

**IN THE SUPREME COURT OF OHIO**

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

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**PETITION RESPONDENTS' RESPONSE TO  
RESPONDENT SECRETARY'S MOTION FOR LEAVE**

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## MEMORANDUM IN OPPOSITION

The only asserted justification for Respondent Secretary's Motion for Leave is wholly unfounded. The Secretary's Motion purports to notify the Court of various "misstatements of law" made in Petition Respondents' Motion for Judgment on the Pleadings. But to support his assertion, the Secretary misleadingly combines unrelated statutes and inserts non-existent language into this Court's holdings. Because of this, Petition Respondents oppose the Secretary's Motion.

The Secretary's Motion contends that two sections of Petition Respondents' Motion for Judgment on the Pleadings contains misstatements of law. These two sections are: (1) the lack of any legal basis for PhRMA Relators' claim that whole part-petitions should be invalid if they contain signatures struck out by someone other than the circulator or signer; and (2) the lack of any legal basis for PhRMA Relators' claim that whole part-petitions should be invalidated if the circulator statement over-reports the number of signatures appearing on the part-petition. The Secretary does not contest Petition Respondents' point that the Court lacks original jurisdiction over PhMRA Relators' challenge, under Article II, Section 1g of the Ohio Constitution.

**A. There is no legal basis for the Secretary's claim that part-petitions are invalid if they contain signatures struck out by someone other than the circulator or signer.**

The Secretary's assertion that Petition Respondents misstated the law with respect to struck out signatures is wholly unfounded. The Secretary contends that Petition Respondents misstated the legal effect of someone other than the signer or circulator striking signatures from a part-petition. Petition Respondents moved the Court for Judgment on the Pleadings, in part, because there is no basis in Ohio law for PhRMA Relators' claim that R.C. 3501.38(G)-(H) and R.C. 3519.06(C) require the invalidation of whole part-petitions if someone other than the signer or circulator struck out signatures on the part-petition. Nowhere in the provisions cited by PhRMA Relators or the Secretary—or anywhere else in Ohio law—does it state that whole part-petitions

must be invalidated if someone other than the circulator or signer (or signer's attorney-in-fact) strikes out signatures on the part-petition before it is filed with a public office.

**1. R.C. 3501.38 does not permit whole part-petitions to be invalidated because they contain signatures struck out by someone other than the circulator or signer.**

Neither R.C. 3501.38(G) nor (H) provide that whole part-petitions must be invalidated if someone other than the signer or circulator strikes out signatures on the part-petition. As explained more fully in Petition Respondents' Motion for Judgment on the Pleadings, these sections provide only that a signer or circulator "may" remove signatures from the part-petitions prior to the petition being filed with a public office. These sections do not state that "only" these individuals may strike signatures from the part-petitions, nor do these sections state that whole part-petitions may be invalidated if someone, other than these individuals, strikes out signatures before the petition is filed. In contrast, the preceding section R.C. 3501.38(F), expressly allows entire part-petitions to be invalidated if a signer signs a part-petition with someone else's name.<sup>1</sup> This demonstrates an awareness and intent by the General Assembly to limit the invalidation of whole part-petitions to expressly identified scenarios; striking out signatures is not such a scenario. The Secretary is wrong to assert otherwise, and he is wrong to assert that Petition Respondents misstated this law.

**2. R.C. 3519.06(C) is an unrelated statute, and does not permit whole part-petitions to be invalidated because they contain signatures struck out by someone other than the signer or circulator.**

In his Motion, the Secretary baldly asserts that R.C. 3519.06(C), which prohibits certain alterations of the circulator's statement that appears at the end of part-petitions, requires whole part-petitions be invalidated if they contain signatures struck out by someone other than the signer

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<sup>1</sup> R.C. 3501.38(F) ("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).

or circulator. This interpretation defies the plain meaning of the statute, and there is no other basis in law to support the Secretary's contention. 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.

R.C. 3519.06(C) plainly refers only to the "statement required by section 3519.05 of the Revised Code." The "statement" required by R.C. 3519.05 is what is commonly referred to as the "circulator's statement" which appears at the end of each part-petition:

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 Secretary provides no support for his contention that R.C. 3519.06(C) refers not just to the circulator's statement, but to the whole part-petition. 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. Additionally, the terms "form of the petition" and "statement" are terms of art used by the General Assembly throughout Title 35 of the Ohio Revised Code; the "petition form" refers to the entire part-petition, whereas the "statement" refers to the circulator's statement that is attached to the end of the part-petition. For example, R.C. 3501.38(L) refers to the "petition form" as the entire part-petition,<sup>2</sup> while R.C. 3501.38(E) expressly refers to the "the circulator's statement" and sets forth the requirements found in R.C. 3519.05.<sup>3</sup> Indeed, R.C. 3519.06, itself, makes the distinction between certain errors on the "statement required by section 3519.05" (Sections A-D) and errors on the signature portion of the part-petition (Section E).

Moreover, the Secretary's assertion is in direct conflict with the Court's long-standing interpretation of R.C. 3519.06 and R.C. 3519.05. In *State ex rel. Sinay v. Soddors*, the Court explained that R.C. 3519.05 "requires that the petition include a circulator's statement specifying if the circulator received any consideration of soliciting signatures and a declaration by the circulator that the electors signing the petition did so with knowledge of its contents," and that

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<sup>2</sup> See, R.C. 3501.38(L) ("If a board of elections distributes for use a petition form for a declaration of candidacy, nominating petition, or any type of question or issue petition that does not satisfy the requirements of law as of the date of that distribution, the board shall not invalidate the petition on the basis that the petition form does not satisfy the requirements of law, if the petition otherwise is valid. Division (L) of this section applies only if the candidate received the petition from the board within ninety days of when the petition is required to be filed.")

<sup>3</sup> See, R.C. 3501.38(E)(1) ("On each petition paper, the circulator \* \* \* 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 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.") (emphasis added)

“R.C. 3519.06 specifically refers to the statement required by R.C. 3519.05.” 80 Ohio St. 3d 224, 228, 685 N.E.2d 754 (1997) (emphasis added). In *State ex rel. Hodges v. Taft*, the Court again noted the distinction between the “form” of the petition and the “statement” at the end of the petition: “R.C. 3519.05 sets out the form to be used for initiative petitions, which includes the following statement for execution by the circulator . . . Read together, [R.C. 3519.05 and R.C. 3519.06] require completion of the prescribed statement by a circulator of his or her compensation as part of the verification required by Sections 1g and 1b, Article II to qualify the signatures on the petition.” 64 Ohio St.3d 1, 5-6 (1992) (emphasis added). The Secretary cited no authority to support his assertion that Petition Respondents’ reliance on the Court’s long-standing case law amounted to a misstatement of the law.

Further, the Secretary’s contention is at odds with his own brief. Earlier in his brief, the Secretary states that R.C. 3519.06 refers to the circulator’s statement:

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: [text of R.C. 3519.05’s circulator statement omitted].

Husted Br. at 3. The Secretary does not explain his inconsistency in interpreting the statute, which further demonstrates that the only misleading statements are the Secretary’s own.

**3. Crossed-out signatures do not make the circulator’s statement false or incorrect.**

Respondent Secretary also baldly asserts that even if the Petition Respondents are correct to rely on this Court’s precedent, a part-petition “with subsequent cross-outs would still be invalid because the attestation would be incorrect.” It is not clear if the Secretary contends that striking signatures would somehow affect the circulator’s attestation that he witnessed the signatures, or that striking signatures would affect the number of signatures the circulator attested to witnessing.

Either way, there is no support for the Secretary's assertion. Striking a signature would not alter the fact that the circulator witnessed the signers affix their signatures, and this Court has instructed that crossed-out signatures "may nonetheless be a signature as far as the [circulator's statement] is concerned," meaning that a crossed-out signature would not render a circulator's statement incorrect. *State ex rel. Keyse v. Sarosy*, 175 Ohio St. 237, 237, 193 N.E.2d 269 (1963). Once again, the Secretary misstates the law to contend that Petition Respondents have misstated the law.

**B. There is no legal basis for the claim that whole part-petitions should be invalidated because the circulator statement over-reports the number of signatures appearing on the part-petitions.**

The Secretary's contention that Petition Respondents misstated the law with respect to the over-reporting of petition signatures is also wholly unfounded. In support of his assertion, the Secretary ignores the long-standing case law, inserts non-existent language into this Court's holdings, and ignores his own instructions to the boards of elections that "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."<sup>4</sup>

**1. In support of his Motion, the Secretary ignores and misstates the Court's long-standing case law that so long as the stated total in the circulator statement is not less than the number of signatures, there is no violation.**

The law is well-settled with respect to circulator statements that over-report the number of actual signatures on the part-petitions. 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,

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<sup>4</sup> 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>

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) (emphasis added). 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) (emphasis added).

The Secretary does not explain how Petition Respondents allegedly misstated this long-standing case law. Instead, the Secretary cites case law that has no bearing on the issue of a circulator statement that over-reports the number of signatures appearing on the part-petition. The Secretary cites *State ex rel. Loss v. Bd. of Elections of Lucas Cty.*, 29 Ohio St.2d 223, 281 N.E.2d 186 (1972) and *State ex rel. Reese v. Tuscarawas Cty. Bd. of Elections*, 6 Ohio St.2d 66, 215 N.E.2d 698 (1966), both of which involved a circulator statements that had been *left blank*. The Secretary cites *State ex rel. Barton v Butler Cty. Bd. of Elections*, 44 Ohio St.2d 33, 336 N.E.2d 849 (1975), which involved part-petitions that completely omitted the circulator statements. None of these cases address the issue of over-reporting the number of signatures in the circulator statement, and none of these cases, in any way, support the Secretary’s contention that Petition Respondents misstated the law.

The Secretary cites *Citizens for Responsible Taxation*, but inserts non-existent language in an attempt to limit the scope of the holding. The Secretary contends that “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.’ In all other circumstances, such petition has not properly been verified as required under R.C. 3519.06.” Husted Br. at 4 citing *Citizens for Responsible Taxation*, 65 Ohio

St.3d at 172 (internal citations omitted) (emphasis added). As explained more fully in the Motion for Judgment on the Pleadings, the “arithmetic error” language in *Citizens for Responsible Taxation* came from the Court’s *speculation* as to why the Secretary of State might have instructed boards of elections to invalidate part-petitions when the circulator statement provides a number lower than the actual number of signatures, but to accept part-petitions when the circulator statement provides a number greater than or equal to the actual number of signatures. 65 Ohio St. 3d at 172.<sup>5</sup> The Court has never held that “at most only” an arithmetic error will be tolerated with respect to circulator statements, nor has the Court ever held that “in all other circumstances,” the petition is invalid. On this, the Secretary entirely misstates the law in order to contend that Petition Respondents misstated the law.

**2. In support of his Motion, the Secretary misrepresents his own instructions in order to contend that Petition Respondents misstated the law.**

Prior to the Secretary’s issuance of Directive 2016-01, which was issued *after* the boards of elections completed their first review of the Petition, and certified that there were more than a sufficient number of signatures, the Secretary had consistently instructed boards of elections that “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.”<sup>6</sup> In his Motion, the Secretary denies that he issued such instructions and contends that Petition Respondents misstated his instructions.

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<sup>5</sup> 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” and to, in effect, overlook discrepancies in the number of signatures “in all other instances.”” (emphasis original)

<sup>6</sup> 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>

As explained more fully in Petition Respondents' Motion for Judgment on the Pleadings, the Secretary issued a tie-breaking decision on this very issue in February 2015. The Pickaway County Board of Elections had tied 2-2 on whether to count a candidate's part-petitions that contained circulator statements with number higher than the number of actual signatures appearing on the part-petitions. 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.

(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>) (emphasis added).

The Secretary has consistently issued similar instructions in his past directives and, most recently, in the Ohio Elections Official Manual ("the Manual"). In support of his Motion, the Secretary misleadingly cites only a small portion of his full instruction to boards regarding the review of circulator statements. The Secretary contends that the Manual instructs "The board must accept the circulator statements on part-petitions at face value unless there are inconsistencies with

the number of signatures witnessed.” Husted Br. at 4. However, the Secretary omits that the Manual goes on to instruct the boards on what to do when presented with such “inconsistencies,” including the instruction that boards should not invalidate whole part-petitions because the circulator statement over-reports the number of signatures appearing on the part-petition. The Manual provides:

The board must review each part-petition to determine that information required as part of the circulator’s statement is entered on each part-petition. The board must accept the circulator statements on part-petitions at face value unless there are inconsistencies with the number of signatures witnessed (see below) or with information about the circulator across part-petitions reviewed within a single county (i.e., the circulator writes different permanent residence addresses on different part petition [sic]).

**If the number of signatures reported in the statement is less than the total number of uncrossed out signatures submitted on the part-petition, then the board must reject the entire part-petition.**

**Example:** The circulator statement indicates 20 signatures witnessed, but there are 22 signatures on the petition, none of which were crossed out prior the petition being filed.

**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.

Ohio Election Official Manual, Chapter 11 at \*11:8-9, available at <http://www.sos.state.oh.us/sos/upload/elections/EOResources/general/2015EOM.pdf#page=454> (underlines added).

As the Secretary noted his February 2015 tie-breaking decision, this has been his consistent instruction to the boards of elections. Yet, in support of his Motion, the Secretary misleadingly contends that he has never offered such instructions.

**3. The Secretary incorrectly denies that prior Secretaries of State have instructed boards of elections to accept part petitions if the number of signatures in the circulator statement is equal to or greater than the number appearing on the part-petition.**

The Secretary further denies that prior Secretaries of State have issued these instructions.

Husted Br. at 4. The Secretary's assertion is just not true. In Directive 2010-01, then-Secretary of State Jennifer Brunner instructed boards:

When the number of signatures on a part petition appears to differ from the number reported in the circulator's statement, the board must examine that part petition to determine the nature of the inconsistency. If the number of signatures reported as being witnessed by the circulator in the circulator's statement is:

- **Equal to or greater than the total number of signatures not crossed out on the part petitions, do not reject the part petition because of the inconsistent signature numbers.**

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

Ohio Secretary of State, Directive 2010-01 at 3, available at <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2010/Dir2010-01.pdf#page=3> (underlines added).

Similarly, in Directive 2006-94, then-Secretary of State Kenneth Blackwell directed that:

If the number of signatures reported in the circulator's statement is:

- **Equal to or greater than the total number of signatures on the part-petition, do not reject the part-petition because of the inconsistent signature numbers.**

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

Ohio Secretary of State, Directive 2006-94 at \*4, available at <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2006/Dir2006-94.pdf#page=4> (underlines added).

Once again, the Secretary's asserted justification for filing the Motion for Leave—that Petition Respondents misstated the law—is wholly unfounded.

### CONCLUSION

As set forth above, the Secretary's only stated justification for filing his Motion for Leave is wholly unfounded. For this reason, Petition Respondents respectfully request that this Court deny the Secretary's Motion for Leave.

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 April 15, 2016,

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