In the
Supreme Court of Ohio

STATE ex rel. LETOHIOVOTE.ORG., et al.,	:	
Relators,	:	Case No. 2009-1310
v.	:	Original Action in Mandamus
OHIO SECRETARY OF STATE JENNIFER BRUNNER,	:	
Respondent.	:	

MERIT BRIEF OF RESPONDENT OHIO SECRETARY OF STATE JENNIFER BRUNNER

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INTRODUCTION

The Ohio Constitution provides that a referendum petition to challenge a law enacted by the General Assembly must be filed in the office of the Secretary of State. Section 1c, Article II, Ohio Constitution. The Constitution does not, however, expressly require the Secretary to accept every referendum petition proffered to her for filing. In exercising her constitutional and statutory duties relative to referendum, it is entirely appropriate that the Secretary review a proffered referendum petition and determine whether it complies with certain basic legal requirements. The Secretary respectfully submits that this court should expressly affirm in this case that the Secretary has the authority to refuse to accept proposed referendum petitions when the filing would be untimely or the filing is otherwise outside the scope of the referendum process established by the Constitution.

In the case at bar, Relators proffered a referendum petition to challenge sections of Amended Substitute House Bill 1 ("Am. Sub. H.B. 1") that the General Assembly had expressly declared to be exempt from referendum. In the absence of a court order to the contrary, the Secretary did not abuse her discretion in deferring to that characterization—which was made by the General Assembly and affirmed by Governor Strickland who signed the bill—and refusing to accept the referendum petition proffered by Relators.

Am. Sub. H.B. 1 provides that the amendments to R.C. 3770.03 and the enactment of R.C. 3770.21 (the "VLT sections") are "exempt from the referendum" and therefore "take[] effect immediately." Section 812.20, Am. Sub. H.B. 1. Notwithstanding this legislative determination, Relators argue that Secretary of State Jennifer Brunner had a "clear legal duty to treat the VLT Sections as subject to the referendum." Relators accordingly request this Court to issue a writ of mandamus against the Secretary requiring her to change the effective dates of the

VLT sections in the Secretary's records and treat the VLT sections as subject to the referendum. Am. Compl. ¶¶37, 38, prayer for relief. In effect, Relators are urging this Court to declare that the Secretary, in the absence of a judicial order invalidating Section 812.20 of Am. Sub. H.B. 1, had a clear legal duty to disregard the expressed will of the General Assembly and the Governor and to accept and process Relators' proffered petitions, thereby effectively overriding the legislative determination that certain sections in Am. Sub. H.B. 1, including the VLT sections, are exempt from the referendum. When presented with the petitions proffered by the Relators, the Secretary had no authority, let alone a duty, to disregard the General Assembly's direction concerning whether the VLT sections were exempt from the referendum.

Additionally, though plead as a mandamus action, Relators' real object is a declaration that Section 812.20 of H.B.1 improperly exempts the VLT sections from the referendum process in violation of Section 1(c), Article II of the Ohio Constitution. Relators are also seeking injunctive relief in the form of an order "staying the implementation of the VLT Sections for 90 days from the date of the Court's decision" – a matter outside the scope of the Secretary's duties. Because declaratory and injunctive relief are properly sought in the court of common pleas, Relators have an adequate remedy at law such that resort to an extraordinary action in mandamus is unwarranted. In the alternative, Relators' claims fail because the Court lacks jurisdiction to issue declaratory and injunctive relief.

For these reasons, Relators' writ of mandamus should be denied in its entirety.

STATEMENT OF THE CASE AND FACTS

On July 17, 2009, Governor Strickland filed Am. Sub. H.B. 1 with the Secretary. (Exhibit 1, Affidavit of Brian E. Shinn ("Shinn Aff.") ¶ 7). Section 812.20 of Am. Sub. H.B. 1 lists the sections exempt from the referendum and provides, in pertinent part:

> The amendment, enactment, or repeal by this act of 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.

Thus, section 812.20 of Am. Sub. H.B. 1 exempted certain portions of the bill from the referendum and specifically stated that those portions take effect immediately. Two of the sections listed in 812.20 were the amendments to R.C. 3770.03 and enactment of R.C. 3770.21 – the provisions that the parties in this litigation have referred to as the "VLT sections."

The Secretary maintains on her web site an electronic log that lists new acts that have been adopted by the General Assembly, signed by the Governor, and filed in her office. See, http://www.sos.state.oh.us/sos/upload/records/journal/acts_128.pdf. As a service to the public, the Secretary includes in this electronic log her calculation of the effective date of those new laws. (Shinn Aff. ¶ 6). Accordingly, when an act is filed with the Secretary, her staff reviews the act to determine whether the General Assembly has expressly established an effective date for new legislation and whether the General Assembly has included any provisions relating to whether the new law, or sections of it, are subject to or exempt from the referendum process. (Shinn Aff. ¶ 4). If the act, or sections in the act, are subject to the referendum, the Secretary calculates the expiration of the referendum period, which is ninety days following the date on

which the act is filed with the Secretary's office. (Shinn Aff. ¶ 5; Section 1(c), Article II, Ohio Constitution). If the act, or sections in the act, are exempt from the referendum, the act became effective by operation of law upon the signature of the Governor. Section 1(c), Article II, Ohio Constitution; *State ex rel. Pincombe v. Bd. of State Teachers Retirement* (1961) 172 Ohio St. 217, 218. The Secretary merely *records* the act's effective dates (many acts have multiple effective dates) in the Governor's Office Bill Record and in electronic logs kept in the Secretary's office. (Shinn Aff. ¶ 6). The Secretary does not *determine* an act's effective date, which is established by operation of law in view of the General Assembly's direction as expressed in the act itself.

Despite the General Assembly's determination that the VLT sections were exempt from the referendum, Relators filed a Complaint for Writ of Mandamus on July 20, 2009, stating that the Secretary had a "clear legal duty to treat the VLT Sections as subject to the referendum, and thus refrain from implementing those sections for at least 90 days."[1] Am. Compl. ¶ 30. On July 23, 2009, Relator Gene Pierce appeared at the Secretary's office indicating that he had a referendum petition to file against Am. Sub. H.B. 1's amendments to R.C. 3770.03 and enactment of R.C. 3770.21. (Shinn Aff. ¶ 10).

Because Relators filed their complaint before attempting to file summary petitions with the Secretary, the Secretary was well aware that the issue of whether the VLT sections were subject to referendum had already been submitted to this Court for determination. In the absence of a court order to the contrary, and expecting this Court to clarify the Secretary's duties under the facts at issue, the Secretary appropriately deferred to the General Assembly's conclusion that the VLT sections were exempt from the referendum. Accordingly, the Secretary's Assistant

[1] The Secretary does not have any responsibility to either implement or refrain from implementing the VLT sections of Am. Sub. H.B. 1.

General Counsel informed Relator Pierce that the Secretary's office could not accept the referendum petition because the General Assembly had determined that the amendments to R.C. 3770.03 and the enactment of R.C. 3770.21 in Am. Sub. H.B. 1 were exempt from the referendum. (Shinn Aff. ¶ 12).

That same day, Relator Pierce attempted to file summary part-petitions concerning the VLT sections in Am. Sub. H.B. 1 with the Ohio Attorney General's office. (Relators' Evidence, Exhibit 4, Affidavit of Gene Pierce ("Pierce Aff.") ¶ 14). The Attorney General's Office also rejected the referendum petitions, citing the General Assembly's determination in Am. Sub. H.B. 1 that the VLT sections were exempt from the referendum. (Pierce Aff. Exhibit E.)

On July 31, 2009, Relators filed an Amended Complaint for Writ of Mandamus stating again that the Secretary had "a clear legal duty to treat the VLT Sections as subject to the referendum" and, additionally, that the Secretary has "clear legal duties with respect to referendum petitions." (Am. Compl. ¶ 37). Specifically, Relators' request that the Court:

> Issue a writ of mandamus against Respondent Secretary of State compelling her to treat VLT sections of H.B. 1 (R.C. 3770.03 and 3770.21) as subject to the constitutional right of referendum by:
>
> (i) setting forth in both paper and electronic journals kept by the Secretary that the VLT sections of H.B. 1 shall not be effective for 90 days from the date of the Court's decision and that any referendum petitions challenging those sections must be filed with the Secretary within 90 days from that date; and
>
> (ii) fulfilling each of the Secretary's duties and obligations relating to the referendum as imposed by Article II, Section 1 of the Ohio Constitution and Title 35 of the Revised Code, with respect to the VLT Sections of H.B. 1

Am. Compl., prayer for relief.

LEGAL ARGUMENT

Relators have failed to establish the necessary elements of a complaint for writ of mandamus against the Secretary. In the absence of judicial direction to the contrary, it is entirely appropriate that the Secretary defer to the effective dates of legislation as determined by the General Assembly and as signed into law by the Governor. The Secretary has no clear legal duty to *ignore*, *second guess*, or *override* these legislative determinations, and the Secretary has no clear legal duty to accept referendum petitions against laws that the General Assembly has deemed exempt from the referendum process. Relators request this Court to create such duties in mandamus, which the Court has repeatedly held it will not do. Additionally, Relators have an adequate remedy at law and are improperly seeking injunctive relief, disguised as mandamus, to seek a ruling as to the constitutionality of Am. Sub. H. B. 1 and to prevent the implementation of the VLT legislation. For these reasons, the Relators' writ must be dismissed.

I. Relators Have Failed To Establish The Necessary Elements For A Writ of Mandamus.

"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." *State ex rel. Smith v. Indus. Comm'n* (1942), 139 Ohio St. 303, 306. In order to obtain a writ of mandamus in this case, Relators must show (1) that they have a clear legal right to the requested relief, (2) that the Respondent is under a clear legal duty to perform the requested act, and (3) that Relators do not have an adequate remedy at law. *State ex rel. Nat'l City Bank v. Bd. of Ed.* (1977), 52 Ohio St. 2d. 81, 83.

Because Relators have failed to establish the elements necessary for a writ of mandamus to issue against the Secretary, Relators' complaint should be dismissed.

A. Secretary Brunner has no clear legal duty to ignore the General Assembly's legislative determination or to herself improperly adjudicate whether certain provisions of an act fall within the appropriations exemption from referendum established by the Ohio Constitution.

Relators assert that the Secretary has "a clear legal duty to treat the VLT Sections as subject to the referendum." Am. Compl. ¶ 37. To fulfill this duty, the Secretary would be required to ignore the General Assembly's determination that certain sections of Am. Sub. H.B. 1, including the VLT sections, are exempt from the referendum. Nothing in the Ohio Constitution, Ohio Revised Code, or this Court's jurisprudence suggests that the Secretary has such a duty. In fact, these authorities demonstrate that the Secretary's only "clear legal duty" under this set of facts is to defer to the General Assembly's legislative determination.

The Ohio Constitution states 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," except where a legally sufficient referendum petition is filed with the Secretary of State. Section 1(c), Article II, Ohio Constitution. Additionally, "[l]aws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws" are not subject to the referendum process and "shall go into immediate effect." Section 1(d), Article II, Ohio Constitution. Clearly, not all laws are subject to the referendum. Ohio law, which the Secretary is sworn to follow unless and until invalidated by a court of law, gives authority to the *General Assembly* to determine which laws are subject to the referendum. R.C. 1.471 defines "appropriation for current expenses" – for purposes of Article II, Section 1(d) of the Ohio Constitution – and explains that an act that contains an appropriation for current expenses is "not subject to the referendum and goes into immediate effect." More importantly,

the statute provides: ***"The general assembly shall determine which sections go into immediate effect."*** Thus, in light of this provision of the Revised Code and unless and until ordered otherwise by a court of law, the Secretary must follow the direction set by the General Assembly in determining which sections go into immediate effect and are therefore exempt from the referendum.

The Court's decisions describing the Secretary's duties in accepting a bill for filing lead to the same conclusion: the General Assembly determines which acts are exempt from the referendum and the Secretary should not ignore, second guess, or override that decision. For example, in *State ex rel. Riffe v. Brown* (1977), 51 Ohio St. 2d 149, this Court stated that "the role of the Secretary of State in connection with laws mentioned in Section 1d, Article II" is that the Secretary "has no function in approving or otherwise authorizing the effectiveness of such laws." *Id.* at 157.

In *Riffe*, the General Assembly passed an elections bill containing five sections. The first four sections of the bill included substantive changes to Ohio's election laws. The fifth section provided an appropriation for the current expenses of the Secretary of State's office. Then Secretary of State Ted W. Brown, in his acknowledgment of the filing of the bill, indicated that the fifth section, the appropriation section, was effective May 27, 1977, the date the Governor signed it, and that all other sections were effective August 30, 1977, ninety days after the day of filing with the Secretary of State. *Id.* at 149. The Speaker of the House and the Senate President Pro Tempore argued that all five sections of the bill should be immediately effective and thereafter filed a complaint against Secretary Brown for writs of mandamus and prohibition directing that Secretary Brown give immediate effect to the substantive election procedures mandated by the first four sections of the bill. *Id.*

The Supreme Court granted the writ of mandamus, holding that the entire bill took immediate effect because one part of the bill contained an appropriation for current expenses. *Id.* at 154. This holding was later overruled in *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St. 3d 225, 1994-Ohio-2, where the Court held that nonappropriation sections of a bill are subject to the referendum, notwithstanding the fact that one section of a bill may be an appropriation for current expenses. The Court also held, however, that Secretary of State Brown acted outside the scope of his authority, and the Court's description of the Secretary of State's duties remains binding precedent. According to the Court, the Secretary of State had a clear legal duty to carry out the provisions of the law as directed by the General Assembly and the Secretary had no authority to change the effective date of an act. Specifically, the Court reasoned:

> The foregoing statement of more than 60 years vintage makes clear the role of the Secretary of State in connection with laws mentioned in Section 1d, Article II: he has no function in approving or otherwise authorizing the effectiveness of such laws. The brief filed on his behalf has not set forth any authority for the Secretary of State to set or establish the effective date of law. . . .

Riffe, 51 Ohio St. 2d at 157. Thus, this Court has long held that the Secretary of State has no authority "in approving or otherwise authorizing" the effective date of a bill filed in the Secretary of State's office. Applying *Riffe*'s reasoning to this case, the Secretary certainly lacks the authority to *ignore* the legislature's determination that the VLT sections are exempt from the referendum.

The Court also explained in *State ex rel. Governor v. Taft* (1994), 71 Ohio St. 3d 1, that under the Ohio Constitution, a bill becomes a law upon the signature of the Governor and that the Secretary of State "has the ministerial duty to file the Act." *Id.* at 3 (citing *Maloney v. Rhodes* (1976), 45 Ohio St. 2d 319). In so filing an Act, the Secretary "exercises no judicial or quasi-judicial authority over such bills." *Id.* at 4. If the Secretary has no judicial or quasi-

judicial authority over legislation filed in her office, she also does not have the authority – let alone the *duty* – to override legislative determinations of when acts are effective or are exempt from the referendum.[2]

More recently, this Court described the Secretary of State's statutory duties after a bill has been filed in her office in *State ex rel. Ohio General Assembly v. Brunner* (2007), 114 Ohio ST. 3d 386, 2007-Ohio-3780. In summarizing the Secretary's duties, nowhere did this Court state that the Secretary has a separate duty to "second guess" the General Assembly's determination that certain sections of an Act are exempt from the referendum. *Id.* at ¶ 26 (citing the Secretary's statutory duties in R.C. 149.08, 149.09, 149.091, 149.16, R.C. 111.08, and R.C. 103.131, which include "forwarding copies of each law to clerks of courts of common pleas; distributing the laws to county law libraries, county auditors, and the state library board; publishing and distributing session laws; and distributing laws and journals," and "safely keep[ing] the laws and resolutions passed by the general assembly and such other papers and documents as are required to be deposited in his office").

Justice O'Donnell, in his concurring opinion in *General Assembly v. Brunner*, elaborated further on the Secretary's duties, concluding that 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. Rather, the scope of the Secretary's duties are limited by the Constitution and the

[2]*See also State ex rel. North Main Street Coalition v. Webb, Village Clerk* (2005), 106 Ohio St. 3d 437, 2005-Ohio-5009, where the village clerk refused to certify an initiative petition by attempting to resolve substantive questions on the underlying issue that were not evident on the face of the petition. The Court held that the clerk "improperly engaged in a judicial or quasi-judicial determination to decide the manifestly substantive issues of whether the ordinance proposed by relators' initiative petition involved a subject that the village was authorized to control by legislative action." *Id.*, 106 Ohio St. 3d at 442. Similarly, if the Secretary independently decides whether certain portions of Am. Sub. H.B. 1 are exempt from the referendum, she would be improperly engaging in judicial or quasi-judicial determinations.

Revised Code to "the ministerial tasks of accepting legislation for filing, safely keeping it, publishing it, and distributing it to various public offices." *Id.* Justice O'Donnell explained: "Nothing in the Constitution, the Revised Code, or the precedent of this court suggests that the secretary of state has the authority or discretion to make any determination with respect to legislation or the actions of either the governor or the General Assembly in the legislative process." *Id.*

Thus, there is no duty in the Constitution or the Revised Code requiring the Secretary to ignore, second guess, or override the General Assembly's determination that portions of Am. Sub. H.B. 1 are exempt from the referendum. By declaring that the Secretary had "a clear legal duty to treat the VLT Sections as subject to the referendum," this is exactly what Relators are requesting of the Secretary and this Court. Am. Compl. ¶ 37. Surely, if the framers of the Ohio Constitution or the General Assembly determined that the "strong presumption in favor of the referendum power" requires the Secretary to independently determine whether an act is exempt from the referendum – regardless of the General Assembly's determination – this duty on the Secretary would have been made clear in the Constitution or in statute. This apparent "duty," however, has been invented by the Relators, and as this Court routinely holds, "a court cannot create a duty in mandamus." *State ex rel. Governor v. Taft* (1994), 71 Ohio St. 3d 1, 3-4; *State ex rel. Heffelfinger v. Brunner* (2007), 116 Ohio St.3d 172, 182 ("We cannot create the legal duty enforceable in mandamus.").

B. The Secretary of State has a clear legal duty to reject referendum petitions that do not comply with express provisions of law.

Relators also claim that the Secretary has "clear legal duties with respect to referendum petitions under Article II, Section 1 of the Ohio Constitution and Chapter 3519 of the Revised Code." Am. Compl. ¶37. Relators apparently argue that the Secretary had a "clear legal duty" to accept their referendum summary petitions even though the General Assembly expressly exempted the VLT sections from the referendum process. Relators' claim fails, however, because the Secretary is under no duty to accept petitions that do not comport with law. In fact, the Secretary has the duty to reject petitions that on their face do not comply with law. See, e.g., *State ex rel. Burech v. Belmont Cty. Bd. of Elections* (1985), 19 Ohio St. 3d 154, 155 (elections officials "are under a clear legal duty to reject petitions which are not in compliance with law and prohibit their placement on the ballot").

It is well-established that the Secretary of State has no authority to accept petitions that fail to comply with express statutory requirements. The duties of the Secretary of State do not require her, as Relators mistakenly argue, to accept every referendum petition presented to her. Relators' Br., p. 15, n.1. Indeed, the Relators have acknowledged in their complaint that 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." Am. Compl. ¶ 7. If the Secretary must accept and file every referendum petition presented to her, even those that are untimely, there is little reason for the Secretary to determine the fact of untimeliness. Accordingly, in *State ex rel. Fahrig v. Brown* (1971), 28 Ohio St. 12, the Court denied the mandamus petition of a relator who missed the statutory deadline for filing a declaration and petition of candidacy and sought an order compelling the Secretary of State to establish a new filing deadline. The Court pointed out that "[t]here is no provision in law

authorizing the acceptance of a late filed petition." *Id.* at 14. In the absence of such authority, the Secretary of State had no legal duty to accept the petition. *Id.*

Furthermore, in *State ex rel. Tulley v. Brown* (1972), 31 Ohio St. 2d 188, the Court held that the Secretary of State properly rejected and refused to transmit to the boards of elections part-petitions that were not verified by an affidavit of the individuals who solicited signatures to each part petition, as required by Section 1g, Article II of the Ohio Constitution. *Id.* at 189. The Court therein "expressly acknowledged the authority of the Secretary of State to reject petitions that were not verified, as provided by the Constitution." *Id.*, citing *State ex rel. Herbert v. Mitchell* (1939), 136 Ohio St. 1. See also *Burech*, 19 Ohio St. at 156 (board of elections had clear legal duty to reject referendum petition that failed to comply with statute requiring a full and correct copy of the title and text of the resolution to be referred); *State ex rel. Esch v. Lake Cty Bd. of Elections* (1991), 61 Ohio St. 3d 595 (same); *State ex rel. Burgstaller v. Franklin Cty. Bd. of Elections* (1948), 149 Ohio St. 193 (petition properly rejected where "the General Assembly has clearly expressed its intent that such a petition shall be signed by five...qualified electors").

If Relators prevail in their argument that the Secretary should have accepted and filed their referendum petition despite the General Assembly's determination that the VLT provisions were not subject to referendum because they relate to an appropriation, then the Secretary must also accept referendum petitions concerning Acts in which the General Assembly has expressly declared a new law to be emergency legislation, also exempt from the referendum pursuant to the Ohio Constitution. Requiring the Secretary to accept and file referendum petitions pertaining to legislation deemed by the General Assembly to be emergency legislation would inject unnecessary confusion and delay into the legislative process—and defeat the very purpose of the

emergency legislation. This result should be avoided, particularly as challengers to a law deemed to address an emergency retain their ability to present their arguments to a court of law for ultimate determination of the question whether that law is subject to referendum.

Moreover, practical considerations weigh in favor of the conclusion that the Secretary has a responsibility to initially examine referendum petitions before accepting and filing them—and to refuse to file those that are deficient or that on their face demonstrate that they are not subject to referendum. The filing of referendum petitions triggers further administrative measures, as set forth in R.C. 3519.01(B)(2), including determination of the validity of the signatures on the petition within 10 business days after the secretary receives the petition. Should the Secretary be required to accept every referendum petition proffered to her, she would be statutorily required to proceed to administer successive steps in the referendum process as to petitions that clearly lack merit, thereby unnecessarily taxing the resources of her office and the county boards of elections with the task of verifying signatures on clearly invalid referendum petitions. In addition, should the Secretary be required to accept and file every referendum petition proffered to her, she would be required to accept clearly untimely or otherwise invalid filings by members of so-called "militia" groups, which have in the past used certified copies of official filings for less than legitimate purposes..

There is no authority, and the Relators have failed to provide any, that the Secretary has a "clear legal duty" to accept summary referendum petitions for sections of law that the General Assembly expressly exempted from the referendum process (and which have already become effective law). Certainly, if the General Assembly deems sections of an act exempt from the referendum, Chapter 3519 of the Revised Code cannot require the Secretary to blindly accept referendum petitions against those same sections of law. If Chapter 3519 of the Revised Code

requires the Secretary to accept the petitions, it must also require the Secretary to certify the summary petitions (if the petitions meet the statutory requirements), accept the actual petitions for the referendum issue, transmit the petitions to the boards of elections for signature verification, and proceed with placing the issue on the ballot – all in direct contravention to the express will of the General Assembly. There cannot be a "clear legal duty" to violate a section of law (in this case, Am. Sub. H.B. 1 Section 812.20). Relators provide no authority for this duty, and the Court should not now create one in mandamus. *State ex rel. Governor v. Taft,* 71 Ohio St. 3d at 3-4; *State ex rel. Heffelfinger v. Brunner* (2007), 116 Ohio St.3d 172, 182 ("We cannot create the legal duty enforceable in mandamus.").

C. Relators are not entitled to mandamus because they have an adequate remedy at law.

The preceding sections have demonstrated that no writ should issue because the Secretary is under no clear legal duty or authority to override the General Assembly's express intention that R.C. 3770.03 and 3770.21 are not subject to referendum. Additionally, Relators are not entitled to mandamus because they have an adequate remedy at law. The proper remedy was to seek an injunction and declaratory judgment in common pleas court, rather than seeking that relief from this Court. This Court has long recognized that if the allegations in a complaint indicate that the real object sought in a complaint for an extraordinary writ are declaratory judgment and a prohibitory injunction, the complaint must be dismissed. *State ex rel. Evans v. Blackwell*, 111 Ohio St. 3d 1; 2006-Ohio-4334, ¶ 19; *State ex rel. Grendell v. Davidson*, 86 Ohio St. 3d 629, 634, 1999-Ohio-130; *State ex rel. Youngstown v. Mahoning County Board of Elections*, 1995-Ohio-184, 72 Ohio St. 3d 69, 70. Therefore, mandamus is not available here because adequate remedies for the concerns raised by Relators may be addressed through the normal operation of law.

Relators' Amended Complaint asks the Court to "[s]tay the implementation of the VLT Sections for 90 days from the date of the Court's decision." Am. Compl., prayer for relief, ¶ B. Though styled as a request for relief in mandamus *against the Secretary,* Relators are in effect asking this Court to issue a temporary restraining order *against the Ohio Lottery Commission* – the agency charged with implementing the VLT sections. Thus, Relators' request amounts to a thinly-disguised request for a temporary restraining order to enjoin a bill enacted by the General Assembly and signed by Governor Strickland which, by its own terms, took effect immediately. See Am. Sub. H.B. 1. Because this relief is available at law, extraordinary relief in mandamus is not warranted here.

Furthermore, regardless of the manner in which Relators have couched their petition and prayer for relief, they are actually seeking a declaration that the VLT sections of Am. Sub. H.B. 1 constitute a permanent change in state law and thus should be subject to referendum under Section 1c, Article II of the Ohio Constitution. Am. Compl. ¶ 34. Argued a different way, Relators seek a declaration that section 812.20 of Am. Sub. H.B. 1 "improperly excludes [the VLT sections] from the referendum power" in violation of Section 1(c). *Id.*, ¶ 33. The Secretary takes no position on the merits of this proposition, instead deferring to the arguments presented by the intervening respondents, the Directors of the Office of Budget and Management and the Ohio Lottery Commission. However, it may be noted that in *State ex rel. Grendell v. Davidson,* 86 Ohio St. 3d 629, 1999-Ohio-130, this Court refused to grant a similar petition in mandamus that, while on its face sought to compel action from certain officials, actually amounted to a request for declaratory relief. There, state representatives filed a mandamus action to compel the inclusion of an airport funds provision in an enacted bill and to challenge the constitutionality of other provisions. 86 Ohio St. 3d 629. The Court recognized that what relators really sought was

a declaration that the bill violated the three-consideration rule of Section 15(c), Article II, the single subject rule of Section 15(d), Article II, and the right of referendum of Section 1, Article II. *Id.* at 634-35. For that reason, the Court dismissed relators' complaint.

The relief sought in *Grendell v. Davidson* is identical to the relief that Relators seek here. In reality, Relators want this Court to issue a declaration that Section 812.20 of Am. Sub. H.B.1 improperly exempts the VLT provisions from the referendum process in violation of Section 1(c), Article II. Relators' Complaint is styled as a petition for mandamus against the Secretary to compel the acceptance of referendum petitions. Am. Compl. prayer for relief, ¶ A. However, in order for that relief against the Secretary to issue, the Court would have to declare that the VLT sections are subject to referendum. Because such "constitutional challenges to legislation are normally considered in an action originating in a court of common pleas," *Grendell*, 86 Ohio St. 3d at 635, Relators are not entitled to seek relief here in an extraordinary writ action.

II. The Court Lacks Jurisdiction to Issue Injunctive and Declaratory Relief Disguised as Mandamus.

Alternatively, the Court should dismiss Relators' petition for mandamus because the Court lacks original jurisdiction to issue injunctive and declaratory relief. The Ohio Constitution vests this Court with original jurisdiction only in quo warranto, mandamus, habeas corpus, prohibition, and procedendo. *State ex rel. Smith v. Industrial Comm'n.* (1942), 139 Ohio St. 303, 304, syllabus ¶ 1. The Court has long recognized that it must dismiss a complaint for lack of jurisdiction if the allegations in the complaint indicate that the relator actually seeks declaratory relief and a prohibitory injunction. *Grendell v. Davidson,* 86 Ohio St. 3d at 634-635; *State ex rel. Stine v. McCaw* (1939), 136 Ohio St. 41, 44; *State ex rel. Butler County Children Serv. Bd. v. Sage*, 95 Ohio St. 3d 23. 2002-Ohio-1494, ¶¶ 1-2; *State ex rel. Evans v. Blackwell*, 2006-

Ohio-4334, at ¶ 19. Accordingly, the Court has repeatedly rejected disguised attempts to use mandamus as a vehicle for enjoining state officials and preventing them from acting on legislation. See *Smith,* 139 Ohio St. at 306 (court lacked jurisdiction to issue order to cease disbursements from state workers compensation fund); *Grendell v. Davidson,* 86 Ohio St. 3d at 634 (dismissing mandamus that sought a prohibitory injunction preventing state officials from implementing newly-enacted law).

In fact, the Court has denied requests similar to Relators' that attempt to enjoin public officials – such as Ohio Lottery Commission in this case – from executing their duties during the pendency of a mandamus action. In *State ex rel. Youngstown v. Mahoning County Bd. of Elections* (1995), 72 Ohio St. 3d 69, 70, the Court denied a request to enjoin a county board of elections from holding city council elections when the legality of those elections were the subject of the mandamus action. In *Evans,* 2006-Ohio-4334, the Court recognized that it lacked jurisdiction to issue an injunctive order against the Secretary of State and the Clerks of the Ohio House of Representative and the Ohio Senate to prevent them from transmitting petitions and an initiated statute before the completion of petition challenges in the common pleas court. *Id.* at ¶¶ 17-19. Furthermore, the Court has also dismissed for lack of jurisdiction complaints in mandamus that are in effect constitutional challenges to legislation. *Grendell v. Davidson,* 86 Ohio St. 3d at 634-635.

Therefore, because Relators' Complaint seeks declaratory and injunctive relief, which are outside the Court's original jurisdiction, Relators' Complaint should be dismissed in its entirety.

CONCLUSION

For the foregoing reasons, Relators have failed to establish the necessary elements for a writ of mandamus. In addition, because their Amended Complaint seeks injunctive relief, disguised as mandamus, the Court lacks jurisdiction to hear their claim. Relators' Complaint should be dismissed.

Respectfully submitted,

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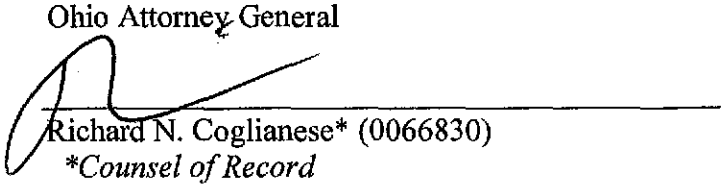

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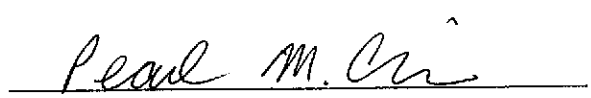

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