

IN THE SUPREME COURT OF OHIO

STATE EX REL., OHIO GENERAL ASSEMBLY, ET AL., :

RELATORS, : CASE No. 2007-0209

-v-

: ORIGINAL ACTION IN MANDAMUS

JENNIFER BRUNNER, SECRETARY OF STATE, :

RESPONDENT. :

BRIEF OF *AMICI CURIAE* EQUAL JUSTICE FOUNDATION, COALITION ON HOMELESSNESS AND HOUSING IN OHIO, AARP, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, OHIO STATE LEGAL SERVICES ASSOCIATION, LEGAL AID SOCIETY OF CLEVELAND, LEGAL AID SOCIETY OF COLUMBUS, MIAMI VALLEY FAIR HOUSING CENTER, TOLEDO FAIR HOUSING CENTER, NORTHEAST OHIO COALITION FOR THE HOMELESS, CLEVELAND TENANTS ORGANIZATION, ADVOCATES FOR BASIC LEGAL EQUALITY, LEGAL AID OF WESTERN OHIO, & THE CUYAHOGA COUNTY FORECLOSURE PREVENTION PROGRAM IN SUPPORT OF RESPONDENT

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FILED

APR 16 2007

MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

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STATEMENT OF THE INTERESTS OF THE *AMICI CURIAE*

The *amici curiae* are fourteen nonprofit organizations which comprise a broad cross-section of groups that represent the interests of consumers.

The Equal Justice Foundation is a statewide, Columbus-based nonprofit organization established in 1996 to represent the poor and others who otherwise would not have access to the legal system. It also engages in education of the public, attorneys, and law students.¹ The Foundation has filed lawsuits, including impact litigation, on behalf of the disabled, minorities, migrants, children, the aging, victims of predatory lending and consumer scams,² and tenants denied their rights.

The Coalition on Homelessness and Housing in Ohio is a non-profit corporation organized to advocate for the end of homelessness and for the availability of decent, safe, fair, affordable housing particularly for low income Ohioans. COHHIO has more than 600 organizational members throughout the State of Ohio, numbers of which represent homeowners and borrowers who are victims of predatory mortgage lending.³

¹ EJF acknowledges the research assistance of Alyson Terrell and Shannon Leis, students at Capital University Law School, in the preparation of this brief.

² EJF cases have been instrumental in laying some of the groundwork leading to the adoption by the General Assembly of anti-predatory lending legislation and other public policies that will be significantly undercut if Senate Bill 117 is permitted to become law.

³ COHHIO advocated to amend the Consumer Sales Protection Act (CSPA) to cover certain kinds of mortgage lending practices in order to provide a level of protection to homeowners victimized by predatory mortgage lending as a key feature of S.B. 185, signed by the Governor in June of 2006. Abusive lending practices have been a key reason Ohioans are suffering from the record level of mortgage foreclosures. The damages available to consumers under S.B. 185, was assumed to cover the full range of potential damages suffered by the consumer as was intended under the CSPA when it was first established and has been available throughout its thirty year history. COHHIO maintains

The purpose of the Northeast Ohio Coalition for the Homeless (NEOCH) is to organize and empower homeless and at risk men, women and children in order to break the cycle of poverty through public education, advocacy and the creation of nurturing environments.⁴

The Miami Valley Fair Housing Center (MVFHC) is a private, non-profit fair housing organization in Dayton, Ohio whose mission it is to eliminate illegal housing discrimination and ensure equal housing opportunity for all people in its region.⁵

The Toledo Fair Housing Center ("TFHC") is a non-profit corporation organized under the laws of the State of Ohio. The purposes of the TFHC are to identify and

that the CSPA should not be diluted in the manor that S.B. 117 indicates with an artificial limitation of up to \$5,000 in non-economic damages because it provides a disincentive to avoid unfair, deceptive and unconscionable acts in the practice of mortgage lending and it places businesses not engaged in such behavior at a competitive disadvantage.

⁴ NEOCH supports the veto of S.B. 117 because it believes the law violates home rule and we believe the process for passage of the law violated the open government guidelines established in the Ohio Constitution. The Coalition believes that Ohio has an orderly and constitutional process for seeing that bills become law, and the state legislature violated that process by limiting public discussion on this bill and passing it late at night as they fled the state capital in a lame duck session. This law puts limitations on how municipal government may act when state law gives those local government jurisdictions no guidance on how to address the harm lead paint has created. NEOCH also objects to the limiting of damage awards as also violating home rule provisions of the Ohio Constitution. The Governor had an obligation upon being sworn into office to uphold the Ohio Constitution, and therefore had a duty to return to the legislature bad legislation before it became law.

⁵ Since 2001, the MVFHC has been the lead agency in a collaborative project called the Predatory Lending Solutions project that is designed to offer prevention and intervention services to Miami Valley families who are current or potential victims of predatory lending practices. Since the project's inception, the MVFHC has been advocating for more effective regulation of the subprime lending industry in order to bring better protections to Ohio residents. Senate Bill No. 117 effectively rolls back nearly all of MVFHC's efforts to get better rules and regulations at the state level to protect some of Ohio's most vulnerable citizens.

eliminate all forms of unlawful discrimination in housing in the greater Toledo area, including discriminatory advertising, marketing and sales practices; to educate the public about housing discrimination laws, discriminatory housing practices, and the availability of legal remedies for such discriminatory practices; to provide counseling and referral services to the public with respect to housing discrimination matters; and to expand equal housing opportunities for all persons.⁶

The National Association of Consumer Advocates is a nonprofit association of public and private sector and legal services attorneys, law professors, and students, whose primary practice involves the protection and representation of consumers. Its mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices.

The Ohio State Legal Services Association (OSLSA) is a nonprofit corporation formed in 1966 for the purpose of bringing free civil legal services to low-income Ohioans. OSLSA receives most of its funds from the federal Legal Services Corporation and the Ohio Legal Assistance Foundation. OSLSA provides direct service to 30 southeastern Ohio counties through its Southeastern Ohio Legal Services program (SEOLS), which has offices in nine southeastern Ohio communities. OSLSA also provides services to all of Ohio's legal aid societies through its State Support Center in Columbus. These support

⁶ The Center has recently been working with families that have fallen victim to unscrupulous lending practices. The Consumer Sales Practices Act has worked well as a level of protection to consumers in other lending areas and is an appropriate tool for home lending protection enacted as a result of anti-predatory lending measures enacted by the General Assembly last year. The Center believes that if the veto of Senate Bill No. 117 is not upheld, a consequence is that consumers of all types will enjoy significantly less protection.

services include trainings, publications, task force coordination, and substantive specialty assistance.⁷

The Legal Aid Society of Cleveland, founded in 1905, is the law firm for low-income families in Northeast Ohio. Legal Aid's mission is to secure justice and resolve fundamental problems for those who are low income and vulnerable by providing high quality legal services and working for systemic solutions that empower those it serves. The attorneys of the Legal Aid Society of Cleveland represent clients in civil law cases and primarily address issues of consumer law, housing law, domestic relations, immigration, community development, and issues of health, education, work and income.⁸

⁷ Issues which affect families' abilities to acquire and retain important assets, such as a home and a car, are of central importance to OSLSA as the primary provider of legal services to low-income Ohioans in Appalachia, and as the support entity for the entire state. SEOLS provides representation to many low-income consumers who are increasingly preyed upon by unscrupulous car dealers, home improvement scam artists and mortgage brokers marketing subprime mortgage loans. In particular, predatory lenders target the most vulnerable, who are at the greatest risk to suffer significant non-economic damages. As more low-income families depend on work income rather than welfare payments, cars are critically important to provide reliable transportation to work. In the shrinking affordable rental housing market, home ownership plays a greater role in family stability. OSLSA's clients depend on strong consumer protection laws with effective and meaningful remedies to provide relief from unfair, deceptive and unconscionable business practices. OSLSA believes that low-income consumers have relatively little bargaining power in the limited markets available to them and would be especially hard hit by the limitations to the CSPA that would come into effect if Governor's veto of Senate Bill 117 were reversed.

⁸ Cleveland Legal Aid's representation of consumers particularly addresses recurring issues (e.g., auto fraud, home improvement scams), wherein non-economic damages are available to them under Ohio's Consumer Sales Practices Act. As such, the Legal Aid Society of Cleveland joins this brief of *amici curiae* because the issue to be resolved before this Court may affect important rights of Ohio consumers with respect to the non-economic damages that are currently available to them under the Consumer Sales Practices Act, as recently affirmed by this Court in *Whitaker v. M.T. Automotive, Inc.* (2006), 111 Ohio St.3d 177, 2006-Ohio-5481, 855 N.E.2d 825. The measure may affect these important rights of consumers because the Relators' argument is relevant to whether these non-economic damages will be restricted pursuant to Amended Sub. S.B. 117 (e.g., a \$5,000

The Legal Aid Society of Columbus ("LASC") is a non-profit corporation organized under the laws of the State of Ohio to represent low-income persons in civil matters related to basic human needs, including access to safe and affordable housing. Many of LASC clients have young children and live in older, inter-city properties, where the risk of exposures to lead based paint is extremely high.⁹

AARP is the largest membership organization in the nation serving the needs and interests of people age 50 and older, with over 37 million members, 1.6 million of whom reside in Ohio. AARP acts to combat fraud and deceptive practices that disproportionately affect older consumers in the marketplace. In the past decade, AARP has focused its efforts to protect homeownership of older persons, particularly in the face of widespread abuse in the home mortgage market.¹⁰

The Cleveland Tenants Organization is a non-profit organization established in 1975 for the purpose of assisting tenants and landlords to understand their rights and responsibilities under the Ohio Landlord Tenant Law.¹¹

cap) or whether they will remain available to Ohio consumers as articulated by this Court in *Whitaker*.

⁹ Due to funding and regulatory limitations, LASC cannot bring actions on behalf of these clients against the manufacturers of the lead based paint, and thus these families must rely on government entities such as the City of Columbus to take action against the lead-based paint industry. If the veto of S.B. 117 is not upheld, these families will lose a significant protection.

¹⁰ AARP's state advocacy has resulted in passage of eighteen laws designed to protect consumers from predatory practices in the home mortgage market. AARP was a strong advocate for the Ohio Consumer Sales Practices Act whose recent June 2006 amendments, for the first time, conferred on Ohio homeowners the right to obtain redress for predatory mortgage lending practices.

¹¹ The purpose of Cleveland Tenants Organization is to expand the supply of safe, decent, fair, affordable and accessible rental housing in Greater Cleveland by informing citizens of

Legal Aid of Western Ohio, Inc. (LAWO) and Advocates for Basic Legal Equality, Inc. (ABLE) are non-profit corporations organized under the laws of the State of Ohio. LAWO and ABLE provide free, high quality legal assistance to low-income persons in 32 counties in northwest and west central Ohio who cannot afford to hire a private attorney to help them with their legal problems.¹²

their rights and duties in rental housing; representing tenants and the interest of tenants in the preservation and promotion of rental housing rights; empowering tenants individually and collectively to represent themselves and their interests; advocating for the needs of low and moderate income tenants; resolving disputes between landlords and tenants; preventing homelessness; and combating discrimination based on race, religion, color, gender, handicap, familial status, social/economic class, and sexual orientation. Moreover, the Greater Cleveland Lead Advisory Council, lead by The Cleveland Department of Public Health, Cuyahoga County Board of Health, Lutheran Metropolitan Ministry, Cleveland Tenants Organization, Environmental Health Watch, and over forty government and non-profit agencies, has embarked on an ambitious plan to eliminate the occurrence of childhood lead poisoning by the year 2010. As a member of the GCLAC, the Cleveland Tenants Organization recognizes the importance that companies that previously sold lead paint take an active part in the resolution of this crisis and in attempting to alleviate damages already done. If this Court should overturn Governor Strickland's veto of S.B. 117, it would significantly limit the damages available to those families affected by the hazards of lead paint. Additionally the liability of those companies that are directly responsible would be substantially reduced.

¹² LAWO and ABLE represent low-income persons and groups in a variety of areas, including consumers' rights, civil rights, immigration, and housing law. An increasing number of LAWO and ABLE clients need help with mortgage foreclosure and debt collection cases that frequently involve predatory loans, house flipping, and other illegal lending practices. Homes sold in this manner often have unsafe and unsanitary conditions which result in children suffering from lead paint poisoning, carbon monoxide poisoning from malfunctioning furnaces and stoves, and asthma attacks triggered by cockroach infestations or mold or moisture damage from leaking roofs or bad plumbing. These conditions force involuntary relocation of our clients, who then incur additional costs for replacement of basic necessities. Limiting damages collected for these losses can result in ongoing financial and health risks. The Consumer Sales Practices Act (CSPA) and other provisions targeted in S.B. 117 provide substantial protections and remedies for these types of problems and will be a critical part of enforcing the anti-predatory lending measures the General Assembly adopted last year. It is important to LAWO and ABLE clients that the CSPA and other protections addressed in S.B. 117 not be weakened.

The Cuyahoga County Foreclosure Prevention Program was created in 2006 following an in-depth study examining the scope of the residential foreclosure problem within Cuyahoga County commissioned by the Cuyahoga County Commissioners. The program works toward eliminating the root causes of the foreclosure epidemic and is the culmination of a series of meetings with consumer advocates in Cuyahoga County. Recognizing that education is an effective means of addressing the root causes of foreclosures, the program provides counseling help to the borrowers of Cuyahoga County in financial distress and provides comprehensive education to those who are considering home loans or have questions about their credit. The program is a true public private partnership receiving funds from the county as well as several local and national partner organizations.

STATEMENT OF THE CASE AND THE FACTS

Amici Curiae adopt by reference the Statement of the Case and the Facts set forth in Respondent's Motion to Dismiss and facts based upon other exhibits filed by the parties in this case as noted herein.

ARGUMENT

The real object of this case is the undoing of Governor Strickland's veto of Senate Bill 117, not the performance of a ministerial task by Secretary of State Brunner. What the Relators really seek is a declaratory judgment or an advisory opinion that the veto was ineffective and that the bill became law. The Relators' misstyling of this case as a mandamus action against Secretary of State Brunner, apparently in order to invoke this Court's original jurisdiction rather than follow the proper path through the state courts, is

not only an improper attempt to draw this Court into a political dispute, it is dangerous. To grant such an end-run of the judicial process, this Court would have to ignore its own earlier interpretation of the Ohio Constitution and overreach to misinterpret the Ohio Constitution to abridge the Governor's veto power. Even if the Relators had the better of the legal arguments, which they do not, a mandamus action is a manipulation of the judicial process to make the task easier.

As it stands now, S.B. 117 is a vetoed bill. The Relators' have two proper courses of action, namely, either to try to override that veto in the manner set forth in Article II, Section 16 of the Ohio Constitution or to introduce new legislation to accomplish its ends, not to try to sidestep the political process by trying to get this Court to interfere with the separation of powers. The Court should decline that invitation.

In the alternative, if the Court concludes that Senate Bill 117 was not vetoed, it should declare unconstitutional the purported amendments to the consumer (Consumer Sales Practices Act) and product liability amendments (the bases for the Strickland veto and, in part, for Governor Taft's refusal to sign the measure) as violative of the single subject requirement of the Ohio Constitution, Article II, Section 15(D).

I. THE GOVERNOR EFFECTIVELY VETOED SENATE BILL NO. 117.

The question whether Governor Strickland's veto was valid turns on whether S.B. 117 had already become law before the veto, or whether it was still an unsigned bill. That question in turn depends upon whether the bill had become a law without signature ten days after the Senate adjourned, as the Relators urge, or, as their *amici*, a coalition of commercial, manufacturing and business interests (hereinafter, "Commercial Interest

amici”), inconsistently argue, at the time of filing even if it was within the ten-day period. Neither of those positions is correct; the bill was still an unsigned bill, with the ten-day clock running, when Governor Strickland vetoed it on January 8, 2007. Senate Bill 117 would not have become law until 12:01 a.m. on January 9, because the bill was presented to Governor Taft on December 27, 2006, and ten days after December 27, 2006 (excluding Sundays) was January 8, 2007. Therefore, when Secretary Brunner returned S.B. 117 to Governor Strickland on January 8, 2007 and he vetoed it on that date, it had not yet become law, because the constitutionally required ten-day period had not passed.

All the Relators’ discussion of Governor Taft’s “intention” is meaningless: his intentions cannot and do not change the Constitution. Governor Taft did indeed have the power to make sure the bill became law before he left office: *by signing it*. Had he simply signed the bill, it would have become law, and that would have been the end of it; Governor Strickland would not have been able to veto, and we would not be here. But for whatever reasons he had, Governor Taft chose not to sign the bill, either incorrectly assuming that the time would run before Governor Strickland succeeded him, or deciding to take that risk, and here we are.

Likewise, all the Relators’ and their *amici*’s arguments regarding the Secretary of State’s alleged duties depend upon the bill already having become law. If S.B. 117 was still just a bill, not a law, none of those duties attaches, and therefore of course mandamus does not lie.

A. THE GOVERNOR AND THE RESPONDENT PROPERLY CALCULATED THE TEN-DAY PERIOD.

The first issue to clarify is the correct day upon which the bill would have become a law without the Governor's signature. The Relators' argument that Governor Strickland could not veto S.B. 117 depends upon their ability to persuade this Court that the ten-day period had already run and the bill had already become a law prior to the veto. But in order to make that argument, the Relators are forced to assert that the Constitution must be read to allow counting from adjournment, not presentment, where adjournment came first. Their proposed reading, however, is simply incorrect, by virtue of this Court's precedent, by the requirements of the separation of powers, and by plain logic.

Article II, Section 16 of the Ohio Constitution provides the ways in which a bill becomes a law in our state. It reads in pertinent part:

If the governor approves an act, he shall sign it, it becomes law and he shall file it with the secretary of state.

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

There are two ways for a bill approved by the governor to become law: either the governor signs it, or ten days pass following presentment without either signature or return with objections. That's it. Contrary to the suggestion of the Relators' *amici*, at page 6 of their brief, there is *no* provision for a bill automatically to become a law upon the governor's filing it, without signature, *earlier* than ten days from either presentment or adjournment.

A simple timeline of the relevant dates shows why the key question here is whether the “presentment” or the “adjournment” counting rules apply:

| Date | Event | Relator’s proposed counting | Correct counting |
|---------------------|--|-----------------------------|---|
| Thursday, 12/14/06 | House and Senate pass bill. | | |
| ~~~~~ | | | |
| 12/15/06- 12/25/06 | Bill held for 13 days | | |
| ~~~~~ | | | |
| Tuesday, 12/26/06 | Senate adjourns. | | |
| Wednesday, 12/27/06 | Sub. S.B. 117 presented to Gov. Taft. ¹³ | Day 1 | Does not count (day of presentment; 1945 OAG 496) |
| Thursday, 12/28/06 | | Day 2 | Day 1 |
| Friday, 12/29/06 | | Day 3 | Day 2 |
| Saturday, 12/30/06 | | Day 4 | Day 3 |
| Sunday, 12/31/06 | | Day 5 ¹⁴ | Does not count (Sunday) |
| Monday, 1/1/07 | | Day 6 | Day 4 |
| Tuesday, 1/2/07 | | Day 7 | Day 5 |
| Wednesday, 1/3/07 | | Day 8 | Day 6 |
| Thursday, 1/4/07 | | Day 9 | Day 7 |
| Friday, 1/5/07 | Secy. Blackwell accepts, files, and signs bill; Gov. Taft says he intends that it become law. | Day 10 | Day 8 |
| Saturday, 1/6/07 | | | Day 9 |
| Sunday, 1/7/07 | | | Does not count (Sunday) |
| Monday, 1/8/07 | Secy. Brunner returns bill to Gov. Strickland at his request; Gov. Strickland vetoes the bill. | | Day 10 |

¹³ Note that the General Assembly did not present the bill to the Governor for thirteen days after it was passed, and not until after adjournment.

¹⁴ *Amici* do not concede that the Relators are correct as to the different rules for counting Sundays under the “presentment” and “adjournment” rules (*see* Relators’ Merit Brief at 7-8), but do not dispute the point, because it does not affect the result in *Amici*’s analysis.

If the “adjournment” counting rules apply, then the bill became law before January 8, 2007, and Governor Strickland had no power to veto it. But if the “presentment” rules apply, then the bill was not yet a law, because it was unsigned, and the ten days would not expire until midnight, so the bill could still be vetoed. The Relators’ argument that the adjournment provision applies is incorrect.

The Relators’ reliance on *Maloney v. Rhodes* (1976), 45 Ohio St.2d 319, is misplaced. In *Maloney*, outgoing Governor Gilligan *had* signed the bills; the question was whether the absence of the signatures of the President of the Senate justified the Secretary of State’s refusal to file them and instead to give them to incoming governor Rhodes. The conclusion was that although a law that does not contain the signatures of the presiding officers of the House and Senate is constitutionally invalid, the Secretary of State does not have the authority to determine constitutionality but does have the duty to file “a law, properly delivered to him, which was enacted by the passage of a bill ... and **which became a law upon the affixing of the signature of the Governor.**” *Id.* (Syllabus, ¶ 1) (emphasis added).

Although the “adjournment vs. presentment” question was not at issue in *Maloney*, because in that case the Governor had signed the bill, this Court clarified that the “adjournment” counting rules apply only when adjournment occurs *after* a bill has already been presented to the Governor, not, as here, where presentment came *after* adjournment:

The language of the Constitution is unmistakably clear that the Governor ... has but three options with regard to bills sent to him for signature. (1) He may sign if he approves the bill, in which case he is required to file the law with the Secretary of State; (2) he may veto if he disapproves the bill, in which case he is required to return it with his objections to the house of the General Assembly in which it originated; (3) he 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 it 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 the adjournment, files it with his objections in writing in the office of the Secretary of State. The Governor is required to file with the Secretary of State every bill **which becomes law** without his signature.

Id. at 323-24 (emphasis added). The “If” construction clarifies that the “adjournment” provision does not even apply unless “the General Assembly adjourns **within** the ten day period” – not “before” or “without respect to,” but “**within**” the ten day period after presentment. If the opposite meaning were intended, this Court could have written, “If the General Assembly adjourns either before or during the ten day period” or, more ambiguously, “If the General Assembly adjourns.” But this Court didn’t; it explicitly wrote, “**If** the General Assembly adjourns **within** the ten day period.” Thus, in the present case, where the General Assembly did not adjourn “within the ten day period,” but before the Governor was presented with the bill, the presentment counting rules apply, and the tenth day was Monday, January 8, 2007.

This Court was correct in *Maloney*. The ten day period is intended to give the Governor a full ten days in which to decide what to do about a bill. *State v. Lathrop* (1915), 93 Ohio St. 79, 82. *See also* 1961 OAG 2615 (Governor’s office is entitled to ten days to evaluate a bill and formulate objections after presentment, and the day of presentment is excluded and the tenth day is included); 1945 OAG 496 (same). The Relators’ proposed reading of Article II, Section 16 is thus irrational; what proper purpose would be served by shortening the Governor’s consideration time? The federal constitutional provision at issue in *Edwards v. United States* (1932), 286 U.S. 482, which,

because it provides that inaction by the executive results in a “pocket veto,” was very different from Ohio’s, but the United States Supreme Court’s reasoning in that case as to the executive’s consideration period applies with identical force here. The Court observed that one of the “definite and controlling purposes” of the President’s ten day consideration period is

to safeguard the opportunity of the President to consider all bills presented to him, so that it may not be destroyed by the adjournment of the Congress during the time allowed to the President for that purpose. As this Court said in *The Pocket Veto Case*: ‘The 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.’

Regard must be had to the fundamental purpose of the constitutional provision to provide appropriate opportunity for the President to consider the bills presented to him. ... **No possible reason, either suggested by constitutional theory or based upon supposed policy, appears for a construction of the Constitution which would cut down the opportunity of the President to examine and approve bills merely because the Congress has adjourned.** No public interest would be conserved by the requirement of hurried and inconsiderate examination of bills

Id. at 486, 493 (citation omitted) (emphasis added).

The Relators’ proposed reading would invite abuse, because it would provide the legislature with a veto-proof window every time it adjourns. The legislature could strip the Governor of the veto power by the simple expedient of not presenting a bill to him or her until ten days following adjournment. Even if the legislators waited fewer than ten days, anything fewer than ten days would shorten the constitutionally mandated period for the Governor to consider. Our Constitution’s balance of power provisions do *not* grant the Governor veto power “except in December” or ten days to consider “unless the legislature

decides to give less.” The Relators’ proposed reading is thus unconstitutional as well as irrational and inconsistent with this Court’s reading in *Maloney*.

The Idaho Supreme Court made just that observation in *Cenarrusa v. Andrus* (1978), 99 Idaho 404, 582 P.2d 1082, a declaratory judgment action. The facts and issues of *Cenarrusa v. Andrus* are very similar to those of the present case:

This appeal involves questions of a governor's vetoes of two bills passed by the Idaho Legislature in 1976 and forwarded to the Governor for his consideration only after the close of the legislative session. The precise question applicable to both bills is whether the Governor's vetoes were ineffective because not within the time limitation placed upon his veto power by Article 4, § 10, Idaho Constitution, the relevant portions of which are:

§ 10. VETO POWER. Every bill passed by the legislature shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it with his objections to the house in which it originated, which house shall enter the objections at large upon its journals and proceed to reconsider the bill. . . . Any bill which shall not be returned by the governor to the legislature within five days (Sundays excepted) after it shall have been presented to him, shall become a law in like manner as if he had signed it, *unless the legislature shall, by adjournment, prevent its return, in which case it shall be filed, with his objections, in the office of the secretary of state within ten days after such adjournment* (Sundays excepted) *or become law.* (Emphasis supplied.)

Id. at 405, 582 P.2d at 1083. The Idaho Supreme Court rejected the same argument that the Relators make here and held that “the governor has ten full days from the date of presentment in which to consider bills presented to him after adjournment of the Idaho Legislature.” *Id.* at 410, 582 P.2d at 1088. That court explained:

Presentment provides an opportunity for the governor to give full consideration to a bill as finally passed by the legislature. The wise exercise of the executive right of veto necessarily requires thoughtful deliberation, which in turn requires time commensurate with the responsibility.

Id. at 417, 582 P.2d at 1085. The court noted that although Idaho's constitutional provision, like Ohio's, was the opposite of the federal "pocket veto" rule, the *Edwards* reasoning applied:

In *Edwards v. United States*, the United States Supreme Court considered the question whether Congress could by adjournment cut off the right of the President to approve a bill which had been presented to him less than ten days prior to adjournment but which he had not yet signed when adjournment occurred. It was there held that the President could sign a bill within ten days after it had been presented to him, irrespective of the adjournment of Congress. ...

We full well realize that the Idaho constitutional provision, which requires an active veto to prevent a bill from becoming law after the legislature has adjourned, is quite different in operation from the federal "pocket veto" provision. We nevertheless declare that the same fundamental purpose underlies the requirement of presentment found in both constitutions. In this case **the choice is between a construction of our constitutional language which would provide a definite amount of time for gubernatorial consideration of bills and one which 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.** The reasoning of the Supreme Court in *Edwards* is readily applicable here.

Id. at 407-8, 582 P.2d at 1085-86 (citation omitted) (emphasis added). The Court concluded forcefully:

If we were to hold that the governor was without power to veto a bill more than ten days after adjournment, **the legislature would be in a position to defeat at will one of the constitutionally granted powers of a separate and coequal branch of government merely by delaying presentment beyond the time in which the governor**

could act. A construction of the Constitution which defeats the very purpose of allowing the governor an opportunity to consider the wisdom of a bill is to be avoided.

Furthermore, 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, 582 P.2d at 1087 (emphasis added).

The Idaho high court also looked at *State ex rel. Peterson v. Hughes* (1939), 372 Ill. 602. In *Peterson*, the Illinois Supreme Court construed Article V Section 16 of the Illinois Constitution, the language of which is similar to Article II Section 16 of the Ohio Constitution:

Any bill shall not be returned by the Governor within ten days (Sundays excepted) after presentation to him, it shall be a law in like manner as if signed by him, unless the General Assembly shall, by their adjournment, prevent its return, in which case it shall be filed with his objections in the office of the Secretary of State, within ten days after such adjournment, or become a law.

The Illinois Supreme Court considered Article 5 Section 16 of the Constitution and held that the date of presentment controlled even where the legislature adjourned:

The purpose of granting the Chief Executive authority to approve or disapprove legislative matters was to enable him to prevent, as far as possible, the evils that flow from hasty and ill-considered legislation. The provision was one of the constitutional checks and balances exercised by one department of government over the other. It is a basic part of our scheme of government and is jealously guarded by the courts.

The constitutional provision granting the Governor ten days within which to approve or disapprove a bill and file the same if vetoed, must, as to all bills coming in the fourth class (those presented after adjournment), be the ten days following presentment. ... It cannot be given an

interpretation which will impair, or abridge, the time within which the Governor may exercise his veto power. If the provision in reference to filing in the office of the Secretary of State within ten days after adjournment was to control, then we are forced to the adoption of one of two impossible constructions. One would impair the legislative power to fix the time of presentment, the other would lessen the period of time for the Governor's consideration of the matter, and in House Bill No. 537, remove it entirely.

Id. at 607, 612. Accordingly, one year later, in *People ex. rel. Erskine v. Hughes* (Ill. 1940), 25 N.E.2d 801, the Illinois Supreme Court considered a writ of mandamus to compel the Secretary of State to authenticate and publish a bill. The bill was passed on June 27, 1939, and on June 30, 1939, the General Assembly adjourned *sine die*. Then, on July 8, 1939, the bill was presented to the Governor. The Governor filed the bill with his objections within ten days (Sundays excepted) with the Secretary of State on July 20, 1939. Just as in the present case, the appellant argued that the bill became a law because the Governor had no right to veto it more than ten days after adjournment of the General Assembly. The Illinois Supreme Court rejected that reasoning and held that its constitutional provision does not require that all bills be presented to the Governor before adjournment or forthwith thereafter. Therefore, the Governor had the power to veto a bill more than ten days after adjournment of the General Assembly but within ten days, Sundays excepted, after it was presented to him. *See also Williams v. Morris* (1995), 464 S.E.2d 97 ("If this Court adopts the interpretation of section 21 of Article IV proposed by the Senator [allowing adjournment to cut off the Governor's consideration period], the practical effect of such an interpretation will be to render the Governor's veto power a nullity under certain circumstances." *Id.* at 98.).

The cases offered by the Relators in support of their argument that the correct ten day period was the "adjournment" period do not help their cause. *State v. Eley* (Ala. App.

1982), 423 So.2d 303, and Ohio Attorney General Opinions 2615 and 496, (*See Relators' Merit Brief at 6, 7-8*) dealt only with the question whether Sundays are to be counted or not under the "adjournment" provision, an irrelevant issue here. There was not even any issue about day-counting at all in *City of Toledo v. Lynch* (1913), 87 Ohio St. 444, or *Woessner v. Bullock* (1911), 176 Ind. 166, 93 N.E. 1057 (*Relators' Merit Brief at 6, 7*), both of which are relied upon only for statements of general principles of constitutional construction. Reaching back a full century yields nothing more helpful than *Wrede v. Richardson* (1907), 77 Ohio St. 182, which likewise had nothing to say about the correct ten day period: that case dealt only with a businessman who sought to avoid a tax by introducing parol evidence that the bill creating the tax was never properly presented to or considered by the Governor, who was very ill at the time.

Under the plain meaning of Article II, Section 16 of the Ohio Constitution and consistent with the decision in this Court in *Maloney*, the separation of powers doctrine, the decisions of courts in other jurisdictions facing similar issues, and the requirement that the Constitution must be read so that all its provisions are neither irrational nor superfluous, the "presentment" period, not the "adjournment" period, is the applicable ten-day period on these facts. As the tenth day of that period was January 8, 2007, the bill had not yet become law under that provision when Governor Strickland vetoed it that day.

Finally, the Relators suggest that Taft's expressed intention that the bill become law without his signature should affect the analysis. That suggestion, like the contention of their *amici*, at page 3 of that brief, that "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," is simply incorrect. "Filing" an unsigned bill by sending it

over prior to the expiration of the ten-day period doesn't "seal" anything. Signing does – but the Governor did not sign the bill. The Relators' observation, at page 8 of their brief, that Governor Taft filed the bill with the Secretary of State "with no indication that he had not had sufficient time to consider it" is likewise irrelevant. The Constitution does not say that an unsigned bill becomes a law when the Governor indicates he or she has had sufficient time to consider it; it says ten days.

Outgoing Governor Taft's apparent hope and expectation that the bill would become a law without his signature are irrelevant, as is any error he made regarding the ten day period. His hopes, expectations, and errors do not change the Constitution, which grants the Governor ten days to consider a bill. Had Governor Taft changed his mind and decided to veto or sign the bill, he could have done so any time before the expiration of the ten days. That "the Governor" was Governor Taft at the beginning of the period but Governor Strickland at the end has no effect upon the power of "the Governor" during the period. The last day belonged to Governor Strickland, and he used it.

It is true that a new administration cannot simply undo what its predecessor did. But that only applies to completed actions; work left unfinished is picked up by the new governor, and he certainly need not do what he thinks his predecessor would have preferred. If Governor Taft had wanted the bill to be protected from Governor Strickland's veto, he could simply have signed it. But he chose not to do that because the legislature had boxed him in with a multi-subject bill, some of which he approved. See Complaint Exhibit H, News Release of Governor Bob Taft, January 5, 2007 and *see* Part III below. In any case, having left it unsigned, his successor vetoed it.

The Relators' reliance upon the language of *Powell v. Hayes* (1907), 83 Ark. 448, 104 S.W. 177, 180 is surprising: "The time allowed the Governor for the consideration of bills is a matter of privilege with him, and may be waived by him, and he may validly sign a bill any time within the period allowed." Exactly. The Governor need not use all the ten days to consider a bill; he or she can waive that time – **by signing it**. Signing the bill is the only method spelled out in the Constitution for "waiving" any part of the ten day period. If the Constitution also provided for early filing or stating intent to waive the time, it would say so.

The Commercial Interest *amici* go even further, arguing that even if the "presentment" period applied, it was waived or shortened by Governor Taft's having sent the bill over early to the Secretary of State's office with the intention that it become law without signature: "Once filed with the Secretary, S.B. 117 became law" (at 4); "Upon the Governor's filing of a bill with the Secretary, it becomes law." (at 5); "Accordingly, when S.B. 117 was filed by Governor Taft with the Secretary on January 5, 2007, it became the law..." (at 5); "there is finality under the Ohio Constitution as soon as the Governor files the bill – whether signed or unsigned – with the Secretary of State." (at 6); "The Ohio Constitution is clear that a bill becomes law at the moment it is filed. ..." (at 6); and so forth. This fusillade of repetition doesn't make the premise correct, as the Commercial Interest *amici* actually point out itself in stressing the language of Article II, Section 16: "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.'" (Commercial Interest *amici* at 6-7; emphasis in their brief). It is certainly

true that the Governor has the duty to file every bill **that becomes law**. But an unsigned bill only becomes a law **after** the ten days have passed. The argument of Relator's *amici* that filing early somehow changes the ten day period amounts to the circular proposition that the Governor had the duty to file a bill, because it is a law, not a bill, because he filed it.

The Relators' and the Commercial Interests' proposed reading would require this Court to hold that the constitutional provision regarding the Governor's signature is altogether meaningless, in violation of its duty not to construe constitutional provisions as superfluous. Under their reading, the Secretary of State would have to treat a bill filed less than ten days after presentment exactly the same way whether or not it were signed, as if the constitutional provision didn't even exist – or, more to the point, as if it existed solely to allow the Governor to exploit the legislative process for political posturing. But early filing is not the same as a signature. Our Constitution does give the Governor a means to permit a bill to become a law without his or her signature, but it isn't filing early; it is filing without objection after ten days. Governor Taft did indeed have the power to see that the bill became law before the ten days had run and he left office: he could have **signed the bill**. This Court should deny the request to create a third method that suits the Relators' interests in this case.

It is true that a new administration cannot simply undo what its predecessor did. But that only applies to completed actions; work left unfinished is picked up by the new governor, and he certainly need not do what he thinks his predecessor would have preferred. If Governor Taft had wanted the bill to be protected from Governor Strickland's

veto, he could simply have signed it. But he chose not to do that, disclosing his ambivalence to the public. Complaint Exhibit H.

B. THE SECRETARY OF STATE DOES NOT HAVE A DUTY TO FILE THE VETOED BILL AS LAW.

The Relators seek to enforce a legal duty that simply does not exist. There is no authority supporting their assertion that the Secretary of State has any duty to file as law an unsigned bill for which the ten-day period of consideration has not run.

Secretary Brunner was acting in her ministerial capacity both when she accepted S.B. 117 from Governor Taft and when she returned it to Governor Strickland. She does not have discretion to determine the constitutionality of a law. If she had refused to return the bill to Governor Strickland upon his request, she would have been exercising discretion.

Accordingly, no matter who was in the Governor's office, the Secretary of State correctly returned the unsigned bill, which had not become a law, to the Governor at his request. She did not have the duty urged by the Relators to file the bill prior to the expiration of the ten day period. The Governor, whether Taft or Strickland, had the power to recall the unsigned bill within the ten days. A new Governor picks up where predecessor left off, so as to an unsigned bill, he can sign it, send it back with objections, or let the time run.

Our Constitution does not provide for early filing of unsigned bills. Article II Section 16 directs: "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 only way provided for a bill not returned to the house of origin becomes law without his

signature is by the passage of ten days. As the correct period ended on January 8, Governor Taft, whatever his intentions or understanding, was premature in filing the bill on January 5. Nothing in the Constitution (or anywhere else) says that the Governor must keep the bill in his possession lest the period be tolled, or that he cannot ask for an unsigned bill back before it becomes law. There being no rule saying the Governor cannot ask for the bill at that time, the Secretary of State certainly cannot be said to have a ministerial duty to deny that request. As this Court said in *State ex rel. Governor v. Taft* (1994), 71 Ohio St.3d 1, 3, “[t]hese are clearly duties the relator has invented as a peg on which to hang his real request, a declaratory judgment on the constitutionality” of something else, in this case, the Governor’s veto. The Relators’ expectation that this Court will reverse itself to suit their purposes is an insult to the integrity of the Court.

The Commercial Interest *amici* go even farther, arguing that the Governor has the *duty* to file an unsigned bill immediately upon deciding to do so: “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 Secretary of State.” (Brief at 5.) Of course, that is not what the Constitution says. Rather, it provides that the Governor must file a bill **after** it **becomes a law** – which means after the Governor signs it or ten days pass, **not** after the Governor “determines whether he will sign.”

Relators argue that even if a bill has not yet become a law, the Governor cannot have it sent back after it has been deposited with the Secretary of State, citing R.C. 111.08, which requires the Secretary of State to keep laws “and other such papers and documents as are required to be deposited in his office.” (Brief of Relators at 11). But as an unsigned bill, S.B. 117 wasn’t “required” to be filed before ten days passed. As an unsigned bill is

neither a “law” Nor a document “required to be deposited in [the Secretary of State’s] office,” its exclusion from the items the Secretary of State is required to keep is implied (*expressio unius est exclusio alterius*). Whatever arguments could be made for a rule prohibiting the Secretary of State from complying with a request to return an unsigned bill on which the time has not yet run, there just isn’t any such rule, or anything else regarding the status of a bill not yet law in the Secretary of State’s office. Therefore, mandamus cannot lie. The Constitution says, “The Governor shall file with the Secretary of State every bill not returned by him to the house of origin **that became law** without his signing.” Not “every bill” – “every bill ... that became law without his signing.” Here again, this Court is being asked to read out provisions of the Constitution or to treat them as superfluities.

The Relators rely on several cases that actually undercut their assertions. In *Powell v. Hayes* (1907), 83 Ark. 448, 104 S.W. 177, for example, an acting Governor had signed a bill intending it to become a law. The next day, his successor vetoed the bill. The Arkansas court held that the veto was improper despite the acting Governor’s having neither reported his approval to the legislature nor filed the bill with the Secretary of State – **because the Governor had signed the bill**. Filing was not the determining event; signing was. Likewise, in *People ex rel. Partello v. McCollough* (1904), 210 Ill. 488, 71 N.E. 602, the Governor had **signed** the bill at issue, and the language that the Relators themselves quote from 1943 Texas Attorney General Opinion No. 0-5310 stresses that a Governor may not recall a bill “when he approves **and signs** a bill and deposits it with the Secretary of State.” (Brief of Relators at 18; emphasis added). Relators’ reliance on these cases is puzzling; the whole point here is that there is a difference between signed bills and

unsigned bills on which the time has not yet run. No one is arguing that had Governor Taft signed S.B. 117, it would not have become law, and the Secretary of State's duties as to laws would not have attached.

The Relators are incorrect that Secretary Brunner has a ministerial duty to file S.B. 117 as a law. In *Maloney v. Rhodes* (1976), 45 Ohio St.2d 319, the court adopted Black's Law Dictionary's definition of a "ministerial act," one that "a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done." *Id.* at 323. See also *State ex rel. O'Grady v. Brown* (1976), 48 Ohio St. 2d 17; *State ex rel. Watkins v. Donahey* (1924), 110 Ohio St. 494. If Secretary Brunner can only act in a ministerial capacity, then her actions must follow a rule (either constitutional or statutory). However, there is no constitutional or statutory rule providing for what the Secretary of State should do when the Governor asks for the return of a bill. Therefore, if Secretary Brunner had refused to return the bill, she would have been exercising improper discretion in determining the Governor's rights. In *Maloney*, this Court held that "[t]he Secretary of State is required by Section 16, Article II of the Ohio Constitution, to file a law, properly delivered to [her], which was enacted by the passage of a bill by both Houses of the General Assembly by the required majority vote **and which became a law upon the affixing of the signature of the Governor.**" (Syllabus, emphasis added). There is no constitutional provision or statute stating that the Secretary of State has the ministerial duty to accept the filing of bills, and because the ten day period had not passed, S.B. 117 was not a law, it was a bill.

This Court's reasoning in *Maloney* included the observation that one of the Governor's options in dealing with a bill is that

he 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 it 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 the adjournment, files it with his objections in writing in the office of the Secretary of State. The Governor is required to file with the Secretary of State **every bill which becomes law without his signature.**"

Id. at 324 (emphasis added). Here, the bill that Governor Taft filed had not yet become law, because the ten day period had not yet run, so there was no duty to file it with the Secretary of State.

It is true that in *Maloney*, this Court stated that "[t]he Secretary of State has no option. The Secretary of State is obligated by the Constitution and [her] oath of office to file the law when it is presented to [her] for filing. It is a ministerial act. It is not discretionary." However, in this case, Secretary Brunner was not asked to file "a law." She did not have a constitutional obligation to file the bill until it became a law, which would have taken place at midnight on January 8, had Governor Strickland not vetoed it.

The facts of *Maloney* are different from those of the present case. In *Maloney*, the issue was whether the Secretary of State could refuse to file a bill "upon the ground that such legislation, if enacted, . . . will be in conflict with the constitution, state or federal." 45 Ohio St.2d at 322. Here, Secretary Brunner did not return S.B. 117 to Governor Strickland because she determined that the bill – if enacted into law – would be unconstitutional. This Court continued, "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 (emphasis added). Again, *Maloney* refers to the filing of a law; the issue now before the Court is whether Secretary Brunner had the duty to file a bill and not return it to the Governor before it actually became a law.

The Relators rely on the language in *Ex rel. Marcolin v. Smith* (1922), 105 Ohio St. 570, that the Secretary of State must do his or her duties “in a manner prescribed by law.” Once again, there is no law or constitutional provision prescribing duties regarding unsigned bills. In *Marcolin*, this Court held that the Secretary of State cannot refuse to submit a properly filed petition to the electors. But in *Marcolin* as well, this Court stated that “no officer or tribunal may interfere either with the enactment of laws or the amendment of the constitution while the same is in process, **upon the ground that such legislation, if enacted, or constitutional amendment, if adopted, will be in conflict with the constitution, state or federal.**” *Id.* at 572 (emphasis added). Secretary Brunner did not return the bill to Governor Strickland because the proposed bill would be an unconstitutional law, but at his request. She did not exercise discretion; the Governor did. If the Relators wish to challenge the propriety of the Governor’s exercise of discretion, a mandamus action against the Secretary of State is not the proper method.

The Secretary of State, whose duties are primarily ministerial, was required to return S.B. 117 to the Governor at his request, because the Governor has the executive power to carry out his constitutionally articulated powers and to direct other executive officers when they are acting in ministerial capacities. Just as the Secretary of State cannot exercise discretion to refuse to file a law signed by the Governor, she cannot exercise discretion with regard to whether to return an unsigned bill to the Governor at his request

before the ten days have run. This Court said in *Maloney* that “[t]he secretary of state is not vested with any jurisdiction to determine judicial questions dealing with the constitutionality of any law. His duties are merely ministerial in this respect, not discretionary.” 45 Ohio St.2d at 323. If Secretary Brunner had not returned the bill to Governor Strickland, she would have been making a judicial determination that S.B. 117 became a law prior to the passage of ten days simply because Governor Taft intended it to become law and filed it, unsigned, with the Secretary of State, and that determination would have been in direct defiance of *Maloney*. It certainly would not have been a ministerial duty.

Nor has the Governor any obligation to file bills that have not become law by either signature or the expiration of the ten day period: “[The governor] has only the executive power to sign, veto, or refuse to sign or veto, and the constitutional obligation to file the law or bill either with the Secretary of State or the house where the bill originated.” *Id.* at 324. The Governor is obligated to file a law with the Secretary of State or file a bill with the house where it originated – but not to file a bill with the Secretary of State.

As this Court put it in *Maloney*, “A successor Governor is constitutionally obligated to present to the Secretary of State a law timely **signed** by his duly elected and qualified predecessor.” *Id.* at 324 (emphasis added). In other words, the incoming Governor is essentially required to pick up where his predecessor left off. That is exactly what Governor Strickland did. If Governor Taft had signed S.B. 117, or if the required ten-day period had run, but he neglected to file it before leaving office, Governor Strickland would have been obligated to file it with the Secretary of State. But Governor Taft had neither signed nor vetoed S.B. 117, and the ten days had not yet expired.

Governor Strickland picked up where Taft left off: he had the choice to sign the bill, to veto it, or to wait the full ten days for it to become law without his signature.

In *State ex rel. AFSCME v. Taft* (2004), 156 Ohio App. 3d 37, the Governor sought to implement the Director of Ohio Department of Rehabilitation and Correction's decision to close Lima Correctional Institution. This Court considered the constitutional authority of the Governor and held that he was acting within his authority, noting that "[t]he legislature cannot take away from the Governor any of the powers and duties that are conferred upon him by the Constitution." *Id.* at 47. Ohio's Constitution confers upon the Governor the power and duty to decide whether to veto a law or to have it become law either by signing it or by doing nothing for the ten day period, and it confers upon the Governor a ten day period in which to consider that choice. The Relators ask this Court to deny the Governor his ten day review period, which is an unconstitutional interference with his powers and duties to determine whether to allow a bill to become a law.

Governor Strickland had the power to veto the unsigned bill, and accordingly, he had the power to retrieve the bill in order to veto it. As this Court noted in *AFSCME*, "it appears to be firmly established in Ohio law that the Governor not only has the powers necessary to perform the duties specifically required of him by the Constitution and statutes, but he is also empowered to act in the interest of the state and in ways not specified, so long as his actions do not contravene the Constitution or violate laws passed by the legislature within its constitutional authority." *Id.* at 49. The Constitution specifically gives the Governor the power to sign or veto a bill or let it become law after the passage of ten days. The Constitution does not specify whether the Governor can request that the Secretary of State return a bill; however, because the Governor is

empowered to act in ways not specified, his request for return of the bill and, accordingly, Secretary Brunner's adherence to his request was proper. There is nothing in the Constitution that prohibits the Governor from requesting the return of a bill that has not yet become law.

Had Secretary Brunner returned to Governor Strickland a law **signed** by Governor Taft, or which had become law by the passage of ten days, she would indeed have been acting improperly, because she would have had the duty to file a law. Likewise, Governor Strickland would have been going beyond his authority in purporting to veto a law that had already become a law. But in the case of an unsigned bill for which the clock is still running, the Governor had the option to veto it, and there is no source for any ministerial duty of the Secretary of State to refuse to return it to him for that proper purpose. Therefore, there is no basis for mandamus. The Secretary of State cannot exercise any discretion regarding the constitutionality of a bill; even if a bill contained content that predictably would be held unconstitutional by courts (e.g., a bill authorizing slavery or banning newspapers), she could not decide that and refuse to file it, much less has she a ministerial *duty* to make such determinations. Thus, even if the Governor were wrong in requesting the bill, or Secretary Brunner suspected that he was, she could not have declined without improperly making a judgment on constitutionality of his action, or on the constitutionality of the status of the bill itself.

II. THE COURT SHOULD NOT GRANT THE REQUESTED RELIEF BECAUSE THE RELATORS HAVE FAILED TO AVAIL THEMSELVES OF THE REMEDIES PROVIDED BY THE OHIO CONSTITUTION.

Article II, Section 16 of the Ohio Constitution, dealing with a veto by the Governor, provides:

If he does not approve it, he shall return it with his objections in writing, to the house in which it originated, which shall enter the objections at large upon its journal, and may then reconsider the vote on its passage. If three-fifths of the members elected to the house of origin vote to repass the bill, it shall be sent, with the objections of the governor, to the other house, which may also reconsider the vote on its passage. If three-fifths of the members elected to the second house vote to repass it, it becomes law notwithstanding the objections of the governor, and the presiding officer of the second house shall file it with the secretary of state. In no case shall a bill be repassed by a smaller vote than is required by the constitution on its original passage. In all cases of reconsideration the vote of each house shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered upon the journal.

The record in this case shows that Governor Strickland initially delivered his veto to officials of the Ohio Senate (where S.B. No. 117 originated), who declined to keep it. Respondent's Exhibit 5, Affidavit of John M. Stephan, ¶¶ 8-10; Respondent's Exhibit 6, Affidavit of Teresa Fedor, ¶¶ 7-15.

The General Assembly holds the possible remedy of veto override in its own hands. Although the *amici* herein acknowledge that there is some suggestion in the debates of the 1912 Ohio Constitutional Convention that a new General Assembly might not be able to override a veto of a bill passed by a preceding General Assembly but vetoed by a new governor while the new General Assembly is in session and delivered to it (Constitutional Convention of Ohio, Proceedings and Debates, April 11, 1912, at 1999-1202), there

appears to be no case directly on that point. However, even if this Court declines to rule on that basis, it should nonetheless refuse to grant the Relators their requested relief because they have another remedy at hand: “There is nothing to prevent the subsequent general assembly from introducing and passing the measure *de novo*.” *Id.* at 1200 (quoting Mr. Knight of Franklin County).

Accordingly, this Court should leave the question of veto override or *de novo* legislation to the political judgment of the 127th General Assembly.

III. IF THE COURT CONCLUDES THAT SENATE BILL NO. 117 WAS NOT VETOED, IT SHOULD DECLARE NEWLY ENACTED AMENDMENTS TO SECTIONS 1345.09, 2307.71, AND 2307.73 TO BE VIOLATIVE OF THE SINGLE SUBJECT COMMAND OF THE OHIO CONSTITUTION.

The Commercial Interest *amici* suggest that resolution of the status of Senate Bill No. 117 is necessary to respond to their needs for “stability and predictability in the civil justice system.” (Brief at 1). If that is true, and *if* the Court concludes that S.B. 117 was not vetoed, then the Court ought now declare that the newly enacted amendments to Sections 1345.09, 2307.71, and 2307.73 violate the single subject provision of the Ohio Constitution – in order to provide “stability and predictability” at this time.

There are two provisions of the Ohio Constitution designed to deter log-rolling in the General Assembly. One is the veto power of the Governor. Constitutional Convention of Ohio, Proceedings and Debates, March 4, 1912, at 568. The other is the single subject command of the Ohio Constitution: No bill shall contain more than one subject, which shall be clearly expressed in its title.” Ohio Const., Art. II, Sec. 15(D).

Ironically, this matter is before the Court precisely because it contains more than one subject. When Governor Taft declined to sign Senate Bill 117, his primary

explanation as to why he would not sign it says although “. . . there are many provisions in this bill that I endorse, there is one that I cannot support. Because the Ohio Constitution precludes me from exercising a line item veto, I feel my only course is to not sign the bill.” Complaint, Exhibit H, News Release of Governor Bob Taft, January 5, 2007. He explained his dilemma, noting that he objected to the undercutting of the Consumer Sales Practices Act and the weakening of protections against predatory lending that had earlier passed the 126th General Assembly. *Id.* Governor Strickland cited the same problems as well as provisions protecting “companies that may have been responsible for products that have harmed and even continue to harm children” Complaint Exhibit J, Veto Message, January 8, 2007.

What had happened was that the bill that was originally noncontroversial as introduced and passed by the Ohio Senate in October 2005 addressed only one subject and amended only one section of the Revised Code (Complaint Exhibit A, Sub. S.B. 117.). By action of the lame-duck session of the 126th General Assembly, the bill had morphed into a twenty-page Hydra-headed measure that amended five sections of the Revised Code on disparate subjects, four of which were substantially different from the original subject and purpose of the measure (Complaint Exhibit C, Amended Substitute Senate Bill 117). The final version amended Section 1345.09 (limiting damages under the Consumer Sales Practices Act), Section 2307.60 (the **original** limited purpose of the bill, i.e., to permit a finding of guilt in a criminal matter to be used as evidence in a civil suit based upon the criminal act), Sections 2307.71 and 2307.73 (protecting, *inter alia*, manufacturers of lead paint in product liability cases, and Section 2307.02 (altering the attorney-client privilege). Complaint, Exhibit C. There is a total disunity of the subject matters.

The measure, reflecting the widely disparate subject matters, even added provisions to set forth the 126th General Assembly's interpretation of the 125th General Assembly's "original intent in enacting the Ohio Product Liability," Exhibit C, Section 3 of Am. Sub. S.B. 117, at 18; to identify certain older product liability decisions of this Court that it was endorsing, *Id.*, Section 4, at 19; and to specify that amendments to the Consumer Sales Practices Act would not go into effect until July 1, 2007, *Id.*, Section 5, at 19; and to express its view that it was modifying three earlier decisions of this Court in order to provide judicial review regarding the attorney-client privilege. *Id.*, Section 6, at 19. This further demonstrates that the General Assembly well knew that it was adopting multiple, unrelated subjects, and this Court should void those sections raised in the veto message of Governor Strickland.

There was a time when this Court regarded the single subject rule as a matter for mere guidance of the legislature, but the recent jurisprudence of the Court quite properly has taken a different view:

Our review of legislation is not so deferential, however, as to effectively negate the one-subject provision. Despite our reluctance to interfere with the legislative process, we "will not * * * abdicate [our] duty to enforce the Ohio Constitution." *Dix*, 11 Ohio St.3d at 144, 11 OBR 436, 464 N.E.2d 153. Indeed, despite earlier cases in which we described the one-subject rule as "directory" in nature, "recent decisions of this court make it clear that we no longer view the one-subject rule as toothless. * * * The one-subject rule is part of our Constitution and therefore must be enforced." *Simmons-Harris v. Goff* (1999), 86 Ohio St.3d 1, 15, 1999Hio 77, 711 N.E.2d 203..

State ex rel. Ohio Civil Service Employees Association v. State Employment Relations Board (2004), 104 Ohio St.3d 122, 130.

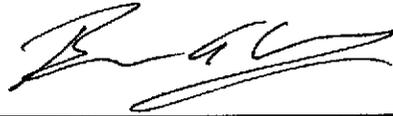
The subjects contained in Amended Substitute Senate Bill 117 make it clear that there is no essential unity or common purpose. It is not enough to claim that all of these matters deal with civil law. Where “there is an absence of common purpose or relationship between specific topics in an act and when there are no discernible practical, rational or legitimate reasons for combining the provisions in one act, there is a strong suggestion that the provisions were combined for tactical reasons, *i.e.*, logrolling.” *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 496-97. Governor Taft, in his statement that he would not sign the bill, clearly identified the disunity. The bill is a classic, lame-duck and shameless example of logrolling, “the very evil the one-subject rule was designed to prevent.” *Id.* at 497.

Accordingly, *if* the Court concludes that Amended Substitute Senate Bill No. 117 has not been vetoed, the Court should nonetheless declare that the consumer and product liability sections identified by Governor Strickland are void as violative of the single subject command of Article II, Section 15(D) of the Ohio Constitution. Even if this Court chooses not to strike those provisions, it should take notice of the legislative manipulation here and conclude that the Relators do not have sufficiently clean hands to justify the extraordinary relief that it seeks.

CONCLUSION

For each of the foregoing reasons, and for all of them, the Court should deny the Relators a writ or, in the alternative, it should void the amendments to Sections 1345.09, 2307.71, and 2307.73 of the Revised Code on grounds of violation of the single subject rule in the Ohio Constitution.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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