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December 30, 2015

The Honorable Jon A. Husted
Secretary of State
Ohio Secretary of State
180 East Broad Street, 16th Floor
Columbus, OH 43215

Re: Ohio Drug Price Relief Act Petition

Dear Secretary Husted:

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:

1. False Circulator Affidavits: A sizable percentage of the part-petitions contain false circulator affidavits because they attest, under penalty of election falsification, to having witnessed significantly more signatures than actually appear on the actual part petition. There appears to have been a systemic, widespread practice of falsifying the circulators' attestation across the state and by numerous circulators who declared under penalty of election falsification that they were the circulator of "the foregoing petition paper containing 28 signatures. . ." although the part-petitions contain only one or two signatures. See attached Exhibit A listing the 6,435 part-petitions (containing 40,612 signatures) that include this type of false certification.

Failure to provide an accurate number of signatures gathered renders a part-petition invalid. Ohio law requires, in mandatory terms, that the circulator of a petition "**shall indicate the number of signatures contained on it**, and shall sign a statement made under penalty of election falsification. . ." R.C. 3501.38(E) (emphasis added). "No initiative or referendum part-petition is properly verified if it appears on the face thereof. . . [that the circulator's] statement is false in any respect." R.C. 3519.06(D).

Ohio law requires **strict** compliance with these provisions and courts have recognized on numerous occasions that the requirement for circulators to accurately list the number of signatures witnessed is a reasonable requirement that protects against a fraudulent practice of signatures being added later.

The Ohio Election Official Manual ("OEM"), and the Ohio case law on which it is based, allow room for minor discrepancies and a plausible

Secretary Husted – Ohio Drug Price Relief Act Petition Issues
December 30, 2015
Page 2 of 4

explanation for a miscount. However, the BOEs should only accept a circulator's statement at face value **unless there "are inconsistencies with the number of signatures witnessed."** There are significant, blatant, discrepancies clearly apparent on the face of 6,435 part-petitions filed by Petitioners. Petitioners have taken the limited reasonable latitude permitted in a fair election scheme to an intentionally abusive extreme.

Both the OEM and numerous Ohio court decisions consistently support a reasonable approach that allows circulators to demonstrate that their part-petition should not be rejected where: 1) the signature discrepancies in the circulator's statement were minor and isolated; and 2) a reasonable explanation was provided by the circulator to the BOE. However, there should be distinction between a minor, explainable counting error on a single part-petition and a systemic, wide-spread falsification on thousands of part-petitions. Circulators are required to attest to the number of signatures on a part-petition under penalty of election law. They should not be permitted to attest to a fabricated number and then leave the petition open for other signatures to be added after the fact. Allowing such a practice to occur renders the statutory requirement for a circulator to witness signatures effectively meaningless. Consistent with Ohio law, every part-petition which contains more or fewer signatures than were attested to, and for which no plausible and lawful explanation is provided, should be rejected. We respectfully urge you to instruct the BOEs accordingly.

2. Altered Petitions. A review of the part-petitions also reveals that a significant number of petitions appear to have been altered by someone other than the circulator or the signer. Attached at Exhibit B is a comprehensive list of the 5598 part-petitions (118,574 signatures) which contain signatures that were clearly stricken by someone other than the circulators or signer. R.C. 3501.38 (G) and (H) authorize only three people to strike signatures from a petition before it is filed: 1) the circulator; 2) the signer; or 3) an attorney in fact acting pursuant to R.C. 3501.382. Here, it is apparent that some other person struck these signatures, and, thus, unlawfully altered the petition such that the petition cannot not be properly verified.

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 . . ." Except in the rare situations noted above and specifically authorized by law, it is of the utmost importance that petitions cannot be altered before they are submitted to any election official. Otherwise, the requirement for a circulator attestation (or for circulators at all) is significantly undermined.

There is no doubt that petition circulation has become a big business in Ohio, significantly for out of state individuals and petition companies. However, that lucrative money-maker for out of state entities with little regard for Ohio law cannot be allowed to undermine the integrity of our elections process or usurp the authority of Ohio BOEs or your Office. Statutes are clear that the BOEs - and not out of state, money-making, petition circulation companies - are entrusted and authorized to verify petition signatures and strike those that do not qualify. R.C. 3501.11(K) imposes the duty to review, examine, and certify the sufficiency and validity of

Secretary Husted – Ohio Drug Price Relief Act Petition Issues
December 30, 2015
Page 3 of 4

petition signatures upon the BOEs and not on any other entity, public or private. Numerous courts have determined that it is incumbent on the BOEs to determine the validity of any signature on a part-petition.

Thus, only the signer, circulator, or attorney in fact may strike a signature from a part-petition before it is filed. And only the BOEs have the statutory authority to determine the validity of a signature on a part-petition. Those fundamental requirements have been repeatedly violated on this Petition and call the validity of these part-petitions into question. We respectfully urge you to instruct the BOEs to disqualify any part-petition that has been improperly altered in this fashion. At the very least, BOEs should conduct a review of these stricken signatures to determine if the electors involved authorized their attorney-in-fact to strike their signatures as permitted by R.C. 3501.382.

As the chief elections officer for Ohio, the Secretary has the duty to “compel the observance by election officers in the several counties of the requirements of the elections laws.” R.C. 3501.05(M). In furtherance of this duty, you have the statutory power and duty to issue directives and advisories to the county boards as to the proper methods of carrying out their duties. R.C. 3501.05(B). Both the county boards and the Secretary have the power and authority to reject any initiative petition that violates *any* requirement established by law. R.C. 3501.39(A)(3). We respectfully ask you to 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. R.C. 3501.05(N)(1) clearly empowers the Secretary to investigate “the administration of election laws, fraud, and irregularities in elections in any county.”

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. The plain language of Article II, Section 1b of the Ohio Constitution states that the Secretary “shall transmit” the Petition to the General Assembly only “[w]hen . . . there shall have been filed with the [Secretary] a petition signed by three per centum of the electors **and verified as herein provided**” (emphasis added). See *Mahaffey v. Blackwell*, 10th Dist. No. 06-AP-963, 2006-Ohio-5319, ¶ 33 (the Constitution requires the Secretary to act to transmit the initiated law to the General Assembly only upon the filing of a petition with the requisite number of signatures that is “verified as provided herein”). The Petition must first be “verified” before it can be transmitted to the General Assembly, which involves confirming the “correctness, truth, or authenticity by oath or affidavit” of the signatures and part-petitions. See *Black’s Law Dictionary* at 1561 (6th ed. 1990).

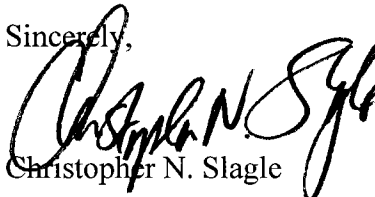
Secretary Husted – Ohio Drug Price Relief Act Petition Issues
December 30, 2015
Page 4 of 4

In *Cappelletti v. Celebreeze*, 58 Ohio St.2d 395, 396 (1979), the Ohio Supreme Court recognized that the phrase “verified as herein provided” as used throughout Article II of the Constitution requires the Secretary “as chief elections officer to first determine that the petition contains the purported signatures of [3 percent] of the electors of the state, for that requirement is fundamental to the constitutional reservation of the right of initiative to the people.” The Supreme Court then expressly “reject[ed] relators’ argument that the presumption of sufficiency of the petition and its signatures, contained in Section 1g of Article II eliminates the further steps of determining whether the petition has been properly verified and establishing the eligibility of the signers as electors.” *Id.* at 396-97. The Secretary and the boards of elections are plainly permitted to look behind the face of the Petition, especially where, as here, there is *prima facie* evidence of a significant amount of fraud and irregularities.

Moreover, Judge French in *Mahaffey*, 2006-Ohio-5319, citing *Cappelletti*, stated that proof of an invalid part-petition or signatures may be established “in various ways,” and that board review of the signatures is but one method of proving or disproving the sufficiency of the signatures. *Id.* at ¶¶ 37-40. Furthermore, the Supreme Court in *State ex rel. Scioto Downs, Inc. v. Brunner*, 123 Ohio St.3d 24, 27 (2009), implicitly found that the Secretary may use the results of his investigatory power under R.C. 3501.05(N)(1) to invalidate part-petitions so long as that power is exercised before the constitutional deadline for his sufficiency determination, which is mid-July (105 days before the election).

While the Secretary may be acting in a ministerial duty in transmitting the Petition to the General Assembly **once sufficiency has been determined**, the Secretary has a corresponding duty to **not** transmit the Petition if sufficiency is in question. A duty to transmit to the General Assembly arises only where first the Secretary has verified that the Petition contains the requisite number of **valid** signatures. *See Cappelletti*, 58 Ohio St.2d at 398 (Supreme Court refused to issue writ and held that there was no clear legal duty for Secretary to transmit the petition to the General Assembly or certify a deficiency because protests involving investigation of signatures and petitions were ongoing). If fraud and violations of law indicate that the Petition fails to contain the requisite number of valid signatures, then it is incumbent upon the Secretary not to transmit the Petition to the General Assembly. Any other result leads to a perversion of the democratic process and an incentive to engage in election fraud.

Thank you for your consideration. If you have any questions, please do not hesitate to contact me.

Sincerely,

Christopher N. Slagle

CNS