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**

REPLY IN SUPPORT OF MOTION TO INTERVENE

For their Reply in Support of their Motion to Intervene, Arkansans for Transparency and Jonelle Fulmer, individually and on behalf of Arkansans for Transparency, state as follows:

1. Petitioners' opposition to intervention is little more than a delay tactic. Petitioners *do not deny* that Movants have an interest in this litigation. Rather, they contend that Movants do not have an interest *at this stage* because "this is only a limited writ request." Resp. at ¶ 3. This argument should be rejected.

2. Petitioners' attempt to characterize this action as a "limited request" and "not the full measure" is belied by the filings to date and the nature of these actions. The issues of facial validity, the initial count, and cure-qualification

currently before the Court go to the heart of any original action contesting a statewide initiative. And, even if Petitioners consider this to be a limited request *now*, it will certainly not remain that way long; the facts and circumstances are continuously and rapidly developing.

3. To that end, intervention should not be delayed until some indefinite point in the future to be determined by Petitioners. Movants' interests require representation from the start. Their interests and organizational purpose are to defeat the subject petitions – a purpose not shared by the Secretary of State. Indeed, Movants will challenge the subject petitions for reasons in addition to those identified by the Secretary of State. For example, Movants contend that Petitioners do not have, and thus cannot present to the Court, any evidence on the *prima facie* sufficiency of their petitions so as to get a signature count and cure. The lack of evidence as to the facial validity of the petitions is reason alone to deny and dismiss not only the preliminary injunction request for a count, but the Amended Petition in its entirety. *See Arkansas Hotels & Entm't, Inc. v. Martin*, 2012 Ark. 335, 11, 423 S.W.3d 49, 55 (2012) (denying writ of mandamus and motion to appoint special master where the petitioners did not have evidence to show *prima facie* sufficiency of their petition). If Petitioners are successful in their request for injunctive relief, Movants' interests and their ability to defeat the subject petitions will likely be impaired. The same cannot be said for the Secretary of State.

4. The Motion to Intervene is not untimely and will not unduly delay this matter either. The Motion to Intervene was made within 24 hours of the Court-imposed deadline and within two days of the Amended Petition. Petitioners have not alleged any prejudice by the timing of the filing. Under these circumstances, Movants' intervention is timely. *See Kelly v. Estate of Edwards*, 2009 Ark. 78, 4, 312 S.W.3d 316, 318 (2009) (stating that "timeliness of intervention under Rule 24 . . . is to be considered from all the circumstances" and determining timeliness based on three factors: (1) how far the proceedings have progressed; (2) any prejudice to other parties caused by the delay; and (3) the reason for the delay") (citation omitted). Going forward, Movants will be subject to and abide by the same deadlines as the current parties. Movants' intervention and participation can hardly be characterized as the type of "overpopulating" that will hold up this case. Resp. at ¶ 10.

5. Lastly, while Petitioners argue that Movants have some alternate remedy against them – they fail to identify what that remedy is, when it might be actionable, and how it differs from the current action before the Court. Movants' statement that the Court "will likely decide issues of law and fact related to the initiative petitions that [they] will later raise or litigate in potential challenges" is not the convicting admission Petitioners make it out to be. *See* Resp. at ¶ 13. Those

challenges will occur in reference to these petitions in this action at the start, though they may evolve as the case evolves.

6. Further, the "alternate remedy" argument in this context is hardly comparable to the case that Petitioners cite in support of it. *See* Resp. at ¶ 12 (citing *Milberg, Weiss, Bershad, Hynes, & Lerach, LLP v. State*, 342 Ark. 303, 28 S.W.3d 842 (2000)). *Millberg* did not concern litigation related to Amendment 7; it concerned a discharged attorney's attempt to intervene in a former client's lawsuit to assert a right to attorneys' fees. *Millberg* is an apples-to-oranges comparison to this case where no such clear, alternate, and independent remedy as an action for attorneys' fees is available to Movants.

7. In sum, Movants have met the requirements for intervention as a matter of right and for permissive intervention. Petitioners do not even challenge Movants' permissive intervention based on common questions of law and fact. *See* Ark. R. Civ. P. 24(b).

8. Allowing intervention is not only necessary to protect Movants' interests, it is also the most efficient way to move forward. For all of these reasons, and those stated in their original Motion, Movants respectfully request that the Court grant their Motion to Intervene.

Respectfully submitted,

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By: /s/ Kevin A. Crass
KEVIN A. CRASS

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CERTIFICATE OF SERVICE

I, Kevin A. Crass, hereby certify that on this 24th day of July, 2020, I electronically filed this Motion using the Court's electronic filing system, which shall send notification of such filing to the following counsel of record:

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