

Danyelle S.T. Wright¹ on the Sixth Circuit Court of Appeals’ Decision that Ohio Law Requiring Petition-Circulators be Paid on Flat-Fee Basis Found Unconstitutional: Citizens for Tax Reform v. Deters (2008), 518 F.3d 375, 2008 FED App. 0104P.

The State of Ohio’s right to combat election fraud does not outweigh its citizens’ First Amendment free speech protections. The United States Court of Appeals for the Sixth Circuit recently struck down an Ohio law requiring petition-circulators be paid on a per-time only basis.² In doing so, the Sixth Circuit Court affirmed the decision of the United States District Court for the Southern District of Ohio, which held that Ohio Revised Code Section 3599.111 created an unconstitutional abridgement of free speech.³

I. Facts

The State of Ohio enacted a provision making it a felony to pay anyone for gathering signatures on electronic related petitions on any basis other than time worked (i.e., no pay per-signature or per-volume basis allowed).⁴ Citizens for Tax Reform (“CTR”) and Jeffrey P. Ledbetter, a former Treasurer of CTR (collectively referred to as “CTR”), brought suit challenging the constitutionality of the provision, Ohio Revised Code Section 3599.111, on the grounds that prohibiting payment to petition circulators on a per-signature or per-volume basis violated their core political speech rights.⁵

CTR named as defendants Joseph T. Deters (“Deters”), the Hamilton County, Ohio prosecutor, and Mathias H. Heck, Jr. (“Heck”), the Montgomery County, Ohio prosecutor, both in their official capacities only, as persons tasked with enforcing the

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² *Ledbetter v. Deters* (2008), 518 F.3d 375, 2008 FED App. 0104P.

³ *Id.* at 377.

⁴ *Id.*

⁵ *Id.* at 377-378.

statute.⁶ Once the Ohio Attorney General (“State of Ohio”) intervened as a defendant to defend the constitutionality of Ohio Revised Code Section 3599.211, Deters and Heck sought summary judgment and were dismissed from the case.⁷

CTR and the State of Ohio filed cross motions for summary judgment, and the district court held that the statute was unconstitutional.⁸ The district court found that CTR had established that the “[s]tatute burdens their core political speech rights.”⁹ Specifically, it found that the statute limits CTR’s ability to retain effective circulators and reduces the likelihood that petition proponents will be able to place their petitions on the ballot.¹⁰ The State of Ohio appealed the district court’s denial of its motion for summary judgment.

II. The Sixth Circuit Court Decision

The Sixth Circuit Court affirmed the district court decision that Ohio’s per-time-only requirement is not sufficiently tied to its otherwise legitimate interest of eliminating election fraud, and found the statute unconstitutional.¹¹ In its decision, the Court analyzed prior case law regarding the issue of payment to petition circulators.

The Court distinguished three other circuit decisions, explaining that unlike the statutes in those cases, Ohio Revised Code Section 3599.111 prohibited all methods of payment and was therefore much more restrictive because it did not provide

⁶ *Id.* at 378.

⁷ *Id.* at 378-379.

⁸ *Id.* at 379.

⁹ *Id.*, citing *Citizens for Tax Reform v. Deters*, 462 F.Supp.2d 827, 832, 2006 U.S. Dist. LEXIS 85502 (S.D. Ohio 2006).

¹⁰ *Id.*

¹¹ *Id.* at 388.

any alternative methods of payment to petition circulators.¹² Specifically, where the other state statutes permitted payment to petition circulators under methods such as hourly wage, establishing minimum signature requirements, terminating circulators who do not perform, adjusting circulator salaries, or paying bonuses, Ohio Revised Code Section 3599.111 prohibited all payment methods except for time worked.¹³ In addition, the Court also distinguished the other circuit court decisions because violations constituted misdemeanors, whereas a violation of Ohio Revised Code Section 3599.111 was a felony.¹⁴

The Court found that although the State of Ohio's reason for the law – the elimination of election fraud – was a compelling state interest, the statute was not narrowly drawn to fulfill that purpose.¹⁵ As a result, the Court affirmed the district court decision.

III. Practical Implications:

The Sixth Circuit Court of Appeals' decision prohibits the Ohio legislature from restricting methods of payment to petition-circulators if they are not narrowly drafted to justify a compelling state interest. In order to pass constitutional muster, the provisions must not unduly burden petitioners' core political speech rights.

- Courts will not uphold statutes that are not narrowly tailored to advance a compelling state interest. Thus, in order to inoculate future legislation from constitutional challenges, the Ohio legislature should strongly consider enacting anti-

¹² *Id.* at 385.

¹³ *Id.*

¹⁴ *Id.* at 386.

¹⁵ *Id.* at 387.

election fraud legislation that does not completely ban per-signature payments. In other words, do as other states have done and permit payment by other methods, such as paying an hourly wage, establishing minimum signature requirements, or paying bonuses.

- This Court noted that Ohio's anti-election fraud legislation imposed harsher criminal penalties states than comparable legislation. Thus, in order to prevent future constitutional challenges, the Ohio legislature should strongly consider lesser penalties, in deference to Ohio Revised Code Section 3599.28, which makes false signatures on an election-related documents a fifth degree felony.