

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE *ex rel.* LETOHIOVOTE.ORG, *et al.*

Relators,

vs.

HON. JENNIFER BRUNNER,

Respondent.

Case No. 09-1310

Original Action in Mandamus

RELATORS' EMERGENCY MOTIONS FOR STAY AND TO EXPEDITE WRIT OF MANDAMUS

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CLERK OF COURT
SUPREME COURT OF OHIO

MOTIONS

Pursuant to Ohio Supreme Court Rule XIV, Section 4(C), and in the event that the Court does not issue a peremptory writ in the first instance, Relators hereby move this Court for an emergency order staying implementation of sections R.C. 3770.03 and 3770.21 of the recently enacted budget bill for the duration of this lawsuit, and to expedite consideration of their claim for a writ of mandamus. The grounds for these Motions are set forth in the Memorandum below.

MEMORANDUM

I. INTRODUCTION

The legislation at issue in this case concerns two highly-controversial statutes which would authorize the Ohio Lottery Commission to implement “video lottery terminal games” (VTLs) at Ohio racetracks. Despite the well-known controversy surrounding the introduction of VTLs into the state of Ohio, the Legislature has seen fit to include these statutes in a biennium budget bill of over 3,000 pages and has attempted, moreover, without legal authority, to declare the statutes beyond the reach of the voters’ right to referendum.

Relators, desiring to refer the VTL sections of the bill to the voters for their approval or rejection, have filed a complaint for mandamus in this Court, asking it to issue a peremptory writ: (i) compelling the Secretary of State to treat the VLT sections of H.B. 1 as subject to the constitutional right of referendum and (ii) staying those sections for 90 days to comply with Article II, Section 1c of the Ohio Constitution.

Because the bill claims that the statutes have taken immediate effect, the potential exists that the lottery commission will begin to implement them before such time as the Court can rule on the merits of this case.

Because of the potential that state resources will be expended to implement statutes which have not legally taken effect, and because Relators do not wish to begin spending funds on a referendum effort before the Secretary of State has been ordered to treat the statutes as subject to referendum, Relators ask this Court to stay the implementation of these two statutes until it has ruled on this matter; they further ask the Court to expedite consideration thereof.

II. FACTS¹

A. *Parties*

Relator LetOhioVote.org is a ballot issue committee consisting of three individuals designated to represent petitioners of a Referendum Petition who seek to refer certain portions of Amended Substitute House Bill No. 1 to the Ohio voters for their approval or rejection (“Referendum Petition”). Relators Thomas E. Brinkman, Jr., David Hansen, and Gene Pierce are residents and electors of the State of Ohio. These relators are members of LetOhioVote.org., the designated committee representing the petitioners of the Referendum Petition under R.C. 3519.02.

Respondent Jennifer Brunner is the Ohio Secretary of State and the chief elections officer of the State of Ohio. Under Article III of the Ohio Constitution, the Secretary is a member of the Executive Department of the State of Ohio. Under R.C. 111.08, the Secretary “shall have the charge of and safely keep the laws and resolutions passed by the general assembly.” Pursuant to Chapter 149 of the Revised Code, the Secretary is required by law to ensure the distribution, compilation, and publication of all laws passed by the general assembly. This chapter specifies the duties of the Secretary to distribute, compile, and publish laws that have been filed with her office.

The Secretary is not vested with any jurisdiction to determine the constitutionality of any

¹ The facts are supported by the verified Complaint for Writ of Mandamus.

law. The Secretary's duties are merely ministerial. The Secretary has the ministerial responsibility of determining the timeframe during which referendum petitions challenging legislation passed by the Ohio general assembly must be filed with the Secretary under the terms of Section 1c of Article II of the Ohio Constitution.

B. *The Governor's VLT Directive and the Biennium Budget*

On July 13, 2009, the Governor issued a Directive to the Ohio Lottery entitled "Implementing Video Lottery Terminals" ("VLT Directive"). (Complaint, Ex. A.) In the VLT Directive the Governor states:

The General Assembly has indicated to me its intent to pass legislation which would expressly acknowledge that the Ohio Lottery has the authority to implement VLTs under the existing laws of the State of Ohio and that the implementation of VLTs does not violate any provision of Ohio's separate prohibitions on gambling activity.

Contingent upon the General Assembly's enactment of legislation expressly acknowledging that the Ohio Lottery has the authority to implement VLTs, the VLT Directive instructs the Director of the Ohio Lottery Commission to adopt rules regarding implementation of VLTs and to immediately take steps to implement VLTs in accordance with the requirements set forth in the Directive. The Governor's VLT Directive provides that unless the General Assembly enacts and the Governor signs "implementing legislation" prior to or as part of the enactment of the biennium budget bill, the Directive will be null and void.

On July 13, 2009, the 128th Ohio General Assembly enacted Amended Substitute House Bill No. 1 ("H.B. 1"), which included the 2010-2011 biennium budget. Late in the afternoon on July 17, 2009, just prior to the close of business on Friday and after he had exercised the line-item veto, the Governor signed H.B. 1.

H.B. 1, which contains in excess of three thousand pages, includes amendments to Chapter

3770 of the Revised Code, which amendments authorize the Ohio Lottery Commission to operate video lottery terminals (“VLTs”). (Complaint, Ex. B.)² H.B. 1 amends section 3770.03 of the Revised Code, to provide:

- that the state lottery commission has authority to operate video lottery terminals, and that the commission has had that authority since the original enactment of the section;
- that any reference in Chapter 3770 to “tickets” shall not be construed to limit the commission’s authority to operate video lottery terminals;
- that nothing in Chapter 3770 shall restrict the authority of the commission to issue rules related to the operation of games utilizing video lottery terminals;
- that the commission shall promulgate rules covering any other subject [not already identified in Section 3770.03(B)] that the commission determines is necessary for the operation of video lottery terminals, including the establishment of fees, fines, or payment schedules;
- that Chapter 2915 of the Revised Code, which governs various forms of gambling, does not apply to, prohibit, or affect lotteries conducted pursuant to Chapter 3770.

H.B. 1 also enacts a new section 3770.21, which provides:

- that “video lottery terminal” means any electronic device approved by the commission that provides immediate prize determinations for participants on an electronic display;
- that the commission shall include in its rules concerning video lottery terminals the minimum investments, including standards and timetables for such investments, that video lottery terminal licensees must make in the buildings and grounds at the permanent or temporary facilities where the terminals will be located;
- that no new license or excise tax not in effect on the effective date of Section 3770.21 shall be assessed upon or collected from any video lottery terminal licensee by any political subdivision of the state that has authority to assess or collect a tax or fee, except for municipal income taxes and horse racing taxes;

² The full text of H.B. 1 is available at http://www.legislature.state.oh.us/bills.cfm?ID=128_HB_1 (last checked July 20, 2009).

- that the Ohio Supreme Court has exclusive jurisdiction over any claim that the provisions dealing with video lottery terminal games, or rules adopted under those provisions, are unconstitutional;
- that if any portion of the sections sought to be referred are found to be unenforceable or invalid, that portion shall be severed and the remaining portions shall remain in effect.

Section 812.20 of H.B. 1 makes the following claim concerning sections 3770.03 and 3770.21, which sections would allow the Lottery Commission to operate VLTs:

The amendment, enactment, or repeal by this act of the sections listed below is exempt from the referendum because it is or relates to an appropriation for current expenses within the meaning of Ohio Constitution, Article II, Section 1d and section 1.471 of the Revised Code, or defines a tax levy within the meaning of Ohio Constitution, Article II, Section 1d, and therefore takes effect immediately when this act becomes law or, if a later effective date is specified below, on that date.

Several other sections of H.B. 1, however (for example, Sections 812.10, 812.30, 812.40, and 812.50), acknowledge that many of the bill's other provisions are subject to referendum and do not take effect immediately.

C. *Relators' Referendum Effort*

Relators Brinkman, Hansen, and Pierce desire to exercise their constitutional right of referendum by referring the VLT Sections of H.B. 1 to Ohio voters for their approval or rejection. In furtherance of that end, Relators have formed a ballot committee, LetOhioVote.org, and have started collecting signatures on a statutorily-imposed "summary" petition, which must be submitted to and approved by the Secretary of State and Attorney General before Relators may begin collecting signatures for the Referendum Petition.³

Additionally, Relator LetOhioVote.org has entered into an agreement with a national petition management firm to collect signatures for the Referendum Petition, at a cost of

³ See R.C. 3519.01(B).

approximately \$1.75 million. Relators also have budgeted an additional \$750,000 in costs related to the referendum effort, bringing the total amount that Relators intend to invest in the Referendum Petition effort over the next three months to \$2.5 million.

III. A STAY OF THE IMPLEMENTATION OF SECTIONS 3770.03 AND 3770.21 AND EXPEDITED CONSIDERATION OF THIS MATTER ARE WARRANTED.

A. *Sections 3770.03 and 3770.21 of H.B. 1 are subject to Referendum under Article II, Section 1c of the Ohio Constitution.*

The Governor and the General Assembly have claimed that Ohio voters have no say in whether video lottery terminals should be permitted in Ohio and, perhaps more importantly, in whether these games are the right answer to Ohio's \$1 billion budget deficit. Despite this claim—that sections 3770.03 and 3770.21 take effect immediately and are not subject to the referendum power—the language of the Ohio Constitution and the decisions of this Court demonstrate that the statutes establishing VLTs have not, in fact, gone into effect immediately because they are not exempt from the reach of the constitutional right of referendum.

This Court has made clear on several occasions that the “constitutional right of citizens to referendum is of paramount importance.” *State ex rel. Ohio Gen. Assembly v. Brunner*, 115 Ohio St.3d 103, 2007-Ohio-3780, 873 N.E.2d 1232, at P8. The Court has said that, with few exceptions, the “reserved power of referendum applies to every law passed in this state and provides an important check on actions taken by the government.” *Id.* at P9. The limited number of laws exempt from referendum is set forth in Article II, Section 1d of the Ohio Constitution.

Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect ***. The laws mentioned in this section shall not be subject to the referendum.

Over the years, this Court has clarified two points about exemption from the right of referendum. The first point is that such exemption is determined on a provision-by-provision basis. Exemption is not extended to an entire bill, to an entire law, or even to an entire section of law merely because that bill, law, or section contains a tax levy or an appropriation; rather, it is only those provisions which in fact levy taxes or appropriate money that are exempt. Individual provisions which do not levy taxes or do not appropriate money are still subject to referendum, no matter how many appropriations or tax levies are included along with them. *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 631 N.E.2d 582. As the Court said in this case:

Any section of a law which changes the permanent law of the state is subject to referendum under the powers reserved to the people by Section 1 of Article II, even though the law also contains a section providing for an appropriation for the current expenses of the state government and state institutions which under Section 1d, Article II, becomes immediately effective.

Id. at 236, quoting *State ex rel. Riffe v. Brown* (1977), 51 Ohio St.2d 149, 167, 365 N.E.2d 876, 886 (O'Neill, C.J., dissenting).

The second point clarified by the Supreme Court is that, in order to qualify as a law providing for a tax levy or as an appropriation for the current expenses of the state government, a provision need do more than merely “relate to” a tax levy or appropriation; that is, it is only provisions that actually *levy* taxes or *appropriate* money that are exempt from referendum. This point was first made by the Ohio Supreme Court in *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, 141 N.E. 16. In that case, as in the present case, it was contended that “laws relating to the levy of taxes” were exempt from referendum, being substantially the same as “laws providing for the levy of taxes.” (Emphasis added.) *Id.* at 467. But the Court rejected this argument, holding it to be “self evident that the word ‘relating,’ and its synonyms, ‘pertaining to’

or ‘concerning,’ are much broader, much more comprehensive, than the word ‘provide,’ and are so used in common conversation.” *Id.* The court further explained that a law “‘relating to the levy of taxes’ might merely create a new public purpose for taxes, might change the body that would be authorized to make such a levy, or might change the rates which such body might impose when actually making the levy; but it would be a strange and strained contention to hold that any such act ‘provided for the tax levy.’” *Id.*

More recently, this Court has stated that “any provision within a law that *appropriates* money for government expenses will go into effect immediately because it is not subject to a referendum, while any provision that *does not appropriate money* for government spending will have its effective date delayed for ninety days to allow Ohio’s citizens to consider a referendum.” (Emphasis added.) *Laidlaw Waste Sys. v. CONRAIL* (1999), 85 Ohio St.3d 413, 416, 709 N.E.2d 124. Again, it is not enough, as H.B. 1 attempts to assert, that a provision “relate to” an appropriation. For a particular provision to be exempt from referendum as an appropriation, that very same provision must truly be an appropriation; that is, it must actually appropriate money.

These holdings of the Supreme Court demonstrate that, despite the language in the bill purporting to exempt them from the right of referendum, the VLT statutes of H.B. 1 are not, in fact, exempt. They are, under the meaning of the Ohio Constitution, neither laws providing for the levy of taxes, nor appropriations of money for the current expenses of the state. There is not a single provision in section 3770.21 or in section 3770.03 which either levies a tax or makes an appropriation for the current expenses of the state. It is true that in addition to these two statutes, HB 1 does contain one uncodified appropriation provision related to VLT oversight, but as this Court has clearly said, this is not enough to render the VLT statutes appropriations. See *AFL-*

CIO, at 236 (overruling the holding in *Riffe* that an entire bill took immediate effect because one part contained an appropriation).

Instead of levying taxes or making appropriations, these sections change the permanent law of the state. See *AFL-CIO*, at 236. The amendments to Section 3770.03 require the lottery commission to promulgate a new set of rules to govern operation of the VLTs. The enactment of 3770.21 defines VLTs, requires the commission to adopt new rules concerning the minimum investments in the buildings and grounds, prohibits political subdivisions from assessing or collecting new fees or taxes, and, perhaps most notably, exempts VLTs from Chapter 2915, which prohibits various forms of gambling, including slots. These statutes are not tax levies or appropriations but are precisely the kinds of provisions that this Court has shown itself vigilant to reserve for referendum. Consequently, the sections of H.B. 1 that allow the Ohio Lottery Commission to operate VLT's are subject to this right and, despite the language in Section 812.20, should not go into immediate effect.

- B. *The implementation of statutes which have not legally taken effect would be a waste of resources, as would a referendum effort on a statute which has not yet been legally declared subject to referendum.*

Relators wish to refer these two controversial VLT statutes to the voters. They have filed a complaint for mandamus in this court, asking the Court to issue a writ of mandamus ordering the Secretary of State to treat them as subject to referendum (including modifying the paper and electronic journals to reflect that the VLT sections do not take immediate effect and are subject to referendum). Furthermore, Relators have already begun the initial processes necessary for exercising their constitutional referendum rights.

Because H.B. 1 claims that the VLT statutes have taken immediate effect, however, it may be that the lottery commission, by promulgating rules and calling for bids, will begin to

implement the VLT statutes before this Court has ruled on this complaint for mandamus. If this Court sees fit to stay the implementation of these statutes, and if they are rejected by the voters, all these resources will have been spent in vain, to the loss of the taxpayers of this state.

Moreover, Relators have determined that their referendum petition effort could cost upwards of \$2.5 dollars, including \$1.75 million for signature collection. While they are eager not to lose any of the ninety days they have to complete their effort, they are also not eager to begin spending millions of dollars before the Court has ordered the Secretary of State to treat the statutes as subject to the right of referendum. The Legislature's unauthorized declaration that the VLT statutes are not subject to referendum has left Relators between a rock and a hard place, where pressing forward with their effort could be as detrimental to their interests as delaying that effort. All this potential waste of time and resources (those of the State, those of the Relators, and, ultimately, those of the taxpayers) can be avoided if this Court orders a stay and expedites consideration of this matter.

IV. CONCLUSION

Based on the foregoing, Relators ask this court to stay the implementation of sections 3770.03 and 3770.21 of H.B. 1, until such time as the Court has ruled on this matter, and to expedite consideration of Relators' claim for writ of mandamus.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a courtesy copy of this Motion, along with a courtesy copy of Relators' Complaint, have been delivered by electronic and overnight mail this 20th day of July, 2009 to the following counsel for Respondent:

By overnight mail

Hon. Richard Cordray
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