

IN THE SUPREME COURT OF OHIO

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

PETITION RESPONDENTS' MERIT BRIEF

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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I. INTRODUCTION AND STATEMENT OF FACTS

This is an action brought by the Pharmaceutical Research and Manufacturers of America (“PhRMA”), an out-of-state special interest group that represents the financial interests of pharmaceutical companies.¹ PhRMA opposes the substance of the proposed law at issue, the Ohio Drug Price Relief Act (“ODPRA”), which seeks to address the skyrocketing costs of prescription drugs and save taxpayers’ money in the process. Throughout their Merit Brief, Relators contend that their only interest is in protecting Ohioans’ right to initiative, but that is not their true motivation, nor is it relevant. The only three issues in this case, as set forth in the petition challenge filed by Relators are as follows: (1) the “permanent residence addresses” of particular circulators; (2) the effect of striking signatures from a part-petition; and (3) the effect of a number in a circulator statement being higher than the actual number of signatures appearing on the part-petition. As set forth herein, Relators failed to meet their burden of proof, pursuant to S.Ct.Prac.R. 14(B), that the petition proposing the ODPRA (“the Petition”) failed to comply with Ohio law.

Relators’ strategy all along has been to delay the constitutional process for citizens to propose the ODPRA to the General Assembly and to submit it to the electors. The path leading to the filing of Relators’ challenge is worth briefly summarizing. On December 22, 2015, Petition Respondents filed the Petition with Respondent Secretary. On December 23, 2015, Respondent Secretary transmitted the Petition and its parts to the 88 county boards of elections for review, and issued Directive 2015-40 which instructed boards on how to verify the Petition and directed them to complete their review by Noon on December 30, 2015. That same day, counsel for PhRMA—though not identifying himself as representing PhRMA—contacted Jack Christopher, Deputy Assistant Secretary of State and Respondent Secretary’s General Counsel, via a phone call and a

¹ There are also several other named Relators.

follow up email identifying two purported issues with the Petition. [Secretary of State's Responses to Petition Respondents' Interrogatories, Interrogatory No. 1, Exhibit 1; December 23, 2015 Email from PhRMA to Secretary of State Staff, Exhibit 2.] At this time, the law firm representing PhRMA had represented Respondent Secretary as special counsel on more matters than any other law firm, and their contract to continue serving as special counsel had just been extended weeks earlier; the firm had also represented Respondent Secretary, in his individual capacity, in another matter before this Court. [Secretary of State Special Counsel Agreements, Exhibit 3.] The next day, on Christmas Eve, counsel for PhRMA—though still not identifying himself as representing PhRMA—held a conference call about the purported issues with several senior staff members of Respondent Secretary's office, including Mr. Christopher; Matthew Damschroder, Assistant Secretary of State and Respondent Secretary's Chief of Staff; Craig Forbes, Respondent Secretary's Deputy Chief of Staff; and Carolyn Kuruc, Respondent Secretary's Senior Elections Counsel. [Secretary of State's Responses to Petition Respondents' Interrogatories, Interrogatory No. 1.]

By Noon on December 30, 2015, the boards of elections had completed their review of the Petition in accordance with Directive 2015-40. [See, Directive 2015-40, Exhibit 5.] They collectively certified that the Petition contained 119,031 valid signatures, 27,354 more than required by the Ohio Constitution, and that 48 counties had met the minimum threshold, 4 more than required.

After the close of business on December 30, 2015—at 5:02pm—counsel for PhRMA, identifying himself as representing PhRMA for the first time, sent an email and attached letter to Respondent Secretary's office with several requests. [December 30, 2015 Email from PhRMA to Secretary of State Staff, Exhibit 4.] The December 30 letter requested Respondent Secretary to

investigate the two purported issues with the Petition that had been previously discussed with the Secretary's senior staff. [*Id.*] The letter also requested Respondent Secretary to refrain from certifying the Petition and to refrain from transmitting the Proposed Law to General Assembly on its first day of session, January 5, 2016, until the Secretary had completed such investigation. [*Id.*]

Secretary Husted did not hesitate to carry PhRMA's water. On January 4, 2016, one day before the General Assembly's first day of session when he should have transmitted the proposed law to the General Assembly, Secretary Husted instead announced that he would do precisely what PhRMA requested him to do: (1) he refused to certify the Petition, even though the boards of elections had collectively certified, in accordance with the Secretary's written instructions, that it contained a sufficient number of valid signatures; (2) he refused to transmit the Proposed Law to the General Assembly, despite the unequivocal constitutional provision requiring him to do so; and (3) he returned the Petition to the boards of elections for further review with new, more rigorous standards, despite any legal or historical precedent to do so. [Directive 2016-01, Exhibit 6.] Further, the Secretary gave the boards 25 more days to "re-review" the Petition—more than *three times* the number of days the boards had for their initial review.

Relator PhRMA's strategy of delay paid off. Secretary Husted did not certify the sufficiency of the Petition or transmit the Proposed Law to the General Assembly until February 4, 2016, one month after he ordered the unprecedented re-review of the Petition and nearly a week after the boards of elections completed their re-review. Moreover, the Secretary's transmittal of the Proposed Law to the General Assembly came 30 days after the constitutionally-required date, effectively eliminating 30 days from the period during which Petition Respondents would be able to circulate their Supplementary Petition and attempt to place the Proposed Law on the November 8, 2016 general election ballot.

In addition to delaying the transmittal and effectively eliminating time to circulate a supplementary petition for the 2016 general election, Secretary Husted's transmittal letter attacked the petitioners in a manner that teed up Relators' subsequent legal challenge. [Secretary of State Ohio Drug Price Relief Act Transmittal Letter to General Assembly, Exhibit 7.] Unhappy with the results from the boards of elections' second, more rigorous review of the Petition,² but realizing the boards had in effect tied his hands, Secretary Husted certified the Petition; however, not until first sua sponte invalidating more than 20,000 otherwise-valid signatures that had been twice verified by the Cuyahoga County Board of Elections, a second unprecedented move.³ Respondent Secretary also refused to break a tie vote submitted to him by the Delaware County Board of Elections, pursuant to R.C. 3501.11(X), regarding whether to certify a subset of part-petitions, robbing the Petition of further signatures that had been previously verified by a board of elections.⁴ These actions left the Petition with 96,936 valid signatures, only about 5,000 more than the constitutional requirement. Respondent Secretary also used the transmittal letter to admonish several petition circulation companies and question whether they had adhered to his newly-announced interpretation of Ohio law. Given that the letter was addressed only to the General Assembly, which has no responsibility for the review of statewide initiative petitions, Respondent Secretary's ad hominem attack on the circulators of the Petition served no purpose other than to set up Relators' legal challenge.

² After the second review of the Petition, the boards of elections had certified a total of 117,038 valid signatures, 25,361 more than required by the Ohio Constitution. In addition, 47 counties met the minimum threshold, 3 more than required.

³ Respondent Secretary could not identify any precedent for invalidating signatures on a statewide initiative or referendum that had been verified by a board of elections. [Secretary of State's Responses to Petition Respondents' Interrogatories, Interrogatory No. 11, Exhibit 1.]

⁴ As a result, the Delaware County Board of Elections has been unable to certify the results of their second review, and Secretary Husted subsequently certified zero valid signatures from Delaware County, even though the Delaware Board certified 85 valid part-petitions containing 324 valid signatures during the first review.

Receiving the hand-off, Relators took it from there. On February 29, 2016—69 days after the Petition was filed, 55 days after Secretary Husted should have transmitted the Proposed Law to the General Assembly, and 25 days after Secretary Husted begrudgingly transmitted the Proposed Law to the General Assembly—Relators filed the instant action. In their Merit Brief, Relators spend much ink castigating the AIDS Healthcare Foundation, the primary proponent of the ODPRA, and speaking in generalities about the Petition. Indeed, Relators do not even get around to the actual allegations from their Complaint until page 18. From there, Relators’ Brief consists largely of misstatements of Ohio law and contains virtually no evidence to support their claims. For these reasons, the Court should deny Relators’ challenge.

II. LAW AND ARGUMENT

A. DESPITE RELATORS’ UNSCRUPULOUS EFFORTS TO DISRUPT OHIO’S INITIATIVE PROCESS, THE ODPRA PETITION MET ALL CONSTITUTIONAL REQUIREMENTS TO BE ELIGIBLE FOR SUBMISSION TO THE GENERAL ASSEMBLY.

- 1. A petition has met the constitutional requirements for submission of a proposed law to the General Assembly for its consideration during the next legislative session commencing at least 10 days after the petition filing (1) if the petition was filed with the Secretary of State at least 10 days before the beginning of the legislative session, (2) it contains the requisite number of signatures from the requisite number of counties, (3) the signatures are accompanied by circulator statements that verify the witnessing of the signatures, and (4) the county boards of elections have validated sufficient signatures as being those of qualified electors and compliance with other legal requirements including completion of circulator statements.**

Although not part of its actual challenge, Relators spend a considerable portion of their brief arguing that under the Constitution, the phrase “ten days prior to the commencement of any session of the general assembly” refers to the next session at least ten days after validation of the signatures and circulator statements by the boards of elections as opposed to ten days after the petition is filed. The pertinent provision of Article II, Section 1b reads:

When at any time, not less than ten days prior to the commencement of any session of the general assembly, there shall have been filed with the secretary of state a petition signed by three per centum of the electors and verified as herein provided, proposing a law, the full text of which shall have been set forth in such petition, the secretary of state shall transmit the same to the general assembly as soon as it convenes.

Relators' position is not supported by this Court's decisions in *Cappelletti v. Celebrezze*, 58 Ohio St. 2d 395, 390 N.E. 2d 829 (1979), *State ex rel. Hodges v. Taft*, 64 Ohio St.3d 1, 591 N.E.2d 1186 (1992), and *State ex rel Evans v. Blackwell*, 111 Ohio St. 3d 1, 854 N.E. 2d 1025, 2006-Ohio-4334 (2006). In *Cappelletti*, the Court stated that the phrase "and verified as herein provided" refers to the validation process conducted by the boards of elections under R. C. 3519.15. Thus, it held that that the Secretary of State did not have a clear legal duty to transmit the proposed law to the General Assembly until after he was able to certify that the petition contained the requisite number of valid signatures.⁵ [*Id.* 396-98.] The Court rejected the argument that the Secretary must treat the signatures as presumed valid and immediately transmit the proposed law to the General Assembly as soon as it convenes. Importantly, however, the Court did not address the question of which session of the General Assembly after filing of the petition and validation by the boards of elections and certification by the Secretary the proposed law must be presented to for consideration. The issue was not before the Court. However, the Court did address this fundamental question in *Hodges*, albeit in a different context.

In *Hodges*, the Court stated:

⁵ For the record, Petition Respondents believe that the phrase "and verified as herein provided" is referring to the requirement in Article II, Section 1g that each part-petition contain a circulator's statement, not to the statutory process for validation of signatures and circulator statements. [See *State ex rel. Hodges v. Taft*, 64 Ohio St.3d 1, 591 N.E.2d 1186 (1992) ("verified as herein provided" refers to the provisions of Article II, Section 1g, which reads, in pertinent part: "To each part of such petition shall be attached the statement of the circulator, as may be required by law, that he witnessed the affixing of every signature").] However, this difference of opinion is not the issue in the present case, which is whether the completion date of the validation process or the date of filing controls which session of the General Assembly the proposed law is presented to for consideration.

For purposes of Section 1b, Article II, requiring the Secretary of State to transmit his certification of a proposed law to the General Assembly "as soon as it convenes," that event occurs at the commencement of the "first regular session" or the "second regular session" following the date on which the petitions proposing the law are filed with the Secretary of State. An exception is made for an initiative proposal filed with the secretary within ten days prior to the commencement of either regular session; the secretary must withhold his certification until the regular session next following. (Emphasis added)

[*Id.* at 10.]

The Court went on to state and hold that:

The initiative petitions and part-petitions were filed with respondent Taft on December 11, 1991. He was required by law to transmit his certification of their sufficiency as soon as the General Assembly convened in its next regular session. That occurred on the first Monday of 1992, the date the secretary transmitted his certification letter. His actions in that respect were entirely ministerial in that they were not discretionary, but rather were performed on a given state of facts in a manner prescribed by law. [Citation omitted.] His duty to comply is constitutional and, therefore, mandatory. [Citation omitted.]

We find that respondent Taft had no clear legal duty to perform the act requested, i.e., to withhold his certification of the proposed legislation until January 1993.

[*Id.* at 11.]

In *Evans*, the issue was whether the Secretary had to wait for the completion of protest proceedings before certifying the sufficiency of an initiative petition and transmitting the proposed law to the General Assembly. In holding that he did not, the Court stated:

Finally, as the Secretary of State contends, *Evans* did not establish that the petition contained an insufficient number of signatures on the Section 1b, Article II deadline of "not less than ten days prior to the commencement" of the January 2006 session of the General Assembly.

[*Evans* at 12.]

In other words, if sufficient valid signatures are filed not less than ten days before the commencement of a legislative session, the Secretary is correct in transmitting the proposed law for consideration at that session. The take away from these three cases is that the date of filing, not the date of validation/certification controls which the session of the General Assembly the proposed law is submitted to for consideration.

It is clear from a reading of Art. II section 1b that the clauses “signed by three per centum of the electors” and “verified as herein provided” both modify the clause which immediately precedes them: “when at any time, not less than ten days prior to the commencement of any session of the general assembly, there shall have been filed with the secretary of state a petition.” This provision connects the time of filing to the session at which the proposed law is to be presented. Relators’ argument that the appropriate session for transmittal of the proposed law is not until the session that occurs more than ten days after the certification of sufficiency of the petition is not only not supported by the language in the constitution, but it is an invitation to delay the right of citizens to propose laws and have them considered in a timely manner.

The Ohio Drug Price Relief act was filed with the Secretary of State on December 22, 2015, which was more than ten days prior to the January 5, 2016 start of the next session of the General Assembly. The sufficiency of the signatures and circulator statements was certified not once, but an unprecedented second time by the boards of elections, and the Secretary then certified the overall sufficiency and transmitted the proposed law for consideration by the General Assembly during the session that commenced at least ten days after the petition was filed.⁶ It would

⁶ As the Court is aware, Petition Respondents filed a mandamus action with the Court on January 6, 2016 seeking to compel the Secretary to transmit the proposed law based on the reports submitted to him by the boards of elections by December 30, 2015 pursuant to his original Directive and before he was convince by PhRMA to send the petitions back to the boards for an unprecedented second review under new and more rigorous standards. However, the Court took no action in the case and on February 5, 2016 Petition Respondents requested to voluntarily dismiss it as moot after the Secretary finally transmitted the proposed law to the General Assembly on February 4, 2016.

have been antithetical to the constitutional right of initiative to wait an entire another year and transmit the proposed law in January 2017.

2. If adopted, Relators' interpretation would institutionalize precisely the type of delaying tactics that Relators' have engaged in to delay the Ohio Drug Price Relief Act.

Through their distorted reading of the Ohio Constitution, Relators seek to have this Court incentivize the tactics of delay that they have exercised with respect to the ODPRA, an outcome that would prove destructive to Ohio's system of direct democracy.

Relators' proffered interpretation would fundamentally change the contemplated constitutional timeline of the initiative process. The constitutional design of the initiative process clearly indicates that it is intended to be completed—from initial filing to voting on the Proposed Law at the general election—in under one year.⁷ The petitioners file their petition at least ten days prior to the commencement of the session of the General Assembly, dates in December and January respectively. The General Assembly receives the petition in January when the session begins, and has four months to act. At that point, if the General Assembly has taken the full four months without enacting the Proposed Law, a date in early May, the petitioners may circulate a Supplementary Petition to have the Proposed Law submitted to the voters at the upcoming general election so long as the petition is filed no later than 125 days before the November election, a date in early July. If the General Assembly rejects the proposed law or enacts an unacceptable amended version prior to the expiration of the four month period, then the petitioners would have additional time to circulate and file the Supplementary Petition in time for the general election occurring the same year in which the proposed law was considered by the General Assembly. Indeed, depending

⁷ Relators' continued insistence that Petition Respondents do not have a "right" to place the ODPRA on the November 2016 ballot entirely misses the point. Relators have deliberately delayed and disrupted a process which is structured to be completed in one year.

on how early the General Assembly acts, petitioners could have the entire 90 day period afforded them by the Constitution to qualify for the same year ballot. Article II, section 1g also sets forth precise deadlines for challenges to be filed and decided in time for the general election that same year. This is a regimented, yet achievable timeline to complete the initiative process within the under a year period from the ten day pre-session filing deadline through the general election date.

In keeping with the broader contemplated constitutional timeline, the framers of Ohio's initiative process provided minimum period for determining the validity of a petition, i.e., the ten days prior to the commencement of the next legislative session. Why else would this ten day period be built into the constitution and the General Assembly require the Secretary of State in R. C. 3519.15 to forthwith send the part-petitions to the county boards? However, regardless of whether the petition validation is completed within the ten day, the framers did not intend that the validation process would be used as an excuse to delay for another year a proposed law being submitted to the General Assembly.

Relators have gone to great length to prevent the ODPRA from being placed on the 2016 ballot, and they now seek to use this Court as their agent to allow these same tactics to be used in the future. If it is true that a proposed law is not to be transmitted to the General Assembly until the session that starts more than 10 days after all of the signatures and petitions have been validated, then Ohio's initiative process will continue to be hijacked and manipulated just as Relators have done here. All it would take would be to delay the process under R.C. 3519.15 at a single board of elections, or to enlist the assistance of a compliant Secretary of State to delay certification and transmittal. This would effectively foreclose a crucial element of Ohio's system of direct democracy, and this Court must reject that position.

B. THE GENERAL ASSEMBLY DID NOT INTEND TO ENACT A TOTAL BAN ON PETITION CIRCULATING BY INDIVIDUALS WITHOUT PERMANENT RESIDENCES AND THIS COURT SHOULD NOT ADOPT SUCH AN INTERPRETATION.

The Ohio General Assembly has never enacted a statute declaring that persons without a permanent residence address are forbidden from circulating petitions; the General Assembly has never said this particular right is limited to individuals who hold a deed, a mortgage, or a lease. Nevertheless, Relators urge this Court to impute such legislative intent to the General Assembly, by holding that a petition circulator who does not have a permanent residence may not validly circulate petitions even if that circulator has given a bona fide address where they can actually be contacted, in a good faith effort to comply with an ambiguous requirement.

This Court should reject Relators request. Such an interpretation would be at odds with this Court's long history of construing election statutes to favor, not restrict, access to the democratic process. Relators' interpretation would also raise grave questions under the federal Constitution.

1. Reading into Ohio law a ban on petition circulation by individuals without a permanent residence would violate this Court's maxim against unnecessarily technical interpretations of the law that impede the strongly favored policy of a free, open, and participatory electoral system.

This Court has long held that "the public policy which favors free and competitive elections . . . outweighs the arguments for absolute compliance with each technical requirement" when there is no "fraud or deception." [*Stern v. Bd. of Elections*, 14 Ohio St.2d 175, 183, 237 N.E.2d 313 (1968).] Accordingly, this Court "must avoid unduly technical interpretations that impede public policy in election cases," even in the absence of statutory language providing for substantial compliance. [*Stutzman v. Madison County Bd. of Elections*, 93 Ohio St.3d 511, 514, 757 N.E. 2d 297 (2001).] This is especially true concerning the initiative and referendum process, because the Ohio Constitution specifically reserves these powers to the citizens of Ohio. [*State ex rel. Rose v.*

Lorain County Bd. of Elections, 90 Ohio St.3d 229, 230-31, 736 N.E. 2d 886 (2000).] In determining whether an overly technical application of the law would frustrate these important considerations, this Court must interpret the statute in question in light of the policies it was intended to further. [*Stutzman*, 93 Ohio St.3d at 514.]

To understand why absolute, technical compliance here would undermine free access to the electoral system, consider the situation of Fifi Harper, the only petition circulator attacked in Relators' brief. Following her service in the United States Navy, Ms. Harper has worked as a professional petition circulator since 2001. [Affidavit of Fifi Harper, Exhibit 8.] This profession carries with it a lifestyle that is best described as itinerant. Ms. Harper, like many other petition circulators, works all over the United States, living out of her suitcase, her car, and motel rooms. [*Id.*] Often, it is not convenient or economically feasible for Ms. Harper to maintain a permanent residence while she is working. [*Id.*] She does not have a "home" to go back to. At times she will stay with friends on a temporary basis in between jobs, or simply keep travelling and working. [*Id.*] Ms. Harper last had a residence in the summer of 2015 in Arizona, but she could not afford to maintain it while she was working. [*Id.*] Instead, several months before she came to Ohio to circulate petitions for the ODPRA, Ms. Harper rented a mailbox at a commercial mailbox facility in Arizona. [*Id.*] She arranged for this facility to hold her mail and to send her a notification on her cell phone when she received a piece of certified mail. [*Id.*] That fall, she came to Ohio to circulate petitions for the ODPRA.

When Ms. Harper was confronted with the requirement that she give a "permanent residence" address on her circulator statements, what was she supposed to do? Was she prohibited from circulating petitions because she did not have a permanent residence? She was unaware of any law to that effect, for the reason that one does not exist. Her current residence at the time, a

motel, was certainly not permanent, and the mailbox she maintained in Arizona was certainly not a place where she resided. The circulator statement, as prescribed by R.C. 3519.05, gave her no further guidance, and yet she was, presumably, and in all other respects, completely eligible to circulate the petitions.⁸ Ms. Harper made the decision to give the only address that had any permanence to her, and gave the address of her mailbox in Arizona.

There is little doubt that the address Ms. Harper gave on her statement does not meet the technical definition of a “residence.” However, this was not a false statement—she gave the most truthful statement that she could give to a request which made no accommodation for an itinerate lifestyle or other special circumstances, such as her own. There is no doubt that the address she provided serves many of the same functions as a permanent residence address. She has an ongoing tie to that address, bound through her contract with the mailbox company. She can be contacted by mail there, especially if the mail is sent certified, which would trigger personal notification to Ms. Harper from the mailbox company. For a person who lives a lifestyle with no fixed geographic points, this mailbox in Arizona was the one physical location tied to Ms. Harper with a degree of permanence.

The policy purpose of requiring petition circulators to give an address is to aid election officials in contacting a circulator in the event there is a question or legal challenge concerning petitions that they circulated. [*Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 443 (6th Cir. 2016).] The hyper-technical interpretation that Relators urge here is clearly not the sole method of achieving the policy goals of R.C. 3519.06 and 3501.38(E). Ms. Harper provided a **bona fide address** where she could **actually be contacted**.

⁸ The Secretary of State’s office has itself acknowledged the ambiguity of the permanent residence provisions of Revised Code. See Ohio Elections Manual, 11-8, footnote 16 (“State law does not define ‘permanent residence address’ for the purposes of circulating issue petitions”), Exhibit 10.

Invalidating petitions circulated by individuals *who lack a permanent residence* but who nevertheless provide *a bona fide address*, i.e. a location that actually receives mail, where they can *actually be contacted* would be to apply the statutes governing petition circulators in an overly technical and burdensome manner that would defeat access to the petition process.

2. Interpreting Ohio law so as to ban individuals without permanent residences from participating in the petition process would raise serious constitutional questions under the First Amendment, and it is incumbent upon this Court to avoid such constitutional questions when there are other permissive interpretations available.

Relators' effort to apply the permanent residence provision of the Revised Code to ban individuals without a permanent residence from circulating petitions implicates fundamental political rights protected by the First Amendment. This Court should adopt an alternative interpretation of that statute which avoids those constitutional questions.

“It is axiomatic that all legislative enactments enjoy a presumption of constitutionality” and this Court has assumed the duty “to uphold, if at all possible, a statute or ordinance assailed as unconstitutional.” [*State v. Dorso*, 3 Ohio St.3d 60, 61, 446 N.E.2d 449 (1983).] Accordingly, this Court must “construe statutes in order to avoid constitutional infirmities.” [*State ex rel. Thompson v. Spon*, 83 Ohio St.3d. 551, 555, 700 N.E. 2d. 1281 (1998).] Therefore, in interpreting a statute, the application or interpretation of which has been constitutionally assailed, this Court has held that it is “bound to give a statute a constitutional construction, if one is reasonably available, in preference to one that raises serious questions about that statute’s constitutionality.” [*State v. Keenan*, 81 Ohio St.3d. 133, 150, 689 N.E.2d. 929 (1998).]

This Court must reject Relators' challenge to the petitions circulated by Ms. Harper because such an application would raise serious questions about the constitutionality of R.C.

3519.06 and 3501.38(E).⁹ However, the Court need not decide whether these statutes are unconstitutional, because there is no indication that the General Assembly intended for those provisions to operate as an eligibility requirement for petition circulators, and therefore would not have intended the permanent residence attestation requirement to bar certain individuals from circulating petitions. These are the proper grounds on which the Court should dispose of this challenge.

Despite Relators' blithe rejection of the extensive constitutional jurisprudence presented in Petition Respondents Memorandum in Opposition to Partial Summary Judgment, this case does squarely present this Court with a constitutional question.¹⁰ It is long-settled law that the actions, associations, and verbal expressions that are involved in circulating petitions are "core political speech" and that any restriction on this right are subject to the protection of the First Amendment. [*Meyer v. Grant*, 486 U.S. 414, 420 (1988).] The Supreme Court has held that the First Amendment "protects not only the right to advocate their cause but also to select what they believe to be the most effective means for doing so." [*Id.*] at 424. Accordingly, state actions that place severe burdens on this protected right are subjected to "exacting scrutiny." [*Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 199 (1999).] These twin pillars of U.S. Supreme Court precedent have supported a robust case law in lower federal courts that have reviewed state regulation of petition circulators.

The firm consensus among federal courts states that any regulation of petition circulators that reduces "the available pool of circulators" must be narrowly tailored to a compelling state

⁹ Relators have previously alleged that three other circulators besides Ms. Harper gave false residence addresses. Because Relators have declined to address those claims in their briefing, those additional claims are waived.

¹⁰ This brief principally discusses the constitutional infirmity of these statutes under the First Amendment, however that is not the only constitutional infirmity presented by a permanent residence address requirement. Such a requirement would effectively operate as a regulation of a commercial activity—professional petition circulation—that operates across state lines. As such, it may violate the Dormant Commerce Clause. [*See, Yes on Term Limits v. Savage*, 550 F.3d 1023, 1031 (8th Cir. 2008).]

interest. [*Yes on Term Limits v. Savage*, 550 F.3d 1023, 1029 (10th Cir. 2008); *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 385 (6th Cir. 2008) (holding that Ohio statute requiring petition circulators to be paid only for their time was subject to strict scrutiny because statute makes circulating petitions more expensive and deterred professional circulators from working in the state); see also *Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013) (noting “a general agreement among our sister circuits that residency restrictions bearing on petition circulators . . . burden First Amendment rights in a sufficiently severe fashion to merit the closest examination”); *Nader v. Brewer*, 531 F.3d 1028, 1037 (9th Cir. 2008) (holding that Arizona’s residency requirement for petition circulators is not narrowly tailored to a compelling state interest); *Krislov v. Rednour*, 226 F.3d 851, 860 (7th Cir. 2000); *Nader v. Blackwell*, 545 F.3d 459, 478 (6th Cir. 2008) (striking down Ohio’s residency requirement for nominating petition circulators under the overbreadth doctrine).]

Relators have once again presented a distorted view of the relevant case law. None of the cases cited above upheld the constitutionality of a “permanent residence address” requirement for petition circulators because that was not the precise issue in any of the cases; yet the holdings and legal analysis of the cases regarding residency requirements for circulators are persuasive authority. For example, in *Nader v. Brewer*, the 9th Circuit heard a challenge to Arizona’s law requiring petition circulators to be residents of the state. [*Nader*, 531 F.3d at 1035.] The state argued that the requirement was narrowly tailored to the state’s compelling interest in policing petition circulators by ensuring that they are subject to the state’s subpoena power. [*Id.* at 1037.] The court rejected this argument because it found that it was not narrowly tailored—the state could simply require petition circulators to consent to the state’s jurisdiction. Similarly, in *Libertarian Party of Va. v. Judd*, the 4th Circuit found that submitting to state jurisdiction was “manifestly less

restrictive” than requiring residence, and served the state’s interests just as well. [*Libertarian Party of Va.*, 718 F.3d at 318.]

A ban on petition circulation for individuals without permanent residences would significantly reduce the available pool of petition circulators in the Ohio, and is therefore subject to strict scrutiny. The success of petition drives is dependent on the experience and expertise of professional petition circulators. [Affidavit of Angelo Paparella, Exhibit 9, at ¶ 7.] Many drives rely on professional circulators to collect the bulk of the necessary signatures. [*Id.*] And many of these petition circulators cannot maintain a permanent residence because of their profession. [*Id.* at ¶ 8.] If R.C. 3501.38(E) and 3519.05 are construed as banning those individuals who lack a permanent residence from circulating petitions, those statutes would functionally ban most professional petition circulators from working in Ohio. [*Id.*] Because such a ban would significantly reduce the available pool of petition circulators, such a ban would be constitutionally suspect under the First Amendment and subject to strict scrutiny.

If the General Assembly intended to ban individuals without a permanent residence from circulating petitions, they did so in a decidedly circuitous manner. The principle limitation on the eligibility of circulators is found at R.C. 3503.06(C)(1)(a), which limits circulators to those who are “a resident of the state [enforcement enjoined as unconstitutional] and at least 18 years old.” The Revised Code also prohibits convicted felons who have not completed all terms of their sentence from circulating petitions at R.C. 2961.01. Neither of these statutes says anything about the nature of a person’s residence as a qualification to circulate petitions.

By contrast, it is by no means clear that the General Assembly intended through R.C. 3519.05 and 3501.38(E) to prohibit individuals without a permanent residence from circulating petitions. Section 3519.05 simply provides a space on a form for his or her permanent residence.

Section 3501.38(E) provides the pro forma requirements of a circulator statement, including the requirement that the circulator give his or her name, as well as “the address of the circulator’s permanent residence.”

The principles of avoiding constitutional infirmities and avoiding hyper-technical application that would undermine the right of initiative dictate that this Court hold that these statutes are not bans on petition circulation by individuals without permanent residence addresses. This Court should instead hold that R.C. 3501.38(E) and 3519.05 are satisfied when a circulator without a permanent residence gives a bona fide address where they can actually be contacted.

C. THERE IS NO SUPPORT FOR RELATORS’ ARGUMENT THAT WHOLE PART-PETITIONS MUST BE INVALIDATED IF THEY CONTAIN SIGNATURES STRUCK OUT BY SOMEONE OTHER THAN A CIRCULATOR, SIGNER, OR SIGNER’S ATTORNEY IN FACT.

Relators contend that every part-petition containing a signature struck out by someone other than the circulator, signer, or signer’s attorney in fact must be invalidated in whole. However, there is no support in Ohio law for this position. Indeed, the Court has already stated that this issue would turn on the evidence submitted rather than adopting a blanket rule approach. [*Ohio Manufacturers’ Assn. v. Ohioans for Drug Price Relief Act*, Slip Opinion No. 2016-Ohio-3038 at ¶ 24.] As set forth more fully below, the facts indicate that invalid signatures were removed from the Petition before it was submitted it to the Secretary of State, and that no fraud or any other actions that would undermine Ohio’s initiative process actually occurred.

1. There is no support in Ohio law for Relators’ argument that whole part-petitions must be invalidated if they contain signatures struck out by an “unauthorized” person.

In their Brief, Relators urge the Court to adopt a blanket rule that, pursuant to R.C. 3501.38(G)-(H), whole part-petitions should be invalidated if they contain any signatures that are struck out by someone other than a circulator, signer, or signer’s attorney in fact. Relators contend

that this is also Respondent Secretary’s interpretation, but Respondent Secretary has not yet taken this position in the instant case,¹¹ and nowhere in either Directive 2015-40 or Directive 2016-01 did he actually instruct boards to invalidate whole part petitions for this reason. [Directive 2015-40, Exhibit 5; Directive 2016-01, Exhibit 6; Christopher Depo., Exhibit 15 at 67-69.] As set forth herein, there is no basis in Ohio law for the restrictive approach advocated by Relators.

a. R.C. 3501.38 does not authorize whole part-petitions to be invalidated because they contained signatures struck out by someone other than a circulator or signer.

Relators first cite R.C. 3501.38(G)-(H) to contend that “only” a petition’s circulator, signer or signer’s attorney in fact can strike out signatures from a petition. These provisions state:

- (G) 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.
- (H) 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; no signature may be removed after the petition is filed in any public office.

Nowhere does the law state that signatures may be struck “only” by these listed individuals—indeed, the main thrust of the provision seems to be that signatures may be removed before the petition is filed, but not after the petition is filed. But that is not the real issue raised by Relators. The real issue raised by Relators is whether a part-petition may be wholly invalidated, including all valid signatures, on the basis that someone other than the circulator, signer, or signer’s attorney in fact struck out signatures. Nothing in R.C. 3501.38(G)-(H) authorizes the invalidation of whole part petitions for this reason.

¹¹ If Respondent Secretary subsequently adopts this interpretation in the instant case, then he would be the first Ohio Secretary of State to adopt this novel and extreme position.

The maxim *expressio unius est exclusion alterius*, i.e. the expression of one thing is the exclusion of the other, further indicates that Relators' interpretation is wrong. [See, *Thomas v. Freeman* (1997), 79 Ohio S.3d 221, 224-225, 680 N.E.2d 997 (“if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded”).] Neither R.C. 3501.38(G) nor (H) expressly provide an exception that whole part-petitions may be invalidated because they contain signatures struck out by someone other than a circulator or signer. In contrast, the immediately preceding paragraph, 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 or knowingly allows an unqualified person to sign.¹² This provision indicates that the General Assembly expressly considered when part-petitions may be invalidated, and chose not to include struck out signatures in this list of reasons. Thus, under the maxim *expressio unius est exclusion alterius*, the inclusion of the exception in 3501.38(F) to invalidate whole part-petitions, excludes such an exception in R.C. 3501.38(G)-(H).

None of the remaining provisions cited by Relators, either when combined with R.C. 3501.38(G)-(H) or standing alone, support the invalidation of whole part petitions because they contain signatures struck out by someone other than a circulator or signer.

b. R.C. 3519.06(C) does not permit whole part-petitions to be invalidated because they contain signatures struck out by someone other than the circulator or signer.

Relators also incorrectly 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 or circulator.

¹² 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).

This interpretation defies the plain meaning of the statute; by its own terms, R.C. 3519.06(C) is limited to the alteration of the circulator statements that are at the end of each part-petition. It does not address, or in any way affect, the signature portion of the part-petition. 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 set forth word for word in R.C. 3519.05 and 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 plain language of R.C. 3519.06(A)-(D) refers only to the circulator statement contained in R.C. 3519.05, not to the signature portion of the part-petitions, which is filled out by the individual signers, not by the circulator.

Relators provide no support for their 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, signers simply write their names, addresses, and date of signing. Extending this statute to prohibit any "erasures" or "interlineations" would lead to absurd results—virtually every part-petition would be invalid if a signer simply lines out a mistake in order to make a correction. 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.¹³

Moreover, Relators' assertion is in direct conflict with the Court's long-standing interpretation of R.C. 3519.06 and 3519.05. In *State ex rel. Sinay v. Sodders*, the Court explained that R.C. 3519.05 "requires that the petition include a circulator's statement specifying if the

¹³ 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.") (emphasis added); 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).

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 “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 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, 591 N.E.2d 1186 (1992) (emphasis added).] Adopting Relators’ restrictive interpretation would be inconsistent with the Court’s duty to “liberally construe the citizens’ right of initiative in favor of their exercise of this important right.” [*State ex rel. Ohio Liberty Council, et al. v. Brunner*, 125 Ohio St.3d 315, 2010-Ohio-1845, 928 N.E.2d 410, ¶ 66.]

- c. R.C. 3501.39(A)(3) does not permit whole part-petitions to be invalidated because they contain signatures struck out by someone other than the circulator or signer.**

Relators claim that R.C. 3501.39(A)(3) authorizes the Court to invalidate whole part petitions if they contain signatures that are struck out by someone other than a petition circulator, signer, or signer’s attorney in fact. It does not. R.C. 3501.39(A) provides:

(A) The secretary of state or a board of elections shall accept any petition described in section 3501.38 of the Revised Code unless one of the following occurs:

* * *

(3) The candidate’s candidacy or the petition violates the requirements of this chapter, Chapter 3513 of the Revised Code, or any other requirements established by law.

As is apparent from the text of the statute, R.C. 3501.39(A)(3) provides that the Secretary of State or boards of elections shall not accept petitions—that is, a petition including all of its part-petitions—that violate the law.¹⁴ The statute says nothing about whether striking out signatures violates the law, nor does it say that individual part-petitions containing struck out signatures should be wholly invalidated.

d. There is no policy justification for the restrictive approach advanced by Relators.

Further, there is no valid policy justification for invalidating whole part-petitions simply because someone other than a circulator, signer, or signer’s attorney in fact struck out a signature. In Directive 2016-01, Respondent Secretary contends that the purported justification for his interpretation of R.C. 3501.38(G)-(H) is to “protect registered Ohio voters exercising their right under the state constitution to petition state government . . . from having their signature improperly removed from a part-petition.” [Directive 2016-01, Exhibit 6.] This purported rationale ignores the fact that the statute plainly permits circulators to remove signatures without regard to whether the signer gives them permission to do so. Further, Respondent Secretary claims that he is concerned that signers had their signatures removed without their authorization, but as a remedy, Relators ironically propose throwing out every other non-struck out signature from the part-petition without authorization from the signers. Such a remedy does not make any sense and would be entirely inconsistent with the duty to “liberally construe the citizens’ right of initiative in favor of their exercise of this important right.” [*State ex rel. Ohio Liberty Council, et al. v. Brunner*, 125 Ohio St.3d 315, 2010-Ohio-1845, 928 N.E.2d 410, ¶ 66.] Moreover, Relators’ position would completely upend Ohio’s petition circulation process. Every state and local candidacy and

¹⁴ Relators cite *State ex rel. Linnabary v. Husted*, 138 Ohio St.3d 535, 2014-Ohio-1417, 8 N.E.3d 940, but this case is completely unrelated to R.C. 3501.39(A)(3) as it involves another provision which expressly authorizes the Secretary of State to hear protest hearings concerning petitions for statewide candidates.

initiative petition would be subject to this new rule, which would seemingly require boards of elections to subpoena petition circulators and signers whenever a struck out signature appears on a part-petition in order to determine who struck the signature, and then throw out a whole part-petition if the signer and circulator testify that they did not strike the signature. Indeed, the validity of virtually every petition that has been filed with the Secretary or with the boards of elections would suddenly be called into question.

2. Relators did not present any evidence or arguments that striking out facially invalid signatures from the Petition promoted fraud.

Despite the Court inviting Relators to explain how striking out signatures from the Petition could or did promote fraud, Relators failed to do so. In ruling on Petition Respondents' Motion for Partial Judgment on the Pleadings, the Court declined, at that time, to adopt a "blanket rule . . . that a pattern of unauthorized deletions can never, under any circumstances, call into question the validity of an entire part-petition." [*Ohio Manufacturers' Assn.*, Slip Opinion No. 2016-Ohio-3038 at ¶ 24.] The Court did not grant partial judgment because "resolution of this claim depends on the facts submitted." [*Id.*] With the record now submitted, Relators failed to present any evidence or arguments that the "unauthorized deletions" promoted fraud.

Relators' exhaustive investigation did not uncover any evidence that calls into question the validity of entire part-petitions, nor did it produce any evidence that suggests that that manner in which signatures were struck from the Petition promoted fraud. The facts simply indicate that some circulators and petition companies used a see-through, washable marker to cross out invalid signatures before they were submitted to the Secretary of State's office.¹⁵ None of the struck out signatures were proffered to be counted by the boards of elections. Rather than facilitating fraud,

¹⁵ Relators utilize lower quality scans of part-petitions which do not allow the viewer to see through the strike out lines. The lines are translucent on the original copies of the part-petitions.

the removal of signatures removed facially invalid signatures before filing and also reduced the workload of the boards of elections. Regardless of whether the signature could or could not be removed by someone other than a circulator, signer, or signer's attorney in fact, their removal did not promote fraud.

Angelo Paparella, President of the petition management company PCI and lead manager of the petition drive for the Ohio Drug Price Relief Act, explained how and why facially invalid signatures were removed from the part-petitions. He testified that petition circulators and employees of his company would check verify every signature on every part-petition against Ohio's voter registration roll before they were filed with the Secretary's office. [Rel. Br, Exhibit B, Paparella Dep., at 23, 33-34.] If they determined that the signature was invalid, then they would strike it out. [*Id.* at 24.] As an example, Mr. Paparella explained that a circulator or an employee of his company would strike out a signature if the signer failed to provide all of the required information, such as the signer's cursive signature or address. [*Id.*] As another example, Mr. Paparella explained that, in Ohio, a part-petition can contain signatures from only one county; if a voter from one county, such as Cuyahoga County, signed a part-petition containing signatures from another county, such as Lake County, the company would strike out the signature from the wrong county because it would be invalid if the board of elections reviewed it. [*Id.*] Thus, if they could determine that the signature was invalid, they would remove it from the part-petition before filing the petition.¹⁶

¹⁶ That they sought to only remove invalid signatures was confirmed by one county prosecutor who wrote in a letter to Secretary Husted that his cursory review indicated that the vast majority of the crossed-out signatures would have been deemed invalid by the board of elections on their face had the signatures not already been crossed out. [Butler County Prosecutor's Office Letter to Secretary of State, Exhibit 11.] His letter did not address whether other struck signatures were in fact valid given that the board did not check the signers' registration records.

Below is an example of an invalid signature that was crossed from the part-petition titled, "SENECA_000010." It is apparent that the box was incorrectly filled out by the signer in that they placed the date of signing in the middle initial field and left the date of signing field blank, while also entering their city and state in the street number field and entering their street number in the city field. As a result, the signature was struck out before it was submitted to the Secretary of State's office.

NOTICE

Whoever knowingly signs this petition more than once; except as provided in section 3501.382 of the Revised Code, signs a name other than one's own on this petition; or signs this petition when not a qualified voter, is liable to prosecution.

MUST USE ADDRESS ON FILE WITH BOARD OF ELECTIONS
(Sign with ink. Your name, residence, and date of signing must be given.)

Signature	County	Township	Rural Route or other Post office Address	Month / Day / Year	
<small>(Voters who do not live in a municipal corporation should fill in the information called for by headings printed above.) (Voters who reside in municipal corporations should fill in the information called for by headings printed below.)</small>					
Signature	County	City or Village	Street and Number	Ward/Princt	Month / Day / Year
1. Signature Jan Ferguson Address on file with the Board of Election 2015 Timber Creek Dr Tiffin	here	44883	Seneca		11/3/15
2. Signature Charles W. Poch Address on file with the Board of Election 8324 W. Twp Rd. 120 Tiffin		44883	Seneca		11-3-15
3. Signature John A. Shaw Address on file with the Board of Election [REDACTED]		44883	Seneca		11-3-15
4. Signature Bill Address on file with the Board of Election 3402 W TR 18 Tiffin		44883	Seneca		11/3/15
5. Signature Dwain W. Sharakood Address on file with the Board of Election 2050 W CR 52 Tiffin		44883	Seneca		11/3/15
6. Signature Janet L. Hartson Address on file with the Board of Election 2404 W. Co. Rd 26 Tiffin Oh. Tiffin		44883	Seneca		11-3-15
7. Signature Dore R. Reinhart Address on file with the Board of Election 11 Morningside Dr Tiffin		44883	Seneca		11-3-15

There are a number of valid reasons for removing invalid signatures from part-petitions before submitting them to the Secretary of State. Mr. Paparella explained that eliminating invalid signatures before submitting them for review saves the boards of elections time and resources because removing invalid signatures reduces their workload as they would have fewer (invalid) signatures to verify. [Rel. Br, Exhibit B, Paparella Dep. 30.] Mr. Paparella also explained that there was simply no point to knowingly submit invalid signatures to the Secretary of State's office. [*Id.*] And when asked if there was any economic incentive for the petition companies to remove invalid signatures from the part-petitions, Mr. Paparella explained that there was not since all payments are based on the number of valid signatures collected. [*Id.* at 66-68.] None of these reasons promote fraud—if anything, they help reduce the risk of bad signatures being accepted by a board of elections.

The evidence also shows that removing facially invalid signatures from part-petitions before they are filed is not an uncommon practice in Ohio. Mr. Paparella explained that his company has used this technique several times before in Ohio, and that all of ballot issues qualified for the ballot without anyone raising an issue about struck out signatures. [Rel. Br, Exhibit B, Paparella Dep. 40 ¶¶ 11-21.] Pam Lauter, operator of another petition circulation company involved with the Petition, similarly testified that her company also removes facially invalid signatures from part-petition, and that she has never encountered any problems doing so. [Compl., App'x 27, Exhibit O, Cuyahoga Tr., at 125 ¶¶ 6-19, 148 ¶¶ 6-20.] Thus, Relators' evidence indicates that this was not the first time that a petition was submitted containing numerous signatures that had been struck out prior to filing, as Relators and even Respondent Secretary have alleged.

With the evidence submitted, Relators presented no arguments as to how the removal of facially invalid signatures from the Petition promoted fraud. None of the struck signatures were counted by the county boards, nor were they submitted to be counted by the county boards, as they were struck prior to the Petition being filed. Moreover, to the extent that any struck out signature may have ultimately been accepted by the county boards had it not been struck out, Relators did not identify any such signatures, nor did they explain how the removal of such signatures from the Petition promoted fraud.

In sum, even if Ohio law permitted rejecting all valid signatures on part-petitions based on who struck out bad signatures, which it does not, the evidence submitted by Relators does not justify invalidating whole part-petitions because they contain struck out signatures. The testimony from the leader of the petition effort demonstrates that facially invalid signatures were removed from the part-petitions prior to being filed with the Secretary of State in an effort to reduce the boards of elections' workload and to reduce the risk of bad signatures being accepted. Such conduct does not promote fraud.

3. Relators failed to identify which part-petitions contained signatures struck out by someone other than the circulator, signer or signer's attorney in fact.

Another problem with Relators' claim is that they have failed to identify *which* part-petitions contain signatures that were removed without authorization. Relators included a list of every part-petition containing struck out signatures, but they provided no evidence as to which were struck out by someone was "authorized" and which were struck out by someone who was not authorized. As Mr. Paparella explained, circulators carried markers with them and would often strike out signatures while in the field. [Rel. Br, Exhibit B, Paparella Dep. 36 ¶¶ 11-14, 37 ¶¶ 5-19.] Thus, Relators have not identified with the requisite level of specificity which part-petitions

contain signatures struck out by an unauthorized person, nor have Relators pointed to any specific part-petitions where there was fraud as a result of signatures being struck out.

4. Relators misrepresent the impact of invalidating every part-petition containing struck out signatures.

Relators misrepresent the impact of invalidating every part-petition that contained a signature struck out by someone other than a circulator, signer, or signer's attorney in fact. In their Merit Brief, Relators allege that there are 4,579 part-petitions containing "approximately 63,759 signatures" that would be invalidated under their argument. [Rel. Br. at 10.] Setting aside Relators' failure to identify which signatures were in fact struck out by someone other than a circulator, signer, or signer's attorney in fact, leaving the Court unable to determine which strike outs were actually "unauthorized," Relators contend that invalidating these identified part-petitions would result in the Petition containing "approximately than [sic] 27,640 valid signatures." [Id.] Relators' math is wrong. The Petition was certified by Respondent Secretary as containing 96,936 valid signatures. [Rel. Compl. ¶ 20.] Subtracting 63,759 signatures from 96,936 signatures would leave the Petition with 33,177 valid signatures, not 27,640 as Relators contend.

D. THERE IS NO SUPPORT FOR RELATORS' ARGUMENT THAT WHOLE PART-PETITIONS MUST BE INVALIDATED IF THE CIRCULATOR STATEMENT OVERCOUNTS THE NUMBER OF SIGNATURES APPEARING ON THE PART-PETITION.

Relators contend that every part-petition containing a circulator statement that overcounts the number of signatures appearing on the part-petition must be invalidated. However, there is no support in Ohio law for such a blanket rule approach. Moreover, Relators failed to present any evidence that would warrant invalidating whole part-petitions containing such circulator statements. Instead, Relators dramatically inflated, and, in some cases, created, alleged

discrepancies in order to contend that there was a larger, more systemic problem. For these reasons and the reasons below, the Court should reject Relators' "false circulator statement" argument.

1. Despite the Court's admonishment against adopting blanket rules in this case, Relators urge the Court to adopt a blanket rule regarding circulator statements that is unsupported by Ohio law.

In their Brief, Relators urge the Court to adopt a blanket rule that, pursuant to R.C. 3501.38(E), whole part-petitions should be invalidated if they contain a circulator statement that overcounts the number of signatures appearing on the part-petition. [Rel Br. at 32.¹⁷] However, such an approach would be contrary to decades of case law and instructions from the Ohio Secretary of State. In *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections*, the Court overturned a board's decision to reject part-petitions where the number in the circulator statement was higher than the number of signatures appearing on the petition. [65 Ohio St.3d 167, 172-173, 602 N.E.2d 615 (1992).] In doing so, the Court affirmed the Ohio Secretary of State's interpretation of R.C. 3501.38(E) that it does not mandate a correct signature total and 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:

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" (emphasis *sic*) and to, in effect, overlook discrepancies in the number of signatures "in all other instances."

Respondents disregarded this instruction by rejecting all the signatures on part-petition Nos. 27, 43, 51, 65 and 85, which contained circulator statements indicating signature totals higher

¹⁷ Relators' Brief wrongly contends "[s]pecifically, when a circulator statement contains a false signature total – a number of signatures that never appeared on the part-petition – that part-petition must be invalidated. Therefore, in the instant challenge, the Court must invalidate all part-petitions that contain such circulator statements."

than the number of "uncrossed out signatures." In doing so, respondents acted contrary to R.C. 3501.11(P) and to the Secretary of State's interpretation of R.C. 3501.38(E). Respondents, however, do not oppose this interpretation or attempt to otherwise justify their decision to ignore it.

We, therefore, accept the Secretary of State's reading of the signature-total requirement, see *State ex rel. Beck v. Casey* (1990), 51 Ohio St.3d 79, 81, 554 N.E.2d 1284, 1286, and conclude that respondents improperly rejected the instant five part-petitions for noncompliance with R.C. 3501.38(E). Thus, respondents had a duty to count these signatures toward the total number needed to place this levy decrease on the ballot.

[*Id.*; See also, *Ohio Manufacturers' Assn.*, Slip Opinion No. 2016-Ohio-3038 at ¶ 21.]

The Court reiterated this holding in *State ex rel. Wilson v. Hisrich*, stating, "We held in [*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, 630 N.E.2d 319 (1994) (emphasis added).]

Importantly, the Court in *Citizens for Responsible Taxation*, did not hold that permissible discrepancies in the circulator statements are limited to "arithmetic errors," as Relators and Respondent Secretary have contended. In *Citizens for Responsible Taxation*, the Court read *Loss v. Bd. of Elections of Lucas Cty.*, 29 Ohio St.2d 233 (1972) as implying that "arithmetic error" would be tolerated, as long as it does not promote fraud. However, the Court's reference to "arithmetic error" is pure dicta. The *Loss* Court never mentioned "arithmetic error," and it only involved a circulator statement that was left blank—it did not involve a circulator statement that overcounted the number of signatures. The Court in *Citizens for Responsible Taxation* was speculating that arithmetic error was one possible rationale as to why the Secretary instructed boards to invalidate part-petitions only where the circulator states a number less than the total

number of uncrossed out signatures appearing on a part-petition. [*Citizens for Responsible Taxation*, 65 Ohio St.3d at 172.]

Since *Citizens for Responsible Taxation*, the Secretary of State's instructions to boards of elections regarding circulator statements that overcount the number of signatures have not changed.¹⁸ Indeed, Respondent Secretary has even explained that these decades-long instructions have been "consistent." In breaking a tie vote submitted to his office by the Pickaway County Board of Elections regarding whether or not to count part-petitions that contained circulator statements that overcounted the number of signatures, 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.

¹⁸ See, e.g., Directive 2010-01 (Sec. Brunner instructed, "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.**" (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); Directive 2006-94 (Sec. Blackwell providing similar instructions) available at <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2006/Dir2006-94.pdf#page=4>.)

[Ohio Secretary of State, *Tie Vote on February 11, 2015 on Motion to Invalidate Josh Ford's Nominating Petition for City Council*, Exhibit 12.]

Despite providing an example where the discrepancy was a difference of two signatures, Respondent Secretary indicated that the size of the discrepancy does not matter. The two part-petitions that he counted as valid in his tie breaking vote both attested to containing 25 signatures, but one contained only 21 signatures, for a difference of 4 signatures, and the other contained only 8 signatures, for a difference of 17 signatures. [*Id.*] There was no discussion of limiting permissible discrepancies only to situations involving “arithmetic errors.”¹⁹ [*See, Id.*] The most recent version of Respondent Secretary’s Ohio Elections Official Manual, which boards of elections were directed by Directive 2015-40 and Respondent Secretary’s staff to follow in validating the Petition, provides the same instructions. [*See, Ohio Election Official Manual, Chapter 11 at *11:8-9, Exhibit 10; December 28, 2015 Email from Secretary of State Staff to Board of Elections Regarding Instructions for Reviewing Circulator Statements, Exhibit 13.*]

Accordingly—and contrary to Relators’ Merit Brief—Ohio law has consistently provided that a part-petition should not be invalidated solely because it contains that circulator statement that overcounts the number of signatures.²⁰ Indeed, the Court has already cautioned against adopting a blanket rule with respect to circulator statements that overcount the number of signatures, and has explained that the issue will depend on the facts submitted. [*Ohio*

¹⁹ Indeed, no directive from the Secretary of State’s office, prior Directive 2016-01, had ever discussed limiting discrepancies only to “arithmetic errors.” *See, e.g.*, footnote 18; [Damschroder Depo., Exhibit 14 at 17-34 (acknowledging that a sample of directives from the current and prior Secretaries of State, as well as the current chapters of the Ohio Election Officials Manual do not discuss limiting permissible discrepancies to “arithmetic errors.”)]

²⁰ This Court, as well as Respondent Secretary, have long instructed boards of elections to not make a determination that is “too technical, unreasonable, and arbitrary” when considering whether the number of signatures reported by a circulator matches the number of signatures on the part petition, particularly with regard to crossed out signatures. [*See, State ex rel. Schwarz v. Hamilton Cty. Bd. of Elections*, 173 Ohio St. 321, 181 N.E.2d 888 (1962); Ohio Elections Official Manual, “Circulator’s Statement on Each Part-Petition” at 11-9, Exhibit 10.]

Manufacturers' Assn., Slip Opinion No. 2016-Ohio-3038 at ¶ 21.] Relators and the Secretary, however, now seek to elevate dicta in the *Loss* case to a rule of law, but this Court never has.

- 2. Relators have not produced any evidence that warrants automatically invalidating whole part-petitions because they contain circulator statements that overcount the number of signatures appearing on the part-petitions.**
 - a. Relators provided no evidence that circulators pre-affixed the number of signatures they purportedly witnessed prior to actually circulating the petition.**

Relators failed to present *any* evidence that circulators pre-affixed the number of signatures they purportedly witnessed prior to actually circulating the petition. As explained by the Court, this was Relators' primary allegation: "In this case, OMA alleges that circulators wrote '28' on each part-petition at the outset and then submitted some part-petitions with fewer than 28 signatures on them." [*Ohio Manufacturers' Assn.*, Slip Opinion No. 2016-Ohio-3038 at ¶ 21.] This was also the concern held by Respondent Secretary when he issued Directive 2016-01, explaining "it appears that some circulators may have pre-affixed the number of signatures they purportedly witnessed prior to actually circulating the petition. . . ." and labeling one of the two sections "PRE-AFFIXING THE NUMBER OF SIGNATURES WITNESSED ON A CIRCULATOR STATEMENT." [Directive 2016-01, Exhibit 6.] The Court explained that if this allegation is true, "there is at least a question as to how many signatures the circulators actually witnessed, if any," and that "[t]he validity of the part-petitions therefore depends on specific facts that are in dispute." [*Ohio Manufacturers' Assn.*, Slip Opinion No. 2016-Ohio-3038 at ¶ 21.] With the facts now fully submitted, Relators have presented no evidence whatsoever that circulators pre-affixed the number "28" to the circulator statements prior to actually circulating the petition. Aside from a single statement in their brief, unsupported by any citation to their evidence, that circulators

admitted to pre-affixing circulator statements [Rel. Br. at 33], it appears that Relators have abandoned this argument altogether and instead pivoted to other arguments.

Relators presented excerpts from a number of transcripts from depositions they took and from evidentiary hearings held by the boards of elections. Yet, not one of these testimonies contained an allegation that circulators pre-affixed the number “28” to the circulator statement before they actually circulated the petition. Angelo Paparella, who managed the petition gathering effort, explained that there were no instructions to pre-affix a number to the circulator statement. [Rel. Br, Exhibit B, Paparella Dep. at 59, ¶¶ 14-19.] Pam Lauter, who managed a number of circulators of the Petition, repeatedly explained that there were no instructions to pre-affix a number to the circulator statement. [Rel. Br., App. 6, Lauter Dep. at 32 ¶¶10-21; 33 ¶¶7-16; 35 ¶¶ 19-24; 36 ¶¶ 5-9.] Relators also submitted the transcript from an evidentiary hearing where Gloria Torrence, a circulator of the Petition, testified that she was not instructed to pre-affix the number in the circulator statement and that she did not pre-affix the number. [Rel. Br., App. 6, Torrence Dep. 9 ¶¶ 4-17, 25 ¶25, 26 ¶¶1-3.] Relators also rely on the testimony from circulator Adrienne Collins elsewhere in their Brief; Ms. Collins, too, testified that she did not pre-affix the number in the circulator statement. [Rel. Compl, App. 28, Ex. T, Transcript of Adrienne Raishawn Collins by Franklin County Board of Elections, at 18, ¶¶ 19-21.] Relators cite no other testimony in their Brief. Accordingly, none of the evidence submitted by Relators indicates that circulators pre-affixed the number in the circulator statements.

b. There is no evidence that the alleged discrepancies promote fraud.

Lacking any evidence that circulators pre-affixed the number in the circulator statement, Relators pivot to other arguments. Relators also contend that circulators were instructed to write that they witnessed 28 signatures, even if the petition contained fewer signatures. [Rel. Br. 33.]

However, Relators provided no evidence that this was a widespread or common occurrence. The extent of Relators' evidence is testimony from one circulator, out of hundreds, who testified that she was told by her supervisor to always write "28" in the circulator statement. [Rel. Br. 33 *citing* Rel. Compl., App. 28, Ex. T, Transcript of Adrienne Raishawn Collins by Franklin County Board of Elections, at 7, ¶¶ 6-12.] In contrast, Mr. Paparella and Ms. Lauter both testified that they gave no such instructions nor were they aware of any such instructions. [Rel. Br, Exhibit B, Paparella Dep. at 59, ¶¶ 14-19; Lauter Dep. at 32 ¶¶10-21; 33 ¶¶7-16; 35 ¶¶ 19-24; 36 ¶¶ 5-9.]²¹

Relators also contend that someone other than the circulator wrote in the number on the circulator statement on an unspecified number of part-petitions. [Rel. Br. 34.] Ohio law is silent on whether circulators are required to personally write in the number on the circulator statement or only attest to the number. However, the question of the effect of someone other than a circulator writing the number in the circulator statement is a separate legal issue that was not raised in Relators' Complaint, and is, therefore, not a question properly before the Court. Aside from the impropriety of Relators raising this issue for the first time in their Merit Brief, Relators also failed to present evidence that this was a widespread occurrence. Indeed, Relators greatly overstate their evidence; their only evidence is testimony from one circulator, out of hundreds, who said that the "28" appearing on just two part-petitions, out of the many she circulated, did not appear to be her handwriting. [Rel. Br., App. 6, Ex. F, Gloria Torrence Testimony 21 ¶14 – 22 ¶13.] Even then, the circulator testified that she was not sure if it was hers or not, explaining "Yeah, I might have done it, but I don't remember doing it..." [*Id.* at 26 ¶¶ 20-25.] In contrast, the circulator Adrienne Collins, whose testimony Relators rely upon elsewhere in their Brief, expressly stated that she

²¹ It should also be noted that the practice followed in Ohio in validating petitions involve the Boards of Elections physically validating each and every signature against the signature on file for the registered voter. Therefore, even if the number in the circulator statement is higher than the actual number of signatures, only validated signatures end up being counted.

completed the circulator statement herself. [Rel. Compl, App. 28, Ex. T, Transcript of Adrienne Raishawn Collins by Franklin County Board of Elections, at 6, ¶¶ 21-23.] Thus, Relators failed to produce any evidence that this was a widespread or systemic practice.

c. Lacking any evidence to support their claim, Relators misrepresent Angelo Paparella’s testimony as to the legal effect of discrepancies in a circulator statement.

In support of their claim, Relators misrepresent Mr. Paparella’s testimony as though he admitted that part-petitions with discrepancies in the circulator statements should be wholly invalidated. [Rel. Br. 29-31.] As an initial matter, Relators’ questions—and Mr. Paparella’s answers—about the *legal effects* of such discrepancies are irrelevant as Mr. Paparella is not the Court. More to the point, Mr. Paparella did not state that whole part-petitions should be invalidated if the circulator statement overcounts the number of signatures. The excerpts cited by Relators simply indicate that Mr. Paparella agreed that there were not 28 signatures on a specific part-petition Relators presented to him that attested to containing 28 signatures, but contained one, and that Mr. Paparella stated that circulators should not have done this. [Rel. Br. 29-31 *citing* Paparella Dep. At 40-41, 43-44.] However, Relators omitted that Mr. Paparella explained that although a circulator statement that overcounts the number of signatures might not be accurate, this inaccuracy alone does not make part-petition invalid under Ohio law:

A: In other words, what I’m saying is the same objection I had to the reference in the Husted letter. The 28 number is wrong, but that does not mean he did not witness [a signer] sign this petition.

[Rel. Br, Exhibit B, Paparella Dep. at 42 ¶¶ 1-5.]

Q: Do you have any problem with a circulator signing under penalty of perjury a declaration that the petition he’s signing contains 28 signatures when it does not?

[Mr. Paparella’s Counsel]: Objection; calls for a legal conclusion. You can answer.

A: * * * To answer your question directly, if I have a book with one signature, should the petitioner have written 28 on the back of the petition? No, they should

not. The same standard of being somewhat close should have been adhered to. But – and I know exactly why these things happen – it should not invalidate the signer and it does not mean that they did not witness the signature. Maybe it means they were too quick in signing off on the circulator section, maybe they took some shortcuts. And, certainly, they probably did in this case. I would say it's a reasonable assumption to make.

[Rel. Br, Exhibit B, Paparella Dep. at 43 ¶¶ 8-25, 44 ¶¶ 1-6.]

Q: I thought I also heard you say, though, that you didn't have much of a problem if it said 28 and it was – the actual number was close?

A: What I actually said was that if it says 28 and the number was 1, like the first example you showed me, that should not invalidate the signer who signed the signatures.

[Rel. Br, Exhibit B, Paparella Dep. at 45, ¶¶ 12-18.]

In other words, Mr. Paparella's position is the same as Respondent Secretary's longstanding instructions to the boards of elections: if the number of signatures reported in the circulator 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 signatures numbers.

d. Relators have dramatically inflated—and in some cases, created—the alleged discrepancies.

Ever since Relator PhRMA first inserted itself into Ohio's initiative process, it has greatly exaggerated to Respondent Secretary, the boards of elections, and to the Court the number of part-petitions that contain circulator statements that overcount the number of signatures. The final evidence submitted by Relators identifies 262 part-petitions that purportedly contain only 1 signature, but attest to witnessing 28 and 140 part-petitions that purportedly contain only 2 signatures, but attest to witnessing 28. [Rel. Br., Hasman Third Aff. Ex. 4.] However, when Relator PhRMA first reached out to Respondent Secretary's office about the alleged violations, on December 23, 2015, it represented that 1,700 of the 3,400 part-petitions they had reviewed by that

point contained only one signature, but attested to containing 28 signatures. [Secretary of State’s Responses to Petition Respondents’ Interrogatories, Interrogatory No. 1, Exhibit 1; December 23, 2015 Email from PhRMA to Secretary of State Staff, Exhibit 2.]²² When, on December 30, 2015, Relator PhRMA formally requested that the Secretary, based on their allegations, delay the transmission of the proposed law and to instead send the Petition back to the boards of elections for a re-review, it represented that 6,435 part-petitions contained “only one or two” signatures, but attested to containing 28 signatures. [December 30, 2015 Email from PhRMA to Secretary of State Staff, Exhibit 4.]²³ Relator PhRMA subsequently shared this 6,435 figure with the county boards of elections during the “re-review” of the Petition. Having successfully duped Respondent Secretary, Relator PhRMA, in the Complaint, reduced its allegation from 6,435 of the 10,029 part-petitions filed contained only one or two signatures, but attested to 28 signatures, to 1,400 part-petitions that contained circulator statements *with any degree of discrepancy*—a reduction by *over 5,000* part-petitions. [Rel. Compl. ¶ 62.] Unfortunately, Relators’ exaggerations did not end with the Complaint.

Relators are inconsistent even in their own Merit Brief and supporting evidence. In an ironic twist, Relators even filed an affidavit with inconsistent numbers in support of their Merit

²² Jack Christopher, General Counsel for Respondent Secretary and sole recipient of the December 23 phone call and email from PhRMA, testified that he did not recall verifying the accuracy of this allegation. [Christopher Depo., Exhibit 15, at 29 ¶ 24 to 30 ¶ 6; *see also* Damschroder Depo., Exhibit 14, at 60 ¶ 14 (testifying that the Secretary of State’s office did not verify the allegations in the December 23, 2015 email).]

²³ The letter stated, “There appears to have been a systemic, widespread practice of falsifying the circulators’ attestation across the state and by numerous circulators who declared under penalty of election falsification that they were the circulator of “the foregoing petition paper containing 28 signatures . . . “ although the part-petitions contain only one or two signatures. See attached Exhibit A listing the 6,435 part-petitions (containing 40,612 signatures) that include this type of false certification.” A review of the “attached Exhibit A” showed that 6,435-figure *actually* referred to the number of part-petitions with circulator statements that contained *any* discrepancy—not just the number of part-petitions containing 1 or 2 signatures, but attesting to 28. A further review of the 6,435-figure showed that it was replete with errors and had dramatically exaggerated the number of part-petitions containing such discrepancies. Relators’ misrepresentation achieved its desired result, though, as Respondent Secretary’s office acted on these allegations, and did little to verify the truthfulness of Relator PhRMA’s claims. [Damschroder Depo., Exhibit 14, at 71 ¶¶ 6-10 (“we did not conduct a review to see if those numbers were accurate”).]

Brief. In the “Third Affidavit from David R. Hasman,” a litigation support manager who purportedly oversaw Relators’ review of all of the part-petitions swore under oath to two different figures. Mr. Hasman states that “approximately 1,464 part-petitions” include “circulator statements that attest to witnessing more signatures than were ever included on the part-petition,” but in the following sentence, he inexplicably increased this figure to “1,600 part-petitions”. [Rel. Br., Hasman Third Aff. ¶ 14.] These inconsistent figures are then repeated in Relators’ Merit Brief. In the “Statement of Facts,” Relators allege that there are “1,464 part-petitions containing approximately 9,589 signatures” that have circulator statements that overcount the number of signatures by any degree of discrepancy. [Rel. Br. at 10.] Yet, in their “Law and Argument” section, Relators allege that there are “[a]pproximately 1,600 part-petitions containing approximately 15,557 signatures” that have circulator statements that overcount the number of signatures by any degree of discrepancy. [Rel. Br. at 29.] Relators refer to this 1,600 figure for the remainder of their brief. [See, *id* at 32.] Relators may claim that these were mere typos or oversights—or even “arithmetic errors”—and should be overlooked by the Court as such. However, these errors and inconsistencies call into question the reliability of Relators’ evidence; this is especially so when the sole premise of their claim is that circulators allegedly attested to witnessing more signatures than they actually did.

The reliability of the multiple figures alleged in Relators’ Merit Brief is further undermined by the contrary information provided in the spreadsheet attached to Mr. Hasman’s affidavit as “Exhibit 4.” This spreadsheet, which purports to identify the part-petitions with “false circulator statements” and is the source of the figures cited by Mr. Hasman and Relators, purportedly identifies 1,464 part-petitions with “false circulator statements”—not 6,435, not 1,700, and not 1,600 as Relators have all previously represented to Respondent Secretary and to the Court.

Further, the 1,464 figure includes a large number of part-petitions (164) that either were already invalidated by the boards of elections for various reasons or contain no valid signatures. Thus, a significant number (164) of the 1,464 part-petitions that purportedly contain “false circulator affidavits” are irrelevant to Relators’ present challenge to the sufficiency of the Petition, and Relators are actually alleging that 1,300 part-petitions contain “false circulator statements.” Even this figure, upon further inspection, appears to be based on a series of exaggerations.

An examination of the part-petitions identified in Relators’ Exhibit 4 spreadsheet as containing “false circulator statements” further reveals exaggerations by Relators. In their Merit Brief, Relators misrepresent their spreadsheet as including, in the “signature count” column, the total number of signatures, valid or invalid, on each part-petition in order to contend that the identified part-petitions contain a small number of signatures, but attest to witnessing a much larger number, like 28. In truth, the figure in the “signature count” column is only the number of *valid* signatures as determined by the boards of elections. By omitting the number of invalid signatures on the identified part-petitions, Relators have sought to wildly inflate any discrepancies appearing on the part-petitions. For example, Relators represent that “FRANKLIN_000230” contains only 21 signatures, but attests to containing 28 signatures, for a discrepancy of 7 signatures. However, this part-petition contains 28 signatures, including 7 lined out or invalid signatures, meaning that there is no discrepancy at all. In another example, Relators contend that “BUTLER_000097” contains only 10 signatures, but attests to containing 28, for a discrepancy of 18 signatures. In actuality, however, this petition contains 23 signatures, 13 of which were invalidated by the Butler County Board of Elections, for a discrepancy of just 5 signatures. Relators omitted the invalid signatures from their calculation of the alleged discrepancy for virtually every part-petition they identified.

In other instances, Relators combined the exclusion of signatures from their county with misreadings of the circulator's handwriting to further inflate—and in some cases, create—any discrepancies. For example, Relators contend that “FRANKLIN_000674” contains only 10 signatures, but attests to containing 28 signatures for a discrepancy of 18 signatures. However, this part-petition contains 19 signatures, including one lined-out signature, and attests to 19 signatures, creating no actual discrepancy. In another example, Relators contend that the part-petition “FRANKLIN_000770” contains only 11 signatures, but attests to containing 28 signatures, for a discrepancy of 17 signatures. However, this part-petitions contains 13 signatures, 2 of which were invalidated, and attests to 20 signatures, not 28 signatures, for a discrepancy of 7 signatures. Such errors—intentional or not—are found throughout the evidence submitted by Relators.

Another common occurrence in the part-petitions identified by Relators is that the part-petitions may not contain a total of 28 signatures, but there is a signature appearing on line 28. The circulators likely wrote down the number “28” because it is the last numbered line on the part-petition with a signature. For example, there are no signatures on lines 10-14 in part-petition “WARREN_00065,” and, as a result, a board of elections employee might stop reviewing the signatures after line 9. However, beginning on the next page, there are signatures on lines 15-28. Other examples of this characteristic appearing in the part-petitions identified by Relators include “CARROLL_000001,” “LAKE_000060,” “CLERMONT_000152,” and “WARREN_000065.” This offers a rational explanation on the face of the part-petition to explain the discrepancy.

As a final note, Relators misstate the impact of invalidating every part-petition they identified as containing a circulator statement that overcounts the number of signatures. In their Merit Brief, Relators allege that there are 1,464 part-petitions, with 9,589 signatures, that contain such purported discrepancy. [Rel. Br. at 10.] Setting aside the numerous ways in which Relators

dramatically inflated—and in some cases, created—these discrepancies, Relators contend that invalidating these identified part-petitions would result in the Petition containing approximately 81,820 valid signatures. [*Id.*] Once again, Relators have committed an egregious “arithmetic error.” The Petition was certified by Respondent Secretary as containing 96,936 valid signatures. [Rel. Compl. ¶ 20.] Subtracting 9,589 signatures from 96,936 signatures would leave the Petition with 87,347 valid signatures, not 81,820 as Relators contend.

E. RELATORS’ “QUASI-ESTOPPEL” ARGUMENT IS WITHOUT MERIT.

Relators’ so-called quasi-estoppel argument merits little response, as they have entirely failed to follow the applicable rules for resolving discovery grievances, have flagrantly misrepresented Petition Respondents’ legal position vis-à-vis the petition process, and offer no persuasive authority to justify their request.

Relators have failed to utilize the discovery resolution mechanisms available to them, and have therefore waived any alternative remedies. [*Lakeview Loan Servicing, LLC v. Amborski*, 6th Dist. Lucas No. L-14-1242, 2016-Ohio-2978, ¶ 24 (“Discovery is intended to be self-regulating and should require judicial intervention as a last resort” (internal quotes omitted).] The Ohio Rules of Civil Procedure, applicable to this action through S.Ct.Prac.R. 14.01(C)(2), provide avenues for litigants to resolve discovery disputes, including attempts to first resolve objections through discussion of filing a motion to compel. [*See*, Civ.R. 37(E).] Relators now seek a backdoor remedy because they have themselves failed to follow the applicable discovery procedures. Furthermore, this Court, *at Relators request*, appointed a master commissioner whose role is the “resolution of discovery disputes.” [S.Ct.Prac.R. 14.01(D)(1).] Relators’ have declined to utilize this chosen and favored alternative to resolve discovery issues. Relators have cited no reasons why they could not or did not utilize these channels, and therefore have no grounds on which to claim the extraordinary

order that they seek. Relators have waived any right to dispute discovery at the eleventh hour of this litigation.

In seeking to tar Petition Respondents, Realtors have incorrectly interpreted Ohio law. They cite R.C. 3519.02 for the proposition that the Petition Respondents have “responsibility for ‘all matters relating to’ the Petition.” Relators’ Merits Brief at 38. R.C. 3519.02 **actually reads**:

The petitioners shall designate . . . a committee who shall **represent** them in all matters relating to such petitions. **Notice** of all matters or proceedings pertaining to such petitions **may be served on said committee** . . .

(emphasis added). This statute makes the committee—here, the Petition Respondents—essentially agents for service of any legal process pertaining to the petition. It imposes **no positive duty whatsoever** on the committee beyond receiving service, and certainly not any type of close supervisory responsibility, which Relators have apparently conjured from thin air.

The remedy that Relators seek is wholly inapplicable to this situation. None of the cases they cite in support of their novel position involved a discovery dispute. Simply put, their position is procedurally unjustifiable and legally untenable; this Court should waste little time or consideration in rejecting it.

III. CONCLUSION

The Petition proposing the Ohio Drug Price Relief Act has been the most heavily scrutinized initiative petition in Ohio history. This was true even before Relators, led by an out-of-state special interest group, filed their legal challenge as the Petition had been subjected to an unprecedented “re-review” by the 88 county boards of elections and an unprecedented sua sponte invalidation of more than 20,000 otherwise valid signatures by the Secretary of State. Despite this unmatched level of scrutiny, Relators contend that the Petition was not properly certified. In support of their claim, Relators rely upon novel and extreme legal positions that threaten to upend

Ohio's petition circulation process for ballot issues and candidates, alike, while producing no evidence that the practices at issue here promoted fraud. Accordingly, Relators have failed to satisfy their burden of proof that the Petition failed to comply with Ohio law, as required by S.Ct.Prac.R. 14(B), and the Court should deny Relators' challenge.

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

ccolombo@electionlawgroup.com

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 22, 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/ Derek S. Clinger
Derek S. Clinger (0092075)