OPINION NO. 96-011

Syllabus:

The repeal of 23 U.S.C. §§ 141(a) and 154 in Pub. L. No. 104-59 § 205(d) does not affect the sixty-five mile per hour speed limit prescribed by R.C. 4511.21(B)(10) and (D)(2).

To: George V. Voinovich, Governor, Columbus, Ohio
By: Betty D. Montgomery, Attorney General, January 30, 1996

You have requested an opinion as to whether the repeal of the national maximum speed limits in § 205(d) of the National Highway System Designation Act of 1995, Pub. L. No. 104-59, __ Stat. ____ (19__) affects the sixty-five mile per hour speed limit applicable to certain

freeways within Ohio. In pertinent part, Pub. L. No. 104-59 § 205(d) repealed 23 U.S.C. § 141(a), which required each state annually to certify to the Secretary of Transportation that it was enforcing all speed limits on highways within the state in accordance with 23 U.S.C. § 154 and which prohibited the Secretary of Transportation from approving any project for federal funding under 23 U.S.C. § 106 in any state that failed to provide this certification. In addition, Pub. L. No. 104-59 § 205(d) repealed 23 U.S.C. § 154, which prescribed speed limits with which states were to comply in order to be eligible for a distribution of federal funds under 23 U.S.C. § 106.[1]

In order to determine the effect of § 205(d) of the National Highway System Designation Act of 1995 upon the sixty-five mile per hour speed limit in Ohio, it is first necessary to examine the statutory scheme governing maximum speeds on highways within the state. R.C. 4511.21 states in pertinent part:

> (B) It is prima-facie lawful, in the absence of a lower limit declared pursuant to this section by the director of transportation or local authorities, for the operator of a motor vehicle, trackless trolley, or streetcar to operate the same at a speed not exceeding the following:
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> ....
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> (10) Sixty-five miles per hour at all times on all portions of freeways[2] that are part of the interstate system[3] *and* are *eligible for such speed* in accordance with *criteria* issued by the federal highway administration and on all portions of freeways greater than five miles in length that are *eligible for such speed* in accordance with *criteria* issued by the federal highway administration or established by the "Intermodal Surface Transportation Efficiency Act of 1991," 105 Stat. 1968, 23 U.S.C.A. 154(a), for any motor vehicle weighing eight thousand pounds or less empty weight and any commercial bus, except fifty-five miles per hour for operators of any motor vehicle weighing in excess of eight thousand pounds empty weight and any noncommercial bus.
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> (C) ...[I]t is unlawful for any person to exceed either of the speed limitations in division (D) of this section....

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[1] Pursuant to the "National Highway System Designation Act of 1995," Pub. L. No. 104-59 § 205(d)(3), if the legislature of a state is not in session on the date of enactment of the Act, November 28, 1995, and if the chief executive officer of the state declares, before the tenth day after enactment of the Act, that the legislature is not in session and that the state prefers that the repeal of 23 U.S.C. §§ 141(a) and 154 apply to the state after the legislature convenes, the repeal becomes applicable to that state on the sixtieth day following the date on which the legislature next convenes. It is my understanding that, because the General Assembly was not in session on the effective date of the Act, you declared the state's preference for a deferred date of applicability. The General Assembly having convened on January 3, 1996, the repeal of 23 U.S.C. §§ 141(a) and 154 will, therefore, become applicable to Ohio on March 3, 1996.

[2] As used in R.C. Chapter 4511, the word "freeway" means "a divided multi-lane highway for through traffic with all crossroads separated in grade and with full control of access." R.C. 4511.01(YY).

[3] As used in R.C. 4511.21, the term "interstate system" has the same meaning as in 23 U.S.C.A. 101. R.C. 4511.21(L)(1).

> (D) *No person shall operate a motor vehicle*, trackless trolley, or streetcar upon a street or highway as follows:
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> (1) At a speed exceeding fifty-five miles per hour, except upon a freeway as provided in division (B)(10) of this section;
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> (2) *At a speed exceeding sixty-five miles per hour upon a freeway as provided in division (B)(10)* of this section except as otherwise provided in division (D)(3) of this section;
>
> (3) If a motor vehicle weighing in excess of eight thousand pounds empty weight or a noncommercial bus as prescribed in division (B)(10) of this section, at a speed exceeding fifty-five miles per hour upon a freeway as provided in that division.
>
> ....
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> (H) Whenever the director of transportation determines upon the basis of an engineering and traffic investigation that any speed limit set forth in divisions (B)(1)(a) to (D) of this section is greater or less than is reasonable or safe under the conditions found to exist at any intersection or other place upon any part of a state route, the director shall determine and declare a reasonable and safe prima-facie speed limit, which shall be effective when appropriate signs giving notice are erected at the intersection or other part of the state route. (Footnotes and emphasis added.)

Thus, R.C. 4511.21(D)(1) establishes a maximum speed of fifty-five miles per hour for the operation of motor vehicles on all streets and highways, except on freeways or portions thereof described in R.C. 4511.21(B)(10) to which the sixty-five mile per hour speed limit prescribed by R.C. 4511.21(D)(2) applies. Because the description in R.C. 4511.21(B)(10) of the freeways to which the sixty-five mile per hour speed limit applies is phrased in terms of those freeways that are "eligible for such speed" under various federal criteria, including 23 U.S.C. § 154(a), the question arises as to what effect, if any, the repeal of 23 U.S.C. §§ 141(a) and 154 has upon R.C. 4511.21(D)(2).

In order to understand the effect upon R.C. 4511.21(D)(2) of the repeal of 23 U.S.C. §§ 141(a) and 154, it is useful to understand that the speed limits prescribed by R.C. 4511.21 were established to conform speed limits in Ohio to those prescribed by 23 U.S.C. § 154, compliance with which was necessary in order for the state to be eligible for federal highway moneys under 23 U.S.C. § 106.[4] With the repeal of 23 U.S.C. § 154, however, there are no

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[4] As enacted in 1989-1990 Ohio Laws, Part III, 4697, 4838 (Am. Sub. H.B. 381, eff. July 1, 1989), R.C. 4511.21(B)(10) described the portions of freeways to which the sixty-five mile per hour speed limit applied, in part, as "freeways that are part of the interstate system and are located outside urbanized areas having a population of fifty thousand or more according to the most recent federal census." This portion of R.C. 4511.21 paralleled the portion of 23 U.S.C. § 154(a), as it then read, that prohibited the apportionment of certain federal highway funds to any state that had "a maximum speed limit on any highway within its jurisdiction on the Interstate System located outside of an urbanized area of 50,000 population or more in excess of 65 miles per hour." 23 U.S.C. § 154(a) (1988).

In 1991-1992 Ohio Laws, Part II, 3005 (Am. H. B. 96, eff. June 18, 1991), the General Assembly redefined the freeways to which the sixty-five mile per hour speed limit applied, as

longer national speed limits with which a state must comply in order to be eligible for federal moneys under 23 U.S.C. § 106, and the federal statutory basis underlying the concept of a freeway's "eligibility for" a speed of sixty-five miles per hour no longer exists.[5]

The question thus arises as to whether the language of R.C. 4511.21(B)(10) referring to a freeway's eligibility for a speed of sixty-five miles per hour and the corresponding speed limit appearing in R.C. 4511.21(D)(2) will continue in effect once the repeal of 23 U.S.C. §§ 141(a) and 154 become applicable to Ohio on March 3, 1996. In this regard it may be argued that in

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follows: "all portions of freeways that are part of the interstate system and are eligible for such speed in accordance with criteria issued by the federal highway administration." The Legislative Service Commission's analysis of Am. H.B. 96 explained that the General Assembly's use of the language "eligible for such speed in accordance with criteria issued by the federal highway administration" was intended to encompass those parts of the interstate system to which the sixty-five mile per hour speed limit applied under the Federal Highway Administration's interpretation of federal law at that time. *See generally Meeks v. Papadopulos*, 62 Ohio St. 2d 187, 404 N.E.2d 159 (1980) (Legislative Service Commission analyses of bills are not binding, but may be helpful in construing statutes).

Subsequently, Congress amended 23 U.S.C. § 154(a) in the "Intermodal Surface Transportation Efficiency Act of 1991," Pub. L. 102-240, § 1029, 105 Stat. 1968 (1991), and extended the national sixty-five mile per hour speed limit to freeways that were *not* part of the interstate system but that met certain criteria. In the same act, § 1029(c), Congress required that a rule be adopted to establish speed limit enforcement requirements, which would, in part, provide for the transfer of certain apportionments if a state failed to enforce speed limits in accordance with the federal statute and rule.

After this change in federal legislation, the General Assembly again amended R.C. 4511.21(B)(10), *see* 1991-1992 Ohio Laws, Part I, 1762 (Am. Sub. S.B. 301, eff. March 15, 1993), and added to the types of freeways to which the sixty-five mile per hour speed limit currently applies, "all portions of freeways greater than five miles in length that are eligible for such speed in accordance with criteria issued by the federal highway administration or established by the 'Intermodal Surface Transportation Efficiency Act of 1991,' 105 Stat. 1968, 23 U.S.C.A. 154(a)." In a preliminary summary of Am. Sub. S.B. 301, the Legislative Service Commission explained this amendment, in part, as follows:

> In addition to the 65 miles per hour speed limit authorized by continuing law, the act authorizes similar speed limits on all portions of freeways greater than five miles in length that are eligible for a speed limit of 65 miles per hour in accordance with criteria issued by the [Federal Highway Administration] or established by the federal Intermodal Surface Transportation Efficiency Act of 1991. Essentially, federal law allows certain noninterstate freeways constructed to interstate design standards to carry a 65 miles per hour speed limit.

[5] The federal rules establishing such criteria that were in place on March 15, 1993, were subsequently replaced by 23 C.F.R. 1260 (1995). *See* 58 Fed. Reg. 54812 (Oct. 22, 1993) (removing part 659 of Chapter I, subchapter G of title 23, Code of Federal Regulations, and establishing part 1260 to Chapter II, subchapter C of title 23, Code of Federal Regulations). I note, however, that, to date, the federal rules appearing at 23 C.F.R. Part 1260, which implemented former 23 U.S.C. §§ 141(a) and 154, remain.

its most recent amendment to R.C. 4511.21 in 1991-1992 Ohio Laws, Part I, 1762 (Am. Sub. S.B. 301, eff. March 15, 1993), the General Assembly incorporated into Ohio law as state standards the federal criteria existing at that time. Under such a theory, the stated federal criteria that existed on March 15, 1993, were adopted as part of R.C. 4511.21(B)(10) in Am. Sub. S.B. 301, and those standards remain unchanged as part of R.C. 4511.21, regardless of any subsequent changes to those criteria for purposes of federal law, until altered by action of the General Assembly.

A similar argument was made in *State v. Gill*, 63 Ohio St. 3d 53, 584 N.E.2d 1200 (1992), where the court considered the meaning of R.C. 2913.46(A), which prohibited, among other things, knowingly buying food stamp coupons "in any manner not authorized by the 'Food Stamp Act of 1977,' 91 Stat. 958, 7 U.S.C. § 2011, as amended." The accused argued that by the use of the language "as amended" in reference to 7 U.S.C. § 2011, the General Assembly intended to incorporate all amendments of the federal law subsequent to the enactment of R.C. 2913.46(A), and that such action was an unlawful delegation of legislative authority to Congress by the General Assembly in violation of Ohio Const. art. II, § 1. The court rejected this argument and stated that, "[t]he General Assembly may adopt provisions of federal statutes that are in effect at the time the state legislation is enacted." 63 Ohio St. 3d at 56, 584 N.E.2d at 1202. First, the court noted that at the time R.C. 2913.46(A) was enacted, the federal food stamp program to which the statute referred had already undergone a number of amendments since its origination in 1964. Given this fact, the court then reasoned, as follows:

> It is clear to us that the General Assembly, by using the language "as amended," did not intend to adopt amendments to the federal law subsequent to the effective date of R.C. 2913.46(A), but, rather, the General Assembly simply intended to incorporate the federal food stamp law as it existed on the date R.C. 2913.46(A) was enacted. Given its common and plain meaning, the language "as amended" does not anticipate amendments to the federal law after July 1, 1983. This is buttressed by the fact that had the General Assembly intended to incorporate the federal law subsequent to the enactment of R.C. 2913.46(A), it certainly knew how to do so. For example, R.C. 2915.01(AA) provides that the "'Internal Revenue Code' means the 'Internal Revenue Code of 1986,' 100 Stat. 2085, 26 U.S.C. 1, *as now or hereafter amended.*" (Emphasis added.) There is a notable distinction between the language used in R.C. 2915.01(AA) and in R.C. 2913.46(A). In utilizing the language "as now or hereafter amended," the General Assembly obviously intended to incorporate amendments subsequent to the time R.C. 2915.01(AA) was enacted.

63 Ohio St. 3d at 55-56, 584 N.E.2d 1201-02. *Cf. generally State v. Klinck*, 44 Ohio St. 3d 108, 541 N.E.2d 590 (1989) (finding that R.C. 3719.43, which provides for automatic revision of the Ohio controlled substance schedules to correspond to revisions of the federal controlled substance schedules by the Attorney General of the United States, is not an unconstitutional delegation of state legislative authority because the changes to the federal schedules that are incorporated into state law under R.C. 3719.43 are subject to change by the State Board of Pharmacy under R.C. 3719.44).

Applying the *Gill* court's analysis to the situation you have presented, I note that R.C. 4511.21(B)(10) adopts as its standards the criteria issued by the Federal Highway Administration and those "established by the 'Intermodal Surface Transportation Efficiency Act of 1991,' 105

Stat. 1968, 23 U.S.C.A. 154(a)" without mention of any subsequent amendments to, or changes in, those criteria. The absence of such additional language in reference to the federal law indicates even more strongly than did the language considered in the *Gill* case that the General Assembly intended to adopt as part of state law and as state standards the federal criteria referred to therein, as those criteria existed at the time the amendment to R.C. 4511.21 became effective. The federal criteria referred to in R.C. 4511.21, therefore, became incorporated into the body of Ohio law as if the General Assembly had adopted such criteria itself and thereby retain a state law vitality separate and apart from their federal counterparts. Because the General Assembly incorporated into R.C. 4511.21 the substance of the federal criteria referred to therein as they existed on March 15, 1993, any subsequent change in those criteria for purposes of federal law does not affect the criteria already adopted as state standards in R.C. 4511.21(B)(10).

Therefore, it is my opinion, and you are hereby advised that upon the effective date of the repeal of 23 U.S.C. §§ 141(a) and 154 in Pub. L. No. 104-59 § 205(d) in Ohio, March 3, 1996, the speed limits on Ohio freeways, absent legislative intervention, will remain the same as when 23 U.S.C. §§ 141(a) and 154 were effective; all 65 mile per hour portions, as they existed prior to March 3, 1996, will remain 65 miles per hour and all those portions of freeway limited to 55 miles per hour will retain such limits after March 3, 1996.[6]

[6] Only R.C. 4511.21(B)(10) and (D)(2) pertaining to certain Ohio freeways whereon sixty-five mile per hour speed limits are permitted will be impacted by the repeal of 23 U.S.C. §§ 141(a) and 154. All other portions of R.C. 4511.21 setting various speed limits upon Ohio highways are not affected by Congressional repeal of 23 U.S.C. §§ 141(a) and 154 and are not the subject of this opinion.