

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**

PETITIONER

v.

No. CV-20-454

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

RESPONDENT

RESPONSE TO CONSOLIDATED ORIGINAL PETITION

For his Response to 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 denies that Arkansas Voters First submitted valid initiative petitions to Thurston on July 6, 2020, in support of Arkansas Voters First's proposed "Arkansas Citizens' Redistricting Commission Amendment," as alleged in paragraph 8. Affirmatively, Thurston states that Exhibit 3 to the original Petition evidences that Arkansas Voters First submitted an initiative petition in support of "Citizens' Initiative for an Independent Redistricting Commission." Petition Exhibit 3, pp. 1, 2, and 3. Further, Thurston denies that Open Primaries Arkansas submitted a petition at all. Petition Exhibit 4 evidences that the sponsor of a redistricting

petition was submitted by “Arkansas Voters First.” Petition Exhibit 4, p.1. Finally, 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. As of the date of this filing, Thurston continues the intake procedures for all three petitions, well within the statutory 30-days allowed by the statute.
10. Thurston states that Ark. Code Ann. § 126(a) speaks for itself. As stated in the previous paragraph, Thurston is currently performing an 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 measure for the election ballot.

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*. (emphasis 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 timely submitted a redistricting initiative petition on July 6, 2020, as stated in paragraph 14. Thurston denies that Open Primaries Arkansas submitted any petition on July 6, 2020. Arkansas Voters First submitted two petitions on July 6, 2020. *See* Petition Exhibits 3 and 4. Thurston denies that either petition is valid. Because the intake procedure is ongoing at this time,

Thurston can neither admit nor deny the number of facially valid signatures appearing on either petition.

15. Thurston admits that on July 14, 2020, insufficiency letters were issued to Arkansas Voters First for the two petitions it had submitted. *See* Petition Exhibits 5 and 6, both designating the petition sponsors as Arkansas Voters First. Thurston denies that an insufficiency letter was issued to Open Primaries Arkansas. Open Primaries Arkansas did not submit a petition. *See* Petition Exhibits 3 and 4. Further, 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. § 7-9601(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. Finally, 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 1 and 2 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 denies that he sent any letters to Open Primaries Arkansas. Open Primaries Arkansas has not submitted any petitions to the Secretary of State. 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 denies that he sent any letters to Open Primaries Arkansas. Open Primaries Arkansas has not submitted any petitions to the Secretary of State. 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 3 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. Thurston denies that an insufficiency letter was sent to Open Primaries Arkansas. Open Primaries Arkansas did not submit a petition to the Secretary of State.
20. Thurston denies that his summation of the certifications in the letters to Arkansas Voters First was incomplete. Thurston denies that he sent a letter to Open Primaries Arkansas. Open Primaries did not submit a petition to the Secretary of State. 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. Furthermore, the intake analysis of the two petitions is ongoing (the Secretary is statutorily provided with 30 days from July 6, 2020), thus it is possible that one or both of the petitions submitted by Arkansas Voters First could fail for other reasons, including not having enough facially valid signatures after the statutorily provided culling procedures that make up the intake analysis. Thurston denies he refused to count any signatures submitted by Open Primaries Arkansas. Open Primaries Arkansas did not submit a petition to the Secretary of State.

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 3 attached to this Response.*

23. Thurston admits that the 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 is ongoing. Thurston denies that an insufficiency letter was sent to Open Primaries Arkansas. Open Primaries Arkansas did not submit a petition to the Secretary of State.

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. Thurston denies that Open Primaries Arkansas submitted a petition to the Secretary of State's Office.
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. Thurston denies that Open Primaries Arkansas is entitled to a "cure period" because Open Primaries Arkansas did not submit a petition to the Secretary of State.
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. Thurston denies that Open Primaries Arkansas filed any petitions with the Secretary of State.
31. Thurston denies that Arkansas Votes First is entitled to a cure period of at least 30 days, as alleged in paragraph 31. Thurston denies that Open Primaries Arkansas submitted a petition to the Secretary of State's Office.
32. Thurston denies any violation of Ark. Code Ann. § 7-9-126, as alleged in paragraph 32. Thurston denies that Open Primaries Arkansas submitted a petition to the Secretary of State's Office.

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. Thurston denies that Open Primaries Arkansas submitted a petition to the Secretary of State's Office.
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. Thurston denies that Open Primaries Arkansas submitted a petition to the Secretary of State's Office.
35. Thurston denies that the Court should enter a preliminary and permanent injunction compelling the counting of signatures submitted by Arkansas Votes First. Open Primaries Arkansas has not submitted any signatures to the Secretary of State. 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 Petitioner's claim is not ripe.

39. Affirmatively, Thurston states that if the Court grants Petitioner the requested relief, he be allowed sufficient time to 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

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CERTIFICATE OF SERVICE

I, Gary L. Sullivan, hereby certify that on July 20, 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