the year preceding the year during which the initiative would appear on the ballot.⁷⁸ If the Attorney General approved the title and name, then the Secretary of State was compelled under the previous law to approve and certify the sufficiency of the title and name within ten days.⁷⁹

In addition, the Arkansas General Assembly amended the law governing the Secretary of State's sufficiency determination. As always, the Secretary of State has thirty days from filing to rule on the sufficiency or insufficiency of a petition.⁸⁰ However, Act 1413 added one key sentence: "After a petition has been filed under this subchapter, a canvasser shall not circulate a petition or collect, solicit, or obtain any additional signatures for the filed petition until the Secretary of State determines the sufficiency of the petition under this section."⁸¹ Although the sponsor is still provided with thirty additional days to obtain the required signatures if the Secretary of State declares a petition insufficient, the Act amended the law so that a sponsor can no longer continue to gather signatures during the period of review. It is unclear how the elimination of this intermediate period for collecting signatures prevents fraud. The only clear effect that this provision will have is to limit the time a sponsor has to collect the sufficient number of signatures.

The legislature also added several requirements to the statute concerning what information must be submitted to the Secretary of State when paid canvassers are used.⁸² The sponsor now must submit a statement identifying paid canvassers by

77. Act 1413, § 9, 2013 Ark. Acts 6084, 6094-96 (repealing ARK. CODE ANN. § 7-9-107(e)-(f) (Repl. 2011)).

78. ARK. CODE ANN. § 7-9-107(e)(1)(A) (Repl. 2011), *repealed by* Act 1413, § 9, 2013 Ark. Acts 6084, 6094-96.

79. ARK. CODE ANN. § 7-9-107(e)(1)(A) (Repl. 2011), *repealed by* Act 1413, § 9, 2013 Ark. Acts 6084, 6094-96.

80. ARK. CODE ANN. § 7-9-111(a)(1) (Supp. 2013). Act 1413 did not change this requirement.

81. Act 1413, § 13, 2013 Ark. Acts 6084, 6098 (codified at ARK. CODE ANN. § 7-9-111(a)(3) (Supp. 2013)).

82. *See* Act 1413, § 15, 2013 Ark. Acts 6084, 6098-99 (codified at ARK. CODE ANN. § 7-9-111(f)(2) (Supp. 2013)).

name, along with an acknowledgement signed by the sponsor stating that he or she provided paid canvassers with the Secretary of State's pamphlet and explained the requirements for obtaining signatures.⁸³ The sponsor must stipulate that he or she complied with the statutory requirements before paid canvassers solicit any signatures.⁸⁴

Next, the Arkansas General Assembly altered the statute concerning the Secretary of State's failure to act on a petition within thirty days.⁸⁵ Arkansas law previously allowed for any twenty-five qualified electors who felt "aggrieved" by the Secretary of State to apply for a writ of mandamus from the Arkansas Supreme Court compelling certification.⁸⁶ Now, relief is available exclusively to sponsors of initiatives and referenda.⁸⁷

The Arkansas General Assembly did more, however, than repeal old law and create additional subsections. Act 1413 added a new section entitled "Count of signatures."⁸⁸ Now, all signatures on a "petition part"⁸⁹ are thrown out if any one of eight statements is true.⁹⁰ For example, if the canvasser is paid and a sponsor failed to submit required information about that particular canvasser to the Secretary of State before a petitioner signed the petition, then none of the signatures on the petition part will be counted.⁹¹ Additionally, if a petition part for a statewide petition contains signatures of people from more than one county, then none of the signatures on that signature sheet will be counted.⁹² Further, if the petition part contains a "material defect," none of its signatures will be counted.⁹³

83. ARK. CODE ANN. § 7-9-111(f)(2) (Supp. 2013).

84. ARK. CODE ANN. § 7-9-111(f)(2)(B).

85. See Act 1413, § 16, 2013 Ark. Acts 6084, 6099 (codified at ARK. CODE ANN. § 7-9-112 (Supp. 2013)).

86. ARK. CODE ANN. § 7-9-112(a) (Repl. 2011), amended by Act 1413, § 16, 2013 Ark. Acts 6084, 6099.

87. ARK. CODE ANN. § 7-9-112(a) (Supp. 2013).

88. See Act 1413, § 18, 2013 Ark. Acts 6084, 6100-02 (codified at ARK. CODE ANN. § 7-9-126 (Supp. 2013)).

89. A "petition part" is simply a signature sheet containing information required by statute. See ARK. CODE ANN. § 7-9-101(7) (Supp. 2013) (defining "petition part").

90. See ARK. CODE ANN. § 7-9-126(b) (Supp. 2013) (listing these eight statements).

91. ARK. CODE ANN. § 7-9-126(b)(3)(A).

92. ARK. CODE ANN. § 7-9-126(b)(7).

93. ARK. CODE ANN. § 7-9-126(b)(8). Arkansas law fails to define "material defect." See ARK. CODE ANN. § 7-9-101 (Supp. 2013) (providing relevant definitions).

This new section differs from the section governing the Secretary of State's sufficiency determination because it pertains to the counting of signatures, a requirement distinct from the processes by which signatures are validated or by which the petitioner is deemed in compliance with the rules. The section entitled "Count of signatures" only applies to whether the petition has the required number of signatures "on its face." Understanding this distinction is important because a different provision deems a petition insufficient if the initial count of signatures is less than the required number and the deadline for filing petitions has passed.⁹⁴ Arkansas law also expressly forbids the acceptance of additional signatures to cure the facial insufficiency of the petition.⁹⁵

Act 1413 also repealed an entire subchapter from the Arkansas Code Annotated.⁹⁶ Section 504 of the subchapter, entitled "Cure by correction or amendment," had permitted the sponsors of a petition declared insufficient to cure the insufficiency by correcting or amending the measure.⁹⁷ Section 505 had permitted a petitioner, sponsor, or any Arkansas taxpayer and voter to petition the Arkansas Supreme Court and ask the court to immediately review the Secretary of State's sufficiency determination.⁹⁸

Finally, the legislature added a new subchapter.⁹⁹ This subchapter creates a list of requirements applicable to the hiring and training of paid canvassers.¹⁰⁰ A sponsor now must provide a complete list of the canvassers' names and current addresses of paid canvassers to the Secretary of State.¹⁰¹ If the sponsor hires additional paid canvassers, the sponsor must provide an updated list to the Secretary of State.¹⁰² The paid canvasser also must submit the following information to the sponsor: (1) his or her

94. ARK. CODE ANN. § 7-9-126(d) (Supp. 2013).

95. ARK. CODE ANN. § 7-9-126(d).

96. Act 1413, § 20, 2013 Ark. Acts 6084, 6103-05 (repealing ARK. CODE ANN. §§ 7-9-501 to -506 (Repl. 2011)).

97. ARK. CODE ANN. § 7-9-504 (Repl. 2011), *repealed* by Act 1413, § 20, 2013 Ark. Acts 6084, 6104.

98. ARK. CODE ANN. § 7-9-505 (Repl. 2011), *repealed* by Act 1413, § 20, 2013 Ark. Acts 6084, 6104.

99. *See* Act 1413, § 21, 2013 Ark. Acts 6084, 6105-07 (codified at ARK. CODE ANN. § 7-9-601 (Supp. 2013)).

100. *See* ARK. CODE ANN. § 7-9-601 (Supp. 2013).

101. ARK. CODE ANN. § 7-9-601(a)(2)(C)(i).

102. ARK. CODE ANN. § 7-9-601(a)(2)(C)(ii).

full name and any assumed names; (2) his or her current and permanent address; (3) a signed statement affirming he or she has not pleaded guilty or been convicted of certain criminal offenses; (4) a signed statement acknowledging he or she has read and understands Arkansas initiative and referendum law; (5) a signed statement indicating that he or she received the initiatives and referenda handbook; and (6) a photograph of himself or herself taken within ninety days of the submission of materials to the sponsor.¹⁰³ Arkansas law requires a sponsor to maintain the information for each paid canvasser for three years following the election.¹⁰⁴

B. The Arkansas General Assembly's Motives

Because amendment 7 explicitly prohibits legislation restricting the initiative and referendum process unless the purpose of the legislation is to curb fraudulent practices, an analysis of the Arkansas General Assembly's intent is warranted.¹⁰⁵ Specifically, amendment 7 provides:

No law shall be passed to prohibit any person or persons from giving or receiving compensation for circulating petitions, nor to prohibit the circulation of petitions, nor in any manner interfering with the freedom of the people in procuring petitions; but laws shall be enacted prohibiting and penalizing perjury, forgery, and all other felonies or other fraudulent practices, in the securing of signatures or filing of petitions.¹⁰⁶

This safeguard protects the rights of Arkansans from unwarranted restrictions on their right to engage in direct democracy and ensures that the legislature acts in the interests of the people rather than in the interests of money or power.¹⁰⁷

103. ARK. CODE ANN. § 7-9-601(b)(1)–(6).

104. ARK. CODE ANN. § 7-9-601(c).

105. ARK. CONST. art. 5, § 1, *amended by* ARK. CONST. amend. 7.

106. ARK. CONST. art. 5, § 1, *amended by* ARK. CONST. amend. 7.

107. Distrust for government shaped the Arkansas Constitution, which was drafted in the bitter wake of Reconstruction. ARK. CONST. REVISION STUDY COMM'N, PART ONE REPORT: ANALYSIS AND GENERAL RECOMMENDATIONS 7-8 (1968). It is worth noting that on November 4, 2014, fifty-three percent of Arkansas voters approved a legislatively referred constitutional amendment proposal dealing with signature requirements for ballot initiatives and referenda. *See 4 of 5 Ballot Issues Pass*, TALK BUS. (Nov. 5, 2014), <http://talkbusiness.net/2014/11/4-of-5-ballot-issues-pass/> (providing data about the results from the 2014 general election). This amendment requires a filed petition to contain seventy-five percent of the valid signatures required in order to receive additional time to

According to the 89th Arkansas General Assembly, the initiative and referendum system in Arkansas was broken.¹⁰⁸ Sponsors of four different initiatives submitted petitions containing a cumulative 298,000 purported signatures of registered voters in 2012.¹⁰⁹ None of the four petitions had an initial validity rate above fifty-six percent, and three had a rate below thirty-one percent.¹¹⁰ As alarming as the statistics may appear, none of the petitions appeared on the ballot.¹¹¹ The law as it existed before Act 1413 successfully minimized the risk of improper conduct.¹¹² However, the Arkansas General Assembly felt that if it did not act, “[u]nscrupulous sponsors and canvassers [would] continue to have an incentive to submit forged and otherwise facially invalid signatures and make false statements to the Secretary of State.”¹¹³

Legislators declined to identify the “incentive” for canvassers and sponsors to engage in fraud. The United States Supreme Court has recognized that a professional canvasser is no more likely to engage in fraud than a volunteer because a paid canvasser’s future opportunities in the industry depend on “a reputation of competence and integrity.”¹¹⁴ A volunteer, however, is wholly motivated by the goal of having the petition placed on the ballot.¹¹⁵ Contrary to this seemingly common-

gather additional signatures after the petition has been submitted to the Secretary of State for approval. See S.J.R. 16, 89th Gen. Assemb., Reg. Sess. (Ark. 2013). The effect of this amendment on the initiative and referenda process is unclear at the time of publication, but the amendment will likely implicate a number of issues discussed in this note.

108. Act 1413, § 1, 2013 Ark. Acts 6084, 6086 (“For the reasons stated in this section, the General Assembly finds that passage of this act will make sponsors and canvassers more accountable to the people of this state, facilitate the initiative process, conserve state resources, and help to restore the confidence and trust of the people in the initiative process.”).

109. Act 1413, § 1, 2013 Ark. Acts 6084, 6085.

110. Act 1413, § 1, 2013 Ark. Acts 6084, 6085-86.

111. Brantley, *supra* note 2.

112. *See id.*

113. Act 1413, § 1, 2013 Ark. Acts 6084, 6086.

114. Meyer v. Grant, 486 U.S. 414, 426 (1988) (“[W]e are not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.”).

115. *Id.*

sense logic, Act 1413 imposes stricter requirements on paid canvassers than it does on volunteers.¹¹⁶

Critics of Act 1413 also argue that opponents of recently proposed measures supplied prosecutors with information concerning fraudulent petitions and a list of individuals who signed petitions more than once.¹¹⁷ Prosecutors, however, took no action to punish the wrongdoers.¹¹⁸ The fact that the existing laws were not enforced casts doubt on the legislature's interest in passing additional requirements to prevent fraudulent conduct.

Further, critics question whether the restrictive measures within Act 1413 were influenced purely by the Arkansas General Assembly's duty to prevent fraud.¹¹⁹ The bill was co-sponsored by nine legislators, four of whom represented either Garland County or Crittenden County.¹²⁰ One co-sponsor, State Senator Keith Ingram,¹²¹ represented a district that included Crittenden County and had previously served as Mayor of West Memphis. Another co-sponsor, State Representative Deborah Ferguson,¹²² also represented a district encompassing part of Crittenden County. State Senator Bill Sample¹²³ and State Representative John Vines¹²⁴ represented parts of Garland County. Notably, Arkansas's two legal gaming operations,

116. See Act 1413, § 21, 2013 Ark. Acts 6084, 6105-07 (codified at ARK. CODE ANN. § 7-9-601 (Supp. 2013)) (listing requirements).

117. Brantley, *supra* note 2.

118. *Id.*

119. *Id.* Critics also alleged that legal counsel for Oaklawn and Southland drafted Act 1413. *Id.* Though this assertion has not been formally corroborated, it is in part based on observations that the law firm representing the two gaming operations had a wealth of experience with initiative and referendum petitions. *Id.* Ostensibly, it would be cheaper for Oaklawn and Southland to restrict the process than to hire representation to oppose individual petitions.

120. S.B. 821, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

121. See *Senator Keith Ingram (D)*, ARK. ST. LEGISLATURE, <http://www.arkleg.state.ar.us/assembly/2013/2014F/Pages/MemberProfile.aspx?member=K.%20Ingram> (last visited Sept. 10, 2014).

122. See *Representative Deborah Ferguson (D)*, ARK. ST. LEGISLATURE, <http://www.arkleg.state.ar.us/assembly/2013/2014F/Pages/MemberProfile.aspx?member=Ferguson> (last visited Sept. 10, 2014).

123. See *Senator Bill Sample (R)*, ARK. ST. LEGISLATURE, <http://www.arkleg.state.ar.us/assembly/2013/2014F/Pages/MemberProfile.aspx?member=B.%20Sample> (last visited Sept. 10, 2014).

124. See *Representative John T. Vines (D)*, ARK. ST. LEGISLATURE, <http://www.arkleg.state.ar.us/assembly/2013/2014F/Pages/MemberProfile.aspx?member=Vines> (last visited Sept. 10, 2014).

Oaklawn Park and Southland Park, are located in Garland County and Crittenden County, respectively. While “game[s] of chance” are not permitted in Arkansas,¹²⁵ these operations benefit from statutes authorizing “games of skill.”¹²⁶ In recent years, petitions to amend the Arkansas Constitution have threatened the gaming exclusivity enjoyed by Oaklawn and Southland.¹²⁷ Though only one such petition appeared on the ballot,¹²⁸ some garnered a substantial number of signatures.¹²⁹

IV. CONSTITUTIONALITY

In October 2013, opponents of Act 1413 filed a complaint in Pulaski County Circuit Court challenging the constitutionality of the legislation.¹³⁰ The remainder of this note analyzes the claims made by the opponents of Act 1413 under the Arkansas Constitution and other possible challenges under the United States Constitution. Although a statute is presumed constitutional, and the party challenging the validity of a statute carries the burden of proving otherwise,¹³¹ amendment 7 significantly pronounces, “[n]o law shall be passed to prohibit . . . the circulation of petitions, nor in any manner interfering with the freedom of the people in procuring petitions.”¹³² The trial judge found certain provisions of Act 1413 were unconstitutional under the Arkansas Constitution and

125. ARK. CODE ANN. § 5-66-104(a)(1) (Supp. 2013).

126. See ARK. CODE ANN. § 23-113-101 to -604 (Repl. 2014) (Local Option Horse Racing and Greyhound Racing Electronic Games of Skill Act).

127. See *Walmsley v. Martin*, 2012 Ark. 370, 423 S.W.3d 587; *Ark. Hotels and Entm't, Inc. v. Martin*, 2012 Ark. 335, 423 S.W.3d 49; *Stilley v. Priest*, 341 Ark. 329, 16 S.W.3d 251 (2000); *Crochet v. Priest*, 326 Ark. 338, 931 S.W.2d 128 (1996).

128. *Stilley*, 341 Ark. at 339, 16 S.W.3d at 257.

129. Nancy Todd, who petitioned to give Las Vegas-based Poker Palace, L.L.C. exclusive rights to own and operate casinos in certain counties, obtained a total of 200,746 signatures. *Walmsley*, 2012 Ark. 370, at 5 n.6, 423 S.W.3d at 590 n.6. While only 95,687 were valid, that was well in excess of the 78,133 signatures required. *Id.* In response to the Arkansas Supreme Court's ruling that the ballot title did not accurately convey the effects of the proposed amendment, Nancy Todd characterized the initiative and referendum system in Arkansas as “a blatantly unfair process that is hampered by unnecessary political bureaucracy.” Max Brantley, *Nancy Todd Casino Amendment Short on Signatures*, ARK. BLOG (July 23, 2012, 5:26 PM), <http://www.arktimes.com/ArkansasBlog/>.

130. Brief in Support of Motion for Preliminary Injunction at 1, *Spencer v. Martin*, No. 60CV-13-4020 (Ark. Cir. Ct. Oct. 10, 2013) [hereinafter Plaintiff's Brief in Support].

131. See *Stone v. State*, 254 Ark. 1011, 1013, 498 S.W.2d 634, 635 (1973).

132. ARK. CONST. art. 5, § 1, amended by ARK. CONST. amend. 7.

enjoined enforcement of those provisions.¹³³ The Attorney General and the Secretary of State subsequently appealed to the Arkansas Supreme Court. As of publication, the likelihood of the appeal's success is unknown, but Arkansas courts will only strike down Act 1413 if "there is clear incompatibility between the act and the Arkansas Constitution."¹³⁴

A. Challenges Under the Arkansas Constitution

Opponents claim that Act 1413 imposes unwarranted restrictions on the rights created by amendment 7.¹³⁵ The Arkansas Constitution prohibits the legislature from passing laws that restrict the rights reserved to the people or interfere with the procurement of petitions.¹³⁶ An exception is made for legislation that prevents fraud and does not impede the petition process.¹³⁷ Opponents of Act 1413 argue that it inhibits the initiative and referendum process in a way prohibited by amendment 7,¹³⁸ while supporters voice concerns that fraudulent activity "provide[s] a proper foundation and rational basis for creating standards" for the heightened requirements.¹³⁹ According to the Act's legislative findings, four specific

133. See Order at 11, *Spencer v. Martin*, No. 60CV-13-4020 (Ark. Cir. Ct. Mar. 4, 2014). It is unclear from the trial court's ruling which particular constitutional provision Act 1413 violated. See *id.* (finding provisions simply "unconstitutional"). Judge Mary McGowan, presiding over the bench trial, described the arguments and testimony of both parties at the hearing. See *id.* at 4-11. Judge McGowan then seemingly dismissed the argument that Act 1413 creates two classes of canvassers. *Id.* at 8 ("However, a significant issue is found in the lack of a definition of 'anything of value' which is the test for whether or not the canvasser is a paid one."). In the end, she held that "[t]he effect of the new provisions, especially the sections which fail to define the use of the words, disability, anything of value, material defect, etc., will mean that the citizens of the State of Arkansas will lose their ability to propose legislative measures and laws directly to the people." *Id.* at 11.

134. See *Robert D. Holloway, Inc. v. Pine Ridge Addition Residential Prop. Owners*, 332 Ark. 450, 453, 966 S.W.2d 241, 243 (1998).

135. Plaintiff's Brief in Support, *supra* note 130, at 1 ("The provisions of the Act infringe on the rights of the people of Arkansas to exercise freedom of speech, to petition the government, and to be treated with equality before the law . . .").

136. See ARK. CONST. art. 5, § 1, *amended by* ARK. CONST. amend. 7.

137. See ARK. CONST. art. 5, § 1, *amended by* ARK. CONST. amend. 7.

138. Plaintiff's Brief in Support, *supra* note 130, at 1.

139. Defendant's Brief in Support of Response to Motion for Preliminary Injunction at 15, *Spencer v. Martin*, No. 60CV-13-4020 (Ark. Cir. Ct. Oct. 30, 2013) ("[T]he findings concerning fraudulent signatures that were submitted in 2012, provide a proper foundation and rational basis for creating standards for when entire pages of petition signatures should be rejected.").

instances of fraud supplied the “rational basis” for the changes made to the initiative and referendum process by Act 1413.¹⁴⁰ According to the Attorney General, these instances of fraud represented an “epidemic.”¹⁴¹

Amendment 7 states, in pertinent part, “laws shall be enacted prohibiting and penalizing perjury, forgery and all other felonies or other fraudulent practices.”¹⁴² The Arkansas Supreme Court, deciding whether certain restrictions were unwarranted, analyzed the “practicable” purpose of the law in question.¹⁴³ In *Washburn*, the court found that the “statute in no way curtail[ed] the operation of Amendment No. 7” because it was apparent the Arkansas General Assembly “considered” the fact that the relevant legislation facilitated the initiative and referendum process by providing the signer with as much information as possible.¹⁴⁴ While the court briefly addressed the legislative findings to determine the purpose of the law,¹⁴⁵ its inquiry did not end there.¹⁴⁶ The court inspected the effect of the law and the ease with which it could be understood.¹⁴⁷

In *Pafford*, the court upheld the law in question after finding that “[t]he purpose of the statute [was] to facilitate the exercise of the power of initiative.”¹⁴⁸ The court reiterated this principle in *Stilley*, holding the law under review facilitated the petition process by allowing earlier resolution of ballot title issues, which reinforced amendment 7’s laudable goal of establishing a mechanism through which Arkansans can exercise their rights to participate in direct democracy.¹⁴⁹ The court also looked beyond the stated legislative intent and considered the surrounding circumstances, which showed seven measures were

140. See Act 1413, § 1, 2013 Ark. Acts 6084, 6085.

141. Intervenor’s Post-Trial Brief at 1, 19, *Spencer v. Martin*, No. 60CV-13-4020 (Ark. Cir. Ct. Dec. 3, 2013).

142. ARK. CONST. art. 5, § 1, amended by ARK. CONST. amend. 7.

143. See *Washburn v. Hall*, 225 Ark. 868, 872, 286 S.W.2d 494, 497 (1956).

144. *Id.* at 871-72, 286 S.W.2d at 497.

145. See *id.*

146. *Id.* The fact that the court considered evidence beyond the legislative findings is significant because such findings cannot be overturned unless they are arbitrary. *Stone v. State*, 254 Ark. 1011, 1016-17, 498 S.W.2d 634, 637 (1973).

147. *Washburn*, 225 Ark. at 872, 286 S.W.2d at 497-98 (“There is nothing complicated about Act 195; it is not difficult to follow; it is not calculated to make troublesome the right to take advantage of the [Initiative and Referendum] Amendment.”).

148. *Pafford v. Hall*, 217 Ark. 734, 738, 233 S.W.2d 72, 74 (1950).

149. *Stilley v. Priest*, 341 Ark. 329, 335, 16 S.W.3d 251, 255 (2000).

removed from the ballot immediately before the election due to ballot title problems.¹⁵⁰

Using the Arkansas Supreme Court's decisions as a guide, the true and practicable purpose of Act 1413 can be discerned by analyzing the effects of the legislation on the initiative and referendum process and by considering whether the Act's new requirements are easy to understand. First, the law imposes a litany of new requirements on paid canvassers.¹⁵¹ Opponents of Act 1413 claimed the new requirements would increase the costs of using professional petition circulators.¹⁵² They also took issue with the provisions that require certain information be submitted to the Secretary of State.¹⁵³ Opponents claimed the new requirements would reduce the number of professional circulators willing to work in the state due to Arkansas's unfavorable regulatory climate.¹⁵⁴ This could in turn limit the number of initiative and referendum proposals because professional circulators are often the best way to get an initiative, referendum, or amendment on the ballot.¹⁵⁵

Supporters of Act 1413 recognized the new requirements for paid canvassers, but they claimed that amendment 7 only prohibited a blanket restriction on the use of paid canvassers.¹⁵⁶ Supporters were also skeptical that the legislation would increase the cost of hiring paid canvassers or deter them from working in Arkansas.¹⁵⁷ Witnesses for the opponents of Act 1413 testified that some paid canvassers would be discouraged from working in Arkansas because they would not want to provide personal information to the Secretary of State.¹⁵⁸

150. *Id.* at 335-36, 16 S.W.3d at 255 (“We are mindful that in the past ten years at least seven measures have been stricken from the ballot at the eleventh hour before the November general election owing to a deficiency in the text of the ballot title.”).

151. *See* ARK. CODE ANN. § 7-9-601 (Supp. 2013) (listing requirements).

152. Plaintiff's Brief in Support, *supra* note 130, at 10-11 (“The requirements . . . increase the expense of obtaining canvassers making it unwarrantably difficult to obtain the requisite number of signatures to appear on the ballot.”).

153. *Id.* at 10.

154. *Id.*

155. *See* Meyer v. Grant, 486 U.S. 414, 424 (1988) (noting this argument).

156. Intervenor's Post-Trial Brief, *supra* note 141, at 5.

157. *Id.* at 8.

158. Plaintiff's Post-Hearing Brief at 12, Martin v. Spencer, No. 60CV-13-4020 (Ark. Cir. Ct. Dec. 2, 2013).

Supporters countered, noting that the same witnesses admitted that other states impose similar requirements.¹⁵⁹

Second, the law now imposes a prohibition on the collection of signatures during the time between the filing of a petition and the time it is declared sufficient or insufficient by the Secretary of State.¹⁶⁰ Opponents argued that this moratorium on signature collection fails to facilitate the exercise of rights under amendment 7 and instead makes it more difficult to qualify a petition for the ballot.¹⁶¹ Testimony indicated paid canvassers would not be inclined to wait around and see whether additional signatures will be needed.¹⁶² Instead, opponents claimed the canvassers will leave the state to find work elsewhere.¹⁶³ Supporters, on the other hand, argued that the moratorium creates an equal playing field for sponsors.¹⁶⁴ They state that, because it takes a different amount of time to process petitions, the moratorium assures that one sponsor cannot take advantage of a longer delay.¹⁶⁵

Act 1413 can be distinguished from the cases in which the Arkansas Supreme Court ruled that the laws under review facilitated the referendum and initiative process.¹⁶⁶ The passage of Act 1413 relied on the constitutional exception for legislation designed to prevent fraud. Therefore, the Act is valid under the Arkansas Constitution only if it “prohibit[s] and penalize[es] perjury, forgery and all other felonies or other fraudulent practices, in the securing of signatures or filing of petitions.”¹⁶⁷ Thus, the Arkansas Supreme Court must determine whether the requirements imposed by Act 1413 actually prevent fraud. While the Arkansas General Assembly claimed the measures were necessary for this purpose, no connection was established between the four instances of fraud and the changes made to the

159. Intervenor’s Post-Trial Brief, *supra* note 141, at 8.

160. ARK. CODE ANN. § 7-9-111(a)(3) (Supp. 2013).

161. *See* Plaintiff’s Post-Hearing Brief, *supra* note 158, at 4.

162. *Id.* at 14.

163. *Id.*

164. *See* Intervenor’s Post-Trial Brief, *supra* note 141, at 16.

165. *Id.*

166. *See* *Stilley v. Priest*, 341 Ark. 329, 334-35, 16 S.W.3d 251, 255 (2000); *Washburn v. Hall*, 225 Ark. 868, 871, 286 S.W.2d 494, 497 (1956). Though the court addressed prior instances of fraud in *Pafford*, the constitutionality of the statute was just one of many issues before the court, and the result did not hinge on the prohibition of fraudulent practices. *See generally* *Pafford v. Hall*, 217 Ark. 734, 233 S.W.2d 72 (1950).

167. *See* ARK. CONST. art. 5, § 1, amended by ARK. CONST. amend. 7.

initiative and referendum process. At best, Act 1413 seems tenuously connected to the prevention of fraud. Supporters of the legislation have failed to offer any evidence that shows paid canvassers are more likely to engage in fraud than unpaid canvassers. Likewise, the provision prohibiting the collection of signatures during the intermediate determination period seemingly has no connection to the prevention of fraud.

As it currently stands, it appears that supporters of Act 1413 must offer some evidence demonstrating the connection between the new law and the prevention of fraudulent practices. However, amendment 7 does not explicitly require such a showing, and no binding authority requires such a showing be made. Neither the opponents nor the supporters of Act 1413 focused on whether the law, in reality, has the effect of prohibiting fraud. Rather, both addressed the burden the Act imposes on those engaging in the direct democracy created by amendment 7. However, the word “burden” does not appear in amendment 7.¹⁶⁸ Instead, the amendment prohibits “[u]nwarranted [r]estrictions.”¹⁶⁹ If the government can only impose new requirements on the initiative and referendum process if the requirements are not unwarranted restrictions, then it seems patently unfair that it may do so using uncorroborated justifications. Of course, the Arkansas General Assembly should not be required to offer extensive evidence demonstrating how each law it enacts serves to accomplish the purpose for which it was enacted, but, given the constitutional rights threatened by Act 1413, the basis for these restrictions should be articulated in greater detail.

Ultimately, there is no mechanism that allows opponents of election legislation to successfully challenge the legislature’s “intent” to curb fraudulent practices. Despite convincing circumstantial evidence of questionable legislative motivation behind Act 1413,¹⁷⁰ the Arkansas General Assembly is vested with the authority, and the duty, to enact laws that prohibit and penalize fraud during the initiative and referendum process.¹⁷¹

168. See ARK. CONST. art. 5, § 1, *amended by* ARK. CONST. amend. 7.

169. See ARK. CONST. art. 5, § 1, *amended by* ARK. CONST. amend. 7.

170. See *supra* notes 110-11 and accompanying text.

171. See ARK. CONST. art. 5, § 1, *amended by* ARK. CONST. amend. 7 (“[L]aws shall be enacted prohibiting and penalizing perjury, forgery and all other felonies or other fraudulent practices, in the securing of signatures or filing of petitions.”).

As a result, there exists no safeguard in this situation, absent a violation of other constitutional provisions.¹⁷² The Arkansas Supreme Court would need to intervene because, technically speaking, the Arkansas General Assembly has the right to make the initiative and referendum process so complex that it effectively eviscerates amendment 7.

B. Plausible Challenges Under the United States Constitution

The opponents of Act 1413 did not challenge the validity of the law under the United States Constitution.¹⁷³ However, analyzing the legislation under the United States Constitution is appropriate because the United States Supreme Court has held that certain state laws restricting the petition process invoke First Amendment protections.¹⁷⁴ Through the circulation of a petition, sponsors and canvassers express their desire for political change and discuss the societal value of that change.¹⁷⁵

The Court has characterized the circulation process as the dissemination of a political message because, through canvassers, sponsors educate the public regarding political change and convince the public that an issue deserves attention and consideration.¹⁷⁶ Thus, the process enables a citizen to advance his or her beliefs through the channels he or she deems most appropriate.¹⁷⁷ The Court, reviewing Colorado legislation prohibiting payment to canvassers, stated, “the statute trenches upon an area in which the importance of First Amendment

172. Opponents, in addition to arguing that Act 1413 represented an unwarranted restriction in violation of amendment 7, also argued that Act 1413 was unconstitutionally vague and that it created two different classes of citizens—unpaid canvassers and paid canvassers—one treated differently from the other. *See* Plaintiff’s Brief in Support, *supra* note 130, at 16, 19. The trial court agreed with the opponents’ argument that the law was vague, specifically addressing the terms “anything of value,” “disability,” and “material defect,” in ruling that the law was unconstitutional. *See* Order, *supra* note 133, at 8-9. However, the ultimate holding appears to have been based on the effect Act 1413 had on the initiative and referendum process. *See id.* at 11. (“The effects of Act 1413 seem to impact the citizens rather than the special interests who always seem to have the money to further their goals.”).

173. *See* Plaintiff’s Brief in Support, *supra* note 130, at 1 (“[T]he Act violates Articles 2 and 5 of the Arkansas Constitution.”).

174. *See, e.g.,* Meyer v. Grant, 486 U.S. 414, 422 n.5 (1988) (“[T]he solicitation of signatures for a petition involves protected speech . . .”).

175. *Id.* at 421.

176. *Id.*

177. *Id.* at 424.

protections is at its zenith.”¹⁷⁸ Accordingly, it is profoundly important to consider whether Act 1413 restricts the initiative and referendum process in a way that restricts protected political speech in violation of the United States Constitution.

The First Amendment states, “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹⁷⁹ Courts apply inconsistent standards of review in ballot-access cases.¹⁸⁰ This is due to ambiguous court opinions, likely founded on the belief that applying a consistent standard of review would inequitably favor either state or individual interests over the other.¹⁸¹

In *Buckley v. American Constitutional Law Foundation, Inc.*,¹⁸² the United States Supreme Court struck down three provisions of a Colorado law regulating the initiative process.¹⁸³ The law under review required professional circulators to wear identification badges, mandated canvassers be registered voters, and forced paid canvassers to disclose certain personal information, including how much they were being paid.¹⁸⁴ To begin its analysis, the Court stated, “no litmus-paper test will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon no substitute for the hard judgments that must be made.”¹⁸⁵ The Court found a strong connection between the protected speech inherent in the initiative process and the effect the law had on anonymity,¹⁸⁶ the reduction in the number of individuals who could potentially disseminate a sponsor’s message,¹⁸⁷ and the forced disclosure of a sponsor’s expenses.¹⁸⁸

178. *Id.* at 425 (internal quotation marks omitted).

179. U.S. CONST. amend. I.

180. *See generally* Daniel S. Young, Comment, *Buckley v. American Constitutional Law Foundation, Inc.: The Struggle to Establish a Consistent Standard of Review in Ballot Access Cases Continues*, 77 DENV. U. L. REV. 197 (1999).

181. *Id.* at 213 (“[A]pplying one standard of review to all ballot access cases would lead to absurd results that would tread far too heavily on either state or individual interests.”).

182. 525 U.S. 182 (1999).

183. *See id.* at 205.

184. *Id.* at 186.

185. *Id.* at 192 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)) (internal quotation marks omitted).

186. *Id.* at 204.

187. *Buckley*, 525 U.S. at 210.

188. *Id.* at 205.

Critics argue that the Court's reasoning in *Buckley* "expand[ed] the First Amendment to protect an individual's ability to place an issue on the ballot," rather than merely protecting an individual's ability to freely express his ideas.¹⁸⁹ This interpretation is similar to Justice Thomas's concurring opinion in *Buckley*, in which he articulated what he believed to be the "now-settled approach" used to determine the constitutionality of laws restricting the ballot initiative.¹⁹⁰ According to Justice Thomas:

We unanimously concluded in *Meyer* that initiative petition circulation was core political speech. Colorado's law making it a felony to pay petition circulators burdened that political expression, we said, because it reduced the number of potential speakers. That reduction limited the size of the audience that initiative proponents and circulators might reach, which in turn made it less likely that initiative proposals would garner the signatures necessary to qualify for the ballot. I see no reason to revisit our earlier conclusion. The aim of a petition is to secure political change, and the First Amendment, by way of the Fourteenth Amendment, guards against the State's efforts to restrict free discussions about matters of public concern.¹⁹¹

Standard First Amendment analysis dictates that a law restricting core political speech or imposing severe burdens on speech must "be narrowly tailored to serve a compelling state interest."¹⁹² In other words, such laws are subject to strict scrutiny. If a law imposes "lesser burdens" on speech, then it is generally permissible for the government to justify the burdens on the advancement of important, rather than compelling, regulatory interests.¹⁹³ Justice Thomas asserted that, even though there was no bright-line rule distinguishing severe burdens from lesser burdens, a law that indirectly or directly regulates "core political speech" should be subject to strict scrutiny.¹⁹⁴ The Court in *Buckley* declined to articulate the level of scrutiny to which they were subjecting the three challenged

189. Young, *supra* note 180, at 211.

190. *Buckley*, 525 U.S. at 206 (Thomas, J., concurring).

191. *Id.* at 210-11 (footnote and citations omitted).

192. *Id.* at 206.

193. *Id.* (internal quotation marks omitted).

194. *Id.* at 207.

provisions.¹⁹⁵ Justice Thomas believed that the provisions should be subjected to strict scrutiny because each either regulated core political speech or burdened associated interests.¹⁹⁶

The remainder of this section briefly explores whether the requirements of Act 1413 unconstitutionally restrict the “core political speech” protected by the Court in *Buckley*. A discussion of the state’s interest in regulating the “core political speech” follows. Act 1413 represents a major overhaul of ballot initiative regulations.¹⁹⁷ For the sake of brevity, this section addresses the two most problematic provisions implemented by Act 1413: (1) the stricter requirements imposed on paid canvassers;¹⁹⁸ and (2) the prohibition on the collection of signatures during the Secretary of State’s review period.¹⁹⁹ These provisions shrink the pool of potential canvassers and reduce the likelihood that a proposal will appear on the ballot because the law makes it more difficult to garner the required number of signatures.²⁰⁰

1. *The Burden*

First, opponents of Act 1413 noted the testimony of several individuals involved in the petition process who testified that, because of ambiguous criminal penalties and significant disclosure requirements, paid canvassers would avoid working in Arkansas or charge increased fees if they chose to do so.²⁰¹ The United States Supreme Court characterized paid canvassers as “the most effective, fundamental, and perhaps economical avenue of political discourse, [and] direct one-on-one communication.”²⁰² Because Act 1413 limits the number of voices available to convey a sponsor’s message, it limits the size of the sponsor’s audience. Further, any cost increase will

195. See *Buckley*, 525 U.S. at 206 (Thomas, J., concurring).

196. *Id.*

197. See ARK. SEC’Y OF STATE, *supra* note 66, at 3 (“The 89th General Assembly made significant changes to the statutory law governing initiatives and referendum with the passage of Act 1413 of 2013.”).

198. ARK. CODE ANN. § 7-9-601 (Supp. 2013).

199. ARK. CODE ANN. § 7-9-111(a)(3) (Supp. 2013).

200. Opponents of Act 1413 raised these arguments before the trial court. See Plaintiff’s Brief in Support, *supra* note 130, at 5-9.

201. Plaintiff’s Post-Hearing Brief, *supra* note 158, at 8-15.

202. *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

disproportionately affect sponsors of limited means, while wealthy individuals and entities will continue to have access to the ballot through initiatives and referenda.²⁰³

Second, witnesses also testified that paid canvassers are unlikely to stay in Arkansas during the Secretary of State's review.²⁰⁴ Due to the moratorium on collecting signatures during the review period, paid canvassers will be forced to find work elsewhere. Those canvassers are unlikely to return if the Secretary of State declares the petition insufficient, leaving the sponsor to garner extra signatures on his or her own in order for the petition to make the ballot.²⁰⁵ Therefore, the imposition of this moratorium may effectively end the process permanently once a petition is submitted to the Secretary of State for an initial sufficiency determination.²⁰⁶ Similar to the requirements invalidated in *Buckley*, Act 1413 reduces the number of voices able to convey a sponsor's message.

Therefore, because Act 1413 could ultimately inhibit access to paid canvassers, it involves the "one-on-one communication" of political ideas described and protected by the Court in *Meyer*.²⁰⁷ Many, including Justice Thomas, believe courts should subject such legislation to strict scrutiny.²⁰⁸ Both *Meyer* and *Buckley* vaguely applied "exacting scrutiny" but analyzed the laws in question to determine whether "they were narrowly tailored to serve a compelling state interest," language which usually accompanies strict scrutiny review.²⁰⁹

2. *The State Interest*

The Arkansas General Assembly has a clear interest in protecting the integrity of the initiative and referendum process. Colorado's primary justification in *Buckley* was similarly described as a "strong interest in policing lawbreakers among petition circulators."²¹⁰ The state interest in facilitating the

203. See *Independence Inst. v. Gessler*, 936 F. Supp. 2d 1256, 1268 (D. Colo. 2013) (noting this argument).

204. Plaintiff's Post-Hearing Brief, *supra* note 158, at 14.

205. See *id.*

206. *Id.* at 9.

207. *Meyer*, 486 U.S. at 424.

208. See *supra* notes 189-96 and accompanying text.

209. See *Young*, *supra* note 180, at 203-04; see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (applying "exacting scrutiny").

210. *Buckley v. Am. Constitutional Law Found. Inc.*, 525 U.S. 182, 196 (1999).

initiative and referendum process, which has played a central role in Arkansas's political development since the early twentieth century, is undoubtedly compelling.²¹¹ The codification of amendment 7 reflects this state interest.²¹² However, current law fails to provide a mechanism by which challengers of a petition can challenge the Arkansas General Assembly's stated purpose. The United States Constitution, on the other hand, allows a party to bring a First Amendment challenge to state laws restricting the initiative and referendum process.²¹³ Under this theory, a litigant may force the state to articulate whether or not less restrictive measures could have achieved the goal of keeping the initiative and referendum process free of fraudulent conduct.²¹⁴

The four specific instances of fraud cited by the legislature as motivation for passing the Act 1413 likely serve as an insufficient justification for the legislation's restrictions. None of the fraudulent petitions appeared on the ballot, and laws in effect at the time were working.²¹⁵ In *Meyer*, the United States Supreme Court recognized Colorado's interest in holding paid canvassers accountable for fraud.²¹⁶ However, the Court determined that it was unnecessary to place a sweeping prohibition on paid canvassers.²¹⁷ Ultimately, the government was unable to justify burdening the canvassers' ability to communicate in order to preserve the integrity of the initiative process.²¹⁸ The Court noted the state's prior "provisions seem[ed] adequate to the task of minimizing the risk of improper conduct in the circulation of a petition, especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting."²¹⁹ This reasoning applies similarly to Act 1413. Prior law provided adequate protection from fraud during the initiative and referendum process. No fraudulent petition

211. See *Cobb v. Burress*, 213 Ark. 177, 180, 209 S.W.2d 694, 696 (1948).

212. See ARK. CONST. art. 5, § 1, amended by ARK. CONST. amend. 7.

213. *Meyer v. Grant*, 486 U.S. 414, 421-23 (1988).

214. *Id.* at 425-26.

215. Brantley, *supra* note 2.

216. See *Meyer*, 486 U.S. at 425-26.

217. *Id.*

218. *Id.*

219. *Id.* at 427.

appeared on the ballot because the Secretary of State properly detected and struck the forged signatures from the count.²²⁰

Additionally, if the four instances of fraud justified the radical alterations made by Act 1413, then the changes are nonsensical. Courts, including the United States Supreme Court, have repeatedly found that paid canvassers are no more likely to engage in fraud than unpaid canvassers.²²¹ It is unlikely the State of Arkansas would be able to prove otherwise. The professional success of a paid circulator “depend[s] on a reputation for competence and integrity.”²²² Without evidence that paid canvassers are more likely to engage in fraud, Arkansas “restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. . . . The First Amendment protects [sponsors’] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.”²²³

Because the State of Arkansas retains an arsenal of safeguards to accomplish its goal of deterring fraud, Act 1413 unjustifiably restricts core political speech. The legislation unconstitutionally “inhibit[s] the circulation of ballot-initiative petitions,”²²⁴ and, therefore, cannot withstand strict scrutiny. While the State of Arkansas clearly has a compelling interest in preventing fraud during the initiative and referendum process, it is not corroborated by proof that paid canvassers are more likely to engage in fraud or that prior laws were ineffective in doing so. The new legislation simply places an unlawful restriction on the initiative and referendum process created by amendment 7.

V. CONCLUSION

It is imperative to preserve rights long reserved for the people. If those with power and influence may easily sway legislators to value private interests over those of the public at large, then the process created by amendment 7 will be one of

220. Brantley, *supra* note 2.

221. See, e.g., Buckley v. Am. Constitutional Law Found. Inc., 525 U.S. 182, 203-04 (1999); Meyer, 486 U.S. at 426; Citizens for Tax Reform v. Deters, 518 F.3d 375, 387-88 (6th Cir. 2008).

222. Meyer, 486 U.S. at 426.

223. *Id.* at 424 (citations omitted).

224. Buckley, 525 U.S. at 205.

many rights chiseled away until it serves only to represent a theory rather than a reality. Amendment 7 itself does not explicitly create a mechanism through which Act 1413 can be struck down because the Arkansas General Assembly relied on the guise of preventing fraud. However, both the Arkansas Constitution and the United States Constitution provide options for challenging its constitutionality. Looking at the effects of Act 1413 on the initiative and referendum process, it is evident that the requirements inhibit, rather than facilitate, the operation of amendment 7. If Act 1413 is upheld, Arkansans with revolutionary ideas, but small bank accounts, will be excluded from the ballot, thereby undermining the spirit of the Arkansas Constitution.

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