

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

LEAGUE OF WOMEN VOTERS OF ARKANSAS,
SAVE AR DEMOCRACY, BONNIE HEATHER
MILLER, and DANIELLE QUESNELL

Plaintiffs

and

PROTECT AR RIGHTS and FOR AR KIDS

Intervenor-Plaintiffs

v.

Case No. 5:25-cv-05087-TLB

COLE JESTER, Arkansas Secretary of State,
in his official capacity

Defendant

**INTERVENORS' RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS FOR MOOTNESS**

Defendant's argument that Intervenor's claims are moot is unavailing for two independent reasons. First, there is still a live controversy between Intervenor and the Defendant. Second, Intervenor's claims present controversies capable of repetition yet evading review and therefore fall under an exception to the mootness doctrine. Accordingly, Intervenor's claims are not moot and Defendant's Motion to Dismiss for Mootness should be denied.

I. Intervenor's claims are not moot because there is still a live controversy between Intervenor and the Defendant.

Article III of the Constitution restricts the power of federal courts to "cases" and "controversies." U.S. Const. art. III. Under the mootness doctrine, "no case or controversy exists, and a suit becomes moot, when the issues presented are no

longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (internal quotations omitted). “A case becomes moot . . . when it is impossible for a court to grant any effectual relief whatever to the prevailing party. As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” ECF No. 50, PI Op. at 29 (quoting *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160–61 (2016) (citation modified)). Defendant’s mootness claim constitutes a factual attack on Intervenor’s jurisdiction. “Where, as here, a party brings a factual attack, a district court may look outside the pleadings to affidavits or other documents.” *Moss v. United States*, 895 F.3d 1091, 1097 (8th Cir. 2018) (quoting *Harris v. P.A.M. Transport, Inc.*, 339 F.3d 635, 637 n.4 (8th Cir. 2003)). The party asserting mootness must prove that a case has become moot. *West Virginia v. Env’t Prot. Agency*, 597 U.S. 697, 719 (2022).

A. The controversy between Intervenor and Defendant remains live because Protect AR Rights’ ballot initiative might qualify for the November 2026 ballot.

Intervenor’s claims are not moot because Protect AR Rights might still qualify its ballot measure for the November 2026 ballot. Therefore, a live controversy remains and Intervenor has a concrete interest in the resolution of this case. Indeed, under similar circumstances, the Arkansas Secretary of State (“Secretary”) argued, and the Eighth Circuit agreed, that an insufficiency letter from the Secretary—such as the letter the Secretary sent to Protect AR Rights—does not moot a case when the insufficiency letter is being challenged in state court. *Miller v.*

Thurston, 967 F.3d 727, 734 n.2 (8th Cir. 2020). There, after the Eighth Circuit held oral arguments, the Secretary issued an insufficiency letter to the plaintiff, Arkansas Voters First (“AVF”), stating that he was prohibited from counting the submitted signatures because AVF had failed to certify that each paid canvasser had passed a criminal background check. Ex. 1, Secretary Letter. AVF subsequently challenged the insufficiency letter in the Arkansas Supreme Court. The Secretary argued that “[t]he Secretary’s initial sufficiency determination does not moot this case . . . Plaintiffs or any ‘registered voter’ may challenge the Secretary’s determination in state court . . . In the meantime, a live controversy remains . . .” *Id.* The Eighth Circuit agreed, finding that the Secretary’s insufficiency declaration did not moot the case. *Miller*, 967 F.3d at 734 n.2.

Here, on July 3, 2026, Protect AR Rights submitted over 108,000 signatures to the Defendant to qualify its measure for the November 2026 ballot. Tr. 319:21–25. On July 30, 2026, Defendant issued a letter to Protect AR Rights claiming that its petition was insufficient because it did not have sufficient signatures at the initial-count stage of the Secretary’s certification process. ECF No. 159-1, Insufficiency Letter. The next week, seven Arkansas voters filed a challenge to the Defendant’s decision in the Arkansas Supreme Court, asserting that the Secretary’s insufficiency determination was incorrect and that the petition included enough signatures for the initial count. Ex. 2, Complaint, *Hanna v. Jester*, No. CV-26-543 (Ark. Aug. 5, 2026). Soon after, Protect AR Rights and its treasurer, Bill Kopsky, moved to intervene in the lawsuit. Ex. 3, Motion to Intervene, *Hanna v. Jester*, No.

CV-26-543 (Ark. Aug. 10, 2026). Protect AR Rights and Kopsky also argued that the petition had a sufficient number of signatures to survive the initial count. *Id.* at 36.

In Defendant's July 30 letter, he stated that 2,543 of the 19,924 petition pages that Protect AR Rights submitted could not be counted on their face due to notary or canvasser defects. ECF No. 159-1, Insufficiency Letter. The remaining pages contained 83,211 signatures, which would have been evaluated for the purpose of the initial count required under Arkansas Code Annotated § 7-9-126(a) had it not been for the issue currently being challenged in the Arkansas Supreme Court. This number exceeds the 75% threshold required to trigger the 30-day cure period provided under Article V of the Arkansas Constitution. As such, if the Arkansas Supreme Court invalidates Defendant's insufficiency determination, it is likely Protect AR Rights can close the gap to submit 90,704 valid signatures during a 30-day cure period and still qualify its measure for the November 2026 ballot.

Because litigation is pending and Protect AR Rights still has a chance of qualifying for the November 2026 ballot, it has a concrete interest in the outcome of this litigation and its claims related to this case remain live. Accordingly, Intervenor's claims are not moot and dismissal is improper.

B. Intervenor has a concrete interest in the resolution of this case because they will continue to suffer ongoing harm if the challenged laws are not enjoined.

A live controversy also remains between Intervenor and the Defendant because if the challenged laws are not enjoined, Intervenor will be harmed by these laws again during future campaign cycles. Intervenor can easily demonstrate that they

will face ongoing harm if they are subject to the challenged laws. For AR Kids did not collect enough signatures to qualify for the November 2026 ballot. Tr. 310:23–25. At trial, For AR Kids’ treasurer, Bill Kopsky, stated that whether For AR Kids would try to make the ballot again in a future election cycle would “be determined in the coming months, in part by what the Legislature does [in] the coming session.” Tr. 311: 21–24. He went on to state: “We’re committed to continue to advocate for those issues. If the legislature doesn’t take substantial action on our priorities, I would suspect that some version of [For AR Kids’ ballot measure] would come back.” Tr. 311:24–312:2.

In a July 3, 2026, press release announcing that For AR Kids had not collected enough signatures to qualify for the November 2026 ballot, Bill Kopsky stated: “Our commitment to Arkansas’ children remains unwavering. We will continue working . . . to advance reforms that strengthen public education in all communities, promote accountability for taxpayer dollars, and expand opportunities for all students.” Ex. 4, For AR Kids Press Release. The press release also stated that “[l]ooking ahead, campaign leaders are evaluating future opportunities to advocate for the very principles embodied in the Arkansas Educational Rights Amendment, through policy advancement and continued public engagement.” *Id.*

Furthermore, For AR Kids has a proven history of participating in the ballot initiative process. In 2024, it sponsored a similar measuring aiming to improve Arkansas’s education system. Tr. 310:12–13. Given For AR Kids’ track record of sponsoring ballot initiatives aimed at improving public education and its

statements regarding its commitment to advancing the initiatives contained in its 2026 ballot measure, it is reasonable to expect that For AR Kids will sponsor a similar measure in 2028 and will again be subject to the laws it challenges in this lawsuit. Ex. 5, Kopsky Dec. ¶ 5–6. Accordingly, it still has a concrete interest in the outcome of this case.

Similarly, if Protect AR Rights’ measure does not qualify for the November 2026 ballot, it is likely to pursue another measure in 2028. Protect AR Rights has a history of engaging in the ballot initiative process. *Id.* ¶ 11. It was formed in 2019 and opposed legislatively-referred amendments in 2020 and 2022. *Id.* Furthermore, according to Protect AR Rights’ treasurer, Bill Kopsky, it remains committed to the advancing the policy changes proposed in its 2026 ballot initiative. *Id.* ¶ 12. Protect AR Rights’ member organizations are already discussing the possibility of sponsoring a measure in 2028. *Id.* ¶ 13.

In summary, Protect AR Rights continues to suffer concrete harm because its measure may still make the ballot for this year, and both Intervenor continue to suffer concrete harm because they anticipate sponsoring measures for 2028 and their speech concerning those measures will be burdened if the laws remain in place. The Defendant has not met his burden to show mootness.

II. Intervenor’s claims are exempt from the mootness doctrine because they present controversies capable of repetition yet evading review.

Even if there were not a live controversy between Intervenor and the Defendant, their claims would not be moot because an exception to the mootness doctrine applies to cases that are capable of repetition yet evading review.

Missourians for Fiscal Accountability v. Klahr, 830 F.3d 789, 795 (8th Cir. 2016). In such situations, a court may exercise jurisdiction over an action if the party asserting the exception shows that: “(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again.” *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988). While a party must demonstrate “a reasonable expectation that the event complained of will recur,” it does not have to prove with certainty that the situation will recur. *Ark. AFL-CIO v. F.C.C.*, 11 F.3d 1430, 1435 (8th Cir. 1993). “Election issues are among those most frequently saved from mootness by this exception.” *Missourians for Fiscal Accountability*, 830 F.3d at 795. The Eighth Circuit has stated that “[b]allot issues are notorious examples of [the capable of repetition yet evading review] situation.” *Ark. AFL-CIO*, 11 F.3d at 1436.

For example, in *Arkansas AFL-CIO v. F.C.C.*, a committee opposing a statewide ballot issue filed a complaint to the Federal Communication Commission regarding a local television station’s (“KARK”) coverage of the issue. *Id.* at 1434. KARK argued that the case was moot because the ballot issue giving rise to the litigation had already been decided. *Id.* at 1435. However, the Eighth Circuit found that the capable of repetition yet evading review exception applied because, if the committee was forced to wait until the next ballot issue to contest KARK’s unfair coverage, it would face similar time constraints to those that prevented the resolution of its case before the election initially giving rise to the dispute. *Id.* at 1436. Furthermore, the

committee proved that it reasonably expected to be subject to the same action again because it showed that another dispute regarding the fairness of KARK's coverage had arisen among the parties during the pendency of the initial lawsuit regarding another ballot issue. *Id.* Accordingly, the Eighth Circuit determined that the case was not moot because, given the cyclical nature of ballot initiatives, the claims fell within the capable of repetition yet evading review exception. *See also Missourians for Fiscal Accountability*, 830 F.3d at 789 (finding that a campaign committee's challenge to a requirement that it be formed less than 30 days before an election was not moot under the capable of repetition yet evading review exception, even though the election at issue had passed).

Intervenors can satisfy both elements of the capable of repetition yet evading review exception. First, the current action cannot be fully litigated between the time in which the Attorney General approves a ballot measure for signature collection and the time in which signatures must be turned in. That point should be apparent from the duration of this litigation, which has consumed most of the 2026 election cycle, and the action is not even complete because there is a pending appeal of the preliminary injunction and presumably will be an appeal of the final judgment, putting resolution of the case well into the future. Due to the timing and cyclical nature of ballot-measure campaigns, the laws challenged in this lawsuit will continue to impact Intervenors' ability to qualify their measures for the ballot but may never be resolved if this case is considered moot.

Second, there is a reasonable expectation that Intervenorors would be subjected to the same action again. If the challenged laws are not enjoined in this lawsuit, both Intervenorors will be harmed by these laws during future campaign cycles and thus will be subject to the same action. As explained in the previous section, Intervenorors intend to continue pursuing the policy goals enumerated in their proposed ballot measures, which will likely include sponsoring similar ballot initiative campaigns in 2028. Because For AR Kids and Protect AR Rights have a well-established history of supporting ballot measures and intend to continue doing so in the future, it is likely that they will be subject to these laws again. Combined with the cyclical nature of the ballot initiative process, these laws are capable of repetition yet evading review and thus are an exception to the mootness doctrine. Accordingly, Intervenorors' claims should be decided in this case and should not be dismissed as moot.

Intervenorors' claims are not moot because a live controversy exists between Intervenorors and Defendant. Even if there was not a live controversy, Intervenorors' claims fall under an exception to the mootness doctrine because they present issues that are capable of repetition yet evading review. For these reasons, Defendants' Motion to Dismiss for Mootness should be denied.

Dated: August 18, 2026

Respectfully submitted,

/s/ Shelby H. Shroff

JOHN C. WILLIAMS (ABN 2013233)

SHELBY H. SHROFF (ABN 2019234)

Arkansas Civil Liberties

Union Foundation, Inc.

904 W. 2nd St.
Little Rock, AR 72201
(501) 374-2842
john@acluarkansas.org
shelby@acluarkansas.org

-and-

PETER SHULTS (ABN 2019021)
AMANDA G. ORCUTT (ABN 2019102)
Shults Law Firm LLP
200 West Capitol Avenue, Suite 1600
Little Rock, Arkansas 72201-3621
(501) 375-2301
pshults@shultslaw.com
aorcutt@shultslaw.com

*Counsel for Intervenor-Plaintiffs
Protect AR Rights and For AR Kids*

RETRIEVED FROM DEMOCRACYDOCKET.COM

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2026, I filed the foregoing on the CM/ECF system, which will serve notice on counsel for all parties.

/s/ Shelby H. Shroff
Shelby H. Shroff

RETRIEVED FROM DEMOCRACYDOCKET.COM