OHIO ASSOCIATION for JUSTICE
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Interested Party Testimony to House Bill 285
Robert Wagoner, Immediate Past President
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Chairman Wiggam, Vice Chair John, Ranking Member Kelly, and members of the House State and Local Government Committee, thank you for the opportunity to provide testimony regarding House Bill 285.

My name is Bob Wagoner. I am a lawyer practicing law throughout Ohio, with my firm located in the Columbus area. I am the Immediate Past President of the Ohio Association for Justice. OAJ is a bipartisan, statewide organization whose mission includes protecting and promoting Ohioans' right to a fair and impartial civil justice system.

As an interested party to House Bill 285, my testimony will ask more questions than provide positions, because I and OAJ members want to better understand the problem this legislation is solving, if the bill offers the best solution, and how this solution will affect real cases in the future.

No testimony was offered in support of this bill, and I could not find situations where the General Assembly publicly opposed the Attorney General for a settlement or constitutional defense. What problem is prompting the need for new legislation?

The solution the bill proposes is to allow the Speaker of the House and/or the President of the Senate to hire private counsel to

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represent them as a party in certain types of cases. For example, when the constitutionality or validity of a statute is raised in a commercial driving recklessness case, I am already required to serve and notify the Ohio Attorney General as part of our complaint. The Attorney General then joins with the attorneys for the trucking company, trucker, shipper, broker, and others to defend their position on the constitutionality of the statute. This bill allows the Speaker of House and or the Senate President to add more cooks-in-the-kitchen at any stage of the litigation, including shortly before trial. While the problem here is unclear, is adding more attorneys on one side of a case the best solution?

It is longstanding that only the Attorney General has the authority and responsibility to represent the state in settlements and questions of constitutionality. The separation of this power has been sacred. Yet, this bill creates, for the first time, a right for Ohio's legislature to intervene in lawsuits. Is there an issue or situation that has created the need to shift the Attorney General's power to the General Assembly?

This bill brings to mind two quotes from James Madison in The Federalist Papers:

1. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. (Federalist 47)
2. An elective despotism was not the government we fought for; but one in which the powers of government should be so divided and balanced among the several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others (Federalist 84)

The involvement of the House or Senate in cases allows that body to state the intent of previously passed legislation. Will a future General Assembly interpret a law the same way as the General Assembly which passed the legislation in the first place? Is the intent of laws passed by a General Assembly somehow living or incomplete?

Justice Rehnquist, writing for a unanimous US Supreme Court in *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 118 (1980), noted, "[W]e begin with the oft-repeated warning that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one. And ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." If this bill passes, will a future General Assembly have the opportunity to define your intent in the future in Court. Whose intent matters?

Finally, the bill appears to be silent on competitive bidding, attorney compensation, and other public spending transparency policies regarding the retention of outside legal counsel by the House Speaker or Senate President? For example, in 2015 the General Assembly passed "Ohio's Transparency in private Attorney Contract Act," which is current law, placing specific restrictions and requirements on the Attorney General's hiring of private counsel; the law caps attorney fees in contingency fee contracts and the legal representation has to be shown to be both cost-effective and in the public interest. There also has to be a written determination of the qualifications of the attorneys retained by Ohio Attorney General, among other things, so there was a significant level of transparency brought to the hiring of private attorneys to act on behalf of the state. Should this bill include similar oversight of attorney qualifications, billable hours, or rates of pay?

We ask these questions now to clarify the intent of the legislature to ensure that this bill solves the problem for which it was created. Is the solution to this problem activism or originalism? As Justice Gorsuch recently noted, “It is the business of Congress to sum up its own debates in its legislation,” and once it enacts a statute “ ‘[w]e do not inquire what the legislature meant; we ask only what the statute means.’” *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631, 200 L. Ed. 2d 889 (2018)

Thank you for your time this afternoon, and I welcome any questions that you may have.