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 Arkansas for Transparency — Intervenors

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Petitioners' Response to Intervenors' Motion to Strike and to Dismiss

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For their response to Intervenors' motion to strike and dismiss Petitioners' ARCP Rule 15(d) supplement, Bonnie Miller, Arkansas Voters First ("AVF"), and Open Primaries Arkansas (collectively, "Petitioners") state:

1. This Court should deny Intervenors' motion to strike for three reasons.

2. First, Intervenors do not even attempt to explain why the supplement prejudices them or delays the proceedings—which are the only two grounds on which a 15(d) supplement can be stricken.

3. Second, Intervenors misstate the facts that gave rise to the supplement.

4. Third, Intervenors ignore this Court's prior rulings on its authority to consider constitutional arguments in an Amendment 7 proceeding involving the sponsor of a statewide measure.

5. Therefore, Petitioners respectfully request this Court deny Intervenors' motion to strike and dismiss Petitioners' 15(d) supplemental pleading.

Incorporated Memorandum of Authorities

Intervenors' motion should be denied because it misstates the facts giving rise to the supplement, ignores this Court's rulings on its jurisdiction to hear constitutional-law questions raised by a sponsor in original action under Amendment 7, and fails to explain why the supplement prejudices Intervenors.

A. The motion misstates the facts giving rise to the supplement.

On July 21, 2020, the Secretary of State notified AVF of additional reasons why, in the Secretary's view, AVF's proposed measure on open primaries/rank-choice voting lacked a sufficient number of signatures on the initial, facial count. But only upon receiving and reviewing copies of the complete set of culled petition parts—which occurred on July 28, 2020—were Petitioners able to determine the total number of signatures that were culled on which grounds. The Secretary's July 21, 2020 letter does not contain that information. Further, it was only on July 28, 2020 that Petitioners were able to develop a complete record showing the similarities with the legal issue in *McDaniel v. Spencer*, 2015 Ark. 94, 457 S.W.3d 641 and that this single issue could be dispositive. On that day, Petitioners notified the special master, the parties, the Attorney General about the additional claim and filed the supplement.

Intervenors flatly misstate the factual predicate that gave rise to the supplemental pleading. Petitioners' supplement could not have been filed based on the July 21, 2020 letter because it lacked the necessary factual bases for Petitioners to bring a dispositive constitutional-law claim. Part of the purpose of Ark. R. Civ. Pro. 15(d), which is

substantively identical to Fed. R. Civ. Pro. 15(d), is to serve judicial economy, avoid multiplicity of litigation, and promote as complete an adjudication of the dispute between the parties as possible by allowing the addition of claims which arise after the initial pleadings are filed. Charles Alan Wright, *et al.*, 6A Federal Practice & Procedure § 1506; *City of Fort Smith v. Carter*, 364 Ark. 100, 107, 216 S.W.3d 594, 598 (2005) (holding that when, as here, an Arkansas and a federal rule of civil "are substantially identical," "the interpretation of these rules by federal courts are to be of a significant precedential value."). The newly discovered facts gave rise to a new claim. Rule 15(d) is the procedural vehicle to add the claim.

But even if the 15(d) pleading were better labeled an amended pleading under 15(a), "the mislabeling as a motion to amend as what is properly a motion to supplement is of little consequence." 6A Charles Alan Wright, *et al.,* Federal Practice and Procedure § 1506. "Courts commonly address improperly designated motions under the proper provision of Rule 15, and on occasion ignore the distinction between the two subsections." *Id*. (collecting cases).

Therefore, Intervenors' arguments about the factual bases for the supplemental claim and the use of Rule 15(d) fail.

B. The motion ignores this Court's rulings on its jurisdiction in original actions under Amendment 7.

Intervenors next claim that this Court lacks jurisdiction to hear a sponsor's constitutional-law arguments in an original action under Amendment 7. But when this Court heard the same arguments on motions to dismiss filed by several parties in a similar proceeding late last year, the Court denied those motions. *Safe Surgery Arkansas v. Thurston*, 2019 Ark. 403, 2, n1, 591 S.W.3d 293, 295. Those same parties—including the Secretary of State and the Attorney General—then raised the same jurisdictional arguments in their briefing. This Court again denied those claims in a brief footnote. *Id*.

Here, Intervenors make the same argument and attempt to sidestep *Safe Surgery* by claiming this Court gave no reasoning for its opinion. On the contrary, this Court heard extensive argumentation on the same issue that Intervenors now raise, and this Court, in *Safe Surgery*, dismissed those arguments as meritless—not once but twice. The Court should do the same here.

C. The motion should be denied because Intervenors have given no reason why the supplement prejudices them or delays the proceedings—the only two reasons under Rule 15(d) to strike a supplemental pleading.

Rule 15(d) permits a supplemental pleading to be stricken only when, "upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of a supplemental pleading…." Ark. R. Civ. Pro. 15(d). Intervenors do not even allege that the proceeding would be delayed.

And while they make the bare assertion that the supplement is "prejudicial," Intervenors make no attempt to explain how that could be. The supplemental pleading contained notice of a legal challenge for which no further testimony would be required before the special master.

Nor do Intervenors explain how they themselves are prejudiced by the supplement. Instead, Intervenors make the bare assertion that "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." Intervenors appear to be objecting, not that they themselves

would be prejudiced, but that somehow the Attorney General would be prejudiced.

Such an objection is meritless for three separate reasons. First, Intervenors have no standing to argue that a nonparty would be prejudiced by the supplement. Second, as senior staff at the Office of the Attorney General were notified via email about the challenge, the Attorney General received notice that was reasonable under the circumstances and could intervene at any time under Ark. R. Civ. Pro. 24(a)(1). **Exhibit 1.** Third, Intervenors again resort to bare assertions instead of reasoning when give the vague claim that there is "no time to develop a record on, for example, the State's interests in defending the statute." It is not even clear what this means. Petitioners have raised a legal challenge, which will be fully briefed. The underlying facts regarding that legal challenge were developed on Days 1 and 2 of the special-master proceedings, and Intervenors fully participated in that proceeding.

In summary, proceedings such as these move very quickly. Petitioners gave oral notice of their supplemental claim within hours of obtaining the documents that formed the basis for the constitutional-law

claim; Petitioners formally supplemented the relevant pleading; and Petitioners notified the Attorney General. Petitioners' supplement was timely, does not prejudice any party, and is within this Court's jurisdiction. Therefore, Intervenors' motion should be denied.

Respectfully Submitted,

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Certificate of Service

I certify that on 31 July 2020, a copy of the foregoing was filed with this Court's eFlex filing system, which serves all counsel of record.

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July 28, 2020

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RE: Notice of constitutional challenge to Ark. Code Ann. § 7-9-126(b)(4)(A) pursuant to Ark. Code Ann. § 16-111-111 in an original action before the Supreme Court, CV-20-454

Dear Attorney General Rutledge:

The above-referenced case is pending before the Arkansas Supreme Court as an original action under Amendment 7 to the Arkansas Constitution. The Second Amended Complaint (without exhibits) is attached for your reference. In summary, the case is challenging the legality of the Secretary of State's actions in connection with two proposed statewide measures sponsored by Arkansas Voters First. Counts 1 and 2 of the Second Amended Complaint have been referred to a special master, the Honorable John Fogleman. The proceedings before the special master began today at 1:00pm and will continue tomorrow morning at 9:00 in Room 101 of the Justice Building.

Based on the above-referenced statute, the Secretary of State culled in excess of 5,000 signatures on several hundred petition parts submitted by Arkansas Voters First.

Given this case's extraordinarily expedited nature, Petitioners only received the relevant culled petition parts this morning at around 10:30. Upon an initial review of those culled petition parts, it became clear that thousands of signatures were culled due to the date of signing of a single petitioner. Under such circumstances, the above-referenced statute directs the Secretary of State to set aside *every* signature on the petition part—thereby disenfranchising the other petitioners on that petition part.

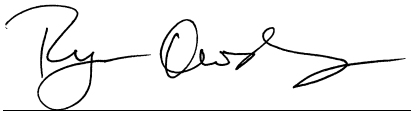
When this same issue arose in *McDaniel v. Spencer*, 2015 Ark. 94, 457 S.W.3d 641 regarding a single signer being from the wrong county, the Secretary followed a similar statute and culled the entire petition part. The Arkansas Supreme Court in *Spencer* declared that requirement unconstitutional under Amendment 7 of the Arkansas Constitution. *Id*. 18, 457 S.W.3d 641, 654 ("[The challenged statute] provides that every signature on a petition part is invalidated if the part contains signatures of more than one county. This court has held that, in situations involving the validity of individual signatures, where there is no evidence of improper motives on the part of the canvasser(s), only those individual signatures are called into question, not the entire petition part.").

While Petitioners will argue they have substantially complied with the relevant legal requirements, Petitioners will also argue that *Spencer* renders unconstitutional the kinds of culls made in this instance. Instead, as in *Spencer*, the Secretary should have culled the single allegedly errant signature and counted the remainder.

A copy of all pleadings and other filings is available at the Court's online docket. Please consider this notice pursuant to Ark. Code Ann. §16-111-111 as to the constitutional challenge to this aspect of the statute. While litigation so far confirms that there has been and will be a fully adversarial and complete adjudication of the constitutional issues, we are nevertheless providing notice to you.

Sincerely,

STEEL | WRIGHT | GRAY

By: 

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Enclosures
Cc: All counsel of record in CV-20-454 (w/enclosures) via email
The Honorable John Fogleman, special master