

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

**INTERVENORS' MOTION TO STRIKE AND DISMISS
PETITIONERS' SUPPLEMENT TO THE SECOND AMENDED
ORIGINAL ACTION COMPLAINT**

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 Motion to Strike and Dismiss Petitioners' Supplement to the Second Amended Original Action Complaint, state as follows:

1. Petitioners' Supplement to their Second Amended Original Action Complaint should be stricken and dismissed for two reasons.

2. First it is not a supplemental pleading. It is a last-minute amendment that is prejudicial because the proceedings before Special Master Fogleman are set to close on Friday, July 31, 2020 (today) and the record will be closed. Second, even if it were a proper pleading, there is no jurisdiction hear it.

3. For the reasons discussed herein, the Court should strike and dismiss Petitioners' "supplement" to their Second Amended Original Action Complaint. Ark. R. Civ. P. 12(b)(1); Ark. R. Civ. P. 15(d).

Memorandum of Authorities

Petitioners have not filed a supplement to their last Complaint. Under the Arkansas Rules of Civil Procedure, a supplemental pleading stems from new facts occurring after the complaint. Ark. R. Civ. P. 15(d) (a supplemental pleading is one that "set[s] forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented"). Here no new facts have occurred; the "supplement" is a new claim.

Petitioners' reliance on their recent receipt of files to invoke Rule 15(d) is contrary to undisputed facts. Petitioners knew no later than the Secretary's July 21, 2020 letter to them that signatures had been culled from the Open Primaries petition under Arkansas Code Annotated § 7-9-126. The very provision that Petitioners are attempting to challenge is cited in the Secretary's letter as one of the reasons for culling signatures. *See* Ex. 7 to Pets. Sec. Am. Orig. Action Compl. ("The reasons

for the signatures that were culled include: (e) some signatures on petition parts contained verifications dated earlier than the date on which a petitioner signed the petition”). Petitioners’ subsequent physical possession of the culled files is immaterial and does not constitute a new “occurrence” since their last Complaint. *See* Ark. R. Civ. P. 15(d). Petitioners’ attempt to improperly tack on additional claims within the confines of this matter’s expedited schedule is prejudicial, as there is no time to develop a record on, for example, the State’s interests in defending the statute as the Attorney General failed to receive sufficient notice. Such gamesmanship should not be permitted.

Second, Petitioners’ Supplement to their Second Amended Original Action Complaint should be stricken and dismissed for lack of jurisdiction.¹ The claim that sections of Arkansas Code Annotated § 7-9-126 are invalid belongs initially in the circuit court and only in this Court on appeal. Amendment 80 established the circuit courts as “the trial courts of original jurisdiction of all justiciable matters not otherwise assigned” by the Arkansas Constitution. Ark. Const., Am. 80, § 6. In

¹ Although the Court denied a motion to dismiss based on subject matter jurisdiction previously, it did so without analysis and while specifically declining to reach the constitutional issue raised. *See Safe Surgery Arkansas v. Thurston*, 2019 Ark. 403, 591 S.W.3d 293. Further, the Court cited to Arkansas Supreme Court Rule 1-2(a)(3) – petitions for prohibition, injunction, or mandamus relief directed to state officials – as the basis for its jurisdiction. But unlike *Safe Surgery Arkansas*, Petitioners here have not pleaded the statute’s unconstitutionality as a basis for mandamus or injunctive relief.

contrast, the Supreme Court is a court of limited jurisdiction. *Id.* at § 2. Its original jurisdiction extends only to determinations of the “sufficiency of state initiative and referendum petitions and proposed constitutional amendments.” *Id.*; *see also id.* at Art. 5, § 1 (“**Sufficiency.** The sufficiency of all state-wide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State.”); Ark. Sup. Ct. R. 6-5(a) (providing for original jurisdiction in “extraordinary actions required by law, such as suits attacking the validity of statewide petitions filed under Amendment 7 of the Arkansas Constitution”). It is pursuant to this authority that the Court has decided ballot title and signature challenges. *See, e.g., Zook v. Martin*, 2018 Ark. 306, 558 S.W.3d 385 (signature challenge under Article 5, § 1); *Benca v. Martin*, 2016 Ark. 359, 500 S.W.3d 742 (same); *Lange v. Martin*, 2016 Ark. 337, 500 S.W.3d 154 (ballot title sufficiency under Ark. Sup. Ct. R. 6-5(a) and Art. 5, § 1).

Such “sufficiency” actions, however, are distinguishable from constitutional attacks on statutes governing statewide initiatives and referendum. *See, e.g., McDaniel v. Spencer*, 2015 Ark. 94, 2, 457 S.W.3d 641, 646 (2015), *as revised* (Mar. 11, 2015) (appellate jurisdiction of circuit court’s ruling enjoining the Secretary of State on constitutional grounds). They are also distinguishable from challenges to the validity of initiative petitions and referendums. *Stilley v. Henson*, 342 Ark. 346, 350, 28 S.W.3d 274, 277 (2000) (“Additionally, when the legal validity of an

initiative petition is at issue, jurisdiction is in circuit court. On the other hand, when the challenge goes to the county clerk's determination of the sufficiency of the petition, such as a challenge to the signatures or the ballot title, jurisdiction is in chancery court.”) (citations omitted).

The Court has resisted expanding its original jurisdiction beyond the “sufficiency” of a petition in the past. For example, in *Forrester v. Daniels*, 2010 Ark. 397, 373 S.W.3d 871, the Court declined to hear a challenge to a legislatively referred constitutional amendment, finding that it did not come within the ambit of its Amendment 7 jurisdiction. In reaching that conclusion, the Court reasoned:

It is only necessary for this court to make a sufficiency determination in those cases involving voter initiated acts, referendums, and proposed constitutional amendments as set forth in amendment 7. In other words, amendment 7 specifically provides that sufficiency of all statewide petitions ‘shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State, which shall have original and exclusive jurisdiction over all such causes.’ Whereas, a challenge to an amendment referred by the legislature, pursuant to article 19, section 22, involves appellate review of whether the procedures governing the method for the legislature to propose an amendment have been followed.

Id. at 9, 373 S.W.3d at 876. The Court also cited its own Rule 6-5, noting that it did not change after Amendment 80 to indicate that its original jurisdiction included challenges to matters referred by the General Assembly. *Id.* at 9-10, 373 S.W.3d at 876.

Applying *Forrester*'s analysis here, there is no "sufficiency determination" to be made with regard to Petitioners' challenge to Arkansas Code Annotated § 7-9-126. Likewise, there is no indication in Rule 6-5 that the Court's original jurisdiction includes attacks on the validity of statutes. *See* Ark. Sup. Ct. R. 6-5(a).

In sum, there is nothing in Amendment 7, or in Petitioners' supplemental pleading, that requires the Court to take on a constitutional challenge of Arkansas Code Annotated § 7-9-126 as part of its original jurisdiction. In fact, the plain language of the governing constitutional provisions and Supreme Court rules indicate that such matters are not within the Court's original jurisdiction.

WHEREFORE, Intervenors Arkansans for Transparency and Jonelle Fulmer, individually and on behalf of Arkansans for Transparency, pray that this Court grant their Motion to Strike and Dismiss Petitioners' Supplement to the Second Amended Original Action Complaint.

Respectfully submitted,

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By: /s/ Kevin A. Crass
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CERTIFICATE OF SERVICE

I, Kevin A. Crass, hereby certify that on this 31st 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:

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