

IN THE SUPREME COURT OF OHIO

STATE EX REL. TRACY L. JONES
5903 Bear Creek Drive
Bedford Heights, Ohio 44146

STATE EX REL. WILLIAM S. BOOTH
1243 Wilson Drive
Dayton, Ohio 45402

STATE EX REL. DANIEL L. DARLAND
3811 N. Main Street
Dayton, Ohio 45405

STATE EX REL. LATONYA D. THURMAN
2618 North Cassady Avenue
Columbus, Ohio 43219

Relators,

-v-

JON HUSTED
OHIO SECRETARY OF STATE
180 East Broad Street, 16th Floor
Columbus, Ohio 43215

Respondent.

CASE NO.

ORIGINAL ACTION IN MANDAMUS

**ALTERNATIVE AND PEREMPTORY
WRITS REQUESTED**

Donald J. McTigue (0022849)
Mark A. McGinnis (0076275)
J. Corey Colombo (0072398)
Derek Clinger (0092075)
MCTIGUE MCGINNIS & COLOMBO LLC
545 East Town Street
Columbus, Ohio 43215
Phone: (614) 263-7000
Facsimile: (614) 263-7078
dmctigue@electionlawgroup.com
mmcginnis@electionlawgroup.com
ccolombo@electionlawgroup.com
dclinger@electionlawgroup.com

Counsel for Relators

Counsel for Respondent

NOW COME THE RELATORS, and hereby aver as follows:

NATURE OF THE ACTION AND JURISDICTION

1. This is an action in mandamus due to Ohio Secretary of State Jon Husted's failure to fulfill his clear statutory obligation to certify and transmit a proposed initiative ("Proposed Law") to the General Assembly pursuant to Art. II, § 1b, Ohio Constitution.
2. As provided in Ohio Constitution Article II, § 1b , when a sufficient number of the electors of this state have signed an initiative petition proposing a law verified as provided therein, the Secretary of State is required to transmit it to the General Assembly as soon as it convenes. Despite the unequivocal provisions of Ohio Constitution Article II, § 1b requiring the Secretary of State to transmit the Proposed Law to the General Assembly, and the fact that the county boards of elections have reviewed the initiative petition containing the Proposed Law and verified that it contains sufficient valid signatures in accordance with Respondent's Directive, the Secretary of State refuses to so act in accordance with the Ohio Constitution.
3. Accordingly, Relators seek an order and/or judgment from this Court that Respondent Secretary of State certify the sufficiency of the petition and submit the Proposed Law to the General Assembly. Relators alternatively seek an order from this Court certifying the sufficiency of the petition and submitting the Proposed Law to the General Assembly.

4. Relators affirmatively allege that they have acted with the utmost diligence in bringing the instant action, that there has been no unreasonable delay or lapse of time in asserting their rights herein and, further, there is no prejudice to Respondent. [See, e.g., *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections* (1995), 74 Ohio St.3d 143, 145, 656 N.E.2d 1277.]
5. Relator lacks an adequate remedy at law.

PARTIES

6. Relators Tracy L. Jones, William S. Booth, Daniel L. Darland, and Latonya D. Thurman (“Petitioners”) are the individuals designated on the face of the initiative petition to represent the petitioners in all matters relating to the initiative petition or its circulation pursuant to Ohio Rev. Code § 3519.02.
7. Respondent Ohio Secretary of State Jon Husted (“Secretary of State”) is the Ohio Secretary of State, the Chief Elections Officer of the State of Ohio. Pursuant to Ohio Rev. Code § 3501.05(K), Respondent Husted has a statutory responsibility to certify the sufficiency or insufficiency of all statewide initiative petitions. [Sec. 1g, Art. II, Ohio Constitution; Ohio Rev. Code § 3519.16.]

ALLEGATIONS SUPPORTING CLAIM FOR RELIEF

Respondent Has A Ministerial Duty to Certify the Sufficiency of the Initiative Petition Based on the Verification Reports Provided by the Boards of Elections and Transmit the Proposed Law to the General Assembly

8. Pursuant to Ohio Constitution Article 2, § 1b, the citizens of Ohio may propose a law by filing an initiative petition with the Secretary of State containing the signatures of three percent of the electors and verified as therein provided.

9. Ohio Constitution Article 2, § 1b, provides, in part:

“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...”

10. Accordingly, pursuant to the Ohio Constitution, where the requisite number of electors present an initiative petition verified as provided therein to the Secretary of State, the boards of elections verify the signatures, and the certifications received from the boards of elections, taken together, indicate that the initiative petition contains the requisite number of signatures, the Secretary of State shall transmit the proposed law to the General Assembly.

11. Ohio Rev. Code 3519.15 provides:

Whenever any initiative or referendum petition has been filed with the secretary of state, he shall forthwith separate the part-petitions by counties and transmit such part-petitions to the boards of elections in the respective counties. The several boards shall proceed at once to ascertain whether each part-petition is properly verified, and whether the names on each part-petition are on the registration lists of such county, or whether the persons whose names appear on each part-petition are eligible to vote in such county, and to determine any repetition or duplication of signatures, the number of illegal signatures, and the omission of any necessary details required by law. The boards shall make note opposite such signatures and submit a report to the secretary of state indicating the sufficiency or insufficiency of such signatures and indicating whether or not each part-petition is properly verified, eliminating, for the purpose of such report, all signatures on any part-petition that are not properly verified.

In determining the sufficiency of such a petition, only the signatures of those persons shall be counted who are electors at the time the boards examine the petition. [Emphasis supplied.]

12. Ohio Rev. Code 3519.16(E) provides:

The properly verified part-petitions, together with an electronic copy of the part-petitions, shall be returned to the secretary of state not less than one hundred ten days before the election, provided that, in the case of an initiated law to be presented to the general assembly, the boards shall promptly check and return the petitions together with their report. The secretary of state shall determine the sufficiency of the signatures not later than one hundred five days before the election.¹ The secretary of state promptly shall notify the chairperson of the committee in charge of the circulation as to the sufficiency or insufficiency of the petition and the extent of the insufficiency. [Emphasis supplied.]

13. Initiative proponents proposing a law must presently submit at least 91,677 valid signatures, a number equal to at least 3% of the total vote cast for the office of governor in the last gubernatorial election. [Sec. 1b, Art. II, Ohio Constitution.] Further, petitioners are required to submit valid signatures equal to at least one and a half percent of the total vote cast for governor at the most recent gubernatorial election in at least 44 of the 88 counties in Ohio. [Sec. 1g, Art. II, Ohio Constitution.] Finally, the petition must comply with various other constitutional and statutory requirements in order for the proposed amendment to be submitted to the electors, including the requirements set forth in Art. II, Sec. 1g of the Ohio Constitution and Ohio Rev. Code 3519.01. Relators' initiative petition meets all legal requirements.

¹ The language that the Secretary of State determine the sufficiency of the signatures not later than one-hundred-five days before the election is nonsensical in this context, as the initial initiative petition refers the matter to the General Assembly rather than to the ballot. The timeline, along with the words "forthwith" and "at once" contained in R.C. 3519.15 supports the assertion that the process is intended to continue moving without delay.

The Petitions Filed with the Secretary of State

14. On December 22, 2015, the Petitioners filed 10,029 part-petitions containing 171,205 signatures with Respondent Secretary of State.
15. On December 23, 2015, Respondent issued Directive 2015-40, "Instructions Regarding the Review, Examination, and Verification of the Petition proposing an Initiated Statute (Ohio Drug Price Relief Act)," to the boards of elections to provide instructions on the "review, examination, and verification of signatures on the petition proposing an initiated statute." [Exhibit A.]
16. Directive 2015-40 instructed the boards of elections to review the instructions contained in Chapter 11 of the Election Official Manual (Directive 2015-33)[*sic.*] regarding the review of circulator's statements and signatures and marking petitions.
17. Section 1.03 of the Election Official Manual (Directive 2015-36) instructs:

"2. Circulator's Statement

The board must *accept the circulator's statement* of part-petitions at *face value* unless there are inconsistencies with the number of signatures witnessed (see below) or with information about the circulator across part-petitions reviewed within a single county (i.e., the circulator writes a different permanent residence address on different part-petitions).

If the circulator reported witnessing fewer than the total number of uncrossed out signatures submitted on the part-petition, then the board **must invalidate the entire part-petition.**

If the circulator reported witnessing the same or more than the total number of signatures not crossed out on the part-petition, **then the board must not invalidate**

the part-petition for this reason alone. Instead, the board must review the validity of each signature as usual. [*Italic Emphasis Supplied.*] ”

18. The above instructions have been the consistent instructions from the Secretary of State’s office to the boards of elections for decades.
19. Directive 2015-40 further provided that once a board of elections completed the verification process, the director of the board of elections was to sign and return the county’s certification form no later than noon on December 30, 2015, less than seven days after the date of the Directive.
20. Respondent Secretary of State received certification forms from all of the 88 county boards of elections on or before December 30, 2015. Based on the certification forms from the 88 county boards of elections reported (certified) that the initiative petition contained 119,031 valid signatures, 27,354 more than required by Art. II, § 1b of the Ohio Constitution, and 48 of the 88 counties met the county threshold requirement, four more than required by Art. II, § 1b of the Ohio Constitution
21. At 5:02 p.m. on December 30, 2015, an attorney from the law firm of Bricker & Eckler LLP transmitted an electronic mail communication to attorney Jack Christopher, General Counsel in the Ohio Secretary of State’s office, on behalf of its client PhRMA.² That correspondence included a letter addressed to Secretary of State Husted setting forth purported issues and concerns with the initiative petition and requesting that he take several actions, including:

² PhRMA, the Pharmaceutical Research and Manufacturers of America, is an advocacy and public policy organization representing pharmaceutical companies. PhRMA is a known opponent of laws such as the one being initiated here.

“On behalf of our client, PhRMA, we respectfully request your consideration of several issues that suggest violations of Ohio law and potentially fraudulent practices in connection with the Ohio Drug Price Relief Act petition (“the Petition”) filed on December 22, 2015. We would appreciate your review and instruction to the Boards of Elections regarding two statistically and legally significant issues:”

* * *

“We respectfully ask that you direct the BOEs, consistent with Ohio law and with protecting the sanctity of the ballot and electors’ signatures, to strike those part-petitions that demonstrate the issues outlined above;”

“Additionally, we respectfully ask that you refrain from certifying the petition and/or transmitting the Petition to the General Assembly until such time as a thorough investigation of these issues can be conducted. This investigation would allow time for determining whether the Petition actually contains the requisite number of lawful signatures, or alternatively whether any supposedly requisite number of signatures was achieved solely through fraud and violations of Ohio election laws;”

* * *

“Moreover, until such time as the Secretary can investigate and determine the sufficiency of the Petition, the Secretary cannot and should not transmit the Petition to the General Assembly.”

22. Petition challenges, such as those set forth in the PhRMA letter referenced above, are committed to the exclusive and original jurisdiction of this Court as provided in Art. II, § 1g, of the Ohio Constitution, to wit:

“The Ohio supreme court shall have original, exclusive jurisdiction over all challenges made to petitions and signatures upon such petitions under this section. * * * If no ruling determining the petition or signatures to be insufficient is issued at least eighty-five days before the election, the petition and signatures upon such petitions shall be presumed to be in all respects sufficient.”

23. On January 4, 2016, the General Assembly first convened its 2016 session.

The Second Directive

24. On January 4, 2016, rather than transmit the Proposed Law to the General Assembly as required by the Ohio Constitution, Respondent issued Directive 2016-01, “Re-Review of the Ohio Drug Price Relief Act.” [Exhibit B.]
25. Despite the fact that each of the boards of elections had already undertaken considerable effort and expense to review and issue certifications verifying the validity of the part-petitions and signatures based on Respondent’s own instructions in Directive 2015-40, Respondent has returned all part-petitions to the boards of elections to conduct a “re-review” not contemplated by the Ohio Constitution or Ohio Law.
26. Directive 2016-01 further provides that the boards of elections must complete the “re-review” and “re-certify” their findings to the Secretary of State’s office no later than January 29, 2016, twenty-five days after the date of the Directive.
27. Directive 2016-01 cites two particular issues for the boards of elections to examine during the re-review process: (1) whether “a signature was improperly removed in violation of R.C. 3501.38(G) and/or (H),”³ and; (2) whether the “circulator’s statement is invalid under R.C. 3501.38(E)(1),” the precise issues raised in the PhRMA letter.⁴

³ A “re-review” on this ground has no effect on the number of valid signatures. There is nothing in the law that an entire part-petition can be invalidated because it contains a stricken signature. Since a signature that has been stricken has not been counted, there is no point in “re-reviewing” the presence of stricken signatures on a part-petition.

⁴ These instructions to the boards of elections contained in the Election Official Manual and referenced in Directive 2015-36 were just re-promulgated by the Secretary of State on December 15, 2015. Other than the PhRMA letter, there was no other known intervening factor that would form the basis for the need to issue a second Directive revising the instructions given days earlier.

28. Respondent Secretary of State has no authority to return the part-petitions back to the boards of elections for a “re-review” and issuance of “re-certifications” and delay the issuance of his certification of the sufficiency of the petition and his transmittal of the Proposed Law to the General Assembly pending a “re-review” and “re-certification” by the boards of elections.
29. Respondent’s engineering a “re-certification process” appears to be in response to the correspondence received on behalf of PhRMA.
30. There is no indication or evidence that the boards of elections failed to follow the Secretary of State’s instructions contained in Directive 2015-40 when reviewing the part-petitions or when issuing their respective certifications.
31. Directive 2016-01’s instruction that the “re-review” process may now include “evidentiary hearings that [the boards] may believe necessary to complete their duties” runs counter to the intent of the Ohio Constitution, which provides that this Court is vested “with original, exclusive jurisdiction over all challenges made to petitions and signatures upon such petitions ...” [Art. II, § 1g, Ohio Constitution.]
32. Further, the delay caused by the “re-review” and “re-certification process” runs counter to the timeline contemplated by the Ohio Constitution. The Ohio Constitution mandates the Proposed Law “shall” be transmitted to the General Assembly “as soon as it convenes.” Accordingly, the Ohio Constitution contemplates that any verification process with respect to the part-petitions must be completed prior to such date, *i.e.*, prior to the time when the General

Assembly convenes. Indeed, from the time the part-petitions were filed in Columbus, Directive 2015-40 gave the boards of elections 7 days to complete the review and certification process, which they did, leaving 5 days for Respondent to perform his ministerial duty. Now, rather than transmit the petition containing the Proposed Law to the General Assembly as required, Respondent has issued a second Directive calling for a “re-certification” process on the same day the General Assembly convened for the first time in 2016.

33. Directive 2016-01 will result in a delay of at least 25 days before transmission of the Proposed Law to the General Assembly. This adversely impacts the time provided in the Constitution for petitioners to file a supplementary petition to gain access to the 2016 General Election ballot.
34. The Constitutional scheme provides specific time periods for each step in the process for proposing a law by initiative petition. [See, e.g., Art. II, § 1b, Ohio Constitution, which provides for the following sequence of events : (1) the Secretary of State transmits the initiative petition containing the proposed law to the General Assembly as soon as it convenes; (2) the General Assembly has four months to take action on the proposed law; (3) if the General Assembly fails to act, or amends the proposed law, the petitioners have 90 days to collect additional signatures to place the issue on the ballot; and, (4) if the petitioners collect sufficient additional signatures, the proposed law is submitted to the electors at the next general election occurring subsequent to 125 days following the filing of the final second petition. Each day that Respondent fails to

transmit the Proposed Law effectively reduces the 90-day supplementary petition period and makes it less likely that the Proposed Law will be submitted to the electors at the November 8, 2016 general election. Indeed, Directive 2016-01 essentially cuts this supplementary period by at least 25 days for the 2016 general election.

CLAIM FOR RELIEF

Issuance of a Writ of Mandamus Directing Respondent to Comply with His Constitutional and Statutory Obligations

35. Each and every allegation contained above is incorporated as if fully rewritten herein.
36. When a petition proposing a law which contains the signatures of three percent of the electors and verified as therein provided has been filed with the Secretary of State and certified by the boards of elections, the Secretary of State is required to certify the validity of the petition and transmit it to the General Assembly as soon as it convenes. [Art. II, Sec. 1b, Ohio Constitution.]
37. Respondent has been presented with an initiative petition which contains the signatures of three percent of the electors and has been certified by the boards of elections as fulfilling the constitutional requirements.
38. Despite receiving certification forms conclusively indicating that the part petitions containing the Proposed Law have been properly verified and contain sufficient signatures, Respondent Secretary of State has not certified the sufficiency of the petition.

39. Despite receiving certification forms conclusively indicating that the part-petitions containing the Proposed Law have been properly verified and contain sufficient signatures, Respondent Secretary of State has not transmitted the petition containing the Proposed Law to the General Assembly as required by Art. II, §1b, Ohio Constitution.
40. Respondent Secretary of State has a ministerial and clear legal duty to certify the sufficiency of the initiative petition based on the certification forms received from the boards of elections and to immediately transmit the Proposed Law to the General Assembly.
41. Relators have a clear legal right to have Respondent certify the sufficiency of the initiative petition and immediately transmit the petition to the General Assembly.
42. Respondent has abused his discretion and/or clearly disregarded applicable legal provisions in not certifying the sufficiency and validity of the initiative petition and immediately transmitting it to the General Assembly.
43. Relators lack any other relief than an order or judgment from this Court ordering that Respondent certify the sufficiency of the initiative petition and immediately transmit the petition to the General Assembly.

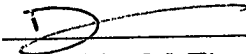
Prayer for Relief

WHEREFORE, Relators respectfully pray the Court to grant the following relief:

- A. Issue a peremptory Writ of Mandamus ordering Respondent to certify the sufficiency and validity of the initiative petition and immediately transmit it to the General Assembly.

- B. Issue a Writ of Mandamus ordering Respondent to certify the sufficiency and validity of the initiative petition and immediately transmit it to the General Assembly.
- C. Issue an alternative writ or other Order certifying the sufficiency and validity of the initiative petition and immediately transmitting it to the General Assembly.
- D. Assess the costs of this action against Respondent;
- E. Award Relators their attorneys' fees and expenses; and
- F. Award such other relief as may be appropriate.

Respectfully submitted,



Donald J. McTigue (0022849)
Mark A. McGinnis (0076275)
J. Corey Colombo (0072398)
Derek Clinger (0092075)
McTIGUE MCGINNIS & COLOMBO LLC
545 East Town Street
Columbus, Ohio 43215
Phone: (614) 263-7000
Facsimile: (614) 263-7078
dmctigue@electionlawgroup.com
mmcginnis@electionlawgroup.com
ccolombo@electionlawgroup.com
dclinger@electionlawgroup.com

Counsel for Relators