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RELATORS' MERIT BRIEF
TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF FACTS	3
A. Discovery of Numerous Circulator Violations	3
B. County Boards and the Secretary Were Made Aware of the Circulator Violations But Largely Failed to Take Any Action To Investigate or Address the Issues.....	6
C. Response from Secretary of State and the Boards.....	9
LAW AND ARGUMENT.....	10
A. Ohio Requires Strict Compliance With Its Election Laws	10
B. Ohio Law Requires Circulators to Include Their Permanent Residence Address on Part-Petitions They Circulate; Part-Petitions with False Addresses Cannot be Verified.	12
1. False Circulator Addresses Render Part-Petitions Invalid.....	13
a. Multiple circulators disclosing identical permanent residence addresses	15
b. Commercial addresses are not permanent residence addresses	19
c. Same circulator with multiple permanent addresses.....	20
d. Temporary Ohio domicile is not enough to validate an Ohio address.....	20
2. One Person Signing Circulator Statement as Another.....	21
C. Ohio Law Requires Part-Petitions Circulated By Felons to be Invalidated.....	22
D. The Secretary Has Resisted and Discouraged Investigation of Circulator Irregularities.....	24

E. In Addition To The Relief Requested In The Relators' Petition,
Peremptory Writ Relief Commanding the Secretary to Immediately
Transmit Part-Petitions to County Boards for Investigation and Review Is
Appropriate.29

F. This Action Is Not Moot.32

CONCLUSION35

CERTIFICATE OF SERVICE37

RELATORS' MERIT BRIEF
TABLE OF AUTHORITIES

Page

CASES

<i>Buckley v. American Constitutional Law Found., Inc.</i> (1999), 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599.....	13
<i>In re Protest Filed with the Franklin County Board of Elections by Citizens for Merit Selection of Judges Inc.</i> (1990), 49 Ohio St.3d 102.....	35
<i>In re Protest of Brooks</i> , 155 Ohio App.3d 370, 2003-Ohio-6348	1, 13, 20
<i>Moore v. Ogilvie</i> (1969), 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1.....	35
<i>Nader v. Blackwell</i> (C.A.6, 2008), 545 F.3d 459.....	14, 15
<i>Norman v. Reed</i> (1992), 502 U.S. 279, 112 S.Ct. 698, 116 L.Ed.2d 711	35
<i>Rust v. Lucas Cty. Bd. of Elections</i> , 108 Ohio St.3d 139, 2005-Ohio-5795	12
<i>Smith v. Granville Twp. Bd. of Trustees</i> (1996), 77 Ohio St.3d 1215	33
<i>State ex rel. Abrams v. Bacharach</i> (1963), 175 Ohio St. 257.....	12
<i>State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections</i> (1992), 65 Ohio St.3d 167	11
<i>State ex rel. Colvin v. Brunner</i> , 120 Ohio St.3d 110, 2008-Ohio-5041	32
<i>State ex rel. Committee for the Referendum of City of Lorain Ordinance No. 77-01 v. Lorain Cty. Bd. of Elections</i> (2002), 96 Ohio St.3d 308, 2002-Ohio-4194.....	11, 12
<i>State ex rel. Evergreen Co. v. Franklin Cty. Bd. of Elections</i> (1976), 48 Ohio St.2d 29	11
<i>State ex rel. Spadafora v. Toledo City Council</i> (1994), 71 Ohio St.3d 546.....	11, 12
<i>State ex rel. Vickers v. Summit Cty. Council</i> , 97 Ohio St.3d 204, 2002-Ohio-5583.....	11
<i>Storer v. Brown</i> (1974), 415 U.S. 724, 39 L. Ed.2d 714, 94 S. Ct. 1274	1

STATUTES

R.C. 2503.40	32, 33
R.C. 2961.01	6
R.C. 2961.01(B).....	1, 22

R.C. 3501.05(B).....	2, 12, 24
R.C. 3501.05(C).....	12
R.C. 3501.05(K).....	34
R.C. 3501.05(M).....	2, 12, 24, 34
R.C. 3501.11(J).....	25, 29
R.C. 3501.11(K).....	25
R.C. 3501.11(P).....	25
R.C. 3501.38(E)(1).....	25
R.C. 3501.39.....	12
R.C. 3501.39(A).....	24
R.C. 3501.39(A)(3).....	2, 9
R.C. 3503.06.....	14, 15
R.C. 3503.06(B).....	20
R.C. 3503.06(B)(2).....	15, 21
R.C. 3519.05.....	passim
R.C. 3519.06(A).....	25
R.C. 3519.06(D).....	14, 26
R.C. 3519.15.....	12, 25
R.C. 3519.18.....	25
R.C. 4507.08(D)(7).....	21
R.C. 4507.50(A).....	21
R.C. Chapter 3513.....	24
R.C. Title 35.....	25

OHIO CONSTITUTION

Article II, Section 1g, Ohio Constitution.....	32, 34
--	--------

REGULATIONS

Ohio Adm. Code 4501:1-1-35(E) 21

INTRODUCTION

[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. *Storer v. Brown* (1974), 415 U.S. 724, 730, 39 L. Ed.2d 714, 94 S. Ct. 1274.

Petition circulators are at the heart of the initiative process for proposing an amendment to the Ohio Constitution for placement on the ballot. Because of the critical role of circulators, the General Assembly enacted laws specifically applicable to them, including that convicted felons are not competent to circulate initiative petitions, R.C. 2961.01(B), and that circulators must include their permanent residence address on the part-petitions they circulate, R.C. 3519.05.

The evidence in this case reveals widespread circulator falsification of their permanent residences, undermining the very purpose behind the requirement. Rather than leave the line blank, or list their true addresses, circulators committed the felony of election falsification. And without disclosure of a circulator's permanent residence, it becomes impossible to perform a criminal background check, or to contact the circulator in the event complications arise during the verification process. Cf. *In re Protest of Brooks*, 155 Ohio App.3d 370, 2003-Ohio-6348, at ¶46.

Based upon Respondents' Answers filed in this action, Relators' prima facie claim is admitted:

- The Secretary of State admits that Ohio law vests the county boards of elections with authority over decisions concerning the validity of petitions (Secretary's Answer, ¶¶ 28, 37 to Petition ¶¶ 30, 42, 43;)
- The Secretary of State directed the Boards of Election to *presume the validity* of circulator addresses, unless presented with "satisfactory evidence" of a false address

(Respondent Muskingum County Board of Elections' Answer, ¶ 3, admitting the allegations in Petition ¶ 45; Secretary's Advisory 2009-06, July 8, 2009;)

- The Secretary, “admits that Advisory 2009-06 did not command the county boards to conduct any investigation.” (Secretary's Answer, ¶ 40 with respect to Petition ¶ 46;) and
- The Secretary's instruction to employ a “presumption of validity” had the practical effect of treating the circulator's information as facially valid (Respondent Muskingum County Board of Elections' Answer, ¶ 3, admitting the allegations in Petition ¶ 46.)

The result of this undisputed series of events is that Ohio's boards of election did nothing when Relators informed them of circulators disclosing false information. Remaining for this Court is to ensure the integrity of the process by issuing an appropriate remedy.

It is the duty of Ohio's election officials, including Respondent Ohio Secretary of State Jennifer Brunner (“Secretary”) and the county boards of elections, to process part-petitions in compliance with all applicable election laws. As chief elections officer for Ohio, the Secretary has the duty to “compel the observance by election officers in the several counties of the requirements of the elections laws.” R.C. 3501.05(M). In furtherance of this duty, the Secretary has the statutory power and duty to issue directives and advisories to the county boards as to the proper methods of carrying out their duties. R.C. 3501.05(B). *Both* the county boards and the Secretary have the power and authority to reject any initiative petition that violates any requirement established by law. R.C. 3501.39(A)(3).

Here, the Secretary acknowledged the election laws applicable to circulators, but abdicated her responsibility to require compliance. The result is an anomaly in Ohio election law. If a circulator simply failed to disclose *any* address as part of the circulator statement, there is no question that boards invalidated the part-petition because the circulator statement is

incomplete. See R.C. 3519.06. But in this case, numerous circulators filled out the circulator statement with *false addresses*, committing the felony of election falsification. Even though this act of falsification is objectively worse than a circulator's mere omission, the boards of elections—following their understanding of the Secretary's instructions—by and large did nothing to enforce the law.

Conceding the need for further action, one business day after Relators filed this lawsuit, the Secretary announced that she now will investigate irregularities related to the Casino Initiative Petition. She will not, however, invalidate part-petitions or require the individual boards to do so based on her investigation. According to the Secretary, her investigation is “to ensure the integrity of the process and prevent problems in the *future*.” (Emphasis added.) Secretary of State's Advisory 2009-08, July 20, 2009. While these are laudable goals, the law demands that *this* initiative petition comply with Ohio law *before* it is placed on the ballot.

Accordingly, Relators request that this Court exercise its exclusive, original jurisdiction to fashion a remedy directing investigation and invalidation of these falsified part-petitions.

STATEMENT OF FACTS

A. Discovery of Numerous Circulator Violations.

This matter involves a statewide initiative petition to amend the Ohio Constitution to allow casino gaming in Ohio, which was circulated by the Ohio Jobs & Growth Committee (“the Petition”). On June 17, 2009, Relator Scioto Downs, Inc. filed a public records request with the Secretary's office, seeking inspection and copying of the Petition which, at that time, had not yet been filed with the Secretary. Citing to its “constitutional duty” to “determine the sufficiency of the signatures” of the Petition by July 21, 2009, the Secretary flatly responded that her office was “unable to accommodate this request.” The Secretary would not commit to providing copies of

the part-petitions until they were returned from the county boards. (Aff. Slagle.)¹

On June 25, 2009, the Petition was filed with the Secretary, who immediately began to make arrangements to send the part-petitions to the various county boards for review and verification. The county boards were required to review and verify the part-petitions and return them to the Secretary on or before July 16, 2009. The inability to inspect or obtain copies of the part-petitions until *after* the county boards verified them presented an obvious obstacle to any interested party's ability to ascertain whether the part-petitions were circulated in accordance with Ohio election law. Any challenge to the Petition was required to be filed with this Court no later than July 31, 2009. Seeing part-petitions from all 88 counties for the first time during the week of July 20th would make it virtually impossible to do anything if statutory violations were found, as there simply would not be sufficient time.

Part-petitions are public records under Ohio law. Previous litigation against the Ohio Secretary of State resulted in a court order that the Secretary must make part-petitions available for inspection and copying *before* they are sent to the county boards. *State ex rel. Pharmaceutical Research and Manufacturers of Am. v. Blackwell* (Dec. 31, 2002), 10th Dist. App. No. 02AP-1433 (Journal Entry). Nonetheless, the Secretary continued to refuse to allow inspection or make copies available.

After extensive negotiations with the Secretary's office, Relators agreed to accept a visual inspection (but not copying) of a fraction of the large-county part-petitions, and electronic copies of the part-petitions from approximately fifty-one of the smallest counties. Even though the Secretary's response provided Relators with only a limited opportunity to inspect part-

¹ The Affidavit of Christopher Slagle, submitted as evidence, has many attachments. In the interest of brevity, the attachments will be referred to as "Ex. ____," without reference to the affidavit.

petitions, and an even more limited number of copies, it still provided Relators with a window into a variety of statutory violations by Petition circulators.

The violations uncovered by Relators, and subsequently verified by some county boards, fall into three categories: (1) multiple circulators listing identical permanent residence addresses;² (2) circulators disclosing a permanent residence address that is, in fact, a commercial address (such as a hotel);³ and (3) the same circulators listing multiple permanent residence addresses on different part-petitions.⁴ The identified violations alone *affect no less than 3,800 part-petitions* across the State, demonstrating widespread, intentional falsification on the part of the Petition circulators.

For example, in Clark County, the Prosecutor's Office investigated several addresses in Fairborn, Ohio that were disclosed by numerous circulators as their "permanent residence." The investigator discovered addresses that do not exist, and others that were never rented or owned by any of the named circulators. In fact, the investigator found that the petition circulator company actually rented the apartment and that circulators were actually there for less than two months. Numerous circulators listed this same address as their "permanent residence," notwithstanding that they neither owned nor rented the premises and did not live there before the circulation date or today. (Aff. Erter.) Nonetheless, each circulator attested, under penalty of election falsification, that this was their "permanent residence."

Other part-petitions revealed that a number of circulators listed more than one address as their "permanent residence" on part-petitions circulated at the same time and in multiple counties. In still other cases, circulators listed hotels or other commercial properties as their

² Ex. D

³ Ex. B

⁴ Ex. C

permanent residence. Clearly, a circulator can only have one “permanent residence” at a time, and a hotel or business is not, in all likelihood, a permanent residence.

The issues with false circulator addresses become even more significant when considering that a convicted felon is incompetent to be a circulator of an initiative petition, rendering any petition circulated by the convicted felon as void ab initio. R.C. 2961.01. At least one convicted felon circulated part-petitions. (Ex. J.) If a circulator does not disclose a true permanent residence address, it becomes difficult (if not impossible) to verify the circulator’s status as a felon, thereby increasing the chance that a board will verify a petition that is void ab initio.

Relators’ limited review of part-petitions also revealed instances of circulators misrepresenting their identities. Specifically, numerous part-petitions purport to have been circulated by an individual named “Jamar Owens,” all of which disclose the same permanent residence address. Yet, the handwriting and signature of “Jamar Owens” on these part-petitions are clearly different from each other. Thus, even if one of these circulator statements was actually completed by “Jamar Owens,” the handwriting on the remaining part-petitions shows that the same “Jamar Owens” did not complete the circulator statements on those part-petitions. (Ex. H, I.) Notwithstanding Relators’ information, no investigation followed.

B. County Boards and the Secretary Were Made Aware of the Circulator Violations But Largely Failed to Take Any Action To Investigate or Address the Issues.

On July 6, 2009, Relators sent letters to all county boards, detailing the prima facie evidence of problems with circulator addresses that had been discovered through review of the limited number of part-petitions provided by the Secretary. (Ex. A, B, C, D.) Relators urged the county boards to investigate the suspect addresses and invalidate all part-petitions in which the circulator information was found to be false. Several county boards communicated with the

Secretary's office to determine what, if anything, to do in response to the information suggesting widespread problems with the circulator statements.

On July 8, 2009, the Secretary issued Advisory No. 2009-06 to address the Relators' letter. (Ex. E.) The Secretary admits that Advisory No. 2009-06 did *not* instruct the county boards to investigate any suspect addresses, nor did it advise the county boards that the Secretary would investigate the circulator problems herself. (See Answer of Respondent Secretary, ¶ 40.) Rather, Advisory No. 2009-06 directed the county boards that the circulator statements enjoyed a "presumption of validity" that is overcome only where there is "satisfactory evidence" showing that a circulator has falsified his or her permanent address.

Advisory No. 2009-06 instructs the county boards, in the first instance, to presume the validity of circulator addresses. And although the Secretary advised the county boards that they were empowered to investigate, the Secretary also emphasized that the boards "*must complete its review of the part-petitions according to the instructions given with Directive 2009-10 and submit a copy of its certification form to this office no later than July 16, 2009.*" (Id., Emphasis original.)

Thus, while telling county boards that they could investigate if they wanted to, the Secretary also instructed county boards to presume validity and required that all part-petitions be reviewed, processed and returned to her within eight calendar days of her Advisory. Worse still, in individual communications with some county boards, the Secretary instructed that the county boards need not be concerned with reviewing circulator problems.

Relators sent another letter on July 9, 2009, again alerting the county boards to irregularities in the circulator addresses and asking for an investigation. The July 9th letter included "satisfactory evidence" of circulator problems by way of a sworn affidavit attesting that

the data provided to the county boards (on July 6 and again on July 9) was a true and accurate compilation of the information gathered through Relators' limited review of various part-petitions. (Ex. F.) Relators sent a similar letter, along with the same evidence, to the Secretary. (Ex. G.)

Despite these letters and accompanying evidence detailing numerous irregularities on the part-petitions, the overwhelming majority of county boards have not investigated and have not invalidated the affected part-petitions based on the instruction (or lack thereof) provided by the Secretary's office. The Secretary's communications with the county boards have made clear that they had no duty to investigate the evidence of circulator violations presented to them, much less invalidate part-petitions based upon those facts.

Additional communications with the Secretary's office yielded similar indifference in response to the mounting evidence of circulator violations of Ohio law. On July 10, 2009, Relators sent another letter to the Secretary, alerting her to the circulator fraud that is apparent on petitions that purport to have been circulated by "Jamar Owens," and identifying some of the various part-petitions that would be invalid as a result of the apparent violation. (Ex. I.) Then, on July 14, 2009, Relators again wrote to the Secretary, revealing information received from a county board of at least one convicted felon who circulated part-petitions. (Ex. J.) The July 14th letter asked the Secretary to ensure that the part-petitions circulated by convicted felons be invalidated.

On July 15, 2009, yet another letter was sent to the Secretary, providing even more evidence of irregularities in circulator addresses. (Ex. K.) This letter included spreadsheets, sorted statewide by county, alphabetical by each circulator name, and separately by circulator address, detailing the irregularities and providing the specific part-petition numbers upon which

the various circulator irregularities appeared. (See Ex. L.) Only after this letter did the Secretary finally respond to the Relators' concerns.

C. Response from Secretary of State and the Boards.

On July 16, 2009, the same day all county boards were required to return all part-petitions to her, the Secretary wrote to Relators that it is *solely* the responsibility of the county boards to verify the part-petitions and signatures. (See Ex. O.) Yet the Secretary never communicated to the county boards this "sole" responsibility to verify circulator signatures.

According to the Secretary's July 16 letter, her office had no duty to "review or alter the findings of the Boards concerning the validity of part-petitions and signatures." *Id.* The Secretary's letter did not explain why she felt that she could not investigate the circulator violations presented, nor did the letter even mention R.C. 3501.39(A)(3). More importantly, the Secretary's letter contained no explanation as to why county boards were not directed to investigate and address circulator violations.

County boards clearly got the message that they were not obligated to investigate circulator irregularities. The Answer of Respondent Muskingum County Board of Elections admits paragraphs 45 and 46 of the Relators' Complaint, that the county boards were instructed to presume the validity of circulator addresses and that county boards were not instructed to investigate circulator violations.

It was only *after* the instant action was filed with this Court that the Secretary finally acknowledged her power and duty to investigate the circulator violations that had been steadily brought to her office's attention for more than two weeks prior to her certification of the petition. (Ex. R.) Though all of these circulator problems were raised while county boards were still reviewing the part-petitions, the Secretary waited, until after this lawsuit was filed, after every county board completed its verification and returned the part-petitions to her, before she decided

to investigate. *Id.* The effect of the Secretary’s instructions to the county boards and her delay in investigating herself has cost more than two weeks in an already constrained process. The result is a defective Petition, fraught with numerous circulator violations, which has now been certified and presented to this Court.

Despite the Relators’ evidence, little was done by the county boards to investigate the circulator irregularities. To their credit, a handful of county boards—such as the Clark County Board of Elections—engaged their prosecuting attorney’s offices to assist in the investigation of circulator falsification of identities and addresses. Where this occurred, falsification was proven and part-petitions rejected. But it was plainly apparent from communications with the county boards that most of them were awaiting direction from the Secretary. Having already been instructed to take the circulator statement at face value, county boards took no action in response to evidence of circulator irregularities unless the Secretary instructed them to do so.

The Secretary provided no such instruction. It was not until after the county boards returned all part-petitions and after the Relators filed this action, that the Secretary ordered an investigation into the irregularities concerning the Casino Initiative Petition. By starting an investigation, the Secretary effectively admits that the information provided by Relators was “satisfactory evidence” to warrant further inquiry into the circulators’ compliance (or noncompliance) with Ohio election law.

LAW AND ARGUMENT

A. Ohio Requires Strict Compliance With Its Election Laws.

In Ohio, election laws are mandatory and require strict compliance. *State ex rel. Commt. for Referendum of Lorain Ordinance No. 77-01 v. Lorain Cty. Bd. of Elections* (2002), 96 Ohio St.3d 308, 2002-Ohio-4194, at ¶49; *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections* (1992), 65 Ohio St.3d 167, 169. Substantial compliance is acceptable only when

an election provision says that it is, and no such provisions are at issue here. See *State ex rel. Vickers v. Summit Cty. Council*, 97 Ohio St.3d 204, 2002-Ohio-5583, at ¶32.

Circulators of part-petitions are at the heart of the initiative petition process. To assure the utmost integrity in the petition process, the General Assembly has enacted simple, but mandatory, requirements specifically applicable to circulators, including that they not be felons and that they truthfully complete, under penalty of election falsification, the “circulator’s statement” (also referred to as “circulator’s affidavit) on each part-petition they circulate. The circulator’s statement is critical to the integrity and reliability of the initiative process. See, e.g., *State ex rel. Spadafora v. Toledo City Council* (1994), 71 Ohio St.3d 546, 549.

The Secretary admits, consistent with overwhelming case law, that “a circulator’s use of a false permanent residence address would make the circulator’s statement false.” (Secretary’s Answer at ¶14.) This Court has consistently demanded strict compliance with the requirements for circulators’ statements. *State ex rel. Committee for the Referendum of City of Lorain Ordinance No. 77-01*, 2002-Ohio-4194, at ¶49; *State ex rel. Citizens for Responsible Taxation*, 65 Ohio St.3d at 174; *State ex rel. Evergreen Co. v. Franklin Cty. Bd. of Elections* (1976), 48 Ohio St.2d 29, 31 (allowing writ of prohibition preventing board from placing referendum on ballot due to defect in circulator’s affidavit); *State ex rel. Abrams v. Bacharach* (1963), 175 Ohio St. 257, 259-261 (requiring strict compliance with form of circulator affidavit).

Failure to accurately complete the circulator’s statement results in invalidation of the part-petition. See, *Rust v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 139, 140, 2005-Ohio-5795; *State ex rel. Commt. for Referendum of Lorain Ordinance No. 77-01*, 96 Ohio St. 3d at 317, *State ex rel. Spadafora*, 71 Ohio St.3d at 549.

Both the county boards and the Secretary have a duty to enforce these requirements. As

the state's chief election officer, the Secretary must "[i]ssue instructions by directives and advisories * * * to members of the boards as to the proper methods of conducting elections," "[p]repare rules and instructions for the conduct of elections," and "[c]ompel the observance by election officers in the several counties of the requirements of the election laws." R.C. 3501.05(B), (C), and (M). The county boards must "ascertain whether each part-petition is properly verified." R.C. 3519.15. And *both* the Secretary and the county boards are required to accept a petition *unless* it violates the "requirements established by law." R.C. 3501.39.

As set forth below, neither the Secretary nor the county boards required strict compliance with Ohio's election laws.

B. Ohio Law Requires Circulators to Include Their Permanent Residence Address on Part-Petitions They Circulate; Part-Petitions with False Addresses Cannot be Verified.

The General Assembly enacted important provisions concerning a circulator's verification that are germane to this matter. First, R.C. 3519.05 establishes the form to be used for initiative petitions, which must include the following statement for execution by the circulator:

I,, declare *under penalty of election falsification* that I am the circulator of the foregoing petition paper containing the signatures of electors, that the signatures appended hereto were made and appended in my presence * * * and that the electors who signed this petition did so with knowledge of the contents of same. I am employed to circulate this petition by (Name and address of employer).
* * *

(Signed)
(Address of circulator's permanent residence in this state)

WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.

(Emphasis added.)

Second, the General Assembly enacted R.C. 3519.06, governing the verification of part-petitions:

No initiative or referendum part-petition is properly verified if it appears on the face thereof, or is made to appear by satisfactory evidence:

(A) That the statement required by section 3519.05 of the Revised Code is *not properly filled out*;

* * *

(D) That the statement is *false in any respect*.]

(Emphasis added.)

R.C. 3519.05 and 3519.06 establish requirements that must be followed in order for a statewide initiative part-petition to be properly verified. These facially reasonable requirements are important in maintaining the integrity of the initiative process in Ohio. As the United States Supreme Court has recognized, “states allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally.” *Buckley v. American Constitutional Law Found., Inc.* (1999), 525 U.S. 182, 191, 119 S.Ct. 636, 142 L.Ed.2d 599.

Simply put, “[i]n applying R.C. 3519.05 and 3519.06, * * * a false circulator’s statement renders a part-petition invalid.” *In re Protest of Brooks*, 2003-Ohio-6348, at ¶56.

1. False Circulator Addresses Render Part-Petitions Invalid

Ohio law requires circulators to list their “permanent residence address” immediately beneath their name on each of the part-petitions they circulate. This information is useful in determining whether circulators are convicted felons (and thereby incompetent to circulate initiative part-petitions) and in detecting fraud in the initiative process. Rather than state a permanent residence address as required by R.C. 3519.05, numerous circulators listed false addresses or addresses that were not, and were never intended to be, their permanent residence addresses. As the Secretary admits in her Answer, false addresses render those part-petitions invalid, and they may not be properly verified. See R.C. 3519.06(D).

Relators provided detailed information of suspect circulator addresses to the county

boards and the Secretary on July 6 and July 9, which included the names of the circulators, addresses used by these circulators, counties they circulated in, and the identification number on the part-petitions they circulated. (Ex. A, B, C, D, F, G.) This information demonstrated the magnitude of the problem and made it easy for the county boards and/or the Secretary to further investigate and invalidate the part-petitions at issue.

It is important to note that the “false address” issues do not turn on whether particular circulators are Ohio residents. The Secretary’s June 29, 2009 Directive 2009-10 instructed county boards not to invalidate part-petitions that list a permanent residence address outside of Ohio. This Directive was based on the Sixth Circuit’s decision in *Nader v. Blackwell* (C.A.6, 2008), 545 F.3d 459, which held R.C. 3503.06 unconstitutional, to the extent it required circulators of nominating petitions for the office of president of the United States to be Ohio residents and electors. Relators are not challenging the Secretary’s Directive in this regard (and whether the *Nader* decision should be extended to the Ohio initiative petition process is not at issue here).

What is at issue is whether certain circulators provided false addresses, i.e., addresses that were *not* their permanent residence addresses. Indeed, *Nader* did not wipe out R.C. 3503.06 or R.C. 3519.05 in their entirety. Ohio law still requires that circulators of initiative petitions *truthfully* list their permanent residence address. While the law (as articulated in *Nader* and Directive 2009-10) does not require circulators to be Ohio residents, the law does not allow circulators to *lie* about being Ohio residents.

What constitutes a circulator’s permanent residence address is governed by R.C. 3503.06(B)(2), which includes the following rules: (1) a residence is that place in which the circulator’s habitation is fixed and to which, whenever the circulator is absent, the circulator has

the intention of returning; and (2) the circulator shall not be considered to have gained a residence in any county in Ohio in to which the circulator comes for temporary purposes only, without the intention of making that county the permanent place of abode.

As set forth below, dozens of circulators listed addresses that were *not* their permanent residence addresses, but which were, at best, temporary dwellings used while they circulated part-petitions. Invalidation of these part-petitions will materially affect the Petition. For instance, Respondent Muskingum County Board of Elections certified 1,940 valid signatures. But, if the Muskingum County Board would invalidate the part-petitions identified by Relators as having false addresses circulated in that county, it has 512 fewer signatures than needed to meet the requisite five percent threshold in Muskingum County.

a. Multiple circulators disclosing identical permanent residence addresses.

Relators identified numerous circulators who have disclosed identical street addresses as their permanent residence address. *Combined, these circulators submitted more than 3,800 part-petitions in at least sixty-eight counties.*

(1) Funderburg Road Addresses

At least twelve circulators listed apartments on West Funderburg Road in Fairborn, Ohio, as their permanent residence addresses. Each of these twelve circulators listed one of the following as his/her permanent address: 157 West Funderburg Road, 159 West Funderburg Road, 163 West Funderburg Road, 165 West Funderburg Road, or 400 West Funderburg Road in Fairborn, Ohio.⁵ *These circulators circulated at least 1,045 part-petitions in forty-three counties.*

An investigator for the Clark County Prosecutor determined that Lin-V-Co., Inc. rented

⁵ Some circulators omitted “West” from the address provided in the Circulator Statement.

three apartments at 159 West Funderburg Road. The lease ran from April 2009 through June 2009. (Ex. Q.) Lin-V-Co., Inc. is a Florida company that came to Ohio to manage and/or compensate circulators of the Casino Initiative Petition. (Ex. S.)

Numerous circulators listed this same address as their “permanent residence” during this time, notwithstanding that they neither owned nor rented the premises, nor lived there before the circulation date or after May 24, 2009, when the lease was terminated early. (Ex. Q.) Again, given the nature of the petition-circulation industry and the facts as set forth in the investigator’s affidavit, it is reasonable to conclude that the circulators who listed this West Funderburg Road address as their permanent residence never intended to stay there for more than a few weeks to complete a job, and they each have a permanent residence somewhere other than on West Funderburg Road. Thus, the circulators provided false addresses, and all of these part-petitions must be invalidated.

Importantly, the Clark County investigator also concluded that other West Funderburg Road addresses used by circulators do not exist, and that in other instances the apartment numbers listed by circulators do not exist. *Obviously, circulators cannot reside at addresses that do not exist.* The part-petitions circulated by persons who disclosed these non-existent addresses must also be stricken because the addresses provided are false.

This one address illustrates the importance and magnitude of the issue. If the part-petitions reflecting Funderburg Road addresses *alone* were invalidated, as they should be, Miami County would no longer qualify as one of the counties that meet the five percent threshold. Instead, it would have 843 fewer signatures than required. (Ex. P.) Thus, one address in one county makes a material difference statewide. *The same circulators used these false West Funderburg Road addresses in at least thirty-five other counties.* All part-petitions reflecting the

West Funderburg Road or Funderburg Road addresses identified above must be invalidated.

(2) E. State Road Addresses

At least four circulators listed 2162 E. State Road, Port Clinton, Ohio as their permanent residence addresses. *These circulators circulated at least 185 part-petitions in twenty-three counties.*

In July 2009, a detective for the Ottawa County Prosecutor interviewed the current resident of 2162 E. State Road, Port Clinton, who has lived there since January 2009. That interview revealed that one of the circulators, Andrew C. Mino, lived at that address until February 2009, then moved to Florida. Mino returned to the Port Clinton address in April 2009 and lived there for a couple of months, but no longer does. According to the detective's report, the other three circulators who listed 2162 E. State Road, Port Clinton, Ohio as their permanent residence addresses have not lived at that address at any time since January 2009, and were unknown to the resident. (Aff. Barney)

(3) Martin Luther King Drive Addresses

At least thirty-two circulators listed one of the following as his/her permanent address: 707 Martin Luther King Drive, Cincinnati, Ohio; 727 Martin Luther King Drive, Cincinnati, Ohio; 730 Martin Luther King Drive, Cincinnati, Ohio.⁶ *These circulators circulated at least 2,076 part-petitions in sixty-eight counties.*

Each of these Martin Luther King Drive addresses is an apartment building. (Aff. Poteet.) No more than four persons are permitted to live in the largest of the units available in these buildings. (Aff. Earley) Presently, none of the circulators who used these addresses is

⁶ Some circulators listed an apartment number in the circulator statements on part-petitions, while others did not. As many as seven different circulators listed the same apartment – apartment #713, 727 Martin Luther King Drive, Cincinnati, Ohio – as their permanent residence address.

listed on the building directory of tenants. (Aff. Poteet.) Relators requested additional information regarding the lease and the tenants of the specific addresses used by circulators, but the management office for these apartment buildings refused to provide that information.

As far as Relators are aware, no one else has investigated whether any of the thirty-two circulators using the Martin Luther King Drive addresses in Hamilton County have ever resided at the addresses provided. Relators have been informed that the Hamilton County Board of Elections did not investigate or invalidate any of the part-petitions with these suspect addresses because the Secretary did not instruct them to. (See Ex. M.) Like other county boards, the Hamilton County Board awaited specific instruction from the Secretary, which was never provided.

While it was unusual to find thirty-two circulators with permanent residence addresses at the same apartment complex, it is perhaps even more unusual that none of them appear to reside there just weeks after the Casino Initiative Petition circulation ended. Based on the nature of the petition-circulating business and the information available regarding these circulators, inferences can be drawn that these thirty-two circulators: (1) were in Ohio, temporarily, for the purpose of circulating part-petitions, with no intention to reside at the Martin Luther King Drive addresses after they circulated, and (2) have permanent residence addresses somewhere other than the Martin Luther King Drive addresses that they disclosed on the part-petitions. These circulators were required to truthfully disclose their permanent residence addresses, not the room where they stayed for a few weeks or less to complete a job.

Accordingly, all of these addresses are false, and the part-petitions listing them must be invalidated.

(4) Rosalind Avenue Addresses

At least nine circulators listed apartments on Rosalind Avenue in Cleveland, Ohio, as

their permanent residence addresses. Each of these nine circulators listed one of the following as his/her permanent address: 1820 Rosalind Avenue, or 1824 Rosalind Avenue, in Cleveland (or “E. Cleveland”), Ohio. *These circulators circulated at least 731 part-petitions in fifty-eight counties.*

The property located at 1820 Rosalind Avenue, Cleveland, Ohio is “Parker’s Guesthouse Bed and Breakfast.” (Ex. B, Auditor’s record information sent to the county boards and Secretary on July 6 and July 9, 2009.) Edward Parker answered the phone when a call was made to the bed and breakfast. (Aff. Earley) Mr. Parker stated that he is the owner of both 1820 Rosalind Avenue and 1824 Rosalind Avenue, Cleveland, Ohio. Mr. Parker also stated that rooms may be rented by the week at 1824 Rosalind Avenue, but these are not apartment units, just rooms. (Aff. Earley)

Like the other rental properties discussed above, these addresses reflect temporary quarters used by the circulators, not their permanent residence. Now that the work is done, the circulators cannot be located because their permanent residence is undisclosed. Thus, each of these part-petitions must be invalidated because the circulator’s statement contains false information.

b. Commercial addresses are not permanent residence addresses

At least twelve circulators listed commercial hotels or motels as their permanent residence addresses, including seven that stayed at a Hilton at 4790 Hilton Corporate Drive in Columbus, Ohio. (Aff. Slagle, Ex. B.) A hotel or motel does not qualify as a permanent residence address if the circulators stay there only to do their job and have no intention of staying. See *In-Re Protest of Brooks*, 2003-Ohio-6348, at ¶45-48 (finding that a hotel address was a false address for the payor of petition circulators because the payor only stayed there temporarily and could not be found or reached there); R.C. 3503.06(B). Hence, all part-petitions

falsely disclosing a hotel or other commercial address as the circulator's permanent residence address must be invalidated.

c. Same circulator with multiple permanent addresses

Several circulators disclosed two or more addresses on part-petitions they circulated. (Ex. D, T.) This means that either all of these circulators changed their permanent residence addresses during the short period of time they were circulating part-petitions for the Casino Initiative Petition, or, more likely, one or more of the permanent residence addresses these circulators listed was not, in fact, their permanent residence address. Because several of these circulators also listed the same West Funderberg Road, Martin Luther King Drive, and Rosalind Avenue addresses as discussed above, it is reasonable to conclude that the addresses they provided, under penalty of election falsification, are not their permanent residences.

d. Temporary Ohio domicile is not enough to validate an Ohio address.

To the extent this Court requires further investigation of the circulators who used suspect addresses, the investigation must require more than merely looking to see whether the circulator has an Ohio driver's license or I.D. card. The reason for this is that to obtain an Ohio driver's license or I.D. card, a person does not need to provide any documentation to verify that the address given is the person's current or correct address.

No provision in Title 35 indicates that the address listed on a circulator's driver's license is proof of the circulator's permanent residence. Indeed, the requirements for obtaining an Ohio driver's license or I.D. card are vastly different from the factors set forth in R.C. 3503.06(B)(2), and a person may obtain an Ohio driver's license or I.D. card even if they are only temporarily living in Ohio. See R.C. 4507.08(D)(7) and 4507.50(A).

But temporarily living at an address—with no intention of making it your residence—does *not* establish a circulator's permanent residence for purposes of R.C. 3503.06(B)(2) and

3519.06. Indeed, Ohio Adm. Code 4501:1-1-35(E) expressly states that an Ohio driver's license or I.D. card "shall *not* be considered evidence of the person's residency in Ohio for any other purpose." (Emphasis added.)

Circulators that came to Ohio for the temporary purpose of circulating part-petitions and obtained Ohio drivers' licenses or I.D. cards in order to create the impression that they are Ohio residents—because they erroneously thought they had to be Ohio residents to circulate in Ohio—do not have permanent residence addresses in Ohio. Thus, to the extent the part-petitions they circulated listed an Ohio address as their permanent residence address, these part-petitions are false. Obtaining Ohio drivers licenses and I.D. cards for this purpose is nothing short of orchestrated election falsification.

2. One Person Signing Circulator Statement as Another

Some circulators misrepresented their identities by signing the circulator statement, under penalty of election falsification, using someone else's name. Specifically, numerous petitions purport to have been circulated by an individual named "Jamar Owens." (Ex. H.) But even to the untrained eye, it is apparent that the same person did not complete the circulator statements. The handwriting, printing, and signature of the circulators of these part-petitions are clearly different from each other. But, the address provided is the same on each part-petition, thereby precluding any suggestion that various persons named Jamar Owens circulated these part-petitions. Thus, even if one of these circulator statements was actually completed by "Jamar Owens," the handwriting on the remaining part-petitions shows that the same "Jamar Owens" did not complete the circulator statements on those part-petitions. All of the "Jamar Owens" part-petitions that Relators identified were provided to each of the county boards and to the Secretary.

Because the circulator statements on these part-petitions are false (i.e., someone other than Jamar Owens signed the name of Jamar Owens), they must be invalidated.

C. Ohio Law Requires Part-Petitions Circulated By Felons to be Invalidated.

A person who has pleaded guilty to or been convicted of a felony under the laws of Ohio, any other state, or the United States is “*incompetent to circulate or serve as a witness for the signing of any * * * initiative * * * petition.*” See R.C. 2961.01(B). (Emphasis added.) Thus, as a matter of law, any part-petition circulated by an individual who is a felon is void ab initio and must be invalidated in its entirety.

The Secretary recognized the importance of this mandatory law, which became effective in 2006 as part of an election reform bill, and informed the Boards of it in Directive No. 2009-10:

Ohio law bars persons who have been convicted of any felony under the laws of this state, another state or the United States from circulating initiative petitions. (see R.C. 2961.01(B) and R.C. 2967.17(B)). *You must invalidate any part-petition which was circulated by a person who has been convicted of a felony whose right to serve as a circulator has not been restored by a court of record. To verify whether a circulator has been convicted of a felony, you may seek the assistance of your county clerk of courts. If you determine that a felon circulated any part-petition you are examining, please provide the felon’s name and address to the Elections Division promptly, so that the Elections Division may share that information with the other boards of election examining parts of the petition.*

(Emphasis added.)

The above Directive states in no uncertain terms that the county boards “must invalidate *any part-petition which was circulated by*” a felon.

While the Secretary has apprised the county boards of this important law, *she has not required* the boards of elections to determine whether circulators are convicted felons. In other words, the Secretary has told the boards to invalidate part-petitions circulated by felons, but has not directed them to check the circulator information to see if the circulator is a convicted felon. Obviously, a board of elections cannot comply with this mandatory law and invalidate part-petitions circulated by convicted felons if it is not checking to determine whether the circulators

are convicted felons. In order for the Secretary to fulfill her duty “to compel the observance by election officers in the several counties of the election laws,” she must direct the county boards to determine whether circulators are convicted felons.

Directive No. 2009-10 asks the county boards to submit the name and address of circulator felons to the Secretary’s Elections Division promptly so that the Elections Division can share this information with other boards. When the Butler County Board of Elections apprised the Secretary that a particular circulator (Melissa Smith) was a convicted felon, the Secretary did nothing. The Secretary’s failure to follow her own Directive and her indifference to Butler County’s investigation and finding, potentially leaves part-petitions circulated by Ms. Smith in other counties among those certified. Thus, the Secretary has not only failed to require the county boards to determine whether petitions have been circulated by convicted felons, she has, in essence, given them permission to ignore this law.

Because Directive No. 2009-10 does not require county boards to determine whether convicted felons are circulating petitions, there is no way to know whether any or all of the county boards have ignored this law.⁷ Strict compliance with Ohio’s election law does not allow this law to be ignored. If the county boards have not reviewed part-petitions to determine whether circulators are felons, then the Secretary should do so. The people of Ohio expect that their election officials are (1) complying with Ohio’s election laws, and (2) ensuring that election proceedings are free from misconduct and irregularities. Election officials, not private citizens, are charged with reviewing part-petitions as required by law. See R.C. 3501.39(A) (stating the “secretary of state or a board of elections shall accept any petition * * * *unless* * * * (3) The * *

⁷ Based on emails that were sent to the county boards by the Defiance and Butler County Boards, Relators are aware that these two county boards have looked at whether felons circulated at least some part-petitions. Relators are also aware that other county boards have refused to check felony status of circulators.

* petition violates the requirements of this chapter, Chapter 3513. of the Revised Code, or any other requirements established by law.”) (Emphasis added).

In sum, the part-petitions circulated in connection with the Casino Initiative Petition cannot be properly verified unless and until the competency of the circulators (i.e., that the circulator is not a felon) is determined by the county boards or the Secretary.

D. The Secretary Has Resisted and Discouraged Investigation of Circulator Irregularities.

As the state’s chief election officer, the Secretary is required to, “[i]ssue instructions by directives and advisories * * * to members of the boards as to the proper methods of conducting elections,” to “compel the observance by election officers in the several counties of the requirements of the election laws,” and to “investigate the administration of election laws, frauds, and irregularities in elections in any county, and report violations of election laws to the attorney general or prosecuting attorney, or both, for prosecution.” R.C. 3501.05(B), (M), (N)(1). In turn, the county boards take their cue not only from statutory law, but from the Secretary. County boards must perform “duties as prescribed by law or the rules, directives, or advisories of the secretary of state.” R.C. 3501.11(P).

With respect to initiative petitions, the county boards have a multitude of duties to perform before an initiative petition is placed on the ballot. County boards have a statutory duty to investigate irregularities or violations of Title 35 of the Revised Code and may, in furtherance of that duty, issue subpoenas, summon witnesses, and compel production of books, papers, records, and other evidence in connection with any such investigation. See R.C. 3501.11(J) and 3519.18. The county boards also have the duty to review, examine, and certify the sufficiency and validity of initiative part-petitions. R.C. 3501.11(K). In performing this duty, the county boards have a duty to determine whether a part-petition contains all of the information required

by law. R.C. 3519.15.

Among the information required on part-petitions is the name and permanent address of the part-petition's circulator. See R.C. 3519.05. A circulator is required to sign the petition and truthfully disclose his or her permanent residence address. R.C. 3501.38(E)(1). Ohio law does not allow a petition circulator to lie about his or her permanent residence address. The failure of a circulator to truthfully disclose his or her permanent residence address requires invalidation of an entire part-petition. See R.C. 3519.06(A) (circulator statement "not properly filled out") and (D) (circulator statement false).

In accordance with her statutory duties, and in order to assist the boards of elections in performing their duties with respect to the Casino Initiative Petition, the Secretary issued Directive 2009-10 on June 29, 2009. In Directive 2009-10, the Secretary instructed the county boards on a variety of issues relating to the verification of the part-petitions comprising the Casino Initiative Petition. This Directive, however, did not require county boards of elections to determine whether circulators were felons or apprise them of what to do with information suggesting that circulators had misrepresented their names and/or addresses on the face of the part-petitions.

As set forth previously, Relators provided extensive information about the different circulators whose information was suspect and should be investigated for irregularities that might prove fatal to the part-petitions. In response to the Relators' communication of these irregularities to the county boards, the Secretary issued Advisory 2009-06, which specifically addressed how the county boards should respond to Relators' July 6, 2009 letter. Rather than compel the county boards to follow Ohio election laws with regard to the circulator statements, Advisory 2009-06 instructed the county boards to *presume the validity* of the circulator

statements.

To be sure, Advisory 2009-06 gave lip service to the statutory law that precluded the validity of a part-petition when there is “satisfactory evidence” that a circulator’s statement “is false in any respect.” (See E, Advisory 2009-06, at p. 1, quoting R.C. 3519.06[(D)].) But Advisory 2009-06 went on to point out that circulators are required to sign the circulator statement under penalty of election falsification. *Id.* at p. 2, citing R.C. 3519.05. In light of the fact that circulators are subject to penalty for falsification of the disclosure made in their circulator statements, the Secretary leaped to the conclusion that these statements therefore carry a “presumption of validity” that is overcome only by “satisfactory evidence” that the circulator falsified his or her permanent address. *Id.* The Secretary then continued:

[A] board of elections may generally presume that the permanent residence address provided by a circulator is valid if such an address exists in the county. This presumption of validity is overcome where “satisfactory evidence” exists that a circulator falsely represented his or her permanent address. To overcome the presumption of validity, an individual questioning the validity of the permanent residence address of a circulator has the burden of providing to the board “satisfactory evidence” that the listed address is false.

Id. at p. 2. The Secretary goes on to describe “satisfactory evidence” to include an affidavit “of an individual with personal knowledge that the circulator did not live at the residence address on the part-petition.” *Id.* The Secretary advised that unsworn documents or written assertions were not “satisfactory evidence.” *Id.*

The problem with the Secretary’s advisory is that it effectively gave the county boards carte blanche to ignore the reams of evidence presented by Relators that should have raised a red flag and, *at the very least*, triggered an investigation (pursuant to the county boards’ statutory duty) into the circulator irregularities. Given the time limits and other constraints that Relators faced, the volume of evidence provided to the county boards and to the Secretary was

extraordinary, and far more than a mere collection of speculative allegations. Relators provided detailed information as to which circulators listed suspect addresses, what those addresses were, the reasons for the suspect nature of those addresses, and the specific part-petition numbers (*i.e.*, using the Secretary's own Bates numbers) that were affected.

Despite the significance of the information submitted to the Secretary and the county boards, the Secretary's Advisory 2009-06 gave license to the county boards to do nothing in response to that information, on the basis that it was not "satisfactory evidence" of circulators' falsification of their permanent addresses. But in so advising the county boards, the Secretary instructed the boards to apply a "presumption of validity" that does not exist in Ohio law.

While R.C. 3519.06 says that "satisfactory evidence" must be present in order to invalidate a part-petition, this statute does not provide a legal basis for the "presumption of validity." By instructing the county boards as to this so-called "presumption," the Secretary has placed the cart before the horse. To the extent that R.C. 3519.06 can be read to create a presumption of anything, the statute only speaks to the quantum of evidence required to *invalidate* an entire part-petition. But when the Relators were placing their findings before the boards of elections, they were *not* asking simply for the county boards to take their word for it and invalidate all part-petitions circulated by the persons with suspect addresses.⁸ Relators were asking the county boards and/or the Secretary to *investigate* these prima facie irregularities in accordance with their statutory responsibilities to do so. Only if the investigation confirmed circulator falsification would the part-petitions be deemed invalid as a matter of Ohio law.

By instructing the county boards to presume validity before deciding whether to

⁸ The Relators did ask for the invalidation of the felon-circulated petitions and the part-petitions circulated by "Jamar Owens." These required no further investigation, as the Jamar Owens petitions were facially invalid and the felon petitions were void ab initio.

investigate, the Secretary inappropriately saddled Relators with a burden to prove that the circulators' addresses were invalid *before the county board or the Secretary had any duty to investigate*. This is akin to saying that a police officer must be able to prove beyond a reasonable doubt that a suspect committed the crime before he is allowed to arrest him. Of course, this is not the law of arrest; probable cause suffices to justify an arrest. And here, the evidence provided to the county boards provided enough cause to trigger an investigation by the Secretary and/or the county boards into the widespread circulator irregularities identified by Relators' evidence.

Though the Secretary gives an example of "satisfactory evidence" that could theoretically trigger an investigation, the Secretary's advisory strongly suggests to the county boards that they do not have the time to conduct any investigation, no matter what evidence Relators (or anyone else) may have provided them with respect to circulator irregularities. While the Secretary giveth the notion that the county boards are "fully empowered" to investigate irregularities under R.C. 3501.11(J), the Secretary taketh away that very power by reminding the boards that **"every Ohio board must complete its review of the part-petitions according to the instructions given with Directive 2009-10 and submit a copy of its certification form to this office no later than July 16, 2009."** (Advisory 2009-06, at p. 2, emphasis *sic*.) The Secretary's message to the boards was clear—the Secretary did not want the boards to treat the Relators' evidence as "satisfactory" for an investigation because that may disrupt the Secretary's deadline for determining the sufficiency of the initiative petition.

But this scenario only begs the question of what evidence would ever be "satisfactory" to trigger an investigation into circulator irregularities. The weight of the evidence provided by Relators to the Secretary and the county boards, based on a limited review of part-petitions from

at least fifty-one Ohio counties, revealed serious circulator irregularities that were evident in all parts of the state. The Clark County Board of Elections, which chose to investigate the matter (through the Clark County Prosecutor's Office), found that numerous "West Funderburg Road" addresses disclosed by circulators were false, leading to the invalidation of part-petitions containing that address. Yet, few other county boards investigated these addresses (or the other addresses flagged as likely false), and the Secretary did not share, much less instruct the other county boards to consider, the findings of the Clark County Prosecutor's Office.

Faced with the mountain of circumstantial and direct evidence of widespread circulator violations of statutory law, the Secretary did nothing and gave her blessing to county boards of election that likewise chose to do nothing.

E. In Addition To The Relief Requested In The Relators' Petition, Peremptory Writ Relief Commanding the Secretary to Immediately Transmit Part-Petitions to County Boards for Investigation and Review Is Appropriate.

Relators seek a twofold remedy in this action. First, Relators seek a writ (or other order) commanding the Secretary to investigate the irregularities in the part-petitions, which have been brought to her attention during the last two weeks and which are chronicled in the evidence presented to the Court in this action. (See Relators' Complaint, at p. 12.) Second, Relators ask that any part-petition (1) with a false permanent address of the circulator, (2) on which Jamar Owens is identified as a circulator, or (3) circulated by a felon be invalidated due to their noncompliance with Ohio law. *Id.*

The failure of the Secretary and the county boards to investigate and invalidate part-petitions that violate Ohio law, as described previously, warrant Relators' requested relief. Notably, however, the Answers filed by the Respondents in this action, as well as Advisory 2009-08 issued by the Secretary after the Relators' filing of this action, also counsel in favor of this Court's granting immediate relief commanding the Secretary to (1) return the part-petitions

to the various county boards for investigation of the circulator irregularities and (2) compel the county boards to invalidate the part-petitions that fail to comport with Ohio law. In her answer to Relators' Complaint, the Secretary has averred that "it is the legal obligation of the county boards, not the Secretary of State, to determine the validity of part-petitions, including the eligibility of circulators." (Answer of the Secretary, at ¶28.) The Secretary has also taken the position that "the Ohio Revised Code vests authority over decisions concerning the validity of petitions with county boards, not the Secretary of State." Id. at ¶37. Thus, it is apparent that the Secretary's legal position is that the county boards are solely responsible for verifying circulator information disclosed on the face of a part-petition.

On the other hand, the Answer of Respondent Muskingum County Board of Elections suggests that the Secretary has taken a contrary position in previous communications with the county boards. Significantly, the Muskingum County Board of Elections admitted paragraphs 45 and 46 of Relators' Complaint. (See Answer of Muskingum County Board, at ¶ 3.) These paragraphs of the Complaint allege:

45. On July 8, 2009, the Respondent Secretary issued Advisory No. 2009-06, instructing the boards of elections to *presume the validity* of circulator addresses, unless presented with "satisfactory evidence" of a false address. * * *

46. Respondent Secretary did not instruct the county boards to investigate irregularities regarding circulator addresses. Rather, she instructed the county boards in Advisory No. 2009-06 to employ a "presumption of validity," *which would have the practical effect of treating the circulator's information as facially valid.*

(Emphasis added.)

These admissions of the Muskingum County Board are significant in the context of the relief sought in this case. Notwithstanding the legal position now taken by the Secretary her Answer (*i.e.*, that it is the county boards' sole responsibility to verify circulator information), the Respondent Board admitted in its Answer that the Secretary instructed it to presume validity and

use that presumption as a reason *not to even investigate* the circulator irregularities to which Relators alerted the Secretary and the county boards.

The Secretary's legal position expressed in its Answer, coupled with the Muskingum County Board's admission that the Secretary instructed the county boards to essentially do nothing to verify the circulator information (*i.e.*, treat the circulators' information as "facially valid") renders appropriate a peremptory writ of mandamus commanding the Secretary to send the part-petitions back to the county boards for consideration of the circulator issues. Indeed, the Secretary's recent Advisory 2009-08 is tantamount to an admission by the Secretary that there is sufficient evidence of circulator irregularities to warrant an investigation into whether the circulators committed election falsification—which, if found by the boards of elections, would warrant invalidation of part-petitions.

Mandamus is the appropriate remedy to correct erroneous advice given by the Secretary to the county boards. See *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, at ¶20. Here, the Muskingum County Board has admitted that the Secretary advised incorrectly: she said the county boards may *presume* the circulator information to be facially valid, meaning that the county boards had *no* duty to investigate circulator irregularities brought to the boards' attention. But the Secretary now admits that the county boards do.

Without waiving the argument that the Secretary also has a separate duty to investigate and the authority to invalidate part-petitions that are not in strict compliance with Ohio election law, it is appropriate for the Court to order the Secretary to transmit the part-petitions back to the county boards for review of the circulator irregularities. Such relief would give the county boards the opportunity to review the part-petitions and allow for the chance that the county boards might reach some conclusions on the circulator issues prior to oral argument and

disposition of this matter. To not grant that relief immediately risks that this matter may not be resolved prior to the time that the petitions and signatures are presumed “valid” under Section 1g, Article II of the Ohio Constitution.

In addition to mandamus being a proper remedy in this instance, this Court may also invoke the “other writ” provision in R.C. 2503.40 to command the Secretary to transmit the part-petitions to the county boards for investigation into circulator irregularities and, if necessary, invalidation. R.C. 2503.40 provides:

In addition to the original jurisdiction conferred by Section 2 of Article IV, Ohio Constitution, the supreme court when in session, and on good cause shown, may issue writs of supersedeas in any case, and other writs not specially provided for and not prohibited by law, when necessary to enforce the administration of justice.

The “other writ” is appropriate here. Given the Secretary’s claim that her office has no authority to invalidate part-petitions, there is no reason for her office to retain custody of the part-petitions while this case is pending. In order to ensure that complete relief is ultimately possible in this action, the Court can (and should) invoke the “other writ” remedy in R.C. 2503.40 and order the Secretary to transmit the part-petitions to the various county boards for examination of the circulator irregularities and, if necessary, invalidation of those part-petitions where the boards find that the circulator has not strictly complied with Ohio law. Cf. *Smith v. Granville Twp. Bd. of Trustees* (1996), 77 Ohio St.3d 1215 (granting “other writ” commanding specific action pending the Court’s disposition of a discretionary appeal).

F. This Action Is Not Moot.

On July 20, 2009, the day before she certified the Petition, the Secretary announced her intention to investigate the circulator violations identified by the Relators. While acknowledging that fraud, if found, would be “referred for criminal prosecution,” the Secretary stopped short of taking any meaningful action to address the fraud that took place in *this* Petition. (See Ex. R.)

Rather, the Secretary certified the Petition and punted her obligation to ensure the integrity of this Petition to the Court, saying in a press release: “In the end, it is likely to be the Ohio Supreme Court that will determine whether this issue is one submitted to the voters this fall.” (Secretary of State’s News Release, July 20, 2009.)

This position, which is echoed throughout the Answers filed by Respondents and Intervenors, is untenable, irresponsible and contrary to law. Essentially, the Secretary posits that the Ohio Constitution requires her to certify a petition despite evidence of circulator falsification and other irregularities. The Secretary is apparently content to accept (arguably to create) inconsistent results among the county boards of elections, certify the petition, and then wash her hands of any additional duty or obligation to assure the integrity of the ballot. The Secretary cannot shirk her duty to immediately address the problems in *this* Petition by pointing her finger at the county boards and expecting this Court to mop up the mess.

The Secretary’s clear legal duty to address this situation is simply not limited to conducting an investigation to try to prevent some future abuse on a hypothetical future petition. While this Court has “exclusive jurisdiction over all challenges,” nothing in state law or the Ohio Constitution prohibited the Secretary from carrying out her overarching duty to “determine and certify to the sufficiency of” an initiative petition or to “compel the observance by election officers in the several counties of the requirements of the election laws.” R.C. 3501.05(K) and (M). The Secretary has a clear legal duty to provide consistent direction to the county boards of election and to assure consistent results on the issues of fraud.

The Intervenors hint that because the Secretary has now certified the Petition and launched an investigation into the circulators’ statutory violations, the entire issue is moot and that this Court is powerless to assure the integrity of the ballot. But this position fails to take into

account the fact that Relators have not been awarded any of the relief they seek. The issue of the Petition's validity does not become moot by virtue of the Secretary's erroneous certification, which is a purely ministerial act. Indeed, Section 1g, Article II of the Ohio Constitution contemplates challenge actions *after* certification by the Secretary: under Section 1g, the deadline for commencing challenge actions in this Court comes 10 days *after* the Secretary's deadline for certification.

An argument that the Secretary's certification moots any challenge to the Petition renders the new constitutional language regarding this Court's jurisdiction completely meaningless. Article II, Section 1g of the Ohio Constitution sets a deadline of 10 days *after the Secretary's certification* for bringing a legal challenge in this Court. Thus, the Ohio Constitution endorses a challenge action after certification by the Secretary, cutting against any "mootness" argument asserted by virtue of the Secretary's certification.

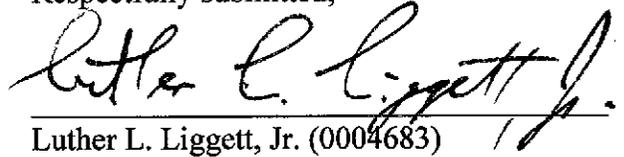
Moreover, courts have often held that elections cases fall squarely within the "capable of repetition yet evading review" exception to the mootness doctrine because of their inherently brief duration. See *Norman v. Reed* (1992), 502 U.S. 279, 112 S.Ct. 698, 116 L.Ed.2d 711; *Moore v. Ogilvie* (1969), 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1. See also, *In re Protest Filed by Citizens for Merit Selection of Judges Inc.* (1990), 49 Ohio St.3d 102 (holding that a matter of constitutional and statutory interpretation which affects how boards of elections review certain petition signatures was not moot even after the election was held). The Secretary's position on this matter and Directives outlining the review process apply to all elections forward, thus the matter is "capable of repetition yet evading review."

CONCLUSION

For the foregoing reasons, Relators respectfully request that this Court issue a writ and/or order commanding the Respondents to investigate the part-petitions for circulator falsification and invalidate any part-petition where the Respondents' investigation finds that a circulator has falsified the information disclosed on the circulator statement. At a *minimum*, this Court should order the Respondents to invalidate any part-petition that was circulated by any of the circulators identified by Relators in their submissions to the county boards and the Secretary. (See Exhibits to Aff. Slagle.) This Court should also order Respondents to invalidate any part-petition circulated by "Jamar Owens" and by Melissa Smith, who was identified as a felon by a board of election.

In the alternative, if this Court deems the county boards to be the primary (if not sole) bodies responsible for verifying circulator information, the Relators ask this Court for a writ or other order commanding the Secretary to compel to county boards of elections, through issuance of a directive or otherwise, to (1) invalidate any part-petition circulated by any of the circulators identified by Relators in their submissions to the county boards and the Secretary. (See Exhibits to Aff. Slagle.), (2) invalidate any part-petition circulated by "Jamar Owens" and "Melissa Smith"; (3) investigate the part-petitions from their county for circulator falsification, and (4) invalidate any part-petition in which a county board finds that a circulator has disclosed false information.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via e-mail or facsimile (as indicated) on July 24, 2009, upon:

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