

ORIGINAL

In the  
**Supreme Court of Ohio**

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

Relators,

v.

HON. JENNIFER BRUNNER,

Respondent.

Case No. 2009-1310

Original Action in Mandamus

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**BRIEF OF AMICI CURIAE OHIO COUNCIL OF RETAIL MERCHANTS AND  
OHIO FARM BUREAU FEDERATION IN SUPPORT OF RESPONDENT**

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## STATEMENT OF INTEREST OF AMICI CURIAE

The Ohio Council of Retail Merchants is a 3,000 member statewide professional organization representing diverse industries along the business supply chain. Members of the Council include the nation's largest companies as well as small independent businesses located across Ohio.

The Ohio Farm Bureau Federation is the largest voluntary, non-profit general farm organization in Ohio. The Ohio Farm Bureau was founded in 1919 for the purpose of improving the quality of life in Ohio's agricultural communities. Today, it continues to represent the business, economic, social, and educational interests of farmers across Ohio, and to represent agricultural interests in general. With 234,000 member families and member county Farm Bureau organizations in all 88 counties in Ohio, its members produce virtually every kind of agricultural commodity found in this region of the country. Ohio Farm Bureau members also work on legislation, regulations, and other public issues that affect agriculture and Ohio's farmers.

The Council and the Bureau have an interest in economic stability in Ohio. Subjecting the appropriations connected to the VLT provisions of H.B. 1 to a referendum threatens untold economic chaos with consequences that will linger well beyond this budget biennium. Granting relator's petition would open a billion-dollar hole in the budget, forcing either emergency budget sessions or the paralyzing economic uncertainty that currently grips California. Because the Council's and Bureau's members rely on economic stability for their own welfare, they support a ruling that lets the General Assembly use all constitutionally available tools to satisfy the Section 4, Article XII constitutional duty of balancing the budget. The Bureau has specifically

considered the gaming issue and its relation to Ohio's economic health. Farm Bureau delegates from across Ohio have adopted a statement of policy declaring their support for the expansion of gaming at Ohio's racetracks. See Ohio Farm Bureau Federation 2009 State Policies, Section 410 (Equine). Specifically, the Farm Bureau supports "legislation that provides additional revenue from Ohio's pari-mutual and related gaming to keep Ohio's equine industry competitive with surrounding states." *Id.*

The Council and the Bureau also have an interest in preserving Ohio's education system because its members rely on an educated workforce to remain competitive. Any threat to the funds flowing to Ohio's schools threatens the most important asset of all Council and Bureau members, the skills and talents of their employees. Farm Bureau delegates have also adopted statements of policy in support of state funding for education. See 2 Ohio Farm Bureau Federation 2009 State Policies, Section 416.8 (School Funding). Specifically, the Farm Bureau opposes any action "regarding school funding that is deemed fiscally irresponsible, fails to help rural schools, and lessens the taxpayers' voice as expressed by the state legislature." *Id.* The money added to the budget via the VLT provisions of H.B. 1 is constitutionally committed to education per Section 6, Article XV of the Ohio Constitution. If the VLT provisions do not take immediate effect, the consequences to education will be immediate, severe, and fiscally irresponsible.

## ARGUMENT

- I. **Relators are not entitled to a writ of mandamus because the true object of their complaint is a declaration that portions of H.B. 1 violate the Constitution. The request for mandamus relief is also improper because the Secretary of State does not have a clear legal mandate to determine which laws are subject to referendum.**

Two independent flaws infect relators' request for a writ of mandamus.<sup>1</sup>

First, mandamus is unavailable because the complaint ultimately seeks ordinary, not extraordinary, legal relief. The true objects of the complaint are a declaration that the VLT sections of H.B. 1 violate Section 1c, Article II, and an order that prevents the law from taking immediate effect. That goal is achievable through the ordinary mechanisms of a declaratory judgment and prohibitory injunction.

Second, mandamus is not available because the Secretary of State has no clear legal obligation to determine which laws are subject to referendum. Her ministerial duty is to treat the law as the General Assembly directs. This she has done.

- A. **Mandamus is improper because relators really seek a declaration that the VLT portions of H.B. 1 are unconstitutional and an order of this Court enjoining its immediate effectiveness.**

The law of mandamus in this Court is now well settled: "if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and must be dismissed." *State ex rel. United Auto., Aerospace, & Agricultural Implement Workers of Am. v. Oh. Bureau of Workers' Comp.*, 108 Ohio

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<sup>1</sup> Mandamus relief is only available if: "[1]relators \* \* \* show that they have a clear legal right, [2] relators \* \* \* show a corresponding clear legal duty on the part of the secretary of state to perform the requested acts, [and 3] relators \* \* \* demonstrate the lack of an adequate remedy in the ordinary course of the law." *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, at ¶ 23, amended on other grounds, 115 Ohio St.3d 103, 2007-Ohio-4460.

St.3d 432, 2006-Ohio-1327, at ¶ 41 (internal citation and quotation marks omitted). This is the rule absent “extraordinary” legislation of the magnitude of 1996 Am. Sub. H.B. 350 that “directly and broadly” divests courts of judicial power. *Id.*, at ¶¶ 49-50. H.B. 1 does not divest this Court of any jurisdiction; in fact, it confers it. See 2009 H.B. 1, at § 3770.21(D) (Supreme Court has original and exclusive jurisdiction over constitutional challenges to the VLT sections).

Relators take no pains to hide the true aim of their petition – a declaration that the VLT portions of H.B. 1 violate the referendum provisions of the Constitution. For example, relators assert that those portions of H.B. 1 transgress the Constitution at least five times:

- “Until this Court decides whether the VLT sections of H.B. 1 constitute an appropriation [constitutionally exempt from the referendum]” [Merit Brief of Relators, at 5];
- “These provisions [VLT], which fall so far outside the scope of the constitutional exceptions, are subject to referendum” [Merit Brief of Relators, at 8 (emphasis added)];
- “Any other rule [besides that announced in *Voinovich*] would authorize the General Assembly to eviscerate Article II [of the Constitution] whenever it saw fit.” [Merit Brief of Relators, at 10 (emphasis added)];
- the Secretary of State justifies her “naked revision of the Constitution” [Merit Brief of Relators, at 11 (emphasis added)]; and
- “Nothing in the text, history or spirit of the Ohio Constitution [exempts the VLT provisions from the referendum]” [Merit Brief of Relators, at 13 (emphasis added)].

Plainly, relators challenge the General Assembly’s authority to declare that the VLT portions of H.B. 1 take immediate effect. And, although relators style their complaint as a request compelling the Secretary of State to perform certain acts, their true aim is an order from this Court prohibiting the Secretary from complying with the

General Assembly's directive in H.B. 1 that the law take effect immediately. To borrow this Court's words, relators' nominal protest about the Secretary of State's inaction are merely a "peg on which to hang [their] real request, a declaratory judgment on the constitutionality of" H.B. 1. *State ex rel. Governor v. Taft* (1994), 71 Ohio St.3d 1, 3.

The proper course of action for relators would have been a request for declaratory relief coupled with a prohibitory injunction staying the effective date of the law. See, e.g., *Maloney v. Rhodes* (1976), 45 Ohio St.2d 319 (action for declaratory judgment; enforcing injunction compelling governor and secretary of state to perform constitutionally mandatory acts with respect to bill); see also *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 1, 2006-Ohio-4334, at ¶ 38 (denying writ because real aim was an order prohibiting legislative clerks from "maintaining on their respective journals" records of a bill's transmittal and an order declaring "void" the Secretary of State's transmittal of the bill).

Relators make only a passing effort at demonstrating their entitlement to the writ. Citing *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St.3d 225, 1994-Ohio-1, relators contend that the Court "should order mandamus relief." (Merit Brief of Relators, at 16.) But this Court has expressly disavowed *Voinovich's* reflexive resort to mandamus when an adequate remedy exists in the ordinary course of law. *United Auto.*, supra, at ¶ 46 ("*Voinovich* \* \* \* never expressly considered the general jurisdictional preclusion concerning mandamus actions that are actually disguised actions for declaratory judgment and prohibitory injunction").

Here, by relators' own admission, they want to test the constitutionality of the General Assembly's declaration that the VLT portions of H.B. 1 are exempt from

referendum. That argument should be litigated like most constitutional questions – in a declaratory judgment action.

**B. Mandamus is improper because the Secretary of State has no clear legal duty to determine the effective date of a law.**

Even assuming relators have no adequate legal remedy, no writ should issue. The Secretary of State has no clear legal duty to ignore the mandate of the General Assembly and decide whether the VLT parts of H.B. 1 are subject to referendum. Relators essentially concede this point, averring in their complaint that the Secretary “is not vested with any jurisdiction to determine the constitutionality of any law.” (Amended Complaint, at ¶ 6; cf. Merit Brief of Relators, at 14 (“the Secretary of State has neither the expertise nor the authority to resolve complicated questions about [the meaning of] prior legal regimes”) (emphasis added).) If the Secretary has no jurisdiction to decide constitutional questions – and relators have left no doubt that they consider the matter before this Court a constitutional question about whether the VLT provisions of H.B. 1 are subject to referendum – the Secretary cannot have a clear legal duty to treat those VLT provisions as subject to the referendum.

Relators make no attempt to demonstrate a clear legal duty in their brief. They do, however, claim in their amended complaint that the Secretary has a duty to determine the timeframe for filing referenda petitions. (Amended Complaint, at ¶ 7.) This assertion contradicts both relators’ own declaration that the Secretary has “no jurisdiction” over constitutional interpretations and this Court’s holdings. For example, *State ex rel. Riffe v. Brown* held that the Secretary of State “has no function in approving or otherwise authorizing the effectiveness” of laws “mentioned in Section 1d, Article II.” (1977), 51 Ohio St.2d 149, 157, overruled on other grounds, *State ex rel.*

*Ohio AFL-CIO*, supra. As in *Riffe*, relators brief “has not set forth any authority for the Secretary of State to set or establish the effective date of a law.” *Id.*; cf. *State ex rel. Barren v. Brown* (1977), 51 Ohio St.2d 169, 170 (considering it “irrelevant” to Attorney General’s duties his belief that certain “matters are not subject to referendum” because Attorney General has no power to determine law’s effective date).

*Riffe* is consistent with other authorities and recent pronouncements from this Court that the Secretary of State has no authority to determine constitutional questions regarding bills. Even before *Riffe*, the Court had held that the Secretary is vested with no discretion to determine the constitutionality of any law. *Maloney*, supra, 45 Ohio St.2d 319. That holding was reiterated in *Taft*, supra, 71 Ohio St.3d 1, 4, when the Court declared that the Secretary “exercises no judicial or quasi-judicial authority over” a bill that is allegedly unconstitutional.

More recently, members of this Court have affirmed the continued validity of *Maloney*. “The Secretary of State is an executive officer who is not vested with any jurisdiction to determine judicial questions dealing with the constitutionality of any law.” *Brunner*, supra, at ¶ 78 (Lundberg Stratton, J., concurring) (internal quotation marks omitted) (collecting authority). “Pursuant to the Constitution, the office of the secretary of state has no role in the legislative process other than to serve as a depository for the filing of bills and laws.” *Id.*, at ¶ 100 (O’Connor, J., concurring).

Just last month, this Court rejected a mandamus petition because the relators improperly sought a writ from this Court against the Secretary of State even though the Secretary had no duty to act as relators desired. *State ex rel. Scioto Downs, Inc. v. Brunner*, \_\_\_ Ohio St.3d \_\_\_, 2009-Ohio-3761, at ¶ 18 (Slip Op. July 31, 2009). The

same result is appropriate here. Because the Secretary has no duty – indeed no power – to determine whether the VLT provisions of H.B. 1 are constitutionally subject to referendum, mandamus does not lie. Instead, the power to determine whether a law is subject to referendum lies first with the General Assembly (see R.C. 1.471), and – ultimately – with the judiciary via declaratory proclamations as to what the Constitution means.

In short, this Court should deny relators' mandamus request for two independent reasons. First, relators essentially ask the Court to declare the General Assembly's decision exempting the VLT provisions from referendum invalid and prohibit the provisions immediate effectiveness even though mandamus is not the remedy for such requests. Second, despite relators' insistence that the Secretary has no power to decide constitutional questions, the complaint requests a writ compelling the Secretary to decide a constitutional question about the meaning of Section 1d, Article II, of the Constitution.

**II. Relators are not entitled to a writ of mandamus because the VLT portions of H.B. 1 went into effect immediately and are not subject to referendum.**

Relators depict the referendum process in Ohio as “this bedrock right” and a “long-standing\* \* \*right of the citizenry” that is “[e]ngrained in our Constitution” as a defense of democracy. (Merit Brief of Relators, at 6, 15.) This distorts the history of Article II, Sec. 1 of the Ohio Constitution and oversimplifies the complex role of the referendum in our political system. Indeed, referendum is a limited right under the Ohio Constitution, and it is not available to relators in this case.

There is no common law right to referendum, and it is not an inherent right of state citizenship; like the initiative, it exists only through an express constitutional grant

by the people of the state. See, e.g., *Pfeifer v. Graves* (1913), 88 Ohio St. 473, 477 (right to initiative is derived from popular declaration); *Wright v. Village of South Orange* (1963), 79 N.J. Super. 96, 101, 190 A.2d 675, 678 (there is no common law right to referendum or initiative); *City of Mount Olive v. Braje* (1937), 366 Ill. 132, 135, 7 N.E.2d 851, 853 (there is no initiative right unless provided by the state constitution). The Ohio Constitution had no provisions creating referendum or initiative rights for more than a century after statehood – more than one-half of this State’s history.

“[O]n September 3, 1912, the electors of Ohio adopted amendments to Article II, Section 1 to 1g of the Ohio Constitution providing for initiative and referendum \* \* \* \*.” *State ex rel. Riffe v. Brown* (1977), 51 Ohio St.2d 149, 158 (O’Neill, C.J. dissenting), overruled, *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St.3d 225, 1994-Ohio-1. See *Ritchmount Partnership v. Board of Supervisors of Elections* (1978), 283 Md. 48, 60, 388 A.2d 523, 531 (the referendum was “the brainchild of Populist and Progressive Movements which dominated national politics in the late nineteenth and early twentieth centuries”). South Dakota had been the first state to recognize these rights when it adopted its constitution in 1898; less than half of the states followed suit, and none except Alaska have done so since World War I. See Chesley, Comment: Use of the Initiative in Ohio and Other States, 53 U. Cin. L. Rev. 541, 544-45 (1984).

In Ohio, the delegates to the 1912 constitutional convention “were sharply divided during the debate on this issue”:

The greatest opposition to the initiative and referendum emanated from the rural delegates who viewed these procedural institutions as particularly advantageous to urban Ohio residents who then constituted an increasing majority of the population.

*Id.*, at 546.

Accordingly, “[t]he power of referendum \* \* \* is not absolute. Article II of the Ohio Constitution limits the power of referendum by providing that certain laws are not subject to referendum.” *Voinovich*, supra, 69 Ohio St.3d at 235. The 1912 amendments to Article II expressly provide that there is no right to referendum as to three specified categories of legislation:

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.

Art. II, Sec. 1d of the Ohio Constitution. See *State v. Lathrop* (1915), 93 Ohio St. 79, 87 (“[l]aws providing for the state levies, appropriations for current expenses of the state government and state institutions, and emergency laws, as defined in section 1d of article 2, go into immediate effect by the express language of the Constitution”).

The referendum right has not played the pivotal role in our democracy that relators suggest. “[T]he popular referendum has been used infrequently,” Calvert, *The Popular Referendum Device and Equality of Voting Rights*, 6 Cornell J.L. & Pub. Policy 383, 385 (1992), and “the vast majority of all initiative and referendum actions have been rejected by the voters,” Chesley, supra, at 547. Moreover, “[t]he Ohio courts have not had much opportunity to interpret this part of the constitution.” *Id.*, at 554.

Relators downplay the purpose of the Section 1d appropriations exception to the right of referendum, but it goes to the heart of the dispute in this case: whether relators can derail the appropriations made in the Ohio budget and create a financial emergency for this State by filing the signatures of six percent of the electorate. “The purpose of excepting appropriations for current expenses was to ensure that current expenses,

such as salaries and other contractual obligations of the state, would be timely honored.” *Riffe*, supra, 51 Ohio St.2d at 164 (O’Neill, C.J., dissenting) (emphasis added). See *Detroit Automobile Club v. Secretary of State* (1925), 230 Mich. 623, 626, 203 N.W. 529, 530 (“the purpose of the Legislature’s power to give an act of appropriation immediate effect \* \* \* [is] to permit the state to exercise its various functions free from financial embarrassment and to allow for state institutions to carry on state functions”) (emphasis added); *Kelly v. Marylanders for Sports Sanity, Inc.* (App. 1987), 310 Md. 437, 456, 530 A.2d 245, 254 (“if laws making appropriations for maintaining the State government were subject to referendum, it would be possible \* \* \* to cause the State serious financial embarrassment in the performance of its various essential functions”) (citation and internal punctuation omitted). “[A] referendum [of an appropriation] might easily cripple or destroy the administration of government affairs even to the extent of requiring the legislative, executive, or judicial branches of the government, or all of them, to cease to function.” *State ex rel. Bonner v. Dixon* (1921), 59 Mont. 58, 195 P. 841, 845.

Relators emphasize that “the referendum power is viewed broadly, with a presumption favoring voter consideration of legislative acts” (Relator’s Merit Brief, at 7), but they ignore the duty of courts to “apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional.” *State ex rel. Taft v. Franklin County Court of Common Pleas*, 81 Ohio St.3d 480, 481, 1998-Ohio-333, at ¶ 6. More importantly, “[a] rule of construction cannot authorize this court to expand the right of referendum beyond what has been reserved [by the constitutional text] or to ignore its plain limitations.” *Pony Lake School*

*Dist. 30 v. State Comm. For the Reorganization of School Dist.* (2006), 271 Neb. 173, 186, 710 N.W.2d 609, 621, certiorari denied, 547 U.S. 1130.

Relators essentially ask this Court to presume that the referendum right is somehow more important than the General Assembly's right to legislate. This presumption was addressed by Justice Markman in his concurring opinion in *Michigan United Conservation Clubs v. Secretary of State* (2001), 464 Mich. 359, 393, 630 N.W.2d 297, 311-12:

I would respectfully suggest that the "overarching right of the people" is to have the constitution that they have ratified given respect and accorded its proper meaning \* \* \* \*. [I]n a system of constitutional government, we examine the language of the constitution itself to determine which rights are "overarching." Whether the referendum process or the legislative judgment should prevail in a particular case does not depend upon which right or which value is perceived to be the more "overarching" by a judge, but rather upon which result is required by the terms of the constitution itself. There is, in fact, an "overarching right" to a referendum, but only in accordance with the standards of the constitution; otherwise, there is the "overarching right" to have public policy determined by a majority of the people's democratically elected representatives.

(Emphasis added). See also Barron, Referendum: Legislative Acts that Make Appropriations for State Institutions Are Not Subject to Referendum, 33 Rutgers L.J. 1555, 1576 (2002) ("[i]t is too subjective for the court to base its decision on opinions as to which powers are more important, the people's referendum power or the legislature's law-making power").

Ohio courts have repeatedly recognized that the plain meaning of the appropriations exception to the right of referendum should be enforced consistent with the purpose of that exception: to prevent a small minority from using the referendum process to undermine the ability of the State to meet its budgetary obligations. For

example, in *Taft*, supra, 81 Ohio St.3d at 484, the Court held that a statute that imposed sales, storage, use, consumption, and service taxes for the benefit of Ohio schools, subject to a statewide election, fell within the appropriations exception to the right to referendum:

The provision that Sections 2, 3, and 5 of Am. Sub. H.B. No. 697 take immediate effect comports with the Constitution because implementation of the statewide election is dependent upon the appropriation in Section 4 \* \* \* \*

The Court relied in part upon R.C. 1.471, which provides that “[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.”

Similarly, in *State ex rel. Davies Mfg. Co. v. Donahey* (1916), 94 Ohio St. 382, 385, the Court held that provisions of a bill requiring competitive bids for appropriated funds were not subject to referendum because “the limitation with reference to competitive bidding was simply a condition under which an appropriation should be drawn.” In the present case, the VLT provisions establish conditions under which some appropriations can be made to the education system.

In short, Ohio courts have recognized that, although appropriations bills cannot be used to logroll substantive programs, “[a]ppropriations bills, of necessity, encompass many items, all bound by the thread of appropriations \* \* \* \*” *State ex rel. Ohio Roundtable v. Taft*, 10<sup>th</sup> Dist. App. No. 02AP-911, 2003-Ohio-3340, at ¶ 47, appeal denied, 100 Ohio St.3d 1484, 2003-Ohio-5992, quoting *Simmons-Harris v. Goff* (1999), 86 Ohio St.3d 1, 16. In *Ohio Roundtable*, the Court held that the statute authorizing

Ohio's participation in a multi-state lottery game did not violate Ohio's "single-subject" rule, Ohio Const. Article II, Sec. 15(D), in light of the strong connection between the lottery provisions and the appropriations provisions:

[T]he provisions authorizing the commission to enter into a new form of lottery game, with the expectation that it would generate an estimated \$41 million per year in additional revenues to Ohio schools, maintains a sufficient common thread with the remaining provisions of H.B. 405 which \* \* \* truly had become a budget correction bill primarily concerned with funding. In the words of the trial court, the multi-state lottery provisions "are firmly related to the central appropriations core of the bill."

Id., at ¶ 49 (emphasis added).

In the present case, the VLT provisions of H.B. 1 are an integral part of the appropriations made in the budget. Most obviously, Ohio cannot meet its budgetary obligations if these provisions are delayed, subjecting this State to exactly the same financial crisis that the appropriations exception to the referendum right was crafted to prevent. The text of Article II, Section 1d expressly prohibits referenda which prevent the State from paying current expenses of the government, and that would be the inevitable result of the proposed referendum in this case.

Courts in other jurisdictions with a similar "appropriations" exception to the right of referendum have also recognized that it must be applied consistent with its purpose to bar referenda on bills that are necessary for the State to meet its current financial obligations. In *Kelly*, supra, the Court held that a bill creating a comprehensive financial scheme to raise funds for construction of a professional sports stadium was an appropriation for constitutional purposes, and thus exempt from the right of referendum, even though the bill did not itself directly authorize the disbursement of any budgeted funds. The appropriations exception "has as its constitutional purpose protecting from

referendum the purpose or object of the legislative appropriation,” in accord with “the obvious purpose of the [appropriations] exception to insulate revenue raising and spending measures from suspension under [the referendum] provisions.” 310 Md. at 461, 472, 530 A.2d at 257, 262. In *Winebrenner v. Salmon* (1928), 155 Md. 563, 142 A. 723, the Court held that a statute that increased the state gasoline tax and created a fund with the receipts, without a technical appropriation, “nevertheless constituted an ‘appropriation’ ” under the state constitutional provision excepting appropriations from public referendum. The statute and the subsequent budget bill “are in pari materia and must be construed together” in applying the appropriations exception. 142 A. at 725. See also *Dorsey v. Petroff* (1940), 178 Md. 230, 244, 13 A.2d 630, 637, holding that “an appropriation may be by legislative act or constitutional declaration,” and that “revenue measures to raise the public funds to pay the appropriations of the Budget Bill are excepted from the operation of the Referendum Amendment, although the revenue thus procured is disbursed \* \* \* without any express authorization in the money bill for its disbursement.”

In *Hessey v. District of Columbia Bd. of Elections and Ethics* (D.C. 1991), 601 A.2d 3, 9, the Court concluded that a bill was a “law appropriating funds,” and thus excepted by statute from referendum and initiative proceedings, because the appropriations exception “extend[s] \* \* \* to the full measure of the Council’s role in the District’s budget process \* \* \* . [T]he word ‘appropriations’ refers to the discretionary process by which revenues are identified and allocated among competing programs and activities.” This ensures that referenda and initiatives do not “create deficits or interfere

with \* \* \* decisions about how District government revenues should be spent.” 601 A.2d at 15 (emphasis added).

Michigan courts have reached the same result in a series of cases applying that state’s appropriations exception to the right to referendum. See, e.g., *Michigan Good Roads Federation v. Alger* (1952), 333 Mich. 352, 364, 53 N.W.2d 481, 487, holding that a bill imposing a new tax on gasoline, and directing that the revenues be paid into the state treasury until they are “allocated and used . . . for such specific highway purposes as may be prescribed by other acts,” was not subject to referendum; and *Moreton v. Haggerty* (1927), 240 Mich. 584, 592, 216 N.W. 450, 453, declining to interpret the appropriations exception in a way that would “defeat the constitutional purpose, which is to save the State from financial embarrassment in exercising any of its State functions.” In 2001, the Supreme Court of Michigan held that a legislative act that lowered the requirements for concealed weapon permits was not subject to referendum even though it contained only a relatively small appropriation. *Michigan United Conservation Clubs*, supra.

Finally, in *Nicholson v. Cooney* (1994), 265 Mont. 406, 877 P.2d 486, the Montana Supreme Court held that a revision of state income tax laws is not an “appropriation,” and is therefore subject to referendum, when it “contains no provisions for expenditures” and was “offered, debated, and voted upon separately from appropriation bills considered by the 1993 Montana legislature.” 265 Mont. at 416, 877 P.2d at 491. In reasoning that is especially pertinent to the present case, two dissenting justices explained why there should be no right to referendum in these circumstances:

[W]hen as few as eight percent of the State's voters can exercise an effective veto over legislation enacted by

representatives who were elected by a majority of the State's voters; and when, based on that veto, services, benefits, and educational opportunities are permanently lost by citizens who were denied any voice in the matter, then the principle of one equally weighted vote for each person is rendered meaningless \* \* \* \*

[W]hen a referendum, by suspending a revenue-raising measure . . . leaves the Legislature with no alternatives other than an unbalanced budget in violation of Article VIII, Section 9, of the Montana Constitution, or rescinding an appropriation of money already made, then the referendum is, in effect, one to reject an appropriation of money \* \* \* \*

265 Mont. at 420-21, 877 P.2d at 494 (Trieweller, J., dissenting) (emphasis added). When the Montana Secretary of State certified the referendum petitions, the Governor had to call the legislature into special session to slash its earlier appropriations in order to balance the state budget. 265 Mont. at 410, 877 P.2d at 488. "[T]he legislature had no choice but to cut spending \* \* \* 65 percent came from cuts in funding to the public schools and the state university system. The bulk of the remaining 35 percent came from programs that serve the poor." Calvert, *supra*, 6 Cornell J. L. & Pub. Policy at 394.

The proposed referendum in the present case would have the same disastrous financial effects for the citizens of Ohio. There is no reason this Court should apply a technical meaning to the term "appropriations" when that leads to the very result that the appropriations exception was created to prevent: the inability of the State of Ohio to pay its current expenses. The immediate and unavoidable consequences of the proposed referendum would include an unbalanced budget and one billion dollars of cuts in appropriations that have already been budgeted. The Ohio Constitution does not recognize a right to referendum in these circumstances, and relators' request for a writ of mandamus should be denied.

## CONCLUSION

Amici curiae Ohio Council of Retail Merchants and Ohio Farm Bureau Federation support respondent and intervenors in asking the Court to deny a writ of mandamus in this case. As set forth above, relators' request for mandamus is improper because they are actually seeking a declaratory judgment and prohibitory injunction, and because respondent has no clear legal duty to determine the effective date of H.B. 1 or any other legislative enactment. Their request should also be denied on substantive grounds because the Ohio Constitution does not allow referenda on bills that are necessary to pay the current expenses of this State.

It is undisputed that ordering a referendum on H.B. 1 would produce exactly the result that the constitutional limitations on referenda were adopted to prevent: Ohio would be unable to pay its current expenses and maintain state government operations. Amici curiae and their members have seen the damage that California's budget crisis has caused to citizens, businesses, and farms in that state: job furloughs, reduced salaries, "IOUs" instead of payments to businesses that provide goods and services, and a financial environment in which customers are reluctant to spend and entrepreneurs are unwilling to invest. The effects of a one billion dollar deficit in Ohio, and the retroactive rescission of appropriations in order to balance the budget, would be equally disastrous for the Ohio economy.

The Ohio Constitution prohibits a small minority of voters from using a referendum to take away the resources that are needed by the government to pay current expenses, for obvious reasons, and this Court should reject any interpretation of the constitutional language that would allow relators to do so.

Respectfully submitted,



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The undersigned hereby certifies that a copy of the foregoing Brief of Amici Curiae Ohio Council of Retail Merchants and Ohio Farm Bureau Federation in Support of Respondent was served via regular United States mail on this 10th day of August, 2009 on the following:

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