

IN THE SUPREME COURT OF OHIO

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

**RESPONDENTS WILLIAM S. BOOTH, DANIEL L. DARLAND,
TRACY L. JONES, AND LATONYA D. THURMAN'S
MOTION FOR JUDGMENT ON THE PLEADINGS, OR
IN THE ALTERNATIVE, FOR PARTIAL JUDGMENT ON THE PLEADINGS**

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Respondents William S. Booth, Daniel L. Darland, Tracy L. Jones, and Latonya D. Thurman (“Petition Respondents”) respectfully move this Court, pursuant to Civ.R. 12(C), for Judgment on the Pleadings due to lack of original jurisdiction over the challenge filed by the Pharmaceutical Research and Manufacturers of America (“PhRMA”), the Ohio Manufacturers’ Association, the Ohio Chamber of Commerce, Keith A. Lake, and Ryan R. Augsburger (“PhRMA Relators”). Alternatively, Petition Respondents move the Court for Partial Judgment on the Pleadings. A Memorandum in Support of this Motion is appended hereto.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. STANDARD OF REVIEW

Civ.R. 12(C) states that “[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” Civ.R. 12(C) motions resolve questions of law. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569, 664 N.E. 2d 931 (1996). In ruling on a Civ.R. 12(C) motion, the Court is permitted to consider both the complaint and answer. *Id.* A court must construe as true all of the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 165-166, 297 N.E.2d 113 (1973). Judgment is appropriate where a court finds beyond doubt that the PhRMA Relators could prove no set of facts in support of his claim that would entitle them to relief. *Pontious*, at 75 Ohio St.3d at 570.

II. ARGUMENT

A. The Court lacks original jurisdiction over PhRMA Relators’ claims.

The subject matter jurisdiction with respect to PhRMA Relators’ Complaint is defined and limited by the same Constitutional provision that they invoke. By its own terms, Article II, Section 1g of the Constitution limits the Court’s original jurisdiction over challenges made to petitions and signatures on petitions seeking placement of an issue on an election ballot. The Petition that PhRMA Relators challenge did not seek to place the proposed law on an election ballot—it sought to propose a law to the Ohio General Assembly.

PhRMA Relators seek to invoke the jurisdiction of Article II, Section 1g of the Ohio Constitution. Rel. Compl. ¶ 1. They cite no other source for jurisdiction, and the Complaint does not contain any jurisdictional arguments in the alternative. See, *id.* Article II, Section 1g has never been interpreted by the Court to extend to petitions proposing laws to the General Assembly. By

its own language, Article II, Section 1g relates only to challenges to petitions seeking to place an issue on a ballot, such as a referendum, a proposed constitutional amendment, or a proposed law submitted by supplementary petition. This is evident from a review of Section 1g's language which makes repeated references to deadlines for certification by the Secretary of State, deadlines for challenging such petitions, and deadlines for deciding such challenges so many days prior to the election at which the issue would appear on the ballot. These deadlines do not affect the separate and distinct deadlines under Article II, Section 1b of the Ohio Constitution, which sets forth the requirements for proposing a law to the General Assembly.

The first paragraph of Article II, Section 1g largely sets the form of part-petitions and establishes requirements for signers and circulators. However, the last sentence is the first signal that Article II, Section 1g contemplates only challenges to petitions seeking to place an issue on a ballot:

Any initiative, supplementary, or referendum petition may be presented in separate parts but each part shall contain a full and correct copy of the title, and text of the law, section or item thereof sought to be referred, or the proposed law or proposed amendment to the constitution. Each signer of any initiative, supplementary, or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and his place of residence. A signer residing outside of a municipality shall state the county and the rural route number, post office address, or township of his residence. A resident of a municipality shall state the street and number, if any, of his residence and the name of the municipality or post office address. The names of all signers to such petitions shall be written in ink, each signer for himself. To each part of such petition shall be attached the statement of the circulator, as may be required by law, that he witnessed the affixing of every signature. **The secretary of state shall determine the sufficiency of the signatures not later than one hundred five days before the election.** (emphasis added)

The last sentence states that the Secretary of State shall determine the sufficiency of signatures by the 105th day "before the election." For initiative petitions proposing constitutional amendments,

laws proposed by supplementary petition, and referendum petitions on laws adopted by the General Assembly, the “election” refers to the election at which the issue would appear on the ballot based on the date the petition is filed under Article II, Sections 1a, 1b, or 1c for submission to the electors, i.e. 125 days before a general election.

There is, however, no “election” for petitions seeking to propose a law directly to the General Assembly that would establish such a deadline. The deadlines for proposing a law directly to the General Assembly are provided for in Article II, Section 1b:

When at any time, **not less than ten days prior to the commencement of any session of the general assembly**, there shall have been filed with the secretary of state a petition signed by three per centum of the electors and verified as herein provided, proposing a law, the full text of which shall have been set forth in such petition, **the secretary of state shall transmit the same to the general assembly as soon as it convenes.** * * * If it shall not be passed, or if it shall be passed in an amended form, or if no action shall be taken thereon **within four months from the time it is received by the general assembly**, it shall be submitted by the secretary of state to the electors for their approval or rejection, if such submission shall be demanded by supplementary petition verified as herein provided and signed by not less than three per centum of the electors in addition to those signing the original petition, **which supplementary petition must be signed and filed with the secretary of state within ninety days after the proposed law shall have been rejected by the general assembly or after the expiration of such term of four months**, if no action has been taken thereon, or after the law as passed by the general assembly shall have been filed by the governor in the office of the secretary of state. **The proposed law shall be submitted at the next regular or general election occurring subsequent to one hundred twenty-five days after the supplementary petition is filed in the form demanded by such supplementary petition**, which form shall be either as first petitioned for or with any amendment or amendments which may have been incorporated therein by either branch or by both branches, of the general assembly. (emphasis added).

It is apparent from the text of Article II, Section 1b that election-based deadlines are not relevant until petitioners file, or seek to file, a *supplementary petition* after the General Assembly has either

rejected the law proposed by initiative petition or has otherwise failed to act on the proposed law within four months. Otherwise, Section 1b is self-contained in its deadlines for petitions seeking to propose a law directly to the General Assembly.

The second paragraph of Article II, Section 1g also contemplates only petitions that seek to place an issue on a ballot. This paragraph provides jurisdiction to the Court for challenges to such petitions, and further provides the Court with a timeline for such challenges. This paragraph provides:

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 signature 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 petitions shall be presumed to be in all respects sufficient.

The schedule set forth by this paragraph is based entirely upon a forthcoming general election. But an initiative petition proposing a law to the General Assembly does not by itself trigger an election, and, thus, there is not an election to which to tether the deadline in Section 1g.

The plain meaning of Article II, Section 1g suggests that it does not apply to petitions proposing laws to the General Assembly. Holding otherwise would lead to absurd results and undermine the right to initiative reserved to the people of Ohio. What would the deadline be under Section 1g for filing a challenge against a petition proposing a law to the General Assembly? What would the deadline be for a decision by this Court given that there is not an election for the issue?

Under Article II, Section 1g, challenges to petitions seeking to place an issue on a ballot could, from start to finish, last as few as ten days. This section provides a deadline by which the Secretary of State must certify a petition, a deadline by which opponents must file a challenge to the petition,

and a deadline by which the Court must reach a decision on the challenge, all tied to an upcoming election. However, Section 1g establishes no such timeline for challenges to petitions seeking to propose a law directly to the General Assembly. Under a normal briefing schedule, such challenges are certain to last beyond the four months the General Assembly has under Article, Section 1b to consider a law proposed by initiative petition, and possibly even beyond the 90-day period in which petitioners can circulate a supplementary petition to place the proposed law on a ballot.¹

While the exclusive, original challenge provision of Article II, Section 1g does not apply, parties seeking to challenge a petition proposing a law directly to the General Assembly under Article II, Section 1b would not be without a remedy. Mandamus, prohibition, and declaratory judgment remedies remain as remedies, either in this Court or in trial courts.

B. The Court should grant Petition Respondents’ Motion for Partial Judgment on PhRMA Relators’ “unlawful alterations” and “circulator statement” challenges.

PhRMA Relators’ Complaint consists of four challenges. Petition Respondents move, in the alternative, for judgment on the pleadings with respect to PhRMA Relators’ so-called “unlawful alterations” and “circulator statement” challenges. These are both questions of law, and neither of PhRMA Relators’ theories in support of their challenges are based in Ohio law. Thus, PhRMA Relators cannot prove any set of facts which would entitle them to relief, and the Court should grant Petition Respondents’ Motion for Partial Judgment on the Pleadings.

1. There is no legal basis for PhRMA Relators’ claim that part-petitions are invalid if they contain signatures struck out by someone other than the circulator or signer.

¹ Such a scenario appears to be what PhRMA Relators have in mind as they filed their challenge, under Section 1g, nearly a month after the proposed law was transmitted to the General Assembly for consideration, and have since argued that there is no need to hear the case on an expedited schedule. *See*, PhRMA Relators’ Response to Petition Respondents’ Motion to Expedite Case Scheduled, filed March 17, 2016.

PhRMA Relators' "unlawful alterations" challenge is premised on a misleading combination of excerpts from unrelated statutes. In their Complaint, PhRMA Relators attempt to fuse portions of R.C. 3501.38, which concern petition signatures, with portions of R.C. 3519.06, which concern circulator statements, to create a plainly incorrect legal theory that if signatures on a part-petition are crossed out by someone other than the circulator or signer, then the entire part-petition is invalid. There is simply no authority to support such a theory.

PhRMA Relators cite R.C. 3501.38(G) and (H) in their Complaint. Pl. Compl. ¶ 41. These provisions state:

(G) The circulator of a petition may, before filing it in a public office, strike from it any signature the circulator does not wish to present as a part of the petition.

(H) Any signer of a petition or an attorney in fact acting pursuant to section 3501.382 of the Revised Code on behalf of a signer may remove the signer's signature from that petition at any time before the petition is filed in a public office by striking the signer's name from the petition; no signature may be removed after the petition is filed in any public office.

Nowhere does the law state that signatures may be struck "only" by these listed individuals, but that is not the issue raised by PhRMA Relators' Complaint. The real issue raised in PhRMA Relators' Complaint is whether a part-petition may be invalidated in whole, including all valid signatures, on the basis that someone other than a signer or circulator struck a signature.²

PhRMA Relators incorrectly claim that R.C. 3519.06(C), when combined with R.C. 3501.38(G)-(H), provides for the invalidation of part-petitions if signatures on the part-petitions are "altered by erasure, interlineation, or otherwise." Pl. Compl. ¶¶ 39, 59. By its express terms, R.C. 3519.06(C) is limited to the alteration of the circulator statements that are at the end of each

² None of the struck signatures were counted by the county boards since they were struck prior to the petition being filed.

part-petition. It does not address, or in any way affect, the signature portion of the part-petition.

R.C. 3519.06 provides, in its entirety:

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

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

When read in its full context, it is apparent that R.C. 3519.06(C) refers to the “statement required by section 3519.05 of the Revised Code.” The statement required by R.C. 3519.05 is:

Immediately following the text of the proposed amendment must appear the following form:

I,, declare under penalty of election falsification that I am the circulator of the foregoing petition paper containing the signatures of electors, that the signatures appended hereto were made and appended in my presence on the date set opposite each respective name, and are the signatures of the persons whose names they purport to be or of attorneys in fact acting pursuant to section 3501.382 of the Revised Code, and that the electors signing this petition did so with knowledge of the contents of same. I am employed to circulate this petition by (Name and address of employer). (The preceding sentence shall be completed as required by section 3501.38 of the Revised Code if the circulator is being employed to circulate the petition.)

(Signed)

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

The plain language of R.C. 3519.06(A)-(D) refers only to the circulator statement contained in R.C. 3519.05, not to the signature portion of the part-petitions, which is filled out by the individual signers, not by the circulator. *See, State ex rel. Sinay v. Soddors*, 80 Ohio St. 3d 224, 228, 685 N.E.2d 754 (1997) (“R.C. 3519.06 specifically refers to the statement required by R.C. 3519.05”). Indeed, there is no “statement” prescribed R.C. 3519.05 for signers of a part-petition to make. Rather, they simply write their names, addresses, and date of signing.

PhRMA Relators contradict their interpretation of R.C. 3519.06 later in their Complaint when they rely upon the actual construction of R.C. 3519.06 and R.C. 3519.05. In Paragraph 61 of the Complaint, PhRMA Relators interpret the phrase “that the statement,” which appears in R.C. 3519.06(B), (C), and (D), to refer to the “circulator’s statement” required by R.C. 3519.05. Paragraph 61 of the Complaint states, in full:

61. Further, “[n]o initiative or referendum part-petition is properly verified if it appears on the face thereof * * * **[that the circulator’s] statement** is false in any respect.” R.C. 3519.06(D).

Then, in Paragraphs 66 and 75 of the Complaint, PhRMA Relators again interpret R.C. 3519.06(A) and (D)—which refer only to the same “statement” referred to by R.C. 3519.06(C)—as imposing requirements only upon the circulator statement:

66. A circulator’s failure to properly attest to the number (or proper number) of signatures on a petition is a fatal defect. Ohio law provides that a part-petition is not properly verified if the petition is either “not properly filled out” or “is false in any respect”. R.C. 3519.06(A) and (D). * * *

75. This Court must invalidate all part-petitions where the circulator statement is “not properly filled out” and/or “false.” R.C. 3519.06(A) and (D).

PhRMA Relators' subsequent reliance on the proper construction of R.C. 3519.06(A)-(D) as referring only to the circulator statement required by R.C. 3519.05 only serves to further illuminate the lack of authority for their "unlawful alterations" argument.

Leaving aside PhRMA Relators' untenable reliance on R.C. 3519.06, it is also apparent that there is no legal basis under R.C. 3501.38 to reject whole part-petitions on the basis that someone other than the signer or circulator struck a signature prior to filing the petition. The maxim *expression unius est exclusion alterius*, i.e. the expression of one thing is the exclusion of the other, would apply. *Thomas v. Freeman* (1997), 79 Ohio S.3d 221, 224-225 680 N.E.2d 997 ("if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded"). Neither R.C. 3501.38(G) nor (H) expressly provide an exception that whole part-petitions may be invalidated because they contain signatures struck out by someone other than a signer or circulator. By contrast, R.C. 3501.38(F) expressly provides two scenarios in which whole part-petitions may be invalidated—otherwise, whole part-petitions should not be invalidated:

Except as otherwise provided in section 3501.382 of the Revised Code, if a circulator knowingly permits an unqualified person to sign a petition paper or permits a person to write a name other than the person's own on a petition paper, **that petition paper is invalid**; otherwise, the signature of a person not qualified to sign shall be rejected but shall not invalidate the other valid signatures on the paper. (emphasis added).

This provision indicates that the General Assembly expressly considered when part-petitions may be invalidated: when the circulator knowingly permits an unqualified person to sign a petition, and when a circulator knowingly permits a person to write someone else's name on the petition. Under the maxim *expression unius est exclusion alterius*, the inclusion of the exception in 3501.38(F) to invalidate whole part-petitions, excludes such an exception in R.C. 3501.38(G) and (H).

In addition to lack of any legal justification, PhRMA Relators' theory also lacks any policy justification. The laws governing the petition process are meant to protect the process from election fraud, but there is no risk of fraud by crossing out signatures before they are submitted to the boards of elections. These struck out signatures—nearly all of which, PhRMA Relators admit, appear to have been otherwise invalid (Rel. Compl. ¶ 57 n.3)—were not proffered to be counted by the boards of elections. Indeed, permitting invalid signatures to be crossed out from part-petitions before they are submitted to the boards actually reduces the work-load for boards of elections and protects the integrity of the process by reducing the likelihood of boards accepting invalid signatures. As punishment for seeking to reduce the work load for elections officials and for seeking to protect the integrity of the process, PhRMA Relators propose invalidating every part-petition that contains struck out signatures. This would serve no purpose other than to silence the voices of every other signer on the part-petition.

Moreover, PhRMA Relators' theory would completely upend Ohio's petition circulation process. Every state and local candidacy and initiative petition would be subject to this new rule, which would seemingly require boards of elections to subpoena petition circulators and signers whenever a struck out signature appears on a part-petition in order to determine who struck the signature, and then throw out a whole part-petition if the signer and circulator testify that they did not strike the signature.

The answer to PhRMA Relators' legal question is clear: nowhere does the law state that entire part-petitions must be invalidated if someone other than the three individuals listed in R.C. 3501.38(G)-(H) strikes out a signature. The Complaint misleadingly combines R.C. 3501.38 with an entirely unrelated provisions, R.C. 3519.06(C), which addresses only circulator statements, to

create their legal theory. Accordingly, PhRMA Relators can prove no set of facts that would entitle them to relief on this claim.

2. PhRMA Relators' argument that whole part-petitions should be invalidated solely because the circulator statement over-reports the number of signatures appearing on the part-petition has been repeatedly rejected by this Court.

In their “circulator statements” challenge, PhRMA Relators resurrect an argument that, for more than two decades, has been repeatedly rejected by the Court and by all of the Ohio Secretaries of State. There is long-standing case law that provides that a part-petition should not be invalidated solely because the number of signatures attested to in the circulator statement is greater than the number of signatures appearing on the part-petition. Indeed, Ohio Secretaries of State, including Respondent Secretary, have consistently provided this same instruction to boards of elections. Yet, in their complaint, PhRMA Relators ignore this precedent and manufacture exceptions to contend that the Court, here, should invalidate part-petitions because the number in the circulator statement is higher than the number of signatures appearing on the part-petitions. Rel. Compl. ¶¶ 62, 71-75. There is no authority to support PhRMA Relators’ “circulator statements” challenge, and the Court should, therefore, dismiss this challenge.

The Ohio Constitution does not require circulators to attest to the number of signatures appearing on the part petition. Article II, Section 1g of the Ohio Constitution provides only that circulators attest to witnessing the affixing of every signature. Rather, the requirement at issue in the Complaint comes from R.C. 3501.38(E)(1). This section provides:

On each petition paper, the circulator shall indicate the number of signatures contained on it, and shall sign a statement made under penalty of election falsification that the circulator witnessed the affixing of every signature, that all signers were to the best of the circulator's knowledge and belief qualified to sign, and that every signature is to the best of the circulator's knowledge and belief the signature of the person whose signature it purports to be or of an attorney in fact acting pursuant to section 3501.382 of the Revised

Code. On the circulator's statement for a declaration of candidacy or nominating petition for a person seeking to become a statewide candidate or for a statewide initiative or a statewide referendum petition, the circulator shall identify the circulator's name, the address of the circulator's permanent residence, and the name and address of the person employing the circulator to circulate the petition, if any.

The Court has explained that the circulator is required to complete the circulator statement, but also that this provision “does not expressly mandate a correct signature total.” *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections*, 65 Ohio St. 3d 167, 173 (1992).³

PhRMA Relators also cite R.C. 3519.06(A) and (D), in conjunction with R.C. 3501.38(E), for the proposition that whole part-petitions must be invalidated because the circulator statement over-reports the number of signatures appearing on the part-petition. Rel. Compl. ¶¶ 61, 66, 75. This provision, as explained *supra*, requires that the statement required by R.C. 3519.05 be “properly filled out” and not “false in any respect.” PhRMA Relators cite no authority in their Complaint to support their mishmash of R.C. 3519.06 and R.C. 3501.38(E)(1), and Petition Respondents have been unable to find any case law that supports such a theory. Instead, nearly every case citing R.C. 3519.06 involved whether a circulator was required to report if they were compensated and/or whether, in fact, the circulator properly reported that they were compensated.⁴ Further, and as explained *infra*, such an interpretation would be entirely inconsistent with this Court’s well-settled case law that part-petitions should not be invalidated solely because the circulator statement over-reports the number of the signatures appearing on the part-petition.

a. It is well-settled case law that part-petitions cannot be rejected because the circulator statement indicates that it contains more signatures than it does.

³ In contrast to the Court’s clear holding, Relators incorrectly contend that R.C. 3501.38(E)(1) strictly mandates that the circulator statement contain the correct signature total. Rel. Compl. ¶¶ 60, 64, 66.

⁴ *See, Rothenberg v. Husted*, 129 Ohio St. 3d 447, 2011-Ohio-4003, 953 N.E.2d 327; *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979; *State ex rel. Comm. for the Charter Amendment Petition v. City of Hamilton et al*, 93 Ohio St.3d 508 (2001); *State ex rel. Sinay et al., v. Soddors, et al.*, 80 Ohio St.3d 224 (1997); *State ex rel. Spadafora v. Toledo City Council*, 71 Ohio St.3d 546 (1994); *State ex rel. Hodges v. Taft*, 64 Ohio St.3d 1 (1992).

Circulator statements present four possible scenarios, all of which have clear legal outcomes. First, the circulator statement could contain the correct number of signatures; such a circulator statement clearly would be valid. Next, the circulator statement could be left blank entirely. This was the issue in *Loss v. Bd. of Elections of Lucas Cty.*, where the Court held that an entire part-petition is invalid if the circulator statement is left blank, and explained that this statement “is a protection against signatures being added later.” 29 Ohio St. 2d 233, 234 (1972) (interpreting a similar requirement under R.C. 3513.07). Another scenario is that the circulator could indicate *fewer* signatures in the circulator statement than the actual number of signatures appearing on the part-petition. This was the issue in *Rust v. Lucas Cty. Bd. of Elections*, where the Court affirmed the Ohio Secretary of State’s interpretation of R.C. 3501.38(E)(1) that if the number indicated by the circulator is less than the actual number of signatures, then the entire part-petition is invalid. 108 Ohio St. 3d 139, 2005-Ohio-5795, 841 N.E.2d 766, ¶¶ 12-13.

The fourth possible scenario is the issue raised by the Complaint: on some part-petitions, the circulator indicated a *higher* number of signatures in the circulator statement than the actual number of signatures appearing on the part-petition. Rel. Compl. ¶ 62. Once again, the law is well-settled on this issue. In *State ex rel. Citizens for Responsible Taxation v. Scioto Bd. of Elections*, the Court affirmed the Ohio Secretary of State’s interpretation of R.C. 3501.38(E)(1) that a part-petition is not invalid if the number of signatures in the circulator statement is higher than the total number of signatures on the part-petition. 65 Ohio St. 3d 167, 172-173 (1992). The Court reasoned that, unlike when the number of signatures in the circulator statement is *lower* than the total number of signatures on the part-petition, this type of error “does not promote fraud.” *Id.* at 172 *citing State ex rel. Loss v. Bd. of Elections of Lucas Cty.*, 29 Ohio St. 2d 233 (1972). The Court reiterated this holding in *State ex rel. Wilson v. Hisrich*, stating

We held in [*State ex rel. Citizens for Responsible Taxation*], that **so long as the stated total is not less than the number of signatures, as is the case here, there is no violation.**” 69 Ohio St. 3d 13, 16 (1994).

Accordingly, the case law is well-settled on the issue raised by the Complaint: so long as the stated total of signatures in the circulator statement is not less than the number of signatures appearing on the part petition, then there is no violation.

b. PhRMA Relators’ Complaint manufactures an unsupported, multi-pronged test to determine whether part-petitions can be invalidated solely because the circulator statement indicates that it contains more signatures than it does.

In their Complaint, PhRMA Relators distort the Secretary of State’s instructions and long-standing case law to manufacture a multi-pronged test to determine whether a part-petition can be invalidated solely because the circulator statement indicates that it contains more signatures than it does. Rel. Compl. ¶ 71 (“The Secretary’s Elections Manual and this Court’s precedent only allow for minor, isolated discrepancies that were the product of arithmetic error, where there is a reasonable explanation provided, and the potential for fraud is not promoted”). Indeed, a side-by-side comparison shows just how dramatic PhRMA Relators’ distortion of the law is:

Ohio Election Official Manual

“If the number of signatures reported in the statement is equal to or greater than the number of signatures not crossed out on the part-petition, then the board does not reject the part-petition because of the inconsistent signature numbers. Instead, the board must review the validity of each signature as usual.” Page 11-9

State ex rel. Wilson v. Hisrich

“We held in [*Citizens for Responsible Taxation*], that so long as the stated total is not less than the number of signatures, as is the case here, there is no violation.” 69 Ohio St. 3d 13, 16 (1994).

PhRMA Relators’ Complaint, ¶ 71

If the number of signatures reported in the statement is greater than the number of signatures crossed out on the part-petition, then the part-petition can be accepted only if:

- 1) The discrepancies are minor and isolated;
- 2) The discrepancies were the product of arithmetic error;
- 3) There is a reasonable explanation provided for the discrepancies; and
- 4) Allowing for the discrepancies would not promote fraud.

There is no authority for PhRMA Relators' argument. Their proposed multi-prong test seems to stem from the Court's dicta in *Citizens for Responsible Taxation*. There, the Court interpreted *Loss* as implying that "arithmetic error" would be tolerated, as long as it does not promote fraud. 65 Ohio St. 3d at 172.⁵ However, the Court's reference to "arithmetic error" is pure dicta. The *Loss* Court never mentioned "arithmetic error," and it involved only a circulator statement that was left blank. Indeed, the Court was speculating that arithmetic error was a possible rationale as to why the Secretary instructed boards to invalidate part-petitions only where the circulator states a number less than the total number of uncrossed out signatures appearing in the part-petition. *Id.* Again, the Court in *Citizens for Responsible Taxation* ultimately overturned a board's decision to reject part-petitions where the number in the circulator statement was higher than the number of signatures appearing on the petition. *Id.*

PhRMA Relators' cite a number of cases, but none of these support their contention. They all involve factually different circumstances that invoke different legal requirements. In Paragraph 64, PhRMA Relators cite *State ex rel. Barton v. Butler Cty. Bd. of Elections*, 44 Ohio St. 2d 33, N.E.2d 849 (1975), which involved a complete omission of the circulator statement, and also cite *State ex rel. Comm. for the Referendum of Lorain Ordinance No. 77-01 v. Lorain Cty. Bd. of Elections*, 96 Ohio St.3d 308, 2002-Ohio-4194, 774 N.E.2d 239 and *Prince v. Franklin County Bd. of Elections*, 10th Dist. No. 98AP-495, 1998 Ohio App. LEXIS 6290 (De. 24, 1998), both of which involved whether circulators falsely attested to witnessing every signature on a part-petition. In Paragraph 65, PhRMA Relators cite *Loss* and *Rust*, neither of which, as discussed *supra*, involve

⁵ The Court stated, "R.C. 3501.38(E), however, does not expressly mandate a correct signature total, and *Loss* implies that arithmetic error will be tolerated, but only if the error does not promote fraud. Indeed, *Loss* may explain why the Secretary of State instructed respondents here to reject an entire part-petition only where the circulator states a number "less than the total number of *uncrossed out* signatures" (emphasis *sic*) and to, in effect, overlook discrepancies in the number of signatures "in all other instances."

the same factual circumstances presented here. PhRMA Relators also cite Ohio Attorney General Opinion No. 1989-049, which involved a question of whether a circulator could leave the circulator statement blank, and cite *State ex rel. Applegate v. Franklin Cty. Bd. of Elections*, No. C2-08-092, 2008 U.D. Dist. LEXIS 8886 (S.D. Ohio Feb. 6, 2008), which involved a question of whether circulator statements indicated less signatures than the petition contained. In Paragraph 72, PhRMA Relators cite *State ex rel. Curtis v. Summit County Bd. of Elections*, 144 Ohio St. 3d 405, 2015-Ohio-3787, 44 N.E.3d 261, which involved a question of whether a circulator statement indicated less signatures than the petition contained; *State ex rel. Schwarz v. Hamilton Cty. Bd. of Elections*, 173 Ohio St. 321 (1962), which also involved a question of whether circulator statement indicated less signatures than the petition contained; and PhRMA Relators cite *State ex rel. Citizens for Responsible Taxation*, which, as explained *supra*, plainly affirmed that part-petitions should not be invalidated because the circulator statement indicates a higher number of signatures the part-petition contains. This is a comprehensive list of the authority cited by PhRMA Relators in their Complaint—none of which support their contention.

That PhRMA Relators' multi-pronged test has been newly manufactured is further evidenced by a recent tie-breaking decision issued by Respondent Secretary, in which he was confronted with the same issue. *See*, Ohio Secretary of State, *Tie Vote on February 11, 2015 on Motion to Invalidate Josh Ford's Nominating Petition for City Council*, available at <http://www.sos.state.oh.us/sos/upload/elections/tievotes/2015/2015-02-23-pickaway.pdf>. In 2015, the Pickaway County Board of Elections tied 2-2 on whether or not to invalidate two part-petitions that contained circulator statements with numbers higher than the number of actual signatures appearing on the part-petitions. *Id.* One part-petition contained twenty-one (21) signatures and the circulator statement said it contained twenty-five (25) signatures, for a

difference of four (4). *Id.* The other part-petition contained eight (8) signatures and the circulator statement said it contained twenty-five (25) signatures, for a difference of seventeen (17). *Id.* In breaking the tie *to count* these part-petitions, Respondent Secretary explained:

It is **well-settled law** that a board of elections cannot reject a part-petition solely because the circulator statement indicates that it contains more signatures than it does. Further, **I have consistently instructed** boards of elections that when examining and verifying candidate petitions:

If the number of signatures reported in the statement is equal to or greater than the total number of signatures not crossed out on the part-petition, then the board does not reject the part-petition because of the inconsistent signature numbers. Instead, the board must review the validity of each signature as usual.

Example: The circulator's statement indicates that the circulator witnessed 22 signatures, but there are only 20 signatures on the petition.

In light of this instruction and the long-standing case law, I break the tie in favor of validating Mr. Ford's petition and certifying him as a candidate for third ward councilman in the City of Circleville. *Id.* at 2 (emphasis added).

None of the factors mentioned in PhRMA Relators' proposed multi-pronged test are discussed in Respondent Secretary's tie-breaking decision. Respondent Secretary did not distinguish between the part-petition with a difference of four (4) signatures and the part-petition with a difference of seventeen (17) signatures; the latter would surely be more than mere "arithmetic error" as PhRMA Relators define it. Further, Respondent Husted was not bothered that all of the part-petitions submitted by this candidate contained discrepancies. Moreover, Respondent Secretary did not request an explanation as to why all of the candidate's part-petitions contained these discrepancies. Instead, Respondent Secretary referred only to the "well-settled"

and “long-standing” case law, and his “consistent instructions” to boards that part-petitions cannot be rejected because the circulator statement indicates that it contains more signatures than it does.

As Respondent Secretary explained in this tie-breaking decision, it is “well-settled” and “long-standing” case law that part-petitions cannot be rejected because the circulator statement indicates that it contains more signatures than it does. The Complaint contends that this is not the correct standard, and that, instead, there is a multi-pronged test the Court must apply. PhRMA Relators’ contention is without any legal authority, and, therefore, PhRMA Relators can prove no set of facts that would entitle them to relief.

III. CONCLUSION

For the reasons set forth above, Petition Respondents respectfully request that this Court grant their Motion for Judgment on the Pleadings, or in the alternative, their Motion for Partial Judgment on the Pleadings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by e-mail on March 30, 2016, upon the following:

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