

IN THE SUPREME COURT OF OHIO

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

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OHIO SECRETARY OF STATE'S MOTION FOR LEAVE TO FILE A RESPONSE TO  
RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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**OHIO SECRETARY OF STATE’S MOTION FOR LEAVE TO FILE A RESPONSE TO RESPONDENTS’ MOTION FOR JUDGMENT ON THE PLEADINGS**

Respondent Ohio Secretary of State Jon Husted respectfully requests permission to file the brief attached hereto, which is a Response to Respondents Tracy L. Jones, William S. Booth, Daniel L. Darland, and Latonya D. Thurman’s Motion for Judgment on the Pleadings. The Secretary requests permission to file this Response to assist the Court and because misstatements of law in the pending motion could negatively affect election administration in the State of Ohio.

Respectfully submitted,

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*s/ Steven T. Voigt*

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**BRIEF IN RESPONSE TO  
RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS**

The Ohio Secretary of State, as a Respondent in this matter, would not normally need to respond to a motion for judgment on the pleadings filed by different Respondents. Nevertheless, the pending motion filed by Respondents Tracy L. Jones, William S. Booth, Daniel L. Darland, and Latonya D. Thurman contains significant inaccuracies and misstatements of the law related to particular election rules. For that reason, the Secretary submits this filing for the Court's consideration. This brief is not intended to be comprehensive. It addresses only a few points where the Secretary's input—as Ohio's chief elections officer—may benefit the Court.

**I. INTRODUCTION**

On February 4, 2016, the Secretary transmitted the Ohio Drug Price Relief Act to the General Assembly, but with reservations. The Secretary's transmittal letter is attached hereto as Exhibit "A". In his letter to the General Assembly, the Secretary noted that:

- “Despite having gathered the majority of their signatures by mid-November 2015, petitioners waited until December 22, 2015 to file . . . an initiative petition purporting to contain 171,205 signatures.”
- The boards of elections had only until December 30, 2015 to conduct their initial review. This was “an uncommonly quick turn-around time” for boards to review, examine, and verify petitions and it included a recognized holiday.
- After the initial review, the Secretary's Office “became aware of an unprecedented quantity of suspicious ‘strikethroughs’ of signatures” and “what appeared to be a widespread, intentional effort to permit circulators to over-report the number of signatures they actually witnessed . . . .”
- Because of the widespread irregularities, the Secretary “issued Directive 2016-01 and

instructed all 88 county boards to conduct a more thorough review of all part-petitions . . . .” (Directive 2016-01 is attached as Exhibit “B”).

In their motion, the moving Respondents misstate the law in at least two critical ways: (1) they argue that a part-petition is always valid when a circulator attests to more signatures than appear on the part-petition; and (2) they claim that part-petitions are valid even when they have signatures stricken by someone other than the circulator, the signer, or the signer’s attorney-in-fact. The Secretary addresses both points below.

## II. LEGAL ARGUMENT

### A. Ohio Law and the Ohio Elections Manual Require that a Circulator Attest to the Correct Number of Signatures on a Part-Petition.

Respondents incorrectly claim that a circulator is permitted to attest to the incorrect number of signatures on a part-petition.

The relevant statute is R.C. 3501.38(E), which provides in part:

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 witnesses 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) is a “substantial, reasonable requirement.” *State ex rel. Loss v. Bd. of Elections of Lucas Cty.*, 29 Ohio St.2d 233, 281 N.E.2d 186 (1972). Among other benefits of this rule, it serves as “a protection against signatures being added later.” *Id.*

A separate statute, R.C. 3519.06, states that a part-petition is not properly verified if “the statement required by section 3519.05 of the Revised Code is not properly filled out” or “the statement is false in any respect.” R.C. 3519.05 recites the circulator’s attestation in part as follows: “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 signatures of the persons whose names they purport to be . . . .” (emphasis added).

This Court has held the requirements of R.C. 3501.38(E) “must be strictly complied with.” *See State ex rel. Baron v. Butler Cty. Bd. of Elections*, 44 Ohio St.2d 33, 35, 336 N.E.2d 849 (1975). When a circulator does not comply with a statutory requirement, “rejecting the petition” is proper. *Loss*, 29 Ohio St.2d at 234; *Reese v. Bd. of Elections*, 6 Ohio St.2d 66, 67, 215 N.E.2d 698 (1966). With respect to attesting to the number of signatures, at most only an “arithmetic error will be tolerated, but only if the error does not promote fraud.” *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections*, 65 Ohio St.3d 167, 172, 602 N.E.2d 615 (1992). In all other circumstances, such petition has not properly been verified as required under R.C. 3519.06.

Importantly, R.C. 3519.06 provides the Secretary and boards with significant discretion to determine that a petition is valid. The statute requires only “satisfactory evidence” of falsity to determine that a part-petition is not properly verified. R.C. 3519.06.

As an additional point, on page 12 of their motion, the moving Respondents posited (without providing any citation) that Secretaries of State have permitted over-reporting of signatures on part-petitions. To be clear, the Secretary of State has never promoted or suggested that a part-petition with potentially fraudulent over-counting of signatures should be taken at face value and verified. To the contrary, the Secretary’s rules follow the Revised Code, which states that a part-petition is not properly verified when “satisfactory evidence” of “fals[ity] in any respect” exists. R.C. 3519.06.

Indeed, the Ohio Elections Official Manual (“the Manual”) provides that “[t]he Board

must accept the circulator's statement of part petitions at face value unless there are inconsistencies with the number of signatures witnessed." *See* Manual at pp. 11-8; 11-9. Likewise, Directive 2016-01 states that "[by] their nature, however, 'arithmetic errors' should be isolated, unintentional oversights. . . . 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." Neither the Manual nor any directive supports Respondents' position that potentially fraudulent over-reporting is to be permitted.

**B. Only the Circulator, the Signer, or the Signer's Attorney-in-Fact can Strike a Signature.**

If someone other than the circulator, signer, or an attorney-in-fact strikes a signature from a part-petition, Ohio law states that the entire part-petition is invalid.

R.C. 3501.38(G) provides that "[t]he 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 part of the petition." Additionally R.C. 3501.38(H) provides that "[a]ny 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." The Ohio Revised Code does not set forth any circumstances where someone other than the circulator, the signer, or a signer's attorney-in-fact may strike a signer's signature.

Moreover, R.C. 3519.06(C) provides that "no 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 . . . ." Contrary to

Respondents' argument on pages 7 to 9 of their motion, the term "statement" in R.C. 3519.06(C) refers to the petition in its entirety because R.C. 3519.05 refers to the form of the petition in its entirety. But even under Respondents' narrow and incorrect reading of R.C. 3519.05 and R.C. 3519.06, a part-petition with subsequent cross-outs would still be invalid because the attestation would be incorrect. Indeed, if someone other than the circulator subsequently deletes signatures, as happened with many of the part-petitions here, then the circulator's attestation that 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" cannot be accurate. *See* R.C. 3519.05.

As noted by the Secretary in his February 4, 2016 letter, "it is the duty of election officials, not a petition company, to determine whether a signature is valid." R.C. 3501.05 provides that one of the duties of the Secretary is to "[r]eceive all initiative and referendum petitions on state questions and issues and determine and certify to the sufficiency of those petitions." R.C. 3501.05(K). Similarly, R.C. 3501.11 states that one of the duties of boards of election is to "[r]eview, examine, and certify the sufficiency and validity of petitions and nomination papers, and, after certification, return to the secretary of state all petitions and nomination papers that the secretary of state forwarded to the board." R.C. 3501.11(K). As the Third District Court of Appeals observed in *In re Protest of Brooks*, "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process \* \* \*." 155 Ohio App.3d 370, 2003-Ohio-6348, 801 N.E.2d 503, ¶ 15 (3d Dist.), quoting *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999). In sum, Respondents' claim that the law permits individuals other than those set forth in R.C. 3501.38(G)

and (H) to strike signatures is wrong.

### III. CONCLUSION

The Secretary of State of Ohio offers the foregoing input to clarify and correct particular errors in the moving Respondents' motion.

Respectfully submitted,

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Ohio Attorney General

*s/ Steven T. Voigt*

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was served by first class mail via the U.S. Postal Service on April 11, 2016, upon the following:

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February 4, 2016

The Honorable Cliff Rosenberger  
Speaker, Ohio House of Representatives  
77 South High St., 14<sup>th</sup> Floor  
Columbus, Ohio 43215

The Honorable Keith Faber  
President, Ohio Senate  
Statehouse, 2<sup>nd</sup> Floor  
Columbus, Ohio 43215

The Honorable Fred Strahorn  
Minority Leader, Ohio House of Representatives  
77 South High St., 14<sup>th</sup> Floor  
Columbus, Ohio 43215

The Honorable Joe Schiavoni  
Minority Leader, Ohio Senate  
Statehouse, 3<sup>rd</sup> Floor  
Columbus, Ohio 43215

Re: Ohio Drug Price Relief Act Proposed Initiated Statute

Dear Speaker Rosenberger, President Faber, and Minority Leaders Strahorn and Schiavoni:

Pursuant to Article II, Section 1b, I am transmitting, effective today, the full text of the Ohio Drug Price Relief Act (DPRA) proposed law to the Ohio General Assembly for its consideration.

However, I do so with reservations.

Despite having gathered the vast majority of their signatures by mid-November 2015, petitioners waited until December 22, 2015 to file with my office, pursuant to Article 2, Section 1b of the Ohio Constitution, an initiative petition purporting to contain 171,205 signatures proposing an addition to the Ohio Revised Code. The next day, I forwarded the part-petitions to the county boards of elections for review. Because petitioners waited so long to file their petitions, I instructed the county boards of election to complete their review no later than December 30, 2015—an uncommonly quick turn-around time.

Subsequently, my office became aware of an unprecedented quantity of suspicious “strikethroughs” of signatures on the part-petitions and other factual circumstances suggesting improper, potentially fraudulent circulator attestations—evidence that I simply cannot ignore. To clarify, this does not appear to be a case of just a few “irregularities,” or “math errors,” or random “strikethroughs” in a few, isolated counties across the state.

Rather, an initial review uncovered that a strikingly similar method of crossing out a petition signer’s name (a bold, black marker) existed on an alarmingly large number of part-petitions in virtually every county in the state. Add to that what appeared to be a widespread, intentional effort to permit circulators to over-report the number of signatures they actually witnessed by claiming to witness as many signatures as there are lines on the petition form when the part-petition actually contained only a few signatures, thereby skirting the requirement that a circulator actually witness each signature and *then* write down the exact number of signatures witnessed.

Consequently, based on my authority as Chief Elections Officer of the state, and my statutory responsibility to “determine and certify to the sufficiency” of statewide petitions<sup>1</sup>, I issued Directive 2016-01 and instructed all 88 county boards of elections to conduct a more thorough review of all part-petitions, suggesting evidentiary hearings in consultation with their county prosecutors, and report their findings by January 29, 2016.

A number of counties did conduct a thoughtful review of the petitions circulated in their counties according to the Directive and some conducted quasi-judicial hearings to elicit testimony from petition circulation management companies and petition circulators. The sworn testimony they have shared paints a picture of how the laws protecting the integrity of the sacred right to petition one’s government were abused in this instance.

In my opinion, the Cuyahoga County Board of Elections produced the most sufficient and probative evidence in their review of the part-petitions. Cuyahoga County’s evidence included sworn testimony from Ms. Pamela Lauter of Ohio Petitioning Partners, LLC, who referred to a purging process called “purging the deck” to improperly strike the signatures of others, undertaken primarily at the behest of the petition company PCI Consultants, Inc.

According to Ms. Lauter:

- *“PCI was the head contractor for the State of Ohio,” explaining that PCI Consultants, Inc. has instructed them to strike signatures on petitions prior to filing, usually with a black washable marker.*
- *“...it's called purging the deck.”*
- *“So someone other than the circulator was striking the petitions?” “That would be me...Yes.”*

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<sup>1</sup> R.C. 3501.05(K).

The political action committee (PAC) supporting this petition effort (Ohioans for Fair Drug Prices) underscores Ms. Lauter's contention that PCI Consultants, Inc., a California company, is, indeed, the head contractor in the State of Ohio, under whose direction all the other petitioning companies involved in this petition effort operated. According to campaign finance details filed last week, Ohioans for Fair Drug Prices paid \$743,473.20 to PCI Consultants, Inc. (out of a total \$799,941.95) for signature gathering. There were no other petition companies on their report.

PCI Consultants, Inc. website bills them as the "largest and most successful full service petition and field management firm in the country." Indeed they earned nearly \$750,000 in Ohio alone for this effort. In a message to prospective customers, PCI boldly admits that they "...actively cross off all invalid signatures by hand" with their own "proprietary database system."<sup>2</sup>

I believe the evidence confirms my suspicion that, at some high level of this campaign, the order was given to strike thousands of petition signatures—ignoring Ohio laws that exist to protect the integrity of the elections process and to safeguard the right of the Ohio voter whose choice it is to sign in support of an initiative, and who may not want his or her name illegally removed from a petition.

Ohio law is clear that (1) ONLY the signer of a petition (or the signer's designated attorney-in-fact<sup>3</sup>) or the circulator of a petition may remove a petition signer's name from a part-petition<sup>4</sup>, and (2) it is the duty of election officials, not a petition company, to determine whether a signature is valid.<sup>5</sup> Ohio law further provides that no part-petition is properly verified if it appears on the face thereof, or is made to appear by satisfactory evidence, that the statement is altered by erasure, interlineation, or otherwise, or that the statement is false in any respect.<sup>6</sup>

Based on the reliable, substantive evidence my office has received from Cuyahoga County, I am invalidating all the signatures on every part-petition that was circulated by the petition companies DRW Campaigns, LLC and Ohio Petitioning Partners, LLC in Cuyahoga County. It is unlikely that these improper petition practices by DRW and OPP under the direction of PCI were limited only to those petitions circulated in Cuyahoga County. Indeed, Ms. Lauer testified that she performed the same interlineation activity in other counties. Absent similar sworn testimony before those county boards of elections, I lack sufficient evidence to invalidate part-petitions beyond those in Cuyahoga County where the testimony was actually presented.

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<sup>2</sup> Interestingly, petitioners could have jeopardized their own efforts by illegally striking signatures. One county prosecutor reported in a letter submitted to me along with their number of certified signatures that only 79% of the stricken signatures were truly invalid.

<sup>3</sup> R.C. 3501.382.

<sup>4</sup> R.C. 3501.38(G) and (H).

<sup>5</sup> R.C. 3501.05(K), R.C. 3501.11(K).

<sup>6</sup> R.C. 3519.06.

Nevertheless, as mentioned above, pursuant to Ohio Constitution Article II, Section 1b, the petition proposing the Ohio Drug Price Relief Act Initiated Statute is hereby transmitted as of this day to the General Assembly with 96,936 valid signatures.

Sincerely,

  
Jon Husted

Enclosure

cc: Brad Young, House Clerk  
Vince Keeran, Senate Clerk

## FULL TEXT OF LAW

Be it Enacted by the People of the State of Ohio that the following chapter and section are added to Title I of the Revised Code.

### **Chapter 194: Drug Price Relief**

#### **Section 194.01**

##### **(A) Title.**

This Act shall be known as "The Ohio Drug Price Relief Act" (the "Act").

##### **(B) Findings and Declarations.**

The People of the State of Ohio hereby find and declare all of the following:

- (1) Prescription drug costs have been, and continue to be, one of the greatest drivers of rising health care costs in Ohio.
- (2) Nationally, prescription drug spending increased more than 800 percent between 1990 and 2013, making it one of the fastest growing segments of health care.
- (3) Spending on specialty medications, such as those used to treat HIV/AIDS, Hepatitis C, and cancers, are rising faster than other types of medications. In 2014 alone, total spending on specialty medications increased by more than 23 percent.
- (4) The pharmaceutical industry's practice of charging inflated drug prices has resulted in pharmaceutical company profits exceeding those of even the oil and investment banking industries.
- (5) Inflated drug pricing has led to drug companies lavishing excessive pay on their executives.
- (6) Excessively priced drugs continue to be an unnecessary burden on Ohio taxpayers that ultimately results in cuts to health care services and providers for people in need.
- (7) Although Ohio has engaged in efforts to reduce prescription drug costs through rebates, drug manufacturers are still able to charge the State more than other government payers for the same medications, resulting in a dramatic imbalance that must be rectified.
- (8) If Ohio is able to pay the same prices for prescription drugs as the amounts paid by the United States Department of Veterans Affairs, it would result in significant savings to Ohio and its taxpayers. This Act is necessary and appropriate to address these public concerns.

##### **(C) Purposes and Intent.**

The People of the State of Ohio hereby declare the following purposes and intent in enacting this Act:

- (1) To enable the State of Ohio to pay the same prices for prescription drugs as the prices paid by the United States Department of Veterans Affairs, thus rectifying the imbalance among government payers.
- (2) To enable significant cost savings to Ohio and its taxpayers for prescription drugs, thus helping to stem the tide of rising health care costs in Ohio.
- (3) To provide for the Act's proper legal defense should it be adopted and thereafter challenged in court.

**(D) Drug Pricing.**

- (1) Notwithstanding any other provision of law and insofar as may be permissible under federal law, neither the State of Ohio, nor any state department, agency or other state entity, including, but not limited to, the Ohio Department of Aging, the Ohio Department of Health, the Ohio Department of Insurance, the Ohio Department of Jobs and Family Services, and the Ohio Department of Medicaid, shall enter into any agreement with the manufacturer of any drug for the purchase of a prescribed drug or agree to pay, directly or indirectly, for a prescribed drug, unless the net cost of the drug, inclusive of cash discounts, free goods, volume discounts, rebates, or any other discounts or credits, as determined by the purchasing department, agency or entity, is the same as or less than the lowest price paid for the same drug by the United States Department of Veterans Affairs.
- (2) The price ceiling described in subsection (1) above also shall apply to all programs where the State of Ohio or any state department, agency or other state entity is the ultimate payer for the drug, even if it did not purchase the drug directly. This includes, but is not limited to, the Ohio Best Rx Program and the Ohio HIV Drug Assistance Program. In addition to agreements for any cash discounts, free goods, volume discounts, rebates, or any other discounts or credits already in place for these programs, the responsible department, agency or entity shall enter into additional agreements with drug manufacturers for further price reductions so that the net cost of the drug, as determined by the purchasing department, agency or entity, is the same as or less than the lowest price paid for the same drug by the United States Department of Veterans Affairs.
- (3) All state departments, agencies and other state entities that enter into one or more agreements with the manufacturer of any drug for the purchase of prescribed drugs or agreement to pay directly or indirectly for prescribed drugs shall implement this section no later than July 1, 2017.
- (4) Each such department, agency or other state entity, may adopt administrative rules to implement the provisions of this section and may seek any waivers of federal law, rule, or regulation necessary to implement the provisions of this section.
- (5) The General Assembly shall enact any additional laws and the Governor shall take any additional actions required to promptly carry out the provisions of this section.

**(E) Liberal Construction.**

This Act shall be liberally construed to effectuate its purpose.

**(F) Severability.**

If any provision of this Act, or part thereof, or the applicability of any provision or part to any person or circumstances, is for any reason held to be invalid or unconstitutional, the remaining provisions and parts shall not be affected, but shall remain in full force and effect, and to this end the provisions and parts of this Act are severable. If this Act and another law are approved by the voters at the same election with one or more conflicting provisions and this Act receives fewer votes, the non-conflicting provisions of this Act shall go into effect.

**(G) Legal Defense.**

If any provision of this Act is challenged in court, it shall be defended by the Attorney General of Ohio. The People of Ohio, by enacting this Act, hereby declare that the committee of individuals

responsible for the circulation of the petition proposing this Act ("the Proponents") have a direct and personal stake in defending this Act from constitutional or other challenges. In the event of a challenge, any one or more of the Act's Proponents shall be entitled to assert their direct and personal stake by defending the Act's validity in any court of law, including on appeal. The Proponents shall be indemnified by the State of Ohio for their reasonable attorney's fees and expenses incurred in defending the validity of the challenged Act. In the event that the Act or any of its provisions or parts are held by a court of law, after exhaustion of any appeals, to be unenforceable as being in conflict with other statutory or constitutional provisions, the Proponents shall be jointly and severally liable to pay a civil fine of \$10,000 to the State of Ohio, but shall have no other personal liability to any person or entity.



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**DIRECTIVE 2016-01**

January 04, 2016

To: All County Boards of Elections  
Directors, Deputy Directors, and Board Members

Re: Re-Review of Ohio Drug Price Relief Act Part-Petitions

**BACKGROUND**

It has come to this Office's attention that several boards of elections have approved part-petitions on which it appears that a person other than the signer of the petition or the circulator may have, contrary to Ohio law, removed one or more signer's name from the part-petition prior to it being filed with the appropriate election official (i.e., striking a signature). Additionally, it appears that some circulators may have pre-affixed the number of signatures they purportedly witnessed prior to actually circulating the petition, potentially calling into question how many signatures the circulator properly witnessed and attested to in his or her circulator statement.

**STRIKING A SIGNATURE**

State law clearly restricts removal of a petition signer's name from a part-petition except in the following, limited circumstances:

- "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,"<sup>1</sup>; and
- "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."<sup>2</sup>

These provisions of law exist to protect the integrity of the elections process and the circulator, who is required to attest under penalty of election falsification that the circulator witnessed every signature and that he or she believes all of the signatures witnessed are genuine and affixed by qualified electors. Most importantly, however, the witness and attestation requirements serve to protect the registered Ohio voters exercising their right under the state constitution to petition state government (in this case, to propose a state law for consideration by the General Assembly) from having their signature improperly removed from a part-petition.

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<sup>1</sup> R.C. 3501.38(G).

<sup>2</sup> R.C. 3501.38(H).

Reviewing a large cross-section of part-petitions from across the state has revealed that a strikingly similar method of eliminating a petition signer's name exists across an alarmingly large number of part-petitions, thus raising a question of fact whether someone other than the petition signer or circulator may have illegally removed a petition signer's signature from part-petitions.

More specifically, it appears that this same or similar method of signature elimination (i.e., a thick, bold stroke of black ink) was used on part-petitions circulated by different individuals, some of whom were paid by different petition circulating firms. If true, a board of elections could conclude that there is sufficient evidence that a part-petition bearing such a bold strike-through was used to remove a signature contrary to Ohio law.

### **PRE-AFFIXING THE NUMBER OF SIGNATURES WITNESSED ON A CIRCULATOR STATEMENT**

Ohio law requires every circulator of a part-petition to complete a statement affirmed under penalty of election falsification indicating the number of signatures contained on that part-petition, and that the circulator witnessed the affixing of every signature he or she reported thereon.<sup>3</sup> This provision is “a substantial, reasonable requirement”<sup>4</sup> and functions to prevent at least two types of petition fraud: (1) fraud resulting from signatures being placed on a part-petition after the circulator has executed the affirmation, and (2) fraud resulting from a circulator executing the affirmation with a number that is close to, or corresponds with, the number of pre-printed blank lines on the part-petition and subsequently leaving it in a public location or distributing it serially to friends and family to sign without the circulator being present to witness signatures.

The Ohio Supreme Court has accorded flexibility to circulators, providing that “...arithmetic errors will be tolerated, but only if the error does not promote fraud.”<sup>5</sup> The relevant example in the Election Official Manual recognizes that “arithmetic errors” may occur:

The circulator's statement indicates that the circulator witnessed 22 signatures, but there are only 20 signatures on the petition. 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.<sup>6</sup>

By their nature, however, “arithmetic errors” should be isolated, unintentional oversights.

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<sup>3</sup> R.C. 3501.38(E)(1).

<sup>4</sup> *State ex rel. Loss v. Bd. of Elections of Lucas Cty.*, 29 Ohio St. 2d 233 (1972).

<sup>5</sup> *State ex rel. Citizens For Responsible Taxation v. Scioto Cty. Bd. of Elections*, 65 Ohio St. 3d 167 (1992), interpreting *Loss*, Id.

<sup>6</sup> [Ohio Election Official Manual, Chapter 11, page 9](#), discussing *Rust v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 139 (2005).

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 credibility. This cannot be the result envisioned by case law; otherwise the exception would swallow the rule.

### **INSTRUCTIONS**

Ohio law<sup>7</sup> vests authority in the boards of elections to determine the validity of signatures contained on part-petitions of proposed initiated statutes. It is ultimately the Secretary of State, however, who must “determine and certify to the sufficiency of those petitions.”<sup>8</sup>

As such, my office is returning all part petitions to the boards of elections to conduct a re-review to determine whether or not the evidence on the part petitions themselves in each county is such that the board determines a signature was improperly removed in violation of R.C. 3501.38(G) and/or (H) or that the circulator’s statement is invalid under R.C. 3501.38(E)(1).

Boards of elections must complete this re-review, including any evidentiary hearings that they may believe necessary to complete their duties, and re-certify their findings to the Secretary of State’s Office no later than January 29, 2016. Boards of elections must follow the other relevant instructions of [Directive 2015-40](#) as a part of their re-review and re-certification process.

If you have any questions regarding this Directive, please contact the Secretary of State’s elections counsel assigned to your county at (614) 466-2585. Questions regarding issuing and serving subpoenas and/or conducting a lawful evidentiary hearing should be directed to the board’s legal counsel, the county’s prosecuting attorney.

Sincerely,

  
Jon Husted

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<sup>7</sup> R.C. 3501.11(K) and 3519.15.

<sup>8</sup> R.C. 3501.05(K).