

IN THE SUPREME COURT OF OHIO

STATE EX REL., THE OHIO GENERAL ASSEMBLY, et al.,

Relators,

v.

JENNIFER BRUNNER, SECRETARY OF STATE,

Respondent.

Case No. 2007-0209

Original Action in Mandamus

MEMORANDUM OF AMICI CURIAE OHIO ALLIANCE FOR CIVIL JUSTICE, OHIO MANUFACTURERS' ASSOCIATION, OHIO CHAMBER OF COMMERCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS/OHIO, OHIO COUNCIL OF RETAIL MERCHANTS, OHIO BUSINESS ROUNDTABLE, OHIO CHEMISTRY TECHNOLOGY COUNCIL AND OHIO AUTOMOBILE DEALER'S ASSOCIATION IN SUPPORT OF RELATOR'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

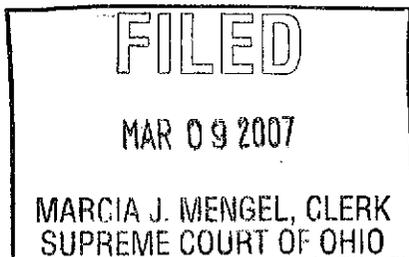
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MEMORANDUM OF AMICI CURIAE IN SUPPORT OF RELATORS'
MEMORANDUM CONTRA MOTION TO DISMISS

I. STATEMENT OF AMICI INTEREST

Amici curiae — Ohio Alliance for Civil Justice, Ohio Manufacturers' Association, Ohio Chamber of Commerce, National Federation of Independent Business/Ohio, Ohio Council of Retail Merchants, Ohio Insurance Institute, Ohio Business Roundtable, Ohio Chemistry Technology Council, and Ohio Automobile Dealer's Association— have a strong interest in the laws passed by the Ohio General Assembly. *Amici curiae's* members are regulated by and must comply with Ohio law, are subject to enforcement action under Ohio law, and are subject to liabilities and afforded protections under Ohio law. For *amici curiae's* members, the first step to understanding their rights and obligations in conducting business in Ohio is to ascertain what laws are in effect.

Indeed, the very cornerstone of our democracy is certainty in the legislative process and the ability to determine what laws are in effect, when they are in effect, and by what processes they may be challenged. In furtherance of those fundamental premises, the Ohio Constitution establishes a clear legislative process, sets clear guidance to determine the effective date of laws, and establishes a process for people to challenge those laws by referendum.

The constitutional procedures implicated by the instant case are no different. The Ohio Constitution sets forth a clear and, until now, unambiguous path for a bill to become a law. Until now, *amici curiae's* members could rely upon a straightforward system where a bill is passed, presented to the governor, and enacted into law by the governor's signature or lack thereof. Absent a veto or a successful referendum, the bill became law on a date certain and *amici curiae* could plan and rely upon that fact in their daily affairs.

In the instant case, Respondent Secretary of State (“Respondent”) attempts to exercise authority that she does not have and fails to perform the statutory duties of her office by trying to reverse and re-do a constitutional process that was already complete when she assumed office. Senate Bill 117 (“S.B. 117”) was already passed, submitted to the Governor, and filed with the Secretary of State’s Office before the Respondent became Secretary of State. Instead of completing the remaining statutory duties involved with publishing a law, Respondent attempted to reverse the process and “unfile” S.B. 117.

Amici curiae were involved in the legislative process that resulted in S.B. 117. Three of the four matters addressed in S.B. 117 — the amendments to public nuisance law, the Consumer Sales Practices Act, and the attorney-client privilege — are of significant import to *amici curiae*. *Amici curiae* have an interest in requiring the Respondent to perform her statutory duties to publish S.B. 117 as valid Ohio law so that courts and litigants throughout Ohio will have clear and ready access to this Ohio law and the protections and/or obligations arising therefrom.

Without timely direction from this Court, duplicative and expensive litigation will ensue regarding whether S.B.117’s provisions are valid and applicable. Conflicting decisions, numerous appeals, and years of uncertainty are sure to result. In the end, this Court, and this Court alone, will need to decide whether Respondent had a clear legal duty to comply with the final procedural duties involved in publishing an enacted law.

This action is more than just a political dispute between two branches of government. It is a very real controversy with very real consequences for *amici curiae* and all Ohioans. By failing to complete the ministerial and mandatory duties of her office, Respondent has injected needless uncertainty in the status of Ohio law. Only this Court can clarify the uncertainty in a timely and decisive manner. *Amici curiae* respectfully urge this Court not to dismiss the instant

action and to render a decision on the merits of a matter that is vitally important to *amici curiae* and all Ohioans.

II. BACKGROUND OF RESPONDENT'S DUTIES

Contrary to Respondent's assertions, this matter is far more significant than a political squabble between two branches of government. (Respondent's Motion to Dismiss at 1.) From a constitutional perspective, resolving this issue and bringing clarity back to the legislative process is of critical importance to all branches of government and to all Ohioans. As to *amici curiae* specifically, resolution of the status of S.B. 117 is of particular importance. This Court is uniquely positioned to resolve this question on the merits of the questions posed and *amici curiae* respectfully ask this Court to do just that.

There is no dispute that S.B. 117 was duly passed by the General Assembly and presented to the Governor. It is also uncontroverted, because the Governor affirmatively and publicly stated as much, that the Governor chose to let S.B. 117 become law without his signature. Finally, it is undisputed that the Governor filed S.B. 117, unsigned, with the Secretary of State's Office.

Once filed, S.B. 117 became law. The remaining steps in the process of distributing and publishing a law are very clear and grounded in the Ohio Revised Code. Ohio Revised Code Section 111.08 requires the Secretary of State to take charge of and safely keep all laws passed by the Ohio General Assembly. Ohio law further requires the Secretary of State to forward a copy of each law to the clerks of the courts of common pleas (R.C. 149.08), distribute copies of laws to each county law library, each county auditor, and to the State Library Board. (R.C. 149.09), and publish all session laws annually or biannually (R.C. 149.091).

Amici curiae have the right to expect that when legislation is passed by the General Assembly, it will be presented to the Governor for signature. Once the Governor determines if he will sign a bill, or let it become law without his signature, the Constitution is clear that the bill must be filed with the Ohio Secretary of State. From that point, the Secretary of State's duties are strictly ministerial. Nothing in Ohio law suggests that the Secretary of State has any authority to determine when a bill becomes a law.

Respondent has a clear legal duty to comply with Ohio law and failed to do so. Relators not only have standing to bring this important issue before this Court, but have appropriately done so through an action in mandamus. *Amici curiae* respectfully urge this Court to deny Respondent's Motion to Dismiss and, for the reasons outlined in the following sections, proceed to the merits of this very important case.

III. RELATORS HAVE STANDING IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE GENERAL ASSEMBLY

Respondent argues that Relators have no standing to bring this matter. At the outset, it is important to note that this is not a situation where a minority legislator attempts to challenge the will of the majority by bringing a "sore-loser" action. Instead, by bringing this action, Relators carry out their duty to ensure that duly adopted bills become law. *Amici curiae* rely upon members of the General Assembly to do just that. Having worked with Relators to draft, vote upon, and pass S.B. 117, *amici curiae* expect that Relators will see their duties through to fruition.

Moreover, the law accords Relators standing to enforce their official actions in cases such as the one at issue here. In arguing that Relators Harris and Husted lack standing in their official capacities as members of the General Assembly, Respondent places much reliance on *Raines v. Byrd* (1997), 521 U.S. 811, 117 S. Ct. 2312, 138 L.Ed 849, in which the United States Supreme

Court held that a member of Congress who voted in the minority lacked standing to bring suit in his official capacity challenging the constitutionality of a federal law. *Raines*, however, does not bar standing in this case.

Many courts have held that a legislator has standing to bring legal action in his or her official capacity for injury to his official interests. For instance, in *Silver v. Pataki* (2001), 96 N.Y.2d 532, 730 N.Y.S.2d 482, the Speaker of the New York State Assembly had standing in his official capacity to bring a declaratory judgment action seeking a finding that the Governor improperly exercised a line-item veto on non-appropriation bills. “[P]laintiff — as a Member of the Assembly — can maintain an action to vindicate the effectiveness of his vote where he is alleging that the Governor has acted improperly so as to usurp or nullify that vote.” *Silver*, at 536 (internal quotations omitted). See also *Grossman v. Dean* (Colo.App.2003), 80 P.3d 952; *Colo. Gen. Assembly v. Lamm* (Colo.1985), 704 P.2d 1371 (under Colorado principles of standing, legislature had standing to challenge the governor’s exercise of line item veto power).

Legal actions by state legislators acting in their official capacity for injury to official interests are not unprecedented in Ohio either. For instance, in *State ex rel. Gilmore v. Brown* (1983), 6 Ohio St.3d 39, 451 N.E. 2d 235, cited by Respondent at page 6 of the Memorandum of Law, a state legislator brought an action in mandamus against a Secretary of State seeking to challenge the effectiveness of a Governor’s veto. In *Brown*, the legislator sought an order that the Secretary of State file and distribute a bill that was vetoed by the Governor and returned to the General Assembly.

Members of the General Assembly may bring an action in their official capacity in matters such as this one. *Amicus curiae* urge this Court to find that Relators have standing to maintain this action.

IV. RELATORS PROPERLY BRING THIS ACTION AS A CLAIM FOR RELIEF IN MANDAMUS

Respondent maintains that mandamus does not lie because she had no clear duty “to make discretionary judicial decisions on the validity of legislation she receives.” (Respondent’s Memorandum of Law, page 1.) This case does not involve any controversy about the validity of the underlying legislation. It does not — or rather should not — involve a judicial or quasi-judicial decision by the Respondent at all.

This case involves a straightforward issue of Respondent’s ministerial duties and her failure to carry them out. The plain language of the Ohio Constitution mandates that, when the Governor fulfills his constitutional obligation to file a bill with the Secretary of State, either with or without his signature, the Secretary of State has a ministerial and mandatory duty to safely keep it and distribute it to the courts and libraries.

A. Respondent’s Ministerial Duty to Safely Keep and Distribute S.B. 117 Was Triggered As Soon As The Bill Was Filed.

Respondent contends that her duty “is limited to safely protecting laws, not bills.” (Respondent’s Memorandum of Law, page 2.) But S.B. 117 became law at the moment it was filed. Respondent’s duties under the Constitution and Ohio law are not triggered by some abstract calculation of how to count ten days. Respondent’s ministerial duties to file, keep and distribute the bill were triggered by the filing of the bill alone.

The Ohio Constitution is clear that a bill becomes law at the moment it is filed and that the Respondents mandatory and ministerial duties are triggered at that point. Article II, Section 1(C) of the Ohio Constitution dictates that, except for emergency laws, a bill becomes law at the moment it is filed with the Secretary of State, not at some later date after it has been filed.

“[N]o law passed by the General Assembly shall go into effect until 90 days after it shall have

been filed by the governor in the office of the Secretary of State.” (emphasis added.) This provision does not distinguish between a bill that is signed and a bill that is unsigned. Nor does it include any authority or suggestion that, other than the ninetieth day after filing, any date after the bill is filed with the Secretary is relevant for any purpose.

In *State v. Lathrop* (1915), 93 Ohio St. 79, 87, 112 N.E. 209, this Court recognized the constitutional importance of filing a bill with the Secretary of State. Distinguishing emergency laws from all others, this Court held that laws go into effect ninety days after the filing with the Secretary of State. “All other acts go into effect after the same have been filed with the Secretary of State, regardless of the date of approval by the Governor.” In other words, the constitutional trigger for determining the effectiveness of a law is filing with the Secretary of State, not approval by the governor or any other action that might take place at some other time.

Sixty years later, this Court revisited *Lathrop* and again found the date a bill is filed with the Secretary of State, not the date of the Governor’s action, is the triggering event. In *State ex rel. Riffe v. Brown* (1977), 51 Ohio St.2d 149, 5 Ohio Op.3d 125, 365 N.E.2d 876, (reversed on other grounds), this Court once again acknowledged that the filing of a bill with the Secretary of State is the constitutionally significant action when determining when a bill becomes a law.

In addition, Article II, Section 16 provides that: “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.” By this constitutional mandate, when a Governor files an unsigned bill with a Secretary of State, it is no longer a bill. It “becomes law.” A Governor makes the determination that a bill has become law by filing an unsigned bill just as surely as he makes that decision by signing the bill.

Both Section 1(C) and Section 16 of Article II, of the Constitution must be read plainly and given full import. “[T]he constitution is not only the primary but the paramount law in every respect in which it voices the public will.” *Switzer v. State* (1921), 103 Ohio St. 306, 318, 133 N.E. 552, citing *Marbury v. Madison* (1803), 5 U.S. 137, 177. This Court has previously recognized the importance of applying the plain law of the Ohio Constitution as paramount in situations such as this:

Importantly too, the Constitution of a state is stable and lasting until changed by vote of the people; it is not to be worked upon by the political temper of the times, nor to rise and fall with the tides of political events, nor to be artfully manipulated or misinterpreted for momentary, political expediency. In the sometimes violent atmosphere generated by opposing political parties, the Constitution should remain firm and immutable.

Maloney v. Rhodes (1976), 45 Ohio St. 2d 319, 337, 74 Ohio Op. 2d 499, 345 N.E.2d 407, J. Corrigan concurring.

Both Section 1(C) and Section 16 of Article II of the Constitution deal with laws, not bills. Both provisions turn upon the filing of a law with the Secretary of State. Both provisions were duly adopted by a vote of the people and should remain “firm and immutable.” *Id.*

In adopting the aforementioned provisions of the Ohio Constitution, the people did not authorize the Secretary of State to determine when a bill becomes law. They did not authorize the Secretary of State to “unfile” a bill or effectively reverse a Governor’s decision to allow a bill to become law without his signature. Instead, the people voted to require the Governor to file a bill with Secretary of State when the Governor decides to allow it to become law without his signature.

The Governor decided to make S.B. 117 law by filing it without his signature. At that point, Respondent had a clear legal duty that she failed to carry out.

B. Respondent Had A Clear Legal Duty To File, Keep And Distribute S.B. 117.

When the Secretary of State receives a law from the Governor, the Secretary must file it. “The Secretary of State has no option. The Secretary of State is obligated by the Constitution and his oath of office to file the law when it is presented to him for filing. It is a ministerial act. It is not discretionary.” *Maloney*, at 322, citing *State ex rel. Marcolin v. Smith* (1922), 105 Ohio St. 570, 138 N.E. 881. In issuing a writ of mandamus, the *Maloney* Court made clear: “The Secretary of State has no judicial power, authority or jurisdiction to declare a law constitutionally invalid or to refuse to file it. Mandamus will lie to compel him to perform the official act of accepting and filing the law.” *Id.* at 323.

Respondent’s ministerial duties to keep safe, publish and distribute S.B. 117 were triggered on January 5, 2007 as soon as it was filed. Respondent’s apparent determination that the unsigned bill filed with her was not a law because of some passage of time was a quasi-judicial determination that was beyond her authority to make. Respondent’s duty as to S.B. 117 was clear: accept it, keep it, publish it, and distribute it.

Respondent failed to complete her duties and an action in mandamus is appropriate to require that she do so.

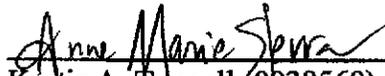
IV. CONCLUSION

Ohioans voted to adopt Article II, Section 16, and have the right to expect that once a Governor has decided a bill should become a law, either with or without his signature, and filed it with the Secretary, that bill will go into effect in 90 days unless a referendum petition is filed. Ohioans, like *amici curiae* and their members, can then react to the passage of that law and make critical business decisions based on it.

However, because of Respondent's actions, *amici curiae* and their members are placed in a situation of great uncertainty as to the status of the law. The law unquestionably was passed by the General Assembly, was presented to the Governor, and was accepted for filing by the Ohio Secretary of State. Respondent, the new Secretary of State, refused to complete the ministerial duties that were started by her predecessor and required of her office. As a result, the new law has not been published, distributed to libraries, or presented to the courts of Ohio.

Amici curiae respectfully urge this Court to deny Respondent's Motion to Dismiss and proceed to the merits of this case.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was mailed to the following person(s) by ordinary mail, postage pre-paid, on March 9, 2007.

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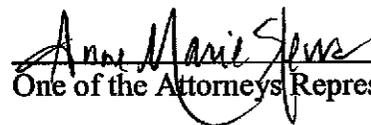
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