ORIGINAL

In the Supreme Court of Ohio

STATE *ex rel.* CLEVELAND RIGHT TO LIFE, INC., *et al.*,	:	Case No. 2013-1668
Relators,	:	Original Action in Mandamus and Prohibition
v.	:	
STATE OF OHIO CONTROLLING BOARD, *et al.*,	:	
Respondents.	:	

BRIEF OF AMICI CURIAE OHIO PROVIDER RESOURCE ASSOCIATION, OHIO COUNCIL OF BEHAVIORAL HEALTH AND FAMILY SERVICES PROVIDERS, NATIONAL ALLIANCE ON MENTAL HEALTH, ADVOCATES FOR OHIO'S FUTURE, OHIO ASSOCIATION OF COUNTY BEHAVIORAL HEALTH AUTHORITIES, AND COALITION FOR HEALTHY COMMUNITIES IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICI CURIAE

A. Description of amici curiae

Six amici curiae have joined together to submit this brief because Relators' challenge to the Controlling Board's authorization of the expenditure of excess federal Medicaid funds, if successful, would harm the people who receive vital services from amici's members and the people who provide many of those services. To conserve the Court's resources, they have agreed with other amici curiae that this brief will present a collective perspective on the substantive legal issue before the Court; they also support the State with respect to the procedural standing and mandamus issues but do not separately address them. Another group of amici, represented by Carpenter Lipps & Leland LLP, will file a separate brief that will focus on the importance of this proceeding to needy Ohioans and those who assist them.

The six amici who authored this brief are dedicated to improving the delivery of services to people who have a wide variety of behavioral, developmental, and addiction-related needs. The Ohio Provider Resource Association ("OPRA") is a statewide association of service providers who serve Ohioans with developmental disabilities. It is the oldest and largest organization of its kind in Ohio, representing more than 15,000 workers who serve individuals with these disabilities through approximately 150 member organizations. It supports the care providers and their clients, and provides advocacy on their behalf, to ensure the availability of programs, services, and funding that is needed to help individuals with developmental disabilities achieve a life of increasing independence, productivity, and integration.

The Ohio Council of Behavioral Health & Family Services Providers ("Ohio Council") serves Ohio families by promoting effective, efficient, and sufficient behavioral health and family services. It strives to ensure that Ohio residents have access to appropriate, affordable,

high quality, outcome-based behavioral health treatment and support services. The Council represents 160 organizations that provide behavioral health and family services to over 600,000 people annually in communities throughout Ohio.

The National Alliance on Mental Illness ("NAMI Ohio") is the statewide organization that serves as the voice on mental illness in Ohio. Its mission is "to improve the quality of life, ensure dignity and respect for persons with serious mental illness, and support their families." Established in 1983, NAMI Ohio is comprised of thousands of family members, consumers, advocates, and professionals working together to ensure that Ohioans with mental illness and their loved ones receive the treatment and support they need. NAMI Ohio and its 50 local affiliates provide an array of programs throughout the State to support those who need assistance and to eliminate the stigma of mental illness.

The Ohio Association of County Behavioral Health Authorities ("OACBHA") is the statewide organization that represents Ohio's county behavioral health authorities, including Alcohol, Drug Addiction and Mental Health (ADAMH) boards, Community Mental Health (CMH) boards, and Alcohol & Drug Addiction Services (ADAS) boards. These boards are responsible for ensuring that community-based alcohol, drug addiction, and mental health services are available to all Ohio citizens, regardless of their ability to pay. They are statutorily empowered to plan, develop, fund, manage, and evaluate these services.

Advocates for Ohio's Future ("AOF") promotes health and human service budget and policy solutions that support a thriving economy and build strong families and communities, so that all Ohioans live better lives. As a statewide coalition of over 450 local and statewide organizations, AOF is committed to a vision of Ohio in which all Ohioans can work and participate in the community. AOF recognizes that when people have essential human

resources -- things like food, housing, health care, education, child care, and transportation -- families and communities thrive.

The Coalition for Healthy Communities ("CHC") is comprised of over 20 statewide organizations that represent and advocate for Ohioans with mental illness and/or substance use disorders. It educates policy makers on the need that many Ohioans have for access to effective, efficient, high quality, and clinically necessary mental health and substance use disorder prevention, treatment, and support. Annually, more than 2.3 million Ohioans with mental health disorders and over 1 million with addictive disorders need services. Unfortunately, only about one in ten Ohioans actually receive services, primarily due to lack of health insurance coverage.

B. Interests of amici curiae

Amici are extremely interested in the issue before this Court because the expansion of Medicaid eligibility will improve the lives of so many vulnerable Ohioans in so many ways. Their primary interest, of course, is in hundreds of thousands of these citizens who cannot afford care that they need. For example, 25 percent of the uninsured in Ohio have a mental illness or a substance abuse addiction but must forego necessary treatment. The expenditure of the federal funds authorized by the Controlling Board will provide them with access to behavioral health care and related services, such as primary care and preventative health services, that can be literally life-saving.

These benefits will go to Ohioans who cannot afford to pay for regular health care and those with special needs, such as childless adults who are struggling with substance abuse, transition-age youth who will otherwise lose services when they enter adulthood, and prisoners who re-enter the community after treatment in corrections facilities but need services to find employment and avoid recidivism. In addition, local resources that are freed up by Medicaid

expansion can be invested in supportive services, including employment and housing services, that promote long-term independence and recovery. In short, the excess federal Medicaid funds will close a coverage gap for a significant portion of the Ohio population who are least able to obtain adequate and affordable health care, which will allow Ohio to continue its progress toward providing the continuum of care that is needed.

For example, Medicaid coverage will give parents of children in Ohio's child welfare system the opportunity to receive treatment for mental health and addiction services for the first time in Ohio history. These are the largest contributing factors to the placement of children into foster care. Medicaid expansion will strengthen families and enhance the fabric of our communities as families receive the health care they need to parent and to lead productive lives.

The excess federal funds will also assist needy Ohioans by enabling amici's members to provide better services. The health care coverage mandate for employees is projected to cost $20 million annually just for OPRA members, who receive most of their funds from Medicaid and have extremely limited opportunities to pay this cost from other sources of revenue. In addition, many employees who directly furnish care are unable to afford adequate health care coverage for themselves, which contributes to a high turnover rate among those who work most closely with patients and clients. Direct support developmental disability professionals in Ohio have an average annual turnover rate of 47 percent, which affects the quality of those services.

Amici strongly urge the Court to find that the Controlling Board's approval of the expenditure of excess Medicaid federal funds was a proper exercise of its statutory authority.

STATEMENT OF FACTS

A. Statement of the Case

Two local right-to-life groups and 6 of the 132 members of the Ohio General Assembly ("Relators") have asked the Court to order the State of Ohio Controlling Board and the Ohio Department of Medicaid ("Respondents") to "treat as void" the Controlling Board's October 21, 2013, authorization of a request by the Department to expend excess federal Medicaid funds. (Verified Complaint for Writ of Mandamus and Prohibition, Oct. 22, 2013.) The Court *sua sponte* granted an alternative writ in mandamus and prohibition and adopted an expedited schedule for the presentation of evidence and briefing. (Entry, Oct. 31, 2013.)

Pursuant to the expedited schedule, the Ohio Attorney General filed an Answer defending the legality of the Controlling Board's authorization of the expenditure. (Answer of Respondents, Nov. 5, 2013.) Relators then filed their evidence and their initial Brief, in which they argue that the Controlling Board violated its statutory duties and seek relief in mandamus only. (Relators' Merit Brief, Nov. 15, 2013). Amici Curiae submit this Brief in support of Respondents.

B. Issue Presented

Relators' Complaint and Merit Brief present a single, narrow legal issue: whether language that is removed from a bill by an executive veto, which the legislature does not override, is legally enforceable as "legislative intent" even though the vetoed language is "void" pursuant to Article II, Section 16 of the Ohio Constitution.

C. The Parties

1. Relators

Two of the eight Relators (Cleveland Right to Life, Inc., and Right to Life of Greater Cincinnati, Inc.) are local organizations that allegedly have "invested significant resources in opposing the expansion of...Medicaid spending in Ohio" because they fear that it "directly and/or indirectly will be used to jeopardize human life." (Complaint at ¶¶ 52, 54.) The remaining six Relators (Ron Young, Matt Lynch, Andy Thompson, Ron Hood, Ron Maag, and John Becker) are Ohio state representatives who either "voted for" or "supported" language in Am. Sub. H.B. 59 that expressed disapproval of extending Medicaid coverage but was removed from the bill by executive veto before it became a law. (*Id.*, at ¶¶ 45, 47.) However, these Relators do not allege that they (or any other members of the General Assembly) made any effort to override the veto.

2. Respondents

a. State of Ohio Controlling Board

The Ohio General Assembly created the predecessor to Respondent State of Ohio Controlling Board in 1915 to authorize the expenditure of money that is appropriated and designated for specific purposes (1914-1915 Ohio Laws 33) and established it as the Ohio Controlling Board two years later (1917 Ohio Laws 187). The General Assembly has codified the authority of the Controlling Board in statutes that specify the circumstances in which it can transfer appropriations and approve expenditures. *See* R.C. 127.14. The Controlling Board performs these delegated functions so that the General Assembly is not overwhelmed by the day-to-day flood of bookkeeping and administrative details involved in the appropriation and expenditure process.

Among other things, the Controlling Board is expressly authorized by statute to approve the expenditure of federal funds that exceed the General Assembly's appropriation for a specific purpose, R.C. 131.35(A)(2). This may occur for many different reasons. For example, state agencies are encouraged to seek federal funds to implement programs and services for which the General Assembly has not appropriated funds. Moreover, as a practical matter, state and federal fiscal years do not coincide and the Controlling Board helps to marry-up federal funds with the State's expenditure of those funds. The Controlling Board has previously exercised its statutory authority to approve expenditures of excess federal funds without objection. For example, it authorized the expenditure of approximately $100 million of federal funds by the Ohio Department of Education pursuant to R.C. 131.35. (Controlling Board Fund/Appropriation Request No. EDU0100145.)

The Controlling Board's actions must be authorized by a majority vote of its seven-member board, R.C. 127.13, which consists of six members of the General Assembly (*i.e.*, the chairpersons or vice-chairpersons of the Ohio House and Senate Finance committees; one member of the majority party and one member of the minority party of the House, who are appointed by the Speaker of the House; and one member of the majority party and one member of the minority party of the Senate, who are appointed by the Senate President) and one member of the executive branch (*i.e.*, the director or representative of the Ohio Department of Budget and Management). R.C. 127.12. In short, the General Assembly determines the statutory authority of the Controlling Board and provides six of its seven members; the Board can take no action at the behest of the representative of the Governor unless at least three of the six representatives of the General Assembly agree.

b. Ohio Department of Medicaid

Respondent Ohio Department of Medicaid was created by the Ohio General Assembly to administer the Medicaid program in this State. Medicaid is a federal-state program that allows eligible individuals in Ohio with low incomes or other specified needs to receive health care coverage for defined services. Some Ohio Medicaid services are paid with a combination of state and federal funds, while others are paid entirely with federal funds. In either event, the Ohio Department of Medicaid determines which services are available for payment in accordance with the Ohio State Plan for Medicaid and federal law.

The General Assembly has directed the Ohio Department of Medicaid to cover all federal mandatory eligibility groups and to cover all federal optional eligibility groups for which coverage is required by Ohio statutes. R.C. 5163.03. The General Assembly has also specifically authorized the Department to cover other federal optional eligibility groups unless expressly prohibited from doing so by statute. R.C. 5136.06. Assuming that no other coverage is reduced, the Department must obtain the approval of the Controlling Board before it can expend federal funds to provide coverage to one of these optional eligibility groups.

c. The Board's approval of the Department's expenditure request in this case

As described above, the Controlling Board regularly approves or denies expenditure requests from state agencies that fall within its statutorily defined authority. On October 21, 2013, it approved a request by the Director of the Ohio Department of Medicaid for an increase in appropriation authority to expend excess federal Medicaid funds, in order to provide coverage to an optional eligibility group that includes Ohio citizens who have incomes slightly above the poverty line and meet other specified requirements. Five of the seven Board members, including four of the six representatives from the General Assembly, voted to approve the Department's

request. The Controlling Board had statutory authority from the General Assembly to approve the request because only federal funds are being expended; in fact, the Board's authorization saved approximately $400 million in state funds. It is simply untrue that "the Controlling Board...commit[ted] Ohio to covering the billions of dollars in costs." (Relators' Merit Brief, at 25.)

D. Relevant Facts

Only four background facts are relevant to this proceeding, and they are all undisputed:

- The General Assembly has specifically authorized Respondent Ohio Department of Medicaid to "cover any of the optional eligibility groups" defined by federal Medicaid law unless "state statutes prohibit [that coverage]." R.C. 5163.03(C) and (D).
- The "As Introduced" version of the biennial budget bill, Am. Sub. H.B. 59, specifically provided that the Ohio Medicaid program "may cover" one particular optional eligibility group, defined in Section 1902(a)(10)(A)(i)(VIII), which consists of persons whose income does not exceed 133 percent (adjusted to 138 percent) of the poverty line and who meet other requirements.
- The Ohio House of Representatives removed the explicit approval of coverage for this optional eligibility group from H.B. 59, and the General Assembly then added language to H.B. 59 stating that the Ohio Medicaid program "shall not cover" the optional eligibility group.
- Governor Kasich vetoed the prohibitory language that the General Assembly added to H.B. 59, and no member of the General Assembly

took any action to override the Governor's veto. As a result, H.B. 59 became law without any language that prohibits coverage of the optional eligibility group.

Relators filed this action in mandamus and prohibition after the Controlling Board approved the Department's request to expend the excess federal Medicaid funds to cover the optional eligibility group. Relators now seek only a writ of mandamus, which would order both Respondents to treat the Controlling Board's authorization of the expenditure as void.

ARGUMENT

Amici Curiae support Respondents and urge this Court to deny Relators' request for a writ of mandamus. Relators purport to represent "the legislative intent" of the General Assembly, but they consist of two local right-to-life groups and just six members of the Ohio House of Representatives. *See* Relators' Merit Brief, at 25 ("it is *Relators*' legislative intent that the Controlling Board is duty-bound to abide by") (original emphasis). They ask this Court to enforce language that was removed from the biennial appropriations bill, H.B. 59, by executive veto before it became law and, thus, is not part of a prevailing appropriations bill. As explained below, the Ohio Constitution declares that vetoed language in a bill is "void," and this Court should not issue a writ in mandamus that enforces the vetoed language in H.B. 59 by giving it legal effect.

Relators' "Proposition of Law" obscures rather than clarifies the issue that the Court must decide. All parties agree that the Controlling Board must obey the Ohio Constitution, and that it must refrain from taking action "which does not carry out the legislative intent of the general assembly...as expressed in the prevailing appropriation acts of the general assembly." R.C. 127.17. Relators are actually arguing that the former language of H.B. 59 that was removed

by executive veto constitutes legislative intent expressed in a prevailing appropriation act, and that the Controlling Board therefore could not authorize the expenditure of the excess federal Medicaid funds because it did not carry out that intent.

Relators cannot prevail on this issue, and they address it in only two pages of their 38-page Brief. (Relators' Merit Brief, at 21-23.) Instead, Relators' Brief consists largely of a diatribe against the federal Patient Protection and Affordable Care Act, which is intended to politicize this legal proceeding, and exaggerated warnings of a host of disasters that will supposedly befall Ohio if the Court rules against them, which are intended to distract it from the narrow legal issue presented.

Relators do not dispute that the Controlling Board's legal authority is defined and delegated by Ohio statutes. Moreover, they admit that the General Assembly expressly authorized the Controlling Board to approve expenditures of excess federal funds, R.C. 131.35(A)(2), subject only to the general statutory limitation that the Controlling Board cannot take action that does not carry out the legislative intent expressed in prevailing appropriation acts, R.C. 127.17. Finally, Relators concede that the authority granted to the Controlling Board under these statutes is a proper and constitutional delegation of the General Assembly's legislative authority. (Relators' Merit Brief, at 14, 16.) They disagree with Respondents only as to whether the vetoed language in H.B. 59 constitutes legally enforceable legislative intent expressed in a prevailing appropriation act and therefore limits the Controlling Board's authority. This is the only issue that the Court is asked to decide in this litigation.

A. The parties agree that the Controlling Board has the legal authority to approve expenditures of excess federal funds that are not inconsistent with legislative intent expressed in prevailing appropriation acts.

1. The General Assembly has specifically authorized the Controlling Board to make transfers between State funds and to authorize expenditures of excess federal funds consistent with legislative intent.

The parties agree that the General Assembly acted properly, and constitutionally, when it delegated broad authority to the Ohio Controlling Board to authorize the expenditure of excess federal funds through three interrelated statutes. (Relators' Merit Brief, at 14, 16.) First, R.C. 127.14(D) expressly authorizes the Controlling Board to transfer cash balances from one State fund to another State fund:

> The controlling board may, at the request of any state agency...authorize, with respect to the provisions of any appropriation act...[t]ransfers of all or part of cash balances in excess of needs from any fund of the State...except [specified named funds].

The statute excludes approximately 30 named State funds, but none are involved in this case.

Second, R.C. 131.35(A) expressly authorizes the Controlling Board to approve expenditures "[w]ith respect to the federal funds received into any fund...from which transfers may be made under subdivision (D) of section 127.14 of the Revised Code," as follows:

> If the federal funds received are greater than the amount of such funds appropriated by the general assembly for a specific purpose, the total appropriation of federal and state funds for such purpose shall remain at the amount designated by the general assembly, except that **the expenditure of federal funds received in excess of such specific appropriation may be authorized by the controlling board.**

R.C. 131.35(A)(2) (emphasis added). In the present case, the Controlling Board authorized the expenditure of federal Medicaid funds received in excess of the specific appropriation that had been made by the General Assembly.

Third, the General Assembly placed one limitation on the authority it delegated to the Controlling Board:

> The controlling board shall take no action which does not carry out the legislative intent of the general assembly regarding program goals and levels of support as expressed in the prevailing appropriation acts of the general assembly.

R.C. 127.17.

In short, the General Assembly has conferred statutory authority on the Controlling Board to authorize the expenditure of excess federal funds from any State fund, other than those listed in R.C. 127.14(D), unless the authorization is inconsistent with legislative intent that is expressed in prevailing appropriation acts.

2. The statutory authority granted to the Controlling Board by the General Assembly poses no threat to Ohio's constitutional system of checks and balances.

In the statutory context described above, Relators' professed fear that an unfavorable ruling by the Court will loose a renegade Controlling Board to run rampant and "appropriate all manner of federal funds" despite "the General Assembly's objections" has no basis in legal reality. *See* Relators' Merit Brief, at 2 (warning that the Controlling Board would be able to "circumvent the legislative branch in setting everything from Ohio's speed limits and other criminal laws to health care and education policy," and "this usurpation cannot be allowed to stand"); at 11 (mandamus must issue in this case "if the Ohio Constitution's checks and balances are to remain intact"); *and* at 25 (a ruling against Relators "risks the solvency of [the] entire state budget").

There is no such danger. Even apart from the fact that the legislature provides six of its seven members, the Controlling Board acted completely within the statutory authority it was given by the General Assembly. The issue before the Court involves language that was removed

from a bill by executive veto and that the General Assembly did not choose to enact into law by overriding the veto. The Court's ruling will not usurp the General Assembly's constitutional authority, and the expenditure of wholly federal funds will not threaten the State's financial solvency.

B. The Controlling Board's approval of the expenditure of excess federal Medicaid funds did not fail to carry out any legislative intent expressed in prevailing appropriation acts.

1. Relators cite no legal authority supporting their claim that vetoed portions of a bill express legally enforceable legislative intent.

As noted above, Relators barely address the narrow legal question that the Court must decide in this case. Their entire argument on that issue consists of their repeated assertion that the language that was removed from H.B. 59 by executive veto constitutes "legislative intent...as expressed in the prevailing appropriation acts" and therefore deprived the Controlling Board of authority to approve the expenditure of excess federal Medicaid funds under R.C. 127.17. (*See* Relators' Merit Brief, at 21-23.) But Relators never explain how this vetoed language was expressed in a "prevailing" appropriation act, when it ultimately did not prevail and was not part of the appropriation act when it became a law.

Relators cite only one authority in support of their assertion that vetoed language in a bill constitutes enforceable legislative intent, *State ex rel. Meshel v. Keip*, 66 Ohio St.2d 379, 423 N.E. 2d 60 (1981) (Brown, J., concurring in part and dissenting in part). However, there was no veto of legislation involved in that case, and Justice Brown merely stated that a single legislative act that separately appropriates funds for two fiscal years must be enforced as a unitary whole after it has been signed into law. 66 Ohio St.2d at 393. He concluded that funds could not be transferred from fiscal year 1981 to fiscal year 1980 because that would nullify the 1981 appropriation and thus thwart the legislative intent expressed in the enacted law. (*Id.*)

This has nothing to do with whether vetoed language in a bill, which is never enacted into law, expresses legally enforceable legislative intent, and thus takes away the authority that the General Assembly has otherwise granted to the Controlling Board in a fully enacted law. Relators have cited no legal authorities whatsoever that address that issue.

2. The Ohio Constitution mandates that vetoed portions of a bill are legally "void."

The answer to the legal question that is now before this Court begins and ends with the text of the Ohio Constitution, which provides in pertinent part:

> The governor may disapprove any item or items in any bill making an appropriation of money, and the item or items, so disapproved, shall be void, unless repassed in the manner proscribed by this section for the repassage of a bill.

Ohio Constitution, Article II, Section 16. Relators lose sight of this constitutional mandate in their attempt to explain why the Court should enforce the vetoed language of H.B. 59. "To analyze away the words of the Constitution is to engage in an act of corroborating one's own belief that the Governor's actions were unwise." *State ex rel. Mauever v. Sheward*, 71 Ohio St.3d 513, 528, 1994 Ohio 496, 644 N.E. 2d 369 (Moyer, J., concurring).

Ohio courts have consistently enforced the plain language of Article II, Section 16, and have held that items in an appropriation bill that is passed by the General Assembly and subsequently vetoed by the Governor are void and have no legal effect. *See, e.g., State ex rel. Brown v. Ferguson*, 32 Ohio St.2d 245, 291 N.E. 2d 434 (1972); *State ex rel. Public Utilities Commission v. Controlling Board*, 130 Ohio St. 127, 197 N.E. 129 (1935). Relators cite no contrary legal authority, and there is none. The Court should not enforce the vetoed language of H.B. 59 as legally binding when the Ohio Constitution declares it "void."

3. The Court cannot ignore the Governor's constitutional role in the legislative process.

Relators' contentions also exclude the Governor from his constitutional role in the legislative process. *See* Relators' Merit Brief, at 17 ("the *bill* passed by the General Assembly, rather than the text of the statute enacted," determines the Controlling Board's legal duty) (original emphasis). Every line-item veto would be open to challenge because a veto of an appropriation is always a change in policy. Relators argue that the Governor's constitutional right to veto legislation must be ignored "if the Ohio Constitution's checks and balances are to remain intact" (*id.*, at 11), but the executive veto power is one of those checks and balances and cannot be treated as meaningless by the judiciary.

In *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 237 N.W. 2d 910, 918 (1976), the Wisconsin Supreme Court squarely rejected the argument "that in the exercise of the veto power the governor can negative what the legislature has done but not bring about an affirmative change in the result intended by the legislature." It concluded:

> Every veto has both a negative and an affirmative about it. There is always a change in policy involved. We think the constitutional requisites ... fully anticipate that the governor's action [in vetoing language in a bill] may alter the policy as written in the bill sent to the governor by the legislature.

237 N.W. 2d at 918. *See also State ex rel. Klezka v. Conta*, 82 Wis. 2d 679, 264 N.W. 2d 539, 552 (1978), which reached the same result and noted that the changed policy brought about by a partial veto "ultimately remain[s] in effect only if the legislature acquiesces in the partial veto by its refusal or failure to override [it]."

The same principle applies here. The text of the bill that was actually enacted into law, rather than the language that was vetoed by the Governor and removed from the bill, governs the legal authority of the Controlling Board.

4. The General Assembly's intent can be determined only from the provisions of a bill that are enacted into law.

Relators insist that, because the veto could not affect the expression of legislative intent in the vetoed language of H.B. 59, the failure of the General Assembly to take any steps to override the veto also had no effect on that expression of intent. (Relators' Merit Brief, at 23.) But Relators' premise is incorrect; as discussed above, the vetoed language is void as a matter of constitutional law. The General Assembly's failure to override the veto obviously did not confirm its pre-veto intent; on the contrary, it suggests that the legislature abandoned that intent.

In this regard, Relators cite *State ex rel. Meshel, supra,* for the proposition that the Controlling Board does not have unlimited discretion to adopt any rules it likes under an existing valid law merely because the General Assembly could enact new laws limiting that discretion. But this has nothing to do with the General Assembly's decision not to override the Governor's veto in the present case, where the veto prevented the prohibitory language in H.B. 59 from ever becoming valid law and the Controlling Board authorized the expenditure pursuant to express statutory authority. Relators read *Meshel* backwards; in the present case, the General Assembly chose not to take any action to override the veto after H.B. 59 was signed into law.

Finally, Relators contend that the decision of the General Assembly not to override the Governor's veto should not be considered an indication of legislative intent. They point out that a 60 percent vote by the General Assembly is required to override a veto and argue that 51 percent of the votes are enough to express legislative intent. But Relators cannot simply assume that 50 percent of the legislators would have voted to override the veto if they had held a vote; the fact that the General Assembly made no attempt to override the veto is the best evidence of its actual intent.

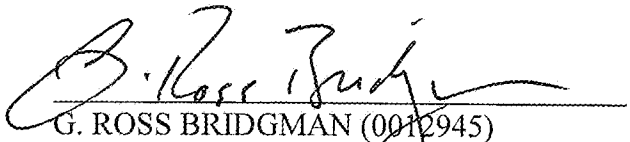
In any event, Relators then abandon this "majority" argument and claim that "any doubt about the General Assembly's inten[t]" was dispelled by a written "formal protest," signed by 38 state representatives, that opposed the Controlling Board's approval of the expenditure of the excess federal Medicaid funds. However, the intent of less than one-third of the legislators cannot be deemed the intent of the legislature. (Relators' Merit Brief, at 18-19.) For the same reason, the Court should also reject Relators' further contention that the intent of just the six Relators who serve in the Ohio House of Representatives, standing alone, establishes the legally enforceable intent of the General Assembly. *See, id.*, at 25 ("it is *Relators'* legislative intent that the Controlling Board is duty-bound to abide by") (original emphasis).

Relators' shifting definition of legislative intent -- from the presumed intent of a majority of legislators, to the intent of 38 members, and then to the intent of six members -- illustrates the reason that legislative intent is determined from enacted laws rather than from unenacted drafts of bills or the allegations of a small number of legislators. In this case, the members of the General Assembly chose not to override the Governor's veto and allowed H.B. 59 to become a valid law; the Controlling Board has express and specific statutory authority to authorize expenditures of excess federal funds; and that is all that matters legally and constitutionally.

CONCLUSION

The language in Am. Sub. H.B. 59 that was vetoed by the Governor is "void" under the Ohio Constitution, and the Controlling Board's authorization of the expenditure of excess federal Medicaid funds therefore did not fail to carry out any legislative intent expressed in a prevailing appropriation act. The Controlling Board acted entirely within its delegated statutory authority to approve the expenditure, and Relators have no right to a writ of mandamus.

Respectfully submitted,



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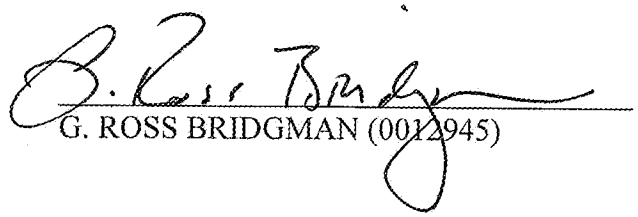

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