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MEMORANDUM OF LAW

INTRODUCTION

In his capacity as the supreme executive for the State of Ohio, on Monday, January 8, 2007, Governor Ted Strickland vetoed Senate Bill 117 (“S.B. 117”), which was passed by the 126th General Assembly. In response, the 127th General Assembly, Senate President Bill Harris and House Speaker Jon Husted (“Relators”) filed this extraordinary action in mandamus against Secretary of State Jennifer Brunner. Relators seek to compel Secretary Brunner to alter records regarding S.B. 117 that she received and keeps in her ministerial role as Secretary of State.

This extraordinary action should be dismissed. Relators’ petition for mandamus, at its essence, is little more than an attempt by certain members of the legislature to draw the Court into a political dispute between the legislature and the executive branch. As such, this effort threatens the values of separation of powers and judicial restraint. Additionally, Relators lack legal support in their effort to pursue such an extraordinary remedy. In the end, the question of whether S.B. 117 should be deemed effective despite the Governor’s veto is one that would likely be raised by private parties attempting to rely on the bill’s substantive provisions. Lower courts are fully capable to consider and distill the legal issues involved for an eventual appeal to the Court, if necessary. By bringing this original action for mandamus, however, Relators would deny the Court the benefits of lower court judgments and appellate review while only enmeshing the Court in an ongoing political controversy.

Specifically, the petition should be dismissed for two reasons: (1) Relators lack standing to bring this action, and (2) Relators have no clear legal right, just as the Secretary of State has no clear legal duty, to make discretionary judicial decisions on the validity of legislation she receives, and Relators have an adequate remedy at law.

First, the complaint should be dismissed because Relators lack standing. The General Assembly cannot meet the standing requirement because it is not a person for purposes of filing an original action in mandamus under R.C. Chapter 2731. Additionally, the current General Assembly, the 127th General Assembly, has not been injured by the veto of a bill it did not pass. To the extent that the legislature might have a claim resulting from Secretary Brunner's alleged conduct, that claim would lie with the 126th General Assembly. However, the 126th General Assembly adjourned sine die on December 26, 2006, so it no longer exists. Further, Senate President Harris and House Speaker Husted also lack standing in the various capacities in which they attempt to bring this action. Moreover, in their individual capacities as citizens and taxpayers, Harris and Husted fail to allege any particularized injury that would provide either of them with standing.

Second, even if Relators could establish standing, Relators fail to plead the requisite facts necessary for issuance of a writ of mandamus. Relators lack a clear legal right to the remedy they seek, and the Secretary of State has no clear legal duty to perform the acts requested by the Relators in this case. If granted, the relief sought by Relators would, in essence, place with the Secretary of State – not Ohio courts – the authority to determine whether legislation presented to her by the Governor has fully completed the constitutionally-prescribed process by which bills become law. But the Secretary's custodial responsibility is limited to safely protecting laws, not bills. She has no clear legal duty to determine whether an alleged action taken by the Governor was sufficient to change a bill into a law. And even if Relators could overcome their lack of standing and satisfy the other basic pleading requirements, this action should be dismissed because Relators possess a plain and adequate remedy at law in the form of an action seeking declaratory judgment.

STATEMENT OF THE FACTS

On December 14, 2006, the Ohio House of Representatives passed an amended version of S.B. 117. Complaint ¶ 11. Later that same day, the Ohio Senate concurred in the House amendments to S.B. 117. Id. at ¶ 12. Exactly one week later, on December 21, 2006, the Ohio House of Representatives adjourned sine die. Id. at ¶ 14. Approximately 12 days after the General Assembly passed S.B. 117, the Ohio Senate adjourned sine die, bringing the 126th General Assembly to an end on December 26, 2006. Id. at ¶ 15. It was not until 13 days after the General Assembly passed S.B. 117 that it presented the Governor with S.B. 117 on December 27, 2006. Id. at ¶ 16.

Pursuant to Section 16, Article II of the Ohio Constitution, the Governor has ten days from the date which a bill is presented to him by the General Assembly or from the date the General Assembly adjourns sine die, whichever is later, to decide whether to approve or veto a bill that both houses of the General Assembly pass, and subsequently present to the Governor. On January 5, 2007, only 8 days after the Clerk of the Senate presented the bill to the Governor, the Governor delivered S.B. 117 to the Secretary of State's office. Id. at ¶ 19, and Exhibit G. At Governor Ted Strickland's direction, Secretary Brunner returned S.B. 117 to the Governor's office on January 8, 2007, the tenth day after the General Assembly presented the bill to the Governor. Id. at ¶ 21.¹ On the same day Secretary Brunner returned S.B. 117 to the Governor, he

¹ Because Relators only provide select portions of Section 16, Article II to the Court in the complaint, the pertinent provision is provided for the Court's benefit and states as follows:

If a bill is not returned by the governor within ten days, Sundays excepted, after being presented to him, it becomes law in like manner as if he had signed it, unless the general assembly by adjournment prevents its return; in which case it becomes law unless, within ten days after such adjournment, it is filed by him, with his objections in writing, in the office of the secretary of state. The governor

vetoed the bill and delivered it back to Secretary Brunner's office along with the veto message. Id. at ¶ 23. Upon receipt of the Governor's veto, id., Secretary Brunner exercised her ministerial duty and filed S.B. 117 along with the Governor's veto. Id. at Exhibits G and K.

ARGUMENT

I. Relators lack standing to file this action in mandamus.

Relators' complaint should be dismissed because they lack standing. Before an Ohio court can consider the merits of a legal claim, "[a] preliminary inquiry in all legal claims is the issue of standing." *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, ¶ 22. The Court defined that mandatory inquiry as "whether a litigant is entitled to have a court determine the merits of the issues presented." Id., citing *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320. The concept of legal standing is based on the principle that courts should decide only cases or controversies between litigants whose interests are adverse to each other and should refrain from giving advisory opinions "to avoid the imposition by judgment of premature declarations or advice upon potential controversies." *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14. Therefore, in order to have standing to bring a claim, a litigant must allege a direct and concrete injury that is in a manner or degree different from that suffered by the public in general. *Cuyahoga Cty. Bd.*, 2006-Ohio-6499, at ¶ 22.

Although styled as a complaint against Secretary Brunner, Relators essentially seek an advisory opinion as to the constitutionality of Governor Strickland's veto of S.B. 117. As a threshold matter, Relators have not brought an actual controversy that is ripe for the Court to adjudicate. Because the Governor vetoed S.B. 117, no one has actually been harmed by the law's

shall file with the secretary of state every bill not returned by him to the house of origin that becomes law without his signature.

Section 16, Article II, Ohio Constitution.

provisions. Additionally, Relators cannot have been harmed by the absence of the would-be law's provisions because even if S.B. 117 were to become law, it would not yet be effective. Most importantly, none of the Relators in this matter have pleaded the existence of any injury resulting from Secretary Brunner's alleged conduct that gives them standing to bring this matter. Therefore, the Court should dismiss this case.

A. The General Assembly does not have standing.

The General Assembly lacks standing because it is not a "person." Revised Code 2731.04 states that a petition for writ of mandamus must be filed "in the name of the state on the relation of the *person* applying, and verified by affidavit." (Emphasis added.) Relators' inclusion of the General Assembly contravenes the plain meaning of this provision and the well-established precedent of the Court. While "person" is not specifically defined in R.C. 2731.04 for the purposes of mandamus actions, R.C. 1.59 provides that a "person," unless another definition is provided in that statute or a related statute, includes a "corporation, business trust, estate, trust, partnership, and association." See, also, R.C. 119.01(F) (for purposes of administrative appeals, "person," means a firm, corporation, association, or partnership). Based upon the plain language of the statute, a branch of state government cannot be a person. See *Boulger v. Evans* (1978), 54 Ohio St.2d 371, 374 ("The state is not a person but a sovereign abstract entity").

A survey of Ohio case law demonstrates this point. Not one reported case in Ohio includes the General Assembly as a named plaintiff in a civil action. Additionally, no state agency or state entity has ever filed a mandamus action in the Ohio Supreme Court without some express statutory authority to do so. See, e.g., *State ex rel. Bd. of Tax Appeals v. Morgan Cty. Budget Comm.* (1963), 174 Ohio St. 297, 299 (writ of mandamus filed pursuant to R.C. 5703.39). Rather, state *officials* file mandamus actions because an individual state official is a

“person” for purposes of mandamus. See, e.g., *State ex rel. State Fire Marshal v. Curl* (2000), 87 Ohio St.3d 568 (Relator was State Fire Marshal James J. McNamee); *State ex rel. Attorney Gen. v. Halliday* (1899), 61 Ohio St. 352 (Relator was Attorney General F.S. Monnett).

Further, Relators fail to allege any particularized injury to the current 127th General Assembly as a result of Secretary Brunner’s actions. In the unlikely event that a gubernatorial veto of a bill might be deemed an “injury” to the General Assembly that passed a bill, in this case, the 126th General Assembly would be the real party in interest because that legislative body passed S.B. 117. The 126th General Assembly ceased to exist, however, when the Senate adjourned sine die on December 26, 2006. See *State ex rel. Gilmore v. Brown* (1983), 6 Ohio St.3d 39. As a result, it is impossible for the 126th General Assembly to initiate legal action. Therefore, the 127th General Assembly, as a Relator composed of different members from those of the 126th General Assembly, does not have standing to seek a remedy for alleged injuries suffered by the 126th General Assembly as a consequence of the Secretary of State’s conduct.

Accordingly, because the General Assembly is neither a person nor empowered by statute to file a mandamus action, the 127th General Assembly lacks standing to file this complaint.

B. Relators Harris and Husted do not have standing to sue in their official capacity as members of the General Assembly.

Relators Harris and Husted lack standing to bring this suit on behalf of the General Assembly in their capacity as “authorized and duly elected representative[s] thereof.” Complaint ¶¶ 2, 3. Relators fail to allege any individualized injury or curtailment of their rights as members of the General Assembly. Furthermore, Relators cannot cite any constitutional, statutory or legislative authority authorizing them to bring this action. Thus, Relators lack standing.

In the absence of a concrete injury to a personal right or interest, Relators rely on their status as members of the General Assembly. This reliance is misplaced. Mere membership in a

legislative body does not in and of itself confer standing on Relators Harris and Husted to file this suit on the General Assembly's behalf. See, e.g., *Baird v. Norton* (6th Cir. 2000), 266 F.3d 408, 410-11 (status as Michigan state legislators was not sufficient to give standing to sue U.S. Secretary of Interior); *Raines v. Byrd* (1997), 521 U.S. 811, 826 (members of Congress suing Secretary of the U.S. Treasury and Director of Office of Management and Budget lacked standing to challenge the constitutionality of the Line Item Veto Act for alleging no more than "the abstract dilution of institutional legislative power"); but, see, *Clinton v. City of New York* (1998), 524 U.S. 417, 431-434 (municipal and private plaintiffs had standing to challenge the line item veto because they alleged an actual injury resulting from the President's cancellation of tax and other benefits pursuant to the Line Item Veto Act).²

In *Raines*, six members of Congress sought to challenge the constitutionality of the Line Item Veto Act, which gave the president authority to cancel certain spending and tax benefits. 521 U.S. at 813. After the Act was passed, the six members – four senators and two congressman – sued the Secretary of the U.S. Treasury and the Director of the U.S. Office of Management and Budget. All six members of Congress had opposed passage of the Act and argued that the Act injured them "directly and concretely...in their official capacity" by: (1) altering the legal and practical effect of all votes they may cast on bills containing separate veto-able items, (2) divesting them of their constitutional role in the repeal of legislation, and (3) altering the constitutional balance of powers between the legislative and executive branches. *Id.* at 816. The Supreme Court held that these members of Congress did not have standing because they failed to claim the deprivation of a personal entitlement or private right: "the injury claimed by the

² While these cases examine Article III standing in federal courts, the requirement of a personal injury that is particularized and concrete for standing has been adopted by Ohio courts. See Section I, *supra*.

Members of Congress here is not claimed in any private capacity but solely because they are Members of Congress.” Id. at 821. Their claim of an “institutional injury” to legislative power was not sufficiently concrete to justify judicial intrusion into a dispute between the legislative and executive branches. Id. at 819-820, 829.

Likewise, in this case, Relators’ mere membership in the General Assembly does not give them standing to seek issuance of a writ of mandamus. Relators do not allege that Secretary Brunner’s actions deprived them of individual entitlements, such as their elected seats. Nor do they allege that they have been treated differently than other members of the House or Senate. Were the Court to endorse Relators’ approach, any member of the legislature would have standing to file a mandamus action to compel an executive officeholder to perform acts the member wants. The Court should not invite future legislators to bring every dispute to the Court. Instead, the Court should find that Relators lack standing.

Furthermore, Relators’ grounds for standing are weaker than the plaintiffs in *Raines*, who filed their suit pursuant to a provision in the Line Item Veto Act allowing “any Member of Congress or any individual adversely affected by [the Act]” to bring an action in federal court. See *Raines*, 521 U.S. at 815-816, citing 2 U.S.C. § 691(a)(1). Relators have no statutory basis for bringing this action. In the absence of any allegations of a concrete injury or any statutory basis for standing, Relators do not have standing in their official capacity as state legislators.

Finally, Relators lack standing because they were not authorized to initiate this lawsuit on behalf of the General Assembly’s other members. Specifically, Relators fail to allege that either chamber of the 127th General Assembly ever authorized the filing of this mandamus action. Because Relators Harris and Husted voted for passage of S.B. 117, see Complaint ¶¶ 2, 3, they cannot presume to have authority to sue on behalf of colleagues who currently oppose, or did

oppose, passage of the bill. See *Raines*, 521 U.S. at 829 (denying standing to members of Congress who filed appeal despite opposition from both Houses); *Bender v. Williamsport Area School Dist.* (1986), 475 U.S. 534, 544 (“Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take”); *U.S. v. Balin* (1892), 144 U.S. 1, 7 (“The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole”).

In a similar matter, the Arizona Supreme Court ruled that four members of the state legislature were not authorized by their respective chambers to file an action challenging the constitutionality of a gubernatorial veto. *Bennett v. Napolitano* (Ariz. 2003), 206 Ariz. 520, 143 P.3d 1023. The named petitioners were the president of the state senate, the speaker of the house of representatives, the majority leader of the senate, and the majority leader of the house. Citing *Raines*, the Court found that the petitioners did not have standing to litigate claims of injury to the legislature as a whole. *Id.* at 526-527. Specifically, these four members were not authorized to bring a claim on behalf of a ninety-member legislative body. *Id.* at 527.

Likewise, Relators Harris and Husted try to bring this action on behalf of their respective legislative bodies without demonstrating any authorization from their colleagues. For the reasons set forth in the well-reasoned authorities above, Relators lack of standing to do so.

C. Relators Harris and Husted do not have standing to sue in their official capacity as President of the Senate or Speaker of the House.

Relators Harris and Husted do not possess standing based on their official status as President of the Ohio Senate and Speaker of the Ohio House of Representatives, respectively. Complaint ¶¶ 2, 3. Relators fail to allege any injury or deprivation of a right specific to these

offices to meet the requirements of standing. Furthermore, merely holding the offices of Senate President or Speaker of the House does not demonstrate that Relators Harris and Husted are authorized to file a lawsuit on behalf of their respective legislative bodies.

Section 7, Article II of the Ohio Constitution provides that, “each House shall choose its own officers,” that “the presiding officer in the Senate shall be the president of the Senate” and that the presiding officer of the House of Representatives shall be the Speaker of the House. See, also, R.C. 101.02 (providing only that the Senate “shall elect a president . . . and other officers”); R.C. 101.13 (providing only that the House “shall elect a speaker . . . and other officers”). Relators Harris and Husted may preside over their respective chambers, but nothing in the Ohio Constitution or the Revised Code empowers them to file suit on behalf of their colleagues.

Additionally, Relators lack standing because they fail to allege that either the 126th or the 127th General Assembly expressly authorized Relators Harris or Husted to file suit on behalf of the Senate or House. In fact, the recent actions of the Ohio Senate confirm the Senate President’s lack of authority. On February 20, 2007, the Ohio Senate passed Senate Resolution 16, which amended the Rules of the Senate for the 127th General Assembly to state: “Initiation and defense of legal actions by the Senate shall be decided by the President.” S.R. No. 16, Rule 5. By adding this for the first time to the Rules of the Senate, and specifically for the 127th General Assembly, by implication the Senate President lacked any such authority prior to February 20, 2007. Correspondingly, no such rule has been adopted by the House of Representatives. Therefore, because this mandamus action was filed prior to the February 2, 2007 enactment of the Senate’s new rule Senate President Harris and House Speaker Husted lacked authority to individually file this action on behalf of the Senate, the House or the General Assembly without the express consent of the other members.

Hence, in the absence of a particular injury to Relators in their official capacity as officers of the Senate and House of Representatives, Harris and Husted lack standing to bring this claim on behalf of these legislative bodies.

D. Relators Harris and Husted do not have standing as members of the Legislative Service Commission.

Relators Harris and Husted lack standing to bring this suit in their “official capacity . . . as member[s] of the Legislative Service Commission.” Complaint ¶¶ 2, 3. As a preliminary matter, it should be noted that had Secretary Brunner delivered S.B. 117 to the Legislative Service Commission (the “LSC”) as Relators wish, S.B. 117 would still be a bill, not a law. Relators’ complaint creatively, but misleadingly, suggests that the LSC’s collection of legislative documents has some role in determining whether or when a bill becomes a law. This implication has no basis in law. Because the LSC lacks any constitutional or statutory authority to determine whether a bill becomes law, Relators cannot have been injured by the fact that S.B. 117 was not delivered to the LSC.

In this novel argument, Relators allege that Secretary Brunner “failed to carry out the Secretary of State’s ministerial duty to provide accurate records to the Director of the Legislative Service Commission . . . with respect to [S.B. 117] so that the Director can carry out his responsibilities to codify the laws of the State under R.C. 103.131.” Complaint ¶ 27. Relators’ mere membership on the LSC does not provide Relators with standing sufficient to bring this claim for three reasons.

First, none of the statutes setting forth the composition, responsibilities, and duties of the LSC confers upon Relators the legal authority to file a suit on behalf of the other members of the LSC. While R.C. 103.11 states that the LSC consists of fourteen members—six members from the Senate, six members from the House of Representatives, the President of the Senate, and the

Speaker of the House—that provision does not grant any special powers to any member to bring this, or any other, action. See, also, R.C. 103.13 (various powers and duties of commission do not include filing lawsuits). Because Ohio law does not grant members of the LSC the authority to initiate legal proceedings on its behalf, Relators lack standing.

Second, assuming *arguendo* that Relators Harris and Husted have some implied authority to bring actions on behalf of the LSC, their claim fails because neither is the party that would be injured by Secretary Brunner’s alleged conduct. According to the plain language of R.C. 103.131, which Relators cite in their complaint at ¶ 27, it is the Director of the LSC, not the LSC’s members, who has the affirmative duty of codifying laws. Because neither Relator Harris nor Relator Husted is the Director of the LSC, both Relators lack standing to sue on behalf of the LSC in mandamus.

Third, this mandamus action fails because Relators seek to enforce a legal duty that simply does not exist. Relators cannot cite any legal authority supporting their assertion that the Secretary of State has a “duty to provide accurate records to the Director of [the LSC] so that the Director can carry out his responsibilities to codify the laws of the State under R.C. 103.131.” See Complaint ¶ 27. As provided by statute, the Secretary is merely a custodian of records. See R.C. 111.08 (“The secretary of state shall have charge of and safely keep the laws and resolutions passed by the general assembly and such other papers and documents as are required to be deposited in [her] office”); see, also, *infra*, Part II.B. Not one statute obligates the Secretary of State to forward to the LSC any laws or documents, particularly a bill that has not yet become a law.

Relators’ complaint against Secretary Brunner also misses the mark because the affirmative duty to collect and examine legislative documents lies with the LSC and the Director

of the LSC as codifier of laws. See R.C. 103.131 (“When an act of a general and permanent nature passed by the general assembly becomes a law and is filed with the secretary of state, such director *shall examine* the same”) (emphasis added); see, also, R.C. 103.13(F) (The LSC “*shall collect*, classify, and index the documents of the state which shall include executive and legislative documents”) (emphasis added). At no point do Relators allege that Secretary Brunner prevented Relators, or even the Director of the LSC, from performing any of these duties.

Consequently, Relators lack standing in their capacity as members of the LSC to bring this action because they fail to allege: (1) they have the legal authority to file this suit on behalf of the LSC; (2) they have suffered any injury in their capacity as members of the LSC; or (3) there exists an enforceable legal duty that the Secretary of State owes to the LSC. Accordingly, this action should be dismissed.

E. Relators Harris and Husted do not have standing as taxpaying citizens in the State of Ohio.

Because Relators Harris and Husted lack any injury to a personal right or interest, they also lack standing as taxpayers to file this mandamus action. As the Court recently explained, a taxpayer action is only appropriate in those circumstances where the taxpayer can demonstrate a particularized need or special interest different from that of all other Ohio citizens. *State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 2006-Ohio-3677, ¶¶ 9-10 citing *Racing Guild of Ohio, Local 304, Serv. Employees Internatl. Union, AFL-CIO v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317, and *State ex rel. Masterson v. Ohio State Racing Comm.* (1954), 162 Ohio St. 366.

Here, in their individual capacities as taxpaying citizens in Ohio, Relators Harris and Husted seek to compel Secretary Brunner to perform certain acts. Relators Harris and Husted fail, however, to make any allegations that include any statements of a particularized injury that

they *personally* suffered as Ohio citizens due to Secretary Brunner's alleged failure to perform certain acts. See Complaint ¶¶ 2, 3. Without alleging any particularized injury, Relators lack standing as taxpayers.

Further, although Ohio courts recognize a "public action" exception that allows Ohio citizens to file a suit without showing some personal or special interest in the subject matter, this narrow exception is reserved for "rare and extraordinary" circumstances that do not apply here. See *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 503-504. The public action exception gives standing to litigants only when the issues "sought to be litigated are of great importance and interest to the public." *Id.* at 471. In those situations, "the people are regarded as the real party, and the relator need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and as such, interested in the execution of the laws." *Id.*, quoting *State ex rel. Meyer v. Henderson* (1883), 83 Ohio St. 644, 648-49. The *Sheward* court expressly limited the public action exception, stating that it does not allow citizens to circumvent the requirement of showing a direct and concrete injury. Instead, the Court entertains a public action "only in the rare and extraordinary cases where relators challenge the constitutionality of a legislative enactment on grounds that it operates directly and broadly to divest the courts of judicial power." *Sheward*, 86 Ohio St.3d at 504.

The public action exception articulated in *Sheward* does not apply here. Relators do not challenge the constitutionality of S.B. 117, nor do they contend that S.B. 117 divests the courts of judicial power. Instead, they simply challenge certain acts performed by the Secretary of State. See Complaint ¶ 7. Furthermore, unlike the challenged legislation in *Sheward*, which proposed sweeping changes to civil tort law and revised over one hundred sections of the Revised Code, the matter currently before the Court involves the narrow issue of the Secretary of

State's duties regarding the distribution, compilation, and publication of laws filed with her office. See *id.* at ¶ 6. Accordingly, Relators Harris and Husted lack standing as taxpaying citizens in Ohio to file this mandamus action.

No matter how many different capacities they rely upon, Relators cannot alter the fact that they lack standing. Because the Ohio General Assembly is not a person, it lacks standing. Moreover, Relators Harris and Husted fail to allege any authorization or individualized injury in any of the capacities in which they attempt to file this action. Accordingly, as members and leaders of the General Assembly, as members of the LSC, and as taxpaying citizens of the State of Ohio, Relators lack standing. As a result, the complaint should be dismissed.

II. Mandamus is an inappropriate remedy in this case.

Even if Relators could somehow establish standing in this case, Relators still fail to satisfy the requirements to plead a colorable claim for a writ of mandamus. Mandamus is a writ issued in the name of the state “commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station.” R.C. 2731.01. The Court has long recognized that a writ of mandamus is an extraordinary remedy. *State ex rel. Coen v. Indus. Comm.* (1933), 126 Ohio St. 550, 553. In order for Relators to obtain a writ of mandamus, they must demonstrate that: (1) they have a clear legal right to the relief requested; (2) the respondent is under a clear legal duty to grant the relief requested; and (3) they have no other adequate remedy at law by which to vindicate the claimed right. *State ex rel. Hattie v. Goldhardt* (1994), 69 Ohio St.3d 123, 125, citing *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29, cert. denied, 464 U.S. 1017 (1983). A prima facie complaint in mandamus must state the legal duty and the lack of an adequate remedy at law “with sufficient particularity so that the respondent is given reasonable notice of the claim asserted.” *State ex rel. White v. Goldsberry*

(1999), 65 Ohio St.3d 545, 548. Mandamus will not issue where the relator has failed to meet a reasonable prerequisite to the relief sought. *State ex rel. Cunagin Constr. Corp. v. Creech* (12th Dist., 1968), 16 Ohio App.2d 114.

Applying these well-settled standards, Relators have failed to meet their prima facie pleading burden. First, Relators lack a clear legal right to the remedy they seek. Second, Secretary Brunner has no clear legal duty to perform the acts Relators attempt to compel her to perform. Third, the Relators have an adequate remedy at law in the form of a declaratory judgment action. Accordingly, the Court should dismiss the complaint.

A. Relators do not have a clear legal right to the requested relief.

Relators lack a clear legal right to the remedy they seek. The burden to establish a clear legal right in mandamus lies with Relators. *State ex rel. Alben v. State Employment Relations Bd.* (1996), 76 Ohio St.3d 133, 136. Here, Relators' lack of standing defeats any allegation of a clear legal right to a remedy in mandamus. Assuming arguendo that one or more of the Relators are found to have standing to file this action, Relators have no right to the requested relief. None of the specific constitutional provisions or laws cited in the complaint provides Relators with a clear legal right to the relief they seek. Where there is substantial doubt as to Relators' right, the writ should be refused. See *State ex rel. McKey v. Cooper* (1919), 99 Ohio St. 258; *State ex rel. Hildebrant v. Stewart* (1904), 71 Ohio St. 55. Because they lack standing and fail to cite specific authorization to file this action, Relators fail to establish a clear legal right to a writ of mandamus. Thus, Relators fail to satisfy the first requirement of a mandamus action.

B. The Secretary of State has no clear legal duty to perform the requested acts.

Relators fail to satisfy the second requirement for mandamus because they are unable to show that the Secretary of State has a clear legal duty to act in this case. In particular, Relators

ask the Court to do what it cannot: create a new legal duty that is beyond the scope of the custodial role of the Secretary of State. At the same time, Relators seek to compel Secretary Brunner to do what she cannot: make discretionary, judicial determinations that would, in effect, empower her with the authority to make bills become laws. Moreover, Relators attempt to command Secretary Brunner to perform acts that she has no clear legal duty to perform, such as maintaining electronic and paper journals. Accordingly, Secretary Brunner has no clear legal duty to perform the acts that Relators wish her to perform.

“Mandamus lies only to enforce a clear legal duty.” *State ex rel. Clink* (1968), 16 Ohio St.2d 1, 2. The Court has previously held that Ohio courts cannot create a legal duty in a mandamus proceeding. *State ex rel. Governor v. Taft* (1994), 71 Ohio St.3d 1, 3 (“A court in a mandamus proceeding cannot create the legal duty the relator would enforce through it; the creation of the duty is the distinct function of the legislative branch of government”); see, also, *State ex rel. Hodges v. Taft* (1992), 64 Ohio St.3d 1, 3.

Undoubtedly, the Secretary of State does have certain clear legal duties; however, none of the specific laws or constitutional provisions Relators rely upon in this case describes the alleged duties that Relators ask the Court to compel Secretary Brunner to perform. In particular, the specific constitutional provision and laws that Relators actually cite in relation to the Secretary of State’s duties are Section 1, Article III of the Ohio Constitution, R.C. 111.08 and R.C. Chapter 149. See Complaint ¶¶ 5-6, 25-28.

Section 1, Article III of the Ohio Constitution simply states:

The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general, who shall be elected on the first Tuesday after the first Monday in November, by the electors of the state, and at the places of voting for members of the general assembly.

This constitutional provision does not require the Secretary to perform a single action that Relators seek to compel in this case. Thus, Relators' reliance on this provision lacks any value.

Next, Relators cite to R.C. 111.08, which states that "[t]he secretary of state shall have charge of and safely keep the laws and resolutions passed by the general assembly and such other papers and documents as are required to be deposited in his office." Contrary to Relators' allegations, the Secretary did not fail to safely keep S.B. 117. All that the Secretary did in this case was receive an unsigned bill, i.e. S.B. 117, on January 5, 2007, deliver it back to the Governor at his request on January 8, 2007 and receive the bill back from the Governor later that same day, along with his veto message. As such, Relators' reliance on R.C. 111.08 is misplaced.

Further, Relators allege that Secretary Brunner failed to perform her clear legal duties as laid out in R.C. Chapter 149, which includes several sections that simply direct entities to file documents with the Secretary of State, and direct the Secretary of State to compile, produce and distribute various documents. See R.C. 149.01, 149.08, 149.09, 149.091, 149.11 and 149.16. This argument fails because none of these statutes has anything to do with whether the Secretary of State can or cannot send a bill back to the Governor if he asks for its return. Nor do any of these statutes obligate the Secretary to maintain electronic journals or to maintain and preserve S.B. 117 as it was submitted by the Governor on January 5, 2007. See Complaint, prayer for relief at ¶¶ (a), (b) and (c). This is evident from the fact that Relators cannot cite any Ohio statute that requires the Secretary to maintain electronic journals, or refuse to deliver a bill to the Governor that has not become law. Instead, these provisions simply relate to the codification of a bill and became irrelevant when the Governor vetoed S.B. 117.

The Court has previously dealt with the same flawed reasoning that Relators rely upon in their complaint. For example, in *State ex rel Governor v. Taft*, the relator sought a writ to compel

the Secretary of State to refuse to accept the filing of a bill. In the alternative, the relator sought to compel the Secretary to strike the language of the bill from the laws of Ohio, and to order the Secretary not to publish or distribute the language of a bill. 71 Ohio St.3d at 2. The Court found that there was “no duty in the Constitution or laws requiring the Secretary of State not to file a bill, to strike an unconstitutional bill from the files, or to inhibit the publishing or distribution of such a bill.” Id. at 3. The Court went on to conclude that “[t]hese are clearly duties the relator has invented as a peg on which to hang his real request, a declaratory judgment on the constitutionality of [the bill].” Id.

In *Maloney v. Rhodes*, 45 Ohio St.2d 319 (1976), the Court reviewed a declaratory judgment action that sought to nullify six bills that were delivered to the Secretary of State. Id. at 319. There, the Secretary refused to file the six bills because he concluded that they did not contain the signature of the President of the Senate. Id. at 321. After making a discretionary, judicial determination on the validity of the bills, the Secretary delivered the six bills to Governor Gilligan’s successor, Governor Rhodes. Id. at 319. The Court concluded that the Secretary of State had no authority to make a discretionary, judicial determination as to the validity of bills passed by the General Assembly and signed into law by the Governor. Id. at 319, paragraph 1 of the syllabus

Here, Relators attempt to resurrect the same failed arguments of *State ex rel. Governor v. Taft*, and seek to compel Secretary Brunner to perform acts that she has no authority to perform, as the Court previously held in *Maloney*. In particular, Relators would like the Court to judicially legislate new legal duties for the Secretary of State – specifically, that she can never return a bill to the Governor *after* he has delivered it to the Secretary of State’s Office, but *before* the Governor’s ten-day period for considering the bill has elapsed. Such a legal duty does not exist,

and the Court would therefore have to create it, because nowhere in the Ohio Constitution or the Revised Code is the Secretary of State constrained in such a way. Regardless, creating that legal duty would expressly contradict *Maloney*. The Secretary of State does not, and indeed cannot, interfere with the Governor's exercise of his constitutional authority to veto legislation, or decide the propriety of the Governor's veto.

Consequently, Secretary Brunner has no clear legal duty to perform in this case. When Secretary Brunner returned S.B. 117 pursuant to the Governor's request, the Secretary was simply performing her ministerial duties. A ministerial duty is defined as an act performed without regard to, or the exercise of, the person's own judgment on the propriety of the act. *State ex rel. Watkins v. Donahey, Governor* (1924), 110 Ohio St. 494, 500. Had the Secretary of State refused to return S.B. 117 to the Governor, despite the Governor's request, she would have had to exercise her own personal judgment. However, such a determination would have been the same discretionary, judicial decision the Court expressly prohibited in *Maloney*.

In the end, Relators' complaint can be reduced to the argument that the Secretary of State violated her statutory or constitutional duties when she complied with the Governor's request and returned S.B. 117 to his office. However, this argument is fundamentally flawed because she was simply serving in her ministerial role as custodian of records, and complied with her statutory and constitutional duties when she delivered S.B. 117 to the Governor. Accordingly, Relators have not satisfied the second requirement for a writ of mandamus.

C. Relators have a plain and adequate remedy at law.

Although filed as an original action in mandamus, Relators actually seek a declaratory judgment that S.B. 117 became law without the Governor's signature by operation of law. As such, Relators Harris and Husted have a plain and adequate remedy at law, assuming they would

have standing to file such an action in an appropriate court of common pleas. Therefore, the Court should dismiss Relators' artfully pleaded complaint that improperly seeks to invoke the Court's original jurisdiction in mandamus.

The Revised Code provides that "[a] writ of mandamus must not be issued when there is plain and adequate remedy in the ordinary course of the law." R.C. 2731.05; see, also, *State ex rel. Dannaheer v. Crawford* (1997), 78 Ohio St.3d 391, 393 ("Neither prohibition nor mandamus will lie where relator possesses an adequate remedy in the ordinary course of law") citing *State ex rel. Hunter v. Certain Judges of the Akron Mun. Court* (1994), 71 Ohio St.3d 45, 46. An adequate remedy at law exists in the form of a common pleas court action for declaratory judgment and prohibitory injunction. *State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am. v. Ohio Bureau of Workers' Comp.*, 2006-Ohio-1327, 108 Ohio St.3d 432, ¶ 55. Therefore, "if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and must be dismissed for want of jurisdiction." *State ex rel. Grendell v. Davidson* (1999), 86 Ohio St.3d 629, 634.

In *State ex. rel. Governor v. Taft*, the Court refused to issue an alternative writ because it concluded that the relator's request was a "thinly disguised request for a declaratory judgment, which [the Court is] without jurisdiction to grant." 71 Ohio St.3d at 8. There, the relator sought to have the Court declare a senate bill void. *Id.* at 2. At the same time, the relator also sought to compel the Secretary of State to refuse acceptance for filing of the bill, and to not publish or distribute the bill as the law of the state. *Id.* After reviewing the complaint, the Court first concluded that the relator's complaint was actually a request to declare the bill unconstitutional. *Id.* at 5. More importantly, the Court concluded that the relator's request in mandamus had no

merit “because [the Secretary of State] has no clear legal duty not to file unconstitutional bills, to strike such bills from his files, or not to publish such bills...” Id. at 8.

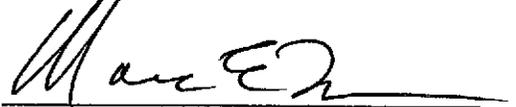
Here, Relators’ complaint should be dismissed because they have an adequate remedy in the ordinary course of the law. Namely, they could file a declaratory judgment action and seek an injunction in a court of common pleas. Assuming arguendo that Relators could establish standing to file a declaratory judgment action in a court of common pleas, they could bring such an action to require the Secretary of State to recognize that the Governor’s veto of S.B. 117 was ineffective. Therefore, for the reasons set forth in *State ex. rel. Governor v. Taft*, Relators have a plain and adequate remedy at law available to them, and the Court should refuse to grant Relators’ thinly disguised request for a declaratory judgment.

CONCLUSION

By filing this mandamus action, Relators have chosen the wrong process and the wrong forum to try and have the Court issue an advisory opinion about a political controversy. Relators, however, lack standing and have not met the basic, prima facie requirements for stating an action in mandamus. Accordingly, Secretary of State Jennifer Brunner respectfully requests that the Court dismiss the complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2007 a copy of the foregoing *Motion to Dismiss* was served by regular U.S. mail upon:

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