

**IN THE SUPREME COURT OF OHIO**

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

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**RELATORS' RESPONSE TO 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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**I. INTRODUCTION**

Respondents William S. Booth, Daniel L. Darland, Tracy L. Jones, and Latonya D. Thurman (the “Committee”) have filed a motion for judgment on the pleadings, contending that this Court is without jurisdiction to preside over a proceeding challenging signatures on an initiative petition. As discussed in Section II.A below, the Constitution gives this Court original, exclusive jurisdiction over all challenges to statewide initiative petitions.

The Committee then makes an alternative motion for partial judgment on the pleadings concerning two of the four legal claims raised in Relators’ Challenge. The Committee contends that altered part-petitions should not be disqualified, even though the Committee and/or its agents struck thousands of signatures after the circulators had signed and turned in the part-petitions. The Committee also claims that part-petitions should be counted even though numerous circulators certified their part-petitions had 28 valid signatures when those part-petitions never contained that many signatures. As discussed in Section II.B below, these part-petitions violate Ohio law, promote fraud, and cannot be counted.

**II. LAW AND ARGUMENT**

**A. This Court Has Jurisdiction To Resolve Challenges To Statewide Initiative Petitions.**

The Committee is attempting to strip this Court of its original, exclusive jurisdiction over all statewide petitions granted to it by the Ohio Constitution. The disjointed theory espoused by the Committee is that Article II, Section 1g of the Ohio Constitution applies to all statewide initiative, supplementary, and referendum petitions—except for the first round of signatures

gathered for an initiative petition proposing a new law. The Committee posits that any action concerning that subpart of an initiative petition must be filed as a mandamus, prohibition, or declaratory judgment action rather than a challenge.

This creative argument must be rejected for several reasons. First, the plain language of Article II, Section 1g of the Ohio Constitution provides that this Court has jurisdiction over *all* initiative petitions. There is no carve-out or exception for the first set of signatures gathered for an initiated statute. Second, the Committee and its counsel have stated on multiple occasions—including before this Court—that anyone seeking to challenge their Petition must do so in this Court in a protest or challenge action. Third, adopting the Committee’s argument would result in no check on statewide initiative petitions—turning Ohio into the wild west of petition drives.

**1. A plain reading of the Ohio Constitution provides that this Court has jurisdiction to hear challenges to all statewide initiative petitions.**

The Committee contends that Article II, Section 1g of the Ohio Constitution does not apply to “petitions proposing laws to the General Assembly.” (Motion for Judgment on the Pleadings at 2.) But a plain reading of Sections 1b and 1g of Article II dispels this argument.

The starting point in the analysis is Section 1b itself. That section states:

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 percent 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 said proposed law shall be passed by the general assembly, either as petitioned for or in an amended form, it shall be subject to the *referendum*. 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 to 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* \* \* \*. (Emphasis added).

Section 1b therefore lays out components for an initiative petition—a petition “proposing a law”—including an original petition, and then potentially a supplementary petition.

Section 1g provides further requirements for initiative petitions, including clear language vesting jurisdiction in this Court. The first two sentences of Section 1g set forth its scope:

*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 items 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. \* \* \*

Section 1g then states in clear and unequivocal language: “*The Ohio supreme court shall have original, exclusive jurisdiction over all challenges made to petitions and signatures upon such petitions under this section.*” (Emphasis added.) A petition “under this section” includes “any *initiative . . . petition.*” (Emphasis added.)

Sections 1b and 1g are part of a larger scheme or process consolidating review of all initiative petitions in this Court. Revised Code 3519.01 provides for several steps before signatures can be gathered on an initiative petition, including (1) an examination and certification of the proposed law by the attorney general; and (2) certification by the ballot board. R.C. 3519.01(A), (B). “Any person who is aggrieved” by an action of the attorney general or ballot board may file in this Court, “which shall have exclusive, original jurisdiction in all challenges of those certification decisions.” R.C. 3519.01(C). This buttresses the conclusion that all legal challenges related to statewide initiative petitions must be filed in this Court.

There can be no dispute that what the Committee filed with the Secretary of State (“Secretary”) was an initiative petition. In the mandamus action the Committee recently filed in this Court on March 25, 2016, the Committee repeatedly referred to its petition as an “initiative

petition.” *Jones v. Husted*, Case No. 2016-0455, Complaint ¶ 2 (defining “Petition” to include the part-petitions “of the initiative petition proposing the Ohio Drug Price Relief Act”). And the top of the petition itself states it is an “Initiative Petition”:

## **INITIATIVE PETITION**

Law Proposed by Initiative Petition First to be Submitted to the General Assembly.

### **TITLE**

**Ohio Drug Price Relief Act**

While this Court’s jurisdiction covers all initiative petitions, the Committee claims that the use of the word “election” in Section 1g implies an intention to only permit challenges to initiative petitions that are intended to be placed on a “ballot.” The Committee then makes the illogical leap, that since there is no election “for petitions seeking to propose a law to the General Assembly” there can be no challenge to petitions and signatures at this stage. (Motion for Judgment on the Pleadings at 4.)

But this interpretation is at odds with the plain language of Article II of the Constitution, and interjects needless ambiguity into what is plain and straightforward language. The Committee does this by fusing two unrelated topics: the Court’s jurisdiction and the deadlines to take action.

The linchpin of the Committee’s argument is the use of the term “before the election” in Section 1g. But the words “before the election” do not appear in the Constitutional grant of jurisdiction to this Court. Rather, every use of the term “before the election” in Section 1g is related to setting a deadline by which someone—the Committee, the Secretary, Relators, this Court, or others—must take some form of action in relation to the Petition. None of these deadlines have any bearing on the Court’s jurisdiction over initiative petitions—both original and

supplementary initiative petitions—which, by the plain terms of Section 1g, is “original” and “exclusive.”

Previously the Committee argued that there is *one* process, which involves both the original petition and a supplementary petition, and that the goal was to get the Petition “submitted to the electors at the November 8, 2016 general election.” *See Jones v. Husted*, Case No. 2016-0020, Motion to Expedite at 3. Indeed, the Committee has stated—both in this case and in its prior mandamus action—that there is a “Constitutional scheme” detailing “each step in the process” for “proposing a law by initiative petition,” and which according to the Committee, includes having “the proposed law . . . submitted to the electors at the next general election occurring subsequent to 125 days following the filing of the final second petition.” Motion to Expedite at 2; *Jones v. Husted*, Case No. 2016-0020, Motion to Expedite at 3. It seems strange, therefore, for the Committee to reverse course a few weeks later and now contend that its efforts, at least at this stage, are not an integral part of an initiative petition to be placed on the ballot.

**2. The Committee has represented that Relators’ sole remedy is a challenge or protest action in this Court.**

What’s more, on multiple occasions, the Committee has represented that this challenge action is appropriate and lawful. Prior to filing its motion for judgment on the pleadings, the Committee’s position was that a challenge or protest was not only appropriate and lawful, but was the *only* way for Relators to obtain relief.

On January 6, 2016, the Committee filed a mandamus action in this Court, captioned *Jones v. Husted*, Case No. 2016-0020, wherein it sought a writ of mandamus to compel the Secretary to cease the re-review of the Petition and compel him to immediately transmit the Petition to the General Assembly. Calling the Secretary’s duty to review the sufficiency of the Petition merely “ministerial,” the Committee complained about Relator PhRMA’s letter to the

Secretary, which brought to light some of the issues that ultimately formed the basis for this challenge. In so complaining, the Committee took the position that *“Petition challenges, such as those set forth in the PhRMA letter referenced above, are committed to the exclusive and original jurisdiction of this Court as provided in Art. II, § 1g, of the Ohio Constitution.”* *Jones v. Husted*, Case No. 2016-0020, Complaint ¶ 22 (emphasis added).

Three weeks later, during the January 25, 2016 hearing conducted by the Delaware County Board of Elections to review part-petitions submitted in that county, counsel for the Committee said the same thing—that the Secretary and boards of elections had no right or duty to undertake a review of the signatures and part-petitions because the exclusive jurisdiction to do so belonged to this Court:

MR. COLOMBO: \* \* \* In this particular case, PhRMA mounted a statewide effort to raise two issues on the petition, which you know what they are because they’re described in the directive. *But what should have happened is anyone who feels they’ve been or are in disagreement with the petition, the correct action now is the constitution has been changed so the Supreme Court has original jurisdiction to hear issues so that the 88 county boards are not deciding the same set of issues.*

*That’s what should have happened here.* \* \* \* (Emphasis added.)

(See Tr. of Delaware Board of Elections hearing at 131-132, attached as Exhibit P to Petition Challenge.)

Under questioning by one of the members of the Delaware County Board of Elections, the Committee’s counsel again opined that all challenges to the Petition were required to be filed in this Court:

MR. STEVENS: How do you believe – so I think you catagorized this as an unprecedented situation where this has been sent back to the counties for re-review.

How would you have liked to – explain again how you would like to have seen this happen if you were Secretary of State.

MR. COLOMBO: If I were Secretary of State and I received an e-mail from PhRMA . . . , I would say the constitution has been changed in the last ten years. *The Supreme Court has original exclusive jurisdiction to handle what essentially is a protest here. And you can file a lawsuit with the Supreme Court. And the Supreme Court will decide the issue for all the boards.*

MR. STEVENS: And where would the evidence be collected?

MR. COLOMBO: The evidence would be collected from –it would be a court case, so they could – whoever is challenging the results, whether it’s PhRMA or someone else, *can gather the data and submit it as evidence to the Supreme Court.* (Emphasis added.)

(*Id.* at 142-143.)

Time and again, the Committee has represented to this Court, to the Secretary, and to the boards of elections that the issues Relators raised must be filed as a challenge (or protest) proceeding in this Court. The Committee’s prior position was correct: this Court is the proper body to resolve all challenges to statewide petitions.

**3. Dismissing this case would leave those who seek to challenge original initiative petitions with no remedy and lead to unchecked abuses in statewide petitions.**

If the Committee’s position is adopted, it would leave Relators, and others like them, with no remedy to challenge signatures and part-petitions on an original initiative petition. While the Committee suggests, without presenting any argument whatsoever, that “mandamus, prohibition, and declaratory judgment remedies remain as remedies, either in this Court or in trial courts,” (Motion for Judgment on the Pleadings at 6), that is simply not correct.

This Court has previously ruled in *State ex rel. Scioto Downs, Inc. v. Brunner*, 123 Ohio St.3d 24, 2009-Ohio-3761, 913 N.E.2d 967, that mandamus relief is inappropriate after the Secretary has determined the sufficiency of the signatures on a statewide initiative petition. This is because, after certification, the Secretary has no further duty or authority to invalidate part-

petitions and signatures. *Id.* at ¶ 22 (“the time for the secretary’s sufficiency determination of the signatures in the petition has now expired, and neither she nor the boards of elections have any further duty or authority after certification under the Constitution or any statute to invalidate additional part-petitions or signatures”). The Secretary verified the signatures on the Petition and transmitted the Petition to the General Assembly on February 4, 2016. Accordingly, as of that date, mandamus relief was no longer appropriate. The sole remedy available is a challenge in this Court under Article II, Section 1g.

Likewise, a writ of prohibition is not proper because the Secretary did not exercise quasi-judicial power and did not exceed his jurisdiction. Declaratory relief is insufficient because there is no right or obligation of a party to be declared, and that relief alone would not result in the affected part-petitions being stricken and affected signatures being uncounted.

The Committee has already argued that neither the Secretary nor the boards have the authority to review the issues raised by Relators. Now the Committee argues that judicial review should also be prohibited. Since mandamus, prohibition, and declaratory relief are not applicable, if this Court now holds that a Section 1g challenge is unavailable, the practical effect will be to ensure that no original initiative petition will ever be subject to any level of meaningful review by either the judicial or administrative branches. This is no doubt the goal of the Committee and fits squarely into its strategy employed here where the Petition was delivered to the Secretary on December 22, 2015 to be reviewed and verified over the Christmas and New Year holidays.

If no review by this Court is permitted, future petition-circulation companies will be aware that there is no review of anything they do. Hence, any unlawful conduct will continue unchecked and unhindered. Being paid for every signature collected without court overview will

increasingly incentivize abuse, including inventing elector names or falsifying elector signatures. Ohio will lose all control over what ends up on the ballot, and more importantly, how it gets there.

The effect of this was recently seen in the investigation of ResponsibleOhio, where there were reports by election officials of fraudulent registrations, non-existent addresses, illegible signatures, duplicate applications from the same address, and underage registrants. Yet, the initiative was presented to the voters. Here, Relators want to ensure that the Petition complies with Ohio law and has sufficient valid signatures before it is proceeds through the initiative process.

The Secretary, boards of elections, the Committee, Relators, and the Court all have an interest in determining the sufficiency and legality of the Petition on the front end, before supplementary signatures are collected.

Accordingly, for these reasons, this Court has jurisdiction over Relators' challenge to the Petition and the Committee's motion seeking dismissal of this challenge should be denied.

**B. The Motion For Partial Judgment On The Pleadings Should Be Denied Because The Facts Alleged By The Relators—Which Are Presumed True—Reflect Widespread Irregularities and Potential Fraud That Requires The Affected Part-Petitions To Be Stricken.**

It is axiomatic that, when considering a motion to dismiss or motion for judgment on the pleadings, a court is required to presume the truth of all factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiff (here Relators). *See State ex rel. Rashada v. Pianka*, 112 Ohio St.3d 44, 2006-Ohio-6366, 857 N.E.2d 1220, ¶ 2. A court cannot dismiss an action unless the plaintiffs could prove no set of facts warranting the requested relief. *Id.* Here, the Court cannot grant judgment on the pleadings unless the Relators can prove no set of facts warranting the relief requested (i.e., the invalidation of signatures and part-petitions).

**1. Widespread alterations on part-petitions by the Committee and/or its agents, presumed to be true, would require the affected part-petitions to be stricken.**

Relators have alleged that thousands of part-petitions submitted by the Committee contain unlawful alterations, including the striking of signatures by unauthorized persons. This factual allegation must be presumed true for purposes of the Committee's motion. This allegation, if proven true, would require the striking of all affected part-petitions.

The Committee claims that Relators' argument is based on a "misleading combination of" various portions of the Revised Code. This is not so. It is R.C. 3501.39 that "combines" and refers to other sections of the Revised Code. Section 3501.39(A)(3) states "[t]he secretary of state or a board of elections shall accept any petition described in section R.C. 3501.38 of the Revised Code *unless . . . the petition violates the requirements of this chapter*, chapter 3513 of the revised Code, *or any other requirement established by law.*" (Emphasis added.) Multiple provisions of the law were violated here, including: (1) R.C. 3519.05 and .06, and (2) R.C. 3501.38(G) and (H).

Revised Code 3519.06(C) states that "[n]o *initiative* or referendum part-petition *is properly verified* if it appears on the face thereof, or is made to appear by satisfactory evidence . . . [t]hat the statement is *altered by erasure, interlineation, or otherwise*[".]" (Emphasis added.) While the Committee attempts to limit the word "statement" to the "circulator statement," the word "statement" as used in R.C. 3519.06(C) is the statement required by R.C. 3519.05. R.C. 3519.05, in turn, describes the *entirety of the initiative part-petition*; not just the circulator statement alone. *See* R.C. 3519.06(A), (B); *In re Protest of Brooks*, 155 Ohio App. 3d 370,

2003-Ohio-6348, ¶¶ 33-41 (3rd Dist.) (Cupp, J.) (holding the entire part-petition is invalid if it fails to comply with R.C. 3519.05 and 3519.06).

In addition to R.C. 3519.05 and 3519.06, the part-petitions also violate R.C. 3501.38(G) and (H). Those sections authorize only three people to strike signatures from a petition before it is filed: (1) the circulator; (2) the signer; or (3) an attorney in fact acting pursuant to R.C. 3501.382. Alteration of a part-petition by someone other than the circulator after the part-petition has been signed and is complete violates R.C. 3519.05 and 3501.38(G) and (H). Accordingly, the affected part-petitions are not “properly verified” and cannot be accepted.

The Committee attempts to argue that R.C. 3501.38(G), and (H) should not be construed as setting forth the *only* individuals who are permitted to strike a signature from a petition. (Motion for Judgment on the Pleadings at 7.) That is, they claim the list in R.C. 3501.38(G) and (H) is non-exclusive, non-exhaustive, and merely advisory. But that is not a cogent or reasonable interpretation of R.C. 3501.38. The doctrine of *expressio unius est exclusio alterius* provides that the expression of one or more class of things implies that those not expressly stated are excluded. *State v. Droste*, 83 Ohio St.3d 36, 39, 697 N.E.2d 620 (1998). The express delineation of individuals who *are* permitted to strike a signature from a part-petition necessarily warrants the common sense conclusion that the legislature intended it to be unlawful for anyone else to do so.

To find an example supporting this type of interpretation, this Court need look no further than its own Rules of Practice. S.Ct.Prac.R. 12.04(B)(1) states: “[t]he respondent may file a motion for judgment on the pleadings at the same time an answer is filed.” Under the Committee’s flawed manner of interpretation, “Rule 12.04(B)(1) does not state that a motion for judgment on the pleadings cannot also be filed at other times; only that it may be filed at the

same time as an answer is filed.” But this Court has interpreted this language as providing that a motion for judgment on the pleadings *must* be filed, if at all, contemporaneous with an answer. *See, e.g., State ex rel. Johnson v. Richardson*, 131 Ohio St.3d 120, 2012-Ohio-57, 961 N.E.2d 187, ¶ 11, citing *State ex el. Van Landingham v. Lucas Cty. Bd. of Elections*, 94 Ohio St.3d 1509, 764 N.E.2d 1038 (2002) and *State ex rel. Toledo v. Lucas Cty. Bd. of Elections*, 95 Ohio St.3d 73, 74, 2002-Ohio-1383, 765 N.E.2d 865.

The allegations in the Petition Challenge and exhibits filed therewith, including evidence adduced by various boards of elections, must be presumed true at this stage of the proceeding and paint a troubling picture of how the Petition was circulated and submitted:

- Of the 10,032 part-petitions submitted statewide, approximately 5,598 of them were uniformly altered by someone striking through signatures on the part-petition using a thick black magic marker. (*See* Petition Challenge ¶ 40 and Exhibits M-1 through M-11 and Exhibits N-1 through N-3 thereto.)
- Sworn testimony received by several county boards of elections showed that signatures that had been stricken on part-petitions were not stricken by the circulator, signer, or an attorney in fact, and that there were no interlineations or stricken signatures present when the circulators submitted their part-petitions. (*See* Petition Challenge ¶ 42.)
- Pamela Lauter (“Lauter”) was the “coordinator” hired by lead contractor PCI Consultants, Inc. (“PCI”), and also worked for other petition circulation companies, including Ohio Petitioning Partners, LLC (“OPP”) and DRW Campaigns LLC (“DRW”). Before the Cuyahoga County Board of Elections, she testified under oath that she personally struck signatures from part-petitions, calling it “purging” or

“purging the deck.” (*See* Petition Challenge ¶¶ 43, 45-46 and Exhibit O thereto at 125-127 and 148.)

- PCI advertises that it will “actively cross off all invalid signatures by hand” with their “proprietary database system” for the purpose of saving “money by not paying for unnecessary invalid signatures.” (*See* Petition Challenge ¶¶ 50-51 and Exhibits E and Q thereto.)
- Circulator Deborah Hill testified before the Delaware County Board of Elections that “every single petition in this state has been put through” a “purging process.” (*See* Petition Challenge ¶ 44 and Exhibit P thereto at 35.)
- While Lauter and others have defended their practice by stating that they were merely removing “bad” or invalid signatures from the Petition, the Butler County Prosecutor determined that only 79.59% of the marked-out signatures in Butler County were actually invalid. (*See* Petition Challenge ¶ 57 and footnote 3.)
- When asked by Cuyahoga County Board of Elections Member Jeff Hastings about whether state elections officials should be the ones making the determination of whether signatures are “bad” and do not count, Lauter responded: “Well, now see, that’s where there was a grey area that maybe we were all taught improperly from the beginning.” (*See* Petition Challenge ¶ 46 and Exhibit O thereto at 138-139.)
- The Secretary invalidated thousands of part-petitions submitted in Cuyahoga County based on the testimony of Lauter, which the Secretary found to be “reliable, substantive evidence.” The Secretary also observed it was unlikely that these “improper practices by DRW and OPP under the direction of PCI were limited to” Cuyahoga County. (*See* Petition Challenge ¶ 48 and Exhibit E thereto.)

If these facts are proven to be true, the law clearly requires the affected part-petitions to be rejected and not be counted. Accordingly, the Committee's motion for partial judgment on the pleadings should be denied.

**2. A part-petition that contains a knowingly false attestation must be stricken.**

A circulator's failure to provide an accurate count of the signatures gathered on a part-petition renders invalid the entire part-petition. Ohio law states that the circulator of any petition:

*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[.] (Emphasis added.)

R.C. 3501.38(E); *see also* R.C. 3519.05(A).

This Court has repeatedly held that the requirement for a circulator to attest to the number of signatures collected is a *mandatory requirement* subject to *strict*, not substantial, *compliance*: “We hold that the inclusion of the circulator's statement as required by R.C. 3501.38(E) must be strictly complied with.” *State ex rel. Barton v. Bd. of Elections*, 44 Ohio St.2d 33, 35, 336 N.E.2d 849 (1975); *see also 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; *Prince v. Franklin Cty. Bd. of Elections*, 10th Dist. Franklin No. 98AP-495, 1998 Ohio App. LEXIS 6290, \*14 (Dec. 24, 1998) (“Although there is no *mens rea* requirement under R.C. 3501.38(E), where a circulator attests that he witnessed all signatures on a part-petition when in fact he knows he did not, he cannot be attesting to such a statement in a manner other than knowingly.”).

This Court has noted that the requirement that “the circulator state in the jurat the number of signatures personally witnessed by him, is a protection against signatures being added later” and “[a]s such, it is a substantial, reasonable requirement.” *State ex rel. Loss v. Bd. of Elections*, 29 Ohio St.2d 233, 281 N.E.2d 186 (1972); *see also Rust v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 139, 2005-Ohio-5795, 841 N.E.2d 766; 1989 Ohio Atty. Gen. Ops. No. 49 (“The requirement that the circulator indicate the number of signatures is now an express legislative directive in R.C. 3501.38(E).”).

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.” *See* R.C. 3519.06(A), (D).

The Committee’s attempt to salvage part-petitions on which a circulator attests to witnessing more signatures than are actually affixed is flawed. The Committee argues that this Court has always authorized overcounts on the circulator statement—without exception or limitation. But that is an erroneous characterization of Ohio law. One need not scratch far beneath the surface of the Committee’s arguments to see how misplaced and dangerous such a far flung interpretation of Ohio law would be.

The Committee is incorrect in stating that part-petitions cannot be rejected if there is an overcount. It seeks to create a bright-line rule that would require boards of elections to rubber stamp all overcounts, no matter the reason for, or prevalence of, the overcount. In its attempt to distort the law to permit its own misconduct, the Committee selectively quotes this Court’s holding in the watershed case on the issue, *State ex rel. Citizens for Responsible Taxation v. Scioto County Bd. of Elections*, 65 Ohio St.3d 167, 172, 602 N.E.2d 615 (1992). The Committee contends:

“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.” (Emphasis added.)

(Motion for Judgment on the Pleadings, at 14.)

But *Citizens for Responsible Taxation* does not stand for the blanket proposition that overcounts do not promote fraud. Quite the contrary, and critical to the facts of this case, *Citizens for Responsible Taxation* stands for the proposition that an overcount will be tolerated in situations of *arithmetic error*, but *only if* they do not promote fraud. The complete quote from *Citizens for Responsible Taxation*, which the Committee conveniently omits is: “*arithmetic error* will be tolerated, *but only if* the error does not promote fraud.” *Id.* at 172 (emphasis added).

Of course, the Committee must attempt to limit the actual holding in *Citizens for Responsible Taxation* in this manner because those two key concepts—arithmetic error and the promotion of fraud—are exactly what distinguishes this Petition from every other overcount previously examined by Ohio courts. The Committee must try to re-characterize the law because the record already establishes that: (1) the widespread overcounts apparent on the face of this Petition constitute much more than “arithmetic” error; and (2) the overcount methods used by the Committee on this Petition do promote fraud.

**a. The overcount issues apparent on the face of this Petition are much more significant than a mere “arithmetic” error.**

By hoping to gloss over the entire concept of “arithmetic error,” the Committee effectively asks this Court to conclude that a systemic, widespread, and intentional practice of overcounts is a mere “arithmetic error” that should be excused. But the record already paints a much different picture. Significantly, this Court already has before it the following allegations, which are presumed true:

- Allegations concerning the size and breadth of the overcount:
  - Of the 6,435 part-petitions submitted, over 1,400 of them contain facial evidence that the circulators attested, under penalty of election falsification, to witnessing significantly more signatures than appear on the actual part-petition. (*See* Petition Challenge ¶ 62 Exhibit J thereto.)
- Testimony that the overcount was intentional and systemic, not erroneous or explainable:
  - Sworn testimony from a circulator who testified that her boss told her to “mark 28 in the box always,” even when she had not collected 28 signatures. In fact, this circulator testified that she quit over this practice: “This was the day that I was given—that I quit. I told him, I’m going home. This is not right. I only have 16 signatures, but I am going home. I’m done.” (*See* Petition Challenge ¶ 69 and Exhibit T thereto at 16.)
  - Sworn testimony from a circulator who testified that he stated on the circulator statement that he had witnessed 28 signatures, even when he had not actually done so:
    - Q: It says you witnessed 28?
    - A: Yes.
    - Q: Did you witness 28 signatures there?
    - A: No. (*See* Petition Challenge ¶ 70 and Exhibit U thereto at 10).
- Testimony that someone other than the circulator filled in the number of signatures:
  - Circulator Marquita Barnhouse testified she only collected two signatures, and she did not write the number “28” that appeared in her circulator attestation. (*See*

Petition Challenge Exhibit P at 17-18.) She had left that line blank when she turned in the part-petition. *Id.*

- Circulator Rebecca Douglas (“Douglas”) testified that she was instructed to write the number “28” on her circulator attestation, which she did even though her part-petition contained only four signatures—one of which had been stricken in black marker. (*See* Petition Challenge Exhibit P at 57.) Douglas testified she was instructed to write “28” on the part-petition by The Strategy Network in prior petition-circulation efforts, and that Elite Campaigns gave her the same instruction for this petition-circulation effort. (*Id.* at 60.)

Pointing to Paragraph 71 of the Petition Challenge, the Committee makes an exaggerated claim that Relators want to “manufacture a multi-pronged test to determine whether a part-petition can be invalidated for an overcount error.” (Motion for Judgment on the Pleadings at 15.) This is not true. In fact, Paragraph 71 summarizes the consistent *factual* underpinning of every case cited by both Relators *and* the Committee on this issue. While the Committee attempts to relegate critical findings in *Citizens for Responsible Taxation*, 65 Ohio St.3d 167 (1992) as “pure dicta” to be ignored, the fact is Ohio courts have consistently acknowledged and focused upon exactly this so-called “dicta.”

Moreover, courts have not had to articulate a multi-pronged test because, prior to this case, courts have not been faced with a petition that contains the systemic, widespread, and deliberate practice of overcounting signatures witnessed that is apparent on the face of the Petition. Nor, to Relators’ knowledge, has any previous court been faced with evidence that so clearly and blatantly establishes that the overcounts were not the product of an honest mistake that can be easily explained, but were part of an intentional and calculated strategy.

The Committee’s attempt to distinguish the cases cited in the Petition Challenge is nothing but smoke and mirrors. For example, the Committee argues that *State ex rel. Curtis v. Summit Cty. Bd. of Elections*, 143 Ohio St.3d 1457, 2015-Ohio-3787, 37 N.E.3d 1 and *State ex rel. Schwarz v. Hamilton Cty. Bd. of Elections*, 173 Ohio St. 321, 323, 181 N.E.2d 888 (1962), should be ignored because those cases involved situations where a circulator attested to *fewer* signatures than were on the petitions. But the Committee completely misses the real point of those cases and the expressed reason that they were cited: “This Court has never allowed **any degree of miscount**—higher or lower—**unless some plausible explanation of signature miscounts was proffered.**” Petition Challenge at ¶ 72 (citations omitted).

The Committee does not even address this point, nor can it. To the best of Relators’ knowledge (and the Committee certainly does nothing to dispel this fact), Ohio courts have never examined a case where the discrepancy in the number of signatures witnessed was anything but minor and isolated and have consistently focused on some uncontradicted and plausible explanation for the miscount.

For example, *State ex rel. Curtis v. Summit Cty. Bd. of Election, supra*, related to one part-petition and one signature where the board of elections received evidence from both the signer and circulator that the discrepancy in the number of signatures attested to resulted from one signer striking his own signature. Similarly, *State ex rel. Schwarz v. Hamilton Cty. Bd. of Elections, supra*, involved a single signature on one part-petition and the board of elections received an “uncontradicted and plausible explanation” from the circulator that he witnessed every signature, but attested to one less than he witnessed because one signer was from a different county. Likewise, in *State ex rel. Keyse v. Sarosy*, 175 Ohio St. 237, 193 N.E.2d 269 (1963), a single part-petition contained two signatures that were stricken by the signers, but were

counted in the circulator's affidavit. A plausible explanation was provided: one of those signatures was stricken by a signer who had signed before she was registered and then later signed again after she had registered.

Even the two cases upon which the Committee relies have this same underpinning of a minor discrepancy and a plausible explanation for the miscount. In *State ex rel. Citizens for Responsible Taxation*, 65 Ohio St.3d 167 (1992), this Court set forth the underlying factual premise of the case and noted that only five part-petitions and five signatures were at issue: “the accompanying circulator statements indicated one more signature than each part-petition actually contained.” Moreover, the case revolved around the very reason for the overcount: “because some signatures had been crossed out in response to the board of elections’ list of signers who had asked for the removal of their names.” *Id.* at 171. And *State ex rel. Wilson v. Hisrich*, 69 Ohio St.3d 13, 16, 630 N.E.2d 319 (1994) also involved a minor discrepancy and a plausible explanation for the miscount. In the sentence immediately preceding the quoted material at pages 14 and 15 of the motion for judgment on the pleadings, *State ex rel. Wilson* Court makes clear the very limited extent of the error and demonstrates the basis for the overcount as a true error, and not a systemic and intentional act:

In his fourth proposition of law, relator argues that without correcting the total number of signatures on the petition is not a violation of law. Respondent does not contest this issue. We held in [*State ex rel. Citizens for Responsible Taxation*], that there is no violation.

*Hisrich*, 69 Ohio St.3d at 16.

The Committee has no “plausible explanation” for the overcount on its Petition and does not proffer one. As noted above, the evidence already before the Court indicates that the overcounts were a part of the Committee’s standard operating procedure and cannot be reasonably characterized as the “arithmetic errors” this Court sanctioned in *State ex rel. Citizens*

*for Responsible Taxation*, 65 Ohio St.3d 167 (1992). Since it cannot provide any plausible explanation and cannot reasonably characterize its practices as the type of excusable error that has been permitted under Ohio’s law, the Committee instead attempts to distinguish, evade, and avoid.

The Committee’s heavy reliance on one selected provision of the Secretary’s Ohio Elections Officials Manual (“EOM”)<sup>1</sup> is misplaced. The EOM does not supersede the requirements of the Revised Code and this Court’s pronouncements interpreting those requirements.

Moreover, the Committee’s interpretation of the EOM is overbroad and misleading. It wholly ignores other sections that indicate boards of elections can and must do more than rubber stamp every part-petition that contains an overcount. Consistent with the case law cited above, the EOM notes that boards of elections must review the circulator statement, but “should take care so as to not make a determination that is ‘too technical, unreasonable, and arbitrary’ given the unique fact set of that petition and information available to the board, if any.” EOM, at 11-9, quoting *Schwarz, supra*. The EOM also provides that: “The board must accept the circulator’s statement of part petitions at face value *unless* there are inconsistencies with the number of signatures witnessed . . .” EOM, at 11-8, 11-9. But nothing in the EOM suggests that the widespread overcounting evident on this Petition should be granted some blanket approval as the Committee contends. On the contrary, the EOM provides an example of a situation where the rejection would be technical or arbitrary (circulator witnessed 22 signatures, but there are only 20 signatures on the petition), which mirrors the line of cases set forth above. EOM, at 11-9.

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<sup>1</sup> See <http://www.sos.state.oh.us/SOS/Upload/elections/EOresources/general/2015EOM.pdf>

And the Committee wholly ignores the Secretary’s most recent pronouncement on the issue in the form of Directive 2016-01, which supplements and augments the EOM. Directive 2016-01 provides: “[b]y their nature, however, “arithmetic errors” should be isolated, unintentional oversights” and instructs the boards of elections that:

The “over-reporting of signatures” (e.g., a circulator statement purporting to witness 28 signatures on a part-petition bearing only two signatures) is so strikingly prevalent in this submission that the suggestion that unintentional “arithmetic errors” are to blame strains credulity. This cannot be the result envisioned by case law; otherwise the exception would swallow the rule.

(Exhibit D to Petition Challenge at 2, 3.)

The Committee’s attempt to distinguish the remaining cases in the Petition Challenge is equally unavailing. For example, it argues that *State ex rel. Barton v. Butler Cty. Bd. of Elections*, 44 Ohio St.2d 33, 35, 336 N.E.2d 849 (1975), *State ex rel. Commt. 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 Cty. Bd. of Elections*, 10th Dist. No. 98AP-495, 1998 Ohio App. LEXIS 6290, (Dec. 24, 1998) are inapplicable because they involved “a complete omission of the circulator statement” or “falsely attesting to witnessing every signature.” (Motion for Judgment on the Pleadings at 16.) Again, the Committee intentionally avoids the point. These cases were cited for the well-established proposition that “the inclusion of the circulator’s statement as required by R.C. 3501.38(E) must be strictly complied with.” Petition Challenge at ¶ 64, citing *State ex rel. Commt. for the Referendum of Lorain Ordinance No. 77-01*, 96 Ohio St.3d 308, at ¶ 38.

It is telling that the Committee does not refute, distinguish, or even mention the strict compliance requirement. Instead, they attempt to deflect *State ex rel. Barton* and *State ex rel. Commt. for the Referendum of Lorain Ordinance No. 77-01* and *Prince, supra*, by pointing to the

underlying facts and not even addressing the proposition for which the cases were cited. Nonetheless, it remains well established that the requirement for a circulator to list the number of signatures collected is mandatory and subject to strict, not substantial, compliance. “We hold that the inclusion of the circulator’s statement as required by R.C. 3501.38(E) must be strictly complied with.” *State ex rel. Barton v. Bd. of Elections*, 44 Ohio St.2d 33, 35, 336 N.E.2d 849. “Because R.C. 3501.38(E)(1)’s use of the word shall, the provision is mandatory and requires strict compliance.” *Chine v. Mahoning County Bd. of Elections*, 7th Dist. Mahoning No. 11-MA-168, 2011-Ohio-5574, ¶13.

As the Secretary correctly concluded, “the suggestion that unintentional “arithmetic errors” are to blame strains credulity” (Exhibit D to Petition Challenge at 3), and it is contrary to the allegations pled and evidence already uncovered by the various boards of elections. If the requirement in R.C. 3501.38(E) is to have any meaning at all, there must be a distinction between a minor clerical or counting error on a part-petition and a systemic, widespread falsification of the magnitude presented here.

**b. Overcounts on this Petition did “promote fraud.”**

This Court has previously held that leaving the number of signatures witnessed on a part-petition blank is proper grounds for rejecting the entire part-petition. *State ex rel. Loss, supra, Brown v. Wood County Bd. of Elections*, 79 Ohio App.3d 474, 607 N.E.2d 848 (1992); *see also State ex rel. Betras v. Mahoning Cty. Bd. of Elections*, 7th Dist. Mahoning No. 86-CA-56, 1986 Ohio App. LEXIS 6512, \*4-5 (Apr. 21, 1986). The reason for requiring an accurate statement of signatures is obvious: there is great potential for fraud in the collection of signatures on petitions, especially where circulators are paid to collect signatures. Circulation companies have both motive and opportunity to fraudulently add more signatures to a part-petition after-the fact either

by having other electors sign the remaining empty lines of the part-petition, or worse yet, forging signatures on the remaining empty lines of the part-petition. As this Court noted, “[t]he purpose of this requirement is to protect against signatures being added after the circulator’s statement is made. As such, it is a substantial, reasonable requirement.” *Rust*, 108 Ohio St.3d at 140.

The Committee cites *Rust* and *Loss* with favor, seemingly conceding that leaving the number of signatures on a part-petition blank is grounds for rejecting the entire part-petition. The Committee ignores the fact that this very practice seems to have occurred in at least Cuyahoga and Delaware counties, where circulators testified that they did not affix a number or the number affixed was not in their handwriting. (*See* Petition Challenge Exhibit O at 27; 43-44; 51; Exhibit P at 17). The Committee also does not explain how leaving the number blank is materially any different than what occurred in Franklin and Delaware counties, where circulators were instructed to write in “28” no matter how many signatures they gathered. (*See* Petition Challenge ¶ 69 and Exhibit T thereto at 16; Petition Challenge ¶ 70 and Exhibit U thereto at 10; Exhibit P thereto at 17-18; 57). The goal of protecting against signatures being added after the circulator’s statement is made is no less compelling if the number is left blank than if the maximum number is filled in.

In this circumstance, boards of elections have no way of knowing how many signatures may have been added to a part-petition after the circulator completed his or her attestation. Case law is clear that strict compliance is required. Circulators are required to attest to the number of signatures on a part-petition, not make up a number and then attest to it under penalty of law, leaving the petition open for other signatures to be added after the fact. Allowing such a practice to occur renders the requirement for a circulator to witness signatures meaningless.

The Ohio Attorney General similarly found that:

The requirement that the circulator indicate the number of signatures is now an express legislative directive in R.C. 3501.38(E). The combined force of the holding in *Loss* and the mandate of R.C. 3501.38(E) lead to the inescapable conclusion that the indication of the number of signatures contained on a petition paper is mandatory.

1989 Ohio Atty. Gen. Ops. No. 49.

Minor arithmetic errors, coupled with an explanation of why they occurred, do not promote fraud. A circulator who witnesses 22 signatures, attests to 22 signatures, crosses out two signatures for some legitimate reason, and turns in a petition containing 20 signatures does not “promote fraud.” If someone adds more signatures to that part-petition after the fact, even the Committee agrees that such a part-petition is appropriately stricken. That is the scenario contemplated by the EOM and the myriad of cases cited above. That is not what happened here, nor does the Committee provide any explanation or justification for why its part-petitions should be treated in the same manner.

### **III. CONCLUSION**

For all the foregoing reasons, the Committee’s motion for judgment on the pleadings should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document was served via email on April 6,

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