



## ADVISORY 2021-05

September 23, 2021

To: All County Boards of Elections  
Board Members, Directors, and Deputy Directors

Re: *State ex rel. Ferrara v. Trumbull Cty. Bd. of Elections*

### BACKGROUND

This Advisory informs county boards of elections that the Supreme Court of Ohio issued an opinion on September 14, 2021 in *State ex rel. Ferrara v. Trumbull Cty. Bd. of Elections*,<sup>1</sup> which changes the rules regarding petitions with circulator statements that indicate fewer than the actual number of signatures. The court overturned its long-standing precedent<sup>2</sup> and provisions in the Election Official Manual<sup>3</sup> on undercounting.

### INSTRUCTIONS

For more than at least a decade,<sup>4</sup> spanning multiple secretaries of state, the reasonable interpretation of [R.C. 3501.38\(E\)\(1\)](#) was “if the number written by the circulator on the circulator’s statement at the end of the part-petition is *less than* the number of uncrossed out signatures on the part-petition, the entire part-petition is invalid” because “the board cannot discern which signature was not witnessed by the circulator.” In fact, it was former Secretary of State and current Supreme Court of Ohio Justice Jennifer Brunner who wrote those words in [Directive 2010-38](#). The Supreme Court’s recent decision in *Ferrara* prohibits a board from invalidating a part-petition *solely* because the number of signatures reported in a circulator’s statement is less than the total number of uncrossed-out signatures submitted on the part-petition, so long as there is no indication of fraud or material misrepresentation.<sup>5</sup>

However, the law remains that a circulator must indicate the number of signatures on the part-petition and attest under penalty of election falsification that they witnessed the affixing of

---

<sup>1</sup> Slip Opinion No. 2021-Ohio-3156.

<sup>2</sup> See *Rust v. Lucas Cty. Bd. of Elections*, 108 Ohio St. 3d 139, 2005-Ohio-5795, 841 N.E.2d 766.

<sup>3</sup> See Election Official Manual, [Chapter 11, Section 1.03](#) and [Chapter 14, Section 1.03](#).

<sup>4</sup> See, e.g., [Directive 2005-02](#).

<sup>5</sup> See *Ohio Mfrs.’ Assn. v. Ohioans for Drug Price Relief Act*, 147 Ohio St.3d 42, 2016-Ohio-3038, 59 N.E.3d 1274, ¶¶ 19.

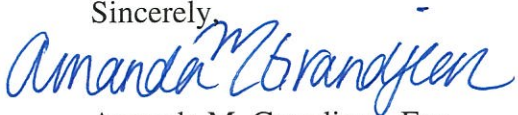
every signature.<sup>6</sup> Thus, a board may still invalidate a part-petition when it has evidence that a circulator committed fraud.<sup>7</sup> Moreover, the holding does not relieve a board from the obligation to

[i]nvestigate irregularities... or violations of Title XXXV of the Revised Code by election officers and other persons; administer oaths, issue subpoenas, summon witnesses, and compel the production of books, papers, records, and other evidence in connection with any such investigation; and report the facts to the prosecuting attorney or the secretary of state....<sup>8</sup>

In *Ferrara*, the circulator statement on the relevant part-petition indicated one less signature than the actual number submitted. The court considered the undercount “a minor, inadvertent mistake in recording the count of signatures on the ballot”<sup>9</sup> as opposed to evidence of fraud. However, if a board of elections has cause to believe that a circulator falsely attested to witnessing every signature, the board must investigate. Ohio courts have clearly established that a circulator’s failure to witness the affixing of each signature may invalidate an entire part-petition.<sup>10</sup>

Each board of elections must share this Advisory with its legal counsel, the county prosecuting attorney. If you have any questions regarding this Advisory, please contact the Secretary of State’s elections counsel at (614) 728-8789.

Sincerely,



Amanda M. Grandjean, Esq.

Director of Elections and Deputy Assistant Secretary of State

---

<sup>6</sup> [R.C. 3501.38\(E\)\(1\)](#).

<sup>7</sup> “And nothing in [*Ferrara*] disturbs the litany of caselaw providing that evidence of fraud triggers full invalidation of a part-petition.” *Ferrara* at ¶ 22.

<sup>8</sup> [R.C. 3501.11\(J\)](#).

<sup>9</sup> *Ferrara* at ¶ 9.

<sup>10</sup> *State ex rel. Commt. for the Referendum of Lorain Ordinance No. 77-01 v. Lorain Cty. Bd. of Elections*, 2002-Ohio-4194, ¶ 49; *Prince v. Franklin Cty. Bd. of Elections*, 1998 Ohio App. LEXIS 6290 (10th Dist. 1998); *State ex rel. Zahneis v. Hamilton Cty. Bd. of Elections*, 27 Ohio App.2d 233, 235-236 (1st Dist. 1971).