

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 Arkansans for Transparency

Intervenors

**MOTION TO STRIKE
THE STATE BOARD OF ELECTION COMMISSIONERS'
BRIEF ON COUNTS 1 AND 2 AND ITS
MOTION TO DISMISS**

Petitioners, for their Motion to Strike the State Board of Election Commissioners' Brief on Counts 1 and 2 and its Motion to Dismiss, states:

1. Each time Respondents have moved the goal post over the last month, Petitioners have been forced to amend their pleadings. One of those amendments added the State Board of Election Commissioners ("SBEC") as a respondent only with respect to Count 3, the sufficiency of

the ballot title. Now SBEC is attempting to shove its way into Counts 1 and 2—both on those counts and now in its motion to dismiss. Because SBEC has no claims or defenses regarding Counts 1 and 2, and because they are not even a party with respect to those claims, both of SBEC’s filings should be stricken under ARCP Rule 12(f).

2. This Court is well-versed in the convoluted history of this litigation which began on July 17, 2020, in which this this Court has repeatedly forced the Secretary of State to perform his duties in compliance with the law. Petitioners will recount only a portion of that history for the Court’s convenience in consideration of this Motion.

3. The SBEC and its chair, Secretary of State John Thurston, were first named as a party to this action in the Second Amended Consolidated Original Action Complaint (the “SAC”) on July 27, 2020, in the additional Count 3 – Sufficiency of the Ballot Title and Popular Name for Open Primaries/Rank-Choice Voting. The factual allegations regarding Count 3 are recited therein and are solely directed at SBEC, a fact acknowledged by the Secretary of State in his Response to the SAC. Petitioners requested a bifurcation of Count 3, dealing with the sufficiency of the popular name and ballot title of the top four open

primaries petition, for consideration independent from Counts 1 and 2, which dealt with actions by the Secretary of State related to the signature count.

4. On July 28, 2020, this Court granted Petitioners' bifurcation request setting this case on two separate tracks. Counts 1 and 2 were referred to the Special Master for factual determinations, while Count 3 was set for a briefing schedule commencing August 7, 2020.

5. Petitioners filed a Supplement to the Second Amended Original Action Complaint on July 29, 2020, and a Third Amended Consolidated Original Action Complaint on August 17, 2020, pertaining to issues unrelated to Counts 1 and 2.

Counts 1 and 2

6. The Special Master conducted a four-day trial on Counts 1 and 2 between July 28-31. Petitioners, the Secretary of State, and Intervenors participated in the trial. SBEC did not participate in the trial, because it was not a party to Count 1 and 2.

7. The Special Master issued his report and finding of facts on August 10, 2020.

8. Petitioners filed the opening brief on Counts 1 and 2 on August 14, 2020.

9. The Secretary of State and Intervenors filed response briefs on Counts 1 and 2 on August 18, 2020.

10. SBEC also filed a response brief on Counts 1 and 2 on August 18, 2020, which is the primary subject of this Motion.

11. Petitioners reply brief is due today, August 19, 2020, at noon.

Count 3

12. Count 3 is now fully briefed.

13. Petitioners filed the opening brief on Count 3 on August 7, 2020.

14. SBEC and Intervenors filed response briefs on August 14, 2020. The Secretary of State did not file a response brief to Count 3, because it was not a party to Count 3.

15. Petitioners filed the reply brief on Count 3 on August 17, 2020.

Grounds to Strike

16. SBEC was not a respondent to Counts 1 and 2.

17. SBEC did not participate in the four-day trial of the factual issues raised by Counts 1 and 2.

18. SBEC did not participate in any of the evidentiary rulings related to Counts 1 and 2.

19. In fact, SBEC has constitutional or statutory role in, and took no actions related to, the signature review at issue in Count 1 and 2. As briefed in Count 3, Article 5, Section 1 of the Arkansas Constitution specifically limits the role of the SBEC to certification of the ballot title, not validation of petition signatures. Ark. Const. art. V, § 1 (“the exact title to be used on the ballot . . . shall be submitted to the [SBEC], who shall certify such title to the Secretary of State . . .”). SBEC did not enter this fray until SBEC refused to certify the ballot title and popular name for the top four open primaries petition at its July 22, 2020, meeting.

20. For these reasons, SBEC has no standing to file a Brief on Counts 1 and 2 and the brief should be stricken. SBEC’s response is more in the nature of an amicus brief but the filing does not comply with this Court’s rules for amicus curiae, and, in any event, is not styled as such.

21. It is therefore improper for a state agency like the SBEC to attempt to weigh in on another state agency’s actions, especially on an issue in which it did not participate in any of the underlying actions.

22. The actual merits of the 49-page motion to dismiss (the “MTD”) are woefully deficient and would demand a more adversarial response in normal litigation. This Court should strike the MTD pursuant to Ark. R. Civ. P. 12(f). The MTD is a pleading that raises insufficient defenses that are “redundant, immaterial, impertinent” and arguably “scandalous.”

23. First, the MTD itself complains of Petitioners’ “continuously evolving complaints.” MTD, pp. 1-2. Even a cursory review of the facts of this case reveals that the amended and supplemental complaints filed by Petitioners are being driven by the actions of the Secretary of State and SBEC, not the other way around.

24. SBEC lays out three legal bases for its MTD. The brief itself is nearly a **word-for-word reproduction** of the two other briefs filed by SBEC in this matter.

25. SBEC first cites the argument that Petitioners allegedly “failed to comply with Arkansas’s background-check-certification statute.” Again, the certification language has nothing to do with Count 3 of the operative complaint and SBEC’s argument in this regard is **solely** an attempt to shoehorn in a justification for its improper brief on

Counts 1 and 2. SBEC fails to advise this Court how it could properly rule on a motion to dismiss and at the same time consider and weigh the numerous factual findings of the Special Master at the **trial** of this matter. But SBEC does not stop there. In connection with its MTD, SBEC repeatedly asks this Court to consider and reject the **arguments made by Petitioners** in its opening brief on Counts 1 and 2.

26. SBEC then states that Petitioners “have shown no error in SBEC’s misleadingness determination.” Is this not the same issue being decided by this Court in Count 3? Is it SBEC’s contention that this Court *does not* have original jurisdiction to consider the sufficiency of the popular name and ballot title? Its jurisdictional statement says otherwise.

27. Finally, SBEC argues that SBEC’s misleadingness review complies with Amendment 7. Again, that is the same issue before this Court in Count 3 that the parties have completely briefed.

28. Because this motion speak for itself, there is no accompanying brief.

WHEREFORE, Petitioners respectfully request that this Court grant its Motion to Strike SBEC's Brief on Counts 1 and 2 and its Motion to Dismiss Petitioners' Third Amended Complaint.

Respectfully submitted,

/s/ Alec Gaines

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Certificate of Service

I certify that on 19 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