

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

PAUL SPENCER and NEIL SEALY

PLAINTIFFS

v.

No.

MARK MARTIN, in his official capacity as
Secretary of State for the State of Arkansas

DEFENDANT

**BRIEF IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

This is an action brought pursuant to the Arkansas Civil Rights Act, §16-123-101 *et. seq.*, which challenges the constitutionality of Act 1413 of the 89th General Assembly of Arkansas, to be codified at Ark. Code Ann. §§9-7-101 to 9-7-601 (the "Act"). The provisions of the Act infringe on the rights of the people of Arkansas to exercise freedom of speech, to petition the government, and to be treated with equality before the law, as the Act places unwarranted restrictions on their right to propose laws by way of initiative and referendum petitions. Thus, the Act violates Articles 2 and 5 of the Arkansas Constitution.

Plaintiffs, two citizens of Arkansas, are involved in the initiative process in this state, having both sponsored and participated in initiative petition drives. They intend to continue to do so but are constrained because of the Act. They ask the Court to issue a preliminary injunction to prevent irreparable harm to them that will result if the Act is enforced.

Statement of Facts and Law

Plaintiff Neil Sealy is a citizen and resident of Pulaski County, Arkansas. He is executive director of Arkansas Community Organization. He has helped organize and

been a member of committees sponsoring petition drives and a canvasser on several statewide and local petition drives to place initiated acts and ordinances on the ballot in Arkansas. Sealy would like to continue in the future with petition sponsorship and canvassing; however, he feels constrained from being able to do so successfully by the undue burdens placed on the process by various provisions of the Act.

Spencer is a citizen and resident of Pulaski County, Arkansas. Spencer He is a teacher of government at Catholic High School in Little Rock, Arkansas. He is president of an organization known as Regnat Populus, which was the sponsor of a petition drive to put certain ethical reforms on the 2012 general election ballot. He would like to continue in the future with petition sponsorship and canvassing; however, he believes various provisions of the Act will prevent him from exercising his rights under the Arkansas Constitution.

Article 5, § 1 of the Arkansas Constitution (previously referred to as Amendment 7) was passed by the people in 1920. The language of Article 5, § 1 is explicit in its grant of power to the people "to propose legislative measures, laws and amendments to the Constitution" and adamant that "[N]o legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people." Art. 5, §1. It contains a section entitled "Unwarranted Restrictions Prohibited" which states;

No law shall be passed to prohibit any person or persons from giving or receiving compensation for circulating petitions, nor to prohibit the circulation of petitions, nor in any manner interfering with the freedom of the people in procuring petitions, but laws shall be enacted prohibiting and penalizing perjury, forgery, and all other felonies or other practices, in securing of signatures or filing of petitions.

In addition, the "Self-Executing" section states:

No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people." Art. 5, § 1.

Article 2 contains the Constitution's Declaration of Rights and provides:

3. Equality before the law.

The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition.

4. Right of assembly and of petition.

The right of the people peaceably to assemble, to consult for the common good; and to petition, by address or remonstrance, the government, or any department thereof, shall never be abridged.

6. Liberty of the press and of speech - Libel.

The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right. In all criminal prosecutions for libel, the truth may be given in evidence to the jury; and, if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party charged shall be acquitted.

8. Criminal charges - Self-incrimination - Due process - Double jeopardy - Bail.

No person shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury, except in cases of impeachment or cases such as the General Assembly shall make cognizable by justices of the peace, and courts of similar jurisdiction; or cases arising in the army and navy of the United States; or in the militia, when in actual service in time of war or public danger; and no person, for the same offense, shall be twice put in jeopardy of life or liberty; but if, in any criminal prosecution, the jury be divided in opinion, the court before which the trial shall be had, may, in its discretion, discharge the jury, and commit or bail the accused for trial, at the same or the next term of said court; nor shall any person be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.

Since Amendment 7 was enacted, Arkansas courts have zealously protected the rights of the people to engage in the direct legislative process. The courts have held that the amendment must be liberally construed to effectuate its purpose. As stated in *Reeves v. Smith*, 78 S.W. 2d. 72, (Ark. 1935):

Amendment No. 7 necessarily must be construed with some degree of liberality, in order that its purposes may be effectuated. Strict construction might defeat the very purposes, in some instances, of the amendment. Amendment No. 7 permits the exercise of the power reserved to the people. Amendment No. 7 permits the exercise of the power reserved to the people to control, to some extent at least, the policies of the state as distinguished from the exercise of similar power by the Legislature, and since that residuum of power remains in the electors, their acts should not be thwarted by strict or technical construction.

Id. at 73. *See also, Porter v. McCuen*, 310 Ark. 674 (1992) (“The initiative and referendum amendment must be liberally construed in order to effectuate its purposes and only substantial compliance with the amendment is required.”)

The 89th General Assembly enacted Act 301 with an emergency clause. The Act went into effect when signed by the Governor on March 22, 2013. The Act revises and amends Title 9, Chapter 7 of the Arkansas Code, specifically Ark. Code Ann. §§7-9-101 through 7-9-601. *See* Act §§1-21. 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 because they attempt to strictly enforce Article 5, § 1 in ways already prohibited by rulings of the Arkansas Supreme Court and are unwarranted restrictions that interfere with the right of the people to petition guaranteed in Article 5, § 1 violating the rights of the people as declared in Article 1.

The Necessity of a Preliminary Injunction

Under Ark. Code Ann. § 7-9-101, *et. seq.* July 7, 2014 is the deadline to file a statewide, initiative petition with the Secretary of State in order to place an initiated measure on the November 2014 general election ballot. *See* Article 5, § 1 and 2013- 2014 Initiative and Referendum handbook published by the Arkansas Secretary of State. By July 7, 2014, 62,507 signatures from 15 counties are required. Because of the time it needed to prepare and try this case, if a preliminary injunction is not granted, there would not be adequate time for plaintiffs and other possible sponsors to gather the necessary number of signatures by the deadline.

Sponsors of initiated acts rely on paid canvassers to gather sufficient signatures to meet constitutional requirements for ballot placement. *See* Exhibits 1-4. Without paid canvassers, it is virtually impossible to qualify measures for a statewide ballot. *See also, Meyer v. Grant*, 486 U.S. 414, 422-23 (1988). The Act will make it more difficult to obtain paid canvassers to work on petition drives in Arkansas. *Id.* In addition, if paid canvassers can be found to work in Arkansas, the cost for these professionals will be increased.

The Preliminary Injunction Standard

In determining whether to issue a preliminary injunction pursuant to Rule 65 of the Arkansas Rules of Civil Procedure, Arkansas courts consider (1) whether irreparable harm will result in the absence of a preliminary injunction, and (2) whether the moving party has demonstrated a likelihood of success on the merits. *Custom Microsystems, Inc.*

v. Blake, 344 Ark. 536, 425 S.W. 3d 453, 456 (2001)¹; *Smith v. Am. Trucking Ass'n*, 300 Ark. 594, 781 S.W. 2d 3, 4 (1989); *W.E. Long Co. v. Holsum Baking Co.*, 307 Ark. 345, 820 S.W.2d 440 (1991).

Plaintiffs Will Suffer Irreparable Harm Absent a Preliminary Injunction

“Irreparable harm is the touchstone of injunctive relief.” *United Food and Com.Workers v. Wal-Mart Stores, Inc.*, 120 S.W. 3d 89, 353 Ark. 902 (2003); *Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221 (1997). Harm is generally considered irreparable when it cannot be adequately compensated by money damages or redressed in a court of law. *Kreutzer v. Clark*, 271 Ark. 243, 607 S.W.2d 670 (1980).

Plaintiffs will suffer irreparable harm if a preliminary injunction is not granted. Plaintiffs request a ruling by this Court that parts of the Act are unconstitutional. They do not seek money damages or redress in a court of law; rather the relief they seek is equitable for the Court to preliminarily and permanently enjoin the enforcement of parts of the Act and to declare it invalid.

In any case, no remedy at law exists which can compensate for the loss of protected free speech rights. *Nat'l People's Action v. Village of Wilmette*, 914 F.2d. 1008, 1013 (7th Cir. 1990). An allegation of impairment of freedom of expression, even for a

¹ In *Custom Microsystems, Inc.*, 425 S.W. 3d at 457, the Arkansas Supreme Court rejected the preliminary injunction four prong test espoused by the Eighth Circuit in *See Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981). In *Dataphase*, the Eighth Circuit considered four factors in determining whether a preliminary injunction should issue: (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other litigating parties; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Id.* at 113. The Court in *Custom Microsystems* stated, “We have never adopted a flexible test where we ‘balance the equities,’ such as the Eighth Circuit adopted in *Dataphase*. And we decline to do so today.” *Id.* at 468.

minimal time, “unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976).

A preliminary injunction is necessary because of the time constraint imposed by Article 5, § 1. Plaintiffs and other possible sponsors of initiated measure have only until July 7, 2014 to gather 62,507 signatures from 15 different counties. Obviously, there is not enough time to accomplish this considering what little time that would remain after preparing and trying a lawsuit to conclusion.

Plaintiffs Are Likely To Succeed on the Merits

The second prong of the preliminary injunction standard is satisfied if plaintiffs can show they are likely to succeed on the merits of their claims. “Likely to succeed on the merits” means “a reasonable probability of success”. *Custom Microsystems*, 42 S.W. 3d at 457 (quoting *Black's Law Dictionary* 938 (7th ed.1999)). Plaintiffs have a reasonable probability of succeeding on the merits of all the claims in their complaint.

Under US Supreme Court Decisions and Article 5, § 1 the Challenged Provisions of the Act Are Unconstitutional

The Arkansas Civil Rights Act provides that Arkansas courts may look to decisions from other state and federal courts interpreting the Federal Civil Rights Act of 1871, codified at 28 U.S.C. §1983, for their persuasive value in deciding a case brought under the Arkansas Civil Rights Act. Two United States Supreme Court cases are instructive here: *Meyer v. Grant*, 486 U.S. 414 (1988) and *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 192 (1999). In these cases, the Supreme Court characterizes petition circulation as “core political speech” protected by the United States Constitution because it involves “both the expression of a desire for political change and a discussion

of the merits of the proposed change.” *Meyer*, 486 U.S. at 421-22; *Buckley*, 525 U.S. at 194-95. As core political speech, it is protected from laws discouraging participation in the petition process by limiting the number of voices available to convey a proponent’s message and diminishing the size of the audience that can be reached. *Id.* The First Amendment protects a sponsors right to “advocate their cause but also to select what they believe to be the most effective means for so doing.” *Meyer*, 486 U.S. at 424. While states are permitted leeway in regulating the electoral process, the latitude permitted cannot produce “undue hindrances to political conversations and the exchange of ideas.” *Buckley*, 525 U.S. at 191-92. Statutes must be struck down if they reduce the number of qualifying initiatives and the exchange of ideas. *Meyer*, 486 U.S. at 421. ²

These Supreme Court decisions, Article 5, §1, Article 2, §§ 3, 6, 8 and the affidavits attached as exhibits to the motion show that all the provisions of the Act challenged in this lawsuit violate the Arkansas Civil Rights Act and the Arkansas Constitution.

The emphatic language of Article 5, §1 in particular should guide this Court’s ruling on this motion. It commands: “No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people.” and “No law shall be passed . . . in any manner interfering with the freedom of the people in procuring petitions.” However, the cumulative effect the challenged provisions of the Act on the people’s ability to exercise their constitutional legislative power is that the provisions not only interfere, restrict, hamper and impair that power, they eviscerate it.

² *Meyer* struck down a Colorado statute that banned paid canvassers. In *Buckley*, the Supreme Court struck down three provisions of a Colorado statute that required (1) canvassers to be registered voters, (2) canvassers to wear identification badges, and (3) and sponsors to provide the names and addresses of paid canvassers and the amount paid to each canvasser.

Courts applying *Meyer* and *Buckley* to challenges under §1983 have invalidated state statutes limiting the ability of the people to petition. For instance, the United States District Court for Colorado recently ruled in *The Independence Institute, et al. v. Gessler*, Civil Action No. 10-cv-00609-PAB-MEH, 2013 WL 1302391 (Mar. 29, 2013), that a Colorado statute that mandated a hybrid compensation scheme for paid canvassers was unconstitutional under the First Amendment.³ The Colorado District Court found that the plaintiffs had provided evidence showing that the statute imposed a severe burden on their expressive activities because it would deter professional canvassers from working in Colorado, thus decreasing the likelihood that a signature-gathering campaign would be successful, and would also increase the cost of hiring these professionals. *Id.* slip op. p. 12, 38. ⁴

The Affidavits Submitted Show That The Act Is Unconstitutional

The affidavits of Paul Spencer, Neil Sealy, Jennifer Pierce and Paul Jacob, attached as Exhibits 1, 2, 3, and 4 to the motion for preliminary injunction, provide evidence that the Act will deter paid canvassers from working in Arkansas, diminish the probability that an initiated act will qualify to be on the ballot, and increase the cost of signature gathering.

³³ The Colorado Statute, Colo. Rev. Stat. §1-40-112(4) limited per-signature compensation to canvassers to 20% of his or her total compensation. Thus, the majority of their compensation was in the form of hourly payments.

⁴ The Colorado court decision discussed the standard that is applied to regulations of the electoral process. A severe burden is subject to strict scrutiny; a lesser burden triggers a less exacting review and is subject to a balancing test. “Where a law appears on its face to regulate the initiative process, courts should engage in a searching inquiry to determine if, in regulating the process, the State has gone too far by instituting procedures which effectively limit underlying speech. Therefore, the essential consideration is how severe a burden a particular regulation effectively places on the underlying speech. *Id.* at 32 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 358 (1997)). The Colorado court found the statute imposed a severe burden on plaintiffs’ expressive activities so that strict scrutiny applied but also that the defendant could not show that pay-per-signature incentivized fraud to a greater extent than pay-per-hour. Therefore, the statute also failed the balancing test that some courts have applied.

The Specific Counts Addressed by the Motion
Counts 1 and 8
7-9-601

- Section 7-9-601 (a) (1) (C) (i) prohibits a person from providing money or anything of value to another person for obtaining signatures on a statewide initiative or referendum petition unless the sponsor provides a complete list of all paid canvassers' names and current residential addresses to the Secretary of State.
- Sections 7-9-601 (b) (1), (2), (3) and (6) prohibit a paid canvasser from obtaining a signature on an initiative or referendum petition unless he or she provides to the sponsor his or her full name and any assumed name, his or her current residence address and permanent domicile address if the latter is different from the former, a signed statement taken under oath or solemn affirmation that the person has not pled guilty or *nolo contendere* to or been found guilty of a criminal offense involving a violation of the election laws, fraud, forgery, or identification theft in any state, and a photograph taken within 90 days.
- Section 7-9-601(d) defines "paid canvasser" as "a person who is paid or with whom there is an agreement to pay money or anything of value before or after a signature on an initiative or referendum petition is solicited in exchange for soliciting or obtaining a signature on a petition."

The requirements of § 7-9-601 are unwarranted restrictions prohibited by Article 5, §1 of the Arkansas Constitution because they 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 definition of “paid canvasser” in §7-9-601 is vague in that “anything of value” is undefined and subjects canvassers and sponsors to uncertainty as to who will be considered a paid canvasser under the Act. Thus, it will have a chilling effect on all potential canvassers and sponsors. This interferes with the freedom of the people in procuring petitions, reduces the pool of potential canvassers and increases the expense of obtaining canvassers, and thus make it makes it unwarrantably difficult to obtain the requisite number of signatures to appear on the ballot.

COUNT 2
7-9-126

- Section 7-9-126 (b) provides that a petition part and all the signatures appearing on the petition part shall not be counted for any purpose by the official charged with verifying the signatures, including the initial count of signatures, if, *inter alia*, one of the following occurs:
 - (a) The petition lacks the signature, printed name, and residence address of the canvasser or is signed by more than one canvasser. *See* §126 (b) (2);
 - (b) The canvasser is a paid canvasser whose name and the information required under §7-9-601 were not submitted by the sponsor to the Secretary of State before the petitioner signed the petition. *See* §7-9-126 (b) (3) (A);
 - (c) The canvasser verification is not notarized, is notarized by more than one notary, or lacks a notary signature or a notary seal. *See* §7-9-126 (b) (4);

(d) The petition is part of a statewide petition clearly and unmistakably contains signatures of petitioners from more than one (1) county unless each signature of a petitioner from another county is clearly stricken before the filing of the petition with the Secretary of State. *See* 7-9-126 (b) (7).

(e) The petition part has a material defect that, on its face, renders the petition part invalid. *See* 7-9-126 (b) (8).

- Section 7-9-126 (d) provides that if the initial count of signatures is less than the designated number of signatures required by the Arkansas Constitution and statutory law in order to certify the measure for the ballot and the deadline for filing petitions has passed, the acceptance of any additional signatures to cure the insufficiency of the petition on its face is prohibited.

It is not uncommon for mistakes to occur with regard to a canvasser's residence address or notarization. Such a mistake will invalidate all signatures on a petition part. It is not uncommon for petitioners to be mistaken as to the county in which they are registered to vote. Even the Secretary of State recognizes the difficulty in determining the voting address since many cities in Arkansas cross county boundaries. *See* 2013-3014 *Fact Sheet Statewide Initiative And Referendum*. Under the Act, a mistake by one petitioner will invalidate all signatures on the petition part.

Because an entire petition part must be disqualified even if it contains an inadvertent rather than an intentional defect, the provisions of the Act challenged in Count 2 are unconstitutional under Arkansas Supreme Court decisions in *Cobb v. Burress*, 209 S.W. 2d 694, 700 (1948); *Sturdy v. Hall*, 204 Ark.785 (1942); *Pafford v. Hall*, 217

Ark. 734, 233 S.W. 2d 72 (1950); *Ellis v. Hall*, 219 Ark. 869, 245 S.W. 2d 223 (1952); *Roberts v. Priest*, 975 S.W. 2d 850, 853 (1998); cf. *Porter v. McCuen*, 310 Ark. 674, 839 S.W. 2d 521 (1992). These cases stand for the principle that an entire petition part cannot be invalidated because one or more signatures on the petition part are invalid if the invalidity is the product of a mistake and not intentional wrongdoing. To do otherwise would disenfranchise honest citizens exercising their core political speech.

In *Pafford*, the plaintiffs questioned the sufficiency of a petition for an initiated act. They contended that all names on 1,290 sheets should be invalidated because the canvassers made false statements in their affidavits verifying the genuineness of signatures. The Court, adopting the rule announced in *Sturdy v. Hall*, 204 Ark. 785 (1942) held that a single signature on a sheet it was not enough to invalidate the entire sheet. Instead, it must be shown that the canvasser was guilty of conscious and deliberate fraud. *Pafford*, 233 S.W. 2d at 73. In *Cobb*, the Court refused to agree with the plaintiff that if one non-genuine signature is attested to by a canvasser's affidavit, then all the signatures covered by the canvasser's affidavit must be stricken. The Court found that the proof showed "an honest effort by citizens to obtain a referendum election, and it would defeat the very purpose of the Constitutional Amendment to allow vague presumptions of fraud to overcome tangible evidence of good faith." *Id.* at 700.

Sections 7-9-126 (b) (3) (A) and 126 (B) (7) and (8) are not only unwarranted restrictions under Article 2, § 1 but also violate the Article 2, §§ 4, 6 of the Arkansas

Constitution in that they chill potential canvassers from engaging in protected speech and thus chill plaintiffs in pursuit of their exercise of the right of free speech.

Finally, the term “material defect” in § 7-9-126 (b) (8) is not defined and is unconstitutionally vague in that no one could reasonably understand what constitutes a material defect. A “material defect” is apparently something other than the defects listed in §7-9-126 (b) (2)-(7).

COUNT 3
7-9-103

- Section §7-9-103 (a) (1) (A) requires a person signing a petition, in addition to signing his or her own name, birth date to also print his or her name, and address unless the signer requires assistance due to a disability. *See* §7-9-103 (a) (2) (A), (B).
- Section 7-9-103(a) (3) prohibits anyone under eighteen years of age from acting as a canvasser.
- Section 7-9-103(a)(4) prohibits a paid canvasser from soliciting signatures on a statewide initiative or referendum petition if the sponsor has not provided the information required under §7-9-610 to the Secretary of State before soliciting signatures on a petition.
- Under Section 7-9-103 (c) (5) a person commits a Class A misdemeanor if a person acting as a canvasser, notary, sponsor or agent of a sponsor accepts or pays money or anything of value for obtaining signatures on a petition when the person acting as a canvasser, sponsor, or agent of a sponsor knows that the name or address of a person acting as a canvasser is not included on the sponsor’s list filed with the Secretary of State under §7-9-601.

Section 7-9-103 imposes unwarranted restrictions in violation of Article 5, §1 of the Arkansas Constitution and the principles enunciated in *Meyer* and *Buckley* because it has a chilling effect on canvassers and sponsors reduces the pool of potential canvassers unwarrantably interfering with the freedom of the people in procuring petitions. Moreover, §7-9-103 (a) (1) (A) is in violation of Article 5, § 1 because it imposes more requirements than allowed by this article.

In addition, the terms “anything of value” and “disability” as used in §7-9-103 are not defined and are unconstitutionally vague in that no one could reasonably understand what constitutes “anything of value” or know to whom the criminal penalty applies or what constitutes a disability such that a canvasser may print the name, address, birth date and date of signing for another. The uncertainty created by these undefined and vague terms will have a chilling effect on all potential canvassers and sponsors. This uncertainty interferes with the freedom of the people in procuring petitions, reduces the pool of potential canvassers and increases the expense of obtaining canvassers, making it unwarrantably difficult to obtain the requisite number of signatures to appear on the ballot.

COUNTS 4 and 10
7-9-103, 7-109, 7-9-111(f)

- Section 7-9-103 (a) (4) provides that a person shall not act as a paid canvasser on a statewide initiative or referendum petition if the sponsor has not provided the information required under §7-9-601.
- Under Section 7-9-109 (c) (5) a person commits a class A misdemeanor if that person, acting as a canvasser, notary, sponsor, or agent of a sponsor accepts or pays money or

anything of value for obtaining signatures on a petition when the person acting as a canvasser, sponsor, or agent of a sponsor knows that the name or address of a person acting as a canvasser is not included on the sponsor's list filed with the Secretary of State under §7-9-601.

- Section 9-7-111(f) requires paid canvassers, when filing petitions, to submit a statement identifying the paid canvasser by name, to sign a statement indicating that the sponsor has provided a copy of the most recent edition of the Secretary of State's initiative and referenda handbook to each paid canvasser before the paid canvasser solicited signatures and explained the requirements under Arkansas law for obtaining signatures on an initiative or referendum petition to each paid canvasser before the paid .
- Section 7-9-103 (a) (4) provides that a person shall not act as a paid canvasser on a statewide initiative or referendum petition if the sponsor has not provided the information required under §7-9-601.

Sections 7-9-109 (c) (5), and 9-7-111(f) violate Article 2, §3 of the Arkansas Constitution in that they treat paid and unpaid canvassers differently and deny the latter the equal protection of state law. Applying even the rational basis test (because canvassers are not a suspect class), there is no rational basis to treat paid and unpaid canvassers differently. *See Lake View v. Huckabee*, 91 S.W. 3d 472, 497-500 (Ark. 2002); *see generally Plyler v. Doe Texas*, 457 U.S. 202, 224-25 (1982).

Plaintiffs anticipate that defendant will contend that the Act's different treatment is warranted because paid canvassers are more likely to commit fraud than unpaid canvassers. This argument was specifically rejected by the United States

Supreme Court in *Meyer*, which found paid canvassers are no more likely to commit fraud than volunteers and struck down laws discriminating against paid canvassers. See e.g., *Meyer*, 486 U.S. at 420-25.

Section 7-9-103 (a) (4) also violates Article 2, §4, 6 of the Arkansas Constitution in that it chills potential canvassers from engaging in protected speech and thus chills plaintiffs in pursuit of their exercise of the right of free speech.

COUNTS 5, 7 and 10
7-9-103, 7-9-109, 7-9-111, 7-9-126, 7-9-601

- Section 7-9-103 (a) (1) (A), (B) provides that a person must sign and print his or her own name, address, birthdate, and date of signing unless the person requires assistance due to a disability. If there is a disability, another person can sign for him or her.
- Under Section 7-9-109 (c) (5), a person commits a class A misdemeanor if that person acting as a canvasser, notary, sponsor, or agent of a sponsor accepts or pays money or anything of value for obtaining signatures on a petition when the person acting as a canvasser, sponsor, or agent of a sponsor knows that the name or address of a person acting as a canvasser is not included on the sponsor's list filed with the Secretary of State under §7-9-601.
- Section 7-9-109 (a) requires a verification form for canvassers that indicates whether one is a paid or unpaid canvasser.
- Section 9-7-111(f) requires paid canvassers, when filing petitions, to submit a statement identifying the paid canvasser by name, to sign a statement indicating that the sponsor has provided a copy of the most recent edition of the Secretary of State's initiative and referenda handbook to each paid canvasser before the paid solicited signatures and

explained the requirements under Arkansas law for obtaining signatures on an initiative or referendum petition to each paid canvasser before the paid canvasser solicited signatures. *See* § 7-9-111 (f) (2) (A), (B), (i), (ii).

- Section 7-9-126 (b) (3) (A) invalidates a petition part and all signatures appearing on the petition part if the canvasser is a paid canvasser whose name and the information required under §7-9-601 were not submitted by the sponsor to the Secretary of State before the petitioner signed the petition.
- Section 7-9-126 (b) (3) (B) defines a “paid canvasser” as one who is paid money or anything of value for soliciting signatures before or after the signatures are obtained.
- Section 7-9-601(d) defines a “paid canvasser” as a person who is paid or with whom there is an agreement to pay money or anything of value before or after a signature on an initiative or referendum petition is solicited in exchange for soliciting or obtaining a signature on a petition.

Sections 7-9-111 (f) (2) (A), (B), (i), (ii), 7-9-126 (b) (3) (A), 7-9-126 (b) (3) (B), 7-9-109 (c) (5), 7-9-126 (b) (3) (B), and 7-9-601(d) violate Article 2, §§ 4, 6 of the Arkansas Constitution in that they contain the terms “disability” and “anything of value”, which are undefined, unconstitutionally vague, chill the exercise of free speech and thus violate the due process rights of the canvasser and sponsor.

Sections 7-9-126 (b) (3) (A), 7-9-109 (c) (5), 7-9-111 (f) (2) (A), (B), (i), (ii), 7-9-126 (b) (3) (B), and 7-9-601(d) violate Article 2, §8 of the Arkansas Constitution in that the terms “disability” and “anything of value” are undefined, unconstitutionally vague,

and subject canvassers to a criminal penalty without knowing what conduct is prohibited and what status is regulated.

“Disability” is a very broad term. It encompasses any number of physical and mental conditions that could afflict a person and affect the ability to sign a petition. There is uncertainty as to how a canvasser can determine if a person is disabled such that someone else may sign for that person. In some cases it may be obvious but certainly not in all cases. Is the canvasser to ask and accept a person’s word that he or she is disabled? Similarly, “anything of value” is vague and broad. For example, a bottle of water given to a canvasser, a t-shirt, a meal, or a candy bar could be “anything of value” such that the recipient becomes a paid canvasser subject to the special rules of the Act.

A law involving a fundamental right is unconstitutionally vague under due process standards “if it does not give a person of ordinary intelligence fair notice of what is prohibited and is so vague and standardless that it allows for arbitrary and discriminatory enforcement.” *Cambiano v. Neal*, 342 Ark. 691, 35 S.W. 3d 792 (2000); *Davis v. Smith*, 266 Ark. 112, 583 S.W. 2d 37 (1979); cf. *Village of Hoffman Estates*, 455 U.S. 489 (1982). The Act infringes upon the fundamental rights of free speech and the right to petition the government recognized by the Article 2 of the Arkansas Constitution and imposes criminal penalties; therefore, a stringent vagueness test is applied.

In *Davis*, the Court articulated the rule for due process in the criminal law context. *Id.* at 41. “A statute defining an offense for which one may be punished is void for vagueness under due process standards, unless it gives one of ordinary intelligence

fair notice that his contemplated conduct is forbidden, so he may act accordingly. *Id.* (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) and *Grayned v. City of Rockford*, 408 U.S. 104 (1972)). A criminal statute which does not furnish a sufficiently ascertainable standard of guilt does not meet constitutional due process requirements. *Id.* (citing *Herndon v. Lowry*, 301 U.S. 242 (1937)).”⁵

Sections 7-9-103 (a) and 7-9-111(f) also violate Article 2, §§ 4, 6 of the Arkansas Constitution in that they chill potential canvassers from engaging in protected speech and thus chill plaintiffs in pursuit of their exercise of the right of free speech.

COUNT 6
7-9-111 (a)

Section 7-9-111 (a) prohibits a canvasser from circulating a petition or collecting additional signatures for the petition after it has been filed until the Secretary of State determines its sufficiency.

Section 7-9-111 (a) is an unwarranted restriction on the powers of the people given in Article 1, § 5 of the Arkansas Constitution in that it will make much more difficult the retention of canvassers, who will be unable to work during the Secretary of State’s determination period, and thus severely hinder the ability of sponsors to collect an adequate number of signatures. Section 7-9-111 (a) is also a violation of Article 2, §§ 4,6 in that it restricts the rights of petition and free speech.

⁵ There is no Arkansas case applying Article 2 to non-commercial speech. , *Walters v. Dobbins*, 2010 Ark. 260, 2010 (slip op. at 8), (Brown, J., dissenting).

CONCLUSION

For the reasons set forth above, plaintiffs respectfully request that the Court grant their motion for a preliminary injunction and enjoin defendant from enforcing any provision of the Act during the pendency of this litigation.

Respectfully Submitted,

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