

IN THE SUPREME COURT OF OHIO

State ex rel.

**The Ohio General Assembly**  
Statehouse  
Columbus, Ohio 43215,

**Bill Harris, President of the Ohio Senate**  
Statehouse  
Room #201, Second Floor  
Columbus, Ohio 43215,

**Jon Husted, Speaker of the Ohio  
House of Representatives**  
77 South High Street, 13th Floor  
Columbus, Ohio 43215,

Relators,

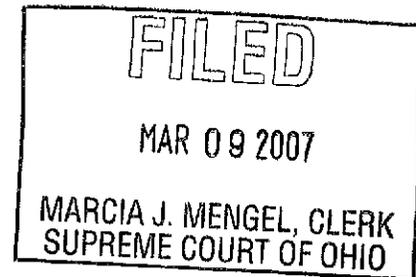
v.

**Jennifer Brunner**  
**Secretary of State of Ohio**  
180 East Broad Street  
Columbus, Ohio 43215,

Respondent.

Case No. 2007 – 0209

Original Action in Mandamus



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**RELATORS' MEMORANDUM IN OPPOSITION TO RESPONDENT SECRETARY OF  
STATE JENNIFER BRUNNER'S MOTION TO DISMISS RELATORS' COMPLAINT  
FOR A WRIT OF MANDAMUS**

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## INTRODUCTION

This is an original action for a writ of mandamus to compel respondent, Secretary of State Jennifer Brunner, to fulfill her mandatory legal duties, pursuant to the Ohio Constitution and statutory law, with respect to Amended Substitute Senate Bill 117 (“S.B. 117”). (Cmplt. ¶¶ 18-20, ¶ 29). See OHIO CONST., § 16, Art. II; R.C. 111.08, 149.08, 149.09, 149.091, 149.11, 3501.05.

Respondent Brunner has now filed a motion to dismiss the complaint. Respondent contends that relators lack standing to bring this action. She also argues that the complaint fails to state a claim for relief, on the theory that relators lack a clear legal right to the relief requested and have not demonstrated the Secretary of State’s clear legal duty to act. Finally, respondent Brunner contends that mandamus is not the proper form of action because, she alleges, relators have an adequate remedy at law through an action for declaratory judgment or prohibitory injunction.

Respondent’s arguments are meritless and should be rejected. The United States Supreme Court and courts nationwide have confirmed that legislators, such as relators, have a direct interest in maintaining the effectiveness of their majority votes. See *Coleman v. Miller* (1939), 307 U.S. 433, 438. Respondent conspicuously ignores that robust authority and instead relies on *Raines v. Byrd* (1997), 521 U.S. 811, which is inapplicable and easily distinguished. Unlike relators in this case, *Raines* concerned legislators who voted with the minority. Moreover, the relators in *Raines* sought to challenge the substantive content of the law at issue, not an unlawful interference with the legislative process, as in this case and *Coleman*. Indeed, even in *Raines*, the U.S. Supreme Court emphasized that legislators voting with the prevailing

side – like relators in this case – have standing to vindicate their majority votes. *Raines*, 521 U.S. at 823.

Furthermore, relators have alleged, and applicable constitutional provisions and statutes establish, that the Secretary of State has clear legal duties to keep, compile, publish, and distribute bills enacted as law. See *Maloney v. Rhodes* (1976), 45 Ohio St.2d 319, 322-23, 345 N.E.2d 407.

Relators have properly stated that they have no adequate remedy at law and that a complaint for mandamus is the proper form of action. Relators cannot obtain the complete relief they seek through an action for declaratory judgment or prohibitory injunction. Relators do not seek an interpretation of S.B. 117; they do not challenge the constitutionality of the bill in any way; they seek no declaration of rights under any of S.B. 117's provisions; and they do not seek to prohibit any state official from doing anything. Rather, relators seek precisely the type of relief that a writ of mandamus, and only a writ of mandamus, affords: an order compelling the Secretary of State to perform the Secretary's clear legal duties to keep, compile, publish, and distribute S.B. 117 as law.

Finally, respondent Brunner suggests – without any legal authority – that this case presents a non-justiciable political question that “threatens values of separation of powers.” (Resp. Mem. at 1.) That is meritless and incompatible with the willingness – indeed, the responsibility – of Supreme Courts to decide whether one branch of government has improperly impinged upon the power of another. See, e.g. *State ex rel. Gilmore v. Brown* (1983), 6 Ohio St.3d 39, 451 N.E.2d 235; *Buckley v. Valeo* (1976), 424 U.S. 1, 138; *United States v. Nixon* (1974), 418 U.S. 683, 707; *The Pocket Veto Case* (1926), 279 U.S. 655, 676-79; *Myers v. United States* (1926), 272 U.S. 52. There is no “lack of judicially discoverable and manageable standards for resolving this case,” nor is a decision impossible “without an initial policy

determination of a kind clearly for nonjudicial discretion.” *Baker v. Carr* (1962), 369 U.S. 186, 217 (discussing standards for determining whether case presents nonjusticiable political question). Resolution of this case only requires this Court to apply normal principles of interpretation to the constitutional and statutory provisions at issue. Moreover, if the Secretary of State has unlawfully interfered with the General Assembly’s constitutional authority to enact laws, then that injury is a far more serious threat to the separation of powers than any legal challenge to those actions. Indeed, without a determination from this Court, both the executive and legislative branches will be without necessary guidance in the crucial realm of law-making.

For these reasons, the Court should deny respondent Brunner’s motion to dismiss and grant the peremptory writ of mandamus.

## ARGUMENT

### I. Standard of Review

In considering a motion to dismiss a complaint for a writ of mandamus, including a motion to dismiss for lack of standing, this Court must presume all factual allegations of the complaint are true and draw all reasonable inferences in the relators’ favor. *State ex rel. Ferguson v. Court of Claims of Ohio*, 98 Ohio St.3d 399, 2003-Ohio-1631, 786 N.E.2d 43, at ¶9 (standard for motion to dismiss mandamus action generally); *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, at ¶¶40-41 (standard to dismiss for lack of standing); *see also Warth v. Seldin*, (1975), 422 U.S. 490, 501. The Court may not dismiss the complaint unless it finds “beyond doubt” that relators can prove no set of facts that would entitle them to the relief requested. *Id.*

Respondent Brunner has ignored this standard. The complaint alleges that S.B. 117 became law at the end of January 5, 2007 and was properly filed and enrolled in the Secretary of

State's office that same day. (Cmplt. ¶¶18-20.) However, respondent Brunner alleges that S.B. 117 was not a filed law prior to her taking office on January 8, 2007. (Resp. Memo. at 3, 18.) To the extent that respondent's arguments are premised on facts differing from those set forth in the complaint, this Court must disregard them.

## **II. Relators Have Standing to File This Action in Mandamus**

### **A. Relators Harris and Husted have standing to sue in their official capacities as legislators who voted with the majority on S.B. 117 and as the chief officers of the Ohio Senate and House, both of which voted to pass S.B. 117.**

#### ***i. Legislators who vote with the majority have standing to challenge executive actions that threaten to nullify their votes unlawfully.***

Respondent Brunner's contention that relators Harris and Husted lack standing to sue in their official capacities is meritless. Respondent has ignored well-established law recognizing legislator standing in cases where legislators seek to protect the effectiveness of their majority votes and prevent their legislative powers from being diminished unlawfully by the acts of other state officials.

The United States Supreme Court's decision in *Coleman v. Miller* (1939), 307 U.S. 433, is on point. In that case, 20 of Kansas's 40 state senators had voted against ratifying a proposed constitutional amendment. With the vote deadlocked at 20-to-20, the amendment ordinarily would not have been ratified. However, the state's Lieutenant Governor stepped in and cast a deciding vote in favor of the amendment. Alleging that this tiebreaking vote was illegal – and that therefore, the amendment was never ratified – the state senators who had voted against the amendment filed an action in mandamus to compel the secretary of the senate and other officials to recognize that the legislature had not, in fact, ratified the amendment.

In holding that the state senators had standing, the U.S. Supreme Court ruled that legislators “have a plain, direct and adequate interest in maintaining the effectiveness of their

votes.” *Coleman*, 307 U.S. at 438. The court concluded that if the legislators were correct on the merits that the Lieutenant Governor’s vote was unlawful, then the senators’ “nay” votes were improperly nullified. *Id.* The U.S. Supreme Court ruled that such vote nullification is a direct injury to a legislator’s interest in casting a meaningful vote. *Id.* (state legislators have a constitutional right “to have their votes given effect”). Thus, pursuant to *Coleman*, where a legislator’s vote would have been sufficient to enact a bill but for the allegedly unlawful act of another state official, that legislator has standing to bring suit to vindicate the effectiveness of his majority vote.

In this case, relators Harris and Husted advance legal interests that fall squarely within those standing parameters:

- The Ohio Constitution vests law-making authority in the General Assembly and its legislators, and specifically establishes majority law-making as a legally protected interest. OHIO CONST., § 1 Art. II (“The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives...”); § 15, Art. II, (bills shall be passed through “the concurrence of a majority of the members elected to each house”).
- A majority in both houses voted to pass S.B. 117. The majority included the individual votes of relators Harris and Husted, who are also heads of the Senate and House respectively. (Cmplt. ¶¶ 2, 3, 10-13.)
- The bill was then presented to Governor Taft, allowed to become law without his signature, and was properly filed with, accepted, and signed by Secretary of State Kenneth Blackwell. (Cmplt. ¶¶ 16-20.)

Respondent Brunner, however, refuses to perform her clear legal duties to record and issue S.B. 117 as law. (See, *infra*, III.B.) Thus, unless respondent Brunner is compelled to perform those duties, Harris’s and Husted’s votes, and the votes of their respective houses, will be completely nullified, and the legislators’ right to have their majority votes effectuated will be overridden. *Coleman*, 307 U.S. at 438.

This Court implicitly recognized exactly that form of legislator standing in *State ex rel. Gilmore v. Brown* (1983), 6 Ohio St.3d 39, 451 N.E.2d 235. In that case, the Court adjudicated a mandamus action filed by a state representative who had voted with the majority to pass a bill and who challenged the procedure by which the bill was allegedly vetoed. Similarly, relying on *Coleman*'s holding concerning standing,<sup>1</sup> state and federal courts have repeatedly recognized that legislators have a judicially-recognized, personal interest in maintaining the effectiveness of their votes and other legislative powers. See, e.g., *Silver v. Pataki* (N.Y. 2001), 755 N.E.2d 842 (speaker of State Assembly had standing to challenge Governor's alleged diminution of legislative powers regarding non-appropriation bills); *Campbell v. White* (Okl. 1993), 856 P.2d 255, 267 (legislators had standing to raise vote dilution claim with respect to special appropriations bills); *Risser v. Thompson* (C.A. 7 1991), 930 F.2d 549, 550-51 (state legislators had standing to challenge governor's partial veto power on ground that it diminished the effectiveness of their votes); *Dennis v. Luis* (C.A. 3 1984), 741 F.2d 628 (members of territorial legislature had standing to challenge gubernatorial appointment of a government officer on grounds that it denied legislators' their right to confirm such nominees); *Zemprelli v. Thornburgh* (1983), 73 Pa. Cmwlth. 101 (state legislators had standing to challenge denial of their right to confirm nomination submitted to them by the governor); *Kennedy v. Sampson* (C.A. D.C. 1974), 511 F.2d 430, 435 (senator had standing to challenge president's pocket veto of Congressionally approved legislation; veto allegedly effected a "diminution of congressional influence in the legislative process" by cutting off opportunity for congressional override). In each of these

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<sup>1</sup> Despite the fact that there were differing opinions on the merits issues in *Coleman* (issues that are not relevant to this case in any event), a clear majority of the Supreme Court joined in the holding regarding standing, which has been repeatedly affirmed and relied upon. See *supra*.

cases, just as here, the legislators had standing to challenge the allegedly unlawful nullification or diminution of their legislative powers.

Accordingly, pursuant to the holdings of *Coleman* and its progeny, Harris and Husted – as members of the General Assembly who voted with the majority in favor of S.B. 117, and as the duly-elected representatives of the legislative bodies that passed the legislation – have standing to challenge actions threatening the effectiveness of their majority votes.

**ii. Respondent Brunner's reliance on Raines v. Byrd is misplaced. Raines is inapplicable and easily distinguished from this case.**

Respondent Brunner rests her entire argument against legislator standing on *Raines v. Byrd* (1997), 521 U.S. 811. Respondent's reliance is misplaced. *Raines* is clearly distinguishable from both *Coleman* and this case, and therefore, inapplicable.

In *Raines*, six members of Congress brought suit challenging the substantive constitutionality of the Line Item Veto Act. They did not, however, challenge the mechanics of the legislative process, as in this case and as in *Coleman*. 521 U.S. at 824. Perhaps most importantly, the six plaintiff-legislators in *Raines* had voted in the minority – that is, they voted against the act that was ultimately approved by Congress. Thus, as the Supreme Court properly ruled, these legislators alleged no cognizable injury by executive officials. They were simply on the losing end of a Congressional battle in which legislation was validly enacted over their opposition. *Id.* (“They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Act, their votes were given full effect. They simply lost that vote.”). Thus, in sharp contrast to this case and *Coleman*, no vote nullification was ever alleged in *Raines*, and therefore, the plaintiffs did not have legislator standing.

Indeed, in *Raines* itself, the U.S. Supreme Court affirmed the continuing vitality of *Coleman* and emphasized the sharp distinction between *Coleman* and *Raines*. The Supreme Court explained that, in contrast to the minority-voting legislators before it in *Raines*, the injury suffered by legislators voting with the majority (like Harris and Husted) is cognizable by the courts:

[L]egislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.

521 U.S. at 823 (reaffirming *Coleman*) (emphasis added).

In sum, *Raines* has no bearing on this case, and *Raines* so states. Legislators voting with the prevailing side – like relators in this case – have standing to vindicate their majority votes. Thus, pursuant to well-established law, relators Harris and Husted have standing to sue both in their official capacities as legislators who voted with the majority in favor of S.B. 117, and as leaders of the legislative houses that voted to pass S.B. 117.

**B. The Ohio General Assembly has standing to challenge a direct injury to its constitutional authority to make laws by majority vote.**

Respondent Brunner also contends that the General Assembly lacks standing. That argument is wrong. As with all standing inquiries, the straightforward question regarding whether the General Assembly has standing is whether there has been an alleged injury to a legally protected interest of the legislative body as a whole. Such an injury plainly has been alleged in this case. Pursuant to the Ohio Constitution, law-making authority is vested in the General Assembly and majority-lawmaking is a legally protected interest of that institution. OHIO CONST., § 1, Art. II (“The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives...”) & § 15 (bills shall be passed through “the concurrence of a majority of the members elected to each house”). Because

respondent Brunner is unlawfully refusing to record and distribute S.B. 117 as law, the General Assembly's right to have the votes of a majority effectuated has been overridden. Thus, the General Assembly as an institution has alleged a direct injury to its constitutional authority to make laws by a majority vote.

Such institutional injury has been recognized repeatedly by state and federal courts. See, e.g., *Colorado General Assembly v. Lamm* (Col. 1985), 700 P.2 508, 516 (state general assembly had standing to bring action against governor challenging actions allegedly infringing on General Assembly's constitutional power of appropriation); *Legislature of the State of California v. Deukmejian* (1983), 34 Cal.3d 658 (state legislature had standing to bring action in mandamus to protect legislature's institutional power to adopt redistricting plans); *Thirteenth Guam Legislature v. Bordallo* (C.A. 9 1978), 588 F.2d 265, 266 (Guamian legislature had standing to protect institutional authority to override governor's item veto of individual appropriations).

Respondent Brunner sets forth two arguments against the General Assembly's standing. First, respondent contends that the General Assembly is not a "person" within the meaning of the mandamus statute, R.C. 2731.04. But as respondent concedes, "person" is not defined in R.C. 2731.04. Moreover, original actions in mandamus, such as this case, derive from the Ohio Constitution, which does not prohibit the General Assembly from being a relator. OHIO CONST., § 2(B)(1)(b), Art. IV. Thus, there is no merit to respondent Brunner's claim that the "plain language of the [mandamus] statute" precludes the General Assembly from bringing an action in mandamus. (Resp. Mem. at 5.) Respondent's argument also fails if this Court looks to the definition of "person" set forth in R.C. 1.59, which explains that "person" "includes a corporation, business trust, estate, trust, partnership, and association." (Emphasis added.) Even if the General Assembly did not fall squarely into one of those categories, "person" is not restricted to the examples in R.C. 1.59, as respondent Brunner contends. Pursuant to well-

established principles of statutory interpretation, the list of “persons” contained in R.C. 1.59 is simply illustrative, not exhaustive. See *West v. Gibson* (1999), 527 U.S. 212, 213 (Congress’s use of the word “including” in a statutory phrase enumerating certain remedies made “clear that the authorization [of remedies] [wa]s not limited to the specified remedies there mentioned.”); *Federal Land Bank of St. Paul v. Bismark Lumber Co.* (1941), 314 U.S. 95, 100 (“the term ‘including’ is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.”). Accordingly, contrary to respondent’s contentions, there is nothing in the mandamus statute or R.C. 1.59 that precludes the General Assembly from bringing a mandamus action.

Second, respondent contends that the General Assembly lacks standing because relators have failed to allege any injury to the 127th session of the General Assembly, and because the 126th session has adjourned. But relators have never purported to bring this action on behalf of one or both sessions of the General Assembly. That is a gloss manufactured solely by respondent. Rather, it is the institution of the General Assembly that has been named as a relator to the complaint. As discussed, the General Assembly as an institution has properly alleged a direct injury to its constitutional authority to make laws by a majority vote. To argue, as respondent does, that the General Assembly somehow “cease[s] to exist” when adjourned is as nonsensical as saying that this Court does not exist when it is adjourned or that the State of Ohio somehow evaporates on official state holidays. (Resp. Memo. at 6.) Indeed, the Ohio Constitution recognizes that the General Assembly perpetually “exists,” by permitting it to carry out official duties – for instance, presentment of a bill to the Governor – even after adjournment. See OHIO CONST., § 16, Art. II.

Accordingly, the General Assembly has standing as a relator to this complaint.

**C. Relators Harris and Husted have standing to sue as Ohio citizens pursuant to the public action doctrine.**

Respondent Brunner also claims that relators Harris and Husted lack standing to maintain this action as taxpayers or citizens of Ohio. (Resp. Mem. at 13.) As a preliminary matter, relators have not attempted to plead standing as taxpayers. Relators do, however, have standing as individual citizens. The “public action” doctrine, which this Court has followed for 125 years, confers standing on Ohio citizens to litigate constitutional disputes over the separation of powers within Ohio government.

Respondent Brunner concedes that public action standing, unlike taxpayer standing, does not require that plaintiffs allege a special interest or a particularized injury. (Resp. Mem. at 13; “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 Court first recognized the public action standing doctrine in *State ex rel. Meyer v. Henderson*:

As regards the degree of interest on the part of the relator, requisite to make him a proper party . . . a distinction is taken between cases where the extraordinary aid of a mandamus is invoked merely for the purpose of enforcing or protecting a private right, unconnected with the public interest, and those cases where the purpose of the application is the enforcement of a purely public right. . . . [W]here the [mandamus] relief is sought merely for the protection of private rights, the relator must show some personal or special interest in the subject matter, since he is considered the real party in interest and his rights must clearly appear. On the other hand, where the question is one of public right and the mandamus is to procure the enforcement of a public duty, 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.

(1883), 38 Ohio St. 644, 649 (emphasis added).

This Court reaffirmed the doctrine of public action standing in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*:

Where the object of an action in mandamus and/or prohibition is to procure the enforcement or protection of a public right, the relator need not show any legal or

special individual interest in the result, it being sufficient that the relator is an Ohio citizen and, as such, interested in the execution of the laws of this state.

(1999), 86 Ohio St.3d 451, 715 N.E.2d 1062, paragraph 1 of the syllabus, recon. denied (1999), 87 Ohio St.3d 1409. Although this Court has subsequently clarified the scope of *Sheward*, the Court has never retreated from its central holding that the public action doctrine confers standing “where there may be an intrusion into areas committed to another and coequal branch of government.” 86 Ohio St.3d at 469. Compare with *State ex rel. Grendell v. Davidson* (1999), 86 Ohio St.3d 629, 635, 716 N.E.2d 704 (declining to extend public action doctrine to include plaintiffs who alleged that the General Assembly violated its own internal rules).

This Court has specifically recognized that the public action doctrine confers standing to compel a public official to perform a public duty. See *State ex rel. Newell v. Brown* (1954), 162 Ohio St. 147, 122 N.E.2d 105, at paragraph 1 of the syllabus (“as a matter of public policy a citizen does have such an interest in his government as to give him capacity to maintain a proper action to enforce the performance of a public duty affecting himself and citizens generally”); *State ex rel. Trauger v. Nash* (1902), 66 Ohio St. 612, 615, 64 N.E. 558 (“a private citizen may be the relator in a mandamus proceeding to enforce the performance of a public duty affecting himself as a citizen and the citizens of the state at large”).

Respondent Brunner contends that the public action doctrine does not confer standing on relators in this case because they have not raised any issues “of great importance.” (Resp. Mem. at 14.) This Court had “no doubt” that the dispute between the judicial and legislative branches in *Sheward*, supra, was “of such a high order of public concern as to justify allowing this action as a public action.” 86 Ohio St.3d at 474. The dispute between the executive and legislative branches in the present case has no less importance than the dispute in *Sheward*. Moreover, this Court has never endorsed respondent Brunner’s contention that only constitutional disputes

implicating the judiciary's constitutional authority are important enough to warrant citizen standing pursuant to the public action doctrine.

Accordingly, relators Harris and Husted have properly alleged their standing as Ohio citizens to maintain this mandamus action.

**III. Relators Have Properly Stated a Claim for Relief in Mandamus: They Possess a Clear Legal Interest to the Relief Requested, Respondent Brunner Has a Clear Legal Duty to Perform the Requested Acts, and There Is No Adequate Remedy at Law**

Original actions in mandamus are authorized by Article IV, § 2 of the Ohio Constitution. Furthermore, R.C. 2731.01 provides: “Mandamus is a writ, issued in the name of the state to an inferior tribunal, board, or person, 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. As this Court has repeatedly recognized, “[t]he basic purpose of the writ of mandamus is to compel a public officer to perform the duties imposed upon [him/her] by law.” *State ex rel. Scott v. Masterson* (1962), 173 Ohio St. 402, 404, 183 N.E.2d 376 (mandamus lays to compel city council to comply with mandatory charter provision requiring council to periodically reapportion voting districts of city).

Mandamus is the proper form of action where relators sufficiently allege that: (1) they have a clear legal right to the relief requested; (2) the respondent is under a clear legal duty to perform the requested acts; and (3) the relators have no plain and adequate remedy at law. *Bowling Green State Univ. v. Williamson* (1988), 39 Ohio St.3d 141, 142, 529 N.E.2d 1371 (“when a petition alleging the three elements of a mandamus claim is filed, mandamus jurisdiction is established.”) (emphasis added); see also *State ex rel. Harris v. Toledo* (1995), 74 Ohio St.3d 36, 37, 656 N.E.2d 334 (“relator is not required to prove his or her case at the pleading stage and need only give reasonable notice of the claim”) (emphasis added). For these

reasons, this Court has repeatedly recognized mandamus as the proper form of action where relators seek to compel a state official to perform clear legal duties, even where the Court ultimately concludes that the writ should not be granted on the merits. See, e.g., *State ex rel. Lakeview Local School Dist. Bd. of Edn. v. Trumbull Cty. Bd. of Commrs.*, 109 Ohio St.3d 200, 2006-Ohio-2183, 846 N.E.2d 847, at ¶¶ 7, 8, 29 (where school board alleged that County Board of Commissions had legal duty to distribute certain federal money, complaint for mandamus was considered proper form of action, even though Court ultimately denied writ on the merits); *State ex rel. Oberlin Citizens for Responsible Development v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529 (where committee of citizens alleged that city auditor had legal duty to submit and certify certain initiative and referendum petitions, complaint for mandamus was considered proper form of action, even though Court ultimately denied writ on the merits); *State ex rel. Gilmore v. Brown* (1983), 6 Ohio St.3d 39, 451 N.E.2d 235 (considering mandamus action filed by state legislator who had voted with majority to pass a bill and who challenged executive procedure for delivering veto message, but denying writ on the merits).

In this case, relators clearly seek to compel a public officer to perform the duties imposed upon her by law, and relators have properly alleged all of the required elements for a mandamus action.

**A. Relators have properly alleged a clear legal right to the relief requested because majority law-making is a constitutionally created right of the General Assembly and its legislators, and because legislators have a judicially recognized right to vindicate the effectiveness of their majority votes.**

Respondent Brunner's sole basis for contending that relators have no clear legal right to the relief requested is that relators lack standing. (Resp. Mem. at 16.) However, for the reasons already discussed, relators do have standing and they have properly alleged a clear legal right to the relief requested.

Relators' clear legal rights are grounded in Article II of the Ohio Constitution: § 1 vests law-making authority in the General Assembly; § 15 establishes majority law-making by the General Assembly, permitting a majority of the members of the legislature to pass legislation; and § 16 requires any such legislation passed by the majority, and not vetoed by the governor, to become law ten days after adjournment. Thus, majority law-making is a constitutionally-created right of the General Assembly and its elected legislators. Moreover, as the U.S. Supreme Court has repeatedly recognized, state legislators have a "right" and "privilege" in "maintaining the effectiveness of their votes." *Coleman*, 307 U.S. at 438. Accordingly, relators have alleged a clear legal right to the relief requested: a writ compelling respondent Brunner to effectuate the results of the majority law-making process.

**B. Relators have properly alleged that the Secretary of State has a clear legal duty to perform the requested acts.**

The factual circumstances triggering the Secretary of State's clear legal duties in this case, as set forth in the complaint, are addressed in § 16, Article II of the Ohio Constitution:

If a bill is not returned by the governor [to the house of the general assembly in which it originated] 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 shall file with the secretary of state every bill not returned by him to the house of origin that becomes law without his signature.

OHIO CONST., § 16, Art. II (emphasis added). Thus, where a Governor allows a bill to become law without his signature following adjournment of the General Assembly, by filing the bill with the Secretary of State's office, the bill becomes a law and the Secretary of State is obligated to file and issue it as such.

The parties agree that S.B. 117 was presented to Governor Taft on December 27, 2006; that the General Assembly adjourned *sine die* on December 26, 2006; and that Governor Taft did

not file written objections to the bill with the office of the Secretary of State within ten days of adjournment. Instead, Governor Taft filed the bill with the Secretary of State on January 5, 2007, with the intention that it become law without his signature ten days after adjournment. The bill was accepted and filed by the office of the Secretary of State on January 5, 2007, and Secretary of State Blackwell signed the enrolled bill that same day.

Thus, S.B. 117 was already law when respondent Brunner “returned” it to Governor Strickland on January 8, 2007. Pursuant to Section 16, Article II of the Ohio Constitution, a bill becomes law if it is not returned by the Governor within ten days (intervening Sundays excepted) after presentment “unless” the legislature adjourns, in which case a bill becomes law if it is not filed by the Governor within ten days (not excepting intervening Sundays) after adjournment. The Ohio Constitution does not provide that the “later” of these two deadlines is controlling, as respondent Brunner contends. (Resp. Mem. at 3.) Indeed, her conclusion adds language to the Ohio Constitution that is simply not there. The General Assembly adjourned *sine die* on December 26, 2006, and the applicable ten-day constitutional period (which does not except intervening Sundays) expired on January 5, 2007.

“The language of Section 16, Article II of the Constitution is unmistakably clear.” *Maloney v. Rhodes* (1976), 45 Ohio St.2d 319, 322, 345. The Ohio Attorney General addressed identical circumstances in a 1945 Ohio Atty.Gen.Ops. No. 2615, at 640, 644 and noted that, if the General Assembly adjourned *sine die*, the constitutional ten-day period after adjournment expired ten days after adjournment, even though the ten-day period following presentment (which excluded intervening Sundays) would expire two days later. Courts in other jurisdictions with similar constitutional provisions have also concluded that the constitutional time period for executive action is measured from adjournment rather than presentment, and that intervening Sundays are not excluded. See, e.g., *State v. Eley* (Ala.App. 1982), 423 So.2d 303, 305; *In re*

*Opinion to the Governor* (1922), 44 R.I. 275, 117 A. 97; *State ex rel. White v. Grant Superior Court* (1930), 202 Ind. 197, 172 N.E. 897; *State ex rel. Watkins v. Norton* (1911), 21 N.D. 473, 131 N.W. 257.

Respondent Brunner should be compelled by writ of mandamus to perform her clear, ministerial duties with respect to this law: to have charge of and safely keep enacted bills and other papers that are presented by the Governor for filing, R.C. 111.08; to forward copies of engrossed bills to the clerks of the courts of common pleas, R.C. 149.08; to distribute pamphlet laws, R.C. 149.09; and to compile, publish and distribute session laws, R.C. 149.091; and to carry out responsibilities with respect to any referenda on the bill, R.C. 3501.05.

Respondent attempts to carve out an exception to her clear statutory duties on the theory that nothing explicitly prevented her from “unfiling” the bill and relinquishing custody of it to Governor Strickland. This argument fails for two reasons. First, pursuant to Section 16, Article II of the Ohio Constitution, S.B. 117 became law before respondent Brunner purported to “unfile” and “return” it to the Governor on January 8, 2007. Her duties, which relators seek to enforce in this action, arose when the bill became law. No action taken by her after that date has any legal impact on those duties. Second, to the extent that respondent Brunner attempts to craft an exception to her clear statutory duties on the theory that such an exception is not expressly prohibited, this Court has repeatedly rejected that reasoning. A court may not “add[] . . . an additional statutory exclusion not expressly incorporated into the statute by the legislature.” *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 394, 2004-Ohio-6549, 819 N.E.2d 1079. *See also Hall v. Lakeview Local School Dist. Bd. of Edn.* (1992), 63 Ohio St.3d 380, 383, 588 N.E.2d 785 (rejecting argument that lack of statutory prohibition allowed Board of Education to enter into supplemental contracts with nonteaching employees; Board of Education, whose duties are delineated by statute, had “no more authority than that conferred upon [it] by statute,” and statute

did not authorize board to enter into such contracts); *State ex rel. Laubscher v. Industrial Commn. of Ohio* (1929), 120 Ohio St. 458, 463, 166 N.E. 403 (“the courts are without power to read into the statute a right that the Legislature has not yet created.”).

Significantly, this Court has already considered this very question and has held that the Secretary of State must file and issue a bill deposited by the Governor:

The Secretary of State has no opinion. The Secretary of State is obligated by the Constitution and [her] oath of office to file the law when it is presented to [her] for filing. It is a ministerial act. It is not discretionary.

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The Secretary of State has no judicial powers, authority, or jurisdiction to declare a law constitutionally invalid or to refuse to file it. Mandamus will lie to compel [her] to perform the official act of accepting and filing the law.

*Maloney v. Rhodes* (1976), 45 Ohio St.2d 319, 322-23, 345 N.E.2d 407 (emphasis added) (reversing Court of Appeals decision to enjoin Secretary of State from accepting and filing law passed by both Houses of the General Assembly, approved by the Governor, and delivered to the Secretary of State for filing; injunction was improper because Secretary of State has mandatory, non-discretionary duty to accept and file bills deposited in his/her office as law). See also *State ex rel. Governor v. Taft* (1994), 71 Ohio St.3d 1, 3-4, 640 N.E.2d 1136 (holding that, because Secretary of State has clear legal duty to file an enacted bill properly deposited with the Secretary of State’s office, there could be no mandamus action against the Secretary of State to compel him not to file the act, as requested by relator, who was challenging the constitutionality of the act). *Maloney* and *State ex rel. Governor* do not aid respondent Brunner at all. Rather, those cases prove relators’ point exactly: that when a bill has been properly deposited in the Secretary of State’s office, the Secretary has no discretion not to file and issue the bill as law.

Respondent Brunner contends that had she “refused to return S.B. 117 to the Governor, despite the Governor’s request, she would have had to exercise her own personal judgment... [a]

discretionary, judicial decision the Court expressly prohibited in *Maloney*.” (Resp. Mem. at 20.) Refusing Governor Strickland’s request, however, would not have constituted an exercise of unlawful discretion at all, particularly where respondent Brunner does not (and cannot) claim that she had any legal duty to accede to the request. Rather, refusing the request simply would have involved abiding by her clear legal duties.

This Court has never suggested that a state official’s “decision” to obey her clear legal duties is an act of discretion, let alone an improper one. Indeed, to accept respondent’s peculiar logic would be to hold that both disobeying and obeying the law are discretionary acts and thus prohibited.

In sum, relators have more than adequately alleged that respondent Brunner has a clear legal duty to accept and keep custody of S.B. 117 and to comply with her statutory obligations to compile, publish, and distribute the bill as law.

**C. Relators have no plain and adequate remedy at law because the relief they seek cannot be obtained through an action for declaratory judgment or prohibitory injunction. A complaint in mandamus is the proper form of action.**

It is well-settled that mandamus is the proper form of action where relators seek to compel a public officer to perform the duties imposed upon her by law. See, e.g., *State ex rel. Lakeview Local School Bd. of Edn. v. Trumbull Cty. Bd. of Commrs*, 109 Ohio St.3d 200, 2006-Ohio-2183, 846 N.E.2d 847 (complaint for mandamus was appropriate form of action for school board’s claim that County Board of Commissioners had legal duty to distribute certain federal money); *State ex rel. Cincinnati Bell Tel. Co. v. Pub. Util. Commn.*, 105 Ohio St.3d 177, 2005-Ohio-1150, 824 N.E.2d 68 (complaint for mandamus was proper form of action, and writ granted, on claim that PUCO had legal duty to transmit transcript of commission proceedings to court clerk); *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529 (complaint for mandamus proper action with respect to claim

that city auditor had legal duty to submit and certify initiative and referendum petitions seeking repeal of a certain ordinance); *State ex rel. Ms. Parsons Constr., Inc. v. Moyer* (1995), 72 Ohio St.3d 404, 650 N.E.2d 472 (mandamus was proper action, and writ granted, to compel auditor and treasurer to perform legal duty of paying contractor after city public service director determined that contractor completely and satisfactorily performed the contract); *State ex rel. Scott v. Masterson* (1962), 173 Ohio St. 402, 183 N.E.2d 376 (mandamus lay to compel city council to comply with mandatory charter provision requiring council to periodically reapportion voting districts of city).

Relators clearly bring this action to compel respondent Brunner to perform her affirmative, ministerial duties to issue S.B. 117 as law. Nevertheless, respondent contends that the complaint should be dismissed, on the theory that relators have an adequate remedy at law in the Court of Common Pleas, in the form of a suit for declaratory judgment or prohibitory injunction. Specifically, respondent Brunner contends that this case is like certain mandamus-styled cases that periodically appear in this Court as disguised actions for declaratory judgment or prohibitory injunction. See, e.g., *State ex rel. United Auto. Aerospace & Agric. Implement Workers of Am. v. Ohio Bureau of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, 844 N.E.2d 335; *State ex rel. Governor v. Taft* (1994), 71 Ohio St.3d 1; *State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St.3d 479, 2003-Ohio-2074, 786 N.E.2d 1289. That is wrong. In all of those cases, the relators improperly sought a writ of mandamus to challenge the substantive constitutionality of the laws at issue and to enjoin state officials from applying the law against them. This Court held that those cases were not proper mandamus actions, but rather actions for declaratory judgment and/or prohibitory injunction. But that is simply not what this case is. Relators do not seek an interpretation of S.B. 117; they do not challenge the constitutionality or

substantive legality of the bill in any way; they seek no declaration of rights under any of S.B. 117's provisions; and they do not seek to prohibit any state official from doing anything.

To the extent respondent Brunner contends that this is a declaratory judgment action because the Court must interpret certain constitutional and statutory provisions in order to determine what the Secretary of State's duties are, that argument overreaches. In all mandamus actions – as in all legal actions – a court must construe and apply law, and thereby “declare” something about it. The distinction between a declaratory judgment action and mandamus that this Court is required to scrutinize is not whether the court must interpret law, but whether a declaratory judgment will afford relators adequate relief. If, as respondent Brunner contends, the need to interpret law rendered every action a “declaratory judgment action,” then mandamus would simply never be appropriate. That reasoning cannot prevail.

The important point here is that, if this Court rules that the Secretary of State had the clear legal duty to record and issue S.B. 117 as law, then a declaration on that issue, standing alone, is not an “adequate remedy.” A mandatory injunction is required to compel the Secretary of State to perform the various duties imposed upon her with respect to an enacted law See supra, Section III.B. Only an action in mandamus provides that relief.

As this Court held in *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v.*

*State Emp. Relations Bd.*:

[W]here declaratory judgment would not be a complete remedy unless coupled with ancillary relief in the nature of mandatory injunction, the availability of declaratory injunction is not an appropriate basis to deny a writ to which the relator is otherwise entitled.

(1986), 22 Ohio St.3d 1, 8, 488 N.E.2d 181 (citation and internal quotation marks omitted)

(emphasis added). See also *State ex rel. Ohio Civ. Serv. Emp. Assn., AFSCME Local 11 v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, at ¶¶ 15-17

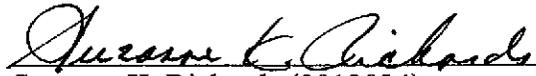
(reaffirming that “a declaratory action, which merely announces the existence of a duty to be performed, has generally not been deemed as adequate as the writ of mandamus, which compels performance”; and holding that union did not have adequate remedy at law by way of declaratory judgment action, and that mandamus was proper, because only “complete relief” could be obtained through a remedy that included both a declaration that the Board’s dismissal of the petitions was unlawful and an affirmative writ compelling reinstatement of the petitions) (citation and internal quotation marks omitted).

Finally, respondent Brunner seems to contend that this action could be brought against Governor Strickland instead of her. That is meritless. This is an action to compel the Secretary of State to perform her affirmative, mandatory duties. There is nothing for this Court either to prohibit or compel with respect to Governor Strickland. The proper remedy unquestionably lies against the Secretary of State. The Secretary of State – not the Governor – is the custodian of bills and laws for the State of Ohio, and she is the state officer charged with keeping and issuing enacted bills as law. Accordingly, Secretary of State Brunner is the proper respondent in this case.

For all of these reasons, relators have no plain and adequate remedy through a declaratory judgment or prohibitory injunction action. This case is properly before this Court as an action in mandamus and relators seek precisely the relief that a writ of mandamus affords: to compel a state official to perform her clear legal duties.

## CONCLUSION

For all of the foregoing reasons, relators have standing to bring this action and they have properly alleged that they possess a clear legal right to the relief requested, that the Secretary of State is under a clear duty to perform the requested acts, and that there is no proper remedy at law. Accordingly, this Court should deny respondent Brunner's motion to dismiss and grant the peremptory writ of mandamus compelling respondent Brunner to record and issue S.B. 117 as law.



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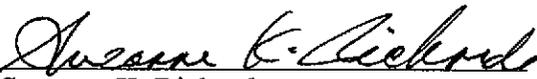
## CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2007, a copy of the foregoing Memorandum in Opposition to Respondent Secretary of State Jennifer Brunner's Motion to Dismiss was served by regular U.S. mail upon:

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