



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

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

**RELATORS' MEMORANDUM CONTRA COMMITTEE'S MOTION FOR  
RECONSIDERATION OR RELIEF FROM JUDGMENT**

**I. Introduction**

Respondents Ohioans for Drug Price Relief Act, William S. Booth, Daniel L. Darland, Tracy L. Jones, and Latonya D. Thurman (the “Committee”) ask this Court to reconsider its decision ordering Respondent Secretary of State (“Secretary”), if he certifies a sufficient number of valid signatures, to “resubmit the initiative to the General Assembly, in accordance with the terms of Ohio Constitution, Article II, Section 1b.” *Ohio Manufacturers’ Assn. v. Ohioans for Drug Price Relief Act*, Slip Op. No. 2016-Ohio-5377, ¶ 47 (“Slip Op.”).

Relators, the Ohio Manufacturers’ Association, the Ohio Chamber of Commerce, Pharmaceutical Research and Manufacturers of America, Keith Lake, and Ryan R. Augsburger (“Relators”) respectfully submit that the Committee’s Motion for Reconsideration or Relief from Judgment (“Comm. Mot. for Recon.”) is an improper attempt to reargue a legal issue that was fully considered and correctly decided. *Dublin City Sch. Bd. of Educ. v. Franklin County Bd. of Revision*, 139 Ohio St.3d 212, 214, 2014-Ohio-1940. The Court properly ruled that the Petition was deficient and correctly ordered that, if the deficiency is properly cured, it be returned to the General Assembly “in accordance with the terms of Ohio Constitution, Article II, Section 1b.” Slip Op., ¶ 47. Relators respectfully request that this Court deny the Committee’s Motion for the following reasons.

**II. This Court correctly ordered that the Petition be returned to the General Assembly if the deficiency is cured.**

Ohio Constitution Article II, Section 1b sets forth a very clear and methodical process that must be followed in order for an initiated statute to reach Ohio voters. By ordering that the Petition be submitted to the General Assembly, if properly cured, this Court correctly applied the

constitutionally-mandated procedures applicable to every initiated statute. It is fundamental that a petition can only be properly submitted to the General Assembly after it is *both* submitted timely and *verified* as provided by Ohio law. In this case, there has not yet been a petition that was “verified as herein provided” and is eligible to be transmitted to the General Assembly. Moreover, unless the Committee cures the demonstrated deficiency found by this Court in *Ohio Manufacturers’ Assn.*, Slip Op. No. 2016-Ohio-5377, there will never be such a petition.

It is premature and a nullity to submit a petition to the General Assembly that is not properly verified. That is exactly what occurred in the instant case. As Justice French noted, “this case highlights the unworkable timeline” inherent in the initiated legislation scheme. *Id.*, ¶ 50. But this difficulty should be addressed, as Justice French also noted, by the Ohio Constitutional Modernization Commission. It should *not* be addressed, as the Committee contends, by skipping over constitutionally-mandated steps in the process. Ohio’s election laws are designed to assure the integrity of the ballot. “Close enough” on an initiative petition proposing a law is not sufficient to trigger legislative review.

Ohio’s election laws are mandatory and require strict compliance. Substantial compliance is acceptable only when an election statute says that it is. *See State ex rel. Vickers v. Summit County Council*, 97 Ohio St.3d 204, 2002-Ohio-5583, at ¶ 32; *Phillips v. Lorain Cty. Bd. of Elec.*, 93 Ohio St.3d 535, 2001-Ohio-1627, ¶ 49. More specifically, strict compliance with the law is consistently required for a circulator’s attestation, which serves as the entire basis for the finding of a deficiency in the instant case. *See State ex rel. Committee for the Referendum of City of Lorain Ordinance No. 77-01*, 96 Ohio St.3d 308, 2002-Ohio-4194, 774 N.E.2d 239, ¶49; *State ex rel. Citizens for Responsible Taxation*, 65 Ohio St.3d 167, 174 602 N.E.2d 615; *Rust v.*

*Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 139, 2005-Ohio-5795, ¶¶ 8-14; *State ex rel. Spadafora*, 71 Ohio St.3d 546, 549, 644 N.E.2d 393.

The Ohio Constitution does not provide for substantial compliance. Yet, without citing any case law in support, the Committee asks this Court to abandon the strict compliance standard in favor of a “close enough” approach to trigger legislative review. Ohio Constitution, Article II, Section 1b sets out the steps to place a piece of initiated legislation on the ballot before the voters and does so in mandatory terms. The Committee suggests that compliance with, or the order of, those steps is not critical so long as it generally “tags up” at each base.

If this Court were to agree with the Committee, a new “standard” for petition processes in Ohio would be created, allowing a petitioner to rush through a first-round of signatures, cutting corners and ignoring rules (as was the case here), knowing that the legislative review process will be triggered regardless of any potential deficiency that may subsequently be proven. Under the standard the Committee advocates, deficiencies in the petition may be cured later, or perhaps not, while the deficient petition continues on with a timeline unaffected by a sloppy, or even purposeful, disregard of Ohio election laws. Such a system does not foster the integrity of the ballot intended by Ohio’s constitutional and statutory scheme.

**III. The Committee erroneously argues that returning a properly verified petition to the General Assembly constitutes a “vain and useless” act.**

The Committee misunderstands its cited proposition that this Court must avoid construing legal provisions that would result in a “vain or useless act.” Comm. Mot. for Recon., at 4.

First, the cases upon which the Committee relies are inapposite. In *State ex rel. McCuller v. Cuyahoga Cnty. Court of Common Pleas*, 143 Ohio St.3d 130, 2015-Ohio-1563, 34 N.E.3d 905, ¶ 18, this Court refused to issue a writ of mandamus because the appellant, a juvenile who

was not prosecuted on one of the crimes with which he was charged, somehow “escaped the consequences that typically follow a bindover [thus] suffered no harm from any error that might have been committed by the juvenile court regarding this bindover.” The appellant in *State ex rel. McCuller* would receive no relief from his requested writ, thus issuing the writ would have been a vain act. The Committee is in a wholly different posture, procedurally, legally, and as a matter of fact.<sup>1</sup>

Second, it is mere speculation to contend that resubmittal to the General Assembly cannot result in any meaningful relief, or will be a vain or useless act. Just because the General Assembly took no action on the improperly transmitted Petition does not mean it will not take action in the future. If this Petition is cured and resubmitted, there will be a new General Assembly and a new group of legislators to consider the matter<sup>2</sup>, making it even more difficult for the Committee to sustain its “vain act” prediction. Presumably, the next petition submitted to the General Assembly will have been properly cured pursuant to the Court’s order and will not be accompanied by the cloud of reservations inherent with the Committee’s first attempt.

Ohio law provides that the “vain and useless act” doctrine focuses on “the authority to grant the relief sought; a vain act does not entail the petitioner’s probability of receiving the remedy.” *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 115, 564 N.E.2d 477 (1990). In the context of this case, the General Assembly clearly has the power to afford the Committee’s

---

<sup>1</sup> The Committee also cites to *Celebrezze v. Hughes*, 18 Ohio St.3d 71, 74, 479 N.E.2d 886 (1985), a statutory interpretation case that does not relate to a judicial remedy or a motion for reconsideration and is wholly misplaced in the context in which the Committee cites it. The *Celebrezze* Court held “the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute, it is inserted to accomplish some definite purpose.” *Id.* at 74 (citation omitted).

<sup>2</sup> The current General Assembly adjourns *sine die* this year and a new General Assembly, will convene Monday, January 9, 2017 pursuant to Ohio Constitution Art. II, Section 8, with a number of new members to be elected.

requested relief. Speculation as to the “happenstance of the relief being granted” is not relevant to this analysis. *Id.*

**IV. Having knowingly taken and acknowledged the risk of moving forward while the instant litigation was pending, the Committee is precluded from claiming “extreme prejudice.”**

The Committee also erroneously maintains that this Court’s order “results in extreme prejudice” because it gives the General Assembly eight months to consider the Committee’s Petition which, the Committee argues, is twice as much time as allowed by Article II, Section 1b of the Ohio Constitution. Comm. Mot. for Recon., at 5. What the Committee fails to recognize, however, is that the General Assembly has not actually reviewed, *for any length of time*, a petition submitted by this Committee that has been properly “verified as herein provided” as required by Article II, Section 1b. It is simply factually inaccurate that the General Assembly will have eight months to review a constitutionally sufficient petition as a result of this Court’s ruling.

The Court’s ordered remedy of returning a properly-validated petition to the General Assembly for consideration does not prejudice or damage the Committee’s plans to put the proposed law on the ballot.

Rather, the Committee is simply required to follow the constitutionally-mandated steps in the process before doing so. While the Committee may prefer to place the proposed law on the ballot sooner rather than later, there is no constitutional right to a particular ballot and the Committee is not prejudiced by having to follow the appropriate process to obtain ballot access.

Finally, the Committee misidentifies as “extreme prejudice” the costs flowing from its own voluntary decision to continue circulating their supplementary petition while in the midst of litigation challenging the Petition itself. The Committee’s decision to engage in a potentially

futile course of action in parallel with the proceedings here, and the consequent expense for doing so, does not meet even the definition for “prejudice” let alone “extreme prejudice.” *See* Black’s Law Dictionary 1198 (7th ed. 1999), defining “prejudice” as “damage or a deterrent to one’s legal rights or claims.” The Committee cites to no legal right or claim that is prejudiced, or even impacted, by the Court’s ordered remedy.

Moreover, a party cannot knowingly take a course of action while litigation is pending, knowing the risks of the various potential litigation outcomes, then use that same voluntary action to show it suffered prejudice. By analogy, the Committee’s argument is no different than a property owner incurring costs to develop property while a zoning decision is pending, then seeking to have an adverse decision overturned because it incurred those development costs. The Committee’s costs have no legal bearing on whether the Court’s ruling should now be reconsidered.

The Committee’s position is even more inappropriate when the Court considers that the Committee opposed Relators’ motion to stay the supplementary petition period. Indeed, in its opposition brief, the Committee expressly acknowledged that it understood that its effort and expense to gather supplemental signatures could be rendered entirely moot by this Court’s decision on the merits if the supplementary petition period was not stayed. *See* Petition Respondents’ Memo. in Op. to Motion to Stay, at 9 (wherein the Committee noted that “[i]f the Court determines rules [sic] for Relators, and if Petitioners subsequently fail to correct the Petition during the 10-day supplemental period, then the supplementary petition that Petition Respondents will begin circulating on June 5<sup>th</sup> would become moot.”).

## V. Conclusion

As set forth above, this Court was correct in ruling that if the Committee properly cures the Petition, the Secretary must resubmit it to the General Assembly in accordance with the terms of Ohio Constitution, Article II, Section 1b. This step is not inconsistent with the Ohio Constitution or the Ohio Revised Code, as the Committee suggests. Rather, it follows the constitutionally-mandated procedures applicable to every initiated statute. Because the Petition was deficient the first time it was submitted to the General Assembly (*i.e.*, was not properly verified), the legislative review process was never actually triggered.

Additionally, the Committee's reliance on the "vain and useless act" standard is misplaced. Not only does the standard not apply to judicial remedies, but the standard focuses on the *authority* to grant the relief sought, not the *likelihood* of whether the relief will be granted.

Finally, there is no prejudice to the Committee or the general public as a result of the Court's decision. The Court's remedy does not prevent the Committee from placing the proposed law on the ballot. Rather, the Court's remedy ensures that the Committee follows the proper constitutional framework before it does so. The Committee similarly cannot claim "extreme prejudice" as a result of costs it has incurred having knowingly taken and acknowledged the risk of moving forward with its actions while the instant litigation was pending.

For the foregoing reasons, the Court's decision with regard to the remedy in this case was correct. The Committee's Motion is without merit and should be denied.

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](mailto:ktunnell@bricker.com)

[asferra@bricker.com](mailto:asferra@bricker.com)

[nreid@bricker.com](mailto:nreid@bricker.com)

[jschuck@bricker.com](mailto: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 26, 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, 16<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-2872 (Telephone)  
(614) 728-7592 (Facsimile)  
[steven.voigt@ohioattorneygeneral.gov](mailto:steven.voigt@ohioattorneygeneral.gov)  
[brodi.conover@ohioattorneygeneral.gov](mailto:brodi.conover@ohioattorneygeneral.gov)

Donald J. McTigue  
J. Corey Colombo  
Derek S. Clinger  
MCTIGUE & COLOMBO LLC  
545 East Town Street  
Columbus, Ohio 43215  
[dmctigue@electionlawgroup.com](mailto:dmctigue@electionlawgroup.com)  
[ccolombo@electionlawgroup.com](mailto:ccolombo@electionlawgroup.com)  
[dclinger@electionlawgroup.com](mailto:dclinger@electionlawgroup.com)

*/s/ Anne Marie Sferra*  
\_\_\_\_\_  
Anne Marie Sferra (0030855)