

IN THE SUPREME COURT OF OHIO

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

RELATORS' MOTION FOR RECONSIDERATION

Kurtis A. Tunnell (0038569)
Anne Marie Sferra (0030855)
Nelson M. Reid (0068434)
James P. Schuck (0072356)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300 (Telephone)
(614) 227-2390 (Facsimile)
ktunnell@bricker.com
asferra@bricker.com
nreid@bricker.com
jschuck@bricker.com

Counsel for Relators

MICHAEL DeWINE (0009181)
Ohio Attorney General

Steven T. Voigt (0092879)
Senior Assistant Attorney General
Brodi J. Conover (0092082)
Assistant Attorneys General
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
(614) 466-2872 (Telephone)
(614) 728-7592 (Facsimile)
steven.voigt@ohioattorneygeneral.gov
brodi.conover@ohioattorneygeneral.gov

*Counsel for Respondent,
Ohio Secretary of State Jon Husted*

Donald J. McTigue (0022849)
J. Corey Colombo (0072398)
Derek S. Clinger (0092075)
McTIGUE & COLOMBO LLC
545 East Town Street
Columbus, Ohio 43215
(614) 263-7000 (Telephone)
(614) 263-7078 (Facsimile)
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*

RELATORS' MOTION FOR RECONSIDERATION

Pursuant to Rule 18.02 of the Ohio Supreme Court Rules of Practice, Relators The Ohio Manufacturers' Association, The Ohio Chamber of Commerce, Pharmaceutical Research and Manufacturers of America, Keith Lake, and Ryan R. Augsburger (collectively "Relators") respectfully request that the Court reconsider its August 15, 2016 decision that circulator Fifi Harper complied with the permanent residence requirement set forth in R.C. 3501.38(E)(1) when she listed a commercial postal box address. *Ohio Manufacturers' Assn. v. Ohioans for Drug Price Relief Act*, Slip Opinion No. 2016-Ohio-5377, ¶¶ 34-35.

As a matter of established law and under the facts presented in this case, Harper did not comply with Ohio law requiring circulators to list a permanent residence address. For the same reasons this Court invalidated the petitions circulated by Roy Jackson and Kacey Veliquette, Harper's petitions likewise should be invalidated. A memorandum in support follows.

Respectfully submitted,

/s/ Anne Marie Sferra

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

(614) 227-2300 (Telephone)

(614) 227-2390 (Facsimile)

ktunnell@bricker.com

asferra@bricker.com

nreid@bricker.com

jschuck@bricker.com

Counsel for Relators

MEMORANDUM IN SUPPORT

I. INTRODUCTION

As this Court noted, R.C. 3501.38(E) requires petition circulators to list their “permanent residence” address on the part-petitions they circulate. *Ohio Manufacturers’ Assn. v. Ohioans for Drug Price Relief Act*, Slip Opinion No. 2016-Ohio-5377, ¶ 33 (“Slip. Op.”). Relators moved to invalidate the petitions circulated by Fifi Harper, Kelvin Moore, Roy Jackson, and Kacey Veliquette on the grounds that they failed to list their permanent residence addresses on their circulator statements. This Court invalidated the petitions circulated by Jackson and Veliquette, finding that they had listed “nonpermanent, nonresidential addresses on their circulator statements.” *Id.* ¶ 37. As to Harper, this Court found that her commercial postal box constituted a “permanent address” for purposes of R.C. 3501.38(E) and did not invalidate her petitions. *Id.* ¶ 35.

Relators move the Court to reconsider the majority’s conclusion that Harper’s postal box satisfies the permanent residence address requirement of R.C. 3501.38(E) because it served “the important function of ensuring that a board of elections can contact the circulator in the event that complications arise during the verification process.” *Id.* The plain language of R.C. 3501.38(E) requires “the address of the circulator’s permanent *residence*” and not just a “permanent address.”

In addition, the evidence in the record demonstrates that Harper could *not* be reached at the “permanent address” she provided. The Scioto County Board of Elections used this address to contact Harper to appear and testify at a Board hearing in January of 2016. As of May, the certified letter to Harper from the Scioto County Board of Elections was still sitting in Harper’s postal box, unclaimed. (Relators’ Motion for Partial Summary Judgment, filed May 13, 2016,

Ex. G, Affidavit of Jim Fenton and Ex. A attached thereto.)¹ The record demonstrates the precise reason why it is crucial that circulators provide an address where they can be located. Harper could not be reached by the Board of Elections, nor could Relators locate her, and the Committee even professed difficulty reaching her. Relators submit that Harper has not complied with the requirements of R.C. 3501.38(E) and, thus, the petitions she circulated should be invalidated.

II. LAW AND ARGUMENT

A. Standard for a Motion for Reconsideration

This Court is authorized to invoke the reconsideration procedures set forth in the Ohio Supreme Court Rules of Practice “to correct decisions which, upon reflection, are deemed to have been made in error.” *State ex rel. Huebner v. W. Jefferson Vill. Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995) (citations omitted); *See also State ex rel. Rust v. Lucas County Bd. of Elections*, 101 Ohio St.3d 63, 2004-Ohio-9, 800 N.E.2d 1162, ¶ 3. Relators respectfully submit that the Court’s decision holding that a commercial postal box satisfies the permanent residential address requirement at issue, under Ohio election law, should be corrected.

B. The Court should have invalidated Fifi Harper’s petitions because a commercial postal box cannot qualify as the “address of the circulator’s permanent residence” under the plain meaning of R.C. 3501.38(E).

Ohio law is clear: “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. . .” R.C. 3501.38(E)(1) (emphasis added). Harper submitted part-petitions containing 3,750 signatures; a number which meaningfully impacts both the total number of valid signatures submitted and the number of counties that qualify toward the 1.5% threshold. Harper concedes

¹ For the Court’s convenience, a copy of the certified mail envelope from the Scioto County Board of Elections to Fifi Harper is attached to this motion as Exhibit A.

that the address of the commercial Pack Ship and Print Center she listed is not her “permanent residence” address and it is uncontroverted that she does not and cannot reside there. Slip Op., ¶ 35.

The majority incorrectly cites the statutory requirement as a “requirement that a circulator provide a *permanent address** * *” *Id.* (emphasis added). However, R.C. 3501.38(E) does not require circulators to provide a “permanent address.” It requires that they provide “the address of the circulator’s *permanent residence*.” This Court has frequently held that “[i]t is our duty ‘to give effect to the words used, not to delete words used or to insert words not used.’” *State v. Tolliver*, 140 Ohio St.3d 420, 422, 2014-Ohio-3744, 19 N.E.3d 870, ¶ 10, quoting *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm’n.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969). Similarly, in *Griffith v. Aultman Hosp.*, 146 Ohio St.3d 196, 2016-Ohio-1138, 54 N.E.3d 1196, ¶ 23, this Court held: “In matters of construction, it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used,” quoting *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St.3d 50, 524 N.E.2d 441 (1988), paragraph three of the syllabus.

In 2006, the General Assembly amended R.C. 3501.38 and specifically inserted the word “residence” into the text of that statute. Yet the majority omits the word “residence” from its analysis. Moreover, given that even Harper acknowledges that she does not reside in a postal box, the majority seemingly excuses this legislative requirement to permit a circulator to list a postal box as a “residence.” In doing so, the majority deviates from its own prior holdings on judicial deference to the legislative branch and statutory construction, as well as previous holdings related to the use of postal boxes in election matters. *See Kyser v. Board of Elections*,

36 Ohio St.2d 17, 303 N.E.2d 77 (1973); *State ex rel. Citizens for Responsible Taxation*, 65 Ohio St.3d 167, 602 N.E.2d 615 (1992).

Omitting the word “residence” from the judicial analysis does not comport with the plain statutory language provided by the General Assembly and is contrary to Ohio’s rules of statutory construction. Relators respectfully urge this Court to reconsider its determination as to Harper and apply the plain language of R.C. 3501.38(E) as it was written and intended.

C. The Court should have invalidated Harper’s petitions because the record demonstrates that she could not, as a matter of fact, be reached at the “permanent residence” address listed in her circulator statement.

The majority of this Court noted, “[t]he requirement that a circulator provide a permanent address serves the important function of ensuring that a board of elections can contact the circulator in the event that complications arise during the verification process.” *Id.* ¶ 35, citing *In re Protest of Brooks*, 155 Ohio App.3d 370, 382, 2003-Ohio-6348, 801 N.E.2d 503 (3d Dist. 2003). The majority’s ruling turns on a finding that “[t]he evidence in the record demonstrates that Harper met this requirement” with the commercial postal box address she provided. Slip Op. No., ¶ 35 (emphasis added).

However, the evidence in the record establishes the exact opposite: the objective of ensuring that a board of elections or someone else could contact a circulator regarding part-petitions he or she circulated clearly was not met here. In fact, Harper’s use of a commercial postal box address, coupled with the Committee’s dilatory discovery tactics, actually served to thwart the very purpose of R.C. 3501.38(E)(1). Contrary to the majority’s finding, there is *no* evidence in the record that a board of elections or anyone else could contact Harper at the address she provided on her part-petitions.

Relators urge this Court to consider facts and evidence not mentioned in the Court's August 15, 2015 decision that demonstrate that Harper's actions in listing a commercial address failed to meet both the letter and the spirit of the law. First, the record shows that a board of elections tried to contact Harper about her part-petitions using the commercial postal box address she provided, but was unsuccessful.² Second, the record shows that Relators were also unsuccessful in their attempts to reach Harper through the address she provided and through Educated Voters, the entity she listed as her payor. Third, the record demonstrates that even the Committee struggled to locate Harper, and could not reach her at the address she provided.

Board of Elections' Attempt to Reach Harper. The evidence before this Court reveals that a board of elections was actually *unable* to contact Harper at the address she provided. Significantly, the evidence in the record shows that as of May 5, 2016, when Relators' subpoena to the Pack Ship and Print Center was honored, the contents of Harper's commercial postal box included a piece of uncollected certified mail from the Scioto County Board of Elections that had been mailed in January 2016.

The purpose of providing a permanent residence address was demonstrably *not* met by Harper in this case. The Scioto County Board of Elections attempted to reach her in January 2016, during its re-review of the part-petitions, but Harper either never returned to that postal box or she refused to collect her mail. Some four months after the Scioto County Board of Elections tried and failed to reach Harper at the address she provided, Harper still had not collected her certified mail from the location where she claimed she could be contacted that was of a "permanent, on-going nature."

² See Relators' Motion for Partial Summary Judgment, at 13-14, n. 11, Relators' Merit Brief, at 19-20, and Amended Reply Brief of Relators, at 6.

This Court twice held that a post office box number is not legally sufficient to fulfill the requirement of a “residence” for purposes of Ohio’s election laws. *Kyser v. Board of Elections*, 36 Ohio St. 2d at 23 (1973) and *State ex rel. Citizens for Responsible Taxation*, 65 Ohio St.3d at 171. The facts of this case do nothing to undermine the significance of those previous rulings. On the contrary, the facts of this case only bolster the precise policy reasons why a permanent residence address is required.

Relators’ Attempts to Reach Harper. As outlined in various filings in this case, Relators also attempted to locate Harper repeatedly and without success. In addition to retaining investigators and having an attorney appear personally at the Pack Ship and Print Center in an attempt to locate Harper,³ Relators sought discovery related to Harper on several occasions. Notably, Relators asked the Committee to provide addresses for a number of circulators, including Harper, during discovery but were advised that the Committee did not have any information about any circulators.⁴

In order to locate Harper and obtain other information to prepare for these proceedings, Relators also made numerous attempts to serve Educated Voters, the entity Harper listed on the part-petitions she circulated as her payor, but those efforts were also unsuccessful.⁵ In short,

³ See Affidavit of Joe Abate, submitted as evidence: Complaint, Ex. I; Motion for Partial Summary Judgment, Ex. F; Relators’ Merit Brief, Ex. G.

⁴ See Committee’s discovery responses attached as Ex. C to Relators Merit Brief, filed June 22, 2016.

⁵ Relators’ attempts to subpoena Educated Voters and its owner, Cody Eldred, revealed that Educated Voters had closed its operations and abandoned the store-front Cincinnati address listed on Harper’s part-petitions. Moreover, Educated Voters could not be located at the Kentucky address Eldred provided on his Form 15 filed with the Secretary of State. When Relators tracked Eldred down in Florida, this Court denied Relators’ request to serve a subpoena in Florida, effectively ending any chance of obtaining information from Eldred. See Relators’ Motion for Order Appointing Commission for Issuance of Subpoenas for Out-of-State Discovery filed on May 20, 2016 and *Ohio Mfrs. Assn v. Ohioans for Drug Price Relief Act*, 6/02/2016 Case Announcements #3, 2016-3257.

neither Harper nor her employer, Educated Voters, provided any “permanent” or “residence” address where she could be located or served with process.

The Committee’s Own Attempts to Reach Harper. Even the Committee professed difficulty in contacting Harper and other circulators who listed commercial addresses: “Earlier attempts to speak with the challenged petition circulators had not been fruitful, owing to their itinerant lifestyles and, in one instance, the petitioner’s medical condition.” Petition-Respondents Response in Opposition to Relators’ Motion to Strike Argument that Statutes are Unconstitutional as Applied to Three Circulators, Filed June 02, 2016, at 3.

Yet the Committee was able to find Harper in order to obtain her affidavit to submit to this Court in response to Relators’ motion for partial summary judgment. *Id.* Clearly, Harper **could** be located. If Harper wanted to meet the spirit of the law, even if she could not meet the letter, she could have listed the same contact information on her part-petitions that she gave to the Committee, which the Committee successfully utilized to communicate with Harper about her affidavit.

Justice O’Donnell correctly observed that Harper made “the untrue representation in her circulator’s statement that a nonresidential address is a residential address. If she truly lacked a permanent residential address, then she should not have provided one, rather than knowingly listing a nonresidential address in violation of R.C. 3501.38(E)(1).” Slip Op., ¶ 57.

Ohio law is drafted precisely to avoid the need for a nationwide forensic search to locate a circulator of a statewide initiative petition. The statutory construction applied by the majority of this Court eviscerates that legislative purpose and leaves boards of elections, county prosecutors, and others with even fewer tools to locate circulators and ensure compliance with Ohio law than before. This is not the intended consequence of R.C. 3501.38(E), but it will be the

result if the Court's decision is not reconsidered. Relators urge this Court to reconsider its ruling as to this issue.

III. CONCLUSION

Harper submitted thousands of signatures from across the state that, if invalidated, would impact both the overall signature total and the number of qualifying counties on the Committee's petition. While the issue of what constitutes a "permanent residence address" under the plain meaning of the law is important in this petition effort, it is even more critical from a precedential standpoint. As a result of the majority ruling, R.C. 3501.38(E) has been contorted to allow a petition circulator to hide behind a petition committee and a postal box to effectively evade boards of elections, prosecutors, and interested parties, like Relators, who have a statutory right and/or duty to examine initiative petition practices.

One of the purposes of R.C. 3501.38(E), as this Court noted, is to allow boards of elections and others to locate circulators. This Court properly invalidated part-petitions submitted by circulators Roy Jackson and Kacey Veliquette on the grounds that the circulators failed to list their permanent residences, but refused to do so as to Fifi Harper. Yet Harper could be reached at the address she listed no more readily than could Jackson and Veliquette. More telling, there is direct evidence in the record showing that Harper could not be reached by a board of elections. The majority's differing construction on this issue does not comport with its prior decisions, the plain language of the statute at issue, the General Assembly's intent in enacting it, or the evidence in this case.

For the foregoing reasons, Relators respectfully request that the Court reconsider its August 15, 2016 Decision as it relates to the petitions circulated by Fifi Harper.

Respectfully submitted,

/s/ Anne Marie Sferra

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

(614) 227-2300 (Telephone)

(614) 227-2390 (Facsimile)

ktunnell@bricker.com

asferra@bricker.com

nreid@bricker.com

jschuck@bricker.com

Counsel for Relators

CERTIFICATE OF SERVICE

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

August 25, 2016 upon:

MICHAEL DeWINE
Ohio Attorney General

Steven T. Voigt
Senior Assistant Attorney General
Brodi J. Conover
Assistant Attorney General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
(614) 466-2872 (Telephone)
(614) 728-7592 (Facsimile)
steven.voigt@ohioattorneygeneral.gov
brodi.conover@ohioattorneygeneral.gov

*Counsel for Respondent,
Ohio Secretary of State Jon Husted*

Donald J. McTigue
J. Corey Colombo
Derek S. Clinger
MCTIGUE & COLOMBO LLC
545 East Town Street
Columbus, Ohio 43215
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*

/s/ Anne Marie Sferra

Anne Marie Sferra (0030855)

CERTIFIED MAIL

nty Board of Elections
Street, Room 105
Curt, OH 43002



U.S. POSTAGE >> PITNEY BOWES

ZIP 45662 \$ 006.73⁵
02 1W
0001396579 JAN 27 2016

7000 0520 0012 9960 2799

*F: Fi Harper
4022 Greenway Rd. # 1132
Phoenix AZ 85032*

65032479799

