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INTRODUCTION

Respondent's Merits Brief addresses a case that does not exist, in which the General Assembly attempted to deprive the Governor of adequate time to consider a bill passed by the General Assembly. (See Respondent's Merit Brief, at 7.) In fact, the evidence is undisputed that the date of presentment of S.B. 117 was a joint determination by the General Assembly and Governor Taft. "[I]t was determined with Governor Taft's staff that those bills should be presented to Governor Taft on December 27, 2006." (Affidavit of Clerk of Ohio Senate, Relator's Exhibit 4.) After deliberation, Governor Taft issued a detailed press release discussing why he had decided to allow S.B. 117 to become law without his signature. (Agreed Statement of Facts, ¶ 15.)

The case presented to the Court in this litigation involves legislation passed by the General Assembly, presented to the Governor, considered by the Governor, and filed by the Governor with the Secretary of State without signature or veto. The General Assembly did not wait until Governor Taft's time to consider the bill had almost expired; that would have violated Article II, § 15, which requires that the General Assembly must present bills "forthwith" to the Governor. Instead, the General Assembly adjourned sine die on December 26, and the General Assembly presented S.B. 117 to Governor Taft on the very next day. (Affidavit of Clerk of Ohio Senate, ¶ 7.)

Respondent Brunner is making a policy argument about why this Court should disregard the plain text of Section 16, Article II and expand the constitutionally defined period of time allowed for gubernatorial consideration of newly enacted bills. As discussed below, that policy choice was made many years ago by the people of the State of Ohio when they ratified the requirements of Section 16, Article II. This Court should issue a writ of mandamus directing

Respondent Brunner to recognize those requirements and perform her constitutional and statutory duties with respect to S.B. 117.

ARGUMENT

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

S.B. 117 became a law on January 5, 2007, ten days after the Ohio Senate adjourned sine die and three days before Respondent Secretary of State Brunner took office and purported to unfile and "return" the bill to Governor Strickland. Respondent Brunner's counter-proposition of law – that "[t]he General Assembly cannot prevent the Governor from lawfully exercising his supreme executive power to consider and veto legislation" – is nonresponsive. The question before this Court is whether an unsigned bill, which the Governor cannot return to the originating house of the General Assembly due to its adjournment sine die, becomes law ten days after adjournment (as Relators contend) or ten days after presentment (as Respondent Brunner contends).

As set forth in Relators' merit brief, the framers of the Ohio Constitution provided a plain and unambiguous answer to that question. Section 16, Article II provides that:

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.

Section 16, Article II (emphasis added).

It is hard to imagine how the framers could have stated more plainly that when the General Assembly is adjourned, the Governor must file any written objections to a bill "within

ten days after such adjournment." It is undisputed that the General Assembly adjourned sine die on December 26, 2006, one day before S.B. 117 was presented to Governor Taft, and thereby "prevent[ed] its return" to the Senate. S.B. 117 accordingly became a law on the tenth day after that adjournment, i.e., January 5, 2007.

Respondent Brunner states that Section 16, Article II is unambiguous but argues that:

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

(Respondent's Merit Brief, at 6; original emphasis.) This is merely a recapitulation of Respondent's previous position that whether the ten-day period is measured from presentment or adjournment depends upon which period is longer. (See Motion to Dismiss, at 6.)

According to Respondent, Section 16, Article II "makes clear" that the ten-day period following adjournment applies to newly enacted bills if presentment occurs before adjournment, but it "does not explicitly address circumstances . . . where the General Assembly presents legislation to the Governor after adjournment." (Id., at 5-6.) But Section 16, Article II does not distinguish between pre-adjournment and post-adjournment presentments; it sets out a single uniform rule that measures the ten-day period from adjournment whenever adjournment prevents the return of a bill, regardless of whether the adjournment occurred before or after presentment.

Respondent Brunner argues that the ten-day period following presentment should nevertheless be applied in this case because this purportedly would be "more logical," would reflect "the obvious intent" of Section 16, Article II and would "make . . . sense from a policy perspective." (Respondent's Merit Brief, at 6.) Not surprisingly, she never acknowledges the unanimous Ohio case law forbidding resort to "policy" arguments, "logic", or "reasoning" in order to judicially reconstruct the meaning of unambiguous constitutional provisions. (See cases cited

in Relators' Merit Brief, at 6-7.) This Court explained in *State ex rel. Maurer v. Sheward* (1994), 71 Ohio St.3d 513, 520-21, that:

The first step in determining the meaning of a constitutional provision is to look at the language of the provision itself. Where the meaning of a provision is clear on its face, we will not look beyond the provision in an attempt to divine what the drafters intended it to mean.

See also *State ex rel. Wallace v. City of Celina* (1972), 29 Ohio St.2d 109, 111 ("Constitutions should be amended by those who have the power to amend them and not by courts).

Moreover, even if Respondent's policy arguments could properly be considered here, they would not support her proposed revision of Section 16, Article II. She argues, first, that otherwise the General Assembly "could unreasonably delay presentment" for ten days after adjournment and thereby "completely deny[] the Governor his constitutional authority" to review and veto bills. (Respondent Merit Brief, at 6.) But Respondent's own Brief makes clear that this is forbidden by Section 15, Article II, which mandates that a bill "shall be presented forthwith to the governor" by the General Assembly after "the procedural requirements for passage have been met." (Emphasis added.) She also concedes that "forthwith" means "immediately; without delay." (Id., at 4 and fn. 2.) This constitutional requirement precludes the General Assembly from unreasonably delaying presentment.

Respondent's second policy argument asserts that it is unreasonable to give the Governor more time to consider bills that are presented before adjournment than he is given to consider bills presented after adjournment:

There is no reason . . . why the Constitutional framers would have suggested that the Governor should have less time to consider whether or not to veto legislation after the General Assembly has adjourned, rather than while the General Assembly is still in session.

(Respondent's Merit Brief, at 6-7.) This argument demonstrates the dangers of resorting to "reason", "intent", and "policy" to imply constitutional language that does not exist. In this instance, the framers and the citizens of Ohio who voted to approve this provision did exactly what Respondent insists they could not have intended to do: give the Governor less time to consider a bill when the General Assembly adjourns. Section 16, Article II specifically provides that the Governor shall have "ten days, Sundays excepted" (i.e., between twelve and fourteen days) to consider a bill if the General Assembly remains in session, but he shall have only "ten days" to consider a bill if it adjourns. Thus, the framers allowed a longer time after presentment than after adjournment, and Respondent's belief that they did not intend to do so is obviously incorrect.

Respondent argues, third, that this Court must pretend that Section 16, Article II distinguishes presentments before adjournment from presentments after adjournment or the "separation of powers" within Ohio's government will be threatened. (Respondent's Merit Brief, at 7.) She is again concerned that the General Assembly might delay presentment of a bill after adjournment and leave the Governor only "one day or less" to consider it. (Id.) Once again, Respondent forgets that the General Assembly must present a bill to the Governor "forthwith" after the last step required for its enactment has been taken, and this necessarily occurs on or before adjournment sine die. The framers thus anticipated that the General Assembly might delay transmitting a bill to the Governor for his consideration and provided a constitutional solution. See Ohio Constitutional Revision Commission, Final Report, June 30, 1977, at 128.

Respondent essentially argues that this Court should modify Section 16, Article II, and create an exception for bills that are presented after adjournment, in order to ensure that the Governor's time for considering a bill is not reduced from ten days by the amount of time it takes

to "forthwith" present the bill to the Governor. There is no reason to do so. Subtracting the short time required to present a bill forthwith, from the ten-day period following presentment, does not restrict the Governor's ability to consider a bill. In the present case, Governor Taft arranged to have S.B. 117 presented one day after adjournment and he then filed it before the ten-day period expired. In any event, the language employed in Section 16, Article II does not improperly limit the Governor's constitutional authority; it defines it, and this Court should not rewrite that provision to expand the Governor's time to consider a bill.

Respondent's primary – and only Ohio – legal authority is an article by a former professor of law at The Ohio State University. Tuttle, *Legal Aspects of the Ohio Executive Veto* (1937), 3 Ohio St. L.J. 259. Respondent cites Professor Tuttle's belief that the ten-day period following adjournment should not be applied when a bill is presented after adjournment, but she does not mention his admission that this view has "some defects in its reasoning." 3 Ohio St. L.J. at 274. He also admitted that:

Satisfactory as this interpretation [of Section 16, Article II] would seem to be [to Professor Tuttle], it has not apparently received the approval of the few courts that have had occasion to discuss it nor does it seem to have been the idea of the members of the [constitutional] convention of 1912 who framed it The ten-day period after adjournment seems to have been accepted by them as applying to all bills regardless of the time of presentation to the governor.

3 Ohio St. L.J. at 275 (emphasis added). Thus, Respondent's contentions about the "intent" of the framers of were rejected by her primary authority, who concedes that the ten-day period would have to be measured from an adjournment that precedes presentment "[i]f . . . the words of the Constitution are literally followed." 3 Ohio St. L.J. at 282.

Professor Tuttle pointed out many possible approaches to this issue, including: (1) Respondent's position, i.e., "that the ten days' limitation after adjournment only applies to a

situation where the bill is [presented to] the governor while the legislature is in session"; (2) the position that the constitutional provision should be "enforce[d] . . . literally", without regard to whether presentment occurred before or after adjournment; and (3) "another view" that would literally apply the ten-day period after adjournment to bills presented before and after adjournment but would also "require the bill to be in the hands of the governor for his consideration a reasonable time before the ten days is up." 3 Ohio St. L.J. at 277-78. The last approach is exactly what the citizens of Ohio ratified 40 years later when the Constitution was amended to require presentment to the Governor "forthwith" after enactment.

Unlike Professor Tuttle, this Court is obligated to enforce the literal language of Section 16, Article II and thus could not adopt Respondent's position even if it felt it was more "sensible" and even if Ohio had not adopted a constitutional safeguard that prevents delay in presentment. Respondent's warnings about the dire effects of the literal language of Section 16, Article II on the separation of powers address a hypothetical factual situation that does not exist here, where presentment occurred "forthwith" and the Governor had sufficient time to consider S.B. 117.

The three cases cited by Respondent are from other jurisdictions and construe different constitutional provisions. In *Florida Soc. Of Ophthalmology v. Florida Optometric Assn.* (Fla. 1986), 489 So.2d 1118, 1119, the Florida Constitution specifically defined the time allowed the Governor when presentment occurs after adjournment but did not address the time allowed when presentment occurs first, and the Court relied upon a Florida legal rule that encourages "flexibility" in interpreting constitutional provisions. In both *People ex rel. Peterson v. Hughes* (1939), 372 Ill. 602, 610, 25 N.E.2d 75, 79, and *Cenarrusa v. Andrus* (1978), 99 Idaho 404, 409, 582 P.2d 1082, 1087, the courts held that the time period following presentment should be

applied when presentment occurs after adjournment, but neither of the state constitutions addressed the time in which the legislature must present the bill, and the courts were concerned that delays in presentment could thwart executive action. There is no such risk in Ohio.

II. Respondent Brunner has not performed the mandatory legal duties of the office of the Secretary of State.

Respondent does not claim that she has performed any of the constitutional and statutory duties of the Secretary of State with respect to new laws in this case. She "returned" the bill to Governor Strickland after it became a law, instead of retaining and safely keeping it, in violation of R.C. 111.08; she did not compile, publish, or distribute S.B. 117 as a law, in violation of R.C. 149.09, 149.091, and 149.08; she has not delivered it to the Legislative Service Commission for sectional enumeration, in violation of R.C. 103.131; and she has not recorded the filing date for referendum purposes, in violation of Section 1c, Article II of the Constitution.

Respondent argues instead that none of these duties attached because S.B. 117 purportedly had not become a law on January 8, 2007, when it was "returned" to Governor Strickland and vetoed. As set forth above, S.B. 117 became a law on January 5, 2007, before it was "returned" and supposedly vetoed, and Respondent accordingly was constitutionally required to perform her statutory and constitutional duties. Moreover, as set forth below, Respondent had a duty to file and keep S.B. 117 even before it became law on January 5, 2007, and it is undisputed that she did not perform that duty.

Finally, Respondent argues that she would have impermissibly exercised discretion if she performed her constitutional and statutory duties instead of "returning" the bill to Governor Strickland. The opposite is true: the Constitution does not authorize a Secretary of State to "return" a properly filed bill, and her decision to do so in this case was an exercise of discretion that required her to make a quasi-judicial decision about the legality of the Governor's request.

By contrast, a decision to comply with constitutional and statutory mandates is ministerial, not discretionary. Respondent Brunner should be compelled to perform those duties with respect to S.B. 117.

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

Relator advances two independent grounds for mandamus: (1) that S.B. 117 became law on January 5, 2007, because 10 days had elapsed from the sine-die adjournment of the General Assembly and (2) regardless of whether S.B. 117 was a law on January 8, 2007, Respondent had no authority to undo a Governor's filing of a bill with the Secretary of State's office. Respondent assumes – wrongly – that the second point depends on the first. It does not, and Relators made this point explicitly on page 10 of their opening brief. Respondent opposes Relators' second ground for mandamus relief with two arguments: (1) contending that the gubernatorial act of filing a bill with the Secretary of State has no constitutional significance and (2) citing instances where legislative clerks have made clerical corrections to filed bills. Neither argument has merit.

A. Respondent cites no authority for her contention that a Governor's act of filing a bill has no legal significance.

Relators' initial brief explained why a Governor may change his mind about a bill before he signs, vetoes, or files it with the Secretary of State, but cannot undo any of those final acts because he has exercised the last act required to exercise his constitutional executive authority over new legislation. (Relators' Brief, at 15-20.) Respondent dodges the legal authority cited by Relators by assigning varying importance to which option the Governor exercises – signing, vetoing, or approving the bill without signature. Respondent's suggestion that the Governor's act

of approving a bill without signature has less constitutional significance than his act of signing or vetoing the bill has no support in the Constitution or the case law, and she cites none.

Abundant authority – including the text of Ohio's Constitution – contradicts Respondent's contention. Section 16, Article II provides that a bill becomes law without the Governor's signature or written objection "in like manner as if he had signed it." Other state Supreme Courts have reached the same conclusion.¹ The Montana Supreme Court best captured the fallacy of Respondent's position in this case: when a Governor "permits a bill to become a law without his signature, the Constitution makes this equivalent to his concurrence." *The Veto Case* (Mont. 1924), 222 P. 428, 433.

Whether a Governor signs a bill, vetoes it, or files it with the Secretary of State without his signature or written objections, his power to reconsider that option ends when the Governor performs the last act necessary to effectuate his decision and relinquishes custody of the bill. Releasing custody of the bill by filing it with the Secretary of State is a final, irrevocable act; a Governor has "no power thereafter to take the bill from the office of the Secretary of State." *People v. McCullough* (1904), 210 Ill. 488, 497. This principle appears throughout the legal authorities Relators cited in their initial Brief (id., at 15-20) and is not limited to bills that are signed by the Governor. See *Hunt v. State* (1904), 72 Ark. 241, 79 S.W.769 noting that a Governor's act of filing a bill without written objections, so that it will become law without his signature is a final, irrevocable act. Respondent cites no legal authority that treats signing a bill differently than filing it without objections.

¹ See, e.g., *State ex rel. Brassey v. Hanson* (1959), 81 Idaho 403, 410 (observing the equivalence of signing a bill and allowing it to become law by inaction); *State ex rel. Board of Commissioners of Laramie Cty. v. Wright* (1945), 62 Wyo.112, 131 (same); *Rice v. Lonoke-Cabot Road Improvement Dist. No. 11 of Lonoke Cty.* (Ark. 1920), 221 S.W. 179, 181 (same).

Respondent also cites no legal authority for her contention that the Governor enjoys a ten-day "test drive" during which he may treat the formal constitutional act of filing a bill as a revocable act without significance or permanent consequences. Instead, Respondent simply insists that filing is constitutionally irrelevant because it does not immediately transform a bill into a valid law. Respondent is wrong; the gubernatorial act of filing a bill without written objections has obvious constitutional significance. Filing is the last act that the Governor must perform to exercise this option and effectuate his decision; there is nothing more for him to do after he files a bill without objections. Filing is the last act by which the Governor yields his control and custody of a bill and implements his authority over the bill. In addition, following adjournment, filing is a mandatory act under Section 16, Article II that the Governor must perform for all bills. Finally, under the Ohio Constitution, the Governor's act of filing a bill without written objections starts the clock running on the people's constitutional right of referendum. (See Section 1 c, Article II.)

Respondent's theory would subject these constitutional landmarks to a Governor's whim. No legal authority supports her argument, for an obvious reason: the Ohio Constitution means what it says, and it says that filing a bill with the Secretary of State has legal significance.

- B. Respondent distracts from the issue presented by citing irrelevant instances of clerical corrections to filed bills.

Respondent points to letters that indicate clerks of the General Assembly have occasionally conformed bills filed in the Secretary of State's office to the actual language that was enacted by the legislature to argue that the General Assembly has treated the act of filing a bill with the same cavalier attitude that her brief now endorses. Her contention should be rejected.

The material cited by Respondent is irrelevant to any issue before this Court.² On their face, the letters show they involve clerical corrections, such as fixing errors in spelling, section numbers, or missing pages. Unlike the facts in this case, no one unfiled anything; no one exercised inconsistent executive authority regarding the bills; no one attempted to undo what was already done. The circumstances involved in the letters are certainly not equivalent to Respondent's decision to return S.B. 117 to the Governor so that he could take inconsistent executive action. In each case described in the letters, the clerk of a legislative house conformed the record of its actions to be consistent with acts that transpired on the floors of the House and Senate and in so doing complied with the constitutional requirement that "no bill shall be passed without the concurrence of a majority" of each house. Section 15(A), Article II.

Moreover, even if the Court accepts Respondent's faulty comparison between correcting clerical errors in bills and undoing constitutionally mandated executive action, past practice cannot amend the plain text of the Constitution, and it affords the same significance to the Governor's filing of a bill without objections that it gives to the act of signing a bill. See, e.g., *Scroggie v. Bates* (S.C. 1948), 48 S.E.2d 634, 640 ("repeated violations of the Constitution: do not "amend that instrument.").

Respondent highlights a 1975 letter from then-Governor Rhodes to then-Secretary of State Brown that, like the fourteen letters from legislative clerks, is likewise irrelevant to the

² This Court has previously stricken evidence in original actions that it found to be irrelevant. See, e.g., *State, ex rel. Dublin v. Delaware Cty. Bd. of Commrs.* (1991), 62 Ohio St.3d 55, 61, overruled on other grounds, *State ex rel. Gaydosh v. Twinsburg* (2001), 93 Ohio St.3d 576.

issues in this case.³ It does not involve an executive taking back a completed act. Instead, the letter reveals Governor Rhodes conforming an inaccurate record in the Secretary of State's office to his official veto message, a situation wholly unlike the circumstances surrounding S.B. 117. In the 1975 letter, the Governor informed the Secretary of State about the content of his veto message to the General Assembly. He was not attempting to undo the official acts of a prior Governor.

Again, the comparison sheds no light on the issue before this Court – whether Respondent has failed to perform her constitutional duties with respect to S.B. 117.

IV. Respondent Brunner's supplemental arguments in support of her Motion to Dismiss do not show that Relators lack standing or that mandamus is an improper remedy.

A. Relators Harris and Husted have standing to sue in their official capacities as legislators who voted with the majority on S.B. 117.

As set forth fully in Relators' Opposition to Respondent's Motion to Dismiss (at 4-8), Relators Harris and Husted have standing to file this action in their official capacities as legislators who voted with the majority to enact S.B. 117.⁴ Respondent contends that Harris and Husted lack standing, yet she cites no case in Ohio or elsewhere in which a suit brought by a legislator voting with the majority and claiming vote nullification was dismissed for lack of standing. Respondent contends, however, that Harris and Husted lack standing unless this action

³ Moreover, this letter has not been authenticated. Rule X, Section 7 of the Rules of Practice requires documents attached to affidavits to be "[s]worn or certified copies." The letter from Governor Rhodes is not sworn or certified, and is not self-authenticating. This Court does not hesitate to apply the rules of evidence in original actions. See, e.g., *State ex rel. Nix v. City of Cleveland* (1998), 83 Ohio St.3d 379, 384, 700 N.E.2d 12 (concluding that hearsay evidence was inadmissible in mandamus action).

⁴ In addition to legislator standing – and as set forth fully in Relators' Opposition to Respondent's Motion to Dismiss, at 4-13, incorporated by reference herein – the Ohio General Assembly has standing to challenge a direct injury to its majority law-making power, and Harris and Husted have standing to sue as Ohio citizens pursuant to the public action doctrine.

is brought by all of the legislators who had votes sufficient to enact S.B. 117. (Respondent's Merit Brief at 18-19.)

That argument is meritless. No "voting bloc" requirement has ever been adopted by any court, including the U.S. Supreme Court in *Coleman v. Miller* (1939), 307 U.S. 433. Moreover, courts that have been presented with that argument have squarely rejected it – and properly so, since the test for standing is "that the party seeking review be himself among the injured," and that all those conceivably injured are among the plaintiffs. *Sierra Club v. Morton* (1972), 405 U.S. 727, 735, 92 S.Ct. 1361.

Nowhere in *Coleman v. Miller* did the U.S. Supreme Court restrict legislator standing to the entire bloc of legislators who had votes sufficient to enact specific legislation. The Supreme Court indeed recognized that "the twenty senators whose votes [would have been sufficient to defeat the resolution at issue] have an interest in the controversy . . . sufficient to give the Court jurisdiction to review that decision." *Coleman*, 307 U.S. at 446. But the Court never stated that all twenty senators needed to join the action. It stated only that those twenty senators suffered injury. In fact, in discussing standing, the Supreme Court analogized to the right of a private citizen to maintain a tort suit for deprivation of the right to vote. *Coleman*, 307 U.S. at 439-40. Such voter suits have never premised an individual's standing on the joinder of all other citizens who cast the same vote. Similarly, no joinder is required for legislative standing.

Respondent's "voting bloc" argument has been addressed and rejected by various courts.⁵ This Court, too, has implicitly rejected Respondent's theory that legislator standing requires all majority-voting legislators to sue as a block. For instance, in *State ex rel. Gilmore v. Brown* (1983) 6 Ohio St.3d 39, 451 N.E.2d 235, this Court adjudicated a mandamus action filed by a single state representative who had voted with the majority to pass a bill and who challenged the procedure by which the bill was allegedly vetoed.

In sum, there is no "voting bloc" requirement for legislator standing in *Coleman* or its progeny. Nor does Respondent offer a reason why this Court should manufacture one. The inquiry regarding legislator standing is simple and straightforward. As with the legislators in *Coleman*, Harris and Husted claim that their votes were denied validity because of the actions of an executive branch official. Unless Respondent Brunner is compelled to perform her clear legal duties to record, publish, and distribute S.B. 117 as law, Harris's and Husted's votes, and the votes of their respective houses, will be nullified, and their right to have their majority votes effectuated will be overridden. Accordingly, Harris and Husted – as members of the General

⁵ *Kennedy v. Sampson*, 511 F.2d 430, 435 (C.A.D.C. 1974) ("The *Coleman* opinion . . . does not express reliance upon the fact that all nay-voters joined as plaintiffs Although references to the parties and their votes are, quite naturally, in the plural form, the opinion does not disclose whether the Court was considering them collectively or severally. In light of the purpose of the standing requirement . . . we think the better reasoned view of both *Coleman* and the present case is that an individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of other members of the majority [A]rgument to the contrary is more formal than substantive.") (emphasis added) (holding that lone senator had standing to challenge president's pocket veto of Congressionally approved legislation; senator had voted with the majority and veto allegedly effected a "diminution of congressional influence in the legislative process" by cutting off opportunity for congressional override); *Silver v. Pataki* (N.Y. 2001), 96 N.Y.2d 532, 755 N.E.2d 842, 848-49 (The court reasoned that "[t]he *Coleman* Court did not rely on the fact that all Senators casting votes against the amendment were plaintiffs in the action," and therefore, a controlling block of legislators is not "a prerequisite to plaintiff's standing as a Member of the General Assembly." The Court further explained that an individual legislator's "injury in the nullification of his personal vote continues to exist whether or not other legislators who have suffered the same injury decide to join in the suit.") (emphasis added).

Assembly who voted with the majority in favor of S.B. 177, and as the duly-elected representatives of the legislative bodies who passed the legislation – have standing to challenge the actions threatening the effectiveness of their majority votes.

B. Mandamus is the proper form of action.

Respondent's contention that mandamus is not appropriate is likewise unsupported and wrong. Mandamus has long been considered the appropriate remedy to compel the Secretary of State to perform those duties enjoined upon the Secretary by law that do not require the exercise of official judgment or discretion. See *Maloney v. Rhodes* (1976), 45 Ohio St.2d 319, 345 N.E.2d 407; *State ex rel. Melvin v. Sweeney* (1924), 154 Ohio St. 223; *State ex rel. Smith v. Smith* (1920), 101 Ohio St. 358, 129 N.E. 879.

This case concerns the Secretary of State's duties regarding a properly enacted bill. As this Court has held repeatedly and emphatically, these duties require no exercise of official judgment or discretion – they are ministerial and mandatory:

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 Mandamus will lie to compel [her] to perform the official act of accepting and filing the law.

Maloney, 45 Ohio St. at 322-23, 345. Indeed, Respondent concedes this point. "The Secretary has no authority to determine which laws she considers valid and which she does not, nor to decide on that basis that certain laws filed in her office will be excluded from the published session laws." (Respondent's Merit Brief at 22.)

The Secretary of State should be compelled by writ of mandamus to perform her clear, ministerial duties with respect to S.B. 117: to have charge of and safely keep enacted bills and other papers that are presented by the Governor for filing, R.C. 111.08; to forward copies of engrossed bills to the clerks of the courts, R.C. 149.08; to distribute pamphlet laws, R.C. 149.09;

to compile, publish, and distribute enacted bills as part of session laws, R.C. 149.091; and to carry out responsibilities with respect to any referenda, R.C. 3501.05. Respondent has failed to undertake these duties and has indicated she has no intention of complying with them.

To the extent that Respondent Brunner contests whether these are, in fact, duties the Secretary of State must perform with respect to S.B. 117, this does not change the fact that mandamus is the proper form of action. As this Court has ruled, the fact that the determination as to what constitutes a duty "calls for the construction of the statute imposing the duty, does not prevent such duty from being enforceable by mandamus." *State ex rel. Melvin w. Sweeney* (1950), 154 Ohio St. 223, 226, 94 N.E.2d 785. "It is the court's duty to solve all such doubts, and to declare the duty as it finds it to be" *Id.* For these reasons, this Court considers mandamus appropriate even where it ultimately concludes the writ is not warranted on the merits. See *State ex rel. Lakeview Local School Dist. Bd. of Educ. v. Trumbull Cty. Bd. of Commrs.*, 109 Ohio St.3d 200, 2006-Ohio-2183, 846 N.E.2d 847, at ¶¶ 7, 8, 29, complaint for mandamus was considered proper form of action, even though Court ultimately denied writ on the merits); *State ex rel. Oberlin Citizens for Responsible Development v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529.

Finally, Respondent's contention that Relators have a plain and adequate remedy at law through an action for declaratory judgment is meritless. Relators clearly bring this action to compel Respondent Brunner to perform her affirmative, ministerial duties to issue S.B. 117 as law. Contrary to Respondent's contention, Relators do not seek a writ ordering her "to proclaim that S.B. 117 is valid law." (Respondent's Merit Brief at 22.) She can do no such thing. Whether S.B. 117 is valid law is a question for this Court to decide. Relators seek no opinion from the Secretary of State on that issue.

If this Court rules that the Secretary of State is under the clear legal duty to issue S.B. 117 as law, then a declaration on that issue, standing alone, is not an "adequate remedy." *State ex rel. Ms. Parsons Constr., Inc. v. Moyer* (1995), 72 Ohio St.3d 404, 405, 640 N.E.2d 472. A mandatory injunction – i.e., a writ of mandamus – is required to compel the Secretary of State to perform the various duties imposed upon her with respect to a validly enacted law.

This Court's pronouncement in *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Emp. Relations Bd.* (1986), 22 Ohio St.3d 1, 8, 488 N.E.2d 181, applies here:

[W]here declaratory judgment would not be a complete remedy unless coupled with ancillary relief in the nature of mandatory injunction, the availability of declaratory injunction is not an appropriate basis to deny a writ to which the relator is otherwise entitled.

(citation omitted). See also *State ex rel. Ohio Civ. Serv. Emp. Assn., AFSCME Local 11 v. SERB*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, at ¶¶ 15-17 (reaffirming that "a declaratory action, which merely announces the existence of a duty to be performed, has generally not been deemed as adequate as the writ of mandamus, which compels performance") (citation and internal quotation marks omitted).

Indeed, Respondent Brunner's brief is conspicuously silent as to how a declaratory judgment alone could provide adequate relief. If anything, the suggestion in her brief that she might never be obligated to issue S.B. 117 as law, even if it were deemed validly enacted – for instance, because the statutes pertaining to some of her duties with respect to enacted laws do not set forth a time frame for performance (Respondent's Merit Brief at 21) – underscores the need for this Court to issue the writ and affirmatively compel her to perform her mandatory duties.

In short, Relators have no plain and adequate remedy through a declaratory judgment or prohibitory injunction action. This case is properly before this Court as an action in mandamus

and Relators seek precisely the relief that a writ of mandamus affords: to compel a state official to perform her clear legal duties.

CONCLUSION

This case involves the obligation of the Secretary of State to codify legislation that the Ohio General Assembly passed and that Governor Taft, without signing or vetoing, filed with Secretary of State Blackwell. Respondent incorrectly tries to paint this litigation as involving an issue of separation of powers between the executive and legislative branches of government, but the representatives of those branches all agreed on January 5, 2007. The General Assembly duly adopted S.B. 117 and presented the enrolled S.B. 117 to Governor Taft on December 27, 2006. On January 5, 2007, Governor Taft exercised one of his three options under the Constitution by issuing a press release explaining why he had decided to let S.B. 117 become law and filing S.B. 117 with Secretary of State Blackwell. On January 5, 2007, Secretary of State Blackwell signed S.B. 17, the first step toward codification of the law.

S.B. 117 became law on January 5, 2007, because ten days had passed since the adjournment (December 26, 2006) sine die of the Ohio General Assembly. Thus Respondent should be compelled to fulfill her mandatory duties with respect to S.B.117. Even if the ten-day period started from the date of presentment to Governor Taft, a writ of mandamus against Respondent is still warranted because once Governor Taft filed S.B. 117 with Secretary of State Blackwell, no Governor had any authority over the legislation, and the Secretary of State had to codify S.B. 117 upon it becoming a law.

For the reasons set forth in their Complaint, their Memorandum in Opposition to the Motion to Dismiss, their Merits Brief and this Reply, Relators respectfully ask this Court to issue a write of mandamus directing Respondent Brunner to codify S.B. 117.

Respectfully submitted,



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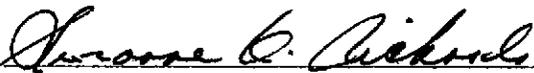
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Relator's Reply Brief was served this 19th day of April, 2007, by First Class, U.S. Mail, postage prepaid, upon the following:

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