IN THE SUPREME COURT OF OHIO

STATE ex rel. THE OHIO GENERAL ASSEMBLY, et al.,	:	
Relators,	:	No. 2007-0209
v.	:	Original Action in Mandamus
JENNIFER BRUNNER, Secretary of State,	:	
Respondent.	:	

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RELATORS' MERIT BRIEF

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STATEMENT OF THE CASE

The sole issue in this proceeding is whether the Ohio Secretary of State should be compelled to perform her constitutional and statutory duties with respect to a bill that has been enacted by the General Assembly, delivered for filing by the Governor without written objections, and accepted for filing by the Secretary of State's predecessor.

Relators are the Ohio General Assembly, the President of the Senate, and the Speaker of the House of Representatives. They brought this original action in mandamus against the Ohio Secretary of State, Respondent Jennifer Brunner, because she is not performing the mandatory legal duties of her office with respect to Amended Substitute Senate Bill 117 ("S.B. 117"), even though it was filed in the Secretary of State's office by Governor Bob Taft without written objections. Respondent has acknowledged in her Motion to Dismiss that she is not treating S.B. 117 as a valid law and is not performing the duties of her office related to enacted laws; instead, she sent S.B. 117 to the successor Governor, who then re-filed it with a purported "veto message." (Motion to Dismiss, Feb. 28, 2007, at 3, 18.)

This Court has not ruled on Respondent's Motion to Dismiss. Instead, it issued an alternative writ setting a briefing schedule and directing the parties to file evidence by April 2, 2007. (Entry, March 22, 2007.)

The few facts that are relevant to the issue before the Court are not in dispute and have been stipulated by the parties. The governing legal principles are equally settled, as discussed below. First, S.B. 117 had already become a law pursuant to Section 16, Article II of the Ohio Constitution before Respondent attempted to un-file it and "return" it to Governor Strickland. Second, even if S.B. 117 had not yet become law when Respondent tried to un-file and "return" it, she had no discretion to ignore the

mandatory duties of her office that require her to keep properly filed bills, and neither Governor Taft nor his successor had any further constitutional executive authority over S.B. 117 after it was filed.

Relators are entitled to a writ of mandamus requiring Respondent to perform her legal duties with respect to S.B. 117 for either and both of these reasons. The relevant constitutional provisions limit the role of the Secretary of State with respect to new legislation and the scope of the Governor's executive authority over that legislation, thereby ensuring the separation of powers between the executive and legislative branches of Ohio's government. Respondent's failure to perform her duties with respect to S.B. 117 usurps this fundamental balance of power. The Supreme Court of Ohio has the constitutional authority and obligation to reaffirm that balance by issuing a writ of mandamus that requires Respondent Brunner to perform the legal duties of the Secretary of State to record, compile, publish, and distribute S.B. 117 as a valid law.

STATEMENT OF FACTS

The parties have stipulated to every fact that is relevant to the issue presented.

1. S.B. 117 was properly enacted by the General Assembly before it adjourned sine die. On December 14, 2006, the Ohio House of Representatives passed Amended Substitute Senate Bill 117 ("S.B. 117") and its Clerk signed the engrossed version of the bill. (Agreed Statement of Facts, ¶¶ 8, 9.) On that same day, the Ohio Senate concurred in S.B. 117 and the Clerk of the Senate signed the engrossed version of the bill. (Id., ¶¶ 10, 11.) The House of Representatives adjourned sine die on December 21, 2006; the Senate, which was the originating house for S.B. 117, adjourned sine die on December 26, 2006. (Id., ¶¶ 12, 13.)

2. S.B. 117 was properly presented to the Governor for his consideration. The signed enrolled version of S.B. 117 was presented to Governor Taft for his consideration, pursuant to Section 16, Article II of the Ohio Constitution, on December 27, 2006, one day after the Senate adjourned sine die. (Id., ¶ 14; Battocletti Affidavit, ¶¶ 5, 7.)

3. S.B. 117 was properly filed with the Secretary of State by the Governor without written objections. Governor Taft filed S.B. 117 with the Secretary of State's office on January 5, 2007, without his signature and without formal written objections. (Agreed Statement of Facts, ¶ 15.) The Governor's Office Bill Record, as maintained in the Secretary of State's office, reflects that the bill was accepted for filing on January 5, 2007, and the file was signed by Secretary of State Kenneth Blackwell on the same day. (Id., ¶¶ 16-19, and Exhibit G of the Complaint.)

4. Respondent is not performing the constitutional and statutory duties with respect to S.B. 117 that apply to new laws. On January 8, 2007, Respondent Secretary of State Jennifer Brunner sent S.B. 117 to Governor Strickland, at his request, and he delivered it to her with a purported "veto message." (Id., ¶¶ 22-28, and Exhibit I of the Complaint.) Respondent is not performing the constitutional and statutory duties of her office with respect to S.B. 117 that are applicable to new laws; inter alia, she has not yet assigned a date by which referendum petitions challenging S.B. 117 must be submitted, and she has not yet begun to compile, publish, and distribute S.B. 117 as a valid law. (Complaint, Exhibit K, authenticated by Briggs Affidavit, ¶ 2 and Exhibit O, ¶ 3, and admitted in Respondent's Motion to Dismiss at 18.)

ARGUMENT

I. The plain and unambiguous language of Section 16, Article II of the Ohio Constitution mandates that a properly enacted bill filed by the Governor without written objections, after the General Assembly adjourns sine die, becomes law ten days after the adjournment.

Respondent Brunner maintains that she has no duty to record and process S.B. 117 as a valid law because it had not yet become a law when she "returned" it to Governor Strickland for his "veto message" on January 8, 2007. (Agreed Statement of Facts, ¶¶ 24-25, 27; Complaint, Exhibit I; Motion to Dismiss, at 3.) As set forth below, Respondent's contention contradicts the clear language of Section 16, Article II of the Ohio Constitution. S.B. 117 became a law on January 5, 2007, with the expiration of the ten-day period following the Senate's adjournment sine die on December 26, 2006, and thus it was already a valid law when Respondent attempted to un-file it and "return" it to Governor Strickland on January 8, 2007.

Section 16, Article II of the Ohio Constitution provides a detailed roadmap for the Court's legal analysis of the issue raised in this proceeding. It provides, in pertinent part:

> If the govenor approves an act, he shall sign it, it becomes law and he shall file it with the secretary of state.
>
> If he does not approve it, he shall return it with his objections in writing, to the house in which it originated * * * *
>
> 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 govenor shall file with the secretary of state every bill not returned by him to the house of origin that becomes law without his signature.

(Emphasis added.)

"The language of Section 16, Article II of the Constitution is unmistakably clear." *Maloney v. Rhodes* (1976), 45 Ohio St.2d 319, 322. It expressly provides that a bill becomes law, even though it is not signed by the Governor, if he does not return it to the originating house of the General Assembly within ten days, Sundays excepted, after it is presented to him, "unless the general assembly by adjournment prevents its return," in which case it becomes law "ten days after such adjournment" if the Governor does not file written objections with the Secretary of State. "[I]f he thus permits a bill to become a law without his signature, the Constitution makes this equivalent to his concurrence." *The Veto Case* (1924), 69 Mont. 325, 222 P. 428, 433.

It is undisputed that S.B. 117 was presented to the Governor on December 27, 2006, after both houses of the General Assembly adjourned. (Agreed Statement of Facts, ¶¶ 12-14.) The Senate had adjourned sine die on the previous day, December 26, 2006, thereby preventing Governor Taft from returning the bill to the originating house. (Id., ¶ 13.) See *State ex rel. Gilmore v. Brown* (1983), 6 Ohio St.3d 39, 40-41 ("the word 'adjournment' in Section 16, Article II, Ohio Constitution, refers to an adjournment sine die"). S.B. 117 thus became law on January 5, 2007, ten days after the Senate's adjournment and three days before Respondent purported to "return" it to Governor Strickland on January 8, 2007.

The "unmistakably clear" language of Section 16, Article II, *Maloney*, supra, mandates that the ten-day period is measured from adjournment, rather than from presentment, when the originating house of the General Assembly has prevented return of a newly enacted bill by adjourning sine die, and this language should be enforced as

written. Indeed, when this Court sought to explain Section 16 in *Maloney*, it did so by repeating the constitutional wording, thereby emphasizing that the meaning of this unambiguous provision is found in the language of the provision itself:

> [A newly enacted bill] becomes law unless the Governor, within ten days of the adjournment [of the General Assembly], files it with his objections in the office of the Secretary of State. The Governor is required to file with the Secretary of State every bill which becomes law without his signature.

45 Ohio St.2d at 324. Section 16, Article II does not allow the Governor, the Secretary of State, or the courts to choose whichever time period they prefer; the ten-day period is measured from adjournment when the General Assembly adjourns sine die. In 1961 Ohio Atty. Gen. Ops. No. 2615, at 644, the Attorney General concluded that if the General Assembly had adjourned sine die on August 2, 1961, "the Governor would have had to file his objections [to a bill] with the Secretary of State by August 12" (i.e., ten days after the adjournment), but if the General Assembly had not adjourned sine die, the Governor would have had to file objections two days earlier, on August 14 (i.e., ten days after presentment). Now, in the present case, Respondent represents that "[p]ursuant to Section 16, Article II of the Ohio Constitution, the Governor has ten days from the date [on] which a bill is presented to him by the General Assembly or from the date the General Assembly adjourns sine die, <u>whichever is later</u>." (Motion to Dismiss, at 3; emphasis added.) No such language appears in Section 16, Article II.

Because it is "unmistakably clear," Section 16, Article II is not susceptible to reinterpretation or construction. "[T]he meaning of constitutional provisions" is "found in the provisions themselves." *State ex rel. City of Toledo v. Lynch* (1913), 87 Ohio St. 444, 448. "The Constitution must be construed in the light of the popular and received

signification of its words." *Platt v. Craig* (1902), 66 Ohio St. 75, 77. See *City of Rocky River v. State Employment Relations Board* (1989), 43 Ohio St.3d 1, 15:

> Where the language of a . . . constitutional provision is clear and unambiguous, it is the duty of courts to enforce the provision as written.

Courts in other jurisdictions have applied corresponding provisions of their own states' constitutions without any judicial confusion or construction. See, e.g., *Woessner v. Bullock* (1911), 176 Ind. 166, 93 N.E. 1057, 1058, addressing constitutional language nearly identical to Section 16, Article II and warning that "courts are not warranted in substituting for the clear language of the instrument their own notions of what it should have been." See also *State v. Eley* (Ala.App. 1982), 423 So.2d 303, 304, writ denied (Ala. 1982), 423 So.2d 305, holding that a similar provision of the Alabama Constitution "is plain, clear, and distinct; there is no doubt, ambiguity, or uncertainty as to its meaning. Consequently, the language must be accepted as written, there being no reason or justification by the court for construction either by way of deletion, addition, or interpolation." The same rule applies here.

The Ohio Attorney General considered the ten-day time period of Section 16, Article II on two prior occasions and applied its clear language, as written, in both instances. Section 16, Article II provides that when the General Assembly continues in session, a newly enacted bill becomes law "ten days, Sundays excepted, after being presented to [the governor]" unless the Governor files written objections, but it further provides that when the legislature adjourns sine die, a newly enacted bill becomes law "ten days after such adjournment" in the absence of written objections. In 1961 Ohio Attorney General Opinions No. 2615, supra, the Attorney General concluded that the ten-day period following presentment expired on August 14, 1961, because Sundays

are expressly excluded in those circumstances, but the ten-day period following adjournment on the same day would have expired two days earlier, on August 12, 1961, if the adjournment was sine die, because the literal language of Section 16, Article II does not exclude intervening Sundays in that instance. (Id., at 644.)

The Ohio Attorney General also reached the same conclusion in 1945 Ohio Attorney General Opinions No. 496:

> [T]he ten day limitation for filing a bill in the office of the Secretary of State [following an adjournment], unlike the provisions dealing with the return of a bill to the House in which it originated, does not except Sundays.

Id., at 649. In the present case, Section 16, Article II unambiguously provides that the ten-day period is measured from the date of the adjournment when the General Assembly has adjourned sine die, and it must be enforced as written.

This plain-language meaning of Section 16, Article II is consistent with the purpose of the ten-day constitutional time period, i.e., "to afford to the Governor an opportunity for the considerate exercise of the discretion which is thus vested in him." *Wrede v. Richardson* (1907), 77 Ohio St. 182, 209. If the General Assembly is in session, the Governor is allowed up to ten days after presentment (Sundays excepted) to return the bill with his objections to the originating house; if the bill cannot be returned to the originating house due to its adjournment sine die, the Governor is allowed up to ten days from the date of the adjournment to file the bill with written objections in the office of the Secretary of State.

In this case, Governor Taft received S.B. 117 on December 27, 2006, one day after the Senate adjourned, and he filed it with the Secretary of State on January 5, 2007, with no indication that he had not had sufficient time to consider it. Section 16,

Article II mandates that S.B. 117 became law on January 5, 2007, ten days after that adjournment and three days prior to Respondent's attempt to un-file it and "return" it to Governor Strickland on January 8, 2007.

II. Respondent Brunner has not performed the mandatory legal duties of the office of the Secretary of State with respect to S.B. 117.

As set forth above, S.B. 117 became a law on January 5, 2007, before Respondent Brunner attempted to "return" it to Governor Strickland for a belated "veto message." Respondent certainly cannot claim that a Secretary of State has the legal authority to "return" a bill after it has become a law. Section 16, Article II of the Ohio Constitution bestows no power on the Secretary of State to repeal a valid law simply by removing it from her files and sending it to the Governor for a putative "veto." S.B. 117 became a law when the ten-day time period of Section 16, Article II expired, and Respondent thus had mandatory duties that she was required to perform with respect to that new law.

The Secretary of State's constitutional duty to accept a bill for filing necessarily includes the correlative duty to keep it and preserve it. "The Secretary of State is the official custodian of our statute laws." *Wrede v. Richardson* (1907), 77 Ohio St. 182, 212. Respondent's duty to keep a new law is reinforced in Ohio by an express statutory mandate: "The secretary of state shall have charge of and safely keep the laws and resolutions passed by the general assembly . . . ." R.C. 111.08 (emphasis added). The Secretary of State also has specific statutory duties to "compile, publish, and distribute" the session laws, R.C. 149.091, and to forward copies of new laws to the Courts of Common Pleas, R.C. 149.08, and county auditors and libraries, R.C. 149.09. See *State v. Miller* (2000), 12th Dist. App. No. CA99-02-045, 2000 WL 204276 ("[t]he

sections of . . . the Revised Code . . . are compiled from copies of enrolled bills provided to the publisher by the Ohio Secretary of State"). The Secretary of State must also deliver bills that have become law to the Legislative Service Commission to ensure proper sectional numbering of statutes pursuant to R.C. 103.131. (See Barley Affidavit, Relators' Evidence.) In addition, the Secretary of State has a constitutional duty to record the date on which a law is filed with her office, which initiates the ninety-day period allowed for referendum petitions and fixes its expiration date. Section 1c, Article II.

It is undisputed that Respondent has not yet performed any of her statutory and constitutional duties with respect to S.B. 117 since it became a valid law. Relators thus are entitled to a writ of mandamus compelling Respondent to perform her legal duties to record the original date of filing of S.B. 117 for referendum and other legal purposes, and to compile, publish, and distribute it as a valid law.

The next section of this Argument provides additional grounds for the Court to issue a writ of mandamus as requested by Relators. However, the Court need not address those additional issues if it finds that S.B. 117 is a valid law, as set forth above.

III. When the Governor files a bill without written objections in the office of the Secretary of State, the Secretary of State's constitutional duty to accept and keep the bill begins, and the Governor's constitutional authority over the bill ends.

Relators would be entitled to the writ they request even if the ten-day time period in Section 16, Article II had not expired, and S.B. 117 thus had not become law, before Respondent Brunner "returned" it to Governor Strickland. As discussed below, the Secretary of State's constitutional duty to accept and keep bills that have been enacted by the General Assembly and filed in her office extends to all bills that are filed, not just

bills that were laws at the time of filing. In addition, the Governor has no constitutional authority over a bill after it has been filed with the Secretary of State; the exercise of executive authority under Section 16, Article II was completely effectuated in this case when Governor Taft filed S.B. 117 in the office of the Secretary of State without written objections, and neither he nor a successor governor could undo that executive act.

A. Respondent Brunner had no discretion to "return" S.B. 117 to Governor Strickland after it was filed in her office without written objections on January 5, 2007.

As discussed above, the Secretary of State's constitutional duty under Section 16, Article II to file bills that have been enacted by the General Assembly and delivered by the Governor would be meaningless if it did not include correlative duties to keep the bill and preserve it in the records of the Secretary of State. "[The Secretary of State] is by the fundamental law required to keep and preserve the manuscripts containing the enrolled acts, etc., of the General Assembly." *Woessner v. Bullock* (1911), 176 Ind. 166, 93 N.E. 1057, 1058. See R.C. 111.08:

> The secretary of state shall have charge of and safety 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.

(Emphasis added.)

The Secretary of State's duty to safely keep and preserve S.B. 117 was triggered when it was filed by Governor Taft, regardless of the date on which it became a law. Respondent Brunner had no discretion to "return" S.B. 117 to Governor Strickland, and she should be ordered to perform her legal duties to record, compile, publish, and distribute S.B. 117 as a valid law now that the ten-day constitutional period following the Senate's adjournment has elapsed.

Respondent contends that her sole obligation with respect to S.B. 117 was to obey Governor Strickland's request to "return" it to him. (Motion to Dismiss, supra, at 20.) But this Court has previously recognized that there is "no duty in the Constitution or laws requiring the Secretary of State not to file a bill . . . or to inhibit the publishing or distribution of such a bill." *State ex rel. Governor v. Taft* (1994), 71 Ohio St.3d 1, 3. The Constitution leaves the Secretary of State with no choice but to accept and keep a bill that the Governor delivers to her for filing; she has "no judicial or quasi-judicial authority over such bills," 71 Ohio St.3d at 4, and has no discretion to decide that a bill can be un-filed and "returned."

In *Maloney v. Rhodes* (1976), 45 Ohio St.2d 319, the Secretary of State refused to file and keep bills that had been delivered by the Governor because they had not been signed by the President of the Senate. As in the present case, the Secretary of State sent the bills to the successor Governor instead of keeping them. The Court held that a writ of mandamus was proper to compel the Secretary of State to perform the duties of that office:

> The language of Section 16, Article II of the Constitution is unmistakably clear.
>
> The Secretary of State has no opinion. <u>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</u>.
>
> * * *
>
> The Secretary of State has no judicial powers, authority, or jurisdiction to declare a law constitutionally invalid or to refuse to file it. <u>Mandamus will lie to compel him to perform the official act of accepting and filing the law</u>.

45 Ohio St. at 322-23 (emphases added). "[T]he secretary [of state] cannot virtute offici decide what acts make a law. He has nothing to do with the working of the machinery by which laws are made." *People ex rel. Harless v. Hatch* (1863), 33 Ill. 139, 142.

The mandatory nature of the Secretary of State's duties was well-established long before the Court decided *Maloney*, supra. See *Marcolin v. Smith* (1922), 105 Ohio St. 570, 590:

> The secretary of state is not vested with any jurisdiction to determine judicial questions dealing with the constitutionality of any law. His duties are merely ministerial in this respect, not discretionary.

The Secretary of State must perform these ministerial duties "in a manner prescribed by law." *State ex rel. Hodges v. Taft* (1992), 64 Ohio St.3d 1, 11. See *State ex rel. O'Grady v. Brown* (1976), 48 Ohio St.2d 17, 20, describing a "ministerial act" by the Secretary of State as "[o]ne which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done." (Quoting Black's Law Dictionary (4th Ed.), and *Maloney*, supra, 45 Ohio St.2d at 323.)

The Ohio Constitution contains no provisions that authorize the Secretary of State to un-file bills that were properly filed in her office and to "return" them to a successor Governor. "Unless otherwise clear from the language employed, all constitutional provisions should be regarded as mandatory so as to preclude any discretion with the executive, legislative or judicial branches as to whether to obey or disregard them." *State v. Eley*, supra, 423 So.2d at 305. Respondent improperly exercised discretion she does not have when she decided that she could properly un-file and "return" S.B. 117.

The mandatory nature of the Secretary of State's ministerial duties – including her duties to file and keep S.B. 117 after Governor Taft delivered it in her office, and to record, compile, publish, and distribute it after it became a valid law – serves the fundamental need for certainty in the law. If she does not perform her duties, Ohio citizens cannot exercise their constitutional right to file referenda petitions, courts and libraries will be unaware of new laws, and the session laws and Revised Code will become incomplete and inaccurate. See *State ex rel. Hodges v. Taft* (1992), 64 Ohio St.3d 1, 11.

In short, giving the Secretary of State "discretion" to decide whether to un-file a valid law, or to keep it and publish it as the law of Ohio, would result in the same evils that were identified one century ago in *Wrede v. Richardson* (1907), 77 Ohio St. 182, 211-12:

> The entire subject of what the law is [would be] withdrawn from the protection of rules devised and applied for the purpose of securing certainty where doubt would be intolerable. . . . The Secretary of State is the official custodian of our statute laws, and we have long been familiar with the rule founded upon statutes that his certificate is conclusive as to what the law is . . . [Otherwise], <u>there would arise a condition of endless doubt respecting a subject upon which every consideration requires that there should be immediate and enduring certainty</u>.

(Emphasis added.)

The Secretary of State has no discretion under the Ohio Constitution to un-file and "return" a bill that has been filed by the Governor in accordance with Section 16, Article II. Relators are entitled to a writ in mandamus ordering Respondent to perform the constitutional and statutory duties with respect to S.B. 117 that apply to all valid laws.

B. The executive authority of the Governor with respect to new legislation is fully and finally exercised when he has performed every act required by Section 16, Article II to effectuate that authority.

Respondent Brunner's attempt to un-file and "return" S.B. 117 to Governor Strickland was also a legal nullity because neither Governor Taft nor Governor Strickland had constitutional authority over the bill after it was filed in the Secretary of State's office by Governor Taft, irrespective of the date on which the bill became a law. Section 16, Article II of the Ohio Constitution authorizes the Governor to exercise one of three options: to sign a bill, to veto it, or to file it in the Secretary of State's office without written objections. Nothing in the Constitution authorizes a Governor to later retroactively exercise a different option that changes the legal status of the bill. As set forth below, once the Governor elects one of his three constitutional options and performs every act required of him by Section 16, Article II to effectuate that option, the authority of the Governor to elect a different option ends, whether or not the bill has yet become a law.

The executive power of the Governor over newly enacted legislation is strictly limited by Section 16, Article II. In *State v. Lathrop* (1915), 93 Ohio St. 79, the General Assembly enacted a bill and amended it two days later, but the Governor signed the amended bill first, and this allegedly resulted in the repeal of the amended bill when he subsequently signed the original bill. The Court held that the Governor cannot defeat properly-enacted legislation by exercising executive authority that was not expressly granted to him by the Constitution:

> We thus have been presented the anomalous situation of the Governor being granted an additional power of veto not contemplated by the Constitution. He may, if this decision is permitted to stand, by mere order of the time of signing

> determine which of two acts . . . may survive, and . . . defeat the manifest purpose of the Legislature . . . . The executive ought not be permitted to defeat the legislative will except by constitutional methods . . . . If it were permitted him to do so, grave possibilities of encroachment on the legitimate functions of the General Assembly might reasonably be apprehended.
>
> * * * *
>
> If the Governor . . . can make or unmake laws, then, contrary to the express terms of the Constitution, he becomes the lawmaking power and his intention, rather than that of the Legislature, governs.

93 Ohio St. at 81-82 (emphasis added).

Section 16, Article II contains no language that authorizes the Governor to undo an exercise of executive authority that he previously effectuated in accord with all applicable constitutional requirements. Courts that have addressed this issue in other jurisdictions have repeatedly recognized that a governor has no such authority. For example, in *Powell v. Hayes* (1907), 83 Ark. 448, 104 S.W. 177, a newly enacted bill was presented to the acting Governor and was signed by him, but he had not yet returned it to the legislature with his approval when his successor took physical possession of the bill and vetoed it. The Arkansas Supreme Court held that the Governor's authority over the bill ended when the acting Governor completed the constitutional steps he must take to effectuate his approval of the bill, even though the successor Governor also acted within the applicable time limit for executive action:

> The time allowed the Governor for the consideration of bills is a matter of privilege with him, and may be waived by him, and he may validly sign a bill any time within the period allowed.
>
> * * * *
>
> [T]here must be a time when the power of the executive over the matter must cease, "and this power has been exercised when the last act required from the person possessing the

> power has been performed" . . . . The discretion of the executive may be exercised until this point has been reached. When this point is reached, and he signs the bill in the exercise of his discretion, his power over the bill has terminated, and it is no longer a bill, but is a law, and is not subject to veto by himself or his successor.
>
> * * * *
>
> [The Governor] may change and rechange his mind upon the merits of a bill before him. But when he has exercised his power over it, either by approval or veto, then the action is final and irrevocable, and . . . it is binding and unchangeable . . . . [W]hen that discretion is exercised, when the last act has been performed, and the bill is signed, then the bill is a law and no more subject to veto than any other law.

104 S.W. at 180, 181-82, quoting *Marbury v. Madison* (1803), 5 U.S. 137, 157 (emphasis added). In this case, Governor Taft completed the last act that an Ohio Governor must perform to allow a bill to become law under Section 16, Article II when he filed S.B. 117 without written objections in the office of the Secretary of State.

The same principle was applied by the Illinois Supreme Court in *People ex rel. Partello v. McCullough* (1904), 210 Ill. 488, 71 N.E. 602, when the Governor of Illinois inadvertently filed a bill with his signature, and then later that day retrieved it from the Secretary of State and vetoed it. The Court concluded:

> [I]f, in the case at bar, the Governor . . . deposited this bill in the office of the Secretary of State, with his approval indorsed upon it and signed by himself, it thereby passed beyond his control, and he had no power thereafter to take the bill from the office of the Secretary of State and veto it and return it to the Secretary of State's office . . . .

71 N.E. at 605 (emphasis added). The Indiana Supreme Court agreed in *Woessner v. Bullock* (1911), 176 Ind. 166, 93 N.E. 1057, 1058:

> When the Governor files such bill in the office of the Secretary of State, his power over it ends . . . . Nor can it be justly said that the Secretary of State is, in any manner, the

> agent or representative of the Governor. [The Secretary of State] is by fundamental law required to keep and preserve the manuscripts containing the enrolled acts . . . .

(Emphasis added.) See also *People ex rel. Lanphier v. Hatch* (1857), 19 Ill. 283 ("had [the Governor] deposited the law, with his approval upon it, with the Secretary of State, then it would have passed beyond his control and its status would have become fixed and unalterable").

This issue was also squarely addressed in 1943 Texas Attorney General Opinion No. 0-5310:

> It is well settled that the time allowed by constitutional provision for consideration of bills is a matter of privilege with the Governor, who may waive his right to the full period and veto or approve a bill within the allotted period . . . .
>
> While the Governor retains a bill in his possession and under his control within the allotted period, he may reconsider his action thereon; but <u>when he approves and signs a bill, and deposits it with the Secretary of State . . . he has placed the bill beyond his control and may not thereafter recall the bill from the Secretary of State</u> for further consideration.

(Emphasis added.)

Ohio courts have recognized similar legal principles. In *Maloney v. Rhodes* (1976), 45 Ohio St.2d 319, the Governor signed recently enacted bills and delivered them to the Secretary of State, who refused to file them and returned them to the successor Governor instead. The Court held that the first Governor's act of signing and delivering the bills was conclusive:

> Under the Constitution, the Secretary of State was required to file [the bills] . . . . A successor Governor is constitutionally obligated to present to the Secretary of State a law timely signed by his duly elected and qualified predecessor . . . .

45 Ohio St.2d at 321, 324.

As set forth in these cases, it makes no difference that a successor governor's attempt to "undo" the previous action of his predecessor occurs before the period of time allowed for executive action has expired. In *McCullough*, supra, the governor tried to take the bill back from the Secretary of State and veto it on the same day that it had been filed. "The time allowed the Governor for the consideration of bills is a matter of privilege with him, and may be waived by him, and he may validly sign a bill any time within the period allowed." *Powell*, supra, 104 S.W. at 180. The circumstances presented by the instant case were before the Court in *Hunt v. State* (1904), 72 Ark. 241, 79 S.W. 769, 772:

> [The bill] was presented to the Governor . . . and was returned by him to the Senate, in which it originated, . . . [with a] communication to the Senate: "Senate Bill No. 85 . . . became a law without my signature." <u>The five days allowed the Governor for the consideration of bills presented to him for approval or disapproval is a matter of privilege with him</u>, until the same shall lapse, when the bills become law. <u>He can, of course, waive the time, and notify the proper house that the bill may become a law without his signature, and that is what he did in this case</u>.

(Emphasis added.) See also *State v. Heston* (1952), 137 W.Va. 375, 71 S.E. 2d 481, 493 ("the designated period of time within which the Governor may return a bill with his disapproval after it is presented to him, being a privilege accorded to enable him to consider it, may be shortened by him and the bill returned before the expiration of the period").

The law would be hopelessly uncertain if a governor were allowed to approve a bill and then later retract his approval and veto the same bill. "Certainty must exist with respect to law." *Thornton v. Salak*, 112 Ohio St.3d 254, 2006-Ohio-6407, ¶20. See also *State ex rel. Chatfield v. Kiesewetter* (1887), 45 Ohio St. 254, 261-62:

> The importance of furnishing to the people sources of information, certain in their character and convenient of access, as to what is and what is not law, is obvious . . . . [I]t is of great interest to each citizen, as well as to the public official, that there be some authentic record to which he may resort to ascertain certainly and definitely what laws are enacted by the legislature, what control him in the daily transaction of business, and of what, at his peril, he is bound to take notice. Whatever conduces to certainty in this regard, therefore, is of great moment to every person in the state, and no rule of construction would be wise which leaves so important a matter in doubt or confusion.

(Emphasis added.) "It is of the first importance that the people should know to what law they are subject. In the case of every unsigned bill, it must be the intent of the Constitution that they should have some certain means of knowledge as to whether it . . . is a law". *State ex rel. Town of Norwalk v. Town of South Norwalk* (1904), 77 Conn. 257, 58 A. 759, 760.

Section 16, Article II does not give the Governor of Ohio authority to undo official executive actions that have been fully effectuated in accordance with constitutional requirements. There would be no certainty in the law if a Governor who has performed every constitutional step he must take to approve or disapprove a bill is thereafter free to undo that decision. The executive authority of the Ohio Governor ended when Governor Taft fully effectuated his decision to allow S.B. 117 to become law by filing it without written objections pursuant to Section 16, Article II.

Accordingly, Respondent was obligated to preserve and keep S.B. 117 after it was filed by Governor Taft, and to compile, publish, and distribute it when it became a valid law ten days after the Senate adjourned sine die. Relators are entitled to a writ of mandamus from this Court that requires her to perform her legal duties with respect to S.B. 117.

CONCLUSION

The Court should issue a writ of mandamus compelling Respondent to perform her constitutional and statutory duties with respect to S.B. 117. Relators have established each of the three requisite elements for mandamus. First, Relators have a clear legal right to the requested relief; majority law-making is a constitutional right of the General Assembly and its legislators, and Relators have a right, recognized by the United States Supreme Court and this Court, to vindicate the effectiveness of their majority votes. See Relators' Memorandum in Opposition to Motion to Dismiss, at 14-15.

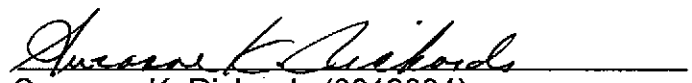
Secondly, as set forth above, Respondent has clear legal duties to perform with respect to this new law. Section 16, Article II of the Ohio Constitution unambiguously mandates that if the General Assembly adjourns sine die, a bill that is filed by the Governor without objections in the office of the Secretary of State becomes law ten days after the date of the adjournment. S.B. 117 thus was already a valid law when Respondent attempted to un-file and "return" it. Moreover, Respondent would now owe the same legal duties even if the ten-day time period in Section 16, Article II were measured from presentment rather than adjournment. Once a properly enacted bill is filed in her office by the Governor, without written objections, the Secretary of State has no discretion to un-file it, and the Governor has no constitutional authority to exercise additional executive power over it.

Finally, there is no adequate remedy at law in these circumstances; Respondent must be compelled to perform her legal duties as Secretary of State with respect to

S.B. 117 now that it has become a law, and mandamus alone provides that remedy. (Id., at 19-22.)

"The judicial department of the government is charged with the duty of restraining the other co-ordinate departments to the exercise of the authority conferred upon them." *Wrede v. Richardson*, supra, 77 Ohio St. at 213. Relators respectfully request that the Court issue a writ of mandamus requiring Respondent to perform her legal duties to record, compile, publish, and distribute S.B. 117 as a valid law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Relator's Merit Brief was served this 9th day of April, 2007, by First Class, U.S. Mail, postage prepaid, upon the following:

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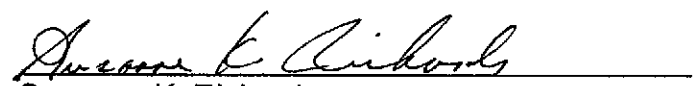

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