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Interested Party Testimony on Senate Bill 108 Before the Ohio Senate Judiciary Committee

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**Daniel J. Dew, Legal Fellow
The Buckeye Institute**

Chairman Eklund, Vice Chair Manning, and Ranking Member Thomas, thank you for the opportunity to testify today on Senate Bill 108 and the important subject of statutory interpretation.

My name is Daniel J. Dew, a legal fellow at **The Buckeye Institute**, an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.

Introduction

Too many people, including many of today’s legal scholars, seem to have forgotten how the legislative bodies that govern so much of our lives actually govern. They govern through the laws they enact, not through their good intentions. Our federal and state constitutions grant legislatures the power to “speak” through legislation, through law. As the late Justice Antonin Scalia **reminded** us when he rebuked the pervasive use of legislative histories to divine the hidden meaning of statutes, “[w]e are bound not by the intent of our legislators, but by the laws which they enacted, laws which are set forth in words, of course.”

Regrettably, Ohio Revised Code Section 1.49 ignores Justice Scalia’s admonition and instead lists sources that Ohio judges may consult when trying to determine the meaning of an ambiguous statute. The list includes amorphous things, such as legislative history, the object sought to be obtained, and the circumstances under which the statute was enacted. The list in ORC 1.49 is problematic for a host of reasons, but I will focus on two of them: the practical and the constitutional.

Practical Problems of Looking Beyond the Text of a Statute

Two practical problems arise when judges strain to look beyond the text of a statute.

First, even if an Ohio court wants to look at the “legislative history” behind a particular statute, the Ohio Supreme Court has stated that “no legislative history of statutes is maintained in Ohio...” ***State v. Dickinson***, 28 Ohio St. 2d 65, 67 (1971).

The **Legislative Services Commission (LSC) disputes** the court’s conclusion and has tried to recast its own reports and analyses as a so-called legislative history. But notwithstanding the LSC’s assertion, Ohio has nothing comparable to the federal Congressional Record, which keeps records of all committee hearings and floor debates, or even Congress’s vaunted committee reports issued by the Finance Committee—considered by some to be the most authoritative of extrinsic evidence. And even these seemingly robust and thorough records of the federal legislative process suffer from fatal defects preventing them from demonstrating definitive legislative intent, as a famous exchange between Senators Armstrong and Dole so vividly illustrates:

Mr. ARMSTRONG. ...My question, which may take [the chairman of the Committee on Finance] by surprise, is this: Is it the intention of the chairman that the Internal Revenue Service and the Tax Court and other courts take guidance as

to the intention of Congress from the committee report which accompanies this bill?

Mr. DOLE. I would certainly hope so...

Mr. ARMSTRONG. Mr. President, will the Senator tell me whether or not he wrote the committee report?

Mr. DOLE. Did I write the committee report?

Mr. ARMSTRONG. Yes.

Mr. DOLE. No; the Senator from Kansas did not write the committee report.

Mr. ARMSTRONG. Did any Senator write the committee report?

Mr. DOLE. I have to check.

Mr. ARMSTRONG. Does the Senator know of any Senator who wrote the committee report?

Mr. DOLE. I might be able to identify one, but I would have to search. I was here all during the time it was written, I might say, and worked carefully with the staff as they worked...

Mr. ARMSTRONG. Mr. President, has the Senator from Kansas, the chairman of the Finance Committee, read the committee report in its entirety?

Mr. DOLE. I am working on it. It is not a bestseller, but I am working on it.

Mr. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report?

Mr. DOLE. No.

Mr. ARMSTRONG. Mr. President, the reason I raise the issue is not perhaps apparent on the surface, and let me just state it: ...The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate.

...If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report.

...For any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let me just make the point that

this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute.

128 CONG. REC. S8659 (daily ed. July 19, 1982).

Senator Armstrong's concerns must be heeded all the more when applied to the comparatively limited legislative materials available in Ohio.

The LSC does yeoman's work, but it is not legislation. LSC reports are not written by members of the General Assembly. They are not voted on by House or Senate committees, nor, of course, by the General Assembly itself. No evidence suggests whether individual assembly members have read any given LSC reports or relied upon them in casting their vote for actual legislation, and members are always free to vote for or against a bill regardless of the LSC's analysis.

Statements made by a bill's proponents fare no better and present no less difficulty, for such statements provide only the interpretation of a single member, and not of the entire legislature. As such, they are entitled to very little weight at all.

Only the statutory text itself enjoys the demonstrated approval of a majority of the legislature.

The second practical problem with relying on legislative history is that such histories allow for public policy "losers" to falsely portray themselves as the winners. In a **case decided by the United States Court of Appeals for the Seventh Circuit**, Judge Frank Easterbrook criticized legislative history as a "loser's history"—that is, a history of reports and testimonies that allows those who cannot get their policies enacted to make it seem as though their preferred policies became law. Such revisionist shenanigans should not "cook the books," so to speak, and distort the meaning of the statutes themselves.

Permitting judges to scour a statute's legislative history for its supposed meaning not only invites those involved in the legislative process to distort or obscure the meaning of the text, but it also invites judges to parse the legislative record selectively, like someone "entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). And that is hardly the sort of judicial approach that the legislature should encourage.

Constitutional Problems of Looking Beyond the Text of a Statute

ORC 1.49 also raises serious constitutional concerns.

The Ohio Constitution prescribes how Ohio laws must be enacted. As the Committee knows all too well, to become law, a bill must pass both chambers of the General Assembly and then be approved by the governor. If the governor vetoes a bill, the legislature may override the veto and thereby enact the law. But any bill failing to satisfy these straightforward requirements, fails to become law.

When a court reads any concept, instruction, or principle outside of the statute's text into the statute, the court gives the force of law to such extrinsic material that has not survived the constitutionally prescribed legislative process. By instructing Ohio courts to look for meaning outside the text of a statute, Revised Code 1.49 encourages courts to circumvent the constitutional legislative process, which will erode respect for our process of bicameralism and presentment.

As Justice Scalia once **cautioned** concerning the judiciary's use of legislative history: "[i]t is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind." *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring).

Conclusion

Ohio courts should look to the text of statutes rather than extrinsic evidence of dubious value. Allowing courts to rely upon sources, statements, and testimonies outside the prescribed proving grounds of bicameralism and presentment, will only encourage staffers, lobbyists, and public interest groups to circumvent the constitutional process. Instead, the General Assembly should work to carefully craft clear and precise legislation free from the ambiguities that tempt courts to look for meaning beyond the statute's own words.

Thank you again for allowing me to testify on this important topic. I am happy to answer any questions that the Committee may have at this time.

About The Buckeye Institute

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