

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' RESPONSE TO SECOND 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 Response to Petitioners' Second Amended Consolidated Original Petition, state as follows:

1. Intervenors admit that Petitioners have purportedly filed an original action under Amendment 7 to the Arkansas Constitution and the Court's Rule 6-5 but deny that Petitioners are entitled to any relief thereunder.

2. Intervenors deny that the Secretary of State wrongly denied a cure period but otherwise admit that the Court has jurisdiction and venue to review statewide initiative petitions. All remaining allegations in paragraph 2 are denied.

3. Intervenors admit the allegations in paragraph 3.

4. Intervenors admit the allegations in paragraph 4.

5. Intervenors admit the allegations in paragraph 5.

6. Intervenors admit the allegations in paragraph 6.

7. Intervenors admit that Respondent John Thurston is the Secretary of State. Intervenors state that the Arkansas Constitution, Amendment 7, and Arkansas Code Annotated § 7-9-126 speak for themselves and deny any allegations inconsistent therewith.

8. Intervenors state that the Arkansas Constitution, Amendment 7, and Arkansas Code Annotated § 7-9-111 speak for themselves and deny any allegations inconsistent therewith. Any remaining allegations are denied.

9. Intervenors are without sufficient knowledge or information to admit or deny the allegations in paragraph 9; therefore, those allegations are denied.

10. Intervenors deny the allegations in paragraph 10.

11. Intervenors deny the allegations in paragraph 11.

12. Intervenors deny the allegations in paragraph 12.

13. Intervenors state that Arkansas Code Annotated § 7-9-126 speaks for itself and deny any allegations inconsistent therewith.

14. Intervenors deny the allegations in paragraph 14.

15. Intervenors state that Arkansas Code Annotated § 7-9-111 speaks for itself and deny any allegations inconsistent therewith.

16. Intervenors deny the allegations in paragraph 16.

17. Intervenors deny the allegations in paragraph 17.

18. Intervenors state that the letters from the Secretary of State to Petitioners dated July 14, 2020 and attached as Exhibits 5 and 6 to the Second Amended Petition speak for themselves and deny any allegations inconsistent therewith.

19. Intervenors deny the allegations in paragraph 19.

20. Intervenors admit that an amended original action petition was filed on July 21, 2020. Intervenors are without sufficient knowledge or information to deny the remaining allegations in paragraph 20; therefore, those allegations are denied.

21. Intervenors state that the letter from the Secretary of State dated July 21, 2020 and attached as Exhibit 7 speaks for itself and denies any allegations inconsistent therewith.

22. On information and belief, Intervenors admit the State Board did not certify the ballot title and popular name for open primaries/ranked choice. Any remaining allegations are denied.

23. Intervenors admit the allegations in paragraph 23.

24. Intervenors restate and incorporated their responses to the foregoing paragraphs herein.

25. Intervenors state that the letter from the Secretary of State dated July 23, 2020 speaks for itself and denies any allegations inconsistent therewith.. The remaining allegations in paragraph 25 are denied.

26. Intervenors deny the allegations in paragraph 26.

27. Intervenors state that Arkansas Code Annotated § 7-9-126 speaks for itself and deny any allegations inconsistent therewith.

28. Intervenors state that Arkansas Code Annotated § 7-9-601 speaks for itself and deny any allegations inconsistent therewith.

29. Intervenors state that Arkansas Code Annotated § 7-9-601 speaks for itself and deny any allegations inconsistent therewith.

30. Paragraph 30 does not contain factual allegations that require a response. To the extent a response is required, the allegations are denied.

31. Intervenors state that Exhibit 12 speaks for itself and deny an allegations inconsistent therewith. Intervenors deny that the certification met the statutory requirements.

32. Intervenors state that Exhibit 13 speaks for itself and deny an allegations inconsistent therewith. Intervenors deny that the certification met the statutory requirements.

33. Intervenors admit that numerous emails were sent. The rest of paragraph 33 does not contain factual allegations that require a response. To the extent a response is required, the allegations are denied.

34. Intervenors state that Exhibits 5 and 6 speaks for themselves and deny an allegations inconsistent therewith.

35. Intervenors state that Exhibits 5 and 6 speaks for themselves and deny an allegations inconsistent therewith.

36. Intervenors state that Arkansas Code Annotated § 7-9-601 speaks for itself and deny any allegations inconsistent therewith.

37. Intervenors state that the letters from the Secretary of State speak for themselves and deny an allegations inconsistent therewith.

38. Intervenors deny the allegations in paragraph 38.

39. Intervenors deny the allegations in paragraph 39.

40. Intervenors deny the allegations in paragraph 40.

41. Intervenors deny the allegations in paragraph 41.

42. Intervenors admit that the Court has granted a provisional cure pursuant to its per curiam Order of July 24, 2020. Intervenors deny the remaining allegations in paragraph 42.

43. Intervenors state that the cases cited speak for themselves and deny any allegations inconsistent therewith. Further, Intervenors deny and disagree with Petitioners' interpretation of the cases cited and expressly deny that Intervenors submitted the required number of signatures and deny that they are entitled to a cure.

44. Intervenors state that the cases cited speak for themselves and deny any allegations inconsistent therewith. Further, Intervenors deny and disagree with Petitioners' interpretation of the cases cited and expressly deny that Intervenors submitted the required number of signatures and deny that they are entitled to a cure.

45. Intervenors deny the allegations in paragraph 45.

46. Intervenors deny the allegations in paragraph 46.

47. Intervenors deny the allegations in paragraph 47.

48. Intervenors deny the allegations in paragraph 48.

49. Intervenors deny the allegations in paragraph 49 and deny that Petitioners are entitled to any relief.

50. Intervenors restate and incorporated their responses to the foregoing paragraphs herein.

51. Intervenors state that the letter from the Secretary of State attached as Exhibit 7 speaks for itself and deny an allegations inconsistent therewith.

52. Intervenors deny the allegations in paragraph 52.

53. Intervenors state that the letter from the Secretary of State attached as Exhibit 7 speaks for itself and deny an allegations inconsistent therewith.

54. Intervenors state that the letter from the Secretary of State attached as Exhibit 7 speaks for itself and deny an allegations inconsistent therewith.

55. Intervenors deny the allegations in paragraph 55.

56. Intervenors deny the allegations in paragraph 56.

57. Intervenors restate and incorporated their responses to the foregoing paragraphs herein.

58. Intervenors will be obtaining separate counsel for issues involving the ballot title and popular name of Open Primaries/Ranked Choice and at the present time, deny the allegations stated in paragraph 58 to the extent contrary to the cited law and Intervenors' position.

59. Intervenors will be obtaining separate counsel for issues involving the ballot title and popular name of Open Primaries/Ranked Choice and at the present time, deny the allegations stated in paragraph 59 to the extent contrary to the cited law and Intervenors' position.

60. Intervenors will be obtaining separate counsel for issues involving the ballot title and popular name of Open Primaries/Ranked Choice and at the present time, deny the allegations stated in paragraph 60 to the extent contrary to the cited law and Intervenors' position.

61. Intervenors will be obtaining separate counsel for issues involving the ballot title and popular name of Open Primaries/Ranked Choice and at the present time, deny the allegations stated in paragraph 61 to the extent contrary to the cited law and Intervenors' position.

62. Intervenors will be obtaining separate counsel for issues involving the ballot title and popular name of Open Primaries/Ranked Choice and at the present time, deny the allegations stated in paragraph 62 to the extent contrary to the cited law and Intervenors' position.

63. Intervenors will be obtaining separate counsel for issues involving the ballot title and popular name of Open Primaries/Ranked Choice and at the present time, deny the allegations stated in paragraph 63 to the extent contrary to the cited law and Intervenors' position.

64. Intervenors will be obtaining separate counsel for issues involving the ballot title and popular name of Open Primaries/Ranked Choice and at the present time, deny the allegations stated in paragraph 64 to the extent contrary to the cited law and Intervenors' position.

65. Intervenors will be obtaining separate counsel for issues involving the ballot title and popular name of Open Primaries/Ranked Choice and at the present time, deny the allegations stated in paragraph 65 to the extent contrary to the cited law and Intervenors' position.

66. Intervenors will be obtaining separate counsel for issues involving the ballot title and popular name of Open Primaries/Ranked Choice and at the present time, deny the allegations stated in paragraph 66 to the extent contrary to the cited law and Intervenors' position.

67. Intervenors will be obtaining separate counsel for issues involving the ballot title and popular name of Open Primaries/Ranked Choice and at the present time, are without sufficient information to admit or deny the allegations on the meeting date stated in paragraph 67 and therefore those allegations are denied.

68. On information and belief, Intervenors admit that the ballot title and popular name were not certified by the SBEC.

69. Intervenors will be obtaining separate counsel for issues involving the ballot title and popular name of Open Primaries/Ranked Choice and at the present time, deny the allegations stated in paragraph 69 to the extent contrary to the cited law and Intervenors' position.

70. Paragraph 70 does not contain factual allegations that require a response. To the extent a response is required, the allegations are denied.

71. Intervenors will be obtaining separate counsel for issues involving the ballot title and popular name of Open Primaries/Ranked Choice and at the present time, deny the allegations stated in paragraph 71 to the extent contrary to Intervenors' position.

72. Intervenors will be obtaining separate counsel for issues involving the ballot title and popular name of Open Primaries/Ranked Choice and at the present time, deny the allegations stated in paragraph 72 to the extent contrary to Intervenors' position.

73. Intervenors will be obtaining separate counsel for issues involving the ballot title and popular name of Open Primaries/Ranked Choice and deny the allegations stated in paragraph 73 to the extent contrary to Intervenors' position.

74. Intervenors admit that Petitioners have attached 13 exhibits to their Second Amended Petition but deny any other allegations made in paragraph 74 or the exhibits.

75. The "WHEREFORE" paragraph of the Second Amended Petition contains a prayer for relief, not factual allegations, and thus no response is required. To the extent that a response is required, Intervenors: deny that Petitioners are entitled to or should be granted a preliminary or permanent injunction; deny that Petitioners are entitled to or should be granted an Order providing them with a "cure period" of at least 30 days on both petitions; deny that factual matters surrounding

Count 2 be included in the existing proceedings and on the existing briefing schedule set by the Court; admit and agree to bifurcating consideration of the ballot title issue and setting an independent briefing schedule; and deny that AVF or any Petitioner is entitled to or should be granted any other relief.

76. All allegations not specifically admitted herein are denied.

77. 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 check 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.

78. 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 a cure period. Otherwise, the provision

mandating certification of canvassers' passage of the background checks is rendered meaningless.

79. 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 as Exhibit 1 to the Answer to the First Amended Petition. 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.

80. 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).

81. Pleading affirmatively, Petitioners have not met the requirements for the issuance of either a preliminary or permanent injunction.

82. 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).

83. 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)).

84. Intervenors plead Arkansas Code Annotated §§ 7-9-601 and 7-9-126 as defenses.

85. Intervenors reserve the right to file cross-claims, amend, and plead further as investigation and discovery continues.

WHEREFORE, Intervenors Arkansans for Transparency, a ballot question committee, and Jonelle Fulmer, individually and on behalf of Arkansans for Transparency, pray that the Second Amended Consolidated Original Petition be denied and dismissed.

Respectfully submitted,

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By: /s/ Kevin A. Crass
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behalf of Arkansans for Transparency*

CERTIFICATE OF SERVICE

I, Kevin A. Crass, hereby certify that on this 27th 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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