

CV-20-454

In the Arkansas Supreme Court
An Original Action

Arkansas Voters First, a ballot question committee; Bonnie Miller, individually and on behalf of Arkansas Voters First; and Open Primaries Arkansas, a ballot question committee

Petitioners

v

CV-20-454

John Thurston, in his official capacity as Secretary of State; the State Board of Election Commissioners

Respondents

Arkansans for Transparency, a ballot question committee; and Jonelle Fulmer, individually and on behalf of Arkansas for Transparency

Intervenors

**Supplement to the Third Amended
Original Action Complaint**

For their supplement, under Ark. R. Civ. Pro. 15(d), to their Third Amended Original Action Complaint, Bonnie Miller, Arkansas Voters First (“AVF”), and Open Primaries Arkansas (collectively, “Petitioners”) state:

1. Since Petitioners filed their Third Amended Original Action Complaint, the Secretary of State (“SOS”) delivered a correspondence

dated August 18, 2020, bringing into question new allegations regarding the validity of the petition concerning the Constitutional Amendment Establishing Top Four Open Primary Elections and Majority Winner General Elections with Instant Runoff if Necessary. (“Top Four Open Primary Petition”)

2. The SOS’s August 18, 2020, correspondence declares that the Top Four Open Primary Petition did not submit enough signatures to qualify for a cure period. The letter states that Petitioners turned in only 62,634 signatures of registered voters, 4,220 signatures short of the 66,864 valid signatures needed to qualify for a cure period. A copy of that letter is attached hereto as **Exhibit 1**.

3. Petitioners verified every signature that it turned in to the SOS. Petitioners’ internal procedure for validating a signature is more stringent than that of the SOS.

4. Therefore, on information and belief Petitioners’ proposed amendment did in fact have the requisite number of valid signatures.

5. Petitioners have requested a list of all registered voters that the SOS verified signed the petition parts submitted, and a list of those signatures that were deemed invalid. Petitioners received that list at

approximately 11:30 a.m. on August 19, 2020, and have not had an opportunity to analyze the data contained therein.

6. However, Petitioners submitted at least 4,220 signatures to the SOS that the SOS has, on information and belief, improperly and erroneously determined to be invalid.

7. In addition, the SOS refused to count signatures from those petitions that it earlier deemed invalid, but which the Special Master in this case ruled should have been counted. That issue is currently before the Court in Counts 1 and 2. Thus, the 4,220 signatures Petitioners need to be entitled to a cure is likely lower.

8. Petitioners intend to submit over 10,000 additional signatures to the SOS on August 20, 2020, pursuant to this Court's earlier provisional ruling granting a 30-day cure period.

9. The SOS has indicated he does not intend to count the signatures Petitioners plan to turn in on August 20, 2020. *See Exhibit 1.*

10. The issues raised by this Supplement are substantially similar to those raised by AVF related to the SOS's August 11, 2020, decision on the Arkansas Citizens' Redistricting Commission Amendment.

11. The SOS's actions appear to be a calculated attempt to avoid its obligations pursuant to Ark. Code Ann. § 7-5-204(c)(1) for which Petitioners are currently seeking emergency action from this Court. Attached as **Exhibit 2** is Petitioners' Emergency Motion for Preliminary Injunction which is incorporated and adopted by reference herein.

12. Petitioners incorporate and adopt by reference their earlier filed Motion to Expedite, for a Preliminary Injunction, and to Refer Additional Matters to the Special Master which is attached as **Exhibit 3**. For the reasons cited therein, given the deadlines involved Petitioners would be severely prejudiced and would suffer irreparable harm by the Secretary of State's refusal to perform his duties. For those reasons, a temporary restraining order is also warranted pursuant to Ark. R. Civ. P. 65(b). Furthermore, Petitioners request an expedited consideration of these matters.

WHEREFORE, Petitioners respectfully ask that this Court:

- (1) enter a preliminary injunction, compelling the Arkansas Secretary of State to count the signatures that will be turned in by Petitioners on August 20, 2020;

- (2) order the Secretary of State to provide Petitioners with a “cure period” related to the Top Four Open Primaries petition;
- (3) consolidate this matter with those issues raised by Petitioners in the Third Amended Original Action Complaint filed August 17, 2020;
- (4) send the factual matters raised herein to a special master;
- (5) grant Petitioners all other relief to which they are entitled.

/s/ Alec Gaines

Ryan Owsley (2007-151)

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Certificate of Service

I certify that on 20 August 2020, a copy of the foregoing was filed with this Court's eFlex filing system, which serves all counsel of record.

/s/ Alec Gaines

Alec Gaines



JOHN THURSTON
ARKANSAS SECRETARY OF STATE

ELECTRONICALLY FILED
Arkansas Supreme Court
Stacey Pectol, Clerk of the Courts
2020-Aug-18 10:04:51
CV-20-454
1 Page

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

via electronic mail to arhog@me.com

August 18, 2020

Re: 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:

On July 24, 2020, the Arkansas Supreme Court entered a *per curiam* directing me to “begin verifying signatures on both initiative petitions.” My office immediately complied with the directive.

My declaration of insufficiency after facial review was communicated to you by letter dated July 21, 2020. I have now completed verification of the 88,707 facially valid signatures from the initial count. Note, the 88,707 included the 84 signatures that I agreed to “throw-back” for verification at trial.

Pursuant to Article 5, § 1 of the Constitution of Arkansas, at least 66,864 (75% of 89,151) signatures from registered Arkansas voters are required to correct or amend an insufficient petition. I have verified that a total of 62,634 registered Arkansas voters signed the petition, thus the petition does not qualify for a cure period. All previous determinations regarding the insufficiency of the petition remain as well.

Sincerely,

John Thurston
Secretary of State

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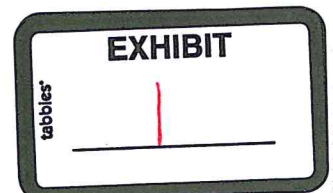


EXHIBIT A

CV-20-454

In the Arkansas Supreme Court
An Original Action

Arkansas Voters First, a ballot question committee; Bonnie Miller, individually and on behalf of Arkansas Voters First; and Open Primaries Arkansas, a ballot question committee

Petitioners

V

CV-20-454

John Thurston, in his official capacities as Secretary of State and Chair of the State Board of Election Commissioners; and the State Board of Election Commissioners

Respondents

Arkansans for Transparency, a ballot question committee; and Jonelle Fulmer, individually and on behalf of Arkansas for Transparency

Intervenors

EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

For their Emergency Motion for Preliminary Injunction, Bonnie Miller, Arkansas Voters First (“AVF”), and Open Primaries Arkansas (collectively, “Petitioners”) state:

1. The Petitioners incorporate by reference the allegations made in their Consolidated Original Petition, Amended Consolidated Original Petition, Second Amended Consolidated Original Action Complaint, Supplement to the Second Amended Consolidated Original



Action Complaint and Third Amended Consolidated Original Action Complaint.

2. AVF has submitted signatures to the Arkansas Secretary of State in support of two initiative petitions.

3. Whether or not the petitions have or will qualify for the ballot is the subject of this litigation.

4. Pursuant to Ark. Code Ann. §7-5-204(a), the deadline for the Arkansas Secretary of State to certify any proposed measures, questions, or amendments to the Arkansas Constitution to the County Board of Election Commissions of each county is Thursday, August 20, 2020.

5. The Secretary of State has not indicated whether or not he intends to certify these two proposed amendments as required by law. The Secretary of State should be ordered to certify the proposed amendments pursuant to Ark. Code Ann. §7-5-204(c)(1). The failure of the Secretary of State to certify these two amendments would be fatal to these proposed amendments.

6. There is no harm to the Secretary of State if he is compelled to certify these two amendments. If the Court rules against the

Petitioners, the Court could simply order that the votes for the proposed amendments not be counted. *See* Ark. Code Ann. § 7-5-204(c)(2).

WHEREFORE, Petitioners respectfully ask this Court to:

- (a) Enter a mandatory injunction, compelling the Arkansas Secretary of State to certify these proposed constitutional amendments to the County Board of Election Commissioners of each county by Thursday, August 20, 2020 and to take all other steps necessary as required by law to ensure these measures are placed on the ballot if and until this court orders otherwise; and,
- (b) Award AVF all other just and proper relief to which it is entitled.

Respectfully Submitted,

/s/ Adam H. Butler
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CERTIFICATE OF SERVICE

I, Adam H. Butler, hereby certify that on August 17, 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/ Adam H. Butler

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In the Arkansas Supreme Court
An Original Action

Arkansas Voters First, a ballot question committee; Bonnie Miller, individually and on behalf of Arkansas Voters First; and Open Primaries Arkansas, a ballot question committee

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John Thurston, in his official capacity as Secretary of State; the State Board of Election Commissioners

Respondents

Arkansans for Transparency, a ballot question committee; and Jonelle Fulmer, individually and on behalf of Arkansans for Transparency

Intervenors

**Petitioners' Motion to Expedite, for a Preliminary Injunction
and
to Refer Additional Matters to the Special Master**

Bonnie Miller, Arkansas Voters First ("AVF"), and Open Primaries Arkansas (collectively, "Petitioners") state:

1. On July 6, 2020, AVF submitted timely, valid initiative petitions with the requisite accompanying signatures to the Secretary of State.

2. On July 14, 2020, the Secretary of State wrote to AVF stating that he was unable to count *any* signatures submitted by AVF in connection with either petition because of the wording of AVF's certification language (required under Ark. Code Ann. § 7-9-601(b)(3)), which was submitted to the Secretary of State. **Exhibits 5 and 6** to Second Amended Complaint (incorporated herein by reference).

3. On July 17, 2020, having no other remedies, AVF filed this original action.

4. On July 21, 2020, AVF filed its first amendment to the original action petition to clarify the standing of the two ballot question committees.

5. Later that day on July 21, 2020, after stating that he was prohibited from counting signatures, the Secretary of State wrote AVF stating additional reasons for not counting thousands more signatures submitted in support of the petition for open primaries/rank-choice. **Exhibit 7** to the Second Amended Complaint (incorporated herein by reference).

6. After culling these signatures on various grounds, the face of the petition for open primaries/rank-choice voting had only 88,623 signatures on its. *Id.*

7. On July 22, 2020, the State Board of Election Commissioners met and refused to certify the sufficiency of the popular name and ballot title for open primaries/rank-choice voting.

8. On July 23, 2020, the Secretary of State sent a letter to AVF regarding the Redistricting Petition contending that AVF only submitted 95,072 (90,493 facially valid + 4,579 culled) signatures. See **Exhibit 3** to the Third Amended Consolidated Original Action Complaint (incorporated herein by reference). AVF submitted 15,118 petition parts (pages) containing 98,728 signatures. See **Exhibit 2** to the Third Amended Complaint (incorporated herein by reference). AVF has learned that the difference in the count (3,656 signatures) is that the Secretary of State contends that some boxes containing the Redistricting Petition were submitted with the Open Primaries petition. This is not accurate. There is no dispute that these petitions were in the office of the Secretary of State at or before the close of business on July 6, 2020. AVF has obtained copies of these petition parts, has

reviewed them and has validated the number of registered voters on these petitions. AVF contends that there are in excess of 2,400 registered voters who signed these petitions. This number exceeds the number that the Secretary of State contends that AVF needs in order to qualify for the cure period. In addition to the petitions culled because they were allegedly turned in with the Open Primaries petition, the Secretary of State contends that he culled an additional 4,579 signatures from the Redistricting Petition, citing several flawed reasons.

9. On July 24, 2020, this Court appointed the Honorable John Fogleman as special master to hear factual issues arising under the Amended Consolidated Original Petition, granted Petitioners' Motion to Expedite, and for a Preliminary Injunction, and also granted a provisional cure period.

10. On July 27, 2020, AVF filed a Second Amended Consolidated Original Action Complaint. The factual matters that were previously raised in the first amended complaint were designated as Count 1 in the second amended complaint.

11. AVF added the Secretary of State's additional grounds for culling the Open Primaries petition signatures as Count 2 in the Second Amended Consolidated Original Action Complaint.

12. On July 28, 2020, this Court referred Count 2 to Judge Fogleman for inclusion in the existing proceedings and expanded his authority to consider the factual issues in Count 2. This Court also granted Petitioners' prior Motion to Expedite.

13. This Court bifurcated Count 3, dealing with the sufficiency of the ballot title and popular name of the Open Primaries Amendment and set a briefing schedule.

14. On July 29, 2020, Petitioners filed a supplement to the Second Amended Original Action Complaint.

15. On August 5, 2020, AVF submitted an additional 45,896 facially valid signatures to the Secretary of State during the provisional cure period. See **Exhibit 4** to the Third Amended Consolidated Original Action Complaint (incorporated herein by reference).

16. On August 11, 2020, the Secretary of State sent correspondence to AFV, wherein he declared AVF failed to submit enough valid signatures for the Redistricting Petition to qualify for a

cure period. The Secretary of State contended that AVF turned in only 64,722 signatures of registered voters when the minimum number to qualify for the 30-day cure period is 66,864. See **Exhibit 4** to the Third Amended Consolidated Original Action Complaint (incorporated by reference).

17. The Secretary of State's contention that there were only 64,722 signatures of registered voters in support of the Redistricting Petition is simply wrong. AVF submitted at least an additional 10,000 (Ten Thousand) signatures of registered voters that should have been counted by the Secretary of State.

18. The Secretary of State has indicated that he does not intend to count the valid signatures Petitioners submitted in support of the Redistricting Petition on August 5, 2011, or the signatures he previously culled, as he indicated in his letter dated August 11, 2020, that "the petition does not qualify for a cure period". See **Exhibit 1** to the Third Amended Consolidated Original Action Complaint (incorporated by reference).

19. The process of counting and verifying the number of valid signatures is but one step in the process. Without taking that step,

immediately, the other, applicable, election deadlines could doom the measure in question due to the Arkansas Secretary of State's refusal to perform his duties regarding the counting of signatures.

20. The Secretary of State should be ordered to immediately count the valid signatures submitted by Petitioner on July 6, 2020 and August 5, 2020.

21. Pursuant to Ark. R. Civ. P. 65, Petitioners have demonstrated they will suffer irreparable harm if the Secretary of State does not begin counting the valid signatures they submitted on August 5, 2020, and the valid signatures they submitted on July 6, 2020 that the Secretary of State erroneously culled. The measure in question will be unlawfully defeated by the refusal of the Secretary of State to perform his duties under Arkansas law if he is not ordered to immediately count the valid signatures.

22. Pursuant to Ark. R. Civ. P. 65, Petitioners have demonstrated a likelihood of success on the merits. The reasons given by the Arkansas Secretary of State for his refusal to count Petitioners' valid signatures are disingenuous, thinly-veiled stalling tactics that are not supported by Arkansas law.

23. Ark. R. Civ. P. 65(b) provides that the Court may issue a temporary restraining order without notice or with oral notice.

24. This Court should issue an immediate, preliminary injunction directing the Arkansas Secretary of State to immediately begin counting the valid signatures submitted by Petitioners on August 5, 2020, as well as the wrongly culled signatures that were submitted on July 6, 2020.

25. Given the short time frames involved in this case, and in the interest of judicial economy, AVF respectfully requests this Court expedite consideration of this motion.

For the reasons set forth in the Third Amended Consolidated Original Action Complaint and this Motion, the Petitioners request that the Court enter a preliminary injunction requiring the Secretary of State to immediately begin counting the signatures submitted on August 5, 2020 in support of the Redistricting Petition, and the wrongly culled signatures submitted on July 6, 2020, in support of the Redistricting Petition, provide the Petitioners the "cure-period" required by Arkansas law; refer the additional matters raised in the Third

Amended Consolidated Original Action Complaint to a Special Master
and for all other relief to which Petitioners are entitled.

Respectfully Submitted,

/s/ Adam H. Butler
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Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Adam H. Butler, hereby certify that on August 17, 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/ Adam H. Butler