

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
NINTH DIVISION**

PAUL SPENCER and NEIL SEALY

PLAINTIFFS

V.

CASE NO. CV-13-4020

**HONORABLE MARK MARTIN, in his official
Capacity as Secretary of State for the State of Arkansas**

DEFENDANT

**HONORABLE DUSTIN MCDANIEL, in his official
Capacity as Attorney General for the State of Arkansas**

INTERVENOR

ORDER

Before this Court are the Plaintiff's Motion for Preliminary Injunction, the Defendant's Response to the Motion for Preliminary Injunction, and the Intervenor's Response in Opposition to the Motion for Preliminary Injunction. The Plaintiffs are represented by David Couch, attorney, and Bettina Brownstein, attorney. The Defendant, the Honorable Mark Martin, Arkansas Secretary of State, is represented by Martha Adcock, General Counsel to the Arkansas Secretary of State, and Justin Tate, Associate General Counsel to the Arkansas Secretary of State. The Intervenor, the Honorable Dustin McDaniel, the Attorney General of the State of Arkansas, is represented by Patrick Hollingsworth, Assistant Attorney General.

The Plaintiffs, Paul Spencer and Neil Sealy, filed a complaint seeking declaratory and injunctive relief against the Honorable Mark Martin, Arkansas' Secretary of State, seeking to prevent the implementation of portions of Act 1413 of 2013 pursuant to the Arkansas Civil Rights Act, §§16-123-101 et seq. The Plaintiffs allege that Act 1413 of 2013 violates Article 1, §5 and Article 2, §§2, 3, 4, 6 and 8 of the Arkansas Constitution.

The Plaintiff, Paul Spencer, is president of Regnat Populous, which was the sponsor of a petition drive to put ethical reforms on the 2012 general election ballot. The Plaintiff, Neil Sealy, is executive director of the Arkansas Community Organization. Both are citizens of the State of Arkansas and have sponsored and participated in the initiative process and in the initiative petition drives. Further, both of the Plaintiffs could be criminally prosecuted if they fail to comply with provisions of the statute. See Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332, 336-41 (2002). Therefore, the Plaintiffs have standing to sue.

The Defendant, the Secretary of State is responsible for the regulation, implementation, and enforcement of the initiative and referendum petition laws and procedures. The Secretary of State's office is also responsible for counting and validating the petition signatures, deciding the sufficiency of the statewide petitions, and certifying the petitions.

As the Plaintiffs are challenging the constitutionality of the statute, the Attorney General intervened to defend the constitutionality of the statute. See Ark. Code Ann. §16-111-106(b).

This Court has subject matter jurisdiction and venue lies in Pulaski County as the Plaintiffs reside here, the cause of action arose in Pulaski County, and the Defendant is an officer of the State. See Ark. Code. Ann. § 16-60-102 and 103.

Article 5, §1 of the Arkansas Constitution (also referred to as Amendment 7 to the Arkansas Constitution) provides, as a guarantee to the citizens of Arkansas, the right to place proposed laws and constitutional amendments on the ballot through an initiative and referendum process. This constitutional provision also includes a section that the Arkansas General Assembly shall enact laws prohibiting perjury, forgery, and all other felonies or other fraudulent practices in the securing of signatures or filing of petitions and that laws may be enacted to facilitate its operation.

Article 5, §1 also provides, in part,

“(1) No legislation shall be enacted to restrict or impair the exercise of the rights herein reserved to the people; (2) No law shall be passed ... in any manner interfering with the freedom of the people in procuring petitions; (3) No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people.”

Act 1413 of 2013 was enacted by the 89th Arkansas General Assembly in the Regular 2013 Session and went into effect on April 22, 2013, as it contained an emergency clause and was signed by the Governor on that date.

The legislative findings as stated in the Act, provide, in part,

(1) Through Amendment 7 to the Arkansas Constitution, the people of Arkansas have reserved to themselves the power to propose legislative measures, laws, and amendments to the Arkansas Constitution and to enact or reject the proposed measures, laws, and amendments at the polls independently of the General Assembly;

(2) The citizens of this state have an expectation that their right of initiative and referendum will be respected and that the process of gathering signatures of registered voters will be free of fraud, forgery, and other illegal conduct by sponsors, canvassers, notaries, and petitioners;

(3) Sponsors and paid canvassers may have an incentive to knowingly submit forged or otherwise invalid signatures in order to obtain additional time to gather signatures and submit supplemental petitions;

(4) In 2012, sponsors of four (4) separate initiative petitions submitted petitions to the Secretary of State containing over two hundred ninety-eight thousand (298,000) purported signatures of registered voters;

(5) Of the four petitions submitted, none had an initial validity rate in excess of fifty-six percent (56%), and three (3) of the petitions had an initial validity rate below thirty-one percent (31%); and

(6) Of the three petitions with the lowest initial validity rate, there were widespread instances of apparent fraud, forgery, and false statements in the signature-gathering process.

The Plaintiffs challenge the constitutionality of Section 3, §7-9-103; Section 11, §7-9-109(a); Section 13, §7-9-111(a); Section 15, §7-9-111(a) and (f); Section 18, §7-9-126; and Section 21, §7-9-601 of the Act.

The Plaintiffs maintain that the statute unconstitutionally has a chilling effect on each plaintiff and other citizens from engaging in the petitioning process in that

(a) It unwarrantably shrinks the pool of potential canvassers by requiring that paid canvassers have their name and residence address provided to the Secretary of State prior to obtaining any signatures.

(b) It unwarrantably shrinks the pool of potential canvassers and places burdens on sponsors by requiring them to collect oaths of each canvasser verifying that they have not pled to or been convicted of a crime involving the violation of election laws, forgery, fraud or identity theft in any state prior to obtaining any signatures.

(c) It unwarrantably shrinks the pool of potential canvassers by requiring them to provide a photograph taken within 90 days prior to obtaining any signatures.

(d) It makes the collection of an adequate number of signatures unwarrantably difficult by requiring that an entire petition part be invalidated if a paid canvasser has not submitted the information required by §7-9-601.

(e) It makes the collection of an adequate number of signatures unwarrantably difficult by requiring that an entire petition part be invalidated if it contains the signature of a petitioner from more than one county unless each signature of a petitioner from another county is clearly stricken before the filing of the petition.

(f) It unwarrantably shrinks the pool of potential canvassers by requiring that a petition shall have attached an affidavit of the canvasser stating that his or her current residence address appearing on the verification is correct.

(g) It chills the pool of potential canvassers and makes collection of valid petition parts unwarrantably difficult because it provides that a canvasser commits a Class A misdemeanor if he or she prints a name, address, birth date, and date of signing for a person unless the person has a disability because “disability” is not defined, and there are no means for determining if a person has a “disability” to trigger this provision of the Act.

(h) It unwarrantably chills the pool of potential canvassers and makes the collection of an adequate number of signatures more difficult by requiring that the entire petition part be invalidated if one signature has a material defect, because what constitutes a “material defect” is not defined in the Act and there are no means of determining what constitutes a material defect.

(I) It unwarrantably chills the pool of potential canvassers because the definition of “paid canvasser” as one who is paid money or “anything of value” will limit, and possibly eliminate, the pool of potential canvassers, as “anything of value” is not defined and could be interpreted to encompass volunteer canvassers who do not receive remuneration for soliciting signatures.

(j) It unwarrantably restricts the ability of the sponsor to obtain adequate signatures by invalidating an entire petition part if the petition lacks the signature, printed name and residence address of the canvasser or is signed by more than one canvasser.

(k) It unwarrantably restricts the ability of the sponsor to obtain adequate signatures by invalidating an entire petition part if the notarization is defective.

(l) It unwarrantably restricts the ability of the sponsor to obtain adequate signatures by requiring a signer to print his name, address, and birth date unless he or she has a disability and requiring the canvasser to print his or her name in the margin of the petition.

The Plaintiffs argue that the new provisions are unwarranted restrictions that interfere with the right of the people to petition and contrary to the legislative findings, these restrictions interfere with the freedom of the people in procuring petitions, reduce the pool of potential canvassers and increase the expense of obtaining canvassers, making it unwarrantably difficult to obtain the requisite number of signatures to appear on the ballot. The Plaintiffs also maintain that the statute violates the equal protection provisions of the Arkansas Constitution in treating paid canvassers differently than unpaid canvassers; that the statute violates the due process rights of the canvasser and sponsor in that portions of the statute are undefined, unconstitutionally vague and chill the exercise of the free speech and the right to petition of the citizens.

The Defendant and the Intervenor argue that Acts of the General Assembly are presumed constitutional and the Plaintiffs bear the burden of proving any provision of Act 1413 is unconstitutional. See Keller v. Fayetteville Police Department, 339 Ark. 274, 5 S.W.3d 402 (1999); Whorton v. Dixon, 363 Ark. 330, 336, 214 S.W. 3d 225, 230 (2005). Further, the Defendant and the Intervenor point out that every act carries a strong presumption of constitutionality and before it will be held unconstitutional, the incompatibility between it and the Constitution must be clear. Every reasonable doubt must be resolved in favor of constitutionality. South Central District of Pentecostal Church of God of America, Inc. v. Bruce-Rogers Co., 269 Ark. 130, 139, 599 S.W.2d 702, 704 (1980).

The Plaintiffs have moved for a Preliminary Injunction which requires that they must demonstrate a likelihood of success on the merits and that they will suffer irreparable harm if an injunction is not issued. See Smith v. American Trucking Association, 300 Ark. 594, 781 S.W.2d 3, 4 (1989). The Plaintiffs maintain that they are not seeking money damages or redress in a court of law. The Plaintiffs seek equitable relief in asking the Court to preliminarily and permanently enjoin the enforcement of parts of the Act and to declare it invalid.

Both the Defendant and the Intervenor maintain that the Plaintiffs have failed to sustain their burden in both demonstrating a likelihood of success on the merits and that they will suffer irreparable harm if the injunction is not granted.

A two day hearing was conducted on the issue of the Motion for Preliminary Injunction. Kerry Baldwin, former assistant director of the Elections Division for the Secretary of State, testified as to the 2012 process for handling initiative petitions and the 2013-2014 process.

This Court notes that the Secretary of State's office did an admirable job in disqualifying signatures which were suspect in four petitions filed in 2012. Two issues failed to turn in the required number of valid signatures after the Secretary of State's office had disqualified many of the signatures. The other two issues used the additional time to secure additional signatures during the "cure period" in order to qualify.

Both of the Plaintiffs testified that the statute creates two classes of canvassers, paid and unpaid. The paid canvassers have more requirements than the unpaid ones. Further, testimony from both Plaintiffs and the expert witness, Paul Jacobs, confirmed that successful initiative campaigns must use paid canvassers in today's world.

However, a significant issue is found in the lack of a definition of "anything of value" which is the test for whether or not the canvasser is a paid one. Both Plaintiffs, Paul Jacobs and Edgee Baggett, an owner of a business providing canvassers, testified that providing bottles of water, t-shirts, pizza (all of which have some monetary value) could mean that volunteers, previously categorized as nonpaid canvassers, should be changed to that of paid canvassers before they are allowed to gather more signatures.

The Plaintiffs' witnesses also testified as to the difficulty of interpreting the term "disability" which requires canvassers to print the name, address, birth date, and date of signing if the person has a disability – without knowing what constitutes a disability. The term "disability" is not defined in the statute.

Further, if there is a “material defect” the entire petition part (made up of 10 signatures on a petition part) is excluded. There is not a definition of “material defect” in the statute. Also, the disqualification of the entire petition part must be based on the intentional conduct on the part of the canvasser to commit fraud or connive with signers to submit false signatures. There are no guidelines for determining the intent of the canvasser to commit fraud or conspiring to submit false signatures.

Another area of concern as indicated by the Plaintiffs’ witnesses is the distinction between the current residence address and the current domicile residence. Testimony from Jacobs, Jennifer Pierce, and Baggett indicated that paid canvassers have temporary addresses when they are employed on statewide initiative actions. To require the canvasser to continually update the residence address places more restrictions on the paid canvasser than the unpaid one and will serve as a chilling effect on recruiting canvassers. Further, Pierce testified that requiring the residence address causes her to be fearful of potential harassment by foes of the petition drive. There is evidence that “blocking” occurs when opponents will interrupt the solicitation process with harassing tactics against the canvassers. Knowledge of where the canvasser lives could lead to more harassment.

Another change that burdens the process is the inability to continue to solicit signatures while awaiting the counting of the valid signatures by the Secretary of State. The Secretary of State has thirty days to make a determination on the validity of the signatures. The new provision does not allow canvassers to continue gathering signatures and therefore, interrupts the process. Testimony from Plaintiff Sealy indicated that canvassers would quit during that time

and sponsors would have to train more canvassers. The Plaintiff Sealy testified that all of these changes would make it more difficult to get measures on the ballot and would increase the cost of the campaign. All of the witnesses testified that currently it is not an easy thing to get measures on the ballot under the 2012 law. With the additional requirements that lack definite terms or slow the process down, the costs of using the initiated act will rise and favor only wealthy sponsors in the process.

In 2013-2014, the valid signatures for an initiated act to be placed on the ballot must total 62,507. This figure represents 8% of the total vote cast in the 2010 gubernatorial race. Included in that overall number, there must be signatures from 15 different counties. The sponsor picks the fifteen counties. Each of these fifteen counties must contain the signatures of not less than one half of the designated percentage of electors from that county. In an initiated act, that percentage would be 4% of the people who voted for governor in the previous election in that particular county. These requirements are not easily met. To establish new requirements which are unclear and not properly defined restricts, hampers and impairs the exercise of the rights reserved to the people of the State of Arkansas.

As earlier noted, the Secretary of State's office did a commendable job in excluding signatures that appeared fraudulent or incomplete in 2012. The Defendant and the Intervenor presented evidence of what appeared to be forged signatures from the 2012 petition drives. However, these signatures were disallowed by the Secretary of State. In other words, the Secretary of State's office guaranteed the citizens of Arkansas that the initiative process in 2012 was free of "fraud, forgery and other illegal conduct by sponsors, canvassers, notaries and petitioners."

The effect of the new provisions, especially the sections which fail to define the use of the words, disability, anything of value, material defect, etc., will mean that the citizens of the State of Arkansas will lose their ability to propose legislative measures and laws directly to the people.

While the goals of stamping out fraud, forgery and false statements are laudatory, and appear to have been met in 2012 by the Secretary of State, the effects of Act 1413 are crushing to the citizens who wish to bring their issues directly to the people. The effects of Act 1413 seem to impact the citizens rather than the special interests who always seem to have the money to further their goals.

Therefore, based on the testimony presented and arguments of counsel, the Court finds that Section 3, ACA §7-9-103; Section 11, ACA §7-9-109(a); Section 13, ACA §7-9-111(a); Section 15, ACA §7-9-111(a) and (f); Section 18, §7-9-126 and Section 21, ACA §7-9-601 of Act 1413 of 2013 are unconstitutional and ENJOINS the Honorable Mark Martin, Arkansas Secretary of State, from applying the provisions of Act 1413 of 2013 in Section 3, ACA §7-9-103; Section 11, ACA §7-9-109(a); Section 13, ACA §7-9-111(a); Section 15, ACA §7-9-111(a) and (f); Section 18, §7-9-126 and Section 21, ACA §7-9-601.

IT IS SO ORDERED. Dated this 28th day of February, 2014.

Judge *McGowan*
Date *2-28-14* Div *9th*

- Jury Trial
- Bench Trial
- Non-Trial

Mary Opemus McGowan
CIRCUIT JUDGE

February 28, 2014
DATE