

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.	:	

**RELATORS' MOTION TO STRIKE
RESPONDENTS' ARGUMENT THAT STATUTES ARE UNCONSTITUTIONAL**

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Pursuant to Rule 4.01(A) of the Ohio Supreme Court Rules of Practice, Relators The Ohio Manufacturers' Association, The Ohio Chamber of Commerce, Pharmaceutical Research and Manufacturers of America, Keith Lake, and Ryan R. Augsburger (collectively "Relators") move to strike the constitutional attack on Ohio Revised Code 3519.05 and 3501.38(E) contained in Respondents' Memorandum in Opposition to Relators' Motion for Partial Summary Judgment (filed 5/23/2016).

A memorandum in support follows.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Ohio Revised Code 3519.05 and 3501.38(E) each require circulators of an initiative petition to list their “permanent residence” address on the part-petitions they circulate. Relators moved this Court for partial summary judgment pursuant to these two statutes on the grounds that four circulators of the Ohio Drug Price Relief Act did not list their permanent residence addresses on the part-petitions they circulated as required by law. Accordingly, Relators have asked this Court to strike those part-petitions.

In their Memorandum in Opposition to Relators’ Motion for Summary Judgment, Respondents William S. Booth, Daniel L. Darland, Tracy L. Jones, and Latonya D. Thurman (hereinafter, the “Committee”) do not dispute that these circulators did not list their permanent address on the part-petitions they circulated but argue, for the first time in this action, that R.C. 3519.05 and 3501.38(E) are unconstitutional.

The Court should strike the Committee’s argument attacking the constitutionality of these statutes on the grounds that the argument has been waived and is barred by laches. Alternatively, the Court should decline to address the constitutional challenge until all of the parties have had the opportunity to develop the record and brief the issue.

II. ARGUMENT

A. The Committee has waived its challenge to the constitutionality of R.C. 3519.05 and 3501.38(E) in this action.

In its Memorandum in Opposition to Relators’ Motion for Partial Summary Judgment, the Committee, for the first time in this case, questions the constitutionality of R.C. 3519.05 and 3501.38(E). The Committee argues that the requirement contained in both statutes that circulators list their “permanent residence” address on part-petitions they circulate violates the

First Amendment rights of those individuals who do not have a permanent residence. While Relators deny that the permanent residence requirement violates the First Amendment, the Committee has waived its ability to challenge the constitutionality of either statute.

This Court has held that “the question of the constitutionality of a statute must generally be raised at the first opportunity[.]” *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986). *See also Cicco v. Stockmaster*, 89 Ohio St.3d 95, 100, 728 N.E.2d 1066 (2000) (finding that plaintiffs improperly raised a constitutional issue for the first time in a motion for summary judgment instead of the complaint or amended complaint for purposes of R.C. 2721.12). Failure to do so constitutes a waiver of such issue.

Here, the Committee was well-aware that the statutes were important to Relators’ claims and had ample opportunity to challenge the constitutionality of R.C. 3519.05 and 3501.38(E). Relators’ Petition Challenge set forth in detail Relators’ argument that the Court should strike certain part-petitions for failure to comply with the permanent residence requirement of the statutes. *See* Petition Challenge ¶¶23-37. The Committee, however, did not raise any constitutional challenges to either statute in the body of its Answer or in its affirmative defenses. The Committee similarly failed to raise any issue with respect to the statutes in any subsequent filings with the Court. Until this week, the Committee’s conduct has been inconsistent with an intent to challenge the constitutionality of the statutes upon which Relators rely.

As set forth above, the Committee had an affirmative obligation to challenge the constitutionality of R.C. 3519.05 and 3501.38(E) at its first opportunity. The Committee failed to do so. Accordingly, the Committee has waived its right to bring a constitutional challenge and should be precluded from contesting the validity of the permanent residence requirement.

B. The Committee's argument related to constitutionality is barred by laches.

The Committee's failure to raise its constitutional claim in a timely manner is also barred by laches. This Court has often stressed the importance of diligence in election matters and, in fact, has previously dismissed an untimely constitutional challenge to Ohio's statutory requirements for petition circulators.

In *Blankenship v. Blackwell*, 103 Ohio St. 3d 567, 572 (2004), this Court concluded:

Regarding relators' claims challenging the constitutionality of residency requirements for circulators, pursuant to R.C. 3503.06, relators were circulating part-petitions for the Nader candidacy as early as June 2004. At that time, they should have known of the residency requirements for circulators and that some of their circulators did not fulfill those requirements. But instead of challenging the constitutionality of these requirements at that time, they waited about *four months thereafter* before raising these claims in this expedited-election case.

Blankenship at ¶24 (emphasis original).

By waiting to raise their challenge until its Memorandum in Opposition to Relators' Motion for Summary Judgment, the Committee has effectively prevented Relators from responding to the merits of its newly raised argument. The Ohio Supreme Court Rules of Practice do not permit parties to file reply briefs and any "motions to waive this rule are prohibited and shall not be filed." S.Ct.Prac.R. 4.01(B)(2).

Additionally, had Relators been aware that the Committee planned to raise a constitutional challenge, Relators would have begun developing the record on that issue from the beginning of this case. As this Court noted in *Blankenship*, the "delay in raising these claims prejudiced the Secretary of State, the protesters, election officials, and electors. Therefore, laches bars relators' mandamus claims, and we deny the writ based on laches." *Id* at ¶ 38. Similarly, the Committee's delay in raising its constitutional claims has prejudiced Relators, and should be rejected by this Court.

C. Alternatively, the Court should decline to address the constitutionality of R.C. 3519.05 and 3501.38(E) in the absence of a record and full briefing.

Constitutional challenges are not to be taken lightly. Indeed, Ohio statutes carry with them “a strong presumption of constitutionality.” *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶36, citing *State v. Thompkins*, 75 Ohio St. 3d 558, 560, 664 N.E.2d 926 (1996); *Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 418-419, 633 N.E.2d 504 (1994). “The party challenging the statutes bears the burden of proving that the legislation is unconstitutional beyond a reasonable doubt.” *Id.*, citing *Thompkins*, 75 Ohio St. 3d at 560, 664 N.E.2d 926; *Arnold v. Cleveland*, 67 Ohio St. 3d 35, 38-39, 616 N.E.2d 163 (1993).

While Relators maintain that the Committee has waived its right to challenge the constitutionality of R.C. 3519.05 and 3501.38(E) and cannot raise that issue for the first time in this stage of the proceedings, if the Court determines that the issue should be addressed, it should only be addressed in the context of a complete record and full briefing. Relators respectfully urge the Court to establish a briefing schedule to allow all parties to fully brief the issue.

III. CONCLUSION

For the foregoing reasons, Relators request that the Court strike the Committee’s constitutional challenge to Ohio Revised Code 3519.05 and 3501.38(E).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served via electronic mail on

May 27, 2016 upon:

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