

IN THE SUPREME COURT OF OHIO

STATE *ex rel.* LETOHIOVOTE.ORG., *et al.*, )  
 )  
 Relators, )  
 )  
 vs. )  
 )  
 HONORABLE JENNIFER BRUNNER, )  
 Ohio Secretary of State, *et al.* )  
 )  
 Respondents. )

Case No. 09-1310  
 Original Action in Mandamus

**BRIEF OF AMICI CURIAE OHIO FEDERATION OF TEACHERS, OHIO SCHOOL BUSINESS OFFICIALS ASSOCIATION, OHIO ASSOCIATION OF PUBLIC SCHOOL EMPLOYEES, EVE BOLTON, AND JANE SIMON IN SUPPORT OF RESPONDENTS**

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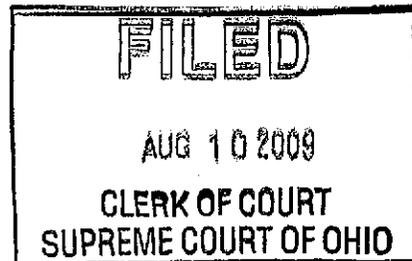
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## INTERESTS OF THE AMICI CURIAE

A group of Ohio educators have joined to oppose the relief sought by the Relators in this case through this Amicus Brief. They include:

- The Ohio Federation of Teachers, an unincorporated association that represents for purposes of collective bargaining more than 20,000 Ohio public school teachers and other Ohio public school employees;
- The Ohio School Business Officials Association, which represents more than 1,000 non-unionized Ohio public school Treasurers, business managers, food service and transportation directors and other confidential employees;
- The Ohio Association of Public School Employees, which represents through collective bargaining more than 37,000 non-teaching Ohio public school employees;
- Eve Bolton, a retired public school teacher who serves as an elected Board member of the City of Cincinnati Public School District; and
- Jane Simon, an elementary school teacher employed by the Cincinnati Public Schools.

(collectively, the “Ohio Educators”).

These Ohio Educators share the belief that Ohio needs a strong, reliable and effective system of public schools not simply to prepare Ohio children for their future, but also to keep and attract employers and families who know that a state can be judged by the quality of education it provides to its children. The primacy of public education for Ohio was recognized in Article VI, § 2 of Ohio’s Constitution, requiring the General Assembly to provide for a “thorough and efficient system of common schools.” Such a system requires funding that is stable and predictable, even in times of economic distress.

These Ohio educators do not advocate satisfying the State's Constitutional obligation to fund our public schools through an expansion of the Ohio lottery. They have no objection to the conduct of a lawful election, whether by initiative or Constitutional amendment, on whether to allow video lottery terminals ("VLTs") at Ohio racetracks if sufficient signatures are collected. However, these Ohio Educators do oppose any relief sought by Relators that would delay implementation of the plan to raise and appropriate the funds required for the FY2010-2011 Biennial Budget as adopted by the General Assembly and signed by the Governor on July 17, 2009. ("Am.Sub.H.B. 1"). The stakes for Ohio's school children are too high, and the time is too short to allow any further delay in establishing the level and source of funding for Ohio's schools for a school year that has already begun in some Ohio schools districts.

### **FACTUAL BACKGROUND**

#### **A. Ohio's Budget Crisis**

With FY2009 ending on June 30, 2009, the Ohio General Assembly and Governor Ted Strickland faced an inflexible requirement to adopt a balanced 2010-11 biennial budget amidst the worst economic crisis facing Ohio and the nation since the Great Depression.<sup>1</sup>

As 2009 unfolded, the grim news for Ohio included accelerating unemployment and plummeting state revenues. As reported by Ohio's Legislative Service Commission ("LSC"), "Job losses nationwide and in Ohio accelerated in late 2008 and early 2009 . . . ." LSC, "Forecast of GRF Revenues and Public Assistance Spending for the Fiscal Year 2010-2011 Biennial Budget (June 11, 2009) (available at <http://www.lbo.state.oh.us/fiscal/budget/>

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<sup>1</sup>"What makes the current recession so bad? Other downturns have been painful by some measures, but none since WWII has delivered so many severe blows to the economy at the same time. Already it is the longest." Lahart, J., "The Great Recession: A Downturn Sized Up," *Wall Street Journal* (July 28, 2009) (available at <http://online.wsj.com/article/SB124874235091485463.html> (accessed August 6, 2009)).

RevenueForecasts/Forecasts128/2009-06/ConferenceCommitteeForecast.pdf (accessed August 6, 2009)). By April 2009, Ohio's unemployment rate was 10.2%, higher than the national average by about 1%. *Id.* at 3. In preparing the 2010-11 biennial budget, the General Assembly and the Governor had to consider the LSC's projections for continued rising unemployment in our state, which was projected to peak above 11% in 2010, and possibly continue at that rate until the end of 2011. *Id.* at 8.

Job losses and reduced economic activity had a devastating impact on state revenues. According to the LSC, "the effects of the current recession on receipts from the personal income tax, the sales and use tax, and the corporate franchise tax are expected to continue into the fiscal year [2010] and to account for hundreds of millions in reduced revenue." In comparing the FY2008-09 biennium, with its forecast for the 2010-2011 biennium, LSC projected a *reduction* in GRF tax revenue "*forecast to be \$4.6 billion (12.6%) lower.*" *Id.* at 10 (emphasis added).

In his June 11, 2009 testimony before the General Assembly's Conference Committee on House Bill 1, Mark Flanders, Director of the LSC, summarized the deteriorating fiscal picture for the state. In just four months, tax revenue for FY2009 had already fallen \$661 million below the February, 2009 forecast. That continued deterioration led to the Commission's projection of the \$4.6 billion (12.6%) decrease in revenue for the FY2010-FY2011 biennium. Flanders, M., "Forecast of GRF Revenues and Public Assistance Expenditures For the FY 2010-FY 2011 Biennial Budget: Testimony before the Conference Committee on House Bill 1" (June 11, 2009) (available at <http://www.lbo.state.oh.us/fiscal/budget/RevenueForecasts/Forecasts128/2009-6/ConferenceCommitteeTestimony.pdf> (accessed August 6, 2009)).

By the time of this testimony, the State had about two weeks to adopt a balanced budget with 12.6% less revenue than the previous biennial budget. After two weeks of temporary

budget authority that stretched the process into FY2010, the General Assembly and the Governor reached agreement on a budget signed by the Governor on July 17, 2009.

## **B. The Impact of the State Budget on Education**

Ohio's educators are well aware that the largest share of State of Ohio expenditures goes to the education of Ohio's children. In FY2009, expenditures for primary and secondary education constituted about 40.7% of the State's budget, totaling about \$8.8 billion. LSC, "Table 2: State-Source GRF, LGF, LPEF Expenditures, FY 1975 - FY 2011" (July 20, 2009) (available at <http://www.lbo.state.oh.us/fiscal/budget/RevenueHistory/HistoricalExpendituresRevenue/Table2-AsEnacted-7-20-2009.pdf> (accessed August 6, 2009)). This does not include federal funding of Ohio public schools. As a result, the State's budget crisis was sure to have an impact on public education.

This Court has spoken through five separate decisions since 1997 of the State's constitutional obligation to reformulate the manner in which it funds public education. See, e.g., *DeRolph v. State* (2002), 97 Ohio St.3d 434, 2002-Ohio-6750 ("*DeRolph IV*") and the earlier *DeRolph* decision cited therein. In its *DeRolph* cycle of decisions, this Court struggled with the proper role of the judiciary and the General Assembly in giving life to the Ohio Constitution's requirement at Section 2, Article IV to provide "a thorough and efficient system of common schools throughout the state." *DeRolph v. State* (1997), 78 Ohio St.3d 193, 1997-Ohio-84 (syllabus) ("*DeRolph I*"). In 2002, this Court noted, "we realize that the General Assembly cannot spend money it does not have. Nevertheless, we reiterate that the constitutional mandate must be met." *DeRolph IV*, 97 Ohio St.3d at 436.

This Court's final word in *DeRolph* came in *State ex rel. State of Ohio v. Lewis*, 99 Ohio St.3d 97, 2003-Ohio-2476, *cert. denied* (2003), 540 U.S. 966, in which the Court found that

“[t]he duty now lies with the General Assembly to remedy an educational system that has been found by the majority in *DeRolph IV* to still be unconstitutional.”

Since his election in 2006, Governor Strickland has worked with Ohio’s educators, business leaders, parents and the General Assembly to address the constitutional inadequacies of our system of school funding identified in *DeRolph*. The Governor and the General Assembly worked with great diligence to include within the 2010-11 biennial budget the most dramatic changes to Ohio school funding system since this Court’s original *DeRolph* decision in 1997. As the Governor stated in his July 17, 2009 budget message:

This budget makes education our first priority. It includes an historic commitment to Ohio students, enacting transformational education reforms and establishing a constitutional funding system. The new funding model is based on what our students need to be successful and will ensure our schools have the resources to meet those needs as it is fully phased in. The educational reforms will improve the quality of our teachers, assessments, and curriculum. Every Ohio school will meet strict spending accountability standards. And every Ohio student will learn the skills that modern businesses look for in the people they hire. Investing in a reformed system of education sharpens Ohio’s competitive edge and strengthens our ability to attract the jobs and capital that will grow Ohio’s economy.

Strickland, T., "Budget Message" (July 17, 2009) (available at <http://www.governor.ohio.gov/News/PressReleases/July2009/News71709/tabid/1134/Default.aspx> (accessed August 6, 2009)).

As required by this Court’s decisions in *DeRolph*, the new funding formula, as phased in, will increase the state’s share of public school funding to 61% in 2019, reducing disparities in public school funding caused by our state’s historic over-reliance on local real estate taxes to fund public schools.

While the percentage of the budget devoted to primary and secondary education increased slightly for the 2010-2011 biennium (from 40.7% of the budget to 42.6% in FY2010), Ohio’s perilous financial circumstances meant that actual *state* dollars devoted to primary and

secondary education by the Biennial Budget will shrink by about 6.1% in FY2010 from \$8.833 billion to \$8.295 billion in real dollars. (Some of the state funding reduction will be covered in FY2010-11 by federal stimulus funds).

Of course, the reason amicus and the parties to this litigation are before the Court is the means used by the General Assembly and the Governor to fill the \$4.6 billion revenue gap between the FY2008-09 budget and the FY2010-11 budget. Much of that gap was covered by dramatic budget cuts, with reductions of more than \$500 million in state dollars for higher education, and \$700 million taken from human services. Overall, the new budget calls for a reduction in state spending of about 10% or about \$2 billion in FY2010, as compared to FY2009. LSC Chart, updated 7/20/2009.

Virtually all states confronted similar problems with declining revenues and increasing costs as a result of the nation's economic distress as they attempted to cover a collective budget shortfall of \$140 Billion for FY2010. "States in Distress," *New York Times* (August 3, 2009) (available at [http://www.nytimes.com/2009/08/04/opinion/04tue1.html?\\_r=3](http://www.nytimes.com/2009/08/04/opinion/04tue1.html?_r=3) (accessed August 6, 2009)). Other states, confronted with similar fiscal crises for FY2010 resulting from the global economic downturn, have increased sales or income taxes, tapped into "rainy day" funds, relied on federal stimulus dollars, or utilized one-time accounting maneuvers. *Id.*<sup>2</sup> In Ohio, the General Assembly and the Governor chose not to increase income or sales taxes, due to the fear that increasing taxes in a time of decreasing economic activity and job loss would simply

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<sup>2</sup>See also Ohio Office on Budget and Management, "Highlighted Strategies to Maintain a Balanced Budget within FY2010" (2009) (showing that Pennsylvania, Illinois, Wisconsin, Michigan, New Jersey and New York have all adopted increases in personal income tax rates, or adjustments to deductions, to raise personal income tax revenues for 2010, while Colorado, New York, Michigan, Minnesota and Arizona adopted increased sales tax rates or adjusted exemptions to sales taxes to generate additional sales tax revenue) (available at [obm.ohio.gov/document.aspx?ID=61e8271c-9f7b-4719-98b6-0f20d01e2e1d](http://obm.ohio.gov/document.aspx?ID=61e8271c-9f7b-4719-98b6-0f20d01e2e1d) (accessed August 6, 2009)).

prolong the State's economic distress. Instead, the State's FY2010-11 Budget raises and appropriates revenues through an expansion of the state's lottery through the installation of video lottery terminals at Ohio's licensed racetracks. If promptly implemented, the installation of VLTs as allowed by the State Budget will add about \$933 million to the state's FY2010-11 revenues, to be placed in the State's education fund as required by Article XV, § 6 of the Ohio Constitution. Only a major increase in state income or sales tax rates could have filled so much of the \$4.6 billion revenue loss caused by the current economic downturn.

Ohio's public school districts had their own obligations to adopt balanced budgets for their fiscal year, which also began on July 1, 2010. The delay in adoption of a final state budget for FY2010-11 left Ohio's School Boards and Treasurers scrambling to adopt and modify their own budgets, despite obligations to enter into contracts with teachers and administrators, and make plans for a school year that now has already begun in some Ohio school districts. Classes have been organized and teachers assigned based on the current state allocations to Ohio's schools. Any ruling by this Court that delays the collection and distribution of more than \$933 million in education funds during FY2010-11 will have a chaotic and damaging impact on our public schools and the children and families who rely on them.

These Ohio Educators do not come to the Court to advocate expansion of the lottery to pay for public schools. Instead, they come before the Court to emphasize the crisis faced by the Governor and the General Assembly in adopting the 2010-11 biennial budget. As shown below, the drafters of Article II, §§ 1c and 1d of the Ohio Constitution did not intend that the right to a referendum should disrupt and delay the State's ability to raise revenues and appropriate funds for the current expenses of state government. When the drafters of Ohio's Constitution obligated the General Assembly to raise and appropriate state revenue that would provide a "thorough and

efficient system of common schools," Ohio Const., Art. VI, § 2, they did not contemplate allowing such appropriations to be placed on hold for the lengthy time required to collect signatures and conduct a referendum.

### ARGUMENT

#### Amici Curiae's Proposition of Law No. 1:

**THIS COURT LACKS JURISDICTION TO RENDER DECLARATORY JUDGMENTS, AND A REQUEST FOR SUCH DECLARATORY JUDGMENT, THOUGH STYLED AS A REQUEST FOR MANDAMUS, MUST BE DISMISSED.**

Relators have styled this case as an "Original Action in Mandamus." A review of the Complaint and Amended Complaint, as well as Relators' Brief, however, reveal that that the true object of this suit is a declaratory judgment that § 812.20 of Am.Sub.H.B. 1 is unconstitutional, and therefore, unenforceable. Because this Court lacks jurisdiction to issue declaratory judgments, Relators' Amended Complaint must be dismissed.

"Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." R.C. 2731.01. A writ of mandamus is warranted only when (1) the relator has a clear legal right to the relief prayed for, (2) the respondent is under a clear legal duty to perform the requested act, and (3) the relator has no plain and adequate remedy at law. *State ex rel. Ohio Civil Serv. Employees Ass'n v. State Employment Relations Bd.* (2004), 104 Ohio St.3d 122, 124, 2004-Ohio-6363 at ¶ 9. See also *State ex rel. Woods v. Oak Hill Community Medical Center* (2001), 91 Ohio St.3d 459, 461, 2001-Ohio-96; *State ex rel. Ohio Association of Public School Employees v. Batavia Local School Dist. Bd. of Educ.* (2000), 89 Ohio St.3d 191, 198, 2000-Ohio-130; *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, *cert. denied* (1983), 464 U.S. 1017. "The duty to be enforced by a writ of

mandamus must be *specific, definite, clear and unequivocal.*" *State ex rel. Karmasu v. Tate* (Scioto App. 1992), 83 Ohio App.3d 199, 205 (emphasis added.). *See also State ex rel. Board of Tax Appeals v. Morgan County Budget Comm'n* (1963), 174 Ohio St. 297, 299; R.C. 2731.05 ("The writ of mandamus must not be issued when there is plain and adequate remedy in the ordinary course of the law.").

In this case, Relators simply cannot establish that Secretary Brunner has a clear legal duty to perform an act. The act they seek to compel—"ordering the Secretary to treat the non-appropriation provision in H.B. 1 as subject to the referendum . . .," Relators' Brief at 18—is expressly contrary to law. Not only does Secretary Brunner have no clear legal *duty* to ignore the express terms of legislation enacted by the General Assembly and signed by the Governor, she has no *authority* to do so. Indeed, Relators themselves acknowledge that the Secretary has no clear legal duty when they assert that they are unable to proceed with their purported referendum attempt "[u]til this court decides whether the VLT sections of H.B. 1 constitute an 'appropriation for the current operating expenses of the state government . . .'" Relators' Brief at 5.

Relators' Brief clearly demonstrates that what they are really seeking is a declaratory judgment that § 812.20 of Am.Sub.H.B. 1 is unconstitutional. "[C]onstitutional challenges to legislation are normally considered in an action originating in a court of common pleas rather than an extraordinary writ action filed [in the Supreme Court]." *State ex rel. Grendell v. Davidson* (1999), 86 Ohio St.3d 629, 635, 1999-Ohio-130. This Court has repeatedly held that it lacks "jurisdiction over claims for declaratory judgment." *State ex rel. Ministerial Day Care Ass'n v. Zelman* (2003), 100 Ohio St.3d 347, 351, 2003-Ohio-6447 at ¶ 22. *See also State ex rel. Coyne v. Todia* (1989), 45 Ohio St.3d 232, 237.

Because neither the Supreme Court of Ohio nor the Ohio courts of appeals have original jurisdiction over claims for declaratory judgment, these courts lack jurisdiction over actions that, although styled in mandamus, actually seek a declaration of rights, status, or other legal relations.

*State ex rel. Ohio Civil Serv. Employees Ass'n*, 104 Ohio St.3d at 125, 2004-Ohio-6363 at ¶ 11 (citations omitted). Because Relators really seek a declaratory judgment that § 812.20 of Am.Sub.H.B. 1 is unconstitutional, this Court lacks jurisdiction over their claim, and this action must, therefore, be dismissed.

Amici Curiae's Proposition of Law No. 2:

**THE GENERAL ASSEMBLY HAS THE AUTHORITY TO DETERMINE WHICH PROVISIONS OF A BUDGET BILL CONSTITUTE "APPROPRIATIONS FOR THE CURRENT EXPENSES OF THE STATE GOVERNMENT AND STATE INSTITUTIONS," AND, GIVEN THE STRONG PRESUMPTION OF THE CONSTITUTIONALITY OF LEGISLATIVE ENACTMENTS, THIS COURT CANNOT INTERFERE WITH SUCH DETERMINATIONS MADE BY THE GENERAL ASSEMBLY UNLESS THEY ARE PATENTLY BASELESS.**

As noted above, the General Assembly has determined to fix the gap in the state budget by authorizing the Lottery Commission to conduct lotteries through the use of video lottery terminals. The resulting revenues "for the support of elementary, secondary, vocational, and special education program" as required by Article XV, § 6 of the Ohio Constitution. In crafting the state budget, the General Assembly identified approximately \$933 million in revenue from the conduct of video lotteries, and allocated that money for educational purposes. To ensure that the full amount of such revenue was realized, the General Assembly included § 812.20 in Am.Sub.H.B. 1, which made the authorization of video lotteries immediately effective as an "appropriation[ ] for the current expenses of the state government and state institutions," thereby exempting the provision from the constitutional ninety-day delay in which citizens may exercise the right to referendum.

Amici Curiae maintain that the General Assembly has the authority to make such determinations, and that this Court must defer to those determinations unless they are patently baseless. Because the General Assembly's determination that the authorization for video lotteries is an "appropriation[ ] for the current expenses of the state government and state institutions" is amply supported in fact and in law, Relators' challenge must fail.

Article II, § 1c of the Ohio Constitution provides that "[n]o law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state." Article II, § 1d, however, provides that certain laws go into immediate effect when approved and signed by the Governor:

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.

See also *State, ex rel. Donahey v. Roose* (1914), 90 Ohio St. 345, 346 ("All sections of a law not subject to the referendum provisions of this section of the constitution go into immediate effect when approved and signed by the governor. ") (syllabus).

Article II, § 1c reserves to the people the right of referendum on "any law, section of any law or any item in any law appropriating money passed by the general assembly." Accordingly, all "appropriations for the current expenses of state government" take immediate effect, even if the non-appropriation provisions of a state budget bill do not:

"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."

*State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 236, 1994-Ohio-1 (quoting *State ex rel. Riffe v. Brown* (1977), 51 Ohio St.2d 149, 167 (O'Neill, C.J., dissenting)).

Following the Court's decision in *State ex rel. Ohio AFL-CIO v. Voinovich*, the General Assembly enacted R.C. 1.471, which was not even cited by Relators in their brief. That section provides, in its entirety:

As used in this section, "appropriation for current expenses" means an appropriation of money for the current expenses of the state government and state institutions as contemplated by Ohio Constitution, Article II, Section 1d.

This section expresses the general assembly's interpretation of *State, ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 234 to 237, insofar as the case holds with respect to the effective date of sections of law contained in acts that contain an appropriation for current expenses.

A codified or uncodified section of law contained in an act that contains an appropriation for current expenses is not subject to the referendum and goes into immediate effect *if any of the following apply*:

(A) The section is an appropriation for current expenses;

(B) *The section is an earmarking of the whole or part of an appropriation for current expenses; or*

(C) *Implementation of the section depends upon an appropriation for current expenses that is contained in the act.*

*The general assembly shall determine which sections go into immediate effect.*

A codified or uncodified section of law contained in an act that contains an appropriation for current expenses that does not go into immediate effect as contemplated by this section is subject to the referendum and goes into effect as provided in Ohio Constitution, Article II, Section 1c.

(emphasis added).

Pursuant to this Court's decision in *State ex rel. Ohio AFL-CIO v. Voinovich* and its enactment of R.C. 1.471, the General Assembly determined which provisions of Am.Sub.H.B. 1 would take immediate effect and which would have a later effective date. Consistent with its responsibility to make this determination, the General Assembly included § 812.20 in the bill.

That section provides, in pertinent part:

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.

Sections \* \* \* 3770.03 [and] 3770.21 \* \* \* of the Revised Code. \* \* \*

(emphasis added).

Relators, in essence, argue that the General Assembly has no role in determining which provisions of laws containing appropriations take immediate effect, and therefore, necessarily imply that R.C. 1.471 is itself invalid. This Court has, however, previously acknowledged that the General Assembly does indeed play an important part in making these determinations. See *State ex rel. Taft v. Franklin County Court of Common Pleas* (1998), 81 Ohio St.3d 480, 484, 1998-Ohio-333 ("The provision that Sections 2, 3, and 5 of Am.Sub.H.B. No. 697 take immediate effect *comports with the Constitution and R.C. 1.471(C)* because implementation of the statewide election is dependent upon the appropriation in Section 4 of Am.Sub.H.B. No. 697.") (emphasis added).<sup>3</sup> Relators would have this Court usurp the General Assembly's role in determining which provisions of a budget bill are or are not subject to referendum and vest itself with the sole responsibility of making these determinations.

To achieve that result, Relators must establish not only that § 812.20 of Am.Sub.H.B. 1 violates Article II, § 1d of the Ohio Constitution, but also that R.C. 1.471 is invalid. Relators

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<sup>3</sup>Indeed, the Court noted in *State ex rel. Ohio AFL-CIO v. Voinovich* that the General Assembly had properly determined that the nonappropriation provisions of the bill at issue therein did not take effect until ninety days after the bill's enactment. 69 Ohio St.3d at 236. The Court nevertheless afforded citizens ninety days from the date of its decision to seek a referendum on the bill because its prior decision in *Riffe, supra*, which the Court overruled in *State ex rel. Ohio AFL-CIO v. Voinovich*, "appears to have foreclosed any meaningful opportunity" for referendum. 69 Ohio St.3d at 236.

have not established that R.C. 1.471 is invalid. Indeed, they don't even mention it in their brief. Moreover, even if this Court were to reach the merits of Relators' claim regarding § 812.20, it must conclude that Relators simply cannot overcome the presumption of constitutionality afforded the legislative enactments and satisfy their burden of proving the unconstitutionality of these provisions.

"The first step in determining the meaning of a constitutional provision is to look at the language of the provision itself. Where the meaning of a provision is clear on its face, we will not look beyond the provision in an attempt to divine what the drafters intended it to mean." Words used in the Constitution that are not defined therein must be taken in their usual, normal, or customary meaning. We recognize that "[a]ll legislative enactments enjoy a presumption of constitutionality,' and 'the courts must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional.'" Courts have a duty to liberally construe statutes to avoid constitutional infirmities.

*State ex rel. Taft*, 81 Ohio St.3d at 481 (citations omitted).

As Relator's properly note, the term "appropriations for the current expenses of the state government and state institutions" is not defined in the Constitution. As noted above, the General Assembly has, however, given meaning to that term through the enactment of R.C. 1.471.

Both the General Assembly and this Court have acknowledged that the term has a meaning broader than that advanced by Relators as the mere "setting aside a sum of money for a public purpose." Relators' Brief at 9.<sup>4</sup> In *State ex rel. Taft, supra*, the Court considered a claim similar to the one at issue herein. The General Assembly had determined that three sections of Am.Sub.H.B. 697 that did not include appropriations "go into immediate effect." Am.Sub.H.B.

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<sup>4</sup>The General Assembly has defined the term "appropriation" to mean "an authorization granted by the general assembly to make expenditures and to incur obligations for specific purposes," R.C. 131.01(F) (emphasis added), a definition far broader than that advanced by the Relators herein as the mere "setting aside a sum of money for a public purpose."

697, § 5 (1998). These sections did not include an "appropriation" as Relators herein would define the term, but rather set forth the requirements for an election on an issue to be submitted to the electors. Section 4 of the act was the only section to contain such an "appropriation." It allocated funds to the Ballot Board to be used "for the advertising costs associated with the statewide special election required by this act." Am.Sub.H.B. 697, § 4 (1998).

This Court rejected the challenge to the so-called "nonappropriation" provisions as violative of the constitutional provisions regarding referenda:

Zanotti finally challenges the constitutionality of Sections 2, 3, and 5 of the Act, based on his claim that these sections violate Sections 1c and 1d, Article II of the Ohio Constitution in that the Act provides that they shall be effective immediately. But, as noted previously, Section 1d, Article II permits certain laws, including "appropriations for the current expenses of the state government and state institutions," to take immediate effect and not be subject to the referendum. The provision that Sections 2, 3, and 5 of Am.Sub.H.B. No. 697 take immediate effect comports with the Constitution and R.C. 1.471(C) *because implementation of the statewide election is dependent upon the appropriation in Section 4 of Am.Sub.H.B. No. 697. See R.C. 1.471 ("A codified or uncodified section of law contained in an act that contains an appropriation for current expenses is not subject to the referendum and goes into immediate effect if \* \* \* [C] Implementation of the section depends upon an appropriation for current expenses that is contained in the act.")*.

*State ex rel. Taft*, 81 Ohio St.3d at 483-84 (emphasis added).

This Court's recognition that the term "appropriations for the current expenses of the state government and state institutions" has broader meaning than the mere setting aside or allocating of money is consistent with decisions in other jurisdictions that have wrestled with similar issues. For example, the District of Columbia Court of Appeals concluded that "the word 'appropriations,' when used in connection with the functions of the Mayor and the Council in the District's budget process, refers to the discretionary process by which *revenues are identified and allocated* among competing programs and activities." *Hessey v. District of Columbia Bd. of*

*Elections and Ethics* (D.C. 1991), 601 A.2d 3, 19 (emphasis added). See also *Dorsey v. District of Columbia Bd. of Elections and Ethics* (D.C. 1994), 648 A.2d 675, 677.

Similarly, in *Board of County Road Comm'rs v. Board of State Canvassers* (1974), 391 Mich. 666, the Michigan Supreme Court concluded that separate acts—one raising revenue through the imposition of a tax and another appropriating the revenue raised—had to be read as "one act" exempt from referendum under a constitutional provision exempting laws making "appropriations for state institutions." 391 Mich. at 669-70. See also *County Road Ass'n of Mich. v. Board of State Canvassers* (1979), 407 Mich. 101, 119. Thus, the Michigan Supreme Court has recognized that it was both the legislature's identification and allocation of revenues that constituted "appropriations for state institutions" within the meaning state constitutional provisions regarding referenda.

The highest court of Maryland has reached a similar conclusion:

Chapter 124 is, therefore, a finely tuned law containing an intricate financing mechanism to permit the State to receive and expend public monies required to obtain a site and to construct the contemplated sports facilities in the public interest. Specifically, it authorizes the borrowing of funds through the issuance of bonds, the disbursement of those funds through the Authority's Financing Fund, and the payment of the Authority's bonded indebtedness through monies directed to be paid by the State to the Authority through annual appropriations in the Budget Bill, by the City of Baltimore, and through the Authority's own revenues included in its Financing Fund. *Simply because no funds were appropriated to the Authority through the Budget Bill which was enacted in the same year as ch. 124 does not convert ch. 124 into other than a law making an "appropriation" within the broader meaning of that term as contemplated by the Referendum Amendment. In other words, ch. 124 is a type of revenue raising and spending measure intended to be embraced within the exclusionary provisions contained in the Referendum Amendment.*

*Kelly v. Marylanders for Sports Sanity, Inc.* (1987), 310 Md. 437, 460-61 (emphasis added). See also *Dorsey v. Petrott* (1940), 178 Md. 230, 240.

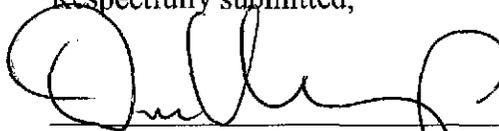
The foregoing demonstrates that the General Assembly properly determined that its authorization of video lotteries constituted an "appropriation[ ] for the current expenses of the state government and state institutions" as that term is used in Article II, § 1d of the Ohio Constitution. In its budget process, the General Assembly both identified a particular source of revenue, and allocated that revenue to primary and secondary education as required by Article XV, § 6. To hold otherwise would, in effect, eliminate a projected \$933 million in revenue required to achieve a balanced budget, and require the nullification of the appropriation of those funds.

Ohio's public school districts have now adopted budgets for the fiscal year. The effective nullification of nearly one billion dollars in appropriated revenue from the State's education fund for the primary benefit of those districts and the children and families they serve, will wreak havoc on school budgets. Classes have been organized and teachers assigned based on the current state allocations to Ohio's schools. Any ruling by this Court that delays the collection and distribution of more than \$933 million in appropriated education funds will create a new budget deficit that must be fixed. Such fix will require further reductions in state allocations to school districts and harm Ohio's children. Surely, the drafters of Ohio Constitution did not intend that the right to a referendum should disrupt and delay the State's ability to raise and appropriate revenues and appropriate funds for the current expenses of the state government, including the cost of providing a "thorough and efficient system of common schools." Ohio Const., Article VI, § 2. Accordingly, even if the Court reaches the merits of Relators' claim, that claim must be rejected and relief in mandamus denied.

**CONCLUSION**

For the foregoing reasons, Amici Curiae the Ohio Federation of Teachers, the Ohio School Business Officials Association, the Ohio Association of Public School Employees, Eve Bolton, and Jane Simon, respectfully urge this Court to dismiss Relators' Complaint.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the (07<sup>th</sup>) day of August, 2009, a copy of the foregoing was served via e-mail, upon the following:

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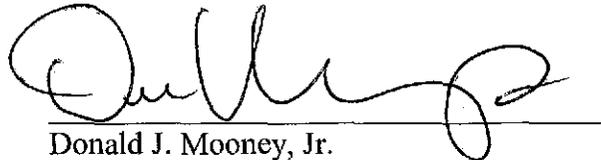
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