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.	:	

REPLY BRIEF OF RELATORS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

REPLY BRIEF OF RELATORS

As the chief election officer in Ohio, the Ohio Secretary of State ("Secretary") has the authority to investigate "the administration of election laws, fraud, and irregularities in elections in any county." R.C. 3501.05(N)(1). Contrary to the Committee's arguments, the Secretary has absolutely ***no*** legal duty to verify a petition and transmit it to the General Assembly before these duties are complete. A petition that is later established to be so fraught with an unprecedented number of deficiencies, as was the Petition here, never qualified to be transmitted to the General Assembly. As the evidence before this Court shows, the Petition contains three legal infirmities, any one of which renders the Petition deficient: (1) circulators listed false residence addresses; (2) unauthorized persons improperly struck signatures; and (3) circulator affidavits were false.

Having been exposed by the facts, and unable to assert credible legal arguments to support its positions, the Committee devotes several pages of its Merit Brief to irrelevant and erroneous personal attacks against Relators, Relators' counsel, and the Secretary. Yet the deposition testimony elicited by the Committee itself reveals the fallacy of the Committee's own arguments.[1] The Committee's tactics are not worthy of response and Relators instead respectfully direct this Court to the relevant legal and factual matters at hand.

While the Committee tries mightily to cloud the picture, the facts are that the Petition fails to meet the fundamental requirements of Ohio law and does so in a systemic and intentional manner. It is also telling that the Committee does ***nothing*** to refute (and in fact essentially admits) the following critical points:

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[1] *See* Dep. of Matt Damschroder, at 79-80, 168-169, Ex. 14 to Comm. Br. and Dep. of Jack Christopher, at 93-95, Ex. 15 to Comm. Br. For example, the Committee repeatedly highlights that Relators' counsel communicated with the Secretary's office regarding the Petition before filing the Relators' challenge. But, both the Assistant Secretary of State and Counsel to the Secretary testified that the Secretary's office routinely engages in such communications, including with the Committee's counsel.

(1) The Committee highlights that *Cappelletti v. Celebrezze,* 58 Ohio St.2d 395, 396, 390 N.E.2d 829 (1979), stands for the proposition that the phrase "and verified as herein provided" means verification by the boards of elections. But the Committee never disputes, or even comments upon, the fact that as of December 26, 2015, only 16 boards of elections had verified fewer than 5,000 signatures on the Petition.

(2) The Committee spends many pages assailing Relators' arithmetic in a misconstrued attempt to undermine the impact of the overwhelming evidence against it.[2] Yet even if the Committee's misconstrued version of the evidence were accurate on each of its points, the result is the same: the Petition is still deficient.

The Petition did not qualify to proceed to the General Assembly, let alone the ballot, and the Committee must cure that deficiency before the Petition is properly submitted to the General Assembly, much less advanced to the ballot.[3]

I. LAW AND ARGUMENT

A. The Petition Was Not Verified At Least Ten Days Before Commencement Of The 2016 Session As Required By The Ohio Constitution

The Committee apparently agrees that the Petition was not verified by either the Secretary or the board of elections before December 26, 2015, which was ten days prior to the commencement of the current legislative session. In light of this undisputed fact (and its desire to make the 2016 ballot), the Committee is forced to argue that the Constitution does not set any express deadline pertaining to verification of the Petition. This Court's most recent

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[2] As outlined later in this Reply Brief, the Committee's attempt to cloud Relators' evidence should be rejected.

[3] Relators deny that they have engaged in delay tactics and refer the Court to their previous filings in which they have refuted similar arguments as those made in the Committee's Brief. This is another effort by the Committee to distract from the real issues before the Court.

pronouncement on the issue in *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 1, 2006-Ohio-4334, 854 N.E.2d 1025 establishes the inconsistency of the Committee's position.

In *Evans* the petition committee filed a petition for initiated legislation with the Secretary on November 17, 2005. *Id.* at ¶ 3. After review by the boards of elections but while protests were still pending, the Secretary transmitted the petition to the General Assembly on December 28, 2005. *Id.* The relator filed a lawsuit and argued, in part, that because the Secretary did not receive the last of the petitions from the boards of elections until December 28, 2005, he could not transmit the petition until that date. *Id.* at ¶ 19. While *Evans* ultimately found against the relator, the Court's analysis is telling:

> 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***. * * * That is, the Secretary of State did not need to wait for all of the counties' sufficiency reports to know that the petition contained sufficient verified signatures for transmission to the General Assembly.

Id. (emphasis added).[4]

The Court's discussion in *Evans* makes clear that the analysis does not turn singularly on the date of filing because verification by the Secretary and the boards in meeting that deadline was vital. This Court clearly linked verification to the "Section 1b, Article II deadline" and its decision turned on more than just the filing of the petition.

According to the Committee, the only requisite trigger for transmission to the General Assembly is the "date of filing, not the date of validation/certification * * *." Comm. Br., at 8. According to the Committee, the clauses "signed by three per centum of the electors" and

[4] A critical fact distinguishes *Evans* from the instant case: in *Evans* the Secretary actually had a sufficient number of verified signatures as of 10 days prior to the commencement of the General Assembly's session to find the petition to be sufficient.

"verified as herein provided" are only modifiers and must be secondary to the clause regarding the date a petition is filed. Such an argument is not only legally infirm, but it strains reason.

By the Committee's logic, a petition bearing just ten signatures, but filed ten days before the commencement of the next General Assembly session, must be transmitted to the legislature and can be fixed later because the clause "signed by three per centum of the electors" has no bearing on the Secretary's timing or duty to transmit. Likewise, according to the Committee's skewed reading of the Constitution, a petition signed by 100,000 fictional characters, but filed ten days before the next legislative session, must advance because the clause "verified as herein provided" takes an insignificant back seat to the date that a defective petition is filed.

The Ohio Constitution does not require the Secretary to blindly transmit, nor the General Assembly to mutely consider an initiative petition that fails to meet ***all*** of the requirements of Article II, Section 1b. Invoking the time and attention of the General Assembly must be a meaningful, justified action that is triggered by more than the date on a calendar. An initiative petition must be filed ***and verified*** no later than ten days before the next session of the General Assembly to be properly transmitted.

The Committee's Petition was filed, but it was not verified by December 26, 2015. Even the Committee points out that, as this Court concluded in *Cappelletti*, verification "refers to the validation process conducted by the boards of elections * * *." Comm. Br., at 6.

Moreover, while the Committee mistakenly persists in its argument that it has a "right" to the 2016 ballot, the federal district court handling the Committee's injunction action recently rejected this argument. *Tracy L. Jones, et al. v. Husted*, Case: 2:16-cv-00438, June 20, 2016 Opinion and Order denying TRO, at 9 ("Further, even if the initiative could not appear on the November 8, 2016 ballot—due to expense, time constraints, or some other reason—the harm to

Plaintiffs would neither be severe nor wholly irreparable. * * * ***Plaintiffs do not have a constitutional right for the initiative to appear on any ballot, far less any particular ballot.***") (Emphasis added, citations and footnote omitted.)[5]

The Committee delayed its filing to a point beyond which the boards of elections or Secretary could reasonably carry out their duties and still meet the Committee's fabricated timetable. This self-inflicted wound does not invoke some constitutional or statutory entitlement.

B. Part-Petitions Submitted By Circulators Who Listed False Permanent Residence Addresses Must Be Stricken[6]

Ohio law is clear: a petition circulator must provide "the address of the circulator's permanent residence." R.C. 3501.38(E)(1). The Committee admits that that "[t]he address Ms. Harper gave on her statement does not meet the technical definition of a 'residence'" and attempts to relegate that admission to a mere technicality subject to liberal interpretation. But no interpretation is needed because the law is clear on its face. Moreover, the Committee has waived its constitutional arguments (which Relators submit are without merit) and is estopped from raising these arguments by its own actions.

Although the Committee asks this Court to "interpret" R.C. 3501.38, there is no need to do so. This Court has repeatedly held that when the "language is clear and unambiguous, the court need not resort to any other means of interpretation, but must, instead, apply the statute as written." *State v. Chappell*, 127 Ohio St.3d 376, 2010-Ohio-5991, 939 N.E.2d 1234, ¶16; *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792, 891 N.E.2d 311, ¶20.

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[5] And, contrary to the Committee's assertion, the "constitutional design of the initiative process" does not "clearly indicate" that it is to be completed in "under one year." Comm. Br., at 9. The Ohio Constitution, Article II, Section 1b provides 90 days to circulate a supplementary petition. If the full 90 days is taken, the issue will always be on the ballot the following year.

[6] Contrary to the Committee's assertion, Relators have not waived their arguments as to the other three false statement circulators. Those are addressed in Relators' pending motion for partial summary judgment.

The Committee's current factual assertions about Fifi Harper's circumstances ring hollow. The Committee contends that Harper arranged for the Pack and Ship facility "to send her a notification on her cell phone when she received a piece of certified mail." Comm. Br., at 12. Yet, there is absolutely no indication of such an arrangement. In fact, Harper did not complete the part of the Pack and Ship application that requested a phone number so that a text could be sent. *See* Ex. A to Aff. Jim Fenton, Ex. G to Motion for Partial Summary Judgment. More telling, as of May 5, 2016 when Relators' subpoena was honored, the contents of Harper's Pack and Ship box included a piece of uncollected certified mail from the Scioto County Board of Elections that had been mailed in January 2016. *Id.*

Although the Committee argues that Harper met the policy purpose of requiring petition circulators to provide an address so that they can be contacted by election officials, the facts in this very case establish that is not true. The Scioto County Board of Elections could not reach Harper, nor could Relators serve Harper. The Committee itself claims to have had difficulty in reaching Harper and ultimately did not reach her by using the address provided. *See* Response to Relators' Motion to Strike, filed June 2, 2016 at 2-3 (asserting how difficult it was for the Committee to find Harper and the other false address circulators). Contrary to the Committee's assertion, Harper could not "actually be contacted" at the Pack and Ship, thus neither the letter nor the spirit of the law was met.

Because Harper (and the other false address circulators) did not comply with Ohio law, the Committee purports to attack the law as unconstitutional. Failure to raise the constitutionality of a statute at the first opportunity constitutes a waiver of such issue. *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986); *Cicco v. Stockmaster*, 89 Ohio St.3d 95, 100, 728 N.E.2d 1066 (2000). The Complaint sets forth in detail Relators' argument regarding Ohio's permanent

residence requirement, citing R.C. 3519.06 and 3501.38(E). *See* Complaint, ¶¶23-37. Although the Committee was on notice that R.C. 3519.05 and 3501.38(E) were at issue, it did not raise any constitutional challenge to either statute in its answer (including its affirmative defenses), or in any filing with the Court until responding to Relators' motion for partial summary judgment on May 23, 2016. For the reasons set forth in the Relators' motion to strike, filed May 27, 2016, Relators urge this Court to find that the Committee has waived its right to bring a constitutional challenge and should be precluded from contesting the validity of the permanent residence requirement in this action.

C. All Part-Petitions That Contain Signatures Struck Out By Someone Other Than A Circulator, Signer, Or Attorney In Fact For A Signer Must Be Invalidated

Ohio law permits three individuals to strike signatures from a part-petition: (1) the circulator; (2) the signer; and (3) the signer's attorney-in-fact. R.C. 3501.38(G) and (H). The Committee does not dispute that someone other than these three individuals struck signatures from part-petitions in this case. Instead, the Committee argues that the part-petitions should not be invalidated on this ground. Relators disagree.

Apparently arguing that anyone can strike a signature from a part-petition the Committee attempts to argue in the negative and points out that the law does not state that signatures may "only" be struck by three individuals. To borrow the Committee's own words, the maxim *expressio unius est exclusio alterius* defeats its argument. The specific statutory inclusion of these three individuals in R.C. 3501.38 implies that the General Assembly intended that they be the only individuals permitted to strike signatures to the exclusion of all others. *See State v. Droste*, 83 Ohio St.3d 36, 39, 697 N.E.2d 620 (1998).

Moreover, the Committee's arguments that part-petitions containing improper strikethroughs cannot be rejected are ill-founded. R.C. 3501.39(A)(3) provides in relevant part:

> The secretary of state or a board of elections ***shall accept any petition*** described in section 3501.38 of the Revised Code ***unless * * * the petition violates the requirements of this chapter***, Chapter 3513 of the Revised Code, ***or any other requirements established by law***. [Emphasis added.]

The unauthorized removal of signatures violates R.C. 3501.38(G) and (H), which is not only a requirement of Chapter 3501, but is also a requirement "established by law."

Unable to refute the plain language of R.C. 3501.39(A)(3), the Committee instead takes a shot gun approach and posits several piecemeal arguments, none of which have merit. First, the Committee argues that nothing in R.C. 3501.38(G) or (H) authorizes the invalidation of the entire part-petition. But the argument misses the point. It is R.C. 3501.39(A)(3), which clearly references "any other requirements established by law," that requires part-petitions to be invalidated ***because of*** the violation of R.C. 3501.38.

Second, the Committee argues that the Secretary has not yet taken the position in this case that an entire part-petition should be invalidated if someone other than the three statutorily-authorized individuals strike signatures. That is simply not true. In his February 4, 2016 transmittal letter, the Secretary invalidated every part-petition containing strikethroughs circulated by two circulating companies in Cuyahoga County based on the evidence before him at the time. *See* Transmittal Ltr. at 3. The Secretary found the practice of "purging the deck" to be a clear violation of Ohio law and struck part-petitions as a result. *Id.* Further, the Secretary reaffirmed this position in his Merit Brief. *See* Secretary Am. Br., at 8-9.

Third, the Committee claims that R.C. 3519.06(C) does not apply because the "statement required by R.C. 3519.05 is * * * ***commonly referred to*** as the 'circulator statement,' which appears at the end of each part-petition." Comm. Br., at 21-22 (emphasis added). R.C. 3519.06(C) provides that: "No initiative or referendum part-petition is properly verified if it appears on the face thereof, or is made to appear by satisfactory evidence * * * that the statement

is altered by erasure, interlineation, or otherwise[.]" The "statement" referred to in R.C. 3519.06(C) is the statement required by R.C. 3519.05, which sets forth the requirements of the entire part-petition. It is wholly reasonable and consistent with R.C. 3519.05 to construe "statement" to include the entire part-petition and conclude, as the Secretary did here, that any alteration on any part of the part-petition violates R.C. 3519.06(C) and results in the entire part-petition being invalid. The statement that is in R.C. 3519.05 is the ***entirety*** of the initiative part-petition.[7] It is wholly irrelevant what might be "commonly referred to" as a statement when the language of the actual statutes refer to the ***entire*** part-petition, including the signature blocks.

Next, the Committee points to *State ex rel. Sinay v. Sodders*, 80 Ohio St.3d 224, 228, 685 N.E.2d 754 (1997) and *State ex rel. Hodges v. Taft*, 64 Ohio St.3d 1, 5-6, 591 N.E.2d 1185 (1992) as support for its argument that the "statement" referred to in R.C. 3519.06 is that "commonly referred to" as the circulator statement. Comm. Br., at 22-23. But reliance on these cases does nothing to make the Committee's point that the "circulator statement" is something other than what the General Assembly says it is in R.C. 3519.05. In fact, courts that have actually considered the legality of striking an entire part-petition have followed the plain letter of the law and adopted Relators' position by applying the term "statement" to the entire part-petition. *See In re Protest of Brooks*, 155 Ohio App.3d 370, 2003-Ohio-6348 (3rd Dist.) ("a part-petition is invalid if [***the part petition***]" fails to comply with R.C. 3519.06) (emphasis added); *see also State ex rel. Linnabary v. Husted*, 138 Ohio St.3d 535, 2014-Ohio-1417, ¶ 18-19 (striking entire part-petition under R.C. 3501.39 for failure to comply with the law).

The Committee further argues that Relators failed to identify which part-petitions contain improper strikethroughs, but at the same time acknowledges that Relators included a list of part-

[7] The full text of R.C. 3519.05 is attached as Ex. B because the LEXIS version of this statute is incomplete.

petitions that contain these strikethroughs. The Committee also glosses over the testimony of Angelo Paparella, the President of PCI, who confirmed that the striking of signatures by someone other than the circulator, signer, or the signer's attorney in fact was a statewide practice. *See* Paparella Dep. at 22-24, 53. PCI was retained by the Committee to oversee the entire signature collection effort. Paparella testified that all part-petitions circulated in Ohio by his contractors and their subcontractors were shipped to PCI's California processing center where "validators," who were not circulators, would review signatures and strike out those that they did not believe were valid. *Id.* at 22-24. Thus, this practice was not limited to any one specific company, but was uniformly done to every part-petition.

Based on the evidence before him as of February 4, 2016, the Secretary invalidated the part-petitions circulated by two companies (DRW and OPP) containing improper strikethroughs in Cuyahoga County. As the Secretary correctly observed, it was unlikely that these "improper practices by DRW and OPP under the direction of the PCI were limited only to those petitions circulated in Cuyahoga County." *See* Transmittal Ltr. at 3. We now have sworn testimony that these improper practices were not limited to two companies nor were they limited to Cuyahoga County. This practice was statewide and intentional. *See* Relators' Merit Br., at 24-28. Accordingly, the Secretary's reasoning and decision should be extrapolated statewide and any part-petition containing improper strikethroughs should be invalidated.

Finally, the Committee seeks to downplay the fact that it violated Ohio law by arguing that Relators have failed to present evidence of fraud. The Committee's argument misses the point. As noted by the Secretary in his February 4, 2016 transmission letter, "it is the duty of election officials, not a petition company, to determine whether a signature is valid." *See* Transmittal Ltr. at 3. Relators are not required to prove fraud, nor is fraud an element of R.C.

3519.06 or the cases that interpret and strictly construe it. The laws requiring the Secretary and the boards of elections to determine the validity of signatures exist to protect the integrity and reliability of the initiative process. This is because the eligibility of an elector to sign the petition is not determined at the time of signing or upon review by the Committee's "validators," but rather is based on who is a registered voter "at the time the boards examine the petition." R.C. 3519.15.

Instead, the Committee took it upon themselves to usurp the duties of Ohio election officials and determine the validity of signatures. While the Committee argues that it was essentially doing the boards of elections a favor by striking invalid signatures and reducing their workload, Ohio law does not permit such conduct.

D. All Part-Petitions That Contain A False Circulator Affidavit Must Be Invalidated

The Committee continues to urge this Court to adopt a blanket rule that part-petitions may never be rejected on the basis of an overcount. The Committee cites to "decades of case law and instructions from the Secretary of State" in support of its position, placing particular emphasis on *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections*, 65 Ohio St.3d 167, 602 N.E.2d 615 (1992). Yet the Committee ignores that this Court has already distinguished the holding of that case from the facts now at issue. *See Ohio Manufacturers' Association v. Ohioans for Drug Price Relief*, Slip Opinion No. 2016-Ohio-3038 at ¶ 20 (Under "***those facts***, the court was willing to overlook the discrepancy if the error did not promote fraud.") (emphasis added).

This Court has already rejected the application of the blanket rule urged by the Committee, stating that the validity of the part-petitions depends instead on a consideration of "the ***specific facts*** that are in dispute." *Id.* at ¶ 21. The specific facts of ***this*** case are that fraud is

promoted by the systematic and intentional practices used by the Committee and the part-petitions that exhibit this practice should be stricken.

The discrepancies in signature counts at issue here far exceed those in *Citizens for Responsible Taxation,* which involved a total of five part-petitions that contained overcounts of ***one*** signature each. *See Citizens for Responsible Taxation*, 65 Ohio St.3d at 171. Contrast that to the instant matter which involves over 1,600 part-petitions with overcounts, hundreds of which contain discrepancies of more than 10 signatures. *See* Third. Aff. of Hasman, ¶ 14.

The Committee maintains that Relators "provided no evidence that circulators pre-affixed the number of signatures they purportedly witnessed prior to actually circulating the petition." Comm. Br., at 35. The Committee mischaracterizes Relators' Complaint. Relators' claim is not that someone pre-affixed the number "28" to the circulator statements. Indeed, the term "pre-affixed" does not appear once in Relators' Complaint. Instead, from the outset, Relators have alleged that the circulators ***falsely attested*** to the number of signatures actually contained in the part-petitions. *See* Relators' Complaint, at ¶ 62 (emphasis added).

Whether such numbers were pre-affixed, affixed during circulation, or affixed at a later date by some unknown person is not the point. Regardless of when the circulators completed the signature counts, such counts were false, they did not reflect the number of signatures actually witnessed, and they promoted fraud. *See* Complaint, at ¶ 67.

As a result, the Committee's attack on Relators' evidence and its attempts to undermine the testimony of Pamela Lauter, Gloria Torrence, and Adrienne Collins is without merit. Adrienne Collins testified that she was instructed by her superiors to "mark 28 in the box always," ***regardless of the number of signatures actually collected,*** directly confirming Relators' allegation that the circulator statements were falsified. *See* Complaint, App. 28, Ex. T,

Transcript of Adrienne Raishawn Collins by Franklin County Board of Elections, at 16, ¶¶ 19-20. Similarly, Gloria Torrence testified that ***someone else filled in the number "28"*** on her part-petitions, though the part-petitions did not in fact contain 28 signatures. *See* Rel. Br., Exhibit F, at 21-23. This evidence fully supports Relators' contention, rather than undermining it as the Committee implies.

Regardless of why or when the number "28" was affixed to the challenged part-petitions, "28" is false. When circulators declared, under penalty of election falsification, that they were the circulator "of the foregoing petition paper containing the ***signature of 28 electors***," and their part-petitions never included 28 signatures, their statements were false.[8] Significantly, the circulators' failure to accurately attest to the actual number of signatures promotes fraud.

This Court has previously held that the statutory requirement to accurately indicate the number of signatures contained on the part-petition is subject to strict compliance and is intended to serve as "a protection against signatures being added later." *State ex rel. Loss v. Bd. of Elections of Lucas Cty.*, 29 Ohio St.2d 233, 234, 281 N.E.2d 186 (1972). Whether a circulator or some other party pre-affixes "28" or adds "28" later to a partially filled-out part-petition, the effect is the same: there is "a question as to how many signatures the circulators actually witnessed, if any." *Ohio Manufacturers' Ass'n*, at ¶ 21. When a circulator does not accurately complete the number of signatures to which he or she has attested, there is a prime opportunity for signatures to be added later and for circulation companies that are paid by the signature to maximize their profits.

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[8] Contrary to the Committee's assertion, where a circulator submitted a part-petition with 28 signatures, but someone with a thick marker later crossed out some of the signatures, Relators intentionally did not include these part-petitions in the list of part-petitions that should be invalidated for false circulator attestations.

The facts of this case show that over 1,600 part-petitions listed the maximum "28" signatures even though they did not contain that many signatures. Instead, these already-attested part-petitions were shipped off to California and through various sets of hands containing blank lines where signatures could be added later. This practice unquestionably promotes fraud, resulting in the exact consequences that the election laws are designed to avoid and provides no "protection against signatures being added later." *State ex rel. Loss,* 29 Ohio St.2d at 234.

The Committee attempts to offer a "rational explanation" for the discrepancies in the part-petitions by claiming that "circulators likely wrote down the number '28' because it is the last numbered line on the part-petition with a signature." Comm. Br., at 43. This explanation is nothing more than conjecture and is not supported by ***any*** evidence in the record. In addition, even if this explanation was supported by the record, it is nonetheless irrelevant, as this purported practice still resulted in false circulator statements, which violate Ohio election laws and promote fraud.

Relators' argument has always focused on the fact that the circulator statements were falsely completed, ***not*** on when, where, or by whom they may have been completed. Relators are not required to prove that actual fraud occurred. That was not a requisite finding in *Rust*, *Loss*, *Scioto*, any of the numerous cases on this issue that have been previously decided or the Ohio Elections Officials Manual. The *Scioto* Court did not require that the relators in that case prove which specific signatures contributed to the undercount. Rather, because the number of signatures claimed to appear on the part-petition and witnessed by the circulators was false, the part-petition was invalid and properly stricken.

E. The Committee's Claim That Relators Misrepresent Or Inflate The Impact Of Invalidating Signatures Is Wrong

The Committee goes on at some length attempting to discredit the extensive evidence before this Court and the impact of that evidence. Comm. Br., at 30, 39-44. One need not scratch far beneath the surface of the Committee's argument to see that the criticisms raised are either flatly wrong or mischaracterize the true nature of the evidence before this Court.

For instance, the Committee tries to make much of the fact that the numbers presented to the Secretary on December 30, 2015 (based on the Petition as filed on December 22, 2015) do not match the numbers in Relators' Complaint or Merit Brief. *Id.* at 39-40. But the Committee seems to forget that the boards of elections invalidated numerous part-petitions and thousands of signatures for various reasons during their review. As the numbers of valid signatures dwindled, so did the scope of Relators' challenge.

Another example is the Committee's attack on the number of part-petitions that reflect a false circulator attestation. The December 30, 2015 letter included a list of 6,435 part-petitions each of which reflected fewer than 28 signatures, but the circulator attested to 28 signatures. The Committee agrees that these 6,435 part-petitions *actually* showed a discrepancy between the number of signatures and the number attested to, but then intermingles those that "contain only one or two signatures," with those having "any degree of discrepancy." Comm. Br., at 40, n.23. It should be no surprise that the number of part-petitions that contain "*any degree* of discrepancy" includes the subset of those part-petitions that contain "only one or two" signatures.

Likewise, the so-called "inexplicable" increase from 1,464 to 1,600 part-petitions is explained in several places. Cuyahoga and Delaware County data was "[i]ntentionally excluded from the spreadsheet * * * The analysis below, thus, reflects totals for the remaining 86 of 88

counties."[9] There are more than 1,600 total part-petitions, including those from Cuyahoga and Delaware Counties, with false circulator attestations. No doubt, some of the part-petitions which remain valid in Cuyahoga County are subject to challenge because they were circulated by someone who listed a false residence address, or include false circulator statements, or contain strikethroughs by other petition companies. But since Relators cannot definitively prove how many signatures remain in Cuyahoga County with those infirmities, Relators chose not to guess at the discrepancy. Instead, Relators assess the materiality of its arguments and the extent of the deficiency as if every remaining Cuyahoga County signature is valid. Relators applied the same reasoning to the 324 Delaware County signatures and note that even if every single Delaware County signature remains valid, the Petition is still deficient.

The Committee also attempts to discredit Relators' evidence by cherry-picking eight part-petitions out of the more than 10,000 filed.[10] Comm. Br., at 42-43. Despite being specifically selected, these part-petitions do not support the Committee's contentions. For example, the Committee takes exception with the fact that "Relators contend that BUTLER _000097 contains only 10 signatures. . ." Comm. Br., at 42. Yet this is exactly the number of valid signatures remaining on BUTLER _000097 after the board's review and is exactly the number of signatures that should be invalidated as a result of the instant challenge. The Committee also complains that "Relators omitted the invalid signatures from their calculation of the alleged discrepancy for

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[9] *See* Relators' Merit Br., at 10-11, n. 4, and Ex. A thereto, Third Aff. of David R. Hasman, at ¶ 10 and Exhibit 4 thereto. As explained there, Relators could not obtain copies of the Cuyahoga County part-petitions stricken by the Secretary, and thus were unable to conclusively determine what signatures might be subject to challenge on the still-valid part-petitions in that county. Nor did Relators include Delaware County in its calculations because a tie vote by the board of elections remains unbroken. Even without those two counties included, the deficiencies proven on the basis of the other 86 counties are so significant as to render the entire Petition invalid.

[10] For the Court's convenience, all of the part-petitions referred to in the Committee's Brief, at 42-43, are attached hereto as Exhibit A-1 through A-8.

virtually every part-petition they identified." *Id.* Again, Relators did so very carefully and intentionally. Why would Relators challenge the 13 signatures on BUTLER_000097 which, even the Committee agrees, were already "invalidated by the Butler County Board of Elections"? *Id.* Each one of the eight part-petitions hand-chosen by the Committee equally undermines the Committee's arguments (and Relators encourage the Court to review Exhibit A attached hereto against the Committee's claims in its Merit Brief).

Finally, the Committee contends that the Relators' "math is wrong" or that Relators committed an egregious "arithmetic error." Comm. Br., at 30, 44. Once again, the Committee overlooks the fact that Cuyahoga and Delaware County data is not included in the calculations setting out the impact of the various legal issues presented on the sufficiency of the Petition. Although the Committee does its best to muddy the waters and call the data into question, the bottom line is this: *Even under the worst case scenarios the Committee attempts to portray, the Petition is still deficient.*

It is telling that after all of its arithmetic gymnastics, the best the Committee can do is to contend, as to the strikethrough issue, that the so-called correct math "would leave the Petition with 33,177 valid signatures, not 27,640 as Relators contend." *Id.* at 30. Plainly, 33,177 valid signatures is still woefully deficient and remains so regardless of how Cuyahoga and Delaware County signatures are considered. Similarly, when the Committee's math is done on the false attestation issue, only 87,347 signatures are valid Comm. Br., at 44. Plainly, 87,347 is still well short of the 91,677 signatures needed to qualify for transmittal to the General Assembly.

In sum, Relators have at all times done their best to present this Court with an accurate assessment of the number of signatures impacted by the arguments. This Court has before it every single part-petition filed. It also has the spreadsheets outlining the issues involved and the

number of valid signatures challenged. To the extent questions remain as a result of the Committee's attempts to interject confusion, this Court need only look to the record before it (or refer it to the Master Commissioner).

F. The Committee's Delay In Filing The Petition And Its Resistance To Discovery Estops It From Using Evidence It Should Have Produced

The Committee apparently believes there can be no negative consequences from its blatant stonewalling in discovery both before and after the condensed schedule ordered in this case and there is nothing Relators can do to address prejudice resulting from the Committee's refusal to cooperate particularly with respect to the whereabouts of the circulators on whose conduct its Petition balances.

The Committee's position is not only incorrect as set forth below, but it is also important to note what the Committee does not say. The Committee does not dispute that its discovery responses were inaccurate or incomplete. It cites no case law precluding quasi-estoppel and presents no legal argument to refute the cases that Relators cite. And it does not dispute that it knew where to find critical circulators and supervisors when it knew Relators were trying repeatedly (without success, based upon incorrect addresses) to serve them with subpoenas for depositions. The Committee allowed the short window of time for discovery to close while keeping critical information secret, for its own benefit and to the clear prejudice of Relators.

All of this goes to the heart of why quasi-estoppel does apply and, in fact, perfectly suits this unique scenario. The Court should not allow the Committee to have it both ways: to disavow knowledge of the whereabouts of circulators, then rely on their testimony; to pass along bad addresses and claim no knowledge of the right ones; to claim it did not have any dealings with the circulators, then produce their affidavits on quite short notice when it served the Committee's purposes.

This Court should reject the Committee contention that it bears no responsibility whatsoever for the Petition under Ohio law, except to act as a mail drop for receiving notices. The Committee's position is contrary to the plain language of R.C. 3519.02, which provides for an appointed committee to "represent" the petitioners in "all matters relating to" the petition. Further, the Committee's position is directly contrary to this Court's interpretation that R.C. 3519.02 makes a petition "that of" the appointed committee at this stage. *State ex rel. Schwartz v. Brown*, 32 Ohio St.2d 4, 288 N.E.2d 821, 824 (1972) (a proposal is "that of the 'committee' provided for in R.C. 3519.02" until such time as an initiative petition containing its full text has been signed by at least ten percent of the electors.) This finding is consistent with the broad language of R.C. 3519.02 setting forth the role of the petition committee. And it only makes sense, given the Committee's obvious position in this case that it is entitled to defend the Petition. Again, the Committee wants to have it both ways: to fully litigate to defend the Petition and yet to claim it is nothing more than a mail drop when it comes to performing obligations to provide Relators with discovery. The theory of quasi-estoppel exists precisely to prevent a party from taking inconsistent positions to suit its whim and it should be applied here against the Committee.

II. CONCLUSION

This case is about the tactics employed by petition circulation companies and others that either disregard or stretch the interpretation of Ohio law beyond all reasonable boundaries and time their efforts so that the boards of elections and Secretary are rushed through the review process. Then, when called on to be accountable, their response is to obstruct all attempts to uncover their tactics and all attempts to require strict compliance with Ohio law.

Relators are tired of these tactics and urge this Court to apply the laws as they are written and as they are intended to apply. While Ohio recognizes the right of citizens to petition their

government, that right must be exercised in a manner that complies with the Ohio Constitution and election laws. This Court has the opportunity to make that clear in this case and for the many others that are expected to follow.

The entire Petition is now before this Court. Even a cursory review will confirm that the same issues the Secretary noted in his transmittal letter to the General Assembly appear on the face of the part-petitions and are both significant and pervasive. As set forth above, the Petition is deficient and does not meet the requisite threshold number of signatures or counties. Accordingly, it should not have been transmitted to the General Assembly. Relators respectfully request that this Court find that the Petition was insufficient to transmit to the General Assembly and, if necessary, send it to the Special Master for a determination of the precise extent of that deficiency.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served via electronic mail on June 28, 2016 upon:

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