

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

**REPLY BRIEF OF RELATORS LETOHIOVOTE.ORG,
THOMAS E. BRINKMAN, JR., DAVID HANSEN, AND GENE PIERCE**

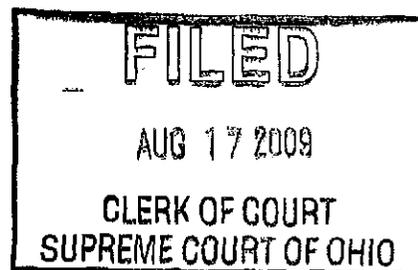
David R. Langdon (0067046)
Thomas W. Kidd, Jr. (0066359)
Bradley M. Peppo (0083847)
LANGDON LAW LLC
11175 Reading Rd., Ste. 104
Cincinnati, Ohio 45241
Telephone: (513) 577-7380
Facsimile: (513) 577-7383
dlangdon@langdonlaw.com
tkidd@langdonlaw.com
bpeppo@langdonlaw.com

Michael A. Carvin
Counsel of Record
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
macarvin@jonesday.com

Douglas R. Cole (0070665)
Chad A. Readler (0068394)
JONES DAY
325 John H. McConnell Boulevard, Suite 600
P.O. Box 165017
Columbus, Ohio 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
drcole@jonesday.com
careadler@jonesday.com

*Counsel for Relators LetOhioVote.org,
Thomas E. Brinkman, Jr., David Hansen, and
Gene Pierce*

Additional Counsel on Next Page



Richard Cordray (0038034)
ATTORNEY GENERAL OF OHIO

Richard N. Coglianesse (0066830)

Counsel of Record

Erick D. Gale (0075723)

Pearl M. Chin (0078810)

Assistant Attorneys General

Constitutional Offices Section

30 East Broad Street, 16th Floor

Columbus, Ohio 43215

Telephone: (614) 466-2872

Facsimile: (614) 728-7592

Richard.Coglianesse@ohioattorneygeneral.gov

Erick.Gale@ohioattorneygeneral.gov

Pearl.Chin@ohioattorneygeneral.gov

Counsel for Respondent

Hon. Jennifer Brunner

Richard Cordray (0038034)
ATTORNEY GENERAL OF OHIO

Benjamin C. Mizer (0083089)

Counsel of Record

Alexandra T. Schimmer (0075732)

William C. Becker (0013476)

30 East Broad St., 17th Floor

Columbus, Ohio 43215

Telephone: (614) 466-8980

Facsimile: (614) 466-5087

Benjamin.Mizer@ohioattorneygen.gov

Alexandra.Schimmer@ohioattorneygen.gov

William.Becker@ohioattorneygen.gov

*Counsel for Intervenors J. Pari Sabety
and Michael A. Dolan*

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
I. MANDAMUS IS AN APPROPRIATE REMEDY	2
A. The Secretary Has A Clear Legal Duty To Treat The VLT Sections As Subject To The Referendum	2
B. Relators Have No Adequate Remedy In The Ordinary Course Of Law.....	6
II. LAWS AUTHORIZING THE USE OF VIDEO LOTTERY TERMINALS ARE NOT “APPROPRIATIONS” SHIELDED FROM THE CITIZENRY’S REFERENDUM POWER	7
A. The VLT-Authorizing Provisions Are Not Appropriations.....	7
B. Intervenor’s Reading Of “Appropriation” Would Render Virtually Every Law Potentially Immune From Referendum	14
C. Temporary Fiscal Challenges Do Not Justify Denying The Citizenry Its Constitutional Referendum Right	15
III. THE COURT NEED NOT DECIDE HYPOTHETICAL ISSUES REGARDING THE GOVERNOR’S ABILITY TO IMPLEMENT UNILATERALLY VLTs	17
CONCLUSION.....	20
CERTIFICATE OF SERVICE	unnumbered

TABLE OF AUTHORITIES

	Page
CASES	
<i>Arbino v. Johnson & Johnson</i> , 116 Ohio St.3d 468, 2007-Ohio-6948.....	15
<i>Bobo v. Kulongoski</i> (Or. 2005), 107 P.3d 18	8, 9
<i>Bradfield v. Stop-N-Go Foods, Inc.</i> (1985), 17 Ohio St.3d 58	16
<i>Brooks v. Zabka</i> (Colo. 1969), 450 P.2d 653	8, 12
<i>County Road Ass'n of Michigan v. Bd. of State Canvassers</i> (Mich. 1979), 282 N.W.2d 774.....	12
<i>Griste v. Griste</i> (1960), 171 Ohio St. 160	19
<i>Kelly v. Marylanders for Sports Sanity, Inc.</i> (Md. 1987), 530 A.2d 245.....	12
<i>Laidlaw Waste Sys., Inc. v. Consol. Rail Corp.</i> , 85 Ohio St. 3d 413, 1999-Ohio-403.....	9
<i>Rzepka v. City of Solon</i> , 121 Ohio St.3d 380, 2009-Ohio-1353.....	17
<i>State ex rel. Arnett v. Winemiller</i> (1997), 80 Ohio St.3d 255	6
<i>State ex rel. Barletta v. Fersch</i> , 99 Ohio St.3d 295, 2003-Ohio-3629.....	17
<i>State ex rel. Davies Manufacturing Co. v. Donahey</i> (1916) 94 Ohio St. 382	10
<i>State ex rel. Elyria Foundry Co. v. Industrial Comm'n</i> , 82 Ohio St.3d 88, 1998-Ohio-366.....	17
<i>State ex rel. Herbert v. Mitchell</i> (1939), 136 Ohio St. 1, 6	2

<i>State ex rel. Huntington Ins. Agency, Inc. v. Duryee</i> (1995), 73 Ohio St.3d 530, 537	6
<i>State ex rel. Keller v. Forney</i> (1923), 108 Ohio St. 463	10
<i>State ex rel. Mill Creek Metro. Park Dist. Bd. of Commrs. v. Tablack</i> , 86 Ohio St.3d 293, 297, 1999-Ohio-103.....	6
<i>State ex rel. Ohio AFL-CIO v. Voinovich</i> (1994), 69 Ohio St.3d 225	7, 9, 11
<i>State ex rel. Ohio General Assembly v. Brunner</i> , 114 Ohio St. 3d 386, 2007-Ohio-3780.....	6, 7
<i>State ex rel. Riffe v. Brown</i> (1977), 51 Ohio St.2d 149	7, 9, 10
<i>State ex rel. Schwartz v. Brown</i> (1972), 32 Ohio St.2d 4	16
<i>State ex rel. Tulley v. Brown</i> (1972), 31 Ohio St.2d 188	4
<i>State ex rel. Ullmann v. Hayes</i> , 103 Ohio St.3d 405, 2004-Ohio-5469.....	6
<i>State ex rel. Watson v. Hamilton Cty. Bd. of Elections</i> (2000), 88 Ohio St.3d 239	6
<i>State ex rel. Williams v. Brown</i> (1977), 52 Ohio St.2d 13	2
<i>Taft v. Franklin County Court of Common Pleas</i> , 81 Ohio St.3d 480, 1998-Ohio-333.....	10, 11

STATUTES

R.C. 1.471	5, 8, 11
R.C. 131.01	8
R.C. 3159.01	3
R.C. 3770.03	9
R.C. 3770.21	9
R.C. Chapter 2915.....	19

R.C. Chapter 3159.....	2, 3
R.C. Chapter 3770.....	19
OTHER AUTHORITIES	
Black’s Law Dictionary (7th ed. 1999).....	8
<i>Keno Income Falls Short</i> , Columbus Dispatch, Aug. 14, 2009.....	14
Md. Const. art. XVI, § 2	12
Mich. Const. art. 2, § 9.....	12
Ohio Const. art. II, § 1	5
Ohio Const. art. II, § 1d	<i>passim</i>
Press Release, Governor Signs FY 2010-2011 Budget Bill (July 17, 2009)	13
Press Release, Governor’s Statement on Balanced Budget (July 10, 2009).....	19
<i>Impasse Ends, Slots to Begin</i> , Columbus Dispatch, July 11, 2009, at 1A	20
<i>Keno Income Falls Short</i> , Columbus Dispatch, August 14, 2009, at 1A	20
<i>Slots?</i> , Columbus Dispatch, June 25, 2009.....	14

INTRODUCTION

Citing unique economic circumstances, Intervenor and the Secretary of State (collectively, the “State”) ask the Court to blind its eyes to the Constitution, allowing the State to deny Ohioans their constitutional right to referendum. Particularly troubling, the State would deny that right with respect to an issue—expanded gaming in Ohio—that has long been an issue of public divide, and one that repeatedly has been frowned upon by the voters.

To its credit, the State now abandons its earlier position that a law that expands upon or “clarifies” current law is somehow immune from referendum. Instead, the State asks the Court to interpret the term “appropriation” in a manner that covers not only an actual appropriation, i.e., the actual spending of money, but also any regulatory or licensing scheme that has any potential impact on State *revenue*. Accepting that interpretation would expand the definition of “appropriation” beyond any meaningful end. Indeed, given that the vast majority of state laws have some ultimate bearing on state revenue, the expansive “appropriation” exception to the referendum power advocated by the State would virtually swallow the broad referendum rule. Recognizing as much, the Court previously has made clear that the term “appropriation” may be expanded to include, at most, only those laws that affect the implementation of an appropriation, namely, the manner in which the money is spent.

Failing on its substantive arguments, the State, by way of the Secretary, asserts procedural roadblocks to Relators’ challenge to her denial of their constitutional referendum right. Those arguments too are unavailing. For one thing, not only would a declaratory judgment not be a speedy enough remedy in this elections case, but also that relief would be incomplete, as only an order compelling the Secretary to treat the VLT provisions of H.B. 1 as subject to the power of referendum will protect Relators’ right to exercise that power. Second, mandamus relief is appropriate because the Secretary has mandatory duties—set out in the

Constitution, no less—that require her to submit a measure to the voters for their approval or rejection. That constitutional duty cannot be undone by an act of the General Assembly.

No one, it should be said, forced the State to authorize new VLT machines as a mechanism for raising additional revenue. Having done so, the State cannot now hide that decision from the voters simply because the State faces difficult economic times and would prefer not to make other budgetary decisions, should the VLT regulatory and licensing scheme be rejected by the voters. Accordingly, the writ should issue.

ARGUMENT

I. MANDAMUS IS AN APPROPRIATE REMEDY.

To prevail in this mandamus action, Relators must prove 1) that the Secretary has a clear legal duty to treat the VLT provisions as subject to the right of referendum (and that Relators have a corresponding right to have the Secretary perform that duty), and 2) that they are without an adequate remedy in the ordinary course of law. Each is addressed below.

A. The Secretary Has a Clear Legal Duty to Treat the VLT Provisions as Subject to the Referendum.

As the State’s chief elections officer, the Secretary plays a lead role in the constitutional referendum process. See Ohio Const. art. II, §§1-1g. In fulfilling this role, the Secretary, when is presented with a legally sufficient referendum petition ordering that a law (or section of a law) be submitted to the electors for their approval or rejection, has a mandatory duty, under sections 1c and 1d, to so submit that law. See *State ex rel. Williams v. Brown* (1977), 52 Ohio St.2d 13; see also *State ex rel. Herbert v. Mitchell* (1939), 136 Ohio St. 1, 6 (“Duties outlined in the Constitution are mandatory and must be followed.”)

Likewise, the Secretary has several statutory duties (assigned by the Legislature under section 1g) to facilitate the constitutional referendum process. See R.C. Chapter 3519. In

particular, R.C. 3519.01(B) imposes specific duties on the Secretary concerning the filing of summary petitions. Under this section, before citizens seeking to file a referendum petition may commence the constitutional referendum process, they are required to submit to the Secretary a petition containing the signatures of at least 1,000 Ohio electors and a copy of the measure to be referred to the voters. R.C. 3519.01(B)(1). In turn, the Secretary is required to have the signatures validated by the boards of elections and to certify that the measure to be submitted is the same as the enrolled act on file in her office. R.C. 3519.01(B)(2). Without this certification, a referendum petition does not comply with Chapter 3519. See, e.g., R.C. 3519.05 (requiring Secretary's certification to appear in specific location on each referendum part-petition). The referendum process thus cannot be consummated unless and until the Secretary performs her constitutional and statutory duties.

Accordingly, if a law is subject to referendum, the Secretary has a clear legal duty to accept a legally sufficient referendum petition filed with her office and submit the question to the voters for their approval or rejection. The Secretary violates that duty if she rejects such a petition or if, as here, she halts the referendum process so that such a petition can never be filed.

The Secretary does not suggest otherwise. Instead, she advances two uncontroversial, but entirely irrelevant, propositions. First, she belabors the point that she has no discretion relative to the ministerial acts she must perform to make a law effective, so she cannot refuse to file a bill from the General Assembly so it can become law. Secretary's Brief at 7-11. That is true, but obviously says nothing about whether she has a duty to accept a referendum to overturn such laws after they become effective—the issue presented here. Indeed, just as she has no power to stop the General Assembly's constitutional lawmaking power by preventing the law from

becoming effective, she has no power to stop the citizenry's constitutional right to subject that law to referendum, unless the Constitution exempts that law from the referendum process.

Second, with respect to her referendum duties, the Secretary argues that she need not blindly accept all referendum petitions, but may reject those which are legally deficient because they were filed late or "not verified, as provided by the Constitution." Secretary's Br. at 13 (quoting *State ex rel. Tulley v. Brown* (1972), 31 Ohio St.2d 188). This is also true, but equally irrelevant, because she has not rejected any petition here as legally deficient. Rather, she has thwarted at the outset Relators' ability to submit a legally sufficient petition because the General Assembly told her that the VLT provisions were not subject to referendum. See *id.* at 5 ("[T]he Secretary's office could not accept the [summary] referendum petition because the General Assembly had determined that [the VLT provisions] were exempt from the referendum.").

Thus, neither of the Secretary's legal principles in any way hints that she may stop the referendum process when a law is subject to referendum, a concession that she does have a clear duty to allow the process to go forward if that constitutional process is applicable to the law at issue. Accordingly, if Relators are correct on the merits, it is undisputed that the Secretary has a duty to accept their summary petition and, if perfected, their referendum petition.

Notwithstanding all this, the Secretary advances the mind-boggling proposition that the Court cannot order her to fulfill her constitutional duty because, "if the General Assembly deems a section of an act exempt from the referendum," then, *ipso facto*, the Secretary has no duty to allow the referendum process to go forward. *Id.* at 14. According to the Secretary, there cannot be a "clear legal duty" to violate the General Assembly's decree that certain sections of a law are excluded from referendum, and therefore this Court can never mandate the Secretary to accept a

referendum if the General Assembly says otherwise, even where, as here, it is the only means of preserving referendum rights under the short Constitutional timelines. *Id.* at 15.

But, of course, if the Constitution deems a section of an act subject to the referendum, then the Secretary *does* have a duty under the Constitution to accept a legally sufficient referendum petition. In other words, if citizens have a right under the Constitution to subject a law to referendum, the General Assembly cannot alter that fact because the Constitution is higher law. And even assuming *arguendo* that the Secretary is not empowered to second-guess the General Assembly's constitutional interpretation, as she maintains, this Court most assuredly is. In short, the Secretary's duty in this case turns on whether the VLT provisions are subject to referendum, not on whether the General Assembly says they are subject to referendum.¹

Of course, if the Secretary were correct, the General Assembly could completely nullify the citizens' right to overrule the General Assembly through referendum, a right which the Constitution expressly states is to be free from legislative interference. Ohio Const. art II, § 1. The Legislature could simply insert into every law a section exempting it from referendum, even if it was patently subject to such referendum. Under the Secretary's bizarre logic, the Court could never remedy this direct evisceration of the constitutionally guaranteed right to referendum because she would have no judicially-enforceable "duty" to send the referendum to the voters.

Nothing in any case cited by the Secretary, or any other case, supports the Secretary's extraordinarily lawless notion that the General Assembly can immunize its own laws from referendum—and judicial enforcement of that constitutional right—simply by issuing a dictate to

¹ This is true regardless of whether the Legislature seeks to exempt laws from referendum by expressly saying so in the law itself or by declaring laws immediately effective and thus foreclosing the referendum process. Thus, contrary to the suggestion of the State's *Amici*, declarations in statutes such as R.C. 1.471(C) that a law is "immediately effective" can no more thwart the constitutionally guaranteed referendum process, or foreclose this Court's resolution of whether that constitutional guarantee has been thwarted, than can the provision of H.B. 1 purporting to exempt the VLT provisions.

that effect in a statute. Rather, the Secretary's duty is defined by no consideration other than whether, under the Constitution, the VLT sections are subject to referendum.

B. Relators Have No Adequate Remedy in the Ordinary Course of Law.

The Secretary and her *amici* have also asserted that Relators' mandamus claim should be denied because Relators have an adequate remedy in the ordinary course of law by way of a declaratory judgment and prohibitory injunction. But these assorted "remedies" would not provide Relators with the full relief they need. First, given the undisputed need for this case to be resolved expeditiously, a declaratory judgment and prohibitory injunction action in common pleas court would not be "sufficiently speedy." *State ex rel. Watson v. Hamilton Cty. Bd. of Elections* (2000), 88 Ohio St.3d 239, 242; see also *State ex rel. Ullmann v. Hayes*, 103 Ohio St.3d 405, 2004-Ohio-5469, at ¶ 8 (alternative to mandamus "must be complete, beneficial, and speedy in order to constitute an adequate remedy at law").

Second, even if these remedies could be obtained in a timely fashion, they would not provide Relators with complete, or indeed, with any, meaningful relief. Where declaratory judgment would not be a complete remedy unless coupled with a mandatory injunction, this Court has repeatedly held that mandamus is the appropriate remedy. See *State ex rel. Ohio General Assembly v. Brunner*, 114 Ohio St. 3d 386; 2007-Ohio-3780 (holding that declaratory judgment would not be complete remedy without mandatory injunction ordering the secretary to treat Am.Sub.S.B. No. 117 as duly enacted law); *State ex rel. Mill Creek Metro. Park Dist. Bd. of Commrs. v. Tablack*, 86 Ohio St.3d 293, 297, 1999-Ohio-103; *State ex rel. Arnett v. Winemiller* (1997), 80 Ohio St.3d 255, 259; *State ex rel. Huntington Ins. Agency, Inc. v. Duryee* (1995), 73 Ohio St.3d 530, 537. Indeed, in two key cases addressing the same question at issue here—whether a particular law is subject to referendum—the Court held in each case that a writ of mandamus was the proper remedy to compel compliance with Article II, Sections 1c and 1d. See

State ex rel. Ohio AFL-CIO v. Voinovich (1994), 69 Ohio St.3d 225; and *State ex rel. Riffe v. Brown* (1977), 51 Ohio St.2d 149.²

For Relators to obtain complete relief, it would not suffice for the Court merely to declare that the VLT sections are subject to referendum. Rather, the Secretary must be ordered to affirmatively fulfill each of the constitutional and statutory duties imposed upon her under Article II, Section 1 and Chapter 3519, all of which must be performed before Relators can proceed with their referendum effort, and all of which the Secretary has said she will not perform unless ordered to by this Court. In this situation, a declaratory judgment and prohibitory injunction would be wholly ineffective. Only an order compelling the Secretary to treat the VLT provisions of H.B. 1 as subject to the referendum power will protect Relators' right to exercise that power.

II. LAWS AUTHORIZING THE USE OF VIDEO LOTTERY TERMINALS ARE NOT "APPROPRIATIONS" SHIELDED FROM THE CITIZENRY'S REFERENDUM POWER.

A. The VLT-Authorizing Provisions Are Not Appropriations.

The Ohio Constitution exempts from the referendum power "appropriations for the current expenses of the state." Ohio Const. art. II, § 1d. Contrary to Intervenor's contention, the VLT-enabling laws recently enacted by the General Assembly are not "appropriations."

The VLT provisions create a new licensing scheme in Ohio. Individuals operating racetracks are authorized to pay fees to acquire the right to run VLTs, or "video slots," at their

² Relators have also requested in their Amended Complaint that the Court stay the effective date of H.B. 1 for 90 days from the date of the Court's decision, to allow Relators to exercise their right of referendum. While the Secretary mischaracterizes this requested relief as "a thinly-disguised request for a temporary restraining order," (Sec. Brief at 16), Relators have simply followed the guidance and common sense exercised by this Court in *Voinovich*, in which the Court, in addition to issuing a writ of mandamus, also stayed the nonappropriation provisions of the bill, *id.* at 236, and in *State ex rel. Ohio General Assembly v. Brunner*, in which the Court, at Secretary Brunner's request, stayed the effective date of the bill to allow citizens to exercise their right of referendum. See 115 Ohio St.3d 103, 2007-Ohio-4460, 873 N.E.2d 1232.

racetracks. The public is permitted to utilize these machines, overseen by the VLT licensees, as part of the State's so-called expanded "lottery" program. The VLT provisions also specify investment criteria for licensees and immunize them from certain local fees and taxes. Simply put, no definition of the word "appropriation" would describe this new gaming regime.

Intervenors seemingly do not disagree. Instead, they make the attenuated argument that because the lottery scheme is expected ultimately to generate revenue for the licensee, who in turn has to pay part of that money to the State, which in turn has to spend that money on education, this law is in an "appropriation" because it is "tied to" an appropriation through this extended causal chain. Intervenors' Br. at 13-17. But the Framers did not exempt laws which ultimately lead to "appropriations," they exempted "appropriations." And every definition of "appropriation" cited in this case, not surprisingly, requires that the provision actually spend or earmark a sum of money, or, at the very least, depend on such spending or earmarking. See R.C. 131.01(F) (defining "appropriation" as "an authorization granted by the general assembly *to make expenditures and to incur obligations* for specific purposes") (emphasis added); Black's Law Dictionary (7th ed. 1999) (defining "appropriation" as "*setting aside a sum of money* for a public purpose") (emphasis added). See also R.C. 1.471.

To be sure, certain provisions that implement or direct spending once it is appropriated can be considered part of the appropriation itself. But actions which ultimately raise revenue—through the creation of a new, substantive video lottery scheme—are fundamentally different from appropriating that money. Cf., e.g., *Brooks v. Zabka* (Colo. 1969), 450 P.2d 653, 656 (holding that a sales tax was not exempt from referendum as an appropriation, as "[t]he sales tax ordinance involved here is designed to raise revenue, not to provide for expenditures from public funds. A sales tax ordinance is the exact antithesis of an appropriation."); *Bobo v. Kulongoski*

(Or. 2005), 107 P.3d 18, 24 (“[A] bill that allocates existing monies among different programs does not ‘raise’ revenue within the meaning of [the Oregon Constitution’s Origination Clause.]”).

Even if Intervenor were somehow correct that laws that ultimately raise revenue somehow constitute “appropriations,” many features of the VLT provisions, including those that exempt VLTs from future local taxes and make clear that VLTs do not violate the criminal code, plainly have nothing to do with revenue and appropriations. See new R.C. 3770.03(c) and 3770.21(c). These provisions, at the very least, must be subject to referendum.

Unsurprisingly, Intervenor’s position is not only contrary to any plausible interpretation of “appropriation,” it also is at odds with the Court’s holdings in this area. As made clear in *Voinovich*, “any section of a law which changes the permanent law of the state is subject to referendum . . . , even though the law also contains a section providing for an appropriation” *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St.3d 225, 236, 1994-Ohio-1.

Intervenor claims that *Voinovich* does not establish a test for determining whether a section of a law falls within the “appropriations” (or other) exceptions in Section 1d. See Intervenor’s Br. at 20. But *Voinovich* cannot be so limited. Necessary to the outcome there was a determination of which sections of a law are appropriations and which are not. To answer this question, the Court expressly adopted the reasoning and the rule of Chief Justice O’Neill’s dissent in *State ex rel. Riffe v. Brown* (1977), 51 Ohio St.2d 149. A section of legislation that “changes the permanent law of the state” is not an appropriation and is subject to referendum. *Voinovich*, 69 Ohio St.3d at 225; see also *Laidlaw Waste Sys., Inc. v. Consol. Rail Corp.*, 85 Ohio St. 3d 413, 415, 1999-Ohio-403 (subrogation amendment to workers compensation law in the legislation at issue in *Voinovich* was not an appropriation). Indeed, Chief Justice O’Neill considered in detail the dividing line between those provisions that can be exempted under the

appropriations exemption and those that cannot. While the competitive-bidding provision at issue in *State ex rel. Davies Manufacturing Co. v. Donahey* (1910), 94 Ohio St. 382, was a temporary, non-separable “condition under which the [underlying] appropriation could be drawn,” by contrast, the provisions at issue in *Riffe*—which changed voting and election procedures—were “unrelated to the appropriation of funds or procedures for their expenditure.” *Riffe*, 51 Ohio St.2d at 166.

Here as well, the VLT provisions in H.B. 1 have nothing to do with *appropriating* funds and are permanent. Unlike the competitive-bidding provision in *Donahey*, the VLT provisions do not establish conditions or procedures for the expenditure of funds. Rather, they create, out of whole cloth, a new, permanent state-run tax-protected gambling program that would survive long beyond the State’s biennial budget.

The Court employs a similar analysis with respect to “tax levies” under Section 1d. Specifically, the Court has rejected the notion that laws tied to such levies fall within the exemption. See, e.g., *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, 471 (law did not “provid[e] for tax levies” for purposes of Ohio Const. art II, § 1d, as it simply created “a new scheme and a new agency [] for levying taxes and enlarging the power and rate of levy,” without stating “the property subject to the tax, the rate of tax, the time when such tax is payable, and other elementary essentials of taxation law”).

Nor can Intervenors find support in *Taft v. Franklin County Court of Common Pleas*, 81 Ohio St.3d 480, 1998-Ohio-333. The legislation at issue there proposed new taxes to benefit schools if voters approved them in a special election and appropriated funds for that special election. Rather than make permanent substantive changes to Ohio’s law, the specific provisions at issue in *Taft* simply directed the Secretary of State to conduct the special election and

established that the result of the election would determine whether the new taxes would take effect. *Id.* at 483-84. In other words, the provisions at issue told the Secretary what to do with the appropriation and stated why the appropriation was made. By contrast, the VLT provisions in this case do not provide details regarding the implementation or expenditure of an appropriation, but instead establish a permanent new gaming program which precedes and says nothing about any temporary, two-year appropriation of funds to schools.

For the same reason, even assuming that *Taft* held that *any* provision of law “*dependent upon the appropriation*” is an “*appropriation*” immune from referendum, and assuming further that R.C. 1.471, correctly defines exempt “*appropriations*” under Section 1d, this would in no way support the notion that the VLT provisions are somehow exempt from referendum. See Intervenors’ Brief at 19, quoting *Taft*, 81 Ohio St.3d at 484; R.C. 1.471 (provision is exempt from referendum as “*appropriation*” if “*implementation of the section depends on an appropriation for current expenses that is contained in the act.*”). The VLT provisions obviously precede the appropriations and the appropriations are dependent upon *them*, not vice versa.

Accordingly, not even the Legislature’s own expansive view of what constitutes an “*appropriation*” in the wake of *Voinovich*, as set forth in R.C. 1.471, supports the notion that VLT provisions are appropriations, because those provisions are not dependent upon any appropriation. Indeed, Intervenors seem to recognize this flaw, briefly asserting that the entire VLT program is dependent upon a separate \$100,000 allocation for Inspector General oversight of VLTs. See Intervenors’ Br. at 17. Of course, the VLT program is not remotely *dependent upon* the implementation of this ancillary and relatively miniscule allocation, as the VLT program entails far more than the Inspector General’s limited oversight. The VLT program can be (and is being) implemented without any state examination *after* it is implemented.

Intervenors' out-of-state cases are even less convincing, as they turn on referendum exemptions markedly different than Ohio's and are also factually distinguishable. See *County Road Ass'n of Michigan v. Bd. of State Canvassers* (Mich. 1979), 282 N.W.2d 774, 780; *Kelly v. Marylanders for Sports Sanity, Inc.* (Md. 1987), 530 A.2d 245, 257. Regardless whether these decisions withstand scrutiny as measured by the Michigan and Maryland Constitutions—cf. *Voinovich*, 69 Ohio St.3d at 236; *Brooks*, 450 P.2d at 656—they certainly would not withstand scrutiny in Ohio. Our Constitution separately exempts both tax levies and appropriations from referendum. Ohio Const. art II, § 1d. By contrast, Michigan and Maryland's Constitutions exempt appropriations, but do not include an exemption, like Ohio's tax levy exemption, specifying what revenue-raising provisions are exempted. Mich. Const. art. 2, § 9; Md. Const. art. XVI, § 2. In other words, in the absence of any specific textual guidance regarding revenue-raising provisions, the Michigan and Maryland courts found that such provisions could be read generally *in pari materia* with appropriations. By contrast, the drafters of Ohio's Constitution dealt expressly with revenue-raising provisions through the tax-levy exemption, leaving no room to incorporate revenue-raising provisions broadly within the appropriation exemption.

And even if these cases dealt with the same constitutional landscape as Ohio's, and they do not, the facts of the cases reveal a fundamental distinction: The laws at issue in *County Road Association* and *Kelley* were, in essence, pure revenue-raising measures, while the VLT provisions not only raise revenue but also create a new controversial gaming system that never existed before. In other words, Michiganders were already using gasoline before the gasoline tax at issue in *County Road Association*, and authorities in Maryland were already exercising bonding power before the bond issues under scrutiny in *Kelley*. By contrast, the VLT provision, prior to raising any revenue, must first introduce a brand new gaming program in Ohio—before

any revenue can be raised for any purpose. In this regard as well, the VLT provisions demand referendum in a way that the provisions in these cases did not.

Intervenors' position would mean that, if Ohio *repealed* the constitutional exemption for "tax levies," such levies still would not be subject to referendum because they are "tied to" "appropriations." But the Ohio Constitution, unlike the Maryland and Michigan Constitutions, sees palpable differences between taxes to raise revenue and appropriations to spend them, which is why it lists them separately. Equally true, these cases dealt with *taxes* and *bonds*, which are fundamentally different than fee-based activities, in particular gambling, which is why no one argues that the VLT provisions are "tax levies." Press Release, Governor Signs FY 2010-2011 Budget Bill (July 17, 2009), *available at* <http://www.governor.ohio.gov/News/PressReleases/July2009/News71709/tabid/1134/Default.aspx> ("we were able to come together to pass a balanced budget that invests in education *without raising taxes* on Ohioans") (emphasis added). A tax simply takes money for the State from private activities. Here, the State is engaging in new activities—activities that some find morally questionable—and is charging a fee for it. The policy issues presented by state-run activities are inherently different than the fiscal issues raised by taxes.

Finally, that lottery funds, by the Constitution and statute, are dedicated expressly to support public education is of no moment. See Intervenors' Br. at 2 ("the Budget Bills' VLT Provisions [are exempt] from the referendum process because the VLT provisions generate and authorize the expenditure of money for local school districts"). Whether the money raised by a law is expressly dedicated to the General Revenue Fund or to the more narrowly focused Lottery Profits Education Fund does not affect whether it is an appropriation. In either case, the act of raising revenue is distinct from spending it. If the State's position held true, then it would also

matter, oddly enough, whether all VLT proceeds were allocated, as opposed to being held in the Lottery Fund for some period. After all, while it is true that lottery profits must be spent on education, those monies need not be spent the year they are generated. If the State decided not to appropriate that money for some period, in Intervenor's eyes the underlying VLT provisions seemingly would no longer qualify as an "appropriation."

In sum, Intervenor's invitation to rewrite Article II, Section 1d should be rejected.

B. Intervenor's Reading Of "Appropriation" Would Render Virtually Every Law Potentially Immune From Referendum.

Intervenor would have this Court establish a new exemption by expanding the appropriations exemption to include any measure that can be explained as a potential revenue raiser for some future spending, no matter how much that measure permanently changes Ohio's substantive law. Under that interpretation of the term "appropriation," myriad laws, including those of the highest order of debate, would be shielded from public referendum. For example, were the State to prevail here, it could lower the driving age to 15 and shield that law from referendum, because: (1) the new drivers must register with the State and be licensed; (2) obtaining a license requires paying a fee to the State; and (3) the State ultimately uses those fees to help fund state highway programs. See Intervenor's Br. at 13 (addressing the state constitutional provision governing highway funds). Likewise, were the State to legalize marijuana use, that law too would be shielded from referendum so long as the Legislature attached a provision taxing all marijuana sales, resulting in revenue that would be used to support the General Revenue Fund.

Indeed, under Intervenor's rule, *any* program that ultimately is anticipated to generate revenue, whether directly or indirectly, is an "appropriation" exempt from referendum, because the State ultimately will spend the revenue raised. For instance, all tort reform measures would

be shielded from referendum. After all, those measures, Intervenor would likely claim, would serve to enhance the State's business climate, luring businesses to move to Ohio, thereby generating additional tax revenue, revenue that will be appropriated to fund some State spending initiative. See, e.g., *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 102 (in passing a tort reform measure to make the civil justice system more predictable, "the General Assembly believes that such predictability will aid the state economy").

Intervenor's asserted rule also ignores the moral choices that underlie the lottery. (Indeed, it may well be the case that the voters required lottery profits to be dedicated to education to offset any concerns over authorizing a lottery in the first place, in the face of moral objections to gambling.) To that end, suppose the State expanded the lottery to include a state-run dog fighting program. Under Intervenor's rule, so long as those proceeds are dedicated to education, Ohio voters would have no chance to weigh in on the public acceptability of the program via referendum. It makes little sense, as Intervenor's advocate, to curtail the public's constitutional referendum right simply because the State has declared that any revenues ultimately attributable to a law ordinarily subject to referendum will be spent for a specific purpose.

C. Temporary Fiscal Challenges Do Not Justify Denying The Citizenry Its Constitutional Referendum Right.

Failing in their exceedingly expansive reading of the term "appropriation," Intervenor turn to the equities, claiming that subjecting the VLT provisions to referendum would cause dire consequences to education funding and even the State biennium budget overall, particularly in view of current economic circumstance. See Intervenor's Br. at 10-11. If anything, the fact that the laws at issue reflect a significant public policy matter is a reason to *allow* the public to weigh in, not to deny them that right. The higher the public policy stakes, after all, the higher the odds that citizens would mobilize to subject the issue to referendum.

At all events, asserted economic hardships, even if true, are no reason for ignoring the Constitution. In that regard, Intervenor sound the alarm that due to the delay of the referendum process, “even the possibility of a referendum—and certainly an actual one—will destabilize the whole appropriation for education . . . by tying up an \$851.5 million piece,” and that “an \$851.5 million hole would create uncertainty about all aspects of the biennial budget.” *Id.* at 2. No one doubts the difficulty public officials face in this economic climate in refraining from relying on VLTs and their projected revenue in fashioning the State’s biennial budget, even if voters have rejected VLTs in the past. But that is no basis for justifying the Legislature’s decision to shield its new licensing and regulatory regime from referendum, in violation of the Ohio Constitution. “[N]o policy considerations . . . , whether weighed and considered by a court or a legislature, can operate so as to emasculate the clear and express provisions of the Constitution.” *Bradfield v. Stop-N-Go Foods, Inc.* (1985), 17 Ohio St.3d 58, 59. Indeed, even alleged “dire consequences” resulting from the loss of tax revenue is not part of the judicial determination whether, under the Ohio Constitution, the Secretary of State should be required to remove a proposed constitutional amendment from the ballot. *State ex rel. Schwartz v. Brown* (1972), 32 Ohio St.2d 4, 11. In other words, the question before this Court is not whether VLTs are the best manner for generating revenue for the 2009-2010 biennium, but whether the Secretary has the constitutional basis to continue to block the referendum process Relators have begun.

Intervenor’s hand-wringing over the future of VLTs is particularly difficult to accept when one considers that any uncertainty regarding the budget is of the State’s own creation. As always, the General Assembly and the Governor had options in setting the State’s biennial budget. Foregoing other options, the State chose to balance the budget by relying upon expected revenue from a newly created form of “lottery.” While the State has the right to make that

decision, the voters have the equal right to subject that law to referendum. It is deeply unfair for the State to take away that right on the simple basis that, in Intervenor's view, even asserting the referendum right could create a budgetary conundrum. After all, it was the State's reliance on new VLTs that created the conundrum to begin with.

III. THE COURT NEED NOT DECIDE HYPOTHETICAL ISSUES REGARDING THE GOVERNOR'S ABILITY TO IMPLEMENT UNILATERALLY VLTs.

Lastly, Intervenor's suggest that there was no need for the extended debate in the Legislature over adding VLTs to the State's gaming menu, nor was there a need for today's proceeding, because the Governor and the Lottery Commission, we now learn, *already had* the authority to implement VLTs. For that reason, Intervenor's seek the Court's blessing to move ahead with VLTs, regardless of the status of H.B. 1, and despite the absence of that issue being raised by Relator's complaint. See Intervenor's Br. at 28.

What Intervenor's fail to note is that, before today, no one asked the Court to decide the issues raised in Intervenor's second proposition of law. Whether the Governor previously possessed authority to implement VLTs, and whether the use of VLTs is in accord with the Ohio Constitution, were not issues raised by Relator's complaint, nor were they the subject of counterclaims by the State. Put differently, no one has invoked the Court's jurisdiction to decide these issues, and Intervenor's response merit brief is hardly the place to do so in the first instance, especially when those issues do not bear on the core issue before the Court. See, e.g., *Rzepka v. City of Solon*, 121 Ohio St.3d 380, 2009-Ohio-1353, ¶ 34 (recognizing the "cardinal principle of judicial restraint" that "if it is not necessary to decide more, it is necessary not to decide more.").

Nor is there an actual "case or controversy" between the parties on this issue suitable for resolution. See *State ex rel. Elyria Foundry Co. v. Industrial Comm'n*, 82 Ohio St.3d 88, 89, 1998-Ohio-366 (noting the Court's desire, "through avoidance of premature adjudication, from

entangling themselves in abstract disagreements over administrative policies”). Whether the Governor has the ability to implement VLTs without legislative approval is an academic question today because the Governor has not even threatened to do so, let alone actually taken such action. Indeed, whether the Governor has the independent legal authority to take such action has no bearing unless all of the following came true: (1) Relators prevail in this case; (2) Relators successfully collect enough signatures to put the VLT issue on the ballot; (3) Ohio voters disapprove of the General Assembly’s authorization of VLTs; (4) the Governor and the Lottery Commission implement VLTs thereafter, without legislative backing; and (5) someone files suit challenging the Governor’s unilateral action. Today, however, this question is purely hypothetical, and its resolution would amount to little more than an imprudent advisory opinion. See *State ex rel. Barletta v. Fersch*, 99 Ohio St.3d 295, 2003-Ohio-3629, ¶ 22 (“[W]e will not issue advisory opinions, and this rule applies equally to election cases.”).

Intervenors’ contention also comes as something of a surprise given their primary argument that the sky will fall should Relators prevail here. To that end, if Intervenors are correct that the Governor already maintains the power to implement VLTs, then their panic over the resolution of this case is dramatically overstated. Equally true, if the Governor already enjoys the ability to authorize VLTs and the expected revenue associated therewith, then the VLT law at issue today would not, as a practical matter, have any ultimate effect on an appropriation.

Similarly unavailing is Intervenors’ suggestion that a holding for Relators would be a “vain” act. Relators’ “ultimate goal,” the mandamus measuring stick used by Intervenors, is to have the referendum challenge to VLTs put on the statewide ballot. Intervenors’ Br. at 34. Regardless whether the Governor could and would ultimately implement VLTs on his own,

Relators here seek to put the issue on the ballot in the first instance. In that way, Relators have a real, achievable goal, namely the possibility of a statewide vote. That is a far cry from Intervenor's cases, where the issue sought to be subject to referendum could *never* be put on the ballot because, unlike here, either the issue was "not subject to referendum" or the "general election had already passed." *Id.* Likewise, given that the Governor cannot unilaterally change the criminal law or prohibit local taxes, certain provisions of the H.B. 1 could *not* be put in place by the Governor alone, further proving the significance of today's case.

Nor, it bears noting, is it clear that the Governor does have such power. During the budget process, the Governor sought legislative authority to implement VLTs, hardly the act of one who already possessed that power to begin with. See *Slots?*, Columbus Dispatch, June 25, 2009, at 1A (Governor Strickland argues that he "should not try to add slots on his own without a vote of the legislature," in view of a then-current "state law banning slot machines"); Press Release, Governor's Statement on Balanced Budget (July 10, 2009) (the "General Assembly will" provide for "implementation requirements in House Bill 1" for new VLTs). He presumably took that position given the lack of clarity over whether he previously had the power to authorize VLTs. Indeed, by adding the term "video lottery terminal" to the lottery provisions in R.C. Chapter 3770, requiring the Lottery Commission to draft additional rules to oversee the use of VLTs, and indicating that R.C. Chapter 2915, which criminalizes gambling, does not apply to VLTs, the General Assembly too hinted that VLTs were *not* authorized by earlier law. See *Griste v. Griste* (1960), 171 Ohio St. 160, 163 ("When the General Assembly amends a statute, it is to be presumed that the legislation is not mere meaningless wordage.").

Intervenor's fall equally short in justifying the implementation (without legislation) of VLTs by equating them to Keno or other lottery games. Intervenor's Br. at 30. Setting aside

whether those earlier games were fairly authorized as “lotteries,” even the Governor concedes that “[v]ideo lottery terminals are a very different product and a very different game.” *Keno Income Falls Short*, Columbus Dispatch, Aug. 14, 2009, at 1A (Governor’s spokeswoman).

* * * * *

Nothing Relators seek here would stop the State from funding education at whatever level it prescribes. The State retains its full discretionary flexibility with respect to setting appropriations, something it exercised when it decided to deduct General Revenue Fund money that would have gone to education and replace it with expected lottery revenues. See *Impasse Ends, Slots to Begin*, Columbus Dispatch, July 11, 2009, at 1A (noting that VLT revenue “would simply supplant state tax money that will instead be spent on other areas of state government”). Relators, in other words, do not seek to direct how the State spends its money. They merely seek the right to address, via referendum, whether to allow expanded gaming in Ohio.

CONCLUSION

The VLT provisions create a new, controversial gaming program. They go far beyond mere appropriations, making substantive changes to Ohio law. The State cannot hide these provisions from the constitutional right of referendum granted to Ohio’s citizens. Accordingly, the Court should issue writ of mandamus to allow the referendum process to continue.

Respectfully submitted,



Michael A. Carvin

Counsel of Record

JONES DAY

51 Louisiana Avenue, N.W.

Washington, D.C. 20001-2113

Telephone: (202) 879-3939

Facsimile: (202) 626-1700

macarvin@jonesday.com

Douglas R. Cole (0070665)

Chad A. Readler (0068394)

JONES DAY

325 John H. McConnell Boulevard, Suite 600

P.O. Box 165017

Columbus, Ohio 43216-5017

Telephone: (614) 469-3939

Facsimile: (614) 461-4198

drcole@jonesday.com

careadler@jonesday.com

David R. Langdon (0067046)

Thomas W. Kidd, Jr. (0066359)

Bradley M. Peppo (0083847)

LANGDON LAW LLC

11175 Reading Rd., Ste. 104

Cincinnati, Ohio 45241

Telephone: (513) 577-7380

Facsimile: (513) 577-7383

dlangdon@langdonlaw.com

tkidd@langdonlaw.com

bpeppo@langdonlaw.com

Counsel for Relators LetOhioVote.org,

Thomas E. Brinkman, Jr., David Hansen, and

Gene Pierce

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Reply Brief of Relators has been delivered by electronic mail this 17th day of August, 2009 to the following counsel for

Respondent and Intervenors:

Richard N. Coglianese
Erick D. Gale
Pearl M. Chin
Richard.Coglianese@ohioattorneygeneral.gov
Erick.Gale@ohioattorneygeneral.gov
Pearl.Chin@ohioattorneygeneral.gov

Benjamin C. Mizer
Alexandra T. Schimmer
William C. Becker
benjamin.mizer@ohioattorneygeneral.gov
alexandra.schimmer@ohioattorneygeneral.gov
william.becker@ohioattorneygeneral.gov



Counsel for Relators