

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

**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, Intervenor is 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, Intervenor is 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, Intervenor states that Exhibit 1 speaks for itself and deny any allegations inconsistent with the content of Exhibit 1.

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

6. Intervenor admits the allegations in paragraph 6 of the Amended Petition.

7. Intervenor states 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. Intervenor deny the allegations in paragraph 8 of the Amended Petition.

9. Intervenor 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. Intervenor 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. Intervenor 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. Intervenor deny that the petitions' pages and the signatures thereon should be counted for any purpose, including the initial count.

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

13. Intervenor 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). Intervenor 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. Intervenor admits 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. Intervenor states 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. Intervenor denies any allegations inconsistent with the contents of Exhibits 5 and 6.

16. Intervenor states 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. Intervenor denies any allegations inconsistent with the contents of Exhibits 5 and 6.

17. Intervenor states 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. Intervenor denies any allegations inconsistent with the contents of Exhibits 5 and 6.

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

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

19. Intervenor 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). Intervenor expressly deny that Petitioners met the requirements of Arkansas Code Annotated § 7-9-601(b)(3).

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

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

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

23. Intervenor 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. Intervenor 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

I, Kevin A. Crass, hereby certify that on this 24th day of July, 2020, I electronically filed this pleading 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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Attorney for Petitioner

Gary Sullivan
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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



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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 script is cursive and fluid, with the first letter of each word being capitalized and prominent.

John Thurston
Secretary of State