

IN THE SUPREME COURT OF OHIO

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

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**PETITION-RESPONDENTS' RESPONSE IN OPPOSITION TO RELATORS' MOTION TO STRIKE ARGUMENT THAT STATUTES ARE UNCONSTITUTIONAL AS APPLIED TO THREE PETITION CIRCULATORS**

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Kurtis A. Tunnell (0038569)  
*Counsel Of Record*  
Anne Marie Sferra (0030855)  
Nelson M. Reid (0068434)  
James P. Schuck (0072356)  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215  
Tel: 614-227-2300 | Fax: 614-227-2390  
ktunnell@bricker.com  
asferra@bricker.com  
nreid@bricker.com  
jschuck@bricker.com

*Counsel for Relators*

Donald J. McTigue (0022849)  
*Counsel Of Record*  
J. Corey Colombo (0072398)  
Derek S. Clinger (0092075)  
McTigue & Colombo LLC  
545 E. Town Street  
Columbus, Ohio 43215  
Tel: 614-263-7000 | Fax: 614-263-7078  
dmctigue@electionlawgroup.com  
ccolombo@electionlawgroup.com  
dclinger@electionlawgroup.com

*Counsel for Respondents William S. Booth,  
Daniel L. Darland, Tracy L. Jones, and  
Latonya D. Thurman*

Michael DeWine (0009181)  
Ohio Attorney General  
Steven T. Voigt (0092879)  
Senior Assistant Attorney General  
BRODI J. CONOVER (0092082)  
Assistant Attorney General  
30 East Broad Street, 16th Floor  
Columbus, Ohio 43215  
Tel: 614-466-2872 | Fax: 614-728-7592  
steven.voigt@ohioattorneygeneral.gov  
brodi.conover@ohioattorneygeneral.gov

*Counsel for Respondent Secretary Husted*

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Petition-Respondents William S. Booth, Daniel L. Darland, Tracy L. Jones, and Latonya D. Thurman offer the attached memorandum in support of their opposition to Relators' Motion to Strike Petition-Respondents' argument that Ohio Revised Code 3519.05 and 3501.38(E) are unconstitutional as applied Fifi Harper, Kelvin Moore, and Kacey Veliquette.

Memorandum in support follows.

Respectfully submitted,

/s/ Donald J. McTigue  
Donald J. McTigue (0022849)\*  
*\*Counsel of Record*  
J. Corey Colombo (0072398)  
Derek S. Clinger (0092075)  
McTIGUE & COLOMBO LLC  
545 E. Town Street  
Columbus, OH 43215  
Tel: (614) 263-7000  
Fax: (614) 263-7078  
[dmctigue@electionlawgroup.com](mailto:dmctigue@electionlawgroup.com)  
[ccolombo@electionlawgroup.com](mailto:ccolombo@electionlawgroup.com)  
[dclinger@electionlawgroup.com](mailto:dclinger@electionlawgroup.com)

*Counsel for Respondents William S. Booth, Daniel  
L. Darland, Tracy L. Jones, and Latonya D.  
Thurman*

## MEMORANDUM IN OPPOSITION

### I. INTRODUCTION

In response and in opposition to Relators' Motion for Partial Summary Judgment, filed on May 13, 2016, Petition-Respondents filed a Memorandum in Opposition, supported by affidavits, that the requirement that petition circulators give a permanent residence address on their part-petitions contained in R.C. 3519.05 and 3501.38(E) would be unconstitutional as applied to the three named petition circulators who lack a permanent residence. The Memorandum in Opposition to Partial Summary Judgment was filed on May 23. Relators have now filed a Motion to Strike this portion of Petition-Respondents Memorandum in Opposition.

Relators' legal contentions in support of their Motion to Strike this constitutional defense are unconvincing, poorly supported by legal authority, and mischaracterize Petition-Respondents' position with regard to Relators' Motion for Partial Summary Judgment. However, Petition-Respondents join Relators in their alternative argument, which requests that the Court decline to rule on Relators' Motion for Partial Summary Judgment until it has afforded all parties the opportunity to conclude discovery and has the benefit of full merits briefs from all parties.

### II. ARGUMENT

#### **A. Petition-Respondents' constitutional defense is not waived because the facts supporting this defense did not become known until after Relators filed their Motion for Partial Summary Judgment.**

Petition-Respondents cannot be found to have waived a defense when the facts supporting it were not known to them. The facts supporting this argument—that three petition circulators did not have permanent residences—did not become clear known until after Relators' Motion for Partial Summary Judgment was filed. Petition-Respondents therefore could not have raised this defense at an earlier stage of the litigation because there were no facts to support such

a defense. Parties should not generally assert claim or defenses without a basis for doing so. Civ. R. 11. Furthermore, Relators have not provided the Court with any applicable authority for why this claim should be considered waived.

**1. Petition-Respondents did not uncover facts to support an as-applied constitutional defense to enforcement of the permanent residence requirement until after Relators' Motion for Partial Summary Judgment was filed. A party cannot be found to have waived a claim or defense that was not supported by known facts at the time the supposed waiver was made.**

Relators attempt to characterize Petition-Respondents' constitutional argument as somehow procedurally improper. They seem to argue that because the argument was not raised within Petition-Respondents' Rule 12 responsive pleading that it has therefore been waived. However, this cannot be the case because Petition-Respondents cannot have waived a defense that was previously unknown.

“Waiver’ is defined as the voluntary relinquishment of a known right.” *State ex rel. Wallace v. St. Med. Bd.*, 89 Ohio St. 3d 431, 435, 732 N.E. 2d 960 (2000). A party may not be deemed to have waived the right to raise facts supporting a defense if the party was not aware of the facts at the time of the alleged waiver. *Michigan Auto Ins. Co v. Van Buskirk*, 115 Ohio St. 598, 605, 155 N.E. 186 (1927) (holding that “It would be an anomalous principle were we to hold that a party could be deemed to have waived material facts, the existence of which he did not know”). Knowledge of a fact or a right is therefore a necessary condition precedent to its waiver; a defense cannot be waived before it is known to exist.

Petition-Respondents have only recently uncovered the facts that support the constitutional argument contained in their Memorandum in Opposition to Partial Summary Judgment. The factual foundation of this argument is that three of the petition circulators actually do not have a permanent residence. Petition-Respondents did not engage the petition circulators,

and contact information for these individuals was not within their custody. Earlier attempts to speak with the challenged petition circulators had not been fruitful, owing to their itinerant lifestyles and, in one instance, the petitioner's medical condition. See Petition-Respondents' Memorandum in Opposition to Partial Summary Judgment, Exh. E, Affidavit of Fifi Harper. Relators have themselves acknowledged the difficulty of contacting these individuals. See Motion for Partial Summary Judgment at 3, footnote 4. Several interviews with each petition circulator were necessary in order to extract the nature of their living arrangements and their lifestyle while they are working on petition drives and when they are between jobs. The Court may take note of the fact that the affidavits supporting Petition-Respondents constitutional defense were not completed until the final days and hours before their Memorandum in Opposition was due. Petition-Respondents were only barely able to obtain the necessary factual affidavits in time to file their response. Petition-Respondents introduced their constitutional argument as soon as they had sufficient factual knowledge.

Petition-Respondents had not discovered the facts that support the constitutional argument in their Memorandum in Opposition to Partial Summary Judgment until after the Motion for Partial Summary Judgment was filed. They therefore cannot be deemed to have waived this defense at some earlier unstated, point in the litigation as Relators contend.

**2. Relators have not cited any applicable authority in support of their waiver argument.**

None of the authorities cited by Relators in support of their waiver argument are controlling. The absence of any case law supporting their argument underscores the fatal weakness of their position with regard to waiver.

Relators' cite *State v. Awan*, 22 Ohio St.3d 12, 122, 489 N.E.2d 277 (1986), for the proposition that constitutional claims are waived if they are not "raised at the first opportunity." That decision does not support their argument. *Awan* concerned a criminal prosecution where, for the first time in a post-conviction appeal, the defendant claimed before the appeals court that the statute under which he was prosecuted was unconstitutionally vague. *Id.* at 120. This holding is therefore inapplicable because Petition-Respondents are not asking the Court to consider a matter that has not first been heard in a lower court – this Court has original jurisdiction over this matter. The Court is not limited as to what defenses or claims it may entertain. It therefore may entertain Petition-Respondents' constitutional claims at any point in this litigation; *Awan* does not dictate otherwise.

Relators' other cited authority is a decision interpreting a statute that has since been amended, and which has no bearing on this case. In *Cicco v. Stockmaster*, this Court held that a statute, former R.C. 2721.12, requiring plaintiffs to serve a copy of "the proceeding" when seeking declaratory relief that a state statute is unconstitutional, must raise the constitutional question in their complaint in order to provide adequate notice to the Attorney General, as the statute requires. 89 Ohio St.3d 95, 97-100, 728 N.E.2d 1066 (2000). This case is simply not relevant. R.C. 2721.12 does not apply to this case, and Relators do not suggest that it does. Petition-Respondents are not seeking declaratory judgment. They are not seeking affirmative relief; they are Respondents in this challenge brought by Relators. Neither this case nor this statute has anything to say about when and how, as here, a claim that a provision of the law is unconstitutional as-applied has been waived.

Relators inability to cite cases that are relevant, let alone on point, should highlight for the Court that their waiver argument lacks foundation and should be rejected.

**B. Laches does not bar Petition-Respondents’ constitutional defense because Relators have not been prejudiced in any way by this argument.**

Relators’ Motion to Strike does not include an articulation of the minimum requirements for the doctrine of laches to apply. Laches requires: “(1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party.” *State ex rel. Polo v. Cuyahoga County Bd. of Elections*, 74 Ohio St.3d 143, 145, 656 N.E.2d 1277 (1995).

Relators have also not made any effort to demonstrate that they have satisfied all of the above requirements for the doctrine of laches to apply. Regardless of the reason for this omission, they have not done so. Relators laches argument cannot succeed because they have not demonstrated that they have suffered any actual prejudice as a result of the constitutional arguments in Petition-Respondents’ Memorandum in Opposition to Summary Judgment. Their single source of authority to the contrary does not support their position.

**1. Relators are not prevented from addressing the constitutional question in their own briefing on the merits.**

Relators argue that Petition-Respondents have foreclosed their ability to brief the Court on the merits of the constitutional issues raised in the Memorandum in Opposition to Partial Summary Judgment. This is categorically incorrect.

In their briefing, Petition-Respondents made clear that their opposition to summary judgment was based, in part, on the difficulty that this Court would face in deciding the constitutional questions involved in this case without a *full briefing by all parties*. See Memorandum in Opposition to Motion for Partial Summary Judgment at 10, 14-15. Petition-Respondents maintain that a full briefing, along with completed discovery and a full record, is necessary for this Court to decide whether the permanent residence requirement can be

constitutionally enforced against petition circulators without permanent residences. Petition-Respondents do not stand opposed to Relators' request to be afforded a full briefing on this question; they stand in total agreement. Relators therefore cannot credibly claim that they have been prejudiced in this litigation, as is required to invoke the doctrine of laches. Petition-Respondents do not seek to deny Relators an opportunity to be heard on this constitutional question; they have urged the Court to do just that. The briefing containing the claim which Relators' contend will prejudice them does not seek to do the very things which they label prejudicial. There is nothing prejudicial in affording all parties complete discovery and a full briefing before the Court. Therefore, no action that Petition-Respondents have requested of this Court would prejudice Relators in any manner.<sup>1</sup>

Furthermore, Relators' have indicated an independent understanding of the questionable constitutional validity of the permanent residence requirement. Relators' present the Court with an abbreviated history of constitutional litigation over Ohio's requirements for petition circulators. See Motion for Partial Summary Judgment at 10, footnote 9. They inform the Court that the in-state residency requirement, which is the basis for the permanent residency language in R.C. 3519.05, is presumed to be unconstitutional and that neither Relators nor Secretary Husted argue that it should be enforced. *Id.* Relators cannot credibly maintain that they are ignorant of the constitutional questions that are raised by a permanent residence requirement. They cannot claim that they have been blindsided by this argument. They therefore cannot claim to have been prejudiced by this argument, and cannot invoke laches against it.

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<sup>1</sup> It is odd that Relators would claim to be prejudiced by the Court ruling on the constitutional argument without the benefit of a full record or briefing; Relators' themselves choose to file the Motion for Partial Summary Judgment before the discovery and briefing schedule was completed under this Court's May 18 Order.

Relators have not satisfied the necessary elements to invoke the doctrine of laches. Therefore, their claim that Petition-Respondents constitutional argument are barred by that doctrine must be denied.

**2. Relators' solitary authority for the applicability of laches is distinguishable and should not control this question.**

Relators rely exclusively on this Court's decision in *Blankenship v. Blackwell* to support their laches argument. 103 Ohio St.3d 567 (2004). While this case did address the question of when constitutional challenges to petition circulator requirements are barred by laches, the case was decided in a radically different context and ultimately does not support Relators' position.

*Blankenship* was filed as an expedited election case in this Court on October 4, 2004, and decided on October 22, less than two weeks before the 2004 general election. The dispute concerned an independent presidential candidate seeking access to the Ohio ballot. The candidate alleged that a backlog of voter registration applications had caused signatures on his ballot-access petitions to be improperly invalidated. *Blankenship* at 568. The candidate-relator's claim for relief centered around these signatures. However, the candidate also argued that the Ohio-residency requirement for petition circulators was unconstitutional. *Id.* at 572. This Court ruled that all of the candidate's claims were barred by laches, focusing most of its opinion on the prejudice and hardship that entertaining those claims would cause to the Secretary of State and election officials so close to the election. *Id.* at 572-573. The Court also gave considerable weight to the fact that the candidate had waited to file an expedited election action until barely a month remained before the election, despite long-standing knowledge of the existence of a cause of action. *Id.* at 571-572. The Court said little about the candidate's constitutional claim, but relied heavily on the fact that the candidate's campaign had begun collecting signatures to place

him on the ballot as early as June and should have known that some of its circulators did not meet the residency requirement. *Id.* at 572.

Unlike the relators in *Blankenship*, Petition-Respondents have not delayed in asserting their position on the constitutionality of the permanent residence requirement. As soon as a factual foundation for that argument emerged from their investigation and discovery, based on the fact that three of the challenged circulators do not have a permanent residence, they asserted that argument in this litigation. The affidavits documenting the facts supporting this position were signed and notarized up to a few hours before Petition-Respondents responded to Relators Motion for Partial Summary Judgment. There has been no delay in asserting these legal arguments, which contrasts starkly with the ruling in *Blankenship* of a four-month delay.

There is no foundation for Relators to assert that Petition-Respondents had knowledge of the living arrangement of petition circulators during the circulating process, as this Court noted in *Blankenship*. Petition-Respondents did not supervise any of the circulating process, which was handled by a professional petitioning firm. See Relators' Motion for Partial Summary Judgment at page 3, footnote 4. Furthermore, while actual supervisors may be expected to know whether or not a petition circulator is from Ohio or another state, as was pertinent in *Blankenship*, the precise details of where a circulator lays their head, and whether that place is a permanent residence as a matter of law, is less likely to come up in the course of a petition drive by professional circulators. The constitutionality of the permanent residence requirement would certainly not have been flagged as a potential issue prior to the present litigation or the filing of Relators' Motion for Partial Summary Judgment

In further contrast to *Blankenship*, this is not an expedited election case. There is no risk of disrupting that electoral process here that skews the balance of equities on this question towards Relators.

Finally, in *Blankenship*, the doctrine of laches was invoked against the candidate who brought the challenge. Here, Petition-Respondents are defending against a challenge to the validity of petitions; defending against a challenge brought by Relators. The doctrine of laches, is evoked as a *defense* to equitable remedies; Relators' seek to employ laches as a sword rather than a shield. Laches, as a species of equitable estoppel, is itself exclusively a defense that a particular claim is barred because it has not been diligently asserted. This contrasts with *Blankenship* highlights Relators inappropriate use of this doctrine.

**3. Relators' are not prejudiced by Petition-Respondents' constitutional defense, and therefore laches does not apply, because Relators' lack clean hands on matters of delay in this dispute.**

Even if Relators were permitted to invoke laches, they should be barred from doing so because they have themselves initiated significant delay in the course of this dispute and should not be permitted to claim prejudice.

The Drug Price Relief Act, the subject of this litigation, was submitted by Secretary Husted to the Ohio General Assembly on February 4, 2016. This challenge was filed on February 29, twenty-five days after that certification. This followed Relators' previous successful efforts to delay certification by convincing Secretary Husted to institute an extraordinary second review of the petitions, which resulted in a 30-day delay in the transmittal of the proposed law to the General Assembly.

As Petition-Respondents have previously argued, see Petition-Respondents' Motion in Opposition to Stay the Supplemental Petition Period, these delays were designed to delay the

initiative petition processes established by the Ohio Constitution, and ultimately frustrate Petition-Respondents efforts to place the Drug Price Relief Act on the 2016 general election ballot. Because Relators have utilized unnecessary delay as a tactic to prejudice Petition-Respondents' interests, they should be barred from claiming that their hands are clean, and their argument attempting to invoke laches should be rejected.

**C. Relators' alternative request is the correct approach – this question should only be decided with a complete record and after a full briefing.**

Relators' argue in the alternative that the Court should not decide their claim at this stage, but should wait to rule on Petition-Respondents' constitutional arguments "in the context of a complete record and full briefing." Motion to Strike at 5. On this point, Relators and Petition-Respondents agree. This is Petition-Respondents basic argument in opposition to Relators' motion for summary judgment. See Memorandum in Opposition to Motion for Summary Judgment at 14-15.

**III. CONCLUSION**

For the foregoing reasons, Relators' Motion to Strike is without factual or legal foundation and should therefore be denied.

Respectfully submitted,

/s/ Donald J. McTigue

Donald J. McTigue (0022849)\*

*\*Counsel of Record*

J. Corey Colombo (0072398)

Derek S. Clinger (0092075)

McTIGUE & COLOMBO LLC

545 E. Town Street

Columbus, OH 43215

Tel: (614) 263-7000

Fax: (614) 263-7078

[dmctigue@electionlawgroup.com](mailto:dmctigue@electionlawgroup.com)

[ccolombo@electionlawgroup.com](mailto:ccolombo@electionlawgroup.com)

[dclinger@electionlawgroup.com](mailto:dclinger@electionlawgroup.com)

*Counsel for Respondents William S. Booth, Daniel  
L. Darland, Tracy L. Jones, and Latonya D.  
Thurman*

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was served by e-mail on June 2, 2016, upon the following:

Kurtis A. Tunnell  
Anne Marie Sferra  
Nelson M. Reid  
James P. Schuck  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215  
ktunnell@bricker.com  
asferra@bricker.com  
nreid@bricker.com  
jschuck@bricker.com

*Counsel for Relators*

Steven T. Voigt  
Brodi J. Conover  
Office of the Ohio Attorney General  
30 East Broad Street, 16th Floor  
Columbus, Ohio 43215  
steven.voigt@ohioattorneygeneral.com  
brodi.conover@ohioattorneygeneral.com

*Counsel for Respondent  
Ohio Secretary of State*

/s/ Donald J. McTigue  
Donald J. McTigue (0022849)