TO: House State & Local Government Committee

FROM: Gary Daniels, Chief Lobbyist, ACLU of Ohio

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RE: House Bill 285 – Interested party testimony

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To Chairman Wiggam, Vice Chair John, Ranking Member Kelly, and members of the House State & Local Government Committee, thank you for this opportunity to provide the following interested party testimony for House Bill 285.

HB 285 allows the speaker of the house and/or senate president, separately or in unison, to intervene "at any time" in a variety of lawsuits and litigation involving a) the constitutionality of a statute; b) claims the statute is preempted by federal law; and c) challenges against the construction or validity of statute, as part of a claim or affirmative defense.

HB 285 also requires the attorney general to first gain approval of the house speaker and/or senate president, as intervenors, or the General Assembly's approval, if the house speaker and/or senate president did not intervene, for settlements and related actions.

The ACLU of Ohio has numerous thoughts and concerns with HB 285 we do not think have been previously aired or considered. Accordingly, we have the following questions and observations:

1) HB 285 places substantial power in the hands of two people, and only two people – the speaker of the house and the senate president. Either person can intervene in a lawsuit without any kind of consideration, hearing, meeting, input, or vote from the other 131 members of the General Assembly. The decision belongs to the house speaker and senate president alone, even if the entire rest of their respective chamber disagrees.

2) Relevant litigation may then expand to include three parties when the state is sued. The plaintiff, the state, and now the General Assembly. Or, perhaps it will be four parties, with the Senate and House split on how to proceed, necessitating the hiring of separate counsel for each chamber, at further expense to Ohio taxpayers.

3) What happens when the house and senate have different opinions on the desire to or wisdom of intervening in a lawsuit? That is, what if one chamber intervenes as plaintiff while the other intervenes as defendant? Or they both intervene as defendants but conclude it is wise to hire separate counsel. Which chamber rules when one wants to settle a lawsuit but the other does not?

4) What happens in this scenario?: One session of the General Assembly passes a law during lame duck, at the end of session. A lawsuit is filed challenging the constitutionality of said law. By the time a lawsuit is filed and/or over the course of the litigation, any combination of the house speaker, senate president or that session's general assembly are replaced, term-limited, or otherwise no longer in power. Do the new leaders now have the power to end involvement from their respective chambers and withdraw as parties or are they permanently anchored to the actions of a previous speaker or senate president?

5) HB 285 anticipates intervention in federal lawsuits. However, federal courts rarely approve intervention by state legislatures in federal court lawsuits and only for specific reasons. It is unlikely HB 285 will change that. This is important to consider for those members who believe HB 285 will allow the OGA to intervene as parties in abortion, or voting rights, or various other lawsuits in federal court when constitutionality of a state law is at issue.

Let's say courts start to change course and allow state legislatures to intervene as defendants in more federal court challenges to the constitutionality of state laws. If the general assembly, now a party to the case, loses in court, they can be made to pay plaintiffs' attorneys' fees and costs. This can and does mean amounts of hundreds of thousands of dollars, potentially millions – for one case – depending on the complexity and length of the litigation. Will the General Assembly be appropriating the necessary funds for this purpose? If so, how much?

6) Under HB 285, when the attorney general wishes to settle relevant lawsuits, they must first submit their plan to a joint committee of legislators for their approval. If the joint committee does not approve, the attorney general is forbidden from settling the suit. This raises obvious separation of powers issues (as does the whole bill) and gives a handful of legislators veto power over the attorney general's wishes if a joint committee rejects the plan or refuses to even meet and consider it.

7) A single court decision, from the Wisconsin Supreme Court (*SEIU Local 1 v. Vos*), has been cited as evidence bills like HB 285 present no constitutional problems with regard to separation of powers concerns. However, what that court said about the matter is different than what has been portrayed to this committee.

In litigation such as this, plaintiffs can file a "facial" or "as-applied" challenge. With a facial challenge, the plaintiffs argue the law is patently unconstitutional in all cases, no matter how it's being applied. With as-applied, they claim the law is unconstitutional in the specific situation where it's being applied to people like them.

In *SEIU Local 1 vs Vos*, plaintiffs filed a facial challenge, which is a higher bar for them to clear. In response, the Court explained there are some distinct, existing ways in Wisconsin the legislature can regulate or direct the actions of their state attorney general. For that reason, the facial challenge failed because, as the court further explained, a facial challenge must demonstrate the law is unconstitutional in each and every application and the plaintiffs failed that test.

What the Wisconsin Supreme Court did not do is rule on the merits of the case. In fact, more than once, they were very careful to state their ruling only addresses the facial challenge. For example:

*We stress that this decision is limited. We express no opinion on whether individual applications or categories of applications may violate the separation of powers, or whether the legislature may have other valid institutional interests supporting application of these laws.*

And of course, it should go without saying that the Wisconsin Supreme Court was applying Wisconsin law. Ohio law and the Ohio Constitution would govern any challenge to this bill, and may well lead to a different outcome even on a facial challenge.

Members of this committee, we have no reason to believe supporters of HB 285 wish to wreak havoc on our state, the legislature, and courts via the passage of this bill. But if a future house speaker and/or senate president wishes to use this legislation for nefarious, unethical, chaotic, or entirely partisan purposes, HB 285, as currently written, provides them with plenty of opportunities.

The ACLU of Ohio asks that you keep this in mind and, if you are intent on its passage, to amend the bill to include needed guardrails preventing House Bill 285 from being used by politicians and political parties in various ways to harm our state.