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INTRODUCTION

This case is an effort by the General Assembly, Senate President Bill Harris and Speaker of the House of Representatives Jon Husted (collectively “Relators”) to subvert the Governor’s authority to veto legislation. Specifically, Relators seek to undermine the Governor’s veto power in two ways.

First, Relators suggest that the General Assembly may, simply by the expedience of adjourning sine die and presenting bills to the Governor at a subsequent date, deny the Governor the full ten days provided to him under the Ohio Constitution to review and consider legislation. Indeed, under their reading of the governing provisions, Relators could effectively deny the Governor *any* meaningful opportunity to exercise his constitutional authority to veto or sign legislation.

Second, Relators contend that the Governor’s right to consider and reconsider legislation can be artificially terminated before he formally vetoes or signs legislation merely by his delivery of an unsigned bill to the Secretary of State. The Ohio Constitution, however, nowhere vests legal significance in the mere delivery of a bill without a Governor’s signature or veto message. The weakness of Relators’ argument is belied by their own well-established practice of requesting changes and substitutions to bills after they have already been filed with the Secretary of State.

Relators’ claims are, at best, an ill-conceived effort to reverse a veto decision with which they disagree and, at worst, an effort to aggrandize their own powers at the expense of a coordinate branch. Accordingly, for the reasons set forth below, and in the Secretary of State’s Motion to Dismiss, the Court should reject this misguided effort.

STATEMENT OF THE FACTS

On April 1, 2005, the Ohio Senate introduced the original version of Senate Bill 117 for its first consideration. (Ohio Senate Journal, attached as Exhibit 7 to Respondent's Submission of Evidence, at 2.) On October 26, 2005, the Ohio Senate amended the original version of Senate Bill 117 and passed Substitute Senate Bill No. 117. (Agreed Statement of Facts, hereinafter "Facts," ¶ 7). The next day, the Ohio House of Representatives considered Substitute Senate Bill No. 117 for the first time. (Ohio House of Representatives Journal, attached as Exhibit 8 to Respondent's Submission of Evidence, at 7.) Over a year later, on December 14, 2006, the Ohio House of Representatives passed Amended Substitute Senate Bill No. 117 ("S.B. 117"). (Facts ¶ 8.) On that same day, the Ohio Senate concurred in S.B. 117. (Facts ¶ 10.)

One week later, the Ohio House of Representatives adjourned sine die on December 21, 2006. (Facts ¶ 12.) On December 26, 2006, the Ohio Senate adjourned sine die. (Facts ¶ 13.) The next day, on December 27, 2006, S.B. 117 was presented to the Governor. (Facts ¶ 14.) Including S.B. 117, the General Assembly presented the Governor with approximately forty-seven (47) bills for his consideration all on December 27, 2006. (Affidavit of Alicia M. Harrison, attached as Exhibit 2 to Respondent's Submission of Evidence, ¶ 15.)

On January 5, 2007, the Governor filed S.B. 117 with the Secretary of State's Office. (Facts ¶ 15.) The Governor neither signed nor vetoed S.B. 117. (Facts ¶ 15) Contrary to Relators' assertion of fact, S.B. 117 was not "accepted for filing on January 5, 2007." (Relators' Merit Brief at 3). Instead, S.B. 117 was simply *delivered to and received* by the Secretary of State on January 5, 2007, as noted in the Governor's Office Bill Record. (Facts ¶ 18; Exhibit G of the Complaint.) The Governor's Office Bill Record is the paper register that the Governor is required to maintain under R.C. 107.10. (Affidavit of Gretchen A. Quinn, attached as Exhibit 1

to Respondent's Submission of Evidence, ¶ 6; Affidavit of Jeffrey A. Rupert, attached as Exhibit 4 to Respondent's Submission of Evidence, ¶ 15.) The Governor's Office Bill Record is located in the Secretary of State's Office as a matter of convenience for the Governor's staff. (Quinn Affidavit ¶ 6.)

On January 8, 2007, the Secretary of State received a request from the Governor to return S.B. 117 to the Governor's office. (Facts ¶ 22; Exhibit 1 of Agreed Statement of Facts.) At the request of the Governor, on January 8, 2007, the Secretary of State returned S.B. 117 to the Governor. (Facts ¶ 24.) That same day, the Governor returned S.B. 117 to the Secretary of State, along with a separate Veto Message.¹ (Facts ¶ 27; Exhibit J of the Complaint.) Because the Secretary of State received a Veto Message with S.B. 117, the Secretary did not calculate a referendum date for S.B. 117. (Harrison Affidavit, ¶ 14.)

LAW AND ARGUMENT

I. The General Assembly cannot prevent the Governor from lawfully exercising his supreme executive power to consider and veto legislation passed by the General Assembly.

The Governor of the State of Ohio is the supreme executive of the State and the only constitutional executive given the authority to affect the enactment of legislation passed by the General Assembly. The Governor's veto, a power vested in him by Section 16, Article II of the Constitution, recognizes the will of the people of the State to grant the Governor a permanent voice in the legislative process. This lawsuit, and Relators' dissatisfaction with the Governor's

¹ Although a representative for the Governor attempted to return S.B. 117 and the Governor's Veto Message back to the house of origin on January 8, 2007, both the bill and the Veto Message were refused. See Affidavit of John M. Stephan, attached as Exhibit 5 to Respondent's Submission of Evidence, ¶¶ 10, 14; Affidavit of Teresa Fedor, attached as Exhibit 6 to Respondent's Submission of Evidence, ¶¶ 15-17.

veto of S.B. 117, is nothing more and nothing less than an attempt to attack and subvert the constitutional prerogative that the Governor be given that voice.

A. Section 16, Article II of the Ohio Constitution clearly and unambiguously provides ten days for the Governor to consider a bill.

Section 5, Article III of the Ohio Constitution vests the supreme executive power of the state in the Governor. Moreover, “[t]he Legislature cannot take away from the Governor any of the powers and duties that are conferred upon him by the Constitution.” *State ex rel. AFSCME v. Taft*, 156 Ohio App.3d 37, 2004-Ohio-493, ¶ 47, citing *State ex rel. S. Monroe & Son Co. v. Baker* (1925), 112 Ohio St. 356.

After a bill is passed by both houses of the General Assembly, Section 15, Article II of the Ohio Constitution requires that:

Every bill which has passed both houses of the general assembly shall be signed by the presiding officer of each house to certify that the procedural requirements for passage have been met and *shall be presented forthwith² to the governor for his approval.*

Section 15(E), Article II (emphasis added). After both houses of the General Assembly pass a bill and the presiding officer of each house signs that bill, the General Assembly is constitutionally required to present that bill immediately to the Governor so that he can decide to approve or veto the law. Once the General Assembly presents a bill to the Governor, he then has ten full days to consider that bill. The Ohio Constitution, in pertinent part, sets forth this process as follows:

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

² The term “forthwith” is defined as “immediately; without delay; directly; promptly; within a reasonable time under the circumstances.” Black’s Law Dictionary, Edition 8, 680.

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

Section 16, Article II, Ohio Constitution (emphasis added). Accordingly, a bill passed by both houses of the General Assembly, but left unsigned by the Governor, does not become law until the requisite ten-day time period has expired.

In this case, the General Assembly presented S.B. 117 to the Governor on December 27, 2006, after having adjourned sine die the previous day. Consequently, under Section 16, Article II, the Governor had the power to sign or veto S.B. 117 until January 8, 2007, the tenth day (excluding Sundays) after presentment on December 27, 2007. Thus, because he acted within this ten-day time period, the Governor effectively vetoed S.B. 117 on January 8, 2007.

B. The General Assembly may not reduce the constitutionally established ten-day period by presenting the Governor with a bill after adjourning sine die.

Ignoring constitutional text and concerns related to separation of powers, as well as common sense, Relators argue that the relevant ten-day period for the Governor to have acted upon S.B. 117 should be measured from December 26, 2007, the date the General Assembly adjourned sine die, rather than December 27, 2007, the date S.B. 117 (along with forty-six other bills) was presented to the Governor. Relators base this contention on the fact that Section 16, Article II, while granting the Governor ten days from the date of presentment to consider legislation, also provides that when the Governor cannot return a bill because of an adjournment by the General Assembly, he has ten days from the adjournment to sign or veto such legislation.

The ten-day-after-adjournment requirement applies to instances in which a bill is presented to the Governor *first* and the General Assembly then adjourns. In that instance, the Ohio Constitution makes clear that the Governor has additional time beyond the ten days after presentment to review the legislation before him. Notably, however, this ten-day-after-

adjournment provision does not explicitly address circumstances, such as the one involved here, where the General Assembly presents legislation to the Governor *after* adjournment. Nevertheless, Relators construe the ten-day-after-adjournment period to apply when the General Assembly adjourns before presentment even though the effect would be to shorten the time for the Governor to review legislation and exercise his veto authority. As such, Relators ignore the more logical conclusion that when presentment occurs after adjournment, it is the ten-day-after-presentment rule that governs because the obvious intent of the Section is to maximize, and not minimize, the Governor's time to exercise this most important power. See Tuttle, *Legal Aspects of the Ohio Executive Veto* (1937), 3 Ohio St.L.J. 273, 274 (arguing that Section 16, Article II should be construed to provide the Governor with the longer time period to review legislation); see, also, *Florida Society of Ophthalmology v. Florida Optometric Assn* (1986), 489 So.2d 1118 (holding that similar provisions in the Florida Constitution should be construed in a manner that give the longer time for the Governor to review legislation).

In fact, the difficulty in Relators' construction is three-fold. First, as a textual matter, it suggests that the time period that a bill is before the Governor for his review can be reduced to less than the constitutionally mandated ten-day period guaranteed to him in Section 16, Article II. Applying Relators' construction, this means that they could delay presentment of more than one-hundred bills until the tenth day after adjournment, completely denying the Governor his constitutional authority to review any of these bills. Such a construction was not the will of the people when enacting Section 16, Article II.

Second, Relators' claim makes no sense from a policy perspective. There is no reason (and in fact Relators do not offer any reason) why the Constitutional framers would have suggested that the Governor should have less time to consider whether or not to veto legislation

after the General Assembly has adjourned, rather than while the General Assembly is still in session. If anything, policy considerations cut the opposite way. After all, when the General Assembly is in session, there may be some reason to require the Governor to act expeditiously – the General Assembly may be awaiting the Governor’s action with an eye to a potential veto override. But if the General Assembly is adjourned, there is no such concern and it makes sense to allow the Governor more time to consider the bills before him. Indeed, the fact that Relators have a practice of passing multiple bills at the end of a session suggests yet another reason why the Governor should have more, not less time, to review legislation after adjournment.

Third, and perhaps most importantly, Relators’ construction of Section 16, Article II threatens separation of powers by allowing the General Assembly, and not the Ohio Constitution, to control the amount of time a Governor has to consider a bill. As previously discussed, the Governor’s time to review a bill could be drastically reduced to one day or less if Relators decided to delay presentment of a bill until the ninth or tenth day after adjournment. Needless to say, such an approach both undermines the ability of the Governor to meaningfully exercise his veto authority and vests a significant advantage in any General Assembly that wants to force legislation into law without the checks and balances provided by gubernatorial oversight.

The very question at issue today was posed in a 1937 Ohio State University Law Journal article, where the Governor’s unmitigated authority for a full ten-day consideration was urged: “The intent of the clause must therefore be to increase under some circumstances the time allowed for examination *but never to decrease it.*” Tuttle, 3 Ohio St.L.J. at 274 (emphasis added). The constitutional authority of the Governor to consider legislation passed by the General Assembly must not be diminished by the tactical use and timing of adjournment sine die and presentment of bills by the very body whose actions the Governor is considering.

As the Court has discussed previously, Relators' interpretation would frustrate the underlying objective of providing the Governor suitable opportunity to review bills presented to him. As Relators repeatedly point out, the Court in *Maloney v. Rhodes* (1976), 45 Ohio St. 2d 319, 323, declared that the "language of [Section 16, Article II] is unmistakably clear." (See Relators' Merit Brief at 5.) In the same paragraph finding the constitution to be "unmistakably clear," the Court assumed that adjournment can only increase, not decrease, the Governor's ten-day period to consider a bill. The Court recognized that the Governor:

may refuse to sign or veto the bill, in which case at the end of ten days after the bill was presented to him it becomes law (unless the General Assembly adjourns within the ten day period) and he is required to file with the Secretary of State. If the General Assembly adjourns within the ten day period, it becomes law unless the Governor, within ten days of adjournment, files it with his objections in writing in the office of Secretary of State.

Maloney, 45 Ohio St.2d at 323-324.

The Court's assumption was correct and should be followed here because to do otherwise would empower the General Assembly to diminish or—taking Relators' argument to its logical conclusion—eviscerate the Governor's ten days to consider bills. Because such a decision would unconstitutionally reduce the amount of time the Governor has to consider bills presented to him, the Court must reject such rationale. See, e.g., *Wright v. United States* (1938), 302 U.S. 583, 596; *The Pocket Veto Case* (1929), 279 U.S. 655, 677-678.

C. Other States that have considered this question have expressly rejected Relators' arguments and reached the conclusion urged by Secretary Brunner.

Notably, not one State court has ever permitted a legislative branch to reduce a governor's constitutionally delegated time period for reviewing bills that are passed, but later presented to a governor after the legislature adjourns sine die. These courts refused to do so because the executive branch was empowered with the ability to "prevent the evils of hasty, ill

considered legislation. . . .” *The Pocket Veto Case*, 279 U.S. at 677, n.4, quoting *People ex rel. Harless v. Hatch* (Ill. 1863), 33 Ill. 9, 59; see, also, *Lewis v. Cozine*, 234 Ky. 781, 29 S.W.2d 34; *Gill v. Nickels* (Va. 1955), 197 Va. 123, 126.

For example, in *State ex rel. Petersen v. Hughes* (1939), 372 Ill. 602, the Illinois Supreme Court concluded that its constitution entitles its governor to a full ten days when reviewing a bill presented to the governor *after* the legislature adjourns sine die. *Id.* at 613. The Illinois Supreme Court interpreted its constitution in such a way because the legislature’s power to present bills to the governor after adjournment sine die is inferior to the governor’s power to approve or veto, which cannot be abridged accidentally, or by design, by the legislature. *Id.* at 611.

Another state supreme court rejected Relators’ arguments in the case of *Cenarrusa v. Andrus* (1978), 99 Idaho 404. There, the Idaho Supreme Court concluded that its constitution entitles its governor to a full ten days to review a bill that was presented to him *after* the legislature adjourned sine die. *Id.* at 410. When concluding this, the Idaho Supreme Court refused to interpret its constitution any other way because such a reading “would have the effect of allowing the legislature to determine the amount of time allowed to a governor, severely limiting it if the legislature so chose.” *Id.* at 408. “[A] construction placing the legislature in control of the time frame available to a governor for consideration of a bill can only lead to an undermining of the dignity of the position to which each of these two equal and coordinate branches of government are entitled in their transactions with each other.” *Id.* at 409.

Yet another example is *Florida Society of Ophthalmology v. Florida Optometric Ass’n*, 489 So.2d 1118. There, the Florida Supreme Court concluded that its constitution provides its governor with a full fifteen days to approve or veto a bill that was presented to him *after* the legislature adjourned sine die. *Id.* at 1121. The Florida Supreme Court interpreted its constitution

in such a way because the court concluded that its governor should be provided with the largest amount of time to review legislation, especially where his constraints are most severe due to a large number of bills submitted after adjournment. *Id.* at 1120.

As these State supreme courts have concluded, the time period for a governor to review legislation should never be limited at the legislature's discretion, especially when a governor is presented with a large number of bills, as was the Governor in this case on December 27, 2006. See, e.g., *State ex rel. Martin v. Zimmerman* (1940), 233 Wis. 442 (holding that because the Wisconsin legislature has no authority to limit the time the Governor has to act, adjournment sine die did not limit the governor's six-day time period to approve an appropriations bill in whole, or in part). Such rationale is based on the courts' reluctance to limit the constitutionally inherent supreme executive power of the governor. Even the United States Supreme Court recognized this in *The Pocket Veto Case*, 279 U.S. at 677-678, when it stated that "[t]he power thus conferred upon the President cannot be narrowed or cut down by Congress, nor the time within which it is to be exercised lessened, directly or indirectly. * * * [T]he President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill." See, e.g., *Wright v. United States*, 302 U.S. at 596 (The United States Supreme Court refused to adopt and construe a narrow construction of the executive's veto power which would frustrate the underlying objective of providing the executive a suitable opportunity to review those bills presented to him). For all of these reasons, the Court should reject Relators' construction that would limit the Governor's ten-day time period to review legislation.

II. The Secretary of State cannot prevent the Governor from lawfully exercising his supreme executive power to consider and veto legislation passed by the General Assembly.

The Secretary of State—like the General Assembly—does not have any authority to interfere with the Governor’s constitutional prerogative to consider for ten days after presentment whether to sign or veto legislation passed by the General Assembly. As such, the Governor’s choice to deliver, and the Secretary’s ministerial receipt of S.B. 117 on January 5, 2007, had no legal significance. Likewise, the Secretary had no authority to refuse to return S.B. 117 prior to the expiration of the ten-day period when so requested by the Governor.

A. The Governor’s delivery of, and the Secretary of State’s receipt of, an unsigned bill—before the expiration of the ten-day consideration period—has no legal significance.

The Secretary of State cannot make a bill a law merely by accepting it. Revised Code 111.08 simply provides that “[t]he secretary of state shall have charge of and safely keep the laws and resolutions passed by the general assembly and such other papers and documents as are required to be deposited in [her] office.” R.C 111.08. Further, the gubernatorial act of filing a bill with the Secretary of State, and any action taken by the Secretary therewith, in itself, does not transform a bill into law. Therefore, Relators’ argument must be rejected.

Although couched as an alternative argument, Relators’ second proposition is dependent upon whether S.B. 117 already had become a law when the Governor vetoed the bill on January 8, 2007. As explained above, S.B. 117 had not yet become a law on January 8, 2007 because the Governor’s full ten days to review S.B. 117 had not expired.

In their brief, Relators mischaracterize the Governor’s options when presented with bills passed by the General Assembly. The first option—choosing to approve a bill—has immediate constitutional significance because the bill at that time becomes law and, accordingly, the

Governor's authority over the bill has ended. See *Maloney*, 45 Ohio St.2d at 323-324 (“[The Governor] may sign if he approves the bill, in which case he is required to file the law with the Secretary of State”).

The second option—vetoing legislation—also has constitutional significance because once a bill is vetoed, the Governor is required to return the bill to its house of origin and the General Assembly can subsequently override the Governor's veto. See *Maloney*, 45 Ohio St.2d at 324. If the General Assembly prevents the bill's return by adjourning sine die, the Governor's veto ends the legislative process because he is unable to return the bill to its house of origin.

However, the Governor's third option—neither approving nor vetoing a bill—does not have constitutional significance and does not end the Governor's authority over a bill. Pursuant to the unambiguous terms of Section 16, Article II of the Ohio Constitution, an unsigned bill becomes law not because of anything done by the Governor or Secretary but only as a result of the expiration of the Governor's ten-day period for consideration.³ *Maloney*, 45 Ohio St.2d at 324 (“[The Governor] may refuse to sign or veto the bill, in which case at the end of ten days after the bill was presented to him it becomes law . . .”). The Court recognized this long ago when it concluded that if the Governor neither vetoes nor approves a bill, then that bill becomes effective only ten days *after* the Governor was presented with a bill. See, e.g., *Patterson Foundry & Machine Co. v. Ohio River Power Co.* (1919), 99 Ohio St. 429, 435 (holding that a bill passed by both houses and presented to the governor, who neither approved nor vetoed the bill, became a law only *after the expiration of ten days*).

Correspondingly, an unsigned and unvetoes bill does not become effective at the time the Governor delivers the bill to the Secretary of State because such a bill would not become

³ Likewise, the Governor's intent in choosing to neither sign nor veto a bill also has no constitutional significance.

effective until after the expiration of the ten-day time period. See *Maloney*, 45 Ohio St.2d at 324; *Patterson Foundry & Machine Co.*, 99 Ohio St. at 435. Although Relators assert that governor's failure to sign or veto a bill does not equate to an "official executive action[] that [has] been fully effectuated in accordance with constitutional requirements" (Relators' Merit Brief at 20), that conclusion is contrary to the Court's previous holding, is nowhere implicated in the language of Section 16, Article II, and has no basis in any other authority.

Indeed, the authorities cited by Relators involve circumstances completely different from those in this case. The legal conclusions in the cases cited by Relators are based either upon the affirmative act of *vetoing* or *signing* legislation, *not* the Governor's inaction. See, e.g., *Powell v. Hayes* (1907), 83 Ark. 448 (holding that a bill that one governor *already signed*, but had not returned to legislature, could not later be vetoed by the successor governor); *People ex rel. Lanphier v. Hatch* (1857), 19 Ill. 282, 287 (concluding that the governor could not retract his approval if he *already signed* the bill and delivered it to the secretary of state); *People ex rel. Partello v. McCullough* (1904), 210 Ill. 488 (concluding that the governor had no authority to veto a bill that he *already signed* and deposited with the secretary of state); *Woessner v. Bullock* (1911), 176 Ind. 166 (recognizing that the governor's power over a bill ends *after he already vetoed* and filed the bill with the secretary of state); 1943 Texas Atty.Gen.Ops. No. 0-5310 (stating that a governor may not recall a bill if he *already signed* and deposited it with the Secretary of State).

Here, the Governor did not sign or veto S.B. 117. As a result, the cases cited by Relators have no bearing in this case because each of the governors in those cases performed an act *vetoing* or *approving* a bill. Thus, not one of those cases provides any guidance concerning a

governor's authority to act on a bill that he, or his predecessor, has not vetoed or signed within the prescribed time period.

Finally, the only other two cases cited by Relators, *Hunt v. State* (1904), 72 Ark. 241 and *State v. Heston* (1952), 137 W.Va. 375, also fail to support their position. *Hunt*, for example, neither involved a matter of separation of powers nor did it involve any facts that are relevant to this case. In *Hunt*, a criminal defendant attempted to challenge his indictment by contending that an evidentiary law apparently used to provide evidence against him was invalid because the governor had returned the bill unsigned before the five days provided to him to consider legislation had elapsed. *Id.* at 249. To say the defendant's claim was a stretch is an understatement as the effective date of the legislation was not at issue in the case and his theory as to why an early delivery could invalidate the provision was not explained. Not surprisingly, the Arkansas Supreme Court summarily dismissed the defendant's claim, holding simply that its governor could file a bill before time expired, and that bill could then become law without his signature. *Id.* at 250. *Heston*, in turn, is equally unhelpful to Relators. There, the West Virginia Supreme Court simply acknowledged that the Arkansas Supreme Court's conclusion in *Hunt* exists. *Id.* at 396. However, the West Virginia Supreme Court chose not to analyze, adopt or reject the Arkansas Supreme Court's opinion. As such, *Hunt* and *Heston* provide no support whatsoever for Relators' alternative argument.

Ultimately, Relators' attempt to vest legal significance in the Governor's delivery of an unsigned bill to the Secretary of State is nothing more than another attempt to limit the Governor's veto authority. But this endeavor has no support in the Ohio Constitution or in sound policy. As the United States Supreme Court has noted, a vibrant veto power is essential in

“prevent[ing] the evils of hasty, ill considered legislation. . . .” *The Pocket Veto Case*, 279 U.S. at 677. Relators’ attempt to weaken this authority should be rejected.

B. The Secretary of State did not have discretion to refuse the Governor’s request for the return of S.B. 117 because the ten-day time period had not expired.

Although the Secretary of State has constitutional and statutory duties to receive filings of both unsigned bills and enacted laws, those duties do not preclude the Secretary from returning bills and laws to other state constitutional officeholders in a manner consistent with state law. Rather, as Relators recognize, the Secretary of State’s responsibilities regarding legislation and acts of law are simply ministerial. (See Relators’ Memorandum in Opposition to Respondent’s Motion to Dismiss at 17.) Therefore, the Secretary cannot exercise independent judgment regarding the appropriateness of an action requested of her by a constitutional actor vested with the authority to request such an action.

Relators, however, attempt to turn the Secretary’s ministerial duties inside out by asserting that her ministerial obligation was to *make a judicial or quasi-judicial determination* that she had to *refuse to take action* requested of her by the Governor. All legislative discretion is vested in the General Assembly (Section 1, Article II, Ohio Constitution); all executive discretion regarding legislation passed by the General Assembly is vested in the Governor (Section 16, Article II, Ohio Constitution). No discretion is vested with the Secretary, and hence she had no authority to refuse the Governor’s request for the return of S.B. 117. See, e.g., *Maloney*, 45 Ohio St.2d at 323 (“The secretary of state is not vested with any jurisdiction to determine judicial questions dealing with the constitutionality of any law.”). Just as the General Assembly has no authority to cut short the ten days given to the Governor after presentment from the front end, the Secretary cannot cut short the ten days by refusing to allow the Governor to

sign or veto a bill under consideration by the Governor for less than the constitutional ten-day period at the back end.

The Court has also recognized that the duties of the Secretary of State in this regard are simply ministerial. In *Maloney*, the Court reinforced this conclusion when it ruled that the Secretary of State could not refuse to file a bill that was signed by the Governor and Speaker of the House, but not the Senate President. 45 Ohio St.2d at 322. Similarly, in *Governor v. Taft* (1994), 71 Ohio St.3d 1, the Court ruled that because the Secretary cannot make a judicial determination regarding the constitutionality of a law, he could not refuse to file a bill, strike a bill from the files, or inhibit its publication or distribution. *Id.* at 4. As a result, *Maloney* and *Governor v. Taft* support Secretary Brunner's return of S.B. 117 to the Governor. As explained above, by returning S.B. 117 to the Governor, the Secretary refrained from making a determination whether the Governor's request was still within his ten-day time period. (See Respondent's Motion to Dismiss at 18-20.)

Furthermore, Relators cite dicta from other cases that simply do not support their argument that Secretary Brunner's return of S.B. 117 to Governor Strickland constituted a quasi-judicial exercise of authority. (See Relators' Merit Brief at 11-14, citing *Wrede v. Richardson* (1907), 77 Ohio St. 182, 210 (concluding that the Governor's Office Bill Record and the records of the secretary of state provided conclusive evidence that the Governor was presented with a bill); *Hodges v. Taft* (1992), 64 Ohio St. 3d 1, 8 (the Secretary of State does not have a clear legal duty to reject unverified referendum petitions even though R.C. 3519.06 requires referendum petitions to be verified); *Marcolin v. Smith* (1922), 105 Ohio St. 570, 593 (the Secretary of State could not refuse to submit a proposed constitutional amendment to electors on the ground that, if adopted, it would contravene some provision of the federal Constitution);

Woessner v. Bullock (Ind. 1911), 176 Ind. 166, (the Indiana Supreme Court concluded a bill never became law because its governor did not properly “lay” a bill before its legislature in accordance with the Indiana Constitution, and its secretary of state was not obligated to do so on behalf of the governor)).

Not only does the plain language of the Ohio Constitution and the Court’s opinions in *Maloney* and *Governor v. Taft* confirm that Secretary Brunner’s return of S.B. 117 to the Governor comports with her ministerial and custodial duties, the cases cited above by Relators provide no support for their contrary arguments. Moreover, Relators’ own well-established practice of requesting changes and substitutions to bills after they have been filed with the Secretary of State squarely contradicts their arguments.

Relators have a long history of asking the Secretary of State to return bills after they have been filed with the Secretary. As recently as January 17, 2007, the Clerk of the House of Representatives asked Secretary Brunner to replace a version of Am. Sub. H.B. 694 (“H.B. 694”), which had been filed with the Secretary on January 5, 2007, so that it could be replaced with the purportedly correct version of that bill. (Quinn Affidavit ¶ 15; Exhibit 2a of the Agreed Statement of Facts.) At the request of Relator Husted’s Clerk, pages 1 to 33 of the incorrect version of H.B. 694 were replaced by pages 1 to 33 of the correct version of H.B. 694, without any changes or substitution to the pages bearing the signatures of Relators Harris and Husted, former Governor Taft, and former Secretary of State J. Kenneth Blackwell. (Quinn Affidavit ¶¶ 18, 19.) Additionally, in at least thirteen instances from September 13, 1984 to June 9, 2004, various clerks of the House of Representatives requested secretaries of state to replace a filed version of a bill with another version of that bill. (Facts, Exhibits 2b-2n.) In fact, as far back as July 1, 1975, former Governor Rhodes asked former Secretary Brown to amend a page of a bill,

which Governor Rhodes vetoed and filed with the Secretary of State. (Exhibit 9 of Respondent's Submission of Evidence, at 1.)

As substantiated by these facts, Relators' own practice of requesting changes and substitutions to H.B. 694, along with other bills originally filed with the Secretary of State throughout this State's history, shows that Relators deem the act of filing an enrolled bill with the Secretary of State a *clerical* act that has no legal significance. If Relators are correct that the Secretary may not return bills, or replace pages of any bills, after they have been filed in her office, then she is precluded from allowing any necessary corrections to the records that she maintains, including those the General Assembly asked the Secretary to correct over the years. And though Relators do not view their own filing of signed bills with the Secretary of State as having independent legal significance, they argue that the Governor's filing of an unsigned bill has independent legal significance. The Court should reject Relators' contradictory reasoning and their attempt to impute their will on the Secretary of State, the Governor and the Court. Secretary Brunner, having no authority to refuse the Governor his ten-day period for consideration of S.B. 117, was simply serving in her custodial capacity when she returned the bill to the Governor for his consideration.

III. Relators lack standing to bring this action against the Secretary of State.

By granting an alternative writ, the Court did not rule definitively on which, if any, Relators have standing to bring this mandamus action. Secretary Brunner re-incorporates her arguments in her Motion to Dismiss that each and every Relator lacks standing to bring this mandamus action. Specifically, the argument of Relators Harris and Husted that legislator standing is appropriate in this case as to them under these circumstances is unavailing. Relators admit in their Memorandum in Opposition to Respondent's Motion to Dismiss that *Coleman v.*

Miller (1939), 307 U.S. 433, stands only for the proposition that standing is appropriate “where a legislator’s vote would have been sufficient to enact a bill.” (Relators’ Memorandum in Opposition to Respondent’s Motion to Dismiss at 5.) In *Coleman*, as Relators note, *all* of the legislators who would have been necessary to pass or defeat the legislation in question—21 of the 40 members of the Senate—filed suit in the case. 307 U.S. at 436; Relators’ Memorandum in Opposition to Respondent’s Motion to Dismiss at 4. Here, in contrast, only one Senator and one Representative sued. Therefore, to establish *Coleman* standing, seventeen of the 33 Senators should have sued or the members could have authorized Relator Harris to sue⁴, or fifty of the 99 Representatives should have sued or the members could have authorized Relator Husted to sue. Not one of these circumstances occurred in this case. As such, these two legislators out of 132 state legislators do not represent sufficient votes to enact or defeat legislation, and therefore they lack standing to bring this action.

Because Relators lack standing, they do not have a clear legal duty to the relief requested and fail to satisfy the first requisite element for relief in mandamus.

IV. Mandamus is not the proper remedy in this case because the Secretary of State has performed all legal duties required of her, and an adequate remedy at law exists for Relators.

Relators fail to cite any authority for their proposition that the Secretary of State has a duty to assign a date by which referendum petitions must be submitted for challenging laws. The Secretary of State has no constitutional duty to assign that date—a date established by the Ohio Constitution itself. The Secretary can do no more than calculate that date, as may any interested

⁴ For example, the Rules of the Senate were amended on February 20, 2007 to authorize the President of the Senate to file litigation on behalf of the Senate. See Senate Resolution No. 16, Rule 5. Though the Secretary takes no position on the authority for or validity of such action, this Rule is instructive for it makes clear that the members of the 127th General Assembly saw the need to affirmatively give the Senate President the additional authority to litigate on behalf of the members.

citizen. Further, because the Secretary received a Veto Message with S.B. 117, she could not calculate a referendum date for S.B. 117. (Harrison Affidavit ¶ 14.)

Sections 1c, 1d and 16 of Article II of the Ohio Constitution establish the procedures by which bills become law and are thereafter subject to referendum. Section 16, Article II clearly requires the Secretary to accept the filings of enacted laws. Other than receiving those filings (and, as previously discussed, the mere fact of receiving a filed bill does not transform that bill into law), the Ohio Constitution imposes an affirmative duty on the Secretary concerning recently enacted legislation. That duty is imposed by Section 1(c), Article II which provides:

“ . . . No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided. *When a petition, signed by six per centum of the electors of the state and verified as herein provided, shall have been filed with the secretary of state within ninety days after any law shall have been filed by the governor in the office of the secretary of state, ordering that such law, section of such law or any item in such law appropriating money be submitted to the electors for the state for their approval or rejection, the secretary of state shall submit to the electors of the state for their approval or rejection such law, section or item, . . . and no such law, section or item shall go into effect until and unless approved by a majority of those voting upon the same.*”

Section 1(c), Article II, Ohio Constitution (emphasis added). The Ohio Constitution thus mandates the Secretary to “submit to the electors of the state for their approval or rejection” any law, or portion of a law that has been the subject of a legally-sufficient referendum petition filed “within ninety days after any law shall have been filed” in the office of the Secretary of State. The Ohio Constitution does *not*, however, require the Secretary to advise Ohio citizens of the date by which referendum petitions must be filed. Nor is that date necessarily equivalent to the effective date of newly-enacted laws. See Section 1d, Article II, Ohio Constitution (identifying laws not subject to referendum that take immediate effect). And the Ohio Constitution does not

impose a clear legal duty on the Secretary to either establish or announce the effective date of newly-enacted laws.

Standard practice over many years has been for the Secretary of State to sign enacted laws and indicate the effective date of those laws. However, the Secretary is constitutionally required to determine the date upon which the governor *files laws* passed by the General Assembly only incident to her responsibilities in regard to submitting a referendum issue to the electors of Ohio. That duty arises only when a sufficient referendum petition has been timely filed (i.e., within ninety days of the filing of a law). See Section 1c, Article II, Ohio Constitution.

Just as importantly, any issue relating to the constitutional right of referendum of S.B. 117 has been mooted by the passage of time. If Relators are correct, and S.B. 117 is a valid law, a referendum petition could have been filed, at the latest, ninety days from the date the governor originally filed the bill (i.e., January 5, 2007). Ninety days from that date produces a deadline of early April 2007 for the filing of a referendum petition. The Court need not engage in the vain act of issuing a writ of mandamus in May or June 2007, ordering the Secretary to announce that the final day for filing referendum petitions challenging S.B. 117 was in April 2007. More than ninety days have passed as of the date of the filing of this brief, and no referendum petitions have been filed with the Secretary; consequently, any referendum issues are moot.

Relators further contend that the Secretary must "compile, publish and distribute S.B. 117 as a valid law." (Relators' Merit Brief at 11.) However, R.C. 149.091 does not require the Secretary to publish and distribute session laws within a specified time, making the current mandamus action premature at best. And the fact that a bill is published in the session laws has no bearing whatsoever as to the legality of the bill. The Secretary has no authority to determine which

laws she considers valid and which she does not, nor to decide on that basis that certain laws filed in her office will be excluded from the published session laws.

Similarly, even assuming, *arguendo*, that the Secretary should have refused the Governor's request to return the original copy of S.B. 117 to him on January 8, 2007, that past action is not relevant to an action in mandamus *today* to compel the Secretary to secure and protect the bill. Mandamus is appropriate only to compel the performance of a clear legal duty that a public official refuses to perform *at the time of the mandamus action*. The Governor returned the original copy of S.B. 117 to the Secretary, and Relators do not contend that the Secretary is currently failing to meet her statutory responsibility under R.C. 111.08 to "safely keep" it.

Finally, Secretary Brunner asserted in her motion to dismiss that the current action is nothing more than an attempt by Relators to dress a request for a declaratory judgment in the clothes of a mandamus action. Relators' merit brief even more clearly demonstrates the legitimacy of that argument. Relators effectively seek a writ from the Court ordering the Secretary to proclaim that S.B. 117 is *valid* law. Expression of such a legal opinion by the Secretary is *not* required, or allowed, by Ohio law. It would be entirely inappropriate for the Secretary of State to publish and distribute S.B. 117, accompanied by her opinion as to whether S.B. 117 is a valid law, just as it would be inappropriate for the Secretary of State to include in the published laws of Ohio any thoughts she may have as to whether any particular law is unconstitutional or otherwise unenforceable. That determination lies within the province of the courts—not the Secretary of State.

CONCLUSION

The Governor of the State of Ohio has the constitutional obligation and authority to consider, in a ten-day period after presentment, whether to approve or veto legislation passed by the General Assembly. In this case, Relators seek to have the Court diminish that authority in two ways. First, Relators seek authority to reduce the Governor's time for consideration by timing its adjournment to reduce, or even eliminate, the Governor's ten-day consideration period. In the alternative, Relators wish to enable the Secretary, through the performance of purely ministerial actions, to prevent the Governor from exercising his authority to sign or veto legislation by refusing to return legislation that has not yet reached the tenth day of consideration. Neither theory has any support in the Constitution of this State, and both would subvert the strong policy underlying the Governor's veto authority by preventing him his full constitutional period to review passed legislation prior to enactment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2007 a copy of the foregoing *Respondent's Merit Brief* was served by electronic mail and regular U.S. mail, postage prepaid, upon:

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