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## INTRODUCTION

Art. II, § 16 of the Ohio Constitution recognizes the importance of maintaining the separation of powers among the branches of state government by giving the Governor the independent power to disapprove bills after the General Assembly has passed them. If the Governor utilizes his constitutional authority to veto a bill, the bill is dead, unless the General Assembly exercises its constitutional authority to override the veto. Thus, the only constitutionally authorized way the General Assembly can render a Governor's veto ineffective is by a super-majority vote to override the veto. Yet, in this case, Relators assert that the Ohio Constitution provides an unwritten, back-door means by which the General Assembly can impede the Governor's authority to exercise his veto power, taking the veto pen out of the hand of the Governor at the discretion of a simple majority of the members of the General Assembly. This Court cannot recognize such an unprecedented, unauthorized, unspoken assault on the Governor's constitutionally established veto authority.

## STATEMENT OF *AMICI* INTEREST

*Amici Curiae*, Governor of Ohio Ted Strickland and 18 Ohio Professors of Constitutional Law, have distinct but aligned interests in the outcome of this litigation. Accordingly, they have joined together to file this brief in support of the Respondent. The Professors' law school affiliations are listed solely to identify the institutions at which they teach. The Professors are joining this brief in their individual capacities only. The *amici* professors are as follows: Joanne C. Brant, Professor of Law, Ohio Northern University Claude W. Pettit College of Law; Philip J. Closius, Professor of Law, University of Toledo College of Law; Sharon L. Davies, John C. Elam/Vorys Designated Professor of Law, Michael E. Moritz College of Law, The Ohio State University; Joshua Dressler, Frank R. Strong Chair in Law, Michael E. Moritz College of Law,

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Governor Strickland firmly believes that Secretary of State Brunner was fully authorized, indeed obligated, to return S.B. 117 to him when he requested that she do so. And he firmly believes that he was fully authorized to veto S.B. 117 when he did so. Now, confronted with a challenge not only to his veto of S.B. 117, but to the overall gubernatorial veto authority established in Ohio's Constitution, Governor Strickland believes that he is duty bound to act to protect the Office of Governor against such an assault.

The Relators' position, if accepted by this Court, could vastly diminish or even eviscerate the veto authority of Ohio governors for generations to come. Accordingly, Governor Strickland's participation in this *amicus* brief is at least as much about preserving his veto authority – and the veto authority of future governors – as it is about vindicating his actions in the instant case.

The eighteen Ohio Professors of Constitutional Law appear as *amici curiae* not as representatives of their respective law schools, but as individuals committed to clarity in the understanding and application of constitutional principles. Each of the professors teaches or has taught Constitutional Law and/or related courses involving the interpretation and application of constitutional provisions associated with the enactment of our laws.

Through their teaching, writing and service work, these professors seek to advance professional and lay understanding of constitutional principles that, in turn, increases societal confidence in those principles. They believe that our legal system is most effective and provides a stable basis for our society when constitutional provisions are fairly and properly interpreted and applied. And they maintain that Relators' position, if accepted by the Court, would inappropriately and unadvisedly alter the balance of power between the legislative and executive branches embedded in the Ohio Constitution, to the detriment of Ohio's citizenry.

## STATEMENT OF THE CASE AND FACTS

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

### ARGUMENT

**A. The Ohio Constitution does not permit the General Assembly to exclude the Governor from the lawmaking process.**

The Ohio Constitution vests “[t]he supreme executive power of this State . . . in the governor.” Art. III, § 5. In addition, Art. II, § 16 ensures the Governor's participation in the lawmaking process by mandating that all duly passed legislation be presented to him, after which he has 10 days to decide whether to approve it or veto it before it automatically becomes law. Once he has taken action on a bill – by either signing or vetoing it – the Governor has completed the exercise of his power under Art. II, § 16. But, if at any point during that 10 days he has yet to take one of those two actions, then no action of the legislature can prevent him from signing or vetoing the bill during whatever portion of the 10 days remains to him, and any arguments made by Relators to the contrary are unsupported by Ohio law.

The Ohio Constitution, by virtue of this veto authority, confers on the Governor a power exceeding that of any single legislator and puts the Governor on a par with the General Assembly as a whole. This unique constitutional power fulfills the basic Civics 101 democratic principle of separation of powers among the three co-equal branches, effected by a system of checks and balances. “While Ohio, unlike other jurisdictions, does not have a constitutional provision specifying the concept of separation of powers, this doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government.” *S. Euclid v. Jemison* (1986), 28 Ohio St. 3d 157, 159. This doctrine “recognizes that the executive, legislative, and judicial branches

of our government have their own unique powers and duties that are separate and apart from the others.” *Dayton Supply & Tool Co. v. Montgomery County Bd. of Revision*, 111 Ohio St.3d 367, 2006-Ohio-5852, ¶ 54, quoting *State v. Thompson* (2001), 92 Ohio St.3d 584, 586. In other words, no one branch of government can or should dominate the others. “The separation-of-powers doctrine requires that each branch of government be permitted to exercise its constitutional duties without interference from the other two branches of government.” *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, ¶ 56.

The Governor’s veto power acts as a check on the legislature. “The principle of separation of powers into three coequal branches . . . and the checks and balances that principle ensures are now deemed fundamental to our democratic form of government.” *Dann*, 2006-Ohio-1825, ¶ 55. Consistent with the “interdependence . . . among the three branches,” fostered by the separation-of-powers doctrine, *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, ¶ 114, the General Assembly, itself, can “check” a veto if a super-majority of three-fifths of the members of each house vote to override it. Art. II, § 16. Consequently, neither the legislative nor the executive branches can govern effectively without each taking the other’s power into account. Through a system of checks and balances, like the veto power, the Ohio Constitution maintains the necessary equilibrium between the legislature and the Office of the Governor (and the judiciary) as coordinate and co-equal branches.

If Relators were to prevail in this case, then the General Assembly would be free to severely diminish the institutional power of the Office of the Governor by shortening or even eliminating the constitutionally guaranteed 10-day period for the Governor to exercise his power to sign or, more to the point of this case, to veto legislation after presentment. As this Court noted with approval in *Dann*, 2006-Ohio-1825, ¶56a, the United States Supreme Court in *Loving*

*v. United States* (1996), 517 U.S. 748, 757, “observed that the separation-of-powers doctrine ‘requires that a branch not impair another in the performance of its constitutional duties.’” But that is exactly what Relators urge the Court to do here. Because the General Assembly’s attempt to limit the scope of Art. II, § 16 improperly interferes with the Governor’s constitutional authority to approve or to veto legislation, this Court should reject the General Assembly’s arguments and deny the requested writ of mandamus.

**B. Because Governor Strickland properly exercised his constitutional authority under Art. II, § 16 by vetoing S.B. 117 within the constitutionally authorized 10-day review period, the veto must be given legal effect.**

**1. Sending an unsigned bill to the Secretary of State does not divest the Governor of the power to veto it during the 10-day review period.**

In the normal course of events, before the General Assembly adjourns *sine die*: 1) a bill is passed in identical form by both houses; 2) it is signed by the leaders of each house—the President of the Senate and the Speaker of the House—and; 3) it is then presented to the Governor for his signature or veto. If that normal course occurs, then Art. II, § 16 provides [t]hat the Governor’s time to sign or veto a bill runs from presentment: “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, . . .” Art. II, § 16 also 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.” The Constitution is notably silent on the impact of the governor’s sending a bill to the Secretary of State that has not “become law.”

Having been presented with S.B. 117 on the day after the 126th General Assembly’s *sine die* adjournment, former Governor Taft neither signed nor vetoed the bill, but submitted it to the Secretary of State stating his expectation that it would, *subsequently*, become law. Governor Taft’s press release (Exhibit H) was headed “Taft To Allow S.B. 117 To Go Into Law Without

Signature” and began by stating, “Governor Bob Taft today released the following statement regarding his decision to allow Amended Substitute Senate Bill 117 to become law without his signature....” Throughout the release, the Governor indicates that he expects the bill to become law at some point in time in the future, implicitly acknowledging that the bill had not yet become law and would only do so when the 10-day constitutional period had actually passed.

Yet, as Respondent well demonstrates in her brief, the only two acts that cut off the running of the Governor’s 10-day period under Art. II, § 16 are signing the bill or vetoing it, and neither had occurred when Governor Strickland took office on January 8, 2007. In the present case, SB 117 was presented to former Governor Taft on December 27, 2006 and there were two intervening Sundays between the date of presentment and Governor Strickland’s veto. Because Art. II, § 16 authorizes the Governor to have 10 days from the date of presentment, Sundays excepted, to either sign or veto a bill, the bill was still in the control of the Office of Governor on January 8, 2007. As such, Governor Strickland was authorized by the Ohio Constitution to take action on the bill – that is, to sign it or veto it – through January 8, 2007.

Consequently, when Governor Strickland retrieved the bill from the Secretary of State and vetoed it on the same day that he took office, no act of the previous Governor affected or limited the constitutional authority vested in the Office of Governor to take subsequent action. Nothing in the Ohio Constitution prevented Governor Strickland from retrieving S.B. 117 and taking one of the two actions open to him – to sign or to veto the bill.<sup>1</sup> If former Governor Taft

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<sup>1</sup> Relators make much of the fact that no language in the Constitution provides that the Secretary of State may return to the Governor a bill that he filed with her without signing it. But nothing in the Constitution prohibits it, nor is there any reason or basis to read such a provision into the Constitution. Indeed, as the Relator vigorously insists, the Secretary of State’s duties associated with the papers filed with her are merely and wholly ministerial. It is inconceivable that such ministerial authority could interfere with the authority constitutionally vested in the Governor to veto a bill.

had exercised the constitutional power to sign the bill before he filed it with the Secretary of State, then Governor Strickland would have been without constitutional authority to undo that act. But because former Governor Taft had not yet acted by either signing or vetoing the bill, Governor Strickland unequivocally retained the authority to take one of the two actions authorized by Art. II, § 16.

In support of their arguments, Relators also cite case law that they mistakenly characterize as holding that once a Governor has filed a bill with the Secretary of State, the Governor cannot retrieve it and then veto it. But in all of those cases, unlike the present case, the Governor had already *signed* or *vetoed* the bill before filing it, thus putting an end to his authority to act on it: *State v. Lathrop* (1915), 93 Ohio St. 79; *Powell v. Hays* (1907), 83 Ark. 448, 104 S.W. 177 (signed); *People ex rel. Partello v. McCullough* (1904), 210 Ill. 488, 71 N.E. 602 (signed); *Woessner v. Bullock* (1911), 176 Ind. 166, 93 N.E. 1057 (vetoed); *People ex rel. Lanphier v. Hatch* (1857), 19 Ill. 283 (signing and filing would have meant that the bill “would have passed beyond [the Governor’s] control and its status would have become fixed and unalterable”). The present case is easily distinguishable from the case law cited by Relators because former Governor Taft took neither of the actions discussed in the cases on which Relators rely.

**2. Gubernatorial inaction cannot undermine – or trump – gubernatorial action.**

It is of no consequence that during the 10-day review period, the individual occupying the Office of the Governor changes; the authority vested under Art. II, § 16 is fully vested in whoever holds that office. The authority to act – to sign or veto a bill – is a right afforded to the individual properly serving as the Governor at any given point in time. Relators’ argument that the inaction of former Governor Taft should take precedence over the action of Governor

Strickland would require this Court to conclude that the constitutionally authorized action of Governor Strickland could be ignored because an earlier incumbent of the office preferred that Governor Strickland not act in the way he did.

Under this analysis, if, on the second day of the 10-day review period, an incumbent Governor expressed his plan to veto a bill, but had not done so, a Lieutenant Governor succeeding him the next day, due to the death of the governor, would be precluded from signing the bill. Nowhere does the Ohio Constitution recognize the binding nature of a governor's hopes, expectations or preferences, even when specifically articulated.

What Relators fail to recognize, or refuse to acknowledge, is that until a bill has either been signed or vetoed by the Governor, it has not, as a constitutional matter, "passed beyond his control." The governor is still in control of the bill, and he can still, in the exercise of that control, veto it. Accordingly, Governor Strickland acted squarely within his constitutional authority when he vetoed S.B. 117, and Relators' request for a writ of mandamus is inappropriate.

**3. The Governor must always have at least ten days to sign or veto a bill; no action of the General Assembly can reduce the number of days available to the Governor in which to act.**

There are two suggested readings of the "double unless" clause of Art. II, § 16. Relators suggest that, under that clause, the Governor's 10-day review period begins at adjournment *sine die*, even if the Governor has not yet been presented the bill for review. The alternative reading, advanced by the Respondent, is that the 10-day review period begins at presentment, but if the legislature's adjournment *sine die* occurred *after presentment*, the 10-day period starts again from the date of adjournment. Under this reading of the clause, if presentment occurs after *sine die* adjournment, the 10-day period still runs from the date of presentment.

The Relator and Respondent briefs each work to parse the language of the clause to try to ascertain its meaning, but a practical review of the comparative consequences of the two possible interpretations makes clear that the Respondent's interpretation must be right. Under the Respondent's reading of the provision, the Governor is always assured at least 10 days (excluding Sundays) to review presented legislation and is given extra time if the legislature adjourns *sine die* during that review period. Under the Relators' reading of the provision, the Governor is given 10 days in which to veto the bill from the date of adjournment *sine die* even if he has not yet been presented the bill.

The Relators' reading of the provision leads to the constitutionally inconceivable result that the legislature could pass a bill, adjourn *sine die* and hold the bill, delaying presentment to shorten the governor's review period. Indeed, under the Relators' reading of the provision, each chamber of the General Assembly could pass a bill in identical form, adjourn *sine die*, and present the bill to the Governor 20 days later – by which time it would have become law due to the passage of 10 days, thus completely eliminating the ability of the governor to veto the bill.

The language in Art. II, § 16 emphasized on the first page of the Relators' argument – “...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” – is plain in one and only one way. It unequivocally presumes that the Governor has been presented the bill. How could its return have been prevented if it had not yet been presented to the governor? How could it be filed by him, with his objections, in the office of the Secretary of State if it had not been presented to him? The “double unless” clause only applies when adjournment occurs after presentment; otherwise,

the 10-day period runs from presentment, whether that presentment is in the middle of the legislative session or after adjournment.

There is one reasonable, logical reading of this disputed provision and one unreasonable, untenable reading of the provision. The Court must read the provision to mean that the legislature is not authorized to unilaterally reduce or eliminate the Governor's 10-day review period by holding a bill after adjournment *sine die* as it did in this case.

So did the Governor veto S.B. 117 within the timeframe prescribed by Art. II, § 16 of the Ohio Constitution? One can only conclude that he did, since any reading of the Ohio Constitution that would suggest that Governor Strickland did not act in a timely manner would necessarily allow the legislature to unilaterally reduce the number of days available to a Governor to veto a bill. Such a reading, would, therefore, allow the legislature to reduce the number of days to zero, thus eviscerating the Governor's veto authority altogether. And such a reading finds no authority in Ohio's Constitution and is directly contrary to the checks and balances between the branches of government it establishes, substantially increasing the authority of the legislature at the expense of the executive.

**4. Delayed, post-adjournment presentment of a bill, effectuating an elimination of gubernatorial veto authority, can in no way be justified by the absence of opportunity for the legislature to override the veto.**

The General Assembly does not need, and should not be allowed, to eliminate the Governor's constitutional veto authority in an effort to "protect" itself from any gubernatorial power conferred by the Ohio Constitution. Relators may contend that, without this "check" on the Governor's authority, they cannot override a post-adjournment veto, eliminating one of the checks and the check-and-balance separation of powers equation. But such a contention is

without merit since the timing of *how* legislation is considered and *when* it is presented to the Governor are decisions that are within the exclusive control of the General Assembly.

The legislature alone decides when it will pass a bill and when it will present it to the Governor. In the present case, the General Assembly made a conscious decision not to present the bill until after its adjournment, knowing that a post-adjournment veto would preclude the possibility of override. That was the General Assembly's decision. And even then, in the event of a post-adjournment veto, the General Assembly could always pass the bill in its next session and avail itself of the ability to override a subsequent gubernatorial veto.

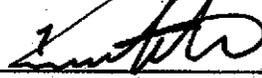
The legislature holds all of the cards with respect to the passage and presentment of a bill to the governor. That authority must not be interpreted to allow the legislature to undermine the governor's time to make a decision about what to do with a bill presented to him.

#### **CONCLUSION**

Art. II, § 16 of the Ohio Constitution provides the Governor with a 10-day time period in which to consider action on a bill. The Governor's constitutional prerogatives must not be sacrificed or compromised by giving Relators the mandamus writ they seek because to do so would demote the Office of the Governor to a subordinate branch of government. That is most assuredly not what the framers of the Ohio Constitution intended. Governor Strickland's veto was timely and, accordingly, *Amici Curiae* in support of Respondent request that this Court deny Relators' request for a writ of mandamus.

Respectfully submitted,

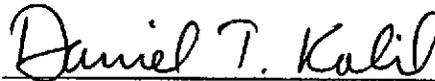
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**CERTIFICATE OF SERVICE**

I certify that on April 16, 2007, the Joint Brief of *Amici Curiae* Governor Ted Strickland and 18 Ohio Professors of Constitutional Law was served, by regular U.S. mail, upon the following:

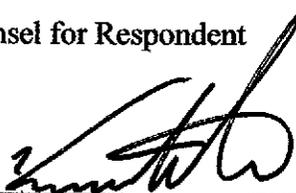
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Courtesy copies have also been provided to other amicus parties.