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## INTRODUCTION

Respondent, Secretary of State Jennifer Brunner, does not contest the Court's ruling in this case, and she does not ask the Court to revisit its holding that the current Governor's attempted veto was invalid based on the former governor's filing of Am.Sub.S.B. No. 117 on January 5, 2007. Secretary Brunner also accepts that the Court found it proper to grant a writ of mandamus to order the Secretary to "treat Am.Sub.S.B. No. 117 as a validly enacted law and to fulfill all of the secretary's statutory duties concerning that law." *State ex rel. Ohio Gen. Assembly v. Brunner*, 2007-Ohio-3780, ¶ 51. Nevertheless, because the Secretary's Office has been asked whether the right of referendum is still available in this matter, see attached **Affidavit of Christopher Nance**, the Secretary seeks clarification from this Court. Specifically, she asks the Court to answer a critical question: do Ohio's citizens still have the right of referendum regarding Am.Sub.S.B.No. 117, or did the time for referendum expire while this case was being litigated?

The Secretary respectfully submits that the Court should clarify whether referendum is still available because the Court's opinion is not conclusive on the matter. Equally important, the Court should resolve this issue because, if the Secretary answers the question without the Court's guidance, either path she takes might carry negative consequences for her office, the referendum process, and this Court. Finally, if the Court's decision did already determine that the time for referendum has past, the Secretary asks the Court to reconsider that determination, or to stay its effect, to allow citizens the chance to exercise their right of referendum.

First, the Court's decision does not conclusively answer whether referendum is available, as different parts of the opinion seem to suggest different answers. While the majority opinion seems to have ruled that the referendum period has expired, the language of the opinion leaves

some room for speculation and debate. Specifically, the majority notes at the end that “[t]he parties did not request a stay of the effective date of the law to allow for circulation of referendum petitions,” and it concludes that “[a]ccordingly, Section 1c, Article II of the Ohio Constitution provides for the effective date of Am.Sub.S.B. No. 117.” By referring in the past tense to the lack of a stay request, and by saying that the effective date is already set by Section 1c of Article II—which establishes a 90-day clock that already ran from January 5 to April 5—the Court seems to say that the window has already closed. But on the other hand, that same passage also says, using the present tense, that “we express no opinion on whether a stay *may be permissible*,” suggesting that it is not too late. Moreover, Justice Stratton, one of the four Justices joining the majority opinion, concluded her concurrence by stating that “Am.Sub.S.B. No. 117 is a valid law subject to the referendum process”, again using the present tense. 2007-Ohio-3780, ¶ 83. Thus, it is not clear whether the Court has expressly left referendum available.

This uncertainty has placed the Secretary in an untenable position as she seeks to carry out her ministerial duties and faithfully obey the Court’s mandamus order. On one hand, if the Secretary tells citizens that referendum remains available, it might be said that she is not obeying the Court and she may be exposed to further legal action. Further, she does not want to send well-meaning citizens on an expensive yet futile effort to collect thousands of signatures in support of the referendum, only to find out eventually that the effort and expense were wasted. On the other hand, if the Secretary tells citizens that the time for filing referendum petitions has passed, she might be guilty of mistakenly cutting off the important right of referendum. Moreover, if she characterizes the Court’s decision cut off the referendum, when perhaps the Court intended no such thing, she might be accused of not only depriving citizens of this right, but also of unfairly ascribing that result to the Court. Additionally, no matter which way the

Secretary acts, by either accepting or denying the referendum petitions, her decision may lead to further litigation and reappearance of the matter before this Court. As such, the Secretary asks for the Court to resolve this question now rather than later.

In short, the Secretary does not wish to err in either direction in carrying out the Court's instructions and therefore asks the Court to clarify its opinion concerning the right of referendum relative to Am.Sub.S.B. No. 117. Further, to the extent that the issue has been decided against referendum, or is still open, the Secretary asks in the alternative for the Court to reconsider, if need be, and/or to stay the effective date of the law and allow for a referendum.

## ARGUMENT

### **A. Clarification is needed to avoid the unintentional abridgment of the right to referendum.**

The Ohio Constitution reserves to the people the power of referendum. Before acting in a way that may cut off or abridge that constitutional right, Secretary Brunner seeks guidance from the Court on whether the referendum process is still available to the citizens of Ohio.

As set forth above, paragraph 52 of the majority opinion, read in conjunction with paragraph 83 of Justice Stratton's concurrence, creates some ambiguity regarding the availability of the referendum process. Paragraph 52 of the Court's opinion reads as follows: "The parties did not request a stay of the effective date of the law to allow for circulation of referendum petitions, and we express no opinion on whether a stay may be permissible. Accordingly, Section 1c, Article II of the Ohio Constitution provides for the effective date of Am.Sub.S.B.No. 117." 2007-Ohio-3780, ¶ 52. Section 1c, Article II provides that a law passed by the General Assembly goes into effect: (1) ninety days after it shall have been filed by the Governor in the office of the Secretary of State; or (2) upon approval by a majority of those voting upon a referendum. Section 1c, Article II; see also *Thornton v. Salak* (2006), 112 Ohio St. 3d 254, 2006-

Ohio-6407, ¶ 24. If the Court's ruling meant that the law went into effect ninety days after it was filed in the Secretary of State's office—a date that has already passed—that ruling precludes the referendum process altogether.

At the same time, paragraph 83 of Justice Stratton's concurrence leaves open the possibility that Am.Sub.S.B.No.117 is subject to the referendum process: "I believe that the veto is ineffective and that Am.Sub.S.B.No. 117 is a valid law subject to the referendum process."

2007-Ohio-3780, ¶ 83. Read in tandem, paragraphs 52 and 83 create ambiguity regarding whether a referendum petition may be filed in opposition to Am.Sub.S.B.No. 117, and thus leaves open the possibility that the Secretary would either accept or reject referendum petitions in error.

Any such error would be significant, as the Ohio Constitution and this Court's decision affirm the importance of the referendum. The Ohio Constitution vests the citizens of the State with the power to reject laws passed by the General Assembly through the referendum process. Section 1, Article II provides that, "[T]he people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls." Furthermore, this Court has recognized the right to referendum as paramount. See *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St. 3d 225, 234 (finding that Am.Sub.H.B. No. 107 of the 120<sup>th</sup> General Assembly denied the citizens of Ohio the right to referendum under Section 1, Article II). Moreover, in this specific instance, concerned citizens have indicated to the

Secretary that they are considering pursuing the referendum process with respect to Am.Sub.S.B.No.117 if that option remains available. See **Letter of Benson A. Wolman, attached as Ex. A of Nance Affidavit**. Accordingly, given the importance of the right to referendum, the Secretary seeks guidance from the Court in order that the people are not improperly deprived of that right.

**B. Secretary Brunner requests clarification in order to carry out her duties as Secretary of State.**

The Secretary of State is an executive officer who lacks the authority to make judicial determinations. *Maloney v. Rhodes* (1976), 45 Ohio St. 2d 319, 323; *State ex rel. Governor v. Taft* (1994), 71 Ohio St. 3d 1, 4. Secretary Brunner, seeking to act within the scope of her duties, therefore asks for clarification from the Court on whether she should accept or reject referendum petitions.

If an interested person were to file a referendum petition opposing Am.Sub.S.B.No. 117, the Secretary of State would have to decide whether to accept or reject the petition—a decision, that will be problematic in this particular case. While the Secretary of State makes this determination initially for other petitions, this matter presents a different situation due to the underlying litigation in this case. Without further clarification from the Court, the Secretary of State would need to determine the availability of the referendum process for Am.Sub.S.B.No. 117—a determination that is outside the scope of her ministerial duties because it touches upon the availability of a public right. As such, Secretary Brunner asks this Court for guidance regarding the availability of the referendum process for Am.Sub.S.B.No. 117 so that she may act in accordance with her duties.

**C. Alternatively, Secretary Brunner seeks a stay or reconsideration so that referendum will be available.**

Alternatively, pursuant to Paragraph 52 of the Court's opinion and previous rulings of this Court, Secretary Brunner asks this Court for a stay of the effective date of Am.Sub.S.B. No. 117 to allow for the filing of referendum petitions, or, if the Court's decision has already found referendum is unavailable, the Secretary asks the Court to reconsider that point. The relevant language of Paragraph 52 reads as follows: "The parties did not request a stay of the effective date of the law to allow for circulation of referendum petitions, *and we express no opinion on whether a stay may be permissible.*" 2007-Ohio-3780, ¶ 52 (emphasis added). To the extent that the use of the present tense suggests that parties may still seek a stay in this matter, Secretary Brunner respectfully requests the Court to grant a stay providing for ninety days from the Court's August 1, 2007 opinion during which she may accept referendum petitions. See *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St. 3d 225, 234 (granting stay of nonappropriation provisions of the bill for a period of ninety days from the date of court's decision to allow submission of referendum petitions to the Secretary of State).

Finally, if the Court's decision had, in fact, already determined that referendum is no longer available, the Secretary requests reconsideration of that point in order to protect Ohioans' ability to pursue their constitutional right to referendum.

## CONCLUSION

For the reasons above, Secretary Brunner respectfully asks that the Court clarify whether referendum is still available for Am.Sub.S.B.No. 117 for the purposes of referendum petitions. In the alternative, Respondent Brunner asks that the Court reconsider, or grant a stay of ninety days from the Court's August 1, 2007 opinion, for the effective date of Am.Sub.S.B.No. 117.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 13, 2007 a copy of the foregoing *Motion For Reconsideration or Stay* was served by regular U.S. mail upon:

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August 10, 2007

The Honorable Jennifer Brunner  
Secretary of State of Ohio  
180 East Broad Street  
Columbus, Ohio 43215

Re: *General Assembly v. Brunner* and Senate Bill 117

Dear Secretary Brunner:

I write on behalf of the Equal Justice Foundation, the Coalition on Homelessness and Housing in Ohio, the National Association of Consumer Advocates, the Ohio Association for Justice, the Cuyahoga County Foreclosure Prevention Program, the Fair Housing Center of Toledo, and the Cleveland Tenants Organization. These groups represent the interests of Ohio consumers who have been harmed by lead paint and unconscionable and deceptive practices, practices that in many instances have caused consumers to lose their homes, their livelihoods, or both. These individuals are directly affected by SB 117, which in one stroke greatly weakens current consumer protections while encouraging the proliferation of deceptive business practices in this State. Victims of predatory mortgage lending in particular, who only recently were brought under the protection of the Consumer Sales Practices Act, now find themselves once again unable to seek appropriate justice.

Given the ramifications of SB 117, our organizations are seriously considering initiating a referendum campaign, but the uncertainties surrounding the availability of a referendum is complicating our efforts. Thus, we are seeking clarification as to whether there is still time to do so before we commit the effort and assets required for such a drive. As we were not parties in *General Assembly v. Brunner*, we do not have standing to seek clarification or a stay from the Court; accordingly, we are respectfully requesting that you do so.

Cordially,

Benson A. Wolman

EXHIBIT

A

TABBOLES