

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

**MERIT BRIEF 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 RELATORS**

Kurtis A. Tunnell (0038569),
Counsel of Record
Anne Marie Sferra (0030855)
Maria J. Armstrong (0038973)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
ktunnell@bricker.com

Counsel for *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

Suzanne K. Richards (0012034)
Counsel of Record
C. William O'Neill (0025955)
Richard D. Schuster (0022813)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, Columbus, Ohio 43215
Phone: (614) 464-6400
Fax: (614) 464-6350
skrichards@vssp.com
Counsel for Relators

Marc Dann (0039425), Ohio Attorney General
Brian J. Laliberte (0071125), *Counsel of Record*
Michael W. Deemer (0075501)
Frank M. Strigari (0078377),
Pearl Chin (0078810)
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Phone: (614) 466-8980
Fax: (614) 466-5807
blaliberte@ag.state.oh.us

Counsel for Respondent

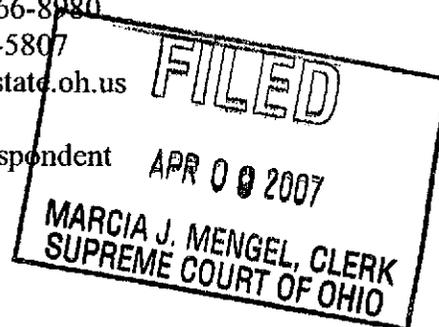


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STATEMENT OF *AMICI* INTEREST

Amici curiae are eight associations whose members collectively employ millions of Ohioans and represent virtually every type of Ohio business. Briefly, the eight *amici curiae* are:

The Ohio Alliance for Civil Justice, (“OACJ”) is a group of over 200 small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations, and others. OACJ members, large and small, support a balanced civil justice system that will award fair compensation to injured persons and impose sufficient safeguards so that defendants are not unjustly penalized. OACJ also supports stability and predictability in the civil justice system in order that Ohio's businesses and professions may know what risks they assume as they carry on commerce in this State.

The Ohio Manufacturers’ Association is a statewide association of more than 2,000 manufacturing companies that collectively employ the majority of the approximately 800,000 men and women who work in manufacturing in the State of Ohio. The Association plays a vital role in ensuring that Ohio’s businesses climate is vibrant and conducive to the growth of manufacturing in this state.

The Ohio Chamber of Commerce is Ohio’s largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its 4,000 business members by dedicating its advocacy efforts to the creation of a strong pro-jobs environment and, in turn, an Ohio business climate responsive to expansion and growth.

The National Federation of Independent Business/Ohio, with more than 25,000 governing members, is the state’s largest association dedicated exclusively to the interests of small and independent business owners. This organization is also keenly involved in ensuring a stable and vital business climate in Ohio.

The Ohio Council of Retail Merchants has a membership roster of more than 3,000 companies that represent various entities along the retail and wholesale supply chain. The Council works aggressively to make sure the voice of business is heard clearly and accurately by government officials across the state of Ohio.

The Ohio Business Roundtable (“Roundtable”) is a partnership of one hundred chief executives of the state’s major businesses who represent all sectors of the economy and are committed to working with public leaders to build a better Ohio.

The Ohio Chemistry Technology Council (“OCTC”) is a trade association representing over 80 chemical industry and related companies that do business in Ohio. The Council is aligned with other *amici* in its commitment to a vital economy in Ohio.

The Ohio Automobile Dealer’s Association (“OADA”) represents nearly 1,000 new automobile, truck and motorcycle dealers throughout the State. These dealerships contribute enormously to Ohio’s economy. Franchised new automobile dealers employ approximately 45,000 people and generate \$25 billion in sales revenue for Ohio, representing 21% of the total retail sales in the State.

Amici curiae have a significant interest in ensuring that their members can effectively conduct and expand business in Ohio. To do so, *amici curiae*’s members must be able to understand their rights and obligations under the laws that regulate them. The law at issue here is just such a law.

Amici curiae were involved in the legislative process that resulted in Senate Bill 117 (“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 that S.B. 117 is

accorded the status that all valid laws receive so that its members, the courts, and litigants throughout Ohio will have clear and ready access to S.B. 117 and be informed of the protections and/or obligations contained in the new law.

While the issues addressed by S.B. 117 are of interest to *amici curiae*, it is important to note that neither the policy implications nor the constitutionality of those issues are before the Court. Indeed, the action before the Court has nothing to do with the policy issues addressed in the statute's text. It has everything to do with ensuring that Ohio has an orderly and constitutional process for seeing that bills become law.

The Constitution and laws of this State establish an unambiguous path for a bill, such as S.B. 117, to become a law. *Amici curiae*'s members 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 timely veto or a successful referendum, the bill becomes law on a date certain and is published and distributed as required by law. Once published and distributed, every individual and entity impacted by the law has clear notice of its existence and can act accordingly.

Failure to follow each step of the process as required injects uncertainty in the status of a law and, most important for *amici curiae*, creates uncertainty in the business climate of Ohio.

In the instant case, S.B. 117 was passed by the General Assembly and submitted to the Governor. The Governor announced his intention to allow S.B. 117 to become law without his signature, and sealed that intent when he filed S.B. 117 with the Secretary of State. Instead of completing the remaining ministerial and statutory duties involved with publishing and distributing a law, Respondent attempted to reverse the process and "unfile" S.B. 117.

The resulting uncertainty in the status of S.B. 117 creates an unprecedented and needless ambiguity for *amici curiae* and all Ohioans. Duplicative and expensive litigation over whether S.B.117's provisions are valid and applicable will likely ensue. 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 has a clear legal duty to comply with the final procedural duties involved in publishing an enacted law.

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 eliminate the uncertainty in a timely and decisive manner. This action is more than just a political squabble between two branches of government. It is a very real controversy with very real consequences for *amici curiae* and all Ohioans. *Amici curiae* respectfully urge this Court to grant a writ of mandamus to Relators.

STATEMENT OF THE CASE AND FACTS

Amici curiae adopt by reference the Statement of the Case and the Statement of Facts set forth in the Relators' Merit Brief.

ARGUMENT

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 on January 5, 2007. (See Agreed Statement of Facts, ¶ 15.)

Once filed with the Secretary, 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 biennially (R.C. 149.091).

Amici curiae rely upon this straightforward process. They expect that when legislation is passed by the General Assembly, it will be presented to the Governor for signature. Once the Governor determines whether 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. Once the Governor files the bill, the Governor's involvement ends. Upon the Governor's filing of a bill with the Secretary, it becomes law. From that point, a Secretary of State's duties are mandatory and strictly ministerial. Nothing in Ohio law suggests that the Secretary has any authority to determine when a bill becomes a law. Nothing in Ohio law allows the Secretary to reverse the decision of the Governor (to have a bill become a law) by "unfiling" a bill that the Governor previously filed with the Secretary. Accordingly, when S.B. 117 was filed by Governor Taft with the Secretary on January 5, 2007, it became the law (effective in ninety days from such filing).

By attempting to return a filed bill and refusing to publish it as required by law, Respondent violates her clear legal duties. Respondent's contention that she had no clear legal duties under the law is simply misplaced.

A. **Senate Bill 117 Became Law At The Moment It Was Filed With the Secretary Of State.**

In returning S.B. 117 to the Governor, Respondent explained that a Governor has three options under the Ohio Constitution with regard to bills sent to him: (1) he may sign a bill; (2) he may veto a bill; or (3) the Governor may refuse to sign the bill, "in which case, at the end of ten

days after the bill has been presented to the Governor, it becomes law.” (Respondent’s January 8, 2007 letter; Complaint, Exhibit I.) Respondent continued, writing that where the General Assembly adjourns during the ten-day period, the bill becomes law unless the Governor files a veto message within the ten days. “Under the terms of the Constitution of Ohio the Governor has a ten-day period to make a determination on a bill before it becomes law without his or her signature.” (Id.)

Respondent apparently believes that her statutory duties are not triggered until the end of the tenth day. In an earlier pleading to this Court, Respondent maintained that her duty “is limited to safely protecting laws, not bills.” (Respondent’s Motion to Dismiss, Memorandum of Law, page 2.) It appears Respondent’s position is that she is free to do what she will with unsigned laws that are filed in her office until she determines that ten days have passed. This novel position is simply contrary to the Ohio Constitution. Contrary to Respondent’s position, the Ohio Constitution’s ten-day provision does not mean that there can be no finality until the ten days has expired. Rather (and as demonstrated below), there is finality under the Ohio Constitution as soon as the Governor files the bill -- whether signed or unsigned -- with the Secretary of State. Once this filing occurs, the ten-day provision is irrelevant.

Accordingly, 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 are irrevocably implicated 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 Respondent’s mandatory and ministerial duties are triggered at that point. 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.

Article II, Section 1c of the Ohio Constitution further 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. Again, there is no logical distinction to be drawn between a bill that is approved by a Governor’s signature and one that is approved without signature.

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 watershed constitutional event. In *State ex rel. Riffe v. Brown* (1977), 51 Ohio St.2d 149, 365 N.E.2d 876 (*rev’d on other grounds by State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 631 NE.2d 582), this Court once again acknowledged that the constitutionally significant action when determining

when a bill becomes a law is filing the bill with the Secretary of State. The Court explained that if both bodies of the General Assembly pass a bill as proposed, it becomes an act, and when it is enrolled and filed by the Governor with the Secretary, it becomes a law. *Id.* at 152-153.

Both Section 1c 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, 345 N.E.2d 407, J. Corrigan concurring.

Both Section 1c and Section 16 of Article II of the Constitution deal with laws, not bills. Neither distinguishes between a bill that becomes law when it is signed and a bill that becomes law when it is not signed by the Governor. Both provisions turn upon the filing of a law with the Secretary of State, and both provisions were duly adopted by a vote of the people. They must 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 to 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.

This result does not change based on the Secretary's practice of substituting a correct version of a bill for a previously filed defective version. Based on the evidence submitted to this Court, it is anticipated that the Secretary will assert that returning, amending or substituting versions of a bill after they have been filed by the Governor is not unusual. It is likely that the Secretary will argue that her action in "unfiling" S.B. 117 is no different than past occurrences and, therefore, is allowed. This argument has no merit.

Allowing the correct version of a bill to be substituted for a defective version that previously has been filed has nothing to do with what occurred with S.B. 117. Nor does substituting a page or two that were defectively copied or submitted erroneously due to some printer error or clerical mix up. In fact, not one single example included in the Agreed Statement of Facts is analogous to facts before this Court. In none of the fourteen examples submitted, did a Secretary of State release a bill from his possession and return it to the Governor. Rather, in each case, additional pages or versions were submitted to the Secretary to correct a computer or printing error, but the Secretary never returned or released the bill from his custody. None of the fourteen bills listed were returned to a Governor and in no instance did the status of the bill change from an effective law to a vetoed one, or vice versa. In each instance, the intent of the Governor who filed the bill with the Secretary was always carried out, regardless of whether there was a correction. Here, the Secretary seeks the opposite result. In the absence of mandamus, the intent and action of the Governor -- who decided the bill should become law without his signature and filed the bill with the Secretary thereby effectuating such result -- will be defeated.

Nor did any action taken by the Secretaries of State in the fourteen examples listed change the effective date of the bills at issue. Six of the examples listed were bills that went into effect immediately pursuant to Ohio Constitution Article II, Section 1d¹. Unlike Ohio Constitution Article II Section 1c, Section 1d contains no requirements for filing with the Secretary, thus is not analogous to the instant case. In any event, the subsequent clerical corrections undertaken by the Secretary did nothing to affect the status of the bill as effective law in these six cases.

The remaining eight examples are not helpful to the Secretary's argument either. In each instance the Secretary was asked by the Legislative Clerk of the House of Representatives to correct a clerical error by substituting pages of a bill that had already been filed with other pages. In no instance did the Clerk ask that the bill be returned to the House. In all cases, the effective date of the law was ninety days after the bill was first filed by the Governor with the Secretary, regardless of when the corrected versions or portions of the bill were submitted to the Secretary.²

¹ Exhibits 2(c), 2(d), 2(f), 2(g), 2(i) and 2(l) all relate to bills that went into effect immediately.

² Exhibit 2(a) relates to H.B. 694, filed on January 3, 2007 and, despite an apparent substitution of different versions of the bill on January 17, 2007, becomes effective April 4, 2007 -- 90 days from the date first filed.

Exhibit 2(b) is a letter dated June 9, 2004 regarding the wrong version of H.B. 292 that was signed by the Governor and filed on June 3, 2004. Despite the fact that the corrected version of H.B. 292 was filed within ten-days after the bill was presented to the Governor, H.B. 292 still became effective on September 2, 2004-- 90 days from the date the bill was first filed.

Exhibit 2(e) involve a letter dated April 19, 1990 asking the Secretary of State to substitute one page of H.B. 575 where several words were mistakenly stricken due to a printer's error. H.B. 575 was signed and filed on April 18, 1990 and went into effect on July 18, 1990 -- 90 days from the date it was first filed.

Exhibit 2(h) is a letter dated October 8, 1987 regarding a printing error on one page of Am. Sub. H.B. 1. H.B. 1 was signed and filed with the Secretary of State on October 6, 1987 and became effective 90 days later on January 5, 1988 -- despite the correction of a technical error on October 8, 1987.

Exhibit 2(j) is a letter received dated December 16, 1985 explaining a computer printing malfunction, which resulted in errors in the filed version of Sub. H.B. 435. H.B. 435 was signed and filed on December 12, 1985 and went into effect on March 11, 1986 -- 90 days from the date first filed.

Exhibit 2(k) involves H.B. 105. In a letter dated January 19, 1984, the Clerk asked the Secretary of State to substitute one page of the bill where several words were mistakenly omitted due to a printer's error. H.B. 105 was signed and filed on January 4, 1984, and became effective on April 4, 1984 -- 90 days from the date first filed.

Consequently, evidence related to correction of clerical errors is simply irrelevant to the issue before the Court. With respect to S.B. 117, the Secretary did not replace a defective version of the bill with a correct version. Instead, she attempted to void the Governor's filing of S.B. 117 altogether – as though it never happened. There is no precedent and no constitutional or other authority for a Secretary to unfile a bill to reverse the Governor's decision that it become law.

The fact that Governor Taft decided to make S.B. 117 law by filing it without his signature is not in dispute. (See Governor's Press Release, Exhibit H of the Complaint.) The fact that S.B. 117 was filed, unsigned, with the Secretary of State is not in dispute. Whether the ten-day period expired or not is of no import. The act of filing S.B. 117 – signed or unsigned – triggered Respondent's ministerial duties to safely keep, publish, and distribute it.

B. The Ohio Constitution Reserves The Decision To Allow A Bill To Become Law To The Governor Alone.

Respondent has suggested that until the ten-day time period has run the status of a bill remains in flux. In the Secretary's view, presumably, a Governor, or succeeding Governor, can take varying actions as to any particular signed, unsigned, or vetoed bill over and over again until the Secretary of State decides that the ten day period has expired. This position ignores one critical, constitutional factor: Article II Section 1c brings finality to the process. Filing a bill with the Secretary of State is the conclusive and final expression of a Governor's decision.

Exhibit 2(m) is a letter dated January 19, 1984 regarding H.B. 425. The Clerk asked the Secretary of State to substitute one page of the bill where several words were mistakenly stricken or omitted due to a printing malfunction. H.B. 425 was signed and filed on December 2, 1983, and became effective on March 2, 1984 -- 90 days from the date first filed despite the later substitution of one page of the bill.

Exhibit 2(n) involves H.B. 183. In a letter dated September 13, 1984, the Clerk asked the Secretary of State to substitute one page of the bill where two lines were mistakenly omitted due to a printer's error. H.B. 183 was signed and filed on July 2, 1984, and became effective on October 1, 1984 -- 90 days from the date first filed.

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 ministerial and mandatory duty of the Secretary of State is to safely keep it and distribute it to the courts and libraries. Nothing in the Constitution or laws of this state suggests that Respondent could “unfile” the bill or make any determination of its effective date. Simply put, Respondent does not have the authority to decide if, or when, a bill becomes a law. That power is vested exclusively in the Governor. Section 1, Article III of the Ohio Constitution provides:

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

The Ohio Constitution, Article III, Section 5 provides: “The supreme executive power of this state shall be vested in the Governor.” As the supreme executive power of the state, the Governor’s executive decision cannot be superseded or reversed by another member of the executive branch. *State ex rel. S. Monroe & Son Co. v. Baker* (1925) 112 Ohio St. 356, 371, 147 N.E.2d 501.

Indeed, this Court has previously held that a Governor’s decision as to a bill cannot be reversed by his successor, even during the ten-day period. “A successor Governor is constitutionally obligated to present to the Secretary of State a law timely signed by his duly elected and qualified predecessor.” *Maloney*, at 324. Once a Governor has expressed his intention as to a bill, by signing it as in *Maloney* or by filing it as here, that decision cannot be reversed except through the referendum process. Surely, if a successor Governor is constitutionally required to complete the steps required

when a bill is signed and cannot reverse the decision of his predecessor, a Secretary of State cannot reverse the decision of a Governor.

The Governor, and only the Governor, may decide to allow a bill to become law without his signature. Governor Taft made that decision when he filed the unsigned bill.³ By failing to carry out her ministerial duties, Respondent effectively attempted to supersede a decision that is vested exclusively in the Governor.

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 began on January 5, 2007 as soon as it was filed. Respondent’s apparent determination that the unsigned bill filed with her was not yet a law constituted a quasi-judicial determination beyond her authority to make. Thus, mandamus properly lies to compel Respondent’s duty.

CONCLUSION

Ohioans voted to adopt Article II, Section 16. Based on this constitutional provision, they have the right to expect that once a Governor has decided a bill should become a law, either

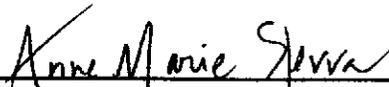
³ Governor Taft’s decision to file an unsigned bill was based on the practical (and political) reality that no line-item veto was available to him. Because he did not agree with one provision of the bill, he exercised his option of not signing the bill. Nonetheless, by filing S.B. 117 with the Secretary without his signature, Governor Taft made an affirmative and final decision to allow the bill to become law.

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 required of her office, which were started by her predecessor. 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 grant Respondent's writ of mandamus.

Respectfully Submitted,



Kurtis A. Tunnell (0038569), *Counsel of Record*
Anne Marie Sferra (0030855)
Maria J. Armstrong (0038973)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
E-mail: ktunnell@bricker.com

Counsel for *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

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 April 9, 2007.

Suzanne K. Richards (0012034)

Counsel of Record

C. William O'Neill (0025955)

Richard D. Schuster (0022813)

Vorys, Sater, Seymour and Pease LLP

52 East Gay Street

Columbus, Ohio 43215

Phone: (614) 464-6400

Fax: (614) 464-6350

skrichards@vssp.com

Counsel for Relators

Marc Dann (0039425)

Attorney General of Ohio

Brian J. Laliberte (0071125), *Counsel of Record*

Michael W. Deemer (0075501)

Frank M. Strigari (0078377)

Pearl Chin (0078810)

30 East Broad Street, 17th Floor

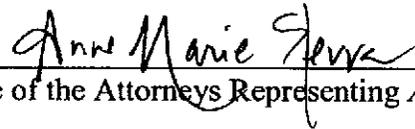
Columbus, Ohio 43215

Phone: (614) 466-8980

Fax: (614) 466-5807

blaliberte@ag.state.oh.us

Counsel for Respondent



One of the Attorneys Representing *Amici Curiae*