

**IN THE ARKANSAS SUPREME COURT
ORIGINAL ACTION**

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

v. **CASE NO. CV-20-454**

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

ARKANSANS FOR TRANSPARENCY, **INTERVENORS**
A BALLOT QUESTION COMMITTEE, and
JONELLE FULMER, individually and on behalf of
ARKANSANS FOR TRANSPARENCY

**INTERVENORS' RESPONSE IN OPPOSITION TO PETITIONERS'
MOTION TO EXPEDITE, FOR A PRELIMINARY INJUNCTION AND TO
REFER ADDITIONAL MATTERS TO THE SPECIAL MASTER**

Intervenors Arkansans for Transparency, a ballot question committee, and Jonelle Fulmer, individually and on behalf of Arkansans for Transparency, respectfully request that the Court deny Petitioners' latest motion seeking expedited review, injunctive relief, and referral of matters back to the Special Master. Petitioners waived challenges to the Secretary's culling of petition parts and signatures in the initial count and intake process.

As evidenced by their own Motion, when the hearings began on July 28, 2020, Petitioners knew that the Secretary had culled petition parts for various reasons and knew that he did not count petition parts turned in with the wrong petition toward the initial count.¹ *See, e.g.*, Mot. at 3, ¶ 8. Petitioners had every opportunity to litigate these issues in the four days of hearings held by the Special Master. And, some of these matters were litigated. In particular, Petitioners’ suggestion in their Third Amended Complaint that the Secretary, rather than the Sponsor, switched petition parts between Redistricting and Open Primaries was settled by the testimony of Mr. Peyton Murphy at the Secretary of State’s Office:

Cross-Examination by Ms. Murray

Q. Were you [Peyton Murphy] there on July 6 when these three proposals were turning in their petitions, their signature cards, their affidavits, all of those type documents?

A. I was.

¹ In fact, Petitioners expressly represented to the Master that they were *not challenging* the Secretary’s determination that Redistricting petition parts were submitted alongside Open Primaries. (RT 25) (“Of the 10,000, about 5,000 were the redistricting petition parts the Secretary contends were filed alongside or with Open Primaries. We’re not concerned about that, and Open Primaries is not concerned about that, and that won’t be an issue in these proceedings.) This is obviously inconsistent and yet another reason for denying the present Motion.

Q. And did you make sure that, for example, that -- I'm trying to say -- I'm sorry -- that Redistricting and Open Primaries boxes, were they labeled separately?

A. They were.

Q. Who did the labeling?

A. I can't say who did. They were actually in folders, and the folders were labeled and they were in a -- the folders, of course, were quite large, and the folders were each in an individual box. I don't know that the box itself had a label in it, but the folder did.

Q. How did you know which ones were going with which?

A. By the folder name.

Q. The folder name?

A. Yes.

Q. So the documents were in folders, and the folders would say Open Primary or Rank Primary --

A. Yes.

Q. -- or Redistricting?

A. Yes.

Q. And you made sure to keep all that separate?

A. Yes.

(RT 361-362)

Redirect by Mr. Gray

Q. Mr. Murphy, who is the sponsor of the Open Primaries Ranked-Choice Voting?

A. I believe on the intake paperwork, it said Arkansas Voters First.

Q. And is that the same sponsor for the Redistricting measure?

A. That's what I recall.

Q. And were -- did the sponsor -- you have the same sponsor for two proposals, correct? Two petitions?

A. That's what they put on their paperwork when they filed them.

Q. And were both of -- were those submitted on the -- both on July 6 of 2020?

A. Yes.

(RT 381-382)

Re-cross Examination by Mr. Sullivan:

Q. Mr. Murphy, all three -- well, both of the petitions in this case were -- came in on July 6, correct?

A. Yes.

Q. Did you say that the Redistricting came -- Redistricting petition came in in the morning before noon; isn't that correct?

A. I believe it was before lunchtime.

Q. And then what time did Open Primaries Ranked-Choice come in?

A. 4:59, I think. Somewhere in that vicinity.

Q. And what point in time does intake begin, the intake process?

A. Intake started just as soon as we could get those temps to start on intake for the Redistricting petition. Now, the Ranked-Choice petition, we took it the following day and we took it to the capitol and set up a different site there to process it.

Q. Was that because of COVID issue?

A. Yes.

Q. Okay. So ever since July 7th, Redistricting has been in one place and Open Primaries has been in a different location, correct?

A. Yes.

(RT 386-386)

Petitioners had the opportunity to argue about wrongly filed petition parts. If they wanted to solicit additional testimony or present more evidence, they should have done so. The undisputed testimony is that the sponsor bears responsibility for filing Redistricting Petition parts with the Open Primaries Petition. Petitioners offered no evidence at the hearing, nor any time in argument or comment, that any mistake had been made in the regard. Their failure to do so equates to waiver, not a second bite at the apple.

The same holds true for signatures cards, verification dates errors, all of which they now want to re-litigate. Signature cards between the two petitions were expressly considered by the Special Master. He found that the Secretary acted reasonably in not counting signatures collected by canvassers' whose signature cards were not turned in with the right petition. He specifically found that the Secretary

should not “be required to scour other petitions to fill missing holes.” (Report at 32-33, ¶ 50(c)) Petitioners failed to object and sought no reconsideration on that finding.

To the extent that Petitioners try to separate arguments made on behalf of Open Primaries from Redistricting, that argument should be rejected. Both Petitions originated from the same sponsor; both sets of lawyers spoke on behalf of the sponsor (and solicited testimony on both Petitions); and both Petitions were brought in this same action – by their own choosing. Everyone knew the Secretary had culled petition parts turned in on July 6, 2020, and everyone knew the Secretary did not count anything submitted with the wrong petition. If they wanted to challenge decisions made during the intake process, they could and should have done so then. Because Petitioners failed to do so, those arguments are now waived. *Pearson v. Henrickson*, 336 Ark. 12, 17, 983 S.W.2d 419, 422 (1999) (waiver is defined as a “voluntary abandonment or surrender by a capable person of a right known by him to exist” and “occur[s] when one, with full knowledge of material facts, does something which is inconsistent with the right or his intention to rely upon that right”) (quoting *Ingram v. Wirt*, 314 Ark. 553, 864 S.W.2d 237 (1993)).

Petitioners are also not entitled to an injunction or any other extraordinary relief requested. They have stated no facts showing that either the Secretary erred in validating signatures or that they can overcome the signature deficit. For example,

Petitioners state that they have shown a likelihood of success on the merits because “[t]he reasons given by the Arkansas Secretary of State for his refusal to count Petitioners’ valid signatures are disingenuous, thinly-veiled stalling tactics that are not supported by Arkansas law.” Mot. at 7, ¶ 22. Accusations are not factual allegations. Nothing in Petitioners’ Complaint or Motion shows a likelihood of proving entitlement to a cure or that they can show error in the Secretary’s provisional validation of signatures.

Accordingly, Petitioners’ Motion should be denied.

Respectfully submitted,

Elizabeth Robben Murray (#79244)
Kevin A. Crass (#84029)
Kathy McCarroll (#2014191)
FRIDAY, ELDREDGE & CLARK LLP
400 West Capitol Avenue, Suite 2000
Little Rock, AR 72201
Telephone: (501) 370-1592/376-2011
murray@fridayfirm.com
crass@fridayfirm.com
mmccarroll@fridayfirm.com

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

*Attorneys for Arkansans for Transparency
and Jonelle Fulmer, individually and on
behalf of Arkansans for Transparency*

CERTIFICATE OF SERVICE

I, Kevin A. Crass, hereby certify that on this 19th day of August, 2020, I filed the foregoing with the Court's efile filing system, which will serve the following counsel of record:

Adam Butler
Robert Thompson
414 West Court Street
Paragould, AR 72450
abutler@paragouldlawyer.com
rthompson@paragouldlawyer.com

AND

Alex T. Gray
Ryan Owsley
Nate Steel
Alec Gaines
Steel, Wright, Gray, PLLC
400 W. Capitol Ave., Suite 2910
Little Rock, AR 72201
alex@capitollaw.com
ryan@capitollaw.com

Attorneys for Petitioner

Gary Sullivan
Managing Attorney
Arkansas Secretary of State
500 Woodlane Street, Suite 256
Little Rock, AR 72201
gary.sullivan@sos.arkansas.gov

Attorney for Respondent

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