

Case No. 09-1294

IN THE SUPREME COURT OF OHIO

STATE EX REL. SCIOTO DOWNS, INC., ET AL.,

Relators,

v.

JENNIFER L. BRUNNER, ET AL.,

Respondents.

**Original Action In Mandamus and Under
Section 1g, Article II, of the Ohio Constitution**

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SUPREME COURT OF OHIO

**MERIT BRIEF OF INTERVENORS OHIO JOBS & GROWTH COMMITTEE,
WILLIAM J. CURLIS, JOHN T. CAMPBELL, MATTHEW HAMMOND, AND
CHARLES J. LUKEN**

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INTRODUCTION

On July 17, 2009, Relators Scioto Downs, Inc. and Stacy Cahill (collectively, “Relators”) filed Relators’ Petition For Writ Of Mandamus And Original Action Complaint Under Section 1g, Article II Of The Ohio Constitution (the “Complaint”). Through the Complaint, Relators are attempting to thwart not only the measured judgments of the county boards of election and Respondent Secretary of State, Jennifer Bruner (the “Secretary of State”), but also the will of the 452,956 Ohio electors who signed the initiative petition and whose signatures were ultimately certified.

Relators are not disinterested parties, advocating only on behalf of the integrity of the initiative process. Rather, Scioto Downs has a pecuniary interest in making sure the “Ohio Jobs and Growth Plan (multi-city casinos)” initiative petition (the “Initiative Petition”) never gets on the ballot. Having just received a windfall from the Governor and legislature facilitating the operation of slot machines at its racetrack, and operating in a fiscally challenged industry, Scioto Downs is looking to protect its new golden goose. Not surprisingly, the arguments advanced by Relators are overly formalistic and would result – in this case of first impression – in standards not in the best interests of Ohio electors. Put simply, Relators’ Complaint suffers from numerous material deficiencies and should be dismissed.

First and foremost, events in this case have overtaken Relators. A large portion of the Complaint requests an order compelling Respondent Secretary of State, Jennifer L. Bruner (the “Secretary of State”), to conduct an investigation into the Initiative Petition – and to order the county boards of election to do likewise. As of July 20, 2009, the Secretary of State has ordered an official investigation and has notified the county boards of election, including Respondent Muskingum County Board of Elections, of their obligation to cooperate in this exercise.

Accordingly, there is nothing else for the Court to order Respondents to do in this regard as conducting an investigation is all that the Secretary of State is legally authorized to do. Not only does the Secretary of State not have any affirmative duty to invalidate part-petitions, in light of the recent revisions to Ohio Const. Art. II, § 1g, the Secretary of State lacks even the *authority* to invalidate part-petitions or to order the county boards of election to do likewise. As such, that portion of the Complaint does not present an actual case or controversy.

In addition, to the extent the Complaint is not moot, it fails to state any viable claim in mandamus. It is now well-established that if a relator's true object is to have a petition declared unlawful and/or to prevent the initiative from being placed on the ballot, this is not the proper subject of a mandamus claim and this Court lacks jurisdiction.

Another fatal deficiency with the Complaint is that, while Relators pay lip service to Ohio Const. Art. II, § 1g, they do not seek any affirmative relief under § 1g. Instead, Relators ask *solely* for mandamus relief – i.e., an order from this Court compelling Respondents to perform certain acts. Thus, no independent claim under Art. II, § 1g has been presented and, as such, the entire Complaint should be dismissed.

Relators' Complaint should also be barred on the basis of laches. Relators are ultimately objecting to the instructions provided by the Secretary of State to the county boards of elections regarding the circulator statement requirements. Yet Relators waited almost nine days after the Secretary of State issued her instructions to file the Complaint. This Court has always instructed that election cases require the utmost diligence. That did not occur in this case.

Accordingly, it is unnecessary for the Court to wade into the specifics of Relators' claims in this case. Even if the Court were so inclined, however, Relators do not fare any better. Under well-established precedent, the Relators must present clear and convincing evidence that the

Secretary of State and the boards of elections abused their discretion and that Relators are entitled to the relief they seek. Relators have failed to put forward admissible evidence based on first hand knowledge to demonstrate (1) that certain part-petition circulator statements are false in any respect and (2) that the boards of elections still certified the part-petitions. Close review further reveals that many of Relators' representations are riddled with inaccuracies. In sum, Relators have not satisfied their burden of presenting clear and convincing evidence in this case.

STATEMENT OF THE FACTS AND CASE

I. Factual Background

Relator Scioto Downs is an Ohio corporation that operates a horse racing track in southern Franklin County. [Complaint, ¶ 4]. Relator Stacy Cahill is the general manager of Scioto Downs. As a result of the Governor's recent executive action, backed by the legislature, Scioto Downs, and indeed all race tracks in this state, for the first time are poised to install slot machines. The Initiative Petition would authorize the creation of casinos in four cities in this state, including Columbus – which casino presumably would compete with Scioto Downs for gaming customers.

Intervenor Ohio Jobs & Growth Committee (the "Ohio Jobs Committee") filed the Initiative Petition, including all part-petitions, with the Secretary of State on June 25, 2009. [Complaint, ¶8]. The Secretary of State sent the part-petitions to the appropriate county boards of election on June 29, 2009.

That same date, the Secretary of State issued Directive 2009-10, which dealt with the Initiative Petition. Directive 2009-10 specifically instructed the boards to verify all part-petitions, including the circulator information, for compliance with the law:

You must verify the validity of each part-petition in addition to verifying the validity of the individual signatures contained on the part-petition. Check each part-petition to determine that the circulator's statement on the last page of the

part-petition has been properly completed; a part-petition is invalid if the circulator's statement is not completed as required by law.

[Secretary of State Directive 2009-10, June 29, 2009, Ex. A to Green Aff., included as Tab 1 to Evidence To Intervenors' Merit Br.] The Secretary of State also reminded the boards of their "statutory authority to investigate irregularities, nonperformance of duties, or violations of the election laws relative to this petition." [*Id.*]

Relators, out of economic self-interest as opposed to altruism, – commenced their attack on the Initiative Petition, and the county boards of election's verification, from the inception of the process. On July 6, 2009, and again on July 9, 2009, Relators' counsel contacted each of the eighty-eight county boards of election to notify them of supposedly suspicious activity in connection with the Initiative Petition and requested the commencement of additional and intensive investigations of even the most obscure immaterial perceived violation. [Complaint, ¶¶ 19, 22, 28]. Largely in response to Relators' actions, the Secretary of State issued Advisory 2009-06 on July 8, 2009.

Advisory 2009-06 indicated that counsel for Relators had contacted the boards of election raising concerns regarding the part-petition circulators, and that several boards had requested guidance from the Secretary of State. Advising the boards of election, the Secretary of State began by instructing the boards that they *could not* verify a part-petition if "satisfactory evidence" was presented that the statement of the circulator was "false in any respect." [Secretary of State Advisory 2009-06, July 8, 2009, Ex. C to Green Aff.]. As to the so-called residency requirement for circulators, the Secretary of State instructed that 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," but that this presumption would be overcome "where 'satisfactory evidence' exists that a circulator falsely represented his or her permanent address."

[*Id.*]. Finally, the Secretary of State provided the following clarification regarding the satisfactory evidence standard in the context of the address requirement:

An example of “satisfactory evidence” of a false address includes (but is not limited to) an affidavit of an individual with personal knowledge that the circulator did not live at the residence address listed on the part-petition. An unsworn document or written assertion that speculates that a circulator may have listed a false permanent address does not, standing alone, constitute “satisfactory evidence” of a false permanent address precluding verification by a board.

[*Id.*]. In addition, the Secretary of State again reminded the boards of their authority to investigate any suspected irregularities and/or noncompliance with Ohio election law. [*Id.*].

The boards of election completed their review of the validity and sufficiency of the applicable part-petitions and the signatures thereon, and advised the Secretary of State of the results, on or about July 16, 2009. The part-petitions contained a total of 902,450 signatures. Of these, 436,409 signatures were found to be invalid by the boards of election. The boards of election also invalidated 685 part petitions. Ultimately, though, 452,956 signatures were found to be valid by the boards of election, which is 50,202, or 12%, more than the minimum signature requirement of 402,758. In addition to exceeding the overall signature requirement, the Initiative Petition surpassed the requisite 5% signature threshold in 73 of the 88 counties, or 29 more than the required 44 counties. [Secretary of State, “Final County By County Tally of Part-Petitions and Signatures,” Ex. G to Green Aff.].

On July 21, 2009, and in accordance with her mandatory obligation under Art. II, §1g of the Ohio Constitution, the Secretary of State certified the Initiative Petition for the November 3, 2009 ballot. Prior to doing so, the Secretary of State issued Advisory 2009-08 on July 20, 2009, which announced the Secretary’s launch of an independent investigation, pursuant to R.C. 3501.05(N)(1), into alleged improprieties involving the circulation of the Initiative Petition. [Secretary of State Advisory 2009-08, July 20, 2009, Ex. E to Green Aff.]. Advisory 2009-08

further directed the individual county boards of election to cooperate in the investigation and to share the results of any investigation undertaken at the county level. [*Id.*]. That investigation is ongoing.

II. Relators' Complaint

The Complaint alleges improprieties involving the part-petitions filed with the Secretary of State, including: (1) part-petition circulators disclosed non-residential addresses, [Complaint, ¶¶ 17-19]; (2) some circulators disclosed more than one residential address, [*id.*, ¶¶ 26-29]; (3) some circulations disclosed the same permanent residential address, [*id.*, ¶¶ 20-25]; (4) one of the part-petition circulators is a convicted felon, [*id.*, ¶¶ 29-32]; and (5) one circulator's signature appears to Relators to be different on part-petitions containing his name, [*id.*, ¶¶ 33-37]. The Complaint also alleges the Secretary of State neither undertook any investigation into the alleged irregularities nor compelled individual boards of election to undertake any investigation. [*See id.*, ¶¶ 38-55].

Relators seek the following relief in the Complaint:

1. a writ of mandamus ordering Respondents to investigate the alleged violations raised in the Complaint and commanding Respondents to invalidate certain part-petitions;
2. an order pursuant to Ohio Const. Art. II, § 1g commanding Respondents to investigate the alleged violations raised in the Complaint and commanding Respondents to invalidate certain part-petitions;
3. a writ of mandamus ordering *the Secretary of State to compel* county boards of election to investigate the alleged violations and to invalidate certain part-petitions.

Reviewing Relator's Complaint, therefore, it is critical to note that Relators are *only* asking this Court to order the Secretary of State and the Muskingum County Board of Elections to take certain actions. Relators *are not asking* the Court to directly invalidate any part-petitions.

Relators also *are not* asking the Court to directly review the actions of any boards of election other than Muskingum County, and *are not* asking that this Court to directly order any other boards of election to take specific action.

ARGUMENT

I. The Complaint Is Largely Moot And Fails To Present An Actual Case Or Controversy

On July 20, 2009, the Secretary of State announced the launch of an investigation into the alleged irregularities surrounding the Initiative Petition, and advised county boards of election to do the same. The press release issued by the Secretary of State's office provides:

[The Secretary of State] has determined that an investigation should go forward. An advisory is being issued to boards of election to coordinate any local investigations that may be underway or completed and to obtain the cooperation of boards in the effort. Any findings that suggest violations, irregularities or fraud that rise to criminal conduct will be referred to the Ohio Attorney General or the local county prosecutor or both. Boards are required to report to the secretary of state the results of any investigation for fraud that is conducted locally.

[Secretary of State Press Release, July 20, 2009, Ex. F to Green Aff.]. As a direct result of the Secretary of State's intervening performance of the requested relief, Relators' action no longer presents an actual justiciable controversy. Because the Court can no longer render a judgment or provide relief that will have any practical legal effect, Relators' action should be dismissed as moot.

"Ohio courts have long exercised judicial restraint in cases which are not actual controversies." *Tschantz v. Ferguson* (1991), 57 Ohio St.3d 131, 133, 566 N.E.2d 655 (citing *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 257 N.E.2d 371); *Davies v. Columbia Gas & Elec. Corp.* (Ohio 2d Dist. 1946), 70 N.E.2d 655, 657, 47 Ohio Laws Abs. 225, (noting that courts do not concern themselves with controversies that are not justiciable), *rev'd on other grounds* (1949), 151 Ohio St. 417, 86 N.E.2d 603. No actual justiciable controversy exists if a case has

been rendered moot by some outside event. *Tschantz*, 57 Ohio St.3d at 133 (concluding that dispute regarding jurisdiction of common pleas court over plaintiff's intentional tort action against a state official was rendered moot by a ruling, in a separately filed lawsuit in the court of claims, denying immunity to state official).

Ohio law makes clear that “it is not the duty of the court to answer moot questions, and when . . . an event occurs . . . which renders it impossible for the court to grant any relief, it will dismiss the petition in error.” *Tschantz*, 57 Ohio St.3d at 133 (quoting *Miner v. Witt* (1910), 82 Ohio St. 237, 92 N.E. 21, syllabus); *see also County of Los Angeles v. Davis* (1979), 440 U.S. 625, 631 (stating that a case is considered “moot” when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome); *Central Motors Corp. v. Pepper Pike* (8th Dist. 1983), 9 Ohio App.3d 18, 19, 457 N.E.2d 1178 (stating that moot “cases are dismissed because they no longer present a justiciable controversy” – either because the “requested relief has been obtained, it serves no further purpose, it is no longer within the court’s power, or it is not disputed”); *In re L.W.* (10th Dist. 2006), 168 Ohio App.3d 613, 618, 861 N.E.2d 546, 550 (“A moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, . . . or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then-existing controversy.”)

The above principles are particularly applicable in extraordinary writ cases involving elections law. Indeed, this Court recently confirmed that “in determining actions involving extraordinary writs, a court is not limited to considering the facts and circumstances at the time that the writ was requested but can consider the facts and conditions at the time that entitlement to the writ is considered.” *State ex rel. Essig v. Blackwell* (2004), 103 Ohio St.3d 481, 485, 817 N.E.2d 5 (declining to address additional arguments that were rendered moot by the Court’s

holding, and reaffirming the principle that a court will not issue advisory opinions, even in election cases); *State ex rel. Howard v. Skow*, 102 Ohio St.3d 423, 424, 811 N.E.2d 1128 (stating same).

Accordingly, when the respondent performs the duty requested in an extraordinary writ action, the action is rendered moot. *Id.* (holding that the trial court's performance of the requested acts rendered writ of procedendo claim moot); *State ex rel. Wilson v. Sunderland* (2000), 87 Ohio St.3d 548, 548-49, 721 N.E.2d 1055 (holding that to the extent relator's mandamus claim sought to compel a trial court judge to rule on a motion for a free trial transcript in connection with an appeal, it was rendered moot when the judge subsequently ruled on the motion); *State ex rel. Grove v. Nadel* (1998), 84 Ohio St.3d 252, 253, 703 N.E.2d 304 (holding that a writ of procedendo will not issue to compel the performance of a duty that has already been performed).

As stated above, three days after Relators filed this action, the Secretary of State announced that her office would be undertaking an investigation into alleged irregularities concerning the Initiative Petition. [Advisory 2009-08, Ex. E to Green Aff.; Secretary of State Press Release, Ex. F to Green Aff.]. The Secretary of State further advised county boards of election to coordinate any local investigations that may be underway or completed, and to obtain the cooperation of boards in the effort. [*Id.*]. The boards were also advised that this investigation could result in criminal prosecution.

Accordingly, the Secretary of State is currently doing everything within her power to ensure compliance with Ohio's election laws and the integrity of the initiative process. To the extent Relators request an investigation, there is no actual, justiciable controversy for this Court to resolve. Simply, the Secretary of State's performance of the requested relief makes it

impossible for the Court to render a judgment that will have any practical legal effect, rendering Relators' extraordinary writ action moot. *Skow*, 102 Ohio St.3d at 424; *Sunderland*, 87 Ohio St.3d 548. Because it is not the duty of the court to determine moot issues, this portion of the Complaint should be dismissed.¹

II. Relators Do Not Have A Clear Right To The Requested Relief And Respondents Do Not Have A Clear Duty To Provide It

As set forth fully in the merit brief filed by the Secretary of State, which arguments Intervenors hereby join and incorporate by reference, the Secretary of State has neither the affirmative duty nor the authority to invalidate part-petitions, or to order individual boards of election to reject petitions. This Court previously addressed the *very same* issues raised by Relators and held mandamus would not lie against the Secretary of State. *State ex rel. Hodges v. Taft* (1992), 64 Ohio St. 3d 1, 8; *State ex rel. Colvin v. Brunner* (2008), 120 Ohio St.3d 110, 114, 896 N.E.2d 979, 985 (“In *Hodges*, we denied a writ of mandamus to compel the secretary of state to reject a statewide initiative petition because the secretary had no legal duty to reject the petition because of the alleged verification defects or to direct the boards of election to do so.”).

With the revisions to Ohio Const Art. II, § 1g, it is clear the Secretary of State now lacks *even the authority* to perform the relief requested by Relators. *See* Ohio Const. Art. II, § 1g (stating the Supreme Court has “original, exclusive jurisdiction over all challenges made to petitions and signatures upon such petitions under this section”). Accordingly, the Complaint should be dismissed.

¹ Contrary to Relators suggestion, Intervenors are not arguing that the entire Complaint is moot – only that portion which seeks an order compelling additional investigation by Respondents. As set forth, *infra*, the remaining portions of the Complaint suffer numerous, additional deficiencies in their own right.

III. Relators' Complaint & Petition Fails To State A Claim Upon Which Relief May Be Granted Within The Court's Jurisdiction

A. Mandamus Claims Under Ohio Const. Art. IV, § 2(B)

Apart from seeking further investigation into the Initiative Petition part-petitions – which part of the Complaint is now moot – Relators are effectively asking for a declaratory judgment and a prohibitive injunction to prevent the Initiative Petition from being placed on the November 3, 2009 ballot. Under well-established Ohio law, this type of relief is inconsistent with a writ of mandamus, and the Complaint should be dismissed for lack of jurisdiction.

Relators ask this Court to compel Respondents to invalidate certain part-petitions. The purported basis is because of various alleged violations of Ohio law committed by or connected with the circulators. The ultimate goal of these requests is to prevent the Secretary of State from certifying the Initiative Petition and to prevent it from appearing on the November 3, 2009 ballot. As this Court has instructed, “if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and must be dismissed for want of jurisdiction.” *State ex rel. Phillips v. Lorain Cty. Bd. of Elections* (2001), 93 Ohio St.3d 535, 537, 757 N.E.2d 319 (emphasis added) (quoting *State ex rel. Grendell v. Davidson* (1999), 86 Ohio St.3d 629, 634, 716 N.E.2d 704).

Addressing an almost identical issue, this Court recently held a viable mandamus action did not exist. *State ex rel. Essig v. Blackwell* (2004), 103 Ohio St.3d 481, 485, 817 N.E.2d 5, 10. The relators in *Essig* argued certain initiative petitions in support of a proposed statewide constitutional amendment did not comply with Ohio law – in that case, the summary and attorney general certification requirements. The relators requested a writ a mandamus to compel

the Secretary of State to declare the petition legally insufficient. The Court dismissed the challengers' mandamus claim for lack of jurisdiction:

Relators seek a writ of mandamus to compel the Secretary of State to declare the supplemental petition legally insufficient. Although relators couch their request for extraordinary relief in mandamus in terms of compelling certain actions, it is manifest that they actually seek a prohibitory injunction. For example, in relators' memorandum in support of their complaint, they assert that "a writ of mandamus should issue barring [the Secretary of State] from accepting these non-compliant supplemental petitions and placing the initiative on the ballot."

...

Therefore, because the true objective of relators' mandamus claim is to prevent the Secretary of State from determining that the supplemental petition is sufficient and placing the proposed constitutional amendment on the November 2, 2004 election ballot, we lack jurisdiction over the mandamus claim and must dismiss it.

Id. at 485, ¶¶20, 22 (emphasis added) (citations omitted).

The holding in *State ex rel. Essig* has also been applied in mandamus cases brought against county boards of election. *State ex rel. McCord v. Delaware Cty. Bd. of Elections* (2005), 106 Ohio St. 3d 346, 835 N.E.2d 336. The specific deficiency

Like the relators in *State ex rel. Essig* . . . , relators here attempt to couch their request for extraordinary relief in mandamus in terms of compelling certain affirmative duties by the board of elections. But the manifest objectives of their claim are a declaratory judgment – to declare the referendum petition insufficient – and a prohibitory injunction – to prevent Resolution 2004-10 from being placed on the November 8, 2005 election ballot.

Therefore, we lack jurisdiction over relators' mandamus claim and must dismiss it. . . .

Id. at 350, ¶¶ 25-26.

As in *State ex rel. Essig* and *State ex rel. McCord*, Relators are asking this Court to declare the part-petitions legally invalid and ultimately seek to prevent the placement of the Initiative Petition on the November 3, 2009 ballot. Accordingly, the Court lacks jurisdiction over these mandamus claims.

B. Petition Challenge Under Ohio Const. Art. II, § 1g

Relators also purport to bring this action as a petition challenge under Art. II, § 1g of the Ohio Constitution. That section was amended November 4, 2008 to provide

The Ohio supreme court shall have original, exclusive jurisdiction over all challenges made to petitions and signatures upon such petitions under this section. Any challenge to a petition or signatures on a petition shall be filed not later than ninety-five days before the day of the election. The court shall hear and rule on any challenges made to petitions and signatures not later than eighty-five days before the election. If no ruling determining the petition or signatures to be insufficient is issued at least eighty-five days before the election, the petition and signatures upon such petition shall be presumed to be in all respects sufficient.

It is clear from the express constitutional language that the jurisdiction of the Supreme Court under Art. II, § 1g is to hear and determine challenges to petitions and signatures. The Court determines whether challenged petitions (part-petitions) and signatures are valid or invalid and, as a result, whether the petition and signatures are ultimately sufficient or insufficient.

Relators, however, do not ask the Court to determine the validity of particular petitions or signatures. Rather, they seek under Art. II, § 1g, the exact same relief they seek under their mandamus claims – i.e., an order to Respondents to investigate alleged violations and take action to invalidate part-petitions.

Relators have either completely misconceived the nature of the new grant of exclusive, original jurisdiction in this Court to determine the validity or invalidity of petitions and signatures, or they are simply seeking a way to make up for the fact that they have failed to present the Court with sufficient proof to be able to invalidate petitions. Given their failure to offer sufficient evidence, they ask for the next best thing, i.e., order Respondents to come up with the evidence.

Not only is the relief sought not available in an Art. II, § 1g proceeding, Relators have also failed to allege facts that, if true, would be sufficient for the Court to determine that the

petition or signatures are insufficient to meet the minimum constitutional requirements. In other words, Relators have failed to set forth sufficient allegations to state a claim upon which relief may be granted. As indicated by the language of Art. II, § 1g, the ultimate determination of the Court in ruling on a challenge brought under the section is whether the petition and signatures are sufficient to be placed on the ballot; otherwise there is no point to the challenge.

Accordingly, Relators have failed to put a viable Art. II, § 1g claim before this Court.

IV. Relators Have Failed To Establish Standing

To establish standing in a mandamus elections case, Relators must establish that they are either (1) a resident elector and taxpayer or (2) *directly* benefited or injured by the judgment in the case. *State ex rel. Sinay v. Soddors* (1997), 80 Ohio St.3d 224, 226, 685 N.E.2d 754, 757. Relators have failed to satisfy their burden as to standing.

Obviously, Relator Scioto Downs is not an elector and does not purport to be. Apart from simply opposing the initiative petition, Scioto Downs has failed to allege or present sufficient evidence of any direct interest in the Initiative Petition. *See id.* (concluding Randolph Township had standing to bring mandamus election action against Clerk of Englewood, Ohio, relating to initiative petition asking Englewood voters to approve agreement creating joint fire and medical district between Randolph Township and Englewood). Unlike Randolph Township in *State ex rel. Sinay* – which faced the possibility of having a prior agreement nullified – Scioto Downs has not clearly demonstrated how it will be *directly* benefited or injured by the Court's decision in this case. Scioto Downs' interest in preventing future business competition is indirect and not the type of vested right necessary to confirm standing.

Accordingly, Relator Scioto Downs has failed to establish standing and the Complaint should be dismissed for this alternative reason.

V. Relators' Claims Are Barred By Laches

Even if the facts were to be accepted and construed exactly as couched by Relators, it is clear that laches should be applied to bar their claims. According to Relators, they expressed the very same concerns which now form the basis of the Complaint to the Secretary of State and boards of election on July 6, 2009 – with the Secretary of State responding with the apparently unacceptable Advisory 2009-06 on July 8, 2009. [Relators' Merit Br. at 7]. Rather than immediately seeking relief, Relators waited an additional nine days, until July 17, 2009, to file this action. By July 8, 2009, it was clear that the Secretary of State was not going to force the boards of election to undertake the investigations Relators sought. Thus, there was absolutely no reason for Relators to wait until July 17, 2009 to file the Complaint.

Laches exists where there is an “(1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party.” *State ex rel. Fishman v. Lucas County Board of Elections* (2007), 116 Ohio St.3d 19, 2007-Ohio-5583, 876 N.E.2d 517, ¶6; citing *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections* (1995), 74 Ohio St.3d 143,145, 656 N.E.2d 1277. Relators failed to act with requisite diligence in asserting their claims, inexplicably waiting for an additional nine days to file this action. See *State ex rel. Landis v. Morrow Cty. Bd. of Elections* (2000), 88 Ohio St.3d 187, 189, 724 N.E.2d 775 (“[w]e have held a delay as brief as nine days can preclude our consideration of the merits of an expedited election case.”)

Relators delay has resulted in prejudice to the Ohio Jobs Committee, the Secretary of State, and the boards of election. As Relators point out, the Secretary's Directive required the boards to issue their certifications no later than July 16, 2009. [Relators' Merit Br. at 7]. By the certification deadline, many boards had already transmitted the original part-petitions back to the Secretary as they were required to do on or before July 20, 2009. [Directive 2009-10]. As

Relators were also assuredly aware, the Secretary of State was constitutionally required to determine the sufficiency of the signatures – *i.e.*, to certify the issue – two business days later, on July 21, 2009. Ohio Const. Art. II, § 1g.

Due to the truncated timeline demanded by the Ohio Constitution, Relators' delay has essentially guaranteed that if the Court grants their request for relief, the Ohio Jobs Committee will be unable to avail themselves of any opportunity to challenge subsequent findings by the boards of election.² See *Blankenship v. Blackwell* (2004), 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382, ¶ 27. By waiting until now to challenge the advisory under which the signatures on the part-petitions were reviewed by the boards of election, Relators have effectively foreclosed the opportunity for any judicial review of the findings made by the boards. Relators could have brought this very action at any time since the issuance of the Advisory 2009-06 on July 8, 2009. Instead, Relators sat on their rights. Accordingly, laches should be applied to bar the relief Relator seek.

VI. Relators Must Satisfy An Extremely Demanding Burden To Obtain Relief On The Merits

It is not necessary for the Court to even consider Relators' underlying allegations on the merits. Yet even assuming the Court elects to do so, Relators still are not entitled to the extraordinary relief they seek. Through this Court's prior jurisprudence, it is well-established that a challenger must clearly establish entitlement to mandamus relief, that this Court must afford deference to the actions of the Secretary of State and the county boards of election, and that initiative and referendum requirements should be interpreted permissively. The standard to be applied in Art. II, § 1g challenges, however, is an issue of first impression. Intervenors submit the same deferential standard should apply.

² The deadline for filing a challenge with respect to petitions and signatures under Art. II, § 1g is three days after the filing of Intervenors' and Respondents' briefs, on July 31, 2009.

A. Mandamus Relief Must Be Established By Clear And Convincing Evidence.

Mandamus is an extraordinary remedy, “to be issued with great caution and discretion and only when the way is clear.” *State ex rel. Williams v. Brown* (1977), 52 Ohio St.2d 13, 15. “In order to be entitled to the requested writ of mandamus, relators must establish a clear legal right to the requested relief, a corresponding clear legal duty on the part of the respondents to provide it, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Commt. for Proposed Ordinance to Repeal Ordinance No. 146-02 v. Lakewood* (2003), 100 Ohio St.3d 252, 255 (citing *State ex rel. Moore v. Malone* (2002), 96 Ohio St.3d 417, ¶ 20). All three elements of the test must be satisfied. *Id.* Moreover, “[t]he facts submitted and the proof produced must be plain, clear, and convincing before a court is justified in using the strong arm of the law by way of granting the writ.” *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141; *State ex rel. Berquist v. Bd. of Trustees of the Ohio Police and Fire Pension Fund*, 174 Ohio App.3d 516, 2008-Ohio-278.

Since the relator must establish a clear legal right to the relief demanded, a peremptory writ will be denied if, upon all the evidence presented, such a right is not clearly established or if the right appears doubtful. *State ex rel. Law Office of Montgomery Cty. Pub. Def. v. Rosencrans* (2006), 111 Ohio St.3d 338, 341, 2006-Ohio-5793; *State ex rel. Goldsberry v. Weir* (1978), 60 Ohio App.2d 149, 153 395 N.E.2d 901 (refusing to find that relator carried his burden of proof and stating a “writ of mandamus must not be granted if the right thereto is not so established, or appears doubtful” (citing *State ex rel. Harris v. Rhodes* (1978), 54 Ohio St.2d 41, 374 N.E.2d 641); *State ex rel. Gilbert v. Cincinnati* (1st Dist. Hamilton 2007), 174 Ohio App.3d 89, 2007-Ohio 6332 (reaffirming that mandamus should not issue in “doubtful” cases); *State ex rel. Gerspacher v. Coffinberry* (1952), 157 Ohio St. 32, 104 N.E.2d 1 (stating that if there is doubt as to the relator’s right, the writ will be refused).

B. The Court Must Defer To The Prior Actions Of The Secretary Of State And The County Boards Of Election And Should Construe The Circulator Requirements In Favor Of Allowing Access To The Initiative Process.

Relators correctly cite the general rule that election laws require strict compliance. Relators, however, ignore the other well-established doctrines that the Court should defer to reasonable interpretations of Ohio election law by the Secretary of State and that the Court should not second-guess decisions of the boards of election absent evidence of fraud or irregularity. Finally, this Court has instructed that ambiguities in the Ohio election law be interpreted in such a way as to promote, rather than hinder, the initiative and referendum process.

1. Deference to the Secretary of State.

The Secretary of State has duties to “[i]ssue instructions by directives and advisories . . . to members of the boards as to the proper methods of conducting 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), (M). Each board of elections must perform “duties as prescribed by law or the rules, directives, or advisories of the secretary of state.” R.C. 3501.11(P).

Because the Secretary of State is the state’s chief election officer, when an election statute is subject to different but equally reasonable interpretations, the Secretary’s interpretation is entitled to more weight. *State ex rel. Chance v. Mahoning Cty. Bd. of Elections* (1996), 75 Ohio St.3d 42, 661 N.E.2d 697. And in determining whether Relators are entitled to mandamus relief, the Court must defer to the Secretary of State’s advisories and directives concerning the initiative process so long as they are reasonable interpretations of Ohio law. *See State ex rel. Skaggs v. Brunner* (2008), 120 Ohio St.3d 506, 516, 900 N.E.2d 982, 991 (noting that this Court would defer to secretary of state’s reasonable preelection instructions issued to boards of election (citing *State ex rel. Colvin v. Brunner* (2008), 120 Ohio St.3d 110, 896 N.E.2d 979, 2008-Ohio-5041)).

In this case, Directive 2009-10 specifically instructed the boards of election to verify all part-petitions, including the circulator information, for compliance with the law. The Secretary of State also reminded the boards of their “statutory authority to investigate irregularities, nonperformance of duties, or violations of the election laws relative to this petition.” R.C. 3501.11(J). [Directive 2009-10, Ex. A to Green Aff.]

Advisory 2009-06 again instructed the boards of election that they could not verify a part-petition if “satisfactory evidence” was presented to the board that statement of the circulator was “false in any respect.” [Advisory 2009-06, Ex. C to Green Aff.] The Secretary of State explained satisfactory evidence as follows:

An example of “satisfactory evidence” of a false address includes (but is not limited to) an affidavit of an individual with personal knowledge that the circulator did not live at the residence address listed on the part-petition. An unsworn document or written assertion that speculates that a circulator may have listed a false permanent address does not, standing alone, constitute “satisfactory evidence” of a false permanent address precluding verification by a board.

[*Id.*]. This interpretation is a reasonable one.

2. Deference to the boards of election.

In addition, the well established standard for reviewing decisions of the boards of election is whether the board engaged in fraud, corruption, abuse of discretion, or clear disregard of statutes or applicable legal provisions. *State ex rel. Chance v. Mahoning Cty. Bd. of Elections* (1996), 75 Ohio St.3d 42, 661 N.E.2d 697 (citing *State ex rel. Rife v. Franklin Cty. Bd. of Elections* (1994), 70 Ohio S.t3d 632, 633-34, 640 N.E.2d 522); *State ex rel. Hanna v. Milburn* (1959), 170 Ohio St. 9, 11, 161 N.E.2d 891 (denying a writ of prohibition to prevent board of elections from placing an issue on the ballot). When reviewing the sufficiency of an election petition, it is not proper for a court to put itself in the shoes of the boards of election. *State ex*

rel. Senn v. Board of Elections of Cuyahoga Cty. (1977), 51 Ohio St.2d 173, 175, 367 N.E.2d 879 (reversing court of appeals decision granting mandamus)

Pursuant to the Secretary of State's directives outlined above, the county boards of election completed their review of the validity and sufficiency of the applicable part-petitions and the signatures thereon, and advised the Secretary of State of the results, on or about July 16, 2009. The part-petitions contained a total of 902,450 signatures. Of these, 436,409 signatures were found to be invalid by the boards of election. The county boards also invalidated 685 part petitions. Ultimately, though, the boards of election collectively certified a total of 452,956 valid signatures – 52,956 more than the required amount – with the Initiative Petition receiving the requisite 5% threshold in 73 of the 88 counties – 29 more than required. [“Final County By County Tally of Part-Petitions and Signatures,” Ex. G to Green Aff.].

3. The initiative and referendum process.

The Ohio Jobs Committee seeks to exercise the right of initiative, a right basic to all Ohioans. Recognizing their supremacy, this Court has held that the rights of initiative and referendum “comprehend all of the sovereign power of legislation not thus delegated [and are] . . . not to be restricted by any limitations, except such as are imbedded in the federal constitution.” *Pfeifer v. Graves* (1913), 88 Ohio St. 472, 286, 104 N.E.2d 529 (emphasis added). And since the initial incorporation of initiative and referendum power into the Ohio Constitution in 1912, this Court has been careful about placing overly formalistic requirements on their excise:

it is the solemn duty of all courts to keep hands off and to avoid giving to the provisions of the Constitution on that subject a strained construction, which, by reason of its very burdensomeness and unreasonableness, would tend to depopularize it. Such character of construction is as unwarranted as judicial construction tending to weaken or emasculate the theory.

Shryock v. City of Zanesville (1915), 92 Ohio St. 375, 386, 110 N.E. 937, 940.

Indeed, the Court has instructed time and again that Ohio election law should be construed in favor of letting Ohio electors, not the courts, decide initiative issues. *Hodges v. Taft* (1992), 64 Ohio St.3d 1, 591 N.E.2d 1186 (stating the “powers of initiative and referendum should be liberally construed to effectuate the rights reserved.”); *State ex rel. Miles v. McSweeney* (2002), 96 Ohio St.3d 352, 2002-Ohio-4455, 775 N.E.2d 468; *State ex rel. Ditmars v. McSweeney* (2002), 94 Ohio St.3d 472, 476; *Stutzman v. Madison Cty. Bd. of Elections* (2001) 93 Ohio St.3d 511, 515; *State ex rel. Oster v. Lorain Cty. Bd. of Elections* (2001), 93 Ohio St.3d 480, 486-487; *State ex rel. Rose v. Lorain Cty. Bd. of Elections* (2000), 90 Ohio St.3d 229, 230-231; see also *State ex rel. Lewis v. Hamilton Cty. Bd. of Elections* (1995), 74 Ohio St.3d 1201, 1202, 655 N.E.2d 177 (Moyer, C.J., concurring) (“Active participation in the election process is the foundation of democracy . . . voting is a basic right without which all other rights become meaningless. It follows that where the Ohio Constitution or statutes establishing the requirement for placing issues on election ballots create doubt, such doubt should be resolved in favor of providing the citizens with access to the ballot.”); *State ex rel. Blackwell v. Bachrach* (1957), 166 Ohio St. 301, 304, 143 N.E.2d 127 (rejecting strict compliance standard which would have invalidated entire petition).

As noted above, the Secretary of State exercised her discretion in instructing the county boards of election regarding the satisfactory evidence requirement. In turn, each board of elections exercised its discretion in determining whether to utilize extremely limited county resources to investigate allegations of circulator impropriety, and the boards all reviewed the part-petitions in accordance with the Secretary of State’s instructions. Accordingly, Relators should be granted relief only upon providing clear and convincing evidence that the Secretary of

State and the boards of election abused their discretion and/or patently misapplied absolutely clear statutory law.

C. The Same Evidentiary Standard Should Apply To Art. II, § 1g Actions

This case is the first opportunity for the Court to address the standard for actions under Ohio Const. Art. II, § 1g. As set forth above in Section III.B., *infra*, Relators have not asserted a viable cause of action under Art. II, § 1g. Thus, it is not necessary to delve into the requirements for prosecuting a successful Art. II, § 1g action. Should the Court nonetheless desire to establish a standard, Intervenors respectfully submit that the evidentiary standard in Art. II, § 1g actions should be the same as in mandamus election actions, in that challenges to petitions and signatures upon such petitions should be established by clear and convincing evidence. Any other outcome would likely open the floodgates to desperate challengers seeking to thwart the democratic process and override the discretion of Ohio's myriad election officials.

VII. Relators Cannot Establish Any Entitlement To Relief On The Merits

A. The Evidence Put Forward By Relators Is Insufficient Under The Supreme Court Rules of Practice

Relators primarily premise their entitlement to relief on the requirement in R.C. 3519.06 that an initiative part-petition cannot be properly verified if it "appears on the face thereof, or is made to appear by satisfactory evidence . . . (D) That the statement is false in any respect." Thus, Relators must prove by clear and convincing evidence that certain part-petitions at issue in this case were false in some respect, but that they were still certified by the county boards of election. Relators have failed to put forth sufficient evidence in this respect.

As an initial matter, Relators cannot credibly object to the so-called presumption of validity set forth by the Secretary of State in Advisory 2009-06. Practically speaking, the residence listed by a part-petition circulator is either presumptively valid or presumptively

invalid. If Relators' position were to be adopted, each and every signer and circulator would be required not only to sign a part-petition, but to later provide additional documentation or testimony verifying their act. Further, an initial presumption of validity is not the final say; the part-petitions were independently reviewed by the boards of election, a review that itself is subject to review by this Court.³ Finally, the Secretary of State repeatedly reminded the boards of election of their statutory authority to investigate any irregularities. In sum, the Secretary of State's instructions were reasonable and not in disregard of any clear statutory dictates.

Relators evidence consists primarily of affidavits that are not based on personal knowledge and lists compiled from primary documents which have not been submitted to the Court. These patently do not comply with S. Ct. Prac. R. X, § 7, which requires that affidavits submitted to Court as evidence in original actions shall be based on personal knowledge, setting forth facts admissible in evidence, and showing affirmatively that the affiant is competent to testify to all matters stated in the affidavit. The Court's rule further requires that sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached.

In addition, the evidence actually put forward by Relators is *not* based on personal knowledge and is not properly admissible. Affidavits supporting an original action other than habeas corpus filed in this Court must specify the details of the claim, set forth facts ***admissible in evidence***, and be made on personal knowledge. S. Ct. Prac. R. X § 7; *see also*, S. Ct. Prac. R. X § 4(B); *State ex rel. Committee for the Charter Amendment for an Elected Law Director v. Bay Village* (2007), 115 Ohio St. 3d 400, 2007-Ohio-5380, 875 N.E.2d 574, ¶ 7. Failure to satisfy the evidentiary requirement in S. Ct. Prac. R. X is fatal to a relator's complaint. *See, e.g., State ex rel. Escaro v. Youngstown City Council* (2007), 116 Ohio St.3d 131, 2007-Ohio-5679,

³ In fact, the boards of election rejected nearly 50% of all the part-petitions, which is indisputable evidence that part-petitions were not taken at face value.

876 N.E.2d 953, ¶ 14; *State ex rel. Evans v. Blackwell* (2006), 111 Ohio St.3d 437, 2006-Ohio-5439, 857 N.E.2d 88, ¶ 31.

Although Relators make several different allegations, the primary challenge in terms of potential signatures and part-petitions affected relates to various circulator residency issues. Relators attempt to prove these allegations through summary compilations. In turn, Relators attempt to introduce this evidence through the affidavit of one of their counsel. [See Slagle Aff.]. Even a cursory review reveals that many of the exhibits to Slagle's affidavit are not based on his personal knowledge and are inadmissible under S.Ct.Prac.R.X(4)(B).

The Slagle affidavit only establishes that he is competent to testify on personal knowledge regarding three matters: (1) that he is an associate with the law firm of Bricker & Eckler LLP; (2) that he was assigned to this case; and (3) that he reviewed various part-petitions on behalf of Relators. [See Slagle Aff. ¶ 6 (“[v]arious attorneys and staff employed by Bricker & Eckler, including myself, have reviewed the copies of these part-petitions”); ¶ 7 (“[e]xhibits A and B attached to relators’ complaint in this action are true and accurate compilations of the information gathered by my office’s staff ...”); ¶ 8 (“I have been actively involved in reviewing part-petitions related to the casino Amendment and have been actively involved in gathering the data to prepare Exhibits A and B to the Relator’s Complaint.”) ¶ 10 (“attached ... is a true and accurate compilation of information gathered by my office’s staff based upon a limited review of part-petitions ...”)].

Slagle fails to aver that he has personal knowledge (and the basis of that knowledge) either that the residential addresses listed by specific part-petition circulators do not exist or that the circulators did not reside at these addresses. Slagle also fails to aver that boards of election failed to reject specific part-petitions.

The additional affidavits submitted by Relators fare no better. Relators submit an affidavit of Stan Erter, an investigator in the Clark County Prosecutor's office. [Relators' Exhibit Q]. The affidavit summarizes information that Mr. Ertz obtained from interviewing certain persons. This is not personal knowledge. It also refers to paperwork that was submitted to him, but the papers are not attached to the affidavit. Relators also submitted affidavits of Jennifer Early and Brenda Poteet, employees of Brickler and Eckler, and the affidavit of James Barney, that suffer from the same hearsay deficiencies.

Thus, Relators have failed to put forth credible, admissible evidence to clearly and convincingly establish that the circulators' statements were "false in any respect." R.C. 3519.06(D). This is fatal to the Complaint.

B. The Residence Requirement Is Either Unenforceable Or Was Complied With

Much confusion has surrounded the statutory requirement that a part-petition circulator disclose his so-called permanent address *in Ohio*. While several courts have struck down the Ohio residency requirement, neither the relevant statutory language nor the required part-petition forms have been revised. In this context, out of state circulators faced an irreconcilable dilemma: either list an out of residence – which would be facially invalid under the statute – or list his or her address while actively working and residing in Ohio. Accordingly, the residence requirement is either unenforceable or must be interpreted in a manner which, when applied, was complied with by the Ohio Jobs Committee circulators.

1. The permanent residency requirement set forth in R.C. 3519.05 is unenforceable

The form of the circulator statement to be used in part-petitions for proposed constitutional amendments is dictated by statute. *See* R.C. 3519.05. Both the statute and the form prescribed by the Secretary of State require that the circulator disclose his "permanent

residence in this state.” *Id.* (emphasis). In their briefing, Relators ignore the underlined portion of R.C. 3519.05. This is critical.

The companion to R.C. 3519.05 is R.C. 3503.06(B)(1) (“No person shall be entitled to circulate any initiative or referendum petition unless the person is a resident of this state.”). The residency requirements in both R.C. 3519.05 and R.C. 3503.06(B)(1) resulted from a comprehensive series of election law reforms contained in Amended Substitute House Bill 3 (“H.B. 3”) promulgated by the 126th General Assembly in 2006. *See* Final Analysis, Am. Sub. H.B. 3, Legislative Services Comm’n, at 32.

Following those amendments, however, the Southern District of Ohio issued an injunction prohibiting the enforcement of the registration and residency requirements for candidate petition circulators in R.C. 3503.06(A). *Moore v. Brunner* (S.D. Ohio Jun. 2, 2008), No. 2:08-cv-224, 2008 WL 2323530, at *5. Similarly, the Sixth Circuit has ruled that the registration and residency requirements for circulators of candidate petitions in R.C. 3503.06(A) are unconstitutional. *Nader v. Blackwell* (6th Cir. 2008), 545 F.3d 459.

Based largely on the *Nader* decision, the Secretary of State ultimately concluded that the *residency* requirement in R.C. 3519.05 was unenforceable and that circulators could comply with the statute by listing a permanent residence outside of Ohio:

In Advisory 2009-04, the Secretary of State applied the *Nader* decision to R.C. 3503.06(B) and concluded that the requirement that circulators of initiative and referendum petitions be Ohio residents is also unconstitutional. Thus, in Directive 2009-10 and in the instructions provided with the directive, Ohio boards of election were instructed not to invalidate any part-petition because a circulator listed a permanent residence address outside the state of Ohio.

The form for a constitutional amendment initiative petition is provided in R.C. 3519.05. That form instructs circulators to provide their “permanent residence in this state.” However, given the *Nader* decision, Advisory 2009-04, and the instructions given with Directive 2009-10, **circulators may list on a part-petition a permanent residence outside of the state of Ohio.**

[Advisory 2009-06, Ex. C to Green Aff. (emphasis in original)].

While the Secretary of State correctly determined that the residency requirement in R.C. 3503.06(B)(1) and R.C. 3519.05 is constitutionally suspect, her proposed solution is inconsistent with her authority. The “in this state language” of R.C. 3519.05 and the “a resident of this state” language of RC 3503.06 cannot simply be severed and the remainder of the statutory language enforced as a generic residence address requirement. When the language of the statute is clear, the Secretary has no authority to rewrite statutory requirements that cannot be enforced due to their unconstitutionality.

Finally, the Secretary of State did not issue Advisory 2009-04 until May 18, 2009 and did not issue Advisory 2009-06 until July 8, 2009. The vast number of the part petitions were completed by then, and during this time, the Ohio Jobs Committee was still faced with the apparent requirement of circulators needing to disclose a permanent residence in Ohio. Accordingly, even if a general residency requirement is deemed valid, it should be held unconstitutional as applied to the Initiative Petition under the unique facts of this case.

2. To the extent R.C. 3519.06 is applied to this case, Relators have failed to satisfy their burden.

Pursuant to the law as it existed at the time, all of the circulators for the Initiative Petition listed a permanent residence in this state. The question then becomes: What constitutes a residence for a circulator? Residence and domicile are not the same. Residence may be read broadly as meaning bodily presence as an inhabitant in a place, and a person may also have more than one residence. *See* 2005 Ohio Atty. Gen. Op. No. 2005-001, 2005 WL 263796. Within the context of R.C. 3519.05, it is entirely reasonable for a circulator to have listed, depending upon the exact dates, more than one permanent residence in Ohio. There is no rule that someone cannot change what they consider to be their permanent residence. Similarly, an out of state

resident could have a permanent Ohio address for the period of time in which that person was living and working in Ohio. Having a residence outside Ohio does not necessarily preclude someone from having a “permanent residence address in this state.” R.C. 3519.05.

Relators have failed to present sufficient evidence to demonstrate that the permanent addresses listed by the identified circulators were, in fact, false. As an initial matter, Relators have provided the Court copies of only five of the hundreds of part-petitions challenged. [Relators’ Exhibit T]. Rather, they have submitted lists that purport to contain the information from the part-petitions. Not only are such lists objectionable as hearsay, but as shown below, they are inaccurate. The Court and Respondents should have the benefit of the actual documents challenged by Relators. Even worse is that Relators want the Court to go beyond the limited evidence they have submitted and use it as a basis for ordering Respondents to conduct an investigation of every circulator of the Initiative Petition. The Court should decline Relators attempt to shift the burden of proof to the county boards of election. The burden squarely rests with Relators, who brought the instant action.

Relators include in their evidence a number of exhibits which they describe as lists of part-petitions that present suspect residence addresses for the circulators. The lists identify circulators by name and the part-petitions by the Secretary of State’s bates stamp number. Relators maintain that these lists were prepared from a review of the part-petitions and rely exclusively on these lists to demonstrate the alleged scope of the suspect residence address claim. [Relators Merit Br. at 13-20]. However, Relators did not provide the Court copies of the part-petitions on the lists. If they had, the Court would quickly discover that the lists contain a large number of errors. A partial review by Intervenors of only 330 of the part-petitions cited by Relators revealed that Relators’ compilations incorrectly identified the circulator in 44 of the 330

part-petitions. [Colombo Aff. at ¶ 4-5, included as Tab 5 to Evidence To Intervenors' Merit Br.]. Intervenors submit for the Court's review true copies of the first and last pages of these part-petition and a chart listing the part-petitions showing the name that Relators claim as being the circulator and the name of the actual circulator as it appears on the part-petition. [Colomobo Aff., Exs. A and B].

Relators' residence claim is based entirely on weak circumstantial evidence from which they want the Court to automatically jump to the conclusion that an address is a false residential address. The rights of petition signers and circulators, however, demand a higher level of proof. Initially, it should be noted that Relators do not argue that the circulators never physically resided at the addresses listed on the part-petitions. Rather, they claim that the addresses are not the circulators' permanent residence addresses in this state. Yet Relators provide no evidence for any of the circulators of a different permanent address in this state.

Even though the only addresses in the record are the ones on the part-petition, Relators want the Court to make broad rulings that certain addresses may never be permanent residence addresses in this state. For example, Relators argue that hotel addresses can never be a circulators' permanent residence addresses in this state. But for some people, hotels are their permanent residences. Relators also claim that an apartment rented by a circulator's employer can never be the circulator's permanent residence in this state. Certainly employers providing employees with housing is certainly not an unheard of concept. Relators claim that because some circulators had the same address, these can not be their permanent residence addresses. Again, this proves nothing as people often do share residences. Finally, Relators claim that a few circulators listed more than one address and that, therefore, they gave false permanent

residence addresses in this state. The more likely explanation is that these individuals had different permanent addresses in this state at different times.

Ultimately, what is completely missing from Relators' evidence on residency is anything that addresses the actual criteria for circulator residency set forth in R. C. 3503.06, such as whether the address was a place of fixed habitation to which the person intended to return when absent. By contrast, a number of circulators have executed affidavits affirmatively indicating that the address listed on their circulator statements was their residence for the time they resided at the address and that it was the circulators' one and only place of fixed habitation in Ohio, the place where the circulator conducted his or her personal dealings, and the place that when away from, the circulator intended to return. [See Affidavits of V. Byrd, S. Hartfield, M. Harris, H. Hennessey, R. King, and R. Musito, Exs. A-F to Tab 2 of Evidence To Intervenors' Merit Br.].

In sum, Relators have failed to satisfy their burden on the residency challenges.

C. Relators Cannot Prove That The Signature Of Jamar Owens Was Falsified.

Relators argue the part-petitions circulated by Jamar Owens should be invalidated because the circulator statements allegedly were not signed by the same individual. [Relators' Merit Br. at 21]. Relators, however, fail to introduce any credible evidence showing that Jamar Owens did not sign all the part-petitions at issue. Instead, Relators rely solely on the fact that the signatures do not appear to be the same.

Jamar Owens has reviewed all of the signatures on the circulator statements attached to both the Complaint and Relators' evidence. [Owens Aff. at ¶ 2, included as Tab 3 to Evidence To Intervenors' Merit Br.]. His sworn testimony is that he did, in fact, personally sign all of the part-petitions referenced therein. [*Id.* at ¶ 3]. Accordingly, Relators have failed to demonstrate any impropriety relating to these part-petitions.

D. Relators Cannot Establish That Any Part-Petition Circulated By A Convicted Felon Were Certified.

Relators argue that the Secretary of State failed to take appropriate action when informed that a part-petition circulator for Butler County, Melissa Smith, was a convicted felon and that Directive 2009-10 improperly failed to require county boards of election to determine whether convicted felons are circulating petitions. [Relators' Merit Br. at 23]. Relators are mistaken.

As an initial matter, Directive 2009-10 was proper. Relators' position seems to be that either the secretary of state or the boards of election are *required* to conduct criminal background checks on all part-petition circulators. Such an onerous burden certainly is not required by any Ohio statute. Thus, Directive 2009-10 was certainly proper in this regard.

Second, Relators are just plain wrong that no action was taken in regard to Melissa Smith, or that her situation reveals a wide-spread problem with part-petitions. Ms. Smith circulated only one part-petition on behalf of the Ohio Jobs Committee and ultimately collected only nineteen signatures. [Stanley Aff. at ¶ 4, included as Tab 4 to Evidence To Intervenors' Merit Br.]. In addition, the part-petition circulated by Ms. Smith was actually *rejected* by the Butler County Board of Elections. [*Id.* at ¶ 5 and Ex. A thereto]. If anything, therefore, the situation involving Ms. Smith indicates the verification process as currently configured works as intended.

E. Relators Have Failed To Satisfy Their Ultimate Burden Of Showing The Initiative Petition Should Not Be Certified.

The final fatal flaw with Relators' position is that they fail to establish that their requested relief would result in any legally significant outcome. As noted above, the boards of election collectively certified a total of 452,956 valid signatures – 52,956 more than the required amount – with the Initiative Petition receiving the requisite 5% threshold in 73 of the 88 counties – 29 more than required. [“Final County By County Tally of Part-Petitions and Signatures,”

Ex. G to Green Aff.] Relators do not allege, let alone prove by clear and convincing evidence, how many part-petitions are affected by any alleged irregularities or, more importantly, how many previously determined valid signatures of electors are on such part-petitions. The fact is that Relators do not know if there are sufficient valid signatures on such part-petitions to certify the Initiative Petition.

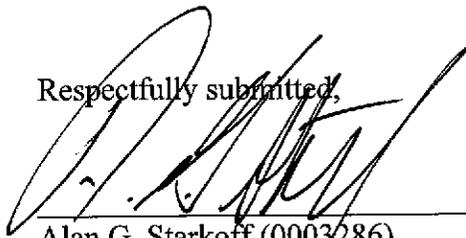
In fact the opposite is true. A partial review by Intervenors of the part-petitions cited by Relators revealed that the county boards of election have already rejected nineteen (19) of the part-petitions Relators seek to invalidate. [Colombo Aff. at ¶¶ 7-8]. Intervenors submit for the Court's review true copies of these part-petitions and a chart listing the part-petitions already invalidated by the boards of election. [Colomobo Aff., Exs. C and D].

For Relators to ultimately be successful, they must be able to establish, by clear and convincing evidence, sufficient facts to change the results of the certification by the Secretary of State. They clearly have not and are not able to do so.

CONCLUSION

The Ohio Jobs Committee complied with Ohio election law. Relators have failed to satisfy their substantial burden and are not legally entitled to the extraordinary relief they request. For the reasons set forth above, the Complaint should be dismissed and the Court should deny any further relief.

Respectfully submitted,



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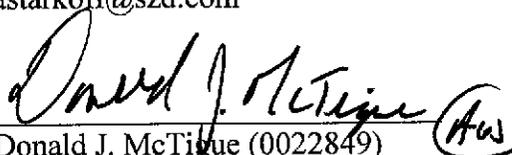
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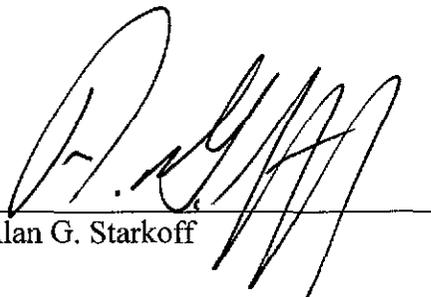
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served, via electronic mail and/or facsimile, this 28th day of July, 2009, upon:

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