

CV-20-454

IN THE ARKANSAS SUPREME COURT

**BONNIE MILLER, individually and on behalf of
ARKANSAS VOTERS FIRST and
OPEN PRIMARIES ARKANSAS,
BALLOT QUESTION COMMITTEES**

PETITIONERS

V. CASE NO. CV 20-454

**JOHN THURSTON, in his capacity as
Arkansas Secretary of State**

RESPONDENT

MOTION TO INTERVENE

Come now Arkansans for Transparency, a ballot question committee, and Jonelle Fulmer, individually and on behalf of Arkansans for Transparency, by and through their undersigned counsel, and pursuant to Arkansas Rule of Civil Procedure 24, hereby move this Court for leave to intervene in this matter in opposition to the Amended Consolidated Original Petition. In support of this Motion, Movants state:

1. Movant Arkansans for Transparency is a ballot question committee as defined in Arkansas Code Annotated § 7-9-402(2) (“Arkansans for Transparency”).
2. Movant Jonelle Fulmer is a registered voter in Sebastian County, Arkansas and is the Co-Chair of Arkansans for Transparency.
3. Arkansans for Transparency was established for the specific purpose of advocating the defeat of two proposed constitutional amendments: an amendment

creating a “Citizens’ Redistricting Commission” for state legislative and congressional redistricting, sponsored by Petitioner Arkansas Voters First; and an amendment requiring open primary elections and instant runoff general elections sponsored and submitted initially by Arkansas Voters First, and now sponsored by Petitioner Open Primaries Arkansas (“Open Primaries Amendment”) (collectively the “Constitutional Amendments”).

4. Petitioners filed a Consolidated Original Petition and an Amended Petition on July 17, 2020 and July 21, 2020 both against Respondent John Thurston in his capacity as Secretary of State. Therein, Petitioners allege that the Secretary of State wrongly determined that the signatures submitted by Petitioners could not be counted “for any purpose” under Arkansas Code Annotated § 7-9-601(f) and that Petitioners did not qualify for a thirty-day cure period due to Petitioners’ failure to properly certify that their paid canvassers “passed” background checks as required by Arkansas Code Annotated § 7-9-601(b). Am. Pet. at 3-9. Petitioners seek a preliminary and permanent injunction to force the Secretary of State to count the signatures and provide them the extra thirty days to cure the deficiencies. *Id.* at 9-10.

5. Since the filing of the Amended Petition, the Secretary of State has sent another letter to Petitioner Arkansas Voters First, listing additional reasons why the

petition in support of the Open Primaries Amendment is facially invalid. Exhibit 1, Ltr dated July 21, 2020.

6. Movants have an interest in this matter: Fulmer is a registered voter and Arkansans for Transparency's organizational purpose centers on defeating the Constitutional Amendments at issue. Movants also have an interest in defending the Secretary of State's culling of petition pages and signatures from the Open Primaries Amendment, reviewing all documentation submitted by the sponsors to the Secretary of State, and defending these issues that might arise in other litigation.

7. Given these interests and because a decision by this Court may impair or impede Movants' ability to later challenge the proposed Constitutional Amendments, Movants respectfully request that they be permitted to intervene as a matter of right. Ark. R. Civ. P. 24(a) ("Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the . . . transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.")

8. Movants do not share the same interests as the Secretary of State, whose purpose and role in this process and litigation is markedly different than that of

Movants. The Secretary of State does not adequately represent Movants' interests, making intervention as a matter of right appropriate.

9. Alternatively, Movants respectfully request permission to intervene because the Court's decision will likely decide issues of law and fact related to the initiative petitions that the Movants will later raise or litigate in potential challenges under Amendment 7 to the Arkansas Constitution. *Id.* at 24(b) (permitting intervention "when an applicant's claim or defense and the main action have a question of law or fact in common").

10. Permitting Movants to intervene will not result in undue delay and will not prejudice the adjudication of the rights of the Petitioner or Respondent.

11. Movants have conferred with counsel for Respondent, and he does not object to Movants' Motion to Intervene. Movants are inquiring with counsel for Petitioners as to whether they oppose Movants' intervention.

12. A copy of Movants' proposed Response to Petitioner's Amended Consolidated Original Petition is attached hereto as Exhibit 2.

WHEREFORE, Movants Arkansans for Transparency and Jonelle Fulmer, individually and on behalf of Arkansans for Transparency, pray that this Court grant them leave to intervene in this matter under Rule 24 of the Arkansas Rules of Civil Procedure.

Respectfully submitted,

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By: /s/ Kevin A. Crass
KEVIN A. CRASS

*Attorneys for Arkansans for Transparency
and Jonelle Fulmer, individually and on
behalf of Arkansans for Transparency*

CERTIFICATE OF SERVICE

I, Kevin A. Crass, hereby certify that on this 23rd day of July, 2020, I electronically filed this Motion using the Court's electronic filing system, which shall send notification of such filing to the following counsel of record:

Adam Butler
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abutler@paragouldlawyer.com

Attorney for Petitioner

Gary Sullivan
Managing Attorney
Arkansas Secretary of State
500 Woodlane Street, Suite 256
Little Rock, AR 72201
gary.sullivan@sos.arkansas.gov

Attorney for Respondent

By: /s/ Kevin A. Crass
KEVIN A. CRASS



JOHN THURSTON
—
ARKANSAS SECRETARY OF STATE

David A. Couch
Attorney at Law
1501 N. University Ave., Suite 228
Little Rock, AR 72207

via electronic mail to arhog@me.com

July 21, 2020

Re: Revised Declaration of Insufficiency
Petition Sponsor: Arkansas Voters First
Petition: A Constitutional Amendment Establishing Top Four Open Primary Elections
and Majority Winner General Elections with Instant Runoff if Necessary

Dear Mr. Couch:

Upon initial review of the above referenced petition, our office has determined that the petition must be declared insufficient for the following reasons:

1. After completion of the intake analysis procedure for the above referenced petition, a total of 10,208 signatures were culled, leaving a total of 88,623 signatures on the face of the petition. A total of 89,151 signatures are required on the face of the petition to trigger further analysis. The reasons for the signatures that were culled include:
 - a. Some signatures were solicited by paid canvassers prior to the canvasser's required information (name and/or canvassers' statement regarding criminal background) being filed with the Secretary of State; and/or
 - b. Some petition parts were submitted for paid canvassers whose names were never reported to the Secretary of State; and/or
 - c. Some signatures were solicited by paid canvassers but the canvassers' signature card was not filed with the Secretary of State; and/or
 - d. Some petition parts were not notarized; and/or
 - e. Some signatures on petition parts contained verifications dated earlier than the



D. Couch
July 21, 2020
Page 2

date on which a petitioner signed the petition; and/or

- f. Some petition parts did not conform to the original draft filed under § 7-9-107.
2. As more fully explained in my preliminary letter of July 14, 2020, Arkansas Voters First did not comply with Ark. Code Ann. § 7-9-601(b)(3) thus none of the signatures solicited by the paid canvassers may be counted *for any purpose* pursuant to Ark. Code Ann. § 7-9-601(f).

Pursuant to Ark. Code Ann. § 7-9-126(d), the petition must be declared insufficient and this office “shall not accept and file any additional signatures to cure the insufficiency of the petition on its face.”

Sincerely,

A handwritten signature in cursive script that reads "John Thurston". The signature is written in black ink and is positioned below the word "Sincerely,".

John Thurston
Secretary of State

CV-20-454

IN THE ARKANSAS SUPREME COURT

**BONNIE MILLER, individually and on behalf of
ARKANSAS VOTERS FIRST and
OPEN PRIMARIES ARKANSAS,
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V.

CASE NO. CV 20-454

**JOHN THURSTON, in his capacity as
Arkansas Secretary of State**

RESPONDENT

**ARKANSANS FOR TRANSPARENCY,
A BALLOT QUESTION COMMITTEE, and
JONELLE FULMER, individually and on behalf of
ARKANSANS FOR TRANSPARENCY**

INTERVENORS

ANSWER TO AMENDED CONSOLIDATED ORIGINAL PETITION

Come now Intervenors Arkansans for Transparency, a ballot question committee, and Jonelle Fulmer, individually and on behalf of Arkansans for Transparency, by and through their undersigned counsel, and for their Answer to Petitioners' Amended Consolidated Original Petition, state as follows:

1. Intervenors are without sufficient knowledge or information to either admit or deny that Petitioner Bonnie Miller is an Arkansas resident and registered voter; thus, that allegation is denied. Intervenors admit that this Court has original and exclusive jurisdiction to review statewide initiative petitions. Intervenors admit



that Petitioners have filed this action purportedly under Article 5, Section 1 of the Arkansas Constitution, Amendment 7 to the Arkansas Constitution and Rule 6-5 of the Rules of the Supreme Court but deny that Petitioners are entitled to the relief they seek thereunder.

2. At this time, Intervenors are without sufficient knowledge or information to either admit or deny the allegations of paragraph 2 of the Amended Petition; therefore, those allegations are denied.

3. At this time, Intervenors are without sufficient knowledge or information to either admit or deny the allegations of paragraph 3 of the Amended Petition; therefore, those allegations are denied.

4. With regard to paragraph 4, Intervenors state that Exhibit 1 speaks for itself and deny any allegations inconsistent with the content of Exhibit 1.

5. With regard to paragraph 5, Intervenors state that Exhibit 2 speaks for itself and deny any allegations inconsistent with the content of Exhibit 2.

6. Intervenors admit the allegations in paragraph 6 of the Amended Petition.

7. Intervenors state that Arkansas Code Annotated § 7-9-126 speaks for itself and deny any allegations inconsistent with the actual content of Arkansas Code Annotated § 7-9-126.

8. Intervenors deny the allegations in paragraph 8 of the Amended Petition.

9. Intervenors admit that Petitioners have purportedly sued Respondent John Thurston in his official capacity but deny that Respondent failed to perform his duties as required by Arkansas Code Annotated § 7-9-126.

10. Intervenors state that Arkansas Code Annotated § 7-9-126 speaks for itself and deny any allegations inconsistent with the actual content of Arkansas Code Annotated § 7-9-126.

11. Intervenors state that Arkansas Code Annotated § 7-9-126 speaks for itself and deny any allegations inconsistent with the actual content of Arkansas Code Annotated § 7-9-126. Intervenors deny that the petitions' pages and the signatures thereon should be counted for any purpose, including the initial count.

12. Intervenors state that Arkansas Code Annotated § 7-9-601(b) speaks for itself and deny any allegations inconsistent with the actual content of Arkansas Code Annotated § 7-9-601(b). Intervenors expressly deny that Petitioners met the requirements of Arkansas Code Annotated § 7-9-601(b).

13. Intervenors state that Arkansas Code Annotated § 7-9-601(f) speaks for itself and deny any allegations inconsistent with the actual content of Arkansas Code Annotated § 7-9-601(f). Intervenors further state that the Secretary of State was and

is barred from counting any signatures in support of the subject initiative petitions for any purpose pursuant to Arkansas Code Annotated § 7-9-601(f).

14. Intervenors admit that Petitioners have attached Exhibits 3 and 4 to their Amended Petition but deny all remaining allegations in paragraph 14 of the Amended Petition.

15. Intervenors state that the letters from the Secretary of State to Petitioners dated July 14, 2020 and attached as Exhibits 5 and 6 to the Amended Petition speak for themselves. Intervenors deny any allegations inconsistent with the contents of Exhibits 5 and 6.

16. Intervenors state that the letters from the Secretary of State to Petitioners dated July 14, 2020 and attached as Exhibits 5 and 6 to the Amended Petition speak for themselves. Intervenors deny any allegations inconsistent with the contents of Exhibits 5 and 6.

17. Intervenors state that the letters from the Secretary of State to Petitioners dated July 14, 2020 and attached as Exhibits 5 and 6 to the Amended Petition speak for themselves. Intervenors deny any allegations inconsistent with the contents of Exhibits 5 and 6.

18. Intervenors state that Arkansas Code Annotated § 7-9-601(b)(1) speaks for itself and deny any allegations inconsistent with the actual content of Arkansas

Code Annotated § 7-9-601(b)(1). Intervenors expressly deny that Petitioners met the requirements of Arkansas Code Annotated § 7-9-601(b)(1).

19. Intervenors state that Arkansas Code Annotated § 7-9-601(b)(3) speaks for itself and deny any allegations inconsistent with the actual content of Arkansas Code Annotated § 7-9-601(b)(3). Intervenors expressly deny that Petitioners met the requirements of Arkansas Code Annotated § 7-9-601(b)(3).

20. Intervenors deny the allegations in paragraph 20 of the Amended Petition.

21. Intervenors deny the allegations in paragraph 21 of the Amended Petition.

22. Intervenors deny the allegations in paragraph 22 of the Amended Petition.

23. Intervenors state that the letters from the Secretary of State to Petitioners dated July 14, 2020 and attached as Exhibits 5 and 6 to the Amended Petition speak for themselves and deny any allegations inconsistent with the contents of Exhibits 5 and 6.

24. Intervenors deny the allegations in paragraph 24 of the Amended Petition.

25. Intervenors deny the allegations in paragraph 25 of the Amended Petition. Intervenors expressly deny that Petitioners qualify for a thirty-day cure period.

26. Intervenors state that Article 5, § 1 of the Arkansas Constitution (Amendment 7) and the case law cited in paragraph 26 speak for themselves and deny allegations in paragraph 26 that are inconsistent with the actual content of the cited cases and Article 5, § 1 of the Arkansas Constitution (Amendment 7). Intervenors expressly deny that the subject initiative petitions qualify for the thirty-day cure period.

27. Intervenors state that the cases cited in paragraph 27 speak for themselves and deny allegations in paragraph 27 that are inconsistent with the actual content of the cited cases. Intervenors expressly deny that the subject initiative petitions qualify for the thirty-day cure period.

28. Intervenors state that the provisions of the Arkansas Constitution cited in paragraph 28 speak for themselves and deny allegations in paragraph 28 that are inconsistent with the actual content of the Arkansas Constitution.

29. Intervenors state that the cases cited in paragraph 29 speak for themselves and deny allegations in paragraph 29 that are inconsistent with the actual content of the cases. Intervenors expressly deny that the subject initiative petitions had the requisite number of signatures to qualify for the thirty-day cure period.

30. Intervenors deny the allegations in paragraph 30 of the Amended Petition.

31. Intervenors deny the allegations in paragraph 31 of the Amended Petition.

32. Intervenors deny the allegations in paragraph 32 of the Amended Petition.

33. Intervenors deny the allegations in paragraph 33 of the Amended Petition.

34. Intervenors admit that Petitioners must collect 89,151 signatures of registered voters and admit that August 20, 2020 is the deadline for the Secretary of State to certify a proposed constitutional amendment to the County Board of Election Commissioners. Intervenors deny the remaining allegations in paragraph 34 of the Amended Petition.

35. Intervenors deny the allegations in paragraph 35 of the Amended Petition.

36. The “WHEREFORE” paragraph of the Amended Petition contains a prayer for relief to which no response is required except to state that Intervenors deny that Petitioners are entitled to any and all of the relief requested.

37. All allegations not specifically admitted herein are denied.

38. Pleading affirmatively, Petitioners failed to satisfy Arkansas Code Annotated § 7-9-601(b). That provision requires a sponsor to obtain a current state and federal criminal record search and then certify that each paid canvasser “passed” the criminal background check when the sponsor submits its list of paid canvassers to the Secretary of State. The requirement that the sponsor certify *passage* of a state and federal background check is clear and mandatory. *See Benca v. Martin*, 2016 Ark. 359, at 12–13, 500 S.W.3d 742, 750 (“[S]hall is mandatory and . . . substantial compliance cannot be used as a substitute for compliance with the statute.”). Because Petitioners did not obtain the required background check and did not certify passage of the requisite criminal records searches, the signatures they submitted “shall not be counted by the Secretary of State for *any purpose*.” *See Ark. Code Ann. § 7-9-601(f)* (emphasis added); *see also id.* at § 7-9-126. As a result, the subject petitions do not meet the threshold requirement for the total number of signatures needed and fail for want of initiation. *See Arkansas Hotels & Entm’t, Inc. v. Martin*, 2012 Ark. 335, 423 S.W.3d 49 (holding that the petition did not have the requisite number of signatures to meet the county requirement); *Dixon v. Hall*, 210 Ark. 891, 198 S.W.2d 1002 (1946) (holding that the petition did not have the required number of signatures statewide). To hold otherwise would override the express intent of the Arkansas Legislature, which added additional and specific paid-canvasser requirements after uncovering widespread fraud and abuse in the signature-gathering process. *See Act*

of Apr. 22, 2013, No. 1413, 2013 Ark. Acts 6084, § 1(a); *see also McDaniel v. Spencer*, 2015 Ark. 94, at 6, 457 S.W.3d 641, 648 (recognizing that the paid-canvasser requirements of Act 1413 “aid in the proper use of the rights granted to the people of this state” and that the state has an interest in ensuring that paid canvassers “do not have a criminal history that calls into question their ability to interact with the public in a manner consistent with [the] law[]”). Simply certifying that a “statewide” and “50-state” background were “obtained” - as Petitioners have done here - impermissibly allows them to circumvent both the plain language of the statute and the General Assembly’s purpose for enacting these requirements.

39. Pleading affirmatively, the subject initiative petitions do not qualify for the thirty-day cure period because none of the signatures are valid due to Petitioners’ failure to comply with Arkansas Code Annotated § 7-9-601(b). Pursuant to Article 5, § 1 of the Arkansas Constitution, correction or amendment of an insufficient statewide petition is permitted “only if the petition contains valid signatures of legal voters equal to . . . at least seventy-five percent (75%) of the number of statewide signatures of legal voters required” and signatures of not less than one-half of the designated electors for at least fifteen counties. Correction and amendment go to form, rather than to “complete failure.” *Arkansas Hotels & Entm’t, Inc.*, 2012 Ark. at 9, 423 S.W.3d at 54 (quoting *Dixon*, 210 Ark. at 893, 198 S.W.2d at 1003). Here, the lack of the required background checks and passage certification is tantamount

to a complete failure. It is not simply an “insufficient petition,” but a complete failure to initiate the petition process. If no signature can be counted for any purpose under Arkansas Code Annotated § 7-9-601(f), there are no signatures that count toward Petitioners’ *prima facie* showing of a sufficient number of statewide and county-level signatures. *See id.* at 10, 423 S.W.3d at 55 (holding that “in order to qualify for additional time, the petition must first, on its face, contain a sufficient number of signatures pursuant to both the state-wide and fifteen-county requirement, before the thirty-day provision to correct deficiencies applies”). Petitioners’ argument that the Court need only look to the accuracy of the cure, is an argument for allowing them to knowingly skip the background check requirements and submit non-compliant certifications for the sake of qualifying for a cure. This is untenable in light of the legislature’s express language and intent behind Arkansas Code Annotated § 7-9-601. Petitioners should be held responsible for meeting *prima facie* statutory requirements before qualifying for an extra thirty days. Otherwise, the provision mandating certification of canvassers’ passage of the background checks is rendered meaningless.

40. Pleading affirmatively, the initiative petition for “A Constitutional Amendment Establishing Top Four Open Primary Elections and Majority Winner General Elections with Instant Runoff if Necessary” (“Open Primaries”) failed to submit the number of signatures required to initiate the petition process. *See* July 21,

2020 letter from the Secretary of State to Petitioner Arkansas Voters First attached hereto as Exhibit 1. Signatures obtained in violation of the specific provisions of Arkansas Code Annotated § 7-9-126 are not to be counted, including the Secretary of State's initial count. Evaluations under that statute are not evaluations of whether a particular signature is sufficient, *i.e.* the signature of a legal voter. Rather, it is a statutory, facial evaluation by the Secretary of State to determine whether the petition meets the threshold requirements for the total number of statewide and county-level signatures needed. Here, the petition submitted in support of the Open Primaries amendment failed that facial test, and as a result, Petitioner is precluded from filing any additional signatures to cure. Ark. Code Ann. § 7-9-126(d); *see also Arkansas Hotels & Entm't, Inc.*, 2012 Ark. at 9, 423 S.W.3d at 54; *Dixon*, 210 Ark. at 893, 198 S.W.2d at 1003.

41. Pleading affirmatively, the Amended Petition should be dismissed for failing to state facts upon which relief can be granted. Ark. R. Civ. P. 12(b)(6).

42. Pleading affirmatively, Petitioners have not met the requirements for the issuance of either a preliminary or permanent injunction.

43. Pleading affirmatively, Petitioners failed to attach necessary documents to have a complete petition; therefore, the Court lacks subject matter jurisdiction. Ark. R. Civ. P. 10(d); Ark. R. Civ. P. 12(b)(1).

44. Pleading affirmatively, Petitioners failed to show a “clear and certain right to the relief requested,” and their Amended Petition should be dismissed accordingly. *Arkansas Hotels & Entm’t, Inc.*, 2012 Ark. at 11 n. 2, 423 S.W.3d at 55 (citing *Manila School Dist. No. 15 v. Wagner*, 357 Ark. 20, 159 S.W.3d 285 (2004)).

45. Intervenors plead Arkansas Code Annotated §§ 7-9-601 and 7-9-126 as defenses.

46. Intervenors reserve the right to amend and plead further as investigation and discovery continue.

WHEREFORE, Intervenors Arkansans for Transparency, a ballot question committee, and Jonelle Fulmer, individually and on behalf of Arkansans for Transparency, pray that the Amended Consolidated Original Petition be denied dismissed.

Respectfully submitted,

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By: /s/ Kevin A. Crass
KEVIN A. CRASS

*Attorneys for Arkansans for Transparency
and Jonelle Fulmer, individually and on
behalf of Arkansans for Transparency*

CERTIFICATE OF SERVICE

[This is being filed as Exhibit 2 to the Motion to Intervene. This Answer will be separately filed and served by the Clerk of the Court later should the Court grant the Motion to Intervene.]



JOHN THURSTON
—
ARKANSAS SECRETARY OF STATE

David A. Couch
Attorney at Law
1501 N. University Ave., Suite 228
Little Rock, AR 72207

via electronic mail to arhog@me.com

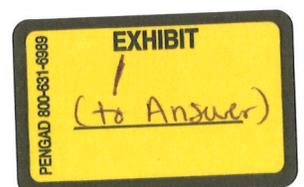
July 21, 2020

Re: Revised Declaration of Insufficiency
Petition Sponsor: Arkansas Voters First
Petition: A Constitutional Amendment Establishing Top Four Open Primary Elections
and Majority Winner General Elections with Instant Runoff if Necessary

Dear Mr. Couch:

Upon initial review of the above referenced petition, our office has determined that the petition must be declared insufficient for the following reasons:

1. After completion of the intake analysis procedure for the above referenced petition, a total of 10,208 signatures were culled, leaving a total of 88,623 signatures on the face of the petition. A total of 89,151 signatures are required on the face of the petition to trigger further analysis. The reasons for the signatures that were culled include:
 - a. Some signatures were solicited by paid canvassers prior to the canvasser's required information (name and/or canvassers' statement regarding criminal background) being filed with the Secretary of State; and/or
 - b. Some petition parts were submitted for paid canvassers whose names were never reported to the Secretary of State; and/or
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 - d. Some petition parts were not notarized; and/or
 - e. Some signatures on petition parts contained verifications dated earlier than the



date on which a petitioner signed the petition; and/or

- f. Some petition parts did not conform to the original draft filed under § 7-9-107.
2. As more fully explained in my preliminary letter of July 14, 2020, Arkansas Voters First did not comply with Ark. Code Ann. § 7-9-601(b)(3) thus none of the signatures solicited by the paid canvassers may be counted *for any purpose* pursuant to Ark. Code Ann. § 7-9-601(f).

Pursuant to Ark. Code Ann. § 7-9-126(d), the petition must be declared insufficient and this office “shall not accept and file any additional signatures to cure the insufficiency of the petition on its face.”

Sincerely,

A handwritten signature in black ink that reads "John Thurston". The signature is written in a cursive, flowing style.

John Thurston
Secretary of State