

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

BONNIE HEATHER MILLER, ROBERT
WILLIAM ALLEN, ADELLA DOZIER
GRAY, and ARKANSAS VOTERS FIRST,

Plaintiffs,

v.

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

Defendant.

Case No. 5:20-cv-05070-PKH

Hon. Paul K. Holmes, III

COMPLAINT

Plaintiffs Bonnie Heather Miller, Robert William Allen, Adella Dozier Gray, and Arkansas Voters First (collectively, “Plaintiffs”), for their Complaint against Defendant John Thurston, in his official capacity as Arkansas Secretary of State (“Defendant”), state and allege as follows:

INTRODUCTION

1. Arkansas’s requirements to place a constitutional amendment on the ballot, onerous under the best of circumstances, have become impossible to satisfy in light of the COVID-19 pandemic and the restrictions imposed to address it. That is especially so because they require close in-person contact between canvassers, voters, and notaries public—the type of contact that is now impermissible and ill-advised due to COVID-19. As a result, the combination of the required in-person procedures, the large number of signatures required for an initiative, and the deadline for submitting those signatures, results in an impossibly severe burden that effectively freezes access to the November ballot. Plaintiffs seek relief in this Court to alleviate the

unconstitutional burden these requirements impose on their rights under the First and Fourteenth Amendment as applied to them during the COVID-19 pandemic.

2. Plaintiffs bring this as-applied challenge to certain Arkansas statutory and constitutional requirements that apply to petitions for proposed amendments to the Arkansas Constitution. Plaintiffs began the process for gathering signatures for the petition for the “Arkansas Citizens’ Redistricting Commission Amendment” to the Arkansas Constitution (the “Proposed Amendment”), until the COVID-19 pandemic halted their efforts. Plaintiffs seek to place the Proposed Amendment before Arkansas voters in the November 3, 2020 general election. Plaintiff Arkansas Voters First (“AVF”) has made considerable effort and has invested significant funds to place the Proposed Amendment on the ballot. AVF, its members, and the individual Plaintiffs would have made significant progress in gathering petition signatures or signing the petition in question in March and April were it not for the COVID-19 pandemic and the restrictions imposed to address it.

3. The Arkansas Constitution and state statutes establish requirements governing signature-gathering for constitutional amendments, including: a required total number of signatures, a geographic distribution of the signers among Arkansas counties, a requirement that signatures be personally witnessed by the petition canvasser, a requirement that the petition canvasser sign an affidavit in the presence of a notary, deadlines for the submission of signatures to the Secretary of State, and requirements that the signatures be wet rather than electronic.

4. The COVID-19 pandemic makes it impossible for Plaintiffs to meet these requirements to get the Proposed Amendment on the ballot. In response to continuing advisories by the World Health Organization, Centers for Disease Control, the President of the United States, the Governor of Arkansas, and the Arkansas Secretary of Health, including orders and warnings

to avoid gatherings of ten people or more or entering within six feet of another person who is not a member of one's household, nearly every public gathering in Arkansas has been voluntarily canceled or banned by government order, including weddings, festivals, parades, concerts, sporting events, and conferences. The State has shut down gyms, indoor entertainment venues, and restaurants, and has closed public K-12 schools for the rest of the year. In addition, public and private universities and colleges have been closed, and students sent home. Although the Governor has set May 4, 2020 as the date that he hopes he is able to remove some restrictions, he has admitted that the state is "still on the upswing in" cases and the state's "testing capacity needs to increase." Thus, there is no immediate end in sight for these closures and the "social distancing" guidance remains in place indefinitely. Further, even if the Governor achieves his goal, it is not clear when the general public will return to their normal routines that would make signature gathering possible.

5. Close, in-person interactions are necessary to any effort to gather wet signatures for an amendment to be placed on the ballot. However, given the severe restrictions on the ability to physically interact with others, Plaintiffs cannot comply with Arkansas's formal constitutional and statutory signature requirements. Given the current circumstances, Arkansas's requirements unduly burden Plaintiffs' fundamental First and Fourteenth Amendment rights under the U.S. Constitution.

PARTIES

6. Plaintiff Bonnie Heather Miller is a resident and eligible, registered voter in the State of Arkansas who wants to serve as a canvasser for the Proposed Amendment as well as to recruit others to do the same.

7. Plaintiff Robert William Allen is a resident and eligible, registered voter in the State of Arkansas who wants to sign the petition in support of the Proposed Amendment. Due to health concerns, Dr. Allen is unable to comply with the Arkansas petition requirements for a constitutional amendment while adhering to guidance issued by the CDC, Arkansas Department of Health, and his doctor's orders.

8. Plaintiff Adella Dozier Gray is a resident and eligible, registered voter in the State of Arkansas who wants to sign the petition in support of the Proposed Amendment. Ms. Gray resides in Butterfield Trail Village, a continuing care retirement community, and thus is unable to comply with the Arkansas petition requirements for a constitutional amendment in light of the COVID-19 pandemic.

9. Plaintiff Arkansas Voters First ("AVF") is an Arkansas ballot question committee responsible for the organization of the signature-gathering effort to certify the Proposed Amendment to the November 3, 2020 general election ballot, and to support its passage by Arkansas voters.

10. Defendant John Thurston is the Arkansas Secretary of State and the chief elections officer in the State of Arkansas, and is charged under the Arkansas Constitution with receiving filed petitions and determining the sufficiency of signatures.

JURISDICTION AND VENUE

11. Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988 to redress the deprivation, under color of state law, of rights secured by the U.S. Constitution.

12. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under the Constitution and laws of the United States.

13. This Court has personal jurisdiction over Defendant, Secretary of State, who is sued in his official capacity only.

14. Venue is proper in this district under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claim have occurred in this district. Plaintiffs Miller and Gray reside in this district and wished to collect or sign petition signatures in this district, and Plaintiff AVF placed an organizer in this district (in Fayetteville), and took steps to open an office to coordinate signature collection in this district.

15. This Court has authority to enter declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202 and Rule 65 of the Federal Rules of Civil Procedure.

FACTUAL ALLEGATIONS

Arkansas Voters First Has Worked Diligently to Place the Proposed Amendment on the November 3, 2020 General Election Ballot

16. Plaintiffs are proponents of the Proposed Amendment to Arkansas's Constitution, which is designed to ensure that electoral districts are drawn in an open, transparent, and fair process.

17. On March 10, 2020, AVF filed its "Statement of Organization" with the Arkansas Ethics Commission and officially became a ballot question committee as defined in Ark. Code. Ann. § 7-9-402(2)(A) and (B).

18. On March 4, 2020, Plaintiff AVF entered into contracts with a petition circulation firm. The terms of the contract stipulated that the firm would assist in circulating the Proposed Amendment and AVF has, thus far, paid the firm \$210,076. The firm made initial offers to staff, conducted background checks, and opened offices across the state.

19. AVF has also used resources to hire consultants, seek legal advice, print campaign materials, and conduct public opinion polling.

20. In late 2019, AVF began developing a broad network of volunteer petition canvassers, who anticipated gathering signatures over the permissible period.

21. On March 16, 2020, AVF filed the Proposed Amendment with the Secretary of State's office. This submission contained the full text, ballot title, and popular name for the Proposed Amendment.

22. On March 16, the Secretary of State returned to AVF a file-marked copy of the Proposed Amendment and AVF was allowed to begin collecting signatures in support of the Proposed Amendment.

23. On March 5, 2020, AVF launched its petition drive and had canvassers in the field within a week. Shortly thereafter, and after collecting fewer than 100 signatures, AVF was forced to suspend its campaign due to the ongoing COVID-19 pandemic.

24. As discussed *infra*, by this point—March 11, 2020—the Governor had already issued an executive order declaring a state of emergency, the first of many measures the State would take to restrict movement to mitigate the effects of the pandemic.

25. Redistricting in Arkansas will occur in 2021, following the decennial census. Thus, in order to reform the redistricting process before new maps are drawn, the Proposed Amendment must be on the November 3, 2020 ballot.

The Signature Gathering Process in Arkansas

26. Arkansas's initiative and referendum provision is “self-executing . . . but laws may be enacted to facilitate its operation.” *See* Ark. Const. art. 5, § 1.

27. Thus, AVF has to abide by several requirements under Arkansas law that presume in-person signature gathering:

- a. AVF has to gather a number of petition signatures equal to at least 10% of the total votes cast for the office of governor in the last gubernatorial election. *See* Ark. Const. art. 5, § 1.
- b. AVF also has to collect signatures from “at least fifteen counties of the State . . . bearing the signature of not less than one-half of the designated percentage of the electors” of the county. *Id.*
- c. The person who collects the signatures—known as the canvasser—must sign an affidavit stating “that all signatures appearing on the petition part were made in the presence of the canvasser.” Ark. Ann. Code § 7-9-108(b).
- d. The canvasser has to sign this affidavit in the presence of a Notary Public. *See* Ark. Ann. Code §§ 7-9-108, 7-9-109.
- e. Petition signatures may not be electronically collected. *See* Ark. Ann. Code §§ 7-9-103(a)(1)(A), 7-9-104(c)(1).

28. Based on the number of votes cast for the office of governor in the last gubernatorial election, AVF must submit the signatures of at least 89,151 qualified Arkansas voters to Defendant.

29. Initiative petitions must be filed with the Secretary of State “not less than four months before the election.” *See* Ark. Const. art. 5, § 1. The deadline to submit signatures for a constitutional amendment for the November general election ballot in Arkansas is July 3, 2020.

30. If the Defendant determines that AVF has submitted an insufficient number of signatures, but at least 75% of the required signatures (66,864 in 2020) are valid, Arkansas law requires him to inform AVF of the deficiency and permit at least 30 days from the date of the

notification to gather the additional needed signatures or provide proof of the validity of the submitted signatures. *See* Ark. Const. art. 5, § 1.

31. An independent candidate for a United States Senate or statewide office must collect the signatures of only three percent of qualified electors of the state based on the total number of votes cast statewide for governor in the most recent gubernatorial election, but in no event is the candidate required to gather more than 10,000 signatures. Ark. Ann. Code. § 7-7-103.

32. A petition seeking a referendum to overturn a legislative act must collect the signatures of only six percent of qualified electors of the state based on the total number of votes cast statewide for governor in the most recent gubernatorial election. Ark. Const. art. 5, § 1.

33. A petition seeking a statutory change must collect the signatures of eight percent of qualified electors of the state based on the total number of votes cast statewide for governor in the most recent gubernatorial election. Ark. Const. art. 5, § 1.

34. If supplemental signatures are filed, the Defendant is to determine the sufficiency of the additional signatures within 30 days of filing the supplemental petitions. Ark. Ann. Code. § 7-9-111(d)(3).

The Coronavirus Pandemic Has Spread Throughout the United States and Arkansas

35. The United States and Arkansas are in a declared state of emergency as a result of a worldwide pandemic caused by a novel coronavirus. The respiratory disease caused by the virus, COVID-19, is highly contagious and can result in serious illness and death.

36. Beginning in January 2020, health experts and federal, state, and local government officials released an escalating series of warnings and emergency advisories, emphasizing the importance of protective measures including “social distancing,” defined as maintaining physical space from affected or potentially affected persons.

37. On January 30, 2020, the World Health Organization (“WHO”) declared that the novel coronavirus constitutes a Public Health Emergency of International Concern. On January 31, President Donald Trump suspended entry into the United States by all foreign nationals who had traveled to China in the past 14 days. On February 24, 2020, President Trump asked Congress to allocate \$1.25 billion for a coronavirus response.

38. On February 25, 2020, the Director of the National Center for Immunization and Respiratory Diseases at the Centers for Disease Control and Prevention (“CDC”) announced that “[d]isruption to everyday life may be severe” as a result of the virus. Regarding the spread, the Director stated that “[i]t’s not so much a question of if this will happen anymore but rather more of a question exactly when this will happen,” and called upon the American public to “work with us to prepare[.]”

39. On February 26, 2020, CDC officials stated that “[n]on-pharmaceutical interventions or NPIs will be the most important tools in our response to this virus,” and that such NPIs included “social distancing measures.”

40. On February 27, 2020, the CDC issued further guidance recommending that affected local communities practice “social distancing” measures, including reducing the frequency of large gatherings and limiting the number of attendees.

41. On March 11, 2020, Arkansas Governor Asa Hutchinson issued an Executive Order declaring a State of Emergency and ordered the “Arkansas Department of Health to take action to prevent the spread of COVID-19.”

42. On that same day, the Director-General of the WHO declared COVID-19 to be a global pandemic.

43. On March 12, 2020, the CDC updated its coronavirus-related guidance to reflect recommendations to consider cancelling or postponing mass gatherings, and noting that person-to-person spread of the virus happens most frequently within a distance of six feet.

44. On March 13, 2020, President Trump declared a national emergency retroactive to March 1, 2020.

45. On that same day, Governor Hutchinson amended his previous Executive Order noting that “[c]itizens of this state have been advised to take precautions to prevent the spread of COVID-19, including the advisement to minimize person to person contact, [and to] avoid large gatherings.”

46. On March 15, 2020, the CDC advised that no gatherings of fifty or more people occur over the next eight weeks, including weddings, festivals, parades, concerts, sporting events, and conferences. On March 16, 2020, President Trump advised citizens to avoid groups of more than 10.

47. On March 26, 2020, Arkansas Secretary of Health Nathaniel Smith issued a directive prohibiting gatherings of more than 10 people in any confined indoor or outdoor space (including community, civic, public, leisure, commercial, or sporting events, concerts, conferences, conventions, fundraisers, parades, fairs, and festivals) until further notice.

48. This directive does not apply to “gatherings of ten (10) or more people in unenclosed, outdoor spaces such as parks, trails, athletic fields and courts, parking lots, golf courses, and driving ranges where social distancing of at least six (6) feet can be easily achieved.”¹ It also does not apply to “businesses, manufacturers, construction companies, places of worship,

¹https://www.healthy.arkansas.gov/images/uploads/pdf/Gatherings_Directive_FINAL_3.26.20.pdf.

the Arkansas General Assembly, municipal or county governing bodies, or the judiciary; however these entities are advised to limit person-to-person contact and maintain appropriate social distancing of at least six (6) feet to prevent the spread of this virus.” *Id.*

49. On March 26, 2020, Governor Hutchinson amended the March 11, 2020 Executive Order to re-state the ongoing state of emergency and to prohibit social gatherings using the same language as the Secretary of Health’s March 26, 2020 directive.² The Executive Order stated that “citizens of the state have been advised to take precautions to prevent the spread of COVID-19, including the advisement to minimize person-to-person contact, avoid large gatherings, and to stay home if they feel ill.” *Id.*

50. The March 26, 2020 Executive Order also stated that “Pursuant to Ark. Code Ann. § 20-7-101, violation of a directive from the Secretary of Health during this public health emergency is a misdemeanor offense, and upon conviction thereof is punishable by a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) or by imprisonment not exceeding one (1) month, or both.” *Id.*

51. These orders do not contain any exceptions for petition canvassers, volunteers, or campaigns working to gather signatures.

52. Additionally, public facilities across Arkansas have closed and multiple events have been cancelled through at least August 2020. For example, the Little Rock Convention and Visitors Bureau has reported that more than 50 events – at an economic impact of \$7.4 million – have been canceled. The 50 canceled events were expected to draw 45,000 attendees. The Central Arkansas Library System, which is the largest public Arkansas library system, is now closed indefinitely. In 2015, the library system averaged over 160,000 visits per month.

² https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-10._.pdf.

53. Public and private colleges and universities throughout Arkansas closed, enacted online instruction measures in lieu of in-person classes, and sent their students away from campus for the remainder of the semester. The University of Arkansas, which is the largest university in the state, announced that on-campus housing would close beginning April 3, 2020.

54. Local governments have responded as well. The City of Fayetteville has asked residents to only visit parks or trails at times when they are unlikely to encounter others, asked residents to maintain a distance of six feet from each other, has posted signs demonstrating what six feet looks like, and has encouraged residents to actually “give more than six feet if you can – the more space between you and others, the better.”³ The Mayor of Fayetteville suspended the Fayetteville Farmers’ Market on March 30, 2020 because it “draws a sizeable crowd of people of all age groups, who come into close contact with each other for hours at a time – and those are all the things we must avoid to slow community spread of this COVID-19 pandemic.”⁴

55. On April 4, 2020, Governor Hutchinson amended the Emergency declaration reiterating his previous declarations but also requiring that the entities that remain open must “[l]imit the number of people who can enter into the facility at any one time to ensure that people in the facility can easily maintain a minimum six-foot distance from one another.”⁵

56. On April 6, 2020, Governor Hutchinson ordered public schools to remain closed for the rest of the school year and on March 19, 2020, he closed all gyms, restaurants, and indoor entertainment venues.

³ See City of Fayetteville, *COVID-19 (Coronavirus Updates & Information*, <https://www.fayetteville-ar.gov/3883/Coronavirus-Updates> (last visited April 21, 2020).

⁴ *Id.*

⁵ See Governor Hutchinson Executive Order https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-13._.pdf

57. Courts have also worked to limit in person contact. This Court, for example, issued Administrative Orders 2020-1 and 2020-4. These orders continued all criminal and civil trials, provided for video conference hearings, cancelled naturalization ceremonies, increased screening for access to the courthouse, and encouraged the public to “use online Court resources or contact the Court by telephone.”

58. On April 3, 2020, the Arkansas Supreme Court extended its suspension of in-person proceedings through May 1, 2020, and noted that the suspension could be extended.

59. As a result of the public health crisis presented by the coronavirus, expert warnings and advisories, news coverage, recommendations from public officials, and public health measures, numerous public gatherings in Arkansas have been cancelled or postponed. Numerous categories of businesses and other public accommodations have closed or shifted to remote operation only, and are likely to remain in this state for an unknown period of time. As a result, public encounters have been drastically reduced.

The Pandemic Has Made the Signature-Gathering Process under Arkansas Law Unduly Burdensome

60. The COVID-19 pandemic makes in-person signature gathering impossible.

61. In normal times, collecting signatures in-person is both time and labor intensive. Collectively, canvassers must make hundreds of thousands of interpersonal contacts with the general public.

62. Canvassers rely heavily on public events, large gatherings, and public buildings such as sporting events, festivals, parades, public libraries, and concerts in order to meet people to ask to sign.

63. Canvassers also depend on meeting eligible voters in front of businesses and retail locations such as restaurants, movie theaters, amusement parks, and office buildings. These

establishments also allow canvassers to make contact with large numbers of signatories and are vital to the signature collection process.

64. Door-to-door collections are also impossible during this pandemic. In light of public warnings and orders recommending social distancing, many individuals, both canvassers and the individuals they solicit, simply cannot risk close contact with others.

65. Indeed, merely exchanging pens and petition papers back-and-forth between the canvassers and the voters creates a risk of transmission.

66. Plaintiff Allen reasonably fears that contact with an unknown canvasser will present an undue risk of exposure and potentially adverse health effects.

67. Plaintiff Gray's continuing care retirement facility is taking every measure possible to prevent the spread of COVID-19 in her community by restricting access to the campus by anyone from the outside. Plaintiff Gray cannot meet with a canvasser to witness her signature.

68. Thus, Plaintiffs Allen and Gray will be unable to sign a petition in support of the Proposed Amendment in a manner that is consistent with both the formal requirements of Arkansas law related to the ballot initiative process and the orders issued by the CDC, Governor Hutchinson, and Secretary Smith.

69. Plaintiff Miller reasonably fears that she cannot successfully or safely recruit or mobilize individuals who otherwise would have been willing to become a canvasser, as doing so will potentially expose both herself and others to serious illness.

70. Thus, Plaintiff Miller will be unable to collect signatures for the Proposed Amendment petition and unable to recruit or mobilize others in a manner consistent with both the formal requirements of Arkansas law related to the ballot initiative process and the orders issued by the CDC, Governor Hutchinson and Secretary Smith.

71. As a result of these circumstances, Plaintiff AVF will be unable to collect the required 89,151 signatures prior to the July 3, 2020 filing deadline, or meet the other formal requirements of Arkansas constitutional and statutory law discussed above, absent relief from this Court.

72. Specifically:

- a. The social distancing efforts, event cancellations, and the closure of public accommodations will prevent Plaintiffs from obtaining 89,151 wet signatures before the filing deadline as required by Arkansas law.
- b. The impermissibility of obtaining proxy or electronic signatures under Arkansas law, the requirement that canvassers witness all signatures, and the necessity that the canvassers swear before a Notary Public, will further prevent Plaintiffs from obtaining the required number of signatures as a result of current events.

The Coronavirus Pandemic is Expected to Continue for an Indefinite Period of Time. Thus, it will be Impossible for Plaintiffs to Meet the Deadline

73. COVID-19 continues to spread in Arkansas and it is not clear when the pandemic will end.

74. As of April 22, 2020, the Arkansas Department of Health reports that 2,262 positive cases of the virus have been confirmed by testing in Arkansas. Forty-three Arkansans have died as a result of this virus. In the United States, there have been 825,306 cases and 45,075 deaths.⁶

75. On March 29, 2020, President Trump announced that federal social distancing guidelines would remain in place through at least April 30, 2020.

⁶ <https://adem.maps.arcgis.com/apps/opsdashboard/index.html#/f533ac8a8b6040e5896b05b47b17a647>.

76. The uncertainty surrounding when the pandemic will abate has made signature gathering impossible.

Arkansas Has Already Recognized That The Pandemic Requires Changes To Previous Voting Rules

77. On March 20, 2020, Governor Hutchinson issued an Executive Order suspending provisions of the Arkansas code that limited the availability of absentee ballots to certain excuses “so that all eligible qualified electors” could vote absentee in the March 31, 2020 primary and provided additional time for voters to request absentee ballots.⁷

78. On March 30, 2020, Governor Hutchinson issued an Executive Order that allows for electronic notary services and removed the requirement that a notary has to witness a signature in person.⁸ On April 9, 2020, the Governor expanded the scope of documents that the order applied to.⁹

79. Jurisdictions across the country have responded to the pandemic by changing the processes, rules, and procedures for elections and petitions to make essential adjustments to meet these extraordinary circumstances.

80. For example, Ohio postponed their 2020 primary election until April 28, 2020. Additionally, Ohio will conduct the election almost exclusively by mail and vote centers will only be open for people with disabilities to vote in person.

⁷ https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-08._.pdf

⁸ See Governor Hutchinson Executive Order https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-14._.pdf (accessed April 17, 2020)

⁹ See Governor Hutchinson Executive Order https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-14._.pdf

81. On March 25, 2020, a Virginia state court granted a preliminary injunction and ordered a reduction in the number of signatures needed for candidates to enter Virginia's primary election from 10,000 to 3,000. The court found that "the circumstances as they exist in the Commonwealth of Virginia and across the United States are not normal right now," and that the regulations requiring the signatures were not narrowly tailored because they "do[] not provide for emergency circumstances, like those that currently exist."¹⁰

82. On April 17, 2020, the Massachusetts Supreme Judicial Court, Massachusetts' highest court, ordered three forms of relief for candidates seeking access to the ballot: first a reduction in the signature requirements by 50%, second an extension of the deadlines for filing of signatures, and third, a requirement that the Secretary of State accept electronic rather than wet-ink original signatures. The court agreed with petitioners that "these extraordinary times of a declared state of emergency arising from the COVID-19 pandemic create an undue burden on prospective candidate's constitutional right to seek elective office."¹¹

83. On April 20, 2020, a federal court in Michigan granted a motion for preliminary injunction reducing the state signature requirement for a candidate to Michigan's Eleventh Congressional District after finding that "the State's actions in the form of enforcing both the Stay-at-Home Order and the statutory ballot-access requirements operate in tandem to impose a severe burden" on the Plaintiff.¹²

¹⁰See Order, *Faulkner v. Virginia Dep't of Elections*, Va. Cir. No. CL 20-1456 (Mar. 25, 2020), available at <https://www.virginiamercury.com/wp-content/uploads/2020/03/3-25-2020-Faulkner-v.-Virginia-Department-of-Elections-CL-20-1456-Prel....pdf> (accessed April 17, 2020).

¹¹ <https://www.mass.gov/files/documents/2020/04/17/12931.pdf>

¹² Order Granting Motion for Preliminary Injunction, *Esshaki v. Whitmer*, 2:20-cv-10831, ECF No. 23, at 4 (Apr. 20, 2020).

CAUSE OF ACTION

COUNT I – UNDUE BURDEN ON BALLOT ACCESS AND RIGHTS TO FREEDOM OF SPEECH AND ASSOCIATION UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION

84. Plaintiffs repeat and reallege paragraphs 1 through 83 above.

85. Plaintiffs’ rights to petition, speech, and association are protected by the First and Fourteenth Amendments to the United States Constitution. The circulation of petitions, including the petition for the Proposed Amendment, is “‘core political speech,’ for which First Amendment protection is ‘at its zenith.’” *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)).

86. Arkansas’ petition signature requirements, in combination with federal and state guidance and orders prohibiting certain gatherings and promoting social distancing due to COVID-19, preclude Plaintiffs’ ability to gain access to the ballot and organize in support of the Proposed Amendment, in violation of Plaintiffs’ rights under the First and Fourteenth Amendments.

87. When analyzing the constitutionality of petition requirements, a Court “must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). “Regulations imposing severe burdens must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

88. Under these circumstances, the burden on Plaintiffs' core constitutional rights is severe, operating to freeze the political status quo and effectively exclude the Proposed Amendment from the ballot. Thus, the challenged Arkansas' statutory and constitutional requirements applying to petitions are subject to strict scrutiny.

89. The petition signature requirements from which Plaintiffs seek relief cannot survive strict scrutiny, as they are not narrowly tailored to serve a compelling governmental interest.

90. Even if the challenged requirements, in light of the COVID-19 pandemic, are characterized as less than a severe burden, they still are not sufficiently justified under any level of scrutiny or balancing.

91. Defendant has no cognizable interest in effectively barring the Proposed Amendment from the ballot. As applied in the current emergency circumstances due to the COVID-19 pandemic, the requirements of Ark. Const. Art. 5, § 1 Ark. Ann. Code § 7-9-108(b), Ark. Ann. Code § 7-9-109, Ark. Ann. Code § 7-9-103(a)(1)(A), Ark. Ann. Code § 7-9-104(c)(1), Ark. Ann. Code § 7-9-111(d)(3), Ark. Ann. Code § 7-9-126(c)(1), and Ark. Ann. Code § 7-9-126(c)(3) are not narrowly tailored to serve a compelling, or even legitimate, state interest, nor are they sufficiently important to justify the burdens on Plaintiffs' First and Fourteenth Amendment rights under any level of review under the current pandemic circumstances.

92. Absent injunctive relief, Plaintiffs will suffer irreparable harm. Plaintiffs have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs respectfully request that the Court enter an order:

1. Declaring that, in the extraordinary situation presented by the coronavirus epidemic, the requirements of Arkansas law as described herein and as applied to

Plaintiffs in their efforts to place the Proposed Amendment on the November 3, 2020 general election ballot, violate Plaintiffs' First and Fourteenth Amendment rights under the United States Constitution.

2. For the November 3, 2020 general election, enjoining Defendant and his agents from enforcing:
 - a. The requirement of Ark. Const. Art. 5, § 1 that the petition for the Proposed Amendment contains signatures of electors equal to at least ten percent of the total vote cast for the office of governor in the most recent gubernatorial election.
 - b. The requirement that the SOS not accept a petition for filing that does not purport to contain the minimum number of signatures as required in Ark. Const. Art. 5, § 1.
 - c. The requirement of Ark. Ann. Code. § 7-9-108(b) that each petitioner sign the petition in the presence of the canvasser.¹³
 - d. The requirement of Ark. Ann. Code. §§ 7-9-108(b), 7-9-109 that each canvasser sign an affidavit in the presence of a Notary Public, swearing that each petitioner signed the petition in the presence of the canvasser.
 - e. The deadline of Ark. Const. Art. 5, § 1 to submit all required signatures to the Secretary of State's office not less than four months before the election at which the petition would be voted on.

¹³ Arkansas defines a petitioner as "a person who signs an initiative or referendum petition ordering a vote on a measure." *See* Ark. Ann. Code. § 7-9-101(8).

- f. The requirements of Ark. Ann. Code § 7-9-126(c)(1) that invalidates signatures that are “not an original signature.”
 - g. The requirement of Ark. Ann. Code § 7-9-126(c)(3) that invalidates signatures that are illegible.
 - h. And any other provision of Arkansas law necessary to effectuate the relief sought herein.
- 3. Order that the Secretary of State is required to accept a petition with the requisite number of electronic signatures. *See* Ark. Ann. Code §§ 7-9-103(a)(1)(A), 7-9-104(c)(1).
- 4. Order that, to appear on the November 3, 2020 ballot, the petition for the Proposed Amendment discussed above, must have been signed by six percent of the qualified electors of the state, based on the total number of votes cast statewide for Governor in 2018, amounting to 53,492 signatures.
- 5. Order that the deadline for Plaintiff AVF to submit signatures be extended to September 3, 2020.
- 6. Order that the Secretary of State shall ascertain and declare the sufficiency or insufficiency of additional signatures within 14 days of the filing of supplemental petitions. *See* Ark. Ann. Code § 7-9-111(d)(3).
- 7. Award attorney’s fees and costs associated with this litigation; and
- 8. Provide any additional relief the Court deems just, proper, and appropriate.

Dated: April 22, 2020

Respectfully submitted,

/s/ David Couch

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