

IN THE ARKANSAS SUPREME COURT

**BONNIE MILLER, individually and on behalf of
ARKANSAS VOTERS FIRST and
OPEN PRIMARIES ARKANSAS,
BALLOT QUESTION COMMITTEES** **PETITIONER**

v. **No. CV-20-454**

**JOHN THURSTON, in his capacity as
Arkansas Secretary of State** **RESPONDENT**

RESPONSE TO AMENDED CONSOLIDATED ORIGINAL PETITION

For his Response to Amended Consolidated Original Petition,
Secretary of State John Thurston states:

1. Secretary Thurston is without knowledge to either admit or deny that Bonnie Miller is an Arkansas citizen, therefore denies same. At this time, Thurston has not verified the allegation that Miller is a registered voter, therefore denies same. Thurston admits that Petitioner purports to have filed this as an original action pursuant to Article 5, § 1 of the Arkansas Constitution, Amendment 7 to the Arkansas Constitution, and Rule 6-5 of this Court, but denies that Petitioner has a cause of action. Thurston admits that this

Court has original and exclusive jurisdiction to review the sufficiency of statewide initiative petitions.

2. Thurston admits that Arkansas Voters First is an Arkansas ballot question committee as defined in Ark. Code Ann. § 7-9-402(2)(A), registered with the Arkansas Ethics Commission, as alleged in paragraph 2.
3. Thurston admits that Open Primaries Arkansas is an Arkansas ballot question committee as defined in Ark. Code Ann. § 7-9-402(2)(A), registered with the Arkansas Ethics Commission, as alleged in paragraph 3.
4. Thurston admits that Arkansas Voters First was established to support the Arkansas Citizens' Redistricting Amendment, as alleged in paragraph 4. Thurston denies that Exhibit 1 to the Petition evidences that Arkansas Voters First was established to support a constitutional amendment requiring open primary elections and instant runoff general elections in Arkansas, as further alleged in paragraph 4.
5. Thurston admits that Open Primaries Arkansas was established to advocate for a constitutional amendment

- requiring open primary elections and instant runoff elections in Arkansas, and oppose any efforts in opposition, as alleged in paragraph 5.
6. Thurston admits that he is the Arkansas Secretary of State, as stated in paragraph 6.
 7. Thurston states that Ark. Code Ann. § 7-9-126 speaks for itself.
 8. Thurston admits that Arkansas Voters First submitted initiative petitions to Thurston on July 6, 2020, in support of Arkansas Voters First's proposed Citizens' Initiative for an Independent Redistricting Commission and a proposed constitutional amendment requiring open primary elections and instant runoff general elections in Arkansas, as alleged in paragraph 8. Thurston denies that either of the petitions were valid.
 9. Thurston denies that he has failed to perform his duties required by Ark. Code Ann. § 7-9-126. Starting July 6, 2020, when three petitions were submitted to the Secretary of State's Office, Thurston began the statutory intake procedures for a facial analysis of the petitions. Thurston completed his duties

required by Ark. Code Ann. § 7-9-126 and promptly notified counsel for the sponsor. *See* Exhibits 1 and 2 attached hereto.

10. Thurston states that Ark. Code Ann. § 126(a) speaks for itself. As stated in the previous paragraph, Thurston completed the initial count of the signatures in order to determine whether or not the petitions, on their face, contain the designated number of signatures required by the Arkansas Constitution and statutory law in order to certify the measures for the election ballot. The sponsor of both petitions failed to comply with Ark. Code Ann. § 7-9-601(b)(3), which requires the sponsor to certify that its paid canvassers passed a criminal background check prior to soliciting signatures. For that reason, neither petition is sufficient and cannot be certified to the ballot. Further, even if the background check certification were not an issue, the open primaries petition does not contain enough signatures on its face after initial review to qualify for a cure period. If the background check certification were not an issue, the Secretary has not completed verification of signatures on the redistricting petition to determine if it meets

the qualifications for a cure period. *See* Ark. Code Ann. § 7-9-126; Constitution of Arkansas, article 5, section 1.

11. Thurston states that Ark. Code Ann. § 126(b) speaks for itself.
12. Thurston states that Ark. Code Ann. § 7-9-601(b) speaks for itself.
13. Thurston admits that Ark. Code Ann. § 7-9-601(f) provides: “Signatures incorrectly obtained or submitted under this section *shall not* be counted by the Secretary of State *for any purpose.*” (emphases added). Affirmatively, Thurston states that the words “*shall not* be counted by the Secretary of State *for any purpose*” prohibit the counting of the signatures on the two petitions submitted by Arkansas Voters First and that the constitutionality of this provision has never been challenged.
14. Thurston admits that Arkansas Voters First submitted two initiative petitions on July 6, 2020, as stated in paragraph 14. Thurston denies that the petitions are valid or contain the requisite number of signatures.

15. Thurston admits that on July 14, 2020, insufficiency letters were issued to Arkansas Voters First for the two petitions it submitted. *See* Amended Petition Exhibits 5 and 6. Thurston admits that the letters state that “none of the signatures solicited by the paid canvassers may be counted for any purpose.” Citing Ark. Code Ann. § 7-9-601(b)(3). Thurston continued, however, to say, “Please note, that because this office is statutorily prohibited from counting the submitted signatures for any purpose, there may be other as yet undetermined reasons the petition may not be sufficient.”

Petition Exhibits 5 and 6. Further, on July 17, 2020, Thurston issued a second letter to Arkansas Voters First (one letter for each of the two petitions submitted by Arkansas Voters First), stating that he “would like to clarify a statement made in the original letter of insufficiency.” Thurston explained, “I did not intend to infer that our normal intake procedures would cease. In fact, we have been continuously evaluating the petition under our normal intake analysis (facial review), which does not involve counting the signatures. Once intake is complete on

the petition, I will issue a revised letter listing all reasons, if there are others in addition to the one originally reported, that the petition is insufficient.” See Exhibits 3 and 4 attached to this Response.

16. Thurston admits that in paragraph 16, the Petitioner has correctly quoted language from his July 14, 2020 letters to Arkansas Votes First. Thurston notes that the cited portion of his letters is referencing the certification by Arkansas Voters First that its paid canvassers had “acquired” background checks.

17. Thurston admits that in paragraph 17, the Petitioner has correctly quoted language from his July 14, 2020 letters to Arkansas Votes First. Thurston notes that the cited portion of his letters is referencing that the statutorily required certification regarding the criminal background checks of paid canvassers *shall* state that the canvassers “passed” a criminal background check. Thurston further notes that Special Master Mark Hewett, on July 13, 2020, filed his Report and Findings of Fact from the trial of *Arkansans for Healthy Eyes v. Thurston*,

Arkansas Supreme Court No. CV-20-136. *See* Exhibit 5 attached to this Response. The Special Master recommended to this Court that the referendum in question not appear on the November 2020 ballot because the sponsor had certified that its paid canvassers had “acquired,” not “passed,” criminal background checks. *Id.* at ¶¶ 20, 21(b), 27, 31, 36 (“This violation triggers the “do not count” requirement, which provides that ‘signatures incorrectly obtained under this section shall not be counted by the secretary of State’ and therefore requires disqualification . . . The term ‘shall’ has been determined to be mandatory and that substantial compliance cannot be used as a substitute for fulfillment with the statute. *Benca v. Martin*, 2016 Ark. 359, at 12-13, 500 S.W.3d at 750; *Zook v. Martin*, 2018 Ark. 306.”), and 132.

18. Thurston states that Ark. Code Ann. § 7-9-601(b)(1) speaks for itself.
19. Thurston states that the insufficiency letters sent to Arkansas Voters First speak for themselves.

20. Thurston denies that his summation of the certifications in the letters to Arkansas Voters First was incomplete.

Affirmatively, Thurston states that Arkansas Voters First's certifications regarding canvassers' criminal background checks were not in compliance with Ark. Code Ann. § 7-9-601 because the word "acquired" was used when the statute provides that the word "passed" *shall* be used. The word "acquired" is not synonymous with the word "passed."

21. Thurston denies that his decision not to validate whether or not the signatures on the two petitions submitted by Arkansas Voters First are of registered voters is a violation of Ark. Code Ann. § 7-9-126. As stated previously, the intake procedures provided for in Ark. Code Ann. § 7-9-126 have been completed. See Exhibits 1 and 2 attached hereto. Furthermore, Thurston states that he is currently verifying whether the signatures on the two petitions are of registered voters.

22. Thurston denies that his position is disingenuous or an attempt to thwart the initiative process as alleged in paragraph 22. Thurston was ordered by this Court, in *Safe Surgery*

Arkansas v. Thurston, 2019 Ark. 403, 591 S.W.3d 293, to count the signatures on the referendum petition at issue in *Arkansans for Healthy Eyes v. Thurston*, Arkansas Supreme Court Case No. CV-20-136. As noted previously herein, the Special Master in that case made findings that the referendum should not appear on the November 2020 ballot for the reason that the majority of the signatures on the petition were solicited by canvassers who had been certified as having “acquired” a criminal background check instead of having “passed” one. *See Exhibit 5* attached to this Response.

23. Thurston admits that the first insufficiency letters sent to Arkansas Voters First contained no other criticisms of the two petitions it had submitted. Affirmatively, Thurston states that the two letters stated that other reasons may exist to deny the petitions and that two letters of clarification were sent to Arkansas Voters First (one for each petition) explaining that the intake analysis was ongoing. As seen in Exhibit 1 attached to this Response, the open primaries petition fell short of the

requisite number signatures on its face to qualify for a cure period regardless of the criminal background certification issue.

24. Thurston denies that the two petitions submitted by Arkansas Voters First met the statutory requirements for statewide ballot initiatives, as alleged in paragraph 24.
25. Thurston denies that Arkansas Voters First is entitled to a 30-day “cure period,” as alleged in paragraph 25, because Arkansas Voters First did not certify that its paid canvassers had passed a criminal background check. Even if the background check certification were not an issue, the open primaries petition does not contain the requisite number of signatures to qualify for a cure period. It remains to be determined whether or not the redistricting petition will qualify for a cure period absent the background check issue.
26. Thurston states that the cases cited in paragraph 26 speak for themselves.
27. Thurston states that the cases cited in paragraph 27 speak for themselves.

28. Thurston states that the constitutional provisions cited in paragraph 28 speak for themselves.
29. Thurston states that the cases cited in paragraph 29 speak for themselves.
30. Thurston denies that on July 6, 2020, Arkansas Voters First filed statutorily valid initiative petitions that made a *prima facie* showing that the requisite number of valid signatures were submitted.
31. Thurston denies that Arkansas Votes First is entitled to a cure period of at least 30 days, as alleged in paragraph 31.
32. Thurston denies any violation of Ark. Code Ann. § 7-9-126, as alleged in paragraph 32.
33. Thurston denies any decisions made regarding the two petitions submitted by Arkansas Voters First were an attempt to shirk his duties and deny the voters of Arkansas the opportunity to initiate legislation, as alleged in paragraph 33.
34. Thurston admits that the two petitions submitted by Arkansas Voters First must contain 89,151 signatures of registered voters and that the deadline to certify constitutional

amendments to the County Boards of Election Commissioners is August 20, 2020. Thurston denies the remaining allegations in paragraph 34.

35. Thurston denies that the Court should enter a preliminary and permanent injunction compelling the counting of signatures submitted by Arkansas Voters First. Thurston acknowledges that this Court has already granted a preliminary injunction requiring the verification of signatures on the two petitions. The verification began within hours of the issuance of the injunction and is continuing as of this filing. Thurston denies the remaining allegations in paragraph 35.

36. Thurston denies each and every material allegation in the Petition that is not specifically admitted herein.

37. Affirmatively, Thurston states that the Petition should be denied for failure to state a claim.

38. Affirmatively, Thurston states that if the Court grants Petitioner the requested relief, he be allowed sufficient time to verify and count the signatures, as was done in *Safe Surgery Arkansas v. Thurston*, 2019 Ark. 403, 591 S.W.3d 293.

WHEREFORE, Secretary of State John Thurston prays that the Petition be denied and dismissed; or, in the alternative, for additional time to count the signatures; and for all other just and proper relief.

Respectfully submitted,

JOHN THURSTON
Arkansas Secretary of State

By: /s/ Gary L. Sullivan
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Attorney for Respondent

CERTIFICATE OF SERVICE

I, Gary L. Sullivan, hereby certify that on July 26, 2020, I electronically filed the foregoing with the Clerk of the Court using the eFlex filing system, which shall serve all counsel of record:

/s/ Gary L. Sullivan