

IN THE ARKANSAS SUPREME COURT

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

v. **No. CV-20-454**

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

**RESPONSE TO SECOND AMENDED
CONSOLIDATED ORIGINAL ACTION PETITION**

For his Response to Second Amended Consolidated Original
Action Petition, Secretary of State John Thurston states:

1. Secretary Thurston admits that this is an original action under Amendment 7 to the Arkansas Constitution and this Court's Rule 6-5, but denies that Petitioners are entitled to the relief they seek.
2. Thurston admits that this Court has original and exclusive jurisdiction in this matter. Thurston denies that he wrongly denied a cure period for either of the two petitions.
3. Secretary Thurston is without knowledge to either admit or deny that Bonnie Miller is an Arkansas citizen or resident,

therefore denies same. At this time, Thurston has not verified the allegation that Miller is a registered voter, therefore denies same.

4. Thurston admits that Arkansas Voters First is an Arkansas ballot question committee registered with the Arkansas Ethics Commission.
5. Thurston admits that AVF is the sponsor of the proposed constitutional amendments at issue herein.
6. Thurston admits that Open Primaries Arkansas is an Arkansas ballot question committee registered with the Arkansas Ethics Commission to support the proposed open primaries amendment.
7. Thurston admits that he is the Arkansas Secretary of State and is charged with reviewing, counting, and determining whether or not initiative petitions are sufficient for certification to the ballot.
8. Thurston admits that he is the chair of the State Board of Election Commissioners, which is charged with certifying the legal sufficiency of the ballot titles for statewide measures.

9. Thurston admits that he is the agent for service of process for the State Board of Election Commissioners, but notes that SBEC has not been named as a party herein.
10. Thurston admits that Arkansas Voters First submitted two initiative petitions on July 6, 2020, in support of Arkansas Voters First's proposed Citizens' Initiative for an Independent Redistricting Commission and a proposed constitutional amendment requiring open primary elections and instant runoff general elections in Arkansas. Thurston denies that either of the petitions were valid.
11. Thurston denies that AVF submitted 94,913 signatures spanning 15,917 petition parts in support of the open primaries amendment.
12. Thurston denies that AVF submitted 9,728 signatures spanning 15,118 petition parts in support of the redistricting amendment.
13. Thurston states that Ark. Code Ann. § 7-9-126(2) speaks for itself.

14. Thurston states that the requirements to qualify for a cure period found in the Arkansas Constitution and the Arkansas Code speak for themselves.
15. Thurston states that Ark. Code Ann. § 7-9-111(d) speaks for itself.
16. Thurston admits that the two initiative petitions submitted on July 6, 2000, were timely. Thurston denies that the petitions were valid or that they contained the requisite number of signatures.
17. Thurston denies that the signatures AVF submitted for the open primaries petition were at least sufficient to qualify for a cure period to gather additional signatures. Thurston is currently verifying the signatures on the redistricting petition to determine whether or not it qualifies for a cure period.
18. Thurston admits that on July 14, 2020, insufficiency letters were issued to Arkansas Voters First for the two petitions it submitted. *See* Second Amended Petition Exhibits 5 and 6. Thurston admits that the letters state that “none of the signatures solicited by the paid canvassers may be counted for

any purpose.” Citing Ark. Code Ann. § 7-9-601(b)(3). Thurston continued, however, to say, “Please note, that because this office is statutorily prohibited from counting the submitted signatures for any purpose, there may be other as yet undetermined reasons the petition may not be sufficient.”

Second Amended Petition Exhibits 5 and 6. Further, on July 17, 2020, Thurston issued a second letter to Arkansas Voters First (one letter for each of the two petitions submitted by Arkansas Voters First), stating that he “would like to clarify a statement made in the original letter of insufficiency.”

Thurston explained, “I did not intend to infer that our normal intake procedures would cease. In fact, we have been continuously evaluating the petition under our normal intake analysis (facial review), which does not involve counting the signatures. Once intake is complete on the petition, I will issue a revised letter listing all reasons, if there are others in addition to the one originally reported, that the petition is insufficient.” *See Exhibits 1 and 2 attached to this Response.*

19. Thurston admits that this action was originally filed on July 17, 2020.
20. Thurston admits that the first amended petition was filed on July 21, 2020.
21. Thurston admits that a revised letter was transmitted to AVF regarding the open primary petition.
22. Thurston admits that the State Board of Election Commissioners met on July 22, 2020, and voted against certifying the popular name and ballot title for the proposed amendment for open primaries. Affirmatively, Thurston states that the vote was 5 to deny certification to 1 in favor. Thurston did not vote.
23. Thurston admits that the deadline to certify proposed constitutional amendments to the county boards of election commissioners is August 20, 2020.
24. Thurston incorporates and adopts all the foregoing paragraphs herein.
25. Thurston admits that a letter regarding the redistricting petition was transmitted to AVF on July 23, 2020, which

speaks for itself. Thurston denies that the only reason he refuses to certify the redistricting petition is the wording of the certification language. Affirmatively, Thurston states that AVF's background check certification error should disqualify the redistricting petition. However, if this Court determines otherwise, until the verification of the signatures (which is being performed as of this filing) is complete, it is not possible to know if enough registered voters signed the petition for it to qualify for a cure period.

26. Thurston denies any violation of Arkansas law.
27. Thurston states that Ark. Code Ann. § 7-9-126(b) speaks for itself.
28. Thurston states that Ark. Code Ann. § 7-9-601(b)(1) speaks for itself.
29. Thurston states that Ark. Code Ann. § 7-9-601(f) speaks for itself.
30. Thurston admits that the original petition parts for the two petitions have been filed with the Secretary of State and that they are too voluminous to attach to a pleading. Thurston

anticipates that they will be made a part of the record before the Special Master.

31. Thurston admits that the certification language stated in paragraph 31 was submitted to the Secretary of State's Office for the paid canvassers soliciting signatures for the redistricting petition.
32. Thurston admits that the certification language stated in paragraph 32 was submitted to the Secretary of State's Office for the paid canvassers soliciting signatures for the open primaries petition.
33. Thurston admits that the certification emails were numerous and ongoing. Thurston anticipates that they will be made a part of the record.
34. Thurston admits that Ark. Code Ann. § 7-9-601 states that the sponsor *shall* certify that its paid canvassers have *passed* a criminal background check, thus the language submitted by AVF was insufficient.
35. Thurston admits that his initial notifications to AVF addressed only the background check certification, but notes

that the letters also stated that other reasons for invalidating the petition might exist, which ultimately was the case with the open primaries petition. Further, a second notification was issued as to both petitions clarifying that the intake process was in progress anyway.

36. Thurston states that Ark. Code Ann. § 7-9-601(b)(1) speaks for itself.

37. Thurston admits that his initial notifications to AVF consisted of the information stated in paragraph 37. As noted above, Thurston also clarified that the intake process was in progress anyway.

38. Thurston denies the characterization in paragraph 38. As stated previously, AVF failed to certify that its canvassers passed criminal background checks as require by law prior to soliciting signatures.

39. Thurston denies that he violated any laws. To the contrary, Thurston followed the law.

40. Thurston denies that his decision was arbitrary, capricious, an attempt to thwart the initiative process, or disenfranchise

any voters, as alleged in paragraph 40. After first deciding not to count signatures, Thurston was ordered by this Court, in *Safe Surgery Arkansas v. Thurston*, 2019 Ark. 403, 591 S.W.3d 293, to count the signatures on the referendum petition at issue in *Arkansans for Healthy Eyes v. Thurston*, Arkansas Supreme Court Case No. CV-20-136. As noted previously herein, the Special Master in that case made findings that the referendum should not appear on the November 2020 ballot for the reason that the majority of the signatures on the petition were solicited by canvassers who had been certified as having “acquired” a criminal background check instead of having “passed” one. See Exhibit 3 attached to this Response.

41. Thurston denies that AVF’s initiative petitions met the statutory requirements.
42. Thurston denies that AVF is entitled to a 30-day cure period on the open primaries petition, even if the background check certifications had been correctly executed. The redistricting petition may or may not be entitled to a 30-day cure period if

the Court determines that the background check certifications were not in error.

43. Thurston states that the cases cited in paragraph 43 speak for themselves.

44. Thurston states that the case cited in paragraph 44 speaks for itself.

45. Thurston denies that the petitions AVF filed met all the facial validity requirements in Arkansas law.

46. Thurston denies that AVF is entitled to a 30-day cure period.

47. Thurston denies that he violated Ark. Code Ann. § 7-9-126.

48. Thurston denies that each day that passes without the counting of signatures makes certifying these measures for the ballot much more difficult. This Court has entered an injunction requiring the Secretary to verify the signatures on the two petitions, which was commenced within hours and is in progress at this moment.

49. Thurston states that this Court has already entered a preliminary injunction. Thurston denies that a permanent

- injunction should be issued. Thurston denies the remaining allegations in paragraph 49.
50. Thurston adopts and incorporates herein all the responses to the foregoing paragraphs.
51. Thurston admits that additional reasons to disqualify the open primaries petition were discovered.
52. Thurston is without knowledge to either admit or deny that any signatures were wrongly excluded from the counting, therefore denies same.
53. Thurston denies the characterization of alleged facts in paragraph 53. The intake analysis does not involve “counting.” Thurston admits that the open primaries petition has only 88,623 signatures on its face.
54. Thurston denies that the open primaries petition is only 528 signatures short of the gross signatures required. AVF failed to properly certify that its paid canvassers had passed criminal background checks, thus the petition is 89,151 short.
55. Thurston denies that the open primaries petition can become eligible for a cure period.

56. Thurston is without knowledge to either admit or deny that the Arkansas State Police is not permitted to obtain federal background checks on paid canvassers, therefore denies same. Thurston notes that an ASP attorney has testified that ASP cannot provide background checks for paid canvassers.

57. Paragraphs 57 through 73 (Count 3) are directed to the State Board of Election Commissioners, which has not been properly named as a party herein. No Summons has been served on SBEC. Undersigned counsel for Secretary Thurston does not represent SBEC. Upon information and belief, the Attorney General will represent SBEC if SBEC is properly added as a party hereto. Thus, undersigned counsel is not authorized to respond to paragraphs 57 through 73. To the extent that a response is deemed required from Secretary of State John Thurston, paragraphs 57 through 73 are denied.

74. Thurston admits that 13 exhibits are attached to the Second Amended Petition.

75. Thurston denies each and every material allegation in the Petition that is not specifically admitted herein.

76. Affirmatively, Thurston states that the Petition should be denied for failure to state a claim.

77. Affirmatively, Thurston states that if the Court grants Petitioners the requested relief, he be allowed sufficient time to verify and count the signatures, as was done in *Safe Surgery Arkansas v. Thurston*, 2019 Ark. 403, 591 S.W.3d 293.

WHEREFORE, Secretary of State John Thurston prays that the Second Amended Petition be denied and dismissed; or, in the alternative, for additional time to count the signatures; and for all other just and proper relief.

Respectfully submitted,

JOHN THURSTON
Arkansas Secretary of State

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CERTIFICATE OF SERVICE

I, Gary L. Sullivan, hereby certify that on July 27, 2020, I electronically filed the foregoing with the Clerk of the Court using the eFlex filing system, which shall serve all counsel of record:

/s/ Gary L. Sullivan