

IN THE SUPREME COURT OF OHIO

The Ohio Manufacturers' Association, et al., :
: **Case No. 2016-0313**
Relators, :
: **Original Action Under Article II,**
v. : **Section 1g of the Ohio Constitution**
: **Ohioans for Drug Price Relief Act, et al.,** :
: **Respondents.** :

**RELATORS' RESPONSE TO RESPONDENTS WILLIAM S. BOOTH,
DANIEL L. DARLAND, TRACY L. JONES, AND LATONYA D. THURMAN'S
MOTION TO EXPEDITE CASE SCHEDULE**

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Latonya D. Thurman*

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There is no basis in law or fact to expedite Relators’ challenge to the initiative petition for the “Ohio Fair Drug Price Act” (“Petition”), and the Respondents’ motion seeking an expedited case schedule should be denied. Relators remain committed to obtaining a prompt resolution to this matter,¹ but object to any contrived attempts to rush to a resolution.

1. There Is No Authority To Expedite This Case.

First, there is no authority for Respondents to seek an expedited schedule in this case. The only authority cited by Respondents in support of such relief is S.Ct.Prac.R. 12.08. But Rule 12.08 does not apply in this instance; it only relates where there is “a pending election” and “the action is filed within ninety days prior to [the] election.” The Petition has not even qualified for the collection of supplementary signatures, let alone found a place on any election ballot. Accordingly, there is no authority to expedite this matter.

¹ In fact, Relators have already started discovery and offered to stipulate to all critical facts.

2. **Regardless Of When The General Assembly Acts and This Case Is Decided, Respondents Will Still Have 90 Days To Collect and File Supplementary Signatures.**

Respondents also claim that this matter must be expedited because time is tight, the General Assembly may act soon, and they must be in a position to begin circulating supplemental petitions on June 3, 2016.² Respondents assert the Constitution provides “specific time periods for each step in the [initiative] process” and permitting discovery in this matter will disrupt this process. Respondents are wrong on all points.

Respondents claim that since the General Assembly has four months to consider the law proposed by the Petition, if this matter remains pending beyond that four-month period, it could cause the Respondents great time and expense in the collection of signatures that might be unnecessary if this Court rules against them. This attenuated and manufactured parade of hypotheticals can easily be alleviated, if and when the need arises, without rushing the natural progress of this case.

Article II, Section 1b of the Ohio Constitution provides Respondents with a full 90 days to collect and file signatures on a supplementary petition. Those 90 days are neither challenged nor delayed by this action. *If* this case remains pending on June 4th without action by the General Assembly, this Court could suspend the 90-day period during the pendency of this case. And *if* this Court grants Relators’ challenge—indicating the Petition should never have been transmitted to the General Assembly in the first instance—Respondents will still have their full 10 days to cure the Petition as set forth in the Ohio Constitution. All the other processes

² Respondents claims that the four-month period for consideration of the Petition by the General Assembly ends on June 3, 2016. But the Petition was transmitted to the General Assembly by Secretary Husted on February 4, 2016. So the General Assembly has through June 4, 2016—**four months from transmission**—to consider the Petition.

afforded to anyone seeking to place an initiated statute on the ballot remain available to Respondents in due course. Likewise, if Respondents prevail here, they will still have their full 90 days to gather supplementary signatures. Respondents suffer no prejudice by this timing.

Respondents next claim they need an expedited schedule because the General Assembly may reject the Petition before June 4th, causing the 90-day period to collect and file supplementary signatures to begin sooner. But it is simply untrue that the General Assembly may act imminently and Respondents provide no allegation or evidence to the contrary. In fact, the General Assembly is currently in recess until April 5th and 6th.³ The proposed law has not been introduced in either the House or the Senate, nor has it been assigned to a committee or scheduled for any hearings. At this point, there is no indication of the hypothetical urgency the Relators' claim. And even if the General Assembly rejects the proposed law prior to June 4th, this Court could at that time suspend the 90-day period for collection of supplementary signatures until this case is resolved. Again, Respondents lean upon a hypothetical occurrence that can be alleviated, if and when the need arises, in a much more expedient manner than can be accomplished with an expedited case schedule.

What is really behind Respondents' claim of great urgency, and what they originally told this Court two months ago when they sued Secretary Husted, is their desire to place this issue on the 2016 general election ballot. *See* Case No. 2016-0020, Compl. at ¶ 33; *see also* Case No. 2016-0020, Motion to Expedite, at 3 (“Each day that Respondent fails to transmit the Proposed Law effectively reduces the 90-day supplementary petition period and makes it less likely that the Proposed Law will be submitted to the electors at the November 8, 2016 general election”).

³ *See* House and Senate Session Schedule: <https://www.legislature.ohio.gov/schedules/session-schedule>

But Respondents have no constitutional right to be on the November 2016 ballot—or any ballot in particular (if on any ballot at all). *See Bullock v. Carter*, 405 U.S. 134, 142-43 (1972). There is no constitutional right to a certain number of days to gather signatures for a ballot petition. *See Lee v. Comm’rs Court of Jefferson Cnty., Texas*, 81 F. Supp.2d 712, 715 (E.D. Tex. 2000).

3. Relators Did Not Delay In Filing This Challenge; They Filed Their Challenge After Aggressively Obtaining Evidence And Are Proceeding Expeditiously With This Action.

In order to bolster their manufactured sense of urgency, Respondents also claim the Relators unduly delayed by waiting 25 calendar days (16 business days) to file this challenge. But the mere fact that Relators filed the protest 16 business days after transmission of the Petition is hardly evidence of undue delay. Immediately upon learning of transmission of the Petition on February 4, 2016, Relators began to prepare for this protest. That same day, Relators, through counsel, renewed and amended their existing public records requests to the Secretary and county boards of election to request the “as-reviewed” part petitions in each county.⁴ Relators’ counsel received the first set of part-petitions on February 12th. Part-petitions were provided to Relators on a rolling basis throughout the month of February and were processed, reviewed, and analyzed immediately upon receipt. Some part-petitions were even received on February 29, 2016—the day this challenge was filed.

⁴ Prior to February 4th, Relators had only the part-petitions in the form submitted to the Secretary by Respondents on December 22, 2015; not the part-petitions in the form after review by the 88 county boards of elections and returned to the Secretary. It was necessary for Relators to have the as-reviewed part-petitions so that they knew which signatures and petitions had been rejected and the reason for the rejections. Certainly the Relators knew the number of valid petitions and signatures certified to the Secretary by each county board of election. But without the as-reviewed part-petitions, Relators had no way of knowing which petitions and signatures had already been rejected and thus the effect that the invalid petitions and signatures had on the overall tabulation in each county.

Taking three weeks to obtain evidence to support a challenge to a statewide petition is hardly undue delay—particularly where Respondents would no doubt have contended that a challenge that had been filed without evidence should be summarily dismissed. *See State ex rel. Owens v. Brunner*, 125 Ohio St.3d 130, 2010-Ohio-1374, 926 N.E.2d 617, ¶ 18 (a delay in filing is reasonable when a relator is diligently trying to obtain documents from a board of elections).

Relators do not seek to take discovery or have a master commissioner appointed in order to unduly delay this proceeding. To the contrary, Relators seek discovery to establish relevant facts and pursue this challenge. Relators are prosecuting this case expeditiously, as evidenced by the fact that they served written discovery on March 11, 2016—two days after Respondents filed their Answer.

4. Relators Should Be Permitted A Reasonable Time To Take Discovery To Prove Their Challenge Should Respondents Refuse To Stipulate To The Facts Alleged In The Challenge.

Respondents also claim that this case can be expedited because it involves only straightforward legal questions that require little discovery. This is only partly true. While this case does involve straightforward legal questions, underlying those legal questions are evidentiary issues that must be proven. Relators have sufficient evidence on several issues which, standing alone, establish that the Petition is deficient and must be cured before it can be properly submitted to the General Assembly. However, the extent of that deficiency and the extent of the required cure are as yet unknown.

For instance, it is believed that there are five felons who were ineligible to circulate the Petition under Ohio law. Relators must take discovery from Respondents to obtain the evidence necessary to confirm this information and establish a record for the Court. It is also believed that all of the alterations on the part-petitions were made by managers or agents employed by various

petition-circulation companies rather than any circulator or signer of a part-petition. Sworn testimony available to date confirms this belief as to several circulation companies but not others. Thus, additional testimony is needed. Respondents themselves characterize this required evidence as “a minor factual component that does not require any sort of complex fact-finding.” Case No. 2016-0313, Memorandum in Opposition to Relators’ Motion for Appointment of A Master Commissioner, at 5.

While Respondents represent to the Court that there are no factual issues to resolve and attempt to rush this case through with an expedited schedule, they have so far not accepted Relators’ suggestion that they stipulate to these “minor” facts that support the underlying legal questions (or even tell Relators when they will substantively respond to the request).⁵ If Respondents truly do not dispute the facts alleged in this challenge, then stipulating to these facts would be a logical step to shorten this case.

But even if Respondents refuse to stipulate to these disputed factual issues, Respondents could still shorten the discovery period by arranging for the witnesses identified by Relators to voluntarily appear in Ohio for depositions. This would allow Relators to quickly take the discovery necessary to establish their claims while ensuring that this case is litigated in the shortest time possible. But absent stipulations or an agreement by Respondents to make witnesses available for depositions in Ohio, Relators have no choice but to travel the road of conducting discovery on their claims.

⁵ Relators’ counsel proposed to Respondents’ counsel that the parties enter into stipulations on the underlying factual issues. *See* Relators’ March 11, 2016 transmittal letter, attached as Exhibit A, and Respondents’ March 15, 2015 e-mail response, attached as Exhibit B.

5. Respondents Are Not Entitled To An Expedited Schedule Where Respondents' Waited Until The Eleventh Hour To File The Petition.

Finally, it should be noted that the fact that Respondents are in the position of asking for an expedited case schedule is a problem of their own making. Respondents could have filed their Petition with the Secretary much sooner than December 22, 2015 (immediately before the long holiday season and just two weeks before the General Assembly was scheduled to convene on January 4, 2016). Secretary Husted's office reported that by mid-November, Respondents had collected over 90% of the 171,205 signatures they ultimately filed.⁶ However, for reasons unexplained, Respondents waited another six weeks to file their Petition. To the extent that Respondents believe their time is now short, it is a problem of Respondents' own doing.

6. Conclusion.

Accordingly, for the foregoing reasons, Relators respectfully request that the Court deny Respondents' Motion To Expedite Case Schedule.

Respectfully submitted,

/s/ James P. Schuck

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Counsel for Relators

⁶ See Affidavit of Matthew Walsh at ¶ 6, attached as Exhibit C (previously filed as Exhibit A to Relators' February 29, 2016 Challenge To Initiative Petition).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served via email on March 17,

2016 upon:

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/s/ James P. Schuck

James P. Schuck (0072356)

March 11, 2016

VIA EMAIL

Donald J. McTigue
MCTIGUE & COLOMBO LLC
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Columbus, Ohio 43215

Re: *The Ohio Manufacturers' Association, et al. v. Ohioans for
Drug Price Relief Act, et al.*
Ohio Supreme Court, Case No. 2016-0313

Dear Mr. McTigue:

Enclosed you will find Relators' First Set of Interrogatories, Request for Production of Documents, and Request for Admissions Propounded to Respondents William S. Booth, Daniel L. Darland, Tracey L. Jones, and Latonya D. Thurman, Individually and as the Committee Supporting the Ohio Drug Price Relief Act.

In your recent filings in this matter, you stated that the issues before the Court are primarily legal ones and that little factual discovery is necessary. Given your representations, we propose stipulating to the primary relevant facts in order to further streamline the process of presenting evidence and briefing.

The proposed stipulations would address the four primary issues Relators have asserted and would generally include:

1. The following circulators did not have permanent residence addresses at the addresses they listed on each of the part-petitions he or she circulated: Fifi Harper, Roy Jackson, Kelvin Moore and Kacey Veliquette.
2. All strikethroughs on the part-petitions were done by petition circulation companies after the circulator had turned in the part-petition and were not done by the signer, attorney-in-fact for a signer, or circulator of that part-petition.
3. All circulators were instructed by either the Committee or the petition circulation companies hired (directly or indirectly) by the Committee to write the number "28" as the number of signatures on the part-petition, regardless of the number of actual signatures on the part-petition.
4. The following individuals are felons who were ineligible (pursuant to R.C. 2967.16(C)(1) and 2010 Ohio Atty.Gen.Op. 2010-002, *see* Challenge, ¶

EXHIBIT A

COLUMBUS | CLEVELAND
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March 11, 2016
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77) to circulate part-petitions under Ohio law during the time they circulated part-petitions of the Petition: Michael Mayo, Walter Searcy, Stephanie Cole, Sean Thomas, and Antoine Woods.

Please let us know if your clients are interested in stipulating to all matters as set forth above by 9:00 a.m. on Tuesday, March 15, 2016. If so, we will withdraw or revise the discovery requests enclosed accordingly. As I will be out of the office on Monday and Tuesday next week, please communicate your response to both me and Jim Schuck (jschuck@bricker.com).

If your clients are interested in proceeding with stipulations, we will also need to stipulate to the part-petitions impacted and the number of signatures thereon to make the process manageable for the Court. While the Supreme Court is certainly capable of reviewing thousands of part-petitions and counting thousands of signatures, we believe it would be much better for the parties, or a Master Commissioner with the assistance of the parties, to do this and present the information to the Court.

Sincerely,


Anne Marie Sferra

cc Steve T. Voight (w/enc.)
AMS/tlh

Sferra, Anne Marie

From: Don McTigue <dmctigue@electionlawgroup.com>
Sent: Tuesday, March 15, 2016 5:03 PM
To: Sferra, Anne Marie; jschuck@briker.com
Subject: March 11 correspondence

Anne Marie and Jim,

I want to acknowledge receipt of your March 11, 2016 letter in which you propose stipulations. My clients will consider them and I will be back to you after a reasonable time to review the factual statements set forth. However, my clients do not consider themselves bound by the deadline in your letter.

Don

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TRACY L. JONES, et al.,	:
	:
<i>Plaintiffs,</i>	: Case No. 2:16-cv-00038
	:
v.	: Judge Michael H. Watson
	:
OHIO SECRETARY OF STATE	: Magistrate Judge Norah McCann King
JON HUSTED, et al.,	:
	:
<i>Defendants.</i>	:

DECLARATION OF MATTHEW WALSH

I, Matthew Walsh, hereby declare that:

1. Since February 2014, I have served as Legislative Counsel for Ohio Secretary of State Jon Husted. Prior to my position as Legislative Counsel, I served as Elections Council for the Secretary from November 2012 to February 2014.
2. As Legislative Counsel for the Secretary of State, my job duties include assisting in lawsuits filed against the office and monitoring legislation introduced by the Ohio General Assembly. In my position as Elections Counsel, I frequently communicated with boards of elections on a variety of election related topics.
3. As counsel for the Secretary of State, I am familiar with Ohio's election laws.
4. In Ohio, petitioners attempting to receive consideration of an initiative petition must gather 91,677 signatures from valid electors. This number represents three percent of the total vote cast for the office of governor at the last gubernatorial election.
5. A review of the "Ohio Drug Price Relief Act" part-petitions found that over 90% of the signatures gathered for the initiative petition were collected at least six weeks prior to the December 22, 2015 filing of the part-petitions.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct based on my personal knowledge.

Tracy L. Jones, et al.,
v. Ohio Secretary of State Jon Husted
Case No. 2:16-cv-00038

EXHIBIT C

Executed this 22 day of January 2016, in Columbus, Franklin County, Ohio.

A handwritten signature in cursive script, appearing to read "Matthew Walsh", written in black ink.

Matthew Walsh
Legislative Counsel