

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION**

BONNIE HEATHER MILLER, and THE  
LEAGUE OF WOMEN VOTERS OF  
ARKANSAS,

*Plaintiffs,*

v.

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

*Defendant.*

Case No. 5:20-cv-05163-TLB

Hon. Timothy L. Brooks

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**REPLY BRIEF ON ISSUES B.1 AND B.2 IN DEFENDANT’S RESPONSE IN  
OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

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Plaintiffs’ constitutionally protected right to speak in support of electoral reform in Arkansas has been infringed. A “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion)).

Defendants begin section B of their Response referring to “Plaintiffs’ initiatives” and whether they have qualified for the ballot. Def. Br., ECF 16, at 15. This shows a fundamental misunderstanding of the nature of the Plaintiffs’ rights. Bonnie Miller is not asserting the rights of Arkansas Voters First, she is asserting her own First Amendment right to sign a petition to amend her state constitution. Similarly, the League of Women Voters of Arkansas are asserting their members’ rights to sign the Citizens Redistricting Commission (“CRC”) and Open Primaries Amendment (“OPA”) petitions (together “the Petitions”). Once the right to petition for a state constitutional amendment has been extended to its citizens, the State must “accord the participants

in that process the First Amendment rights that attach to their roles.” *John Doe No. 1 v. Reed*, 561 U.S. 186, 195, (2010). The First Amendment protection for those signatures is not that they be allowed to sign a piece of paper that is ignored by the state for an irrational reason. The First Amendment protection for ballot petition signatures is a protection against limits on Plaintiffs’ “ability to make the matter the focus of statewide discussion” because that “has the inevitable effect of reducing the total quantum of speech on a public issue.” *Meyer v. Grant*, 486 U.S. 414, 423 (1988). Defendants’ enforcement of Ark Code Ann. § 7-9-601(b)(3) as applied to the Petitions, is limiting Plaintiffs’ First Amendment rights. That is the injury.

All the originally submitted signatures (98,728 for CRC and 94,913 for OPA) were rejected as a result of the application of Ark. Code Ann. § 7-9-601(b)(3). This means that Plaintiffs’ signatures on the CRC Petition and the OPA Petition will not count towards the placement of either amendments on the 2020 general election ballot. Their voices have been muted and that constitutes an irreparable injury that this Court can redress.

To demonstrate redressability a plaintiff must show that it is “likely, as opposed to merely speculative, that the injury will be “redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (internal citation omitted). This inquiry does not require a plaintiff to prove that the defendant is responsible for *every* obstacle. Instead, a plaintiff needs to only show that there is a “significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.” *Utah v. Evans*, 536 U.S. 452, 464 (2002).

Defendant suggests that because there are outstanding claims as to the validity of a small portion of the signatures for the Petitions (and an outstanding claim as to the ballot language for OPA) that the Plaintiffs’ alleged injury is not redressable by this Court. Not so. Plaintiffs have asked this Court to set aside a requirement with which it is impossible for them to comply, so that

their signatures may fairly be judged by the ordinary state process. That process will involve both the Secretary of State's determination as to the facial validity of the signatures *and* the Arkansas Supreme Court considering the matters that Arkansas Voters First has placed before it.

This Court can redress Plaintiffs' injuries for the CRC Petition. Plaintiffs—and approximately 150,000 other Arkansans—are injured by Defendant's requirement that AVF comply with a statute where compliance is impossible. If this Court grants Plaintiffs requested relief, it would remove an impossible-to-surmount barrier placed before AVF. It would allow Defendant to acknowledge Plaintiffs', and others', fundamental rights by counting the signatures AVF collected and allowing the measure to continue on the path to being the focus of statewide discussion.

Defendant avoids the issue of redressability for Plaintiffs' claim before this Court by noting the *next* impediment—a determination of whether AVF has collected a sufficient number of signatures—would still prevent the CRC petition from appearing on the ballot. After AVF challenged the number of signatures that Defendant verified, the Arkansas Supreme Court mooted that challenge because it found that AVF had not complied with Ark Code Ann. § 7-9-601(b)(3) and thus did not even consider whether Defendant improperly removed signatures. Thus, if this Court granted Plaintiffs' requested relief and found that Ark Code Ann. § 7-9-601(b)(3) is unconstitutional as applied to Plaintiffs, it would not immediately place the measure on the ballot but it would “significantly increase” the chances of allowing Plaintiffs to express their fundamental rights.

Therefore, Plaintiffs' motion for preliminary injunction should be granted such that the severe burdens placed on Plaintiffs due to the false statement requirement of Ark. Code Ann. § 7-9-601(b)(3) are removed and the Defendant Secretary of State can begin verifying the signatures.

Dated: September 10, 2020

Respectfully submitted,

/s/ David Couch

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