

Alan G. Starkoff (0003286)
Attorney of Record
Matthew L. Fornshell (0062101)
Matthew T. Green (0075408)
Schottenstein, Zox & Dunn, Co., L.P.A.
250 West Street
Columbus, Ohio 43215
614-462-2700
614-462-5135 (fax)
astarkoff@szd.com

Donald J. McTigue (0022849)
Mark A. McGinnis (0076275)
J. Corey Colombo (0072395)
McTigue & McGinnis LLC
550 East Walnut Street
Columbus, Ohio 43215
614-263-7000
614-263-7078 (fax)
mctiguelaw@rrohio.com

*Attorneys for Intervenors
Ohio for Jobs & Growth Committee,
William J. Curlis, John T. Campbell,
Matthew Hammond, and Charles J. Luken*

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INTRODUCTION

This is a case of first impression, since the amendment by the people of Ohio in November, 2008 of Article II, Sections 1a through 1g of the Ohio Constitution. As amended, the Ohio Constitution imposes ambitious deadlines on nearly every individual and entity involved in an initiative proposing amendments to the Ohio Constitution, including this Honorable Court.

Article II, Section 1g of the Ohio Constitution now requires proponents of an initiative to file their initiative petitions with the Secretary of State (containing a requisite number of signatures) 125 days before a general election. Article II, Section 1g, Ohio Constitution. The Secretary must then distribute those part-petitions (approximately 49,000 in the case at bar) to the 88 county boards of elections for verification and comparison of each signature on the part-petitions (approximately 850,000 in the case at bar) against copies of signatures kept on file by the board. After the number of valid signatures is determined by the boards, those part-petitions are then returned to the Secretary, who must determine no later than 105 days before the election (generally within 20-days of the filing of the part-petitions) whether the initiative shall be placed on the ballot. *Id.* This year the deadline for the Secretary's determination of sufficiency of signatures occurred on July 21.

Opponents of an initiative may then challenge "a petition or signature on a petition" not later than 95 days before the election – in this case, by July 31, 2009. *Id.* Challenges, however, must be filed in the Supreme Court of Ohio, which now has original, exclusive jurisdiction over all challenges. The Court must "hear and rule on any challenges made to petitions and signatures not later, than [85] days before the election," i.e., by August 10, 2009. *Id.*

On June 25, 2009, the Ohio Jobs & Growth Committee filed with the Secretary an initiative to authorize casino gambling in four identified locations in the state. The Secretary of State has in good faith attempted to satisfy all of the duties imposed upon her by the Ohio Constitution and Ohio statutes (including R.C. 149.43, the Ohio Public Records Act) in connection with the initiative. The Secretary has affirmatively endeavored to administer the initiative process in a manner that fairly serves both proponents and opponents of this initiative. The Secretary is sympathetic to the difficulty Relators face trying to review the petitions for indications of fraud in the time frame established by the Constitution. However, the Secretary must not be required to jeopardize her own ability to comply with duties imposed upon her by amended Article II, Section 1g, and upon the county boards of elections by Chapter 3519 of the Revised Code, in order to further the goals of opponents to a proposed initiative, here race track owners who oppose the establishment of casino gambling in the state based, no doubt, on the business competition those casinos would represent. The Relators complain of the difficulties they faced in procuring evidence to support their contention that certain part-petitions should be invalidated. However, those difficulties are created by the time frames established in the Ohio Constitution itself, and not by the actions of the Secretary.

Relators' Complaint invokes this Court's jurisdiction on two grounds. First, Relators seek a writ of mandamus against the Secretary of State. This request must fail, as the Secretary has no authority, let alone a clear legal duty, to perform the acts Relators request of her. Relators' second cause of action is apparently a challenge to the certification of the casino ballot issue by the Secretary of State (although the complaint was filed before the certification occurred). This is the first petition challenge since the voters amended the Ohio Constitution to

give this Court exclusive original jurisdiction over such a challenge. The Secretary of State has no position on the merits of this challenge.

SUMMARY OF THE ARGUMENT

Once a group submits signed petitions to the Secretary of State's office, the "initiative process" for determining whether the proponents have successfully secured a spot on the ballot for their proposed amendment involves three steps: (1) verification by the county boards of election that the part-petitions and the signatures thereon are valid; (2) determination by the Secretary of State that the signatures deemed valid by the county boards are numerically sufficient to meet the threshold set by law for placing an initiative on a state-wide ballot; and (3) post-certification challenges, which, pursuant to constitutional amendment effective November 4, 2008, can only be decided by the Ohio Supreme Court. To understand the claims in this case – and the errors in Relators' legal arguments – it is necessary to remain clear about how the three steps operate, how they differ, and most importantly, who has authority over which aspects.

As explained in more detail below, certification of a proposed ballot initiative is a joint enterprise between the Secretary of State and the 88 County Boards of Elections, and the division of labor is dictated by the Ohio Revised Code: the county boards assess the substantive *validity* of the petitions, and the Secretary of State assesses the numerical *sufficiency* of the petitions. *The Secretary of State has no legal authority to alter, dispute, or second-guess a county board's decision regarding the validity (or lack) of a part-petition.*

After the certification process is complete, it is possible to challenge the petitions. Article II, Section 1g (effective November 4, 2008) vests *exclusive* original jurisdiction over all petition challenges in the Ohio Supreme Court.

The Relators in this case, Scioto Downs, Inc. and Stacy Cahill, repeatedly blur the lines between the role of the Secretary and the boards in certifying the petitions, as well as the difference between certifications and challenges, and the confusion carries over into the relief Relators seek. Thus, they complain that the Secretary failed to investigate and invalidate part-petitions (based on allegations of circulator fraud that are far less substantial than Relators suggest, as discussed in Section III(B), below). Relators seek a writ of mandamus compelling the Secretary to investigate the part-petitions and invalidate any on which the investigation reveals false information. But relief in mandamus is not available because (1) the Secretary has no authority to invalidate part-petitions, and hence no “clear legal duty” to do so;¹ (2) Relators have a remedy at law: the petition challenge they brought as part of this action; and (3) Relators have no right to the remedy they seek, especially since (among other things) granting it would compel the Secretary and the boards to violate the Constitution and exceed their authority.

Much of Relators’ Merit Brief is devoted to laying out evidence they believe shows circulator fraud, which is completely appropriate if Relators are mounting a certification challenge under Article II, Section 1g. Under this new Constitutional provision, the Supreme Court acts as the finder of fact for petition challenges. In other words, the Court can reject part-petitions (and Relators have the burden of proof to establish invalidity), but the Court cannot simply order the Secretary and the boards to conduct a do-over of the certification process, because that would be contrary to the letter and spirit of Section 1g (not to mention impossible to carry out, given the constitutional deadlines involved).

¹ The Secretary *does* have authority to conduct an investigation for possible criminal prosecution, R.C. 3501.05(N)(1), but the decision whether or not to conduct an investigation of criminal wrong-doing is a quintessentially discretionary decision, and thus by definition not amenable to mandamus. Moreover, such an inquiry is already under way, so the issue is moot. [See Advisory 2009-08, Exhibit R].

None of this should be construed to mean the Secretary is unconcerned by allegations of circulator fraud. To the contrary, she has issued Advisories to remind the boards of their ability to investigate such allegations, as well as the tools they have at hand for doing so. [Advisory 2009-06, Exhibit E]. Rather, the Secretary is mindful of the roles assigned to her office, the county boards, and the Supreme Court by the Ohio Constitution and Revised Code, and her position in this case is consistent with, and indeed dictated by, Ohio law.

STATEMENT OF FACTS: THE LEGAL FRAMEWORK
GOVERNING THE INITIATIVE PROCESS

A committee seeking to place an initiative on the ballot must circulate petitions to collect signatures, and then submit the petitions to the Secretary of State. Article II, Section 1a. Upon receipt of the petitions, the Secretary performs basic ministerial acts: the staff sorts the part-petitions by county, BATE stamps a number on each part-petition; creates a list of the range of BATES numbers for future reference; counts the number of signatures on each part-petition and then tallies the total number of signatures. [Exhibit 1, Affidavit of Patricia Wolfe, ¶¶ 9, 11-12]. The staff then prepares a cover sheet for each of the 88 county boards listing the total number of part-petitions being sent to each county and the total number of valid signatures purportedly contained thereon. [*Id.*, ¶ 13]. The part-petitions are then sent to the appropriate county boards of elections for verification, as required by R.C. 3519.16, along with a directive that informs the boards of the procedures for verifying the part-petitions and signatures thereon, as well as the deadline by which they must complete their examination and verification of the part-petitions and report the results to the Secretary of State. [*Id.*, ¶ 14]. (If a part-petition contains signatures of electors from more than one county, the staff determines the county from which the majority

of signatures came; only signatures from that county may be counted, according to R.C. 3519.10).

Once the county boards receive the part-petitions, R.C. 3519.15 requires the boards to review the validity of both the part-petitions themselves and the signatures on the petitions. The first requirement of R.C. 3519.15 is that the county boards (not the Secretary) must ascertain whether each part-petition is “properly verified.” “Verification” is a legal term of art which is defined (in the negative) by R.C. 3519.06: a part-petition cannot be “properly verified” if it “appears on the face” of the part-petition or is “made to appear by satisfactory evidence” that:

- (A) The statement required by R.C. 3519.05 is not properly filled out;
- (B) The statement is not properly signed;
- (C) The statement is altered by erasure, interlineation, or otherwise;
- (D) The statement is false in any respect; or
- (E) Any one person has affixed more than one signature thereto.

The “statement required by R.C. 3519.05,” mentioned in Part (A), refers to the requirement that part-petitions comply with a designated form. Among other things, R.C. 3519.05 requires all part-petitions to contain the signature of the circulator, the permanent address of the circulator, and a signed disclosure that the circulator understands election falsification is a fifth degree felony. By its plain language, it is the duty of the county boards to review the part-petitions to ensure they are completely filled out (Part A). If a board determines that any information on the form is false, such as the circulator’s address, it must not verify that part-petition. (Part D). If a part-petition cannot meet the verification requirement, none of the signatures thereon may be counted.

The conclusion that this duty of verification rests solely with the county boards is underscored by R.C. 3501.11(K), wherein these duties are again spelled out.

Once the boards have separated out the invalid part-petitions, they must then review the signatures on the part-petitions deemed valid, to (1) determine whether the persons who signed the part-petitions are eligible to vote in the county and are in fact registered to vote in the county; and (2) check to see whether there is any repetition or duplication of the signatures. R.C. 3519.15. Upon completion of these tasks, the county boards must then prepare a report back to the Secretary (1) indicating whether or not each part-petition is properly verified, removing from the signature count all signatures on invalid part-petitions; (2) totaling the number of signatures invalidated as illegal or lacking necessary details; and then (3) indicating whether the number of remaining (valid) signatures is sufficient to meet the mandatory minimum for placing the initiative on the ballot (discussed separately below). R.C. 3519.15.

Prior to November, 2008, the Revised Code set out a process for protesting at the county level a board's findings and establishing the sufficiency or insufficiency of the signatures. R.C. 3519.16. However, that section was superseded by the new Amendment to Article II, Section 1g. Under the new law, whereas the boards decide the "validity" of the signatures, the role of the Secretary is limited to "determin[ing] the sufficiency of the signatures." "Sufficiency," by definition, is a question of numbers: to qualify for the ballot, the petition must meet two requirements: the petition as a whole must contain valid signatures totaling 10% of the registered voters; and at least 44 counties must show valid signatures totaling 5% of the registered electorate in each county. Art. II, Section 1a and 1g.

If the Secretary finds the numbers sufficient, based on the validity determinations made by the county boards, then the matter receives certification for inclusion on the ballot. And that

is precisely what occurred in this instance. Once the certification process is complete, the recourse for anyone dissatisfied with the results is a challenge filed in the Ohio Supreme Court.

Due to a constitutional amendment, this case turns, in part, on an issue of first impression for this Court. Before November 4, 2008, challenges against a board of elections' findings were filed with the court of common pleas in each specific county where the boards' findings were contested. R.C. 3519.16. The adoption of the aforementioned constitutional amendment superseded R.C. 3519.16. The Ohio Supreme Court now has "original, exclusive jurisdiction over all challenges made to petitions and signatures upon such petitions under this section."

The new Constitutional provision also placed into effect an extremely tight schedule governing the submission, verification, and challenging of part-petitions. Part-petitions must be filed with the Secretary of State 125 days before the election (July 11, 2009), and the Secretary must determine their sufficiency by 105 days before election (July 21, 2009). The Constitution does not set a specific date for the county boards to complete verification, but it must occur some time during the 20 days between submission and verification.

Any challenge to a petition or a signature on a petition must be filed no later than 95 days before the election (July 31, 2009). "The court shall hear and rule on any challenges made to petitions and signatures not later than eighty-five days before the election (August 10, 2009)." Article II, Section 1g. If the Court does not make a ruling by August 10, 2009, the signatures will be deemed sufficient in accordance with the Secretary of State's determination. Article II, Section 1g.

The difficulty posed by Relators' Petition is that it seeks to assert two separate causes of action, yet treats them interchangeably. The Court's mandamus jurisdiction is very different from its original jurisdiction over petition challenges. To the extent Scioto Downs and Ms.

Cahill wish to assert a petition challenge under Article II, Section 1g, all the Secretary can say is that they have done so in a timely fashion, and that they bear the burden of proof when the Supreme Court considers the matter on its merits. But that challenge should be kept separate from their mandamus action, which must fail as a matter of law.

LEGAL ARGUMENT

I. Relator Failed to Establish the Elements Necessary for a Writ of Mandamus to Issue.

“Mandamus is a writ issued, in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.” *State ex rel. Smith v. Indus. Comm’n* (1942), 139 Ohio St. 303, 306. In order to obtain a writ of mandamus in this case, Relators must show (1) that they have a clear legal right to the requested relief, (2) that the respondents are under a clear legal duty to perform the requested act, and (3) that Relators do not have an adequate remedy at law. *State ex rel. Nat’l City Bank v. Bd. of Ed.* (1977), 52 Ohio St. 2d. 81, 83. Relators cannot meet any of the requirements for relief in mandamus.

First, the Secretary has no legal duty to conduct an investigation of alleged wrongdoing (absent an abuse of discretion), nor do Scioto Downs or Ms. Cahill have a clear legal right to demand that the Secretary conduct an investigation, criminal or otherwise. The decision whether and how to investigate alleged violations of law is clearly a discretionary function of the officer charged with enforcing the law in question, and mandamus cannot be used to compel the performance of a discretionary act. *Tyler v. Petro*, 8th Dist. No. 88128, 2007 Ohio 1160, 2007 Ohio App. LEXIS 1081 11.

This Court has routinely denied mandamus petitions that seek to compel state officers to conduct investigations because the decision whether to conduct an investigation is discretionary. For example, a petitioner cannot use mandamus to compel the Attorney General to institute legal action to identify beneficiaries of a charitable trust. R.C. 109.24 vests the Attorney General with discretionary authority in the investigation and prosecution of matters relating to charitable trusts, and mandamus cannot be used to compel the performance of a discretionary function.² *State ex rel. Lee v. Montgomery*, 88 Ohio St. 3d 233, 2000 Ohio 316. Likewise, a prosecutor has discretion as to which cases to investigate and prosecute, and cannot have his or her decisions controlled by mandamus. *State ex rel. Evans v. Columbus Dep't of Law*, 83 Ohio St. 3d 174, 1998 Ohio 128; *Mootispaw v. Eckstein*, 76 Ohio St. 3d 383, 1996 Ohio 389 (same).

The instant case is remarkably similar to *Gosney v. Board of Elections*, 7th Dist. No. 88-C-54, 1989 Ohio App. LEXIS 1168, in which the Seventh District Court of Appeals considered whether to issue a writ of mandamus compelling the Secretary of State, the county board of elections, and/or the county prosecutor to investigate alleged wrongdoing surrounding the election of the county coroner. The appellate court denied the writ (with respect to the Secretary of State) because investigation is a discretionary function, and the court “cannot delve into the area of defining what is a proper investigation for the Secretary of State to conduct.” *Id.* at * 7.

Not surprisingly, where the official is under no clear legal duty to investigate, citizens have no clear right to demand an investigation. Thus, in *State ex rel. Naples v. Vance*, 7th Dist. No. 02-CA-181, 2003 Ohio 4738, 2003 Ohio App. LEXIS 4277, , a resident of the village of Lowellville, sought a writ of mandamus to compel the local Police Chief to contact the State Attorney General and the Bureau of Criminal Investigation in order to initiate an investigation

² The Supreme Court allowed for the possibility that the writ could issue where the failure to act was an abuse of discretion, but as Section III(B) shows, the evidence was so paltry and the time available so short, the Secretary’s decision cannot be deemed an abuse of discretion.

into alleged illegal actions by the mayor of Lowellville. The Seventh Circuit Court of Appeals held that the Petitioner had no clear legal right to an order compelling the start of an investigation. (*Id.* at ¶¶ 7-11).

This result is not only legally correct, it is sound policy: if the Court were to order the Secretary to conduct an investigation merely because the Relators desire one, it would open this Court to a flood of mandamus petitions from anybody who ever made a complaint to a local prosecutor or state official and did not get the desired result.

The lack of a clear legal duty is even more obvious in this case because of the Revised Code language vesting responsibility for verification with the boards of elections. R.C. 3519.11(K) and R.C. 3519.15. Relators attempt to ground their “duty” argument on more general duties defined by the Revised Code, specifically the requirements set forth in R.C. 3501.05(B), (C), and (M). [Appellant Brief, p. 24]. These provisions provide the Secretary’s general authority to oversee elections, but do not address petition review and so have no special applicability here. (B) and (C) refer to the Secretary’s authority to issue Advisories, Directives, rules, and instructions. The Secretary met this obligation: she issued guidance to the boards, including Advisory 2009-06 outlining their duties and responsibilities for verifying the part-petitions submitted by the Ohio Jobs and Growth Committee. Relators argue that mandamus should issue to correct Advisory 2009-06, because it allegedly created new law and/or misstated Ohio law. This contention is meritless, as explained in Section II, below. The fact that Relators do not agree with the Secretary’s instructions does not mean she failed to perform the obligations of her office.

Relators’ argument concerning R.C. 3501.05(M) -- the Secretary’s duty to “compel the observance . . . of the election laws” -- is flawed because it assumes its own conclusion, namely

that the county boards misapplied election law. There is simply no evidence to support such a conclusion. To the contrary, despite all the rhetoric about felon-circulators in the Merit Brief, Relators have not even alleged, let alone demonstrated, that a county board approved a single petition submitted by Melissa Smith or any other felon.³

The notion of issuing a mandamus writ to re-open the certification process has another problem: doing so would contravene the deadlines set forth in the Constitution. Certification must be complete by July 21, 2009. What Relators are seeking is nothing less than a continuation of the certification process into the month of August. (The complaint that the Secretary imposed an arbitrary deadline for the counties to complete their verifications, and should have changed the deadline, is silly: no matter what date she selected, it had to be before July 21, and indeed sufficiently before July 21 to allow her office to perform its tasks. The tight deadlines in the Constitution left her little discretion).

Curiously, Relators do not limit their mandamus request to a new investigation. They want a mandamus order compelling the Secretary to review evidence and invalidate part-petitions. In essence, *they want the Secretary to conduct the petition challenges, rather than this Court*. It should be sufficient to say that there cannot be a clear legal duty for the Secretary of State to usurp the powers and duties of the Supreme Court. For all these reasons, she has no clear legal duty to undertake the actions Relators are demanding.

Finally, there is a third element necessary for a writ of mandamus to issue: the lack of an adequate remedy at law. *State ex rel. Master v. City of Cleveland*, 75 Ohio St. 3d 23, 24; 1996

³ The entire discussion of "strict compliance" misses the point. Neither the Secretary nor the boards deviated from the "strict compliance" standard. Deviation would mean they verified petitions *even though* the petitions had false addresses or were circulated by felons. Relators have carefully avoided alleging that this happened; they merely speak in terms of concerns and suspicions and possibilities. The boards of elections simply chose not to devote scant resources and precious time to chasing down unsubstantiated allegations, which is completely within their discretion, and was in fact a wise decision. (For a discussion of how flimsy the allegations were, see Section III(B)).

Ohio 228 (mandamus petition denied when there was an adequate remedy at law). In this case, Relators have an adequate remedy at law, and have already invoked it: a petition challenge. The Secretary is not disputing or denying Relators' right to assert challenges to the certification decisions, only to their request that the Court order the Secretary to conduct an investigation into the circulators Relators wish to challenge. (To the extent Relators are complaining that they have inadequate time to gather evidence to sustain their challenges, their problem is with the Constitution, not anything the Secretary did or failed to do).

II. Advisory 2009-06 Was A Correct Statement Of Law.

Relators insist repeatedly that mandamus should issue because Advisory 2009-06 was legally incorrect in that it instructed the boards to presume the part-petitions were valid, and thereby discouraged the boards from conducting investigations. This argument misstates the content of the Advisory.

All Advisory 2009-06 did (in this context) is restate the burden of proof set forth in the Revised Code. R.C. 3519.06 states that a part-petition cannot be verified if it is defective on its face or if it "is made to appear by satisfactory evidence that it is defective." It necessarily follows that in the absence of a facial defect or "satisfactory evidence," the part-petition must be verified. Advisory 2009-06 said the same thing in different terms: the part-petition is "presumptively valid" unless it is defective on its face or the board is presented with "satisfactory evidence" of fraud.

The Secretary certainly did not instruct the boards not to investigate potential fraud, nor did she discourage them from doing so. In a sense, Relators' entire case boils down to frustration that the county boards simply do not have time to perform all their administrative tasks and still investigate every allegation of fraud they receive. Clearly the primary

responsibility of the boards in verifying part-petitions and signatures is to determine if a sufficient number of eligible Ohio voters desire to have a matter submitted to the electorate. The people of Ohio demonstrate this desire by signing the part-petitions. Therefore, determination of the validity of the signatures of Ohio electors must be a primary focus of the boards' attentions during the short part-petition verification period. This is not to say that false circulator statements should be condoned in any form. Election fraud and irregularities certainly warrant full prosecution and the Secretary has accordingly undertaken an investigation with the intent of determining whether criminal prosecutions by county prosecutors or the Ohio Attorney General against fraudulent circulators should occur. But the Secretary and the county boards did not create the compressed timeframe for verification of part-petitions and signatures; the voters of Ohio did when they approved the constitutional amendment. All the Secretary and the local boards can do is the best they can in the short amount of time they have.

Other states have ruled that part-petitions signed under oath or under penalty of criminal law may be deemed prima facie valid, that is, are entitled to a rebuttable presumption of validity.

In an early case the Supreme Court of Oklahoma wrote:

The presumption is that petitions which are circulated, signed, and filed, are valid. People interested as the circulators of these petitions, and the others who sign them, are acting in the capacity of legislators. They are members of the largest legislative body in the state, and, where so acting, do so in a public or at least a quasi public capacity, and when so acting the law presumes the validity and legality of their acts, and even though it should be claimed that they were acting simply in a private capacity, until overcome by proof, their acts, involving the performance of ministerial or administrative duties, such as those performed in the circulation and signing of these petitions, are presumed to be legal and not fraudulent. ***

The presumption above noted is further strengthened by the stringency of the provisions of this act. People are not presumed on mere conjecture, with no semblance of proof, to have committed felony by wholesale, especially with the act denouncing it staring them right in the face. These petitions, therefore, and the signatures thereto, are presumed to be valid,

and the presumption obtains on the filing of the objections in the office of the secretary of state that those who have signed them are legal voters. * *

* We do not mean to hold that the circulator's affidavit can be dispensed with, but that technical defects therein will not destroy the petition.

In re State Question No. 13, Initiative Petition No. 89, (1926) 114 Okla 285, 244 P. 801, citing *Re Initiative Petition No. 23 (1912), State Question No. 38*, 35 Okl. 49, 127 P. 862.

Similarly the Supreme Court of Montana has recognized a presumption of validity of initiative petitions, as follows: “[I]t has long been established that initiative petitions signed and filed in accordance with applicable law are presumptively valid.” *In re State Question No. 138 (1926)*, 114 Okla. 285, 244 P. 801, 803 (1926). However, that presumption of validity may be rebutted and overcome by affirmative proof of willful fraud or procedural noncompliance. *State Question No. 138*, 244 P. at 804. Once evidence is presented to rebut the presumption of validity, it is incumbent upon on the party endorsing the validity of the signatures--in this case the Proponents--to come forward with evidence to rebut or counter the damaging evidence. *Montanans for Justice v. State ex rel. McGrath*, 334 Mont. 237, 146 P.3d 759. See also, *In re Bower* (1968), 41 Ill.2d 277, 242 N.E.2d 252 (Fraud or guilty knowledge will not be imputed to the circulator, but must be affirmatively established).

III. The Secretary Did Not Disregard Concerns About Election Fraud.

Relators’ Merit Brief contains a host of false accusations against the Secretary. These can be grouped into two categories: (1) that the Secretary violated the Public Records Act, which (somehow) compromised the ability of Relators to review the part-petitions and gather evidence of circulator fraud; and (2) that the Relators’ counsel repeatedly provided reams of evidence to the Secretary, which she disregarded. Although the Secretary has no position regarding the merits of the certification challenge, and despite the fact that this case does not assert any claims

under the Public Records Act, still the accusations against the Secretary are so serious and so false that they must be repudiated in the strongest terms.

A. The Public Records Act

On June 17, 2009, counsel for the Relators sent a written public records request to the Secretary of State requesting copies of all part-petitions received by the Secretary of State from the Ohio Jobs and Growth Committee regarding the Ohio Jobs and Growth Plan. [Exhibit 2, Affidavit of Eleanor Speelman, ¶ 3, Exhibit A]. In accordance with the Constitutional deadlines, however, the Secretary of State did not receive the part petitions until 1:30 p.m. on June 25, 2009, eight days later. [Speelman Aff., ¶ 4]. On that basis alone, the Secretary of State could have summarily dismissed the public records request because the records did not exist at the time of request. Nevertheless, in a generous effort to ensure faith in the electoral system and afford due respect to Relators' counsel, the Secretary responded to Relators' counsel within hours of receiving the part-petitions on June 25, 2009. [Speelman Aff., ¶¶ 5-6, Exhibit B].

In her response, the Secretary of State explained that due to the new constitutional time constraints placed on the Secretary of State to determine the sufficiency of the signatures, she would not be able to provide Relators' counsel with photocopies of the 49,162 part petitions prior to their distribution to the county boards of elections. [Spellman Aff., Exhibit B]. However, the Secretary not only offered to forward scanned copies of the part-petitions as they were returned from the county boards of elections, she also permitted four attorneys from Bricker & Eckler to attend and observe as the Secretary's staff processed the part-petitions. [Speelman Aff., ¶ 7, Exhibit C]. While present, the attorneys were afforded the opportunity to photograph part-petitions, as well as physically inspect the part-petition boxes. [Speelman Aff., Exhibit B]. In fact, one attorney from Bricker & Eckler was permitted to conduct such

inspection at 8:00 a.m. *the very next day* after the part-petitions were received (June 26, 2009). [Speelman Aff., Exhibit B, Exhibit C]. Relators' counsel and the Secretary of State continued discussions and negotiations over the next two weeks, both sides acknowledging the unprecedented time constraints established by Article II, Section 1g. In fact, Relators' attorneys conceded that "the actions and timelines sets forth in [the Secretary of State's June 29, 2009 correspondence] constitute an acceptable response to our request for public records." [Speelman Aff., ¶ 12, Exhibit F].

Given this history, the unsubstantiated accusation that the Secretary violated the Public Records law and refused to turn over part-petitions is false and should be disregarded.

B. The Secretary (And The Boards) Did Not Ignore "Substantial Evidence" of Circulator Fraud

Relators' Merit Brief contains extremely serious charges that have no evidentiary support whatsoever. They assert that they provided documentation of circulator fraud to the Secretary, when in fact the "evidence" they submitted does not even suffice to raise a suspicion of wrongdoing. (As discussed below, they have provided evidence of alleged fraud to this Court which was never given to the Secretary; that evidence may be relevant to the petition challenge, but has nothing to do with whether the Secretary ignored proof of wrong-doing, and should not be used to mislead the Court in this fashion). Finally, the Brief baldly asserts that the Secretary failed to ensure the county boards were alerted about petitions circulated by a felon, when in fact their *own exhibits* demonstrate precisely the opposite.

Relators allege that they sent their first "warning" letter on July 6, 2009 to the county boards, with a copy to the Secretary. [Relators' Exhibit A]. The letter purported to alert the boards of a "potential fact issue" regarding circulator addresses, [*Id.* (emphasis in original)], namely that circulators were listing more than one address as their permanent address, or listing

“hotels, commercial locations, or non-residential addresses.” Of course it is entirely possible that someone does have a permanent residence at a hotel, so that fact standing alone would not be cause for concern.

What evidentiary materials did Relators send along with the July 6, 2009 letter? The affidavit of Christopher Slagle is conspicuously silent on this point. The organization of Relators’ evidence creates the impression that what the Secretary received on July 6, 2009 was some or all of the documents marked as Exhibits B and C. (The Complaint/Petition makes this statement explicitly). But in fact this cannot be the case: Exhibits B and C both purport to show results through July 8, and the internet documents show print dates of July 7 and July 8. They could not possibly have been attached to a July 6 letter.

Relators were more specific in their next letter to the boards and the Secretary, dated July 9, 2009. [Exhibit F]. Relators’ counsel asserted three categories of alleged “irregularities:” (1) circulators who listed commercial, non-residential addresses; (2) a single circulator who listed multiple addresses on different petitions; and (3) multiple circulators who listed the same address. But an examination of Exhibit D, which purports to be a coded spreadsheet of the circulators at issue, shows that, time and again, the supposed “irregularities” were the result of errors by the people who reviewed the petitions and created the spreadsheet.

For example, Relators supplied a list of nearly 100 names of supposedly different people who all used the same address. A few of the more obvious errors on the list include:

- Identifying Lawrence Ciaffone, Lawrence Guffione, and Lawrence Liaffone as three different people using the same address;
- Identifying Walt Slewall and Walt Stewart as two different people living in the same apartment;
- Identifying Andrew Miko, Andrew Mino, and Andrew Minu as three different people using the same address;

- Identifying Joshua Timothy Collopy Brady, Josh Brady, Josh Callopy, and Josh Collopy as four different people using the same address; and
- Identifying Waco Day and Day Waco as two different people living in the same apartment.

The author of the July 9, 2009 letter understated the case when he wrote that “given the short time frame, we expect that our summaries include some error, such as misspellings of names.” [Exhibit F].

The other allegations were equally flimsy. More than two-thirds of the “Category 1” offenders (who listed “commercial property addresses”) listed hotels, which, as previously noted, is not automatically a problem.

As for Category 3, circulators who allegedly listed multiple addresses on different petitions, the evidence was even more threadbare. For many of the names Relators identified, their own spreadsheet shows only one address (i.e., Jermaine Crouch, Harold Edmonds, Kenneth Harmon, Rochelle Hamilton, Marvin Johnson., and Abraham Salazar). For others, the evidence consisted of one instance where a different number was used. For example, out of 24 petitions submitted by Betty J. Cowart, twenty showed her living in Apartment 209, one had her in Apartment 212, and three listed no apartment number at all, all at the same street address. The single appearance of the number 212 more likely reflects an error by Relators, not fraud, a suspicion that is only reinforced by the fact that Exhibit D identifies her as Betty Covart, Betty Cowart, and Betsy Cowart. The same is true of Julie Dormine, who is accused of using multiple addresses because, of the 40 petitions she listed containing the same street address, 36 said Apt. 410, one said 412, and four listed no apartment number. Exhibit D identifies her variously as Julie Donmire, Julie Dormine, Julie Dormire, and Julie Durmine. Obviously, Relators cannot read her handwriting consistently, but that is no reason to suspect election fraud.

Incredibly, the July 9 letter demanded much more than “an investigation.” It sought to convince the boards to conclude (based on these flawed summaries) that these part-petitions were defective on their face, which under R.C. 3519.06, would mean they would be invalidated without even an investigation. Such a result gives no consideration to the rights of the casino supporters who signed the petitions, who also have rights that need to be protected.

But that was far from the most egregious overreaching by Relators. On July 14, 2009, Relators informed the Secretary that a convicted felon, Melissa Smith, was circulating petitions. [Exhibit J, p. 1]. The Merit Brief alleges that the Secretary’s office took no action to alert the County Boards about Ms. Smith. This is misleading at best. Their own evidence shows that on July 8, 2009, Butler County sent an e-mail about Ms. Smith to “All Counties.” There was no reason for the Secretary to alert the counties to information she knew they already had.

The multiple references to felons in the brief is particularly troublesome given the fact that there is not even an allegation that any part-petitions circulated by felons were actually approved. Relators have not identified a single instance of a petition circulated by felon Melissa Smith that was accepted and verified by a county board, which would be a simple fact to prove if it ever happened. The fact that they have come forward with no such evidence strongly suggests it did not, and all this discussion about felons is a red herring.

Finally, the Merit Brief devotes a good deal of space to discussing the affidavits of Jennifer Earley, Brenda Poteet, and James C. Barney (included in the Evidence packet but not marked as exhibits). The Early and Poteet affidavits were executed July 22, 2009, and the Barney affidavit on July 23, 2009, *after* the Secretary had certified the issue. Ironically, those affidavits are actually evidence (unlike the charts Relators gave to the boards), and might have been sufficient to trigger an investigation, but they never given to the Secretary or the local

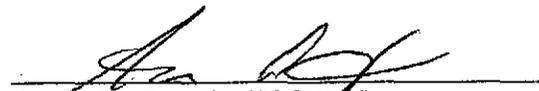
boards; they were produced for the first time on July 24, 2009, when Relators filed their evidence. The affidavits may be relevant as evidence for the petition challenge, but it is unfair to leave the impression that they were submitted to the Secretary and ignored.

CONCLUSION

The right of the people to propose amendments to the Constitution is of great importance, as reflected by its inclusion in the Ohio Constitution as the first provision of Article II which establishes and governs the legislative branch of government. While the initiative now before the court is the sole proposed initiative or referendum filed with the Secretary in this odd-numbered election year, in even-numbered election years it is not uncommon for multiple initiative or referendum petitions to be filed and processed by the Secretary and the county boards, with hundreds of thousands, and potentially a million or more signatures, involved, each of which must be checked by a county election official. The processes, procedures, and evidentiary standards this court may establish in the case at bar will govern the administration of those future petitions. Therefore, in light of the reality of the scope of the task the Constitution imposes on the Secretary and the county boards, the Secretary urges the Court to be mindful during its deliberations of the practical implications of possible alternative interpretations it may consider. Recognition that a rebuttable presumption of validity attaches to part-petitions not only is consistent with the realities of feasible election administration, but is consistent with well-established law throughout the country. The Secretary therefore respectfully asks this court to deny the Relators' requested relief and affirm that the responsibility to produce satisfactory evidence of invalidity rests initially with challengers to the validity of part-petitions in challenge proceedings heard by the Supreme Court of Ohio.

Respectfully submitted,

RICHARD CORDRAY
Ohio Attorney General



Aaron D. Epstein (0063286)
Attorney of Record
Michael J. Schuler (0082390)
Richard N. Coglianesse (0066830)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
614-466-2872
614-728-7592 (fax)
aaron.epstein@ohioattorneygeneral.gov
michael.schuler@ohioattorneygeneral.gov
richard.coglianesse@ohioattorneygeneral.gov

*Attorneys for Respondent Jennifer Brunner
Secretary Of State*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Merit Brief of Respondent Jennifer Brunner, Secretary of State* was served on this 28th day of July, 2009, by electronic mail, facsimile transmission and ordinary, postage prepaid U.S. mail to:

Luther L. Liggett, Jr. (0004683)
Attorney of Record
Anne Marie Sferra (0030855)
Vladimir P. Belo (0071334)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
614-227-2300
614-227-2390 (fax)
lliggett@bricker.com
asferra@bricker.com
vbelo@bricker.com

Attorneys for Relators

D. Michael Haddox (0004913)
Muskingum County Prosecutor
27 North Fifth Street. P.O. Box 189
Zanesville, Ohio 43702
740-455-7123
740-455-7141 (fax)
dmhaddox@muskingumcounty.org

*Attorney for Respondent
Muskingum County Board of Elections*

Alan G. Starkoff (0003286)
Attorney of Record
Matthew L. Fornshell (0062101)
Matthew T. Green (0075408)
Schottenstein, Zox & Dunn, Co., L.P.A.
250 West Street
Columbus, Ohio 43215
614-462-2700
614-462-5135 (fax)
astarkoff@szd.com

Donald J. McTigue (0022849)
Mark A. McGinnis (0076275)
J. Corey Colombo (0072395)
McTigue & McGinnis LLC
550 East Walnut Street
Columbus, Ohio 43215
614-263-7000
614-263-7078 (fax)
mctiguelaw@rrohio.com

*Attorneys for Intervenors
Ohio for Jobs & Growth Committee,
William J. Curlis, John T. Campbell,
Matthew Hammond, and Charles J. Luken*



Aaron D. Epstein (0063286)
Assistant Attorney General