

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE ex rel. CLEVELAND RIGHT TO LIFE, INC., et al.,	:	Case No. 13-1668
	:	
Relators	:	ORIGINAL ACTION IN
	:	MANDAMUS AND
v.	:	PROHIBITION
	:	
STATE OF OHIO CONTROLLING BOARD, et al.,	:	
	:	
Respondents.	:	

RELATORS' MERIT BRIEF

Maurice A. Thompson (0078548)
 1851 Center for Constitutional Law
 208 E. State Street
 Columbus, Ohio 43215
 Tel: (614) 340-9817
 Fax: (614) 365-9564
 MThompson@OhioConstitution.org
Counsel for Relators

Eric E. Murphy (0083284)
 State Solicitor
 Ryan L. Richardson (0090382)
 Charity S. Robl (0075123)
 Ohio Attorney General's Office
 30 East Broad Street, 17th Floor
 Columbus, OH 43215
 (614) 466-8980
 Eric.Murphy@ohioattorneygeneral.gov
Counsel for Respondents

FILED
 NOV 15 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

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Proposition of Law:

Relators are entitled to a writ of mandamus ordering the Controlling Board to abide by its public duty to conform to the intent of the General Assembly, and therefore vacate its unlawful administrative expansion of Ohio’s Medicaid Spending

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I. INTRODUCTION

Expansion of the Patient Protection and Affordable Care Act in Ohio may or may not be wise policy. However the matter of *who* is entitled and required to make that decision is well-settled: "it is an accepted doctrine in our constitutional law that the lawmaking prerogative is a sovereign power conferred by the people upon the *legislative branch* of the government," and therefore "cannot be delegated to other officers, *board* or commission, or branch of government."¹ To those ends, the Court has already answered the question before it here: "[i]t is the General Assembly, not a body consisting of six legislators and a member from the executive branch, which is granted the legislative power. The unfettered delegation of power to such a body is not the constitutional prerogative of the General Assembly."² This Court has further explained that Sections 1 and 26 of Article II of the Ohio Constitution stand for the principle that "[b]ecause the General Assembly cannot delegate its legislative authority, the Controlling Board cannot make laws."³

Consequently, the Controlling Board may act as nothing more than a *proxy* for the Ohio General Assembly. It certainly cannot act inconsistently with the General Assembly's intent. And it most certainly is not an alternative route for policymaking when the General Assembly fails to provide the executive branch with the exact solution it seeks at the exact time it seeks it.

Yet on October 21, 2013, the Board instituted a health care policy for the state of Ohio that the Governor has characterized as "transformational" and the Supreme Court of the United States has explained to be "an entirely new health care system," authorizing the appropriation of nearly \$3 Billion in funds to bind Ohio to expand Medicaid spending in the manner contemplated by the Patient Protection and Affordable Care Act ("ACA"). This authorization came on the heels of eight months of

¹ *Matz v. J.L Curtis Cartage Co.* 132 Ohio St. 271, 7 N.E.2d 220 (1937). (Emphasis added).

² *State ex rel. Meshel v. Keip* (1980), 66 Ohio St.2d 379, citing *Matz*, at pages 280-281.

³ *State ex rel. Meshel v. Keip* (1980), 66 Ohio St.2d 379.

robust legislative debate on the matter, and a budget bill whereby the General Assembly expressly prohibited the very policy that the Controlling Board imposed.

Because the Controlling Board is bound to abide by the Ohio Constitution and the General Assembly's intent as expressed through its acts, it breached its duty on October 21, and remains in breach of that duty today. Should this breach of duty remain unchecked, the Controlling Board could, over the General Assembly's objections, appropriate all manner of federal funds, accompanied by the federal government's policy conditions. An impatient executive branch, in concert with the federal government, could circumvent the legislative branch in setting everything from Ohio's speed limits and other criminal laws to health care and education policy. If the Ohio Constitution's most fundamental guarantees are to retain their meaning, this usurpation cannot be permitted to stand.

II. FACTS AND STATEMENT OF THE CASE

The ensuing facts are offered to supply helpful background on how the origins of this case. The issues raised are best understood in light of the mandates of the Affordable Care Act, ruling of the United States Supreme Court, the debate over and impact of ACA expanded Medicaid spending in Ohio, the Ohio General Assembly's treatment of ACA expanded Medicaid spending when presented with a biennium budget including it, and the Governor's line-item vetoes related to it.

A. 2010-2012: The ACA requires Medicaid Expansion until the Supreme Court renders it optional.

This matter has its origins in the Medicaid spending expansion mandated by the 2010 Patient Protection and Affordable Care Act ("ACA," referenced in common nomenclature as "Obamacare"). The ACA *required* each state to provide Medicaid coverage for a specific expansion population – primarily adults under 138 percent of poverty who do not have either a disability or children at home. Specifically, the ACA added division (a)(10)(A)(i)(VIII) to Section 1902 to require that, as a condition of receiving federal Medicaid dollars, a state's Medicaid state plan “must ... provide [for] making

medical assistance available ... to all individuals ... beginning January 1, 2014, who are under 65 years of age, not pregnant, not entitled to, or enrolled for, benefits under [Medicare Part A], or enrolled for benefits under [Medicare Part B], and are not described in a previous subclause of this clause, and whose income ... does not exceed 133 percent of the poverty line [with a 5-percent disregard that increases the limit to 138 percent of the poverty line] ... applicable to a family of the size involved,”

While the ACA provides that a state can lose *all* federal financial assistance if a state fails to expand Medicaid in this manner, in *National Federation of Independent Business v. Sebelius*, the Supreme Court upheld the ACA requirement on states to extend Medicaid coverage but restricted the federal government’s enforcement authority for that provision, rendering it *optional* for states to comply.⁴ The Court explained that “[a]s a practical matter, that means States may now choose to reject the expansion; that is the whole point. But that does not mean all or even any will. Some States may indeed decline to participate, either because they are unsure they will be able to afford their share of the new funding obligations, or because they are unwilling to commit the administrative resources necessary to support the expansion.”⁵ However, the Court concluded “Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use.”⁶

B. February-June 2013: The Ohio General Assembly exercises Ohio's option by initially rejecting appropriation of federal ACA Medicaid funds.

⁴ See 132 S.Ct. 2566 (2012) (Specifically, the Court held “[W]e determine, first, that § 1396c is unconstitutional when applied to withdraw existing Medicaid funds from States that decline to comply with the expansion.”)

⁵ Id.

⁶ Id.

When asked to do so in the budget, the Ohio General Assembly refused to expand Medicaid spending in Ohio in the manner contemplated by the ACA. Instead, it *prohibited* appropriation of the ACA funds that the Controlling Board now seeks to appropriate.

On February 4, 2013, the Ohio General Assembly introduced the State of Ohio biennium budget bill, the fiscal year 2014-2015 budget, as House Bill 59. The initial version of HB 59, as is customary, consisted of the Governor's Executive Budget proposals. And these proposals included ACA expansion of Medicaid spending through appropriation of federal ACA funds, in a manner identical to the October 11, 2013 request made to the Controlling Board.⁷ Specifically, the budget bill initially sought to use the federal ACA funds to escalate Ohio's Medicaid spending, already "the single largest program in the state budget," by 19 percent in Fiscal Year 2014.⁸ To this end, the Governor's proposed section 5163.04 of HB 59 originally stated that ". . . the [M]edicaid program may cover the group, or one or more subgroups of the group, described in the 'Social Security Act,' section 1902(a)(10)(A)(i)(VIII) . . ." Emphasizing the gravity of this policy overhaul in his Executive Budget, the Governor characterized the appropriation of federal ACA funds as "Medicaid 2.0: Ohio's Plan to Transform Medicaid and Health Care."⁹

On April 18, 2013, the Ohio House of Representatives deliberately removed ACA Medicaid appropriation proposal from HB 59, and passed a budget without the expansion.¹⁰ In doing so, the

⁷ This proposed budget is in the public domain, and remains available at the website of the Office of Management and Budget. See http://media.obm.ohio.gov/OBM/Budget/Documents/operating/fy-14-15/bluebook/budget/Highlights_14-15.pdf, last checked November 12, 2013.

⁸ Id., p. 3.

⁹ See http://media.obm.ohio.gov/OBM/Budget/Documents/operating/fy-14-15/bluebook/budget/Highlights_14-15.pdf, p. 12.

¹⁰ House Passes Budget Without Medicaid Expansion, By Jason Hart, April 19, 2013, available at <http://mediatrackers.org/ohio/2013/04/19/house-passes-budget-without-medicaid-expansion>

House called for a separate debate on the issue, and members of House leadership referenced several types of reforms they would be seeking.¹¹

On April 24, the President of the Ohio Senate confirmed that the Senate would not be placing the ACA Medicaid appropriation back into the budget bill.¹² In doing so, he explained (1) that the Senate would develop separate Medicaid reform legislation in coordination with the Ohio House; (2) “That’s not to say we’re ending the debate on Medicaid reform;” (3) the Medicaid Finance Subcommittee chair would “open up a working group that will explore all sides of Medicaid reform, and see if we can reach a consensus;” (4) “I have members on all sides of Medicaid reform. They simply want more information. . . They want to know the consequences, both short- and long-term, of making a commitment with the federal government. They want to know what the ongoing conversation, ongoing liabilities, from both the administration and the federal government will be;” and (5) “I do believe Medicaid reform is possible,” and “What that reform will mean will be dependent in large part on the flexibility the federal government agrees to give us, and the initiatives and ingenuity our members and the administration and Director Moody can come up with. That may include adding more people to the Medicaid system, but it has to include flexibility to perform and frankly, transform a system that works better for Ohioans.”¹³

In June of 2013, the Ohio House and Senate passed and submitted to the Governor, HB 59 - - the biennium budget bill - - with language expressly prohibiting ACA Medicaid expansion. That

¹¹ Id. (Rep. Sears introduced a floor amendment calling for the House to explore a broad “rightsizing” of the state’s Medicaid program. “This amendment will permit the Medicaid Director, working with the General Assembly, to seek approval for a proposal that will serve as an option for the House to consider,” Rep. Sears explained. Sears listed “reducing enrollment” and developing a reform package that “improves health outcomes with the goal of lowering net state and federal costs” as priorities of the amendment. “We will be going to school on this issue over the summer,” Rep. Sears added.)

¹² Senate Not Expected to Restore Medicaid Expansion to Budget Bill, By Jason Hart, April 24, 2013, available at <http://mediatrackers.org/ohio/2013/04/24/senate-not-expected-to-restore-medicaid-expansion-to-budget-bill>

¹³ Id.

language provides as follows: "The [M]edicaid program shall not cover the group described in the 'Social Security Act,' section 1902(a)(10)(A)(i)(VIII), 42 U.S.C. 1396a(a)(10)(A)(i)(VIII)." Further, the General Assembly added over \$400M in additional Medicaid funding to Am. Sub. HB 59 as a result of removing from the budget the same appropriation requested by the Director of Medicaid.

On June 30, 2013, the Governor line-item vetoed what he described as the "Prohibition on Extending Medicaid Coverage," referencing Section 5163.04, asserting "[t]he item would prohibit the Ohio Medicaid program from covering the group identified in 42 USC 1396(a)(10)(A)(i)(VIII)(i.e. all individuals who, as of January 1, 2014, are under 65 years of age, not pregnant, not entitled to or enrolled for benefits under Medicare Parts A or B, and whose income does not exceed 133 percent of the poverty line)," and "[t]his item also foregoes federal funding."¹⁴ Thus, all acknowledge that the General Assembly passed a budget bill prohibiting appropriation of federal ACA Medicaid expansion funds.

C. October 2013: The Controlling Board seeks to transform health care policy in a manner the General Assembly prohibited.

On October 11, 2013, the Director of Medicaid requested that the Controlling Board authorize, for the very same purpose, the very same appropriation of ACA funds that the Ohio General Assembly prohibited. The request acknowledged its own magnitude and policy implications, stating "[t]his appropriation would provide Medicaid Coverage to adults without dependent children between 0% and 138% of the Federal Poverty Level (FPL) and parents otherwise not covered by current Medicaid eligibility levels up to 138% FPL," referencing the Social Security Act's federal expansion of Medicaid coverage."¹⁵

On October 21, the Controlling Board granted the Director of Medicaid's Appropriation request, No. MCD0100009. The granting of Request No. MCD0100009 took place after several

¹⁴ See Exhibit B, attached to Plaintiffs' October 22 Verified Complaint.

¹⁵ See Exhibit A, attached to Plaintiffs' October 22 Verified Complaint.

members of the Board were replaced with two new members earlier that day. While such a procedure is permitted under R.C. 127.12, all concede that the replacement was related to the Medicaid appropriation vote.¹⁶

At the hearing, Medicaid Director McCarthy conceded the absence of any precedent for Controlling Board action approving program and funding levels that the Ohio General Assembly had expressly sought to prevent.¹⁷ There was limited discussion of the duty to comply with the General Assembly's intentions, with the only member who raised the issue later dissenting in the vote. And while legislative hearings on program and funding levels permit opponent and interested party testimony, the October 21 Controlling Board featured only proponents of the funding request.

The Controlling Board narrowly voted "yes" on the Request, with a state representative who had been installed earlier that morning and an Executive Branch official supplying the decisive votes.

D. Appropriating ACA funds dramatically transforms Ohio's health care system.

The Controlling Board's appropriation of ACA funds, an appropriation of nearly \$3 billion and an act which binds the people of the state to the federal government's strict conditions that accompanying the funds, dramatically shifts Ohio's health care policy. The Supreme Court authoritatively explained this shift, stating "[t]he Medicaid expansion, however, accomplishes a shift in kind, not merely degree." The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. See 42 U.S.C. § 1396a(a)(10). Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for

¹⁶ See <http://www.mansfieldnewsjournal.com/article/20131021/NEWS01/310210007/>

¹⁷ Video of October 21, 2013 Controlling Board hearing. There is no transcript.

the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage."¹⁸

Further, the Court noted that Ohio's obligations would increase, and dramatically so: "[t]here is no doubt that the [ACA] dramatically increases state obligations under Medicaid. The current Medicaid program requires States to cover only certain discrete categories of needy individuals—pregnant women, children, needy families, the blind, the elderly, and the disabled. 42 U.S.C. § 1396a(a)(10). There is no mandatory coverage for most childless adults, and the States typically do not offer any such coverage. The States also enjoy considerable flexibility with respect to the coverage levels for parents of needy families. § 1396a(a)(10)(A)(ii). On average States cover only those unemployed parents who make less than 37 percent of the federal poverty level, and only those employed parents who make less than 63 percent of the poverty line."¹⁹

The Supreme Court added that "the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under *existing* Medicaid,"²⁰ specifically cited the uncompensated "increased state administrative expenses," associated with expansion, and also suggested as tenuous the presumption 'that the Federal Government will continue to fund the expansion at the current statutorily specified levels,' observing 'it is not unheard of, however, for the Federal Government to increase requirements in such a manner as to impose unfunded mandates on the States,' and describing the expansion as 'an attempt to foist an entirely new health care system upon the States.' (Elsewhere the Court characterizes the expansion as "a new health care program").²¹

¹⁸ 132 S.Ct. 2566 (2012). In its Brief to the Supreme Court, the State of Ohio characterized the expansion of Medicaid in the manner the ACA and the Controlling Board have authorized as "a dramatic expansion in health care coverage effected by the Act."

¹⁹ 132 S.Ct. 2566 (2012).

²⁰ See 132 S.Ct. 2566 (2012).

²¹ 132 S.Ct. 2566 (2012).

Thus, the Supreme Court has explained that a state's appropriation of ACA Medicaid funds results in "an entirely new health care system" for Ohio. This is consistent the Governor's Executive Budget, which characterizes the expansion of Medicaid spending through appropriation of ACA funds as "Ohio's Plan to Transform Medicaid and Health Care."²² As chronicled below, the Ohio Constitution mandates that any such plan to dramatically transform Medicaid and health care in Ohio must include the Ohio General Assembly.

III. LAW AND ANALYSIS

Proposition of Law:

RELATORS ARE ENTITLED TO A WRIT OF MANDAMUS ORDERING THE CONTROLLING BOARD TO ABIDE BY ITS PUBLIC DUTY TO CONFORM WITH THE INTENT OF THE GENERAL ASSEMBLY, AND THEREFORE VACATE ITS UNLAWFUL ADMINISTRATIVE EXPANSION OF OHIO'S MEDICAID SPENDING.

The Ohio Constitution mandates that the General Assembly appropriate funds. Consequently, the General Assembly cannot delegate this function away, unless the delegation requires that the Board acts as nothing more than a proxy. Thus, where the Board exceeds that role, the Ohio Constitution's fundamental guarantee of separation of powers is violated. Consequently, the statutory codification of this constitutional limitation, embodied in R.C. 127.17, must be strictly enforced.

Here, the October 21 end-run around the legislature violates R.C. 127.17, and accordingly, Ohio's most basic and sacred guarantees. Because the Controlling Board is under a continuing duty to abide by R.C. 127.17 and the Ohio Constitution, and because the Medicaid Department maintains a duty to only budget lawfully appropriated funds, each must be ordered to treat the October 21 authorization as void.

As an initial observation, this action is consistent with this Court's treatment of mandamus and the Controlling Board, and satisfies the traditional elements of a mandamus claim. Pursuant to R.C.

²² See http://media.obm.ohio.gov/OBM/Budget/Documents/operating/fy-14-15/bluebook/budget/Highlights_14-15.pdf, p. 12.

2731.01, 'mandamus' has been defined as “ * * * 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 specifically enjoins as a duty resulting from an office, trust, or station.”²³ This court has previously held that a mandamus action may test the constitutionality of a statute or other government act.²⁴ Moreover, where this court has found a statute unconstitutional it may direct the public bodies or officials to follow a constitutional course in completing their duties.²⁵

In order for this court to grant a writ of mandamus a court must find “ * * * that the relator has a clear legal right to the relief prayed for, that the respondent is under a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law.”²⁶ Because Relators establish above that the Controlling Board maintains, and is breaching, a clear public duty to act consistently with the intentions of the General Assembly regarding Medicaid expansion expressed in HB 59, Relators address the remaining elements of mandamus below.

Further, this Court has already concluded that it is necessary for it to review the Controlling Board's actions, and that mandamus is the proper means by which to do so. In *State ex rel. Meshel v. Keip*, this Court explained that “the judicial branch of this state is the appropriate body to assess the legitimacy of the delegation and of the use of any power granted” to the Controlling Board,²⁷ and further the Controlling Board's authority is sufficiently limited to its constitutional confines only

²³ *State ex rel. Zupancic v. Limbach* (1991), 58 Ohio St.3d 130, 131–134, 568 N.E.2d 1206, at 1207–1209

²⁴ *State ex rel. Michaels v. Morse* (1956), 165 Ohio St. 599, 608, 60 O.O. 531, 536, 138 N.E.2d 660, 666 (“[t]he right of relator to question, by mandamus, the constitutionality of the statute is recognized in Ohio”); *State ex rel. Brown v. Summit Cty. Bd. of Elections* (1989), 46 Ohio St.3d 166, 167, 545 N.E.2d 1256, 1258.

²⁵ See *State ex rel. Park Invest. Co. v. Bd. of Tax Appeals* (1971), 26 Ohio St.2d 161, 55 O.O.2d 338, 270 N.E.2d 342 (where this court in a mandamus proceeding directed the Board of Tax Appeals to comply with this court's earlier decision in the same case after finding two tax statutes unconstitutional).

²⁶ *State ex rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St.2d 42, 15 O.O.3d 53, 399 N.E.2d 81, paragraph one of the syllabus; see, also, R.C. 2731.05.

²⁷ *State ex rel. Meshel v. Keip* (1980), 66 Ohio St.2d 379, citing *Matz v. J. L. Curtis Cartage Co.* (1937), 132 Ohio St. 271, at pages 280-281.

because of (1) the existence of R.C. 127.17; when combined with (2) "the availability of mandamus relief," as "[m]andamus relief is ordinarily a sufficient process for review of quasi-legislative exercise of power."²⁸

Finally, this Court frequently, and correctly, crafts the duty owed with a degree of generality - - indeed, a degree greater than that required here. In *State ex rel. Ryan v. City Council of Gahanna*, the City of Gahanna was prepared to issue bonds to finance a redevelopment project, without heeding the Ohio Constitution's Article VIII limitations on such arrangements.²⁹ A taxpayer petitioned this Court for a writ of mandamus to compel the City of Gahanna to comply with its public duty to issue bonds that are in accordance with Article VIII of the Ohio Constitution. Finding that the City's bond offering would violate its public duty, the Court ordered "that a writ issue compelling respondents to comply with the provisions of Sections 6 and 13 of Article VIII of the Ohio Constitution."³⁰

Similarly, in *State ex rel. Ohio AFL-CIO v. Voinovich*, relators petitioned this Court for a writ of mandamus to compel the Governor's compliance with the right to referendum.³¹ The relators argued that parts of Am.Sub.H.B.107 were unlawfully exempted from the referendum requirement found in Ohio Const. Article II, Section 1. When the relators sued in mandamus to compel compliance with the governor's public duty to enforce the Ohio Constitution's right to referendum, this Court granted the writ, stating, "we grant relators' request for a writ of mandamus on the issue of whether Am.Sub.H.B. No. 107 violates the right of referendum under Section 1, Article II of the Ohio Constitution."³²

Similar to *Ryan* and *Ohio AFL-CIO*, before this Court is a petition in mandamus demonstrating a clear legal right to enforce a public duty imposed by law. And if the Ohio Constitution's checks and balances are to remain intact, this Court must enforce that duty here.

²⁸

Id.

²⁹

9 Ohio St.3d 126, 131, 459 N.E.2d 208, 212 (1984).

³⁰

Id.

³¹

69 Ohio St.3d 225, 237, 631 N.E.2d 582, 591 (1994)

³²

Id.

A. The Controlling Board is under a clear public duty to abide by the Ohio Constitution and the Ohio General Assembly's intent, and its Medicaid Appropriation breaches that duty.

i. The Controlling Board's public duty to abide by the Ohio General Assembly's intent is mandated by the Ohio Constitution.

This Court rightly emphasizes that "[t]he first, and defining, principle of a free constitutional government is the separation of powers," and to vigilantly enforce this principle is to maintain "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."³³ Accordingly, this Court has "not hesitated to strike down provisions of law that . . . undermine the authority and independence of one or another coordinate Branch."³⁴

Section 2, Article I of the Ohio Constitution provides that "all political power is inherent in the people." Through the Ohio Constitution, the people have delegated this political power to the Ohio General Assembly. This is made clear through Section 1, Article II of the Ohio Constitution, which plainly states "The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided.***" This is further emphasized by Section 26 of Article II, which states: "All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as otherwise provided in this constitution." Likewise, Section 22, Article II of the Ohio Constitution states: "No money shall be drawn from the treasury, except in pursuance of a specific appropriation, *made by law* * * *."

³³ *State v. Bodyke* (2010), 126 Ohio St.3d 266, 933 N.E.2d 753, 2010 -Ohio- 2424; *Mistretta*, 484 U.S. at 382, 109 S.Ct. 647, 102 L.Ed.2d 714, quoting *Buckley v. Valeo* (1976), 424 U.S. 1, 122, 96 S.Ct. 612, 46 L.Ed.2d 659.

³⁴ *State v. Bodyke* (2010), 126 Ohio St.3d 266, 933 N.E.2d 753, 2010 -Ohio-2424.

This Court must be particularly scrutinizing with respect to politically-unaccountable boards, commissions, and agencies, since the constitution “divides power among sovereigns and branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crises of the day.”³⁵ Deterring politically expedient solutions serves to “reduce the risk of tyranny and abuse,” and “secure to citizens the liberties that derive from the diffusion of sovereign power.”³⁶ Accordingly, “[i]t is an accepted doctrine in our constitutional law that the lawmaking prerogative is a sovereign power conferred by the people upon the legislative branch of the government,” and therefore “cannot be delegated to other officers, board or commission, or branch of government.”³⁷ Rather, the General Assembly can only “confer administrative power on an executive, a board or commission.”³⁸ And for over a century the limits on such bodies have been consistent: in *Cincinnati, Wilmington & Zanesville R. Co. v. Com’rs of Clinton County*, this Court clarified that “[t]he true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done.”³⁹

Thus, Sections 1 and 26 of Article II of the Ohio Constitution to stand for the principle that “It is the General Assembly, not a body consisting of six legislators and a member from the executive branch, which is granted the legislative power.” The unfettered delegation of power to such a body is not the constitutional prerogative of the General Assembly.⁴⁰ This Court has further explained that

³⁵ See *New York v. United States* (1992), 505 U.S. 144, at 181, 187-188.

³⁶ *Id.*, at 181, 182, citing to Federalist No. 51. See also *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 114 (“the doctrine was a deliberate design to secure liberty by simultaneously fostering autonomy and comity, as well as interdependence and independence, among the three branches.”)

³⁷ *Matz v. J.L. Curtis Cartage Co.* 132 Ohio St. 271, 7 N.E.2d 220 (1937).

³⁸ *Id.*

³⁹ 1 Ohio St. 77, 88.

⁴⁰ *State ex rel. Meshel v. Keip* (1980), 66 Ohio St.2d 379, citing *Matz v. J. L. Curtis Cartage Co.* (1937), 132 Ohio St. 271, at pages 280-281.

Sections 1 and 26 of Article II of the Ohio Constitution stand for the principle that "[b]ecause the General Assembly cannot delegate its legislative authority, the Controlling Board cannot make laws."⁴¹

Indeed, this Court already holds the Controlling Board is nothing more than an "administrative body."⁴² As such, there must be some discernable limits on the actions of the Controlling Board.⁴³ In fact, the Supreme Court of Ohio has explained that the General Assembly [has] not unconstitutionally delegated legislative authority to the Controlling Board" *only because* "pursuant to R.C. 127.17, [any action] cannot be contrary to the legislative intent regarding program goals and levels of support."⁴⁴ In other words, the Ohio Constitution permits the existence of the Controlling Board *only* because its discretion is confined to making decisions that the Ohio General Assembly would have *otherwise* made on its own - - the Board is and must be a *proxy* for the General Assembly. Thus, stringent enforcement of R.C. 127.17 is critical to our entire constitutional order.

Otherwise, "[i]f such general rule-making power could be conferred indiscriminately, the Legislature could meet, create commissions, pass on to them the duties of legislation, and then adjourn *sine die*. * * * The result would be that statutory law would lose its significance and legal rights would be grounded in great measure upon the readily alterable rules and regulations of boards and commissions. Thus the constitutional right of referendum would be denied, government would be given over to the despotic rule of administrative authorities, and bureaucracy would run wild."⁴⁵

The last of these is particularly pernicious, since "[t]he constitutional right of citizens to referendum is of paramount importance," is "one of the most essential safeguards to representative government," "provides an important check on actions taken by the government," and "[t]he

⁴¹ Id.

⁴² *State ex. rel. Meshel, supra.* ("It is, of course, necessary that administrative bodies (the Controlling Board essentially being one). . .").

⁴³ *Blue Cross v. Ratchford* (1980), 64 Ohio St.2d 256; *Weber v. Bd. of Health* (1947), 148 Ohio St. 389; *Matz, supra.*

⁴⁴ See *State ex. rel. Meshel v. Keip* (1980), 66 Ohio St.2d 379.

⁴⁵ Id., at 281.

referendum * * * is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.'"⁴⁶ This voice is stripped away where the Controlling Board acts in a manner not authorized by the General Assembly - - the right of Ohioans to exercise their veto power has been erased. And the harm here is palpable here: Right to Life Relators have invested resources anticipating the right to referendum expanded Medicaid spending, and still desire to exercise this right if the policy is constitutionally implemented by the General Assembly.⁴⁷

Simply put, R.C. 127.17 is not just a procedural technicality that can be dispensed with to facilitate politically expedient result. To the contrary, it is the very thing that saves the constitutionality of the Controlling Board: the Ohio Constitution demands that the administrative officers of the Controlling Board are bound to "carry out the General Assembly's will," and may do no more.⁴⁸ And the Board's acts must be strictly scrutinized to ensure compliance with the fundamental principles underlying this requirement.

As Justice Clifford Brown put it "[i]nstead of 'infringing upon the power of the legislature to oversee its own affairs,' a writ of mandamus * * * would prevent the Controlling Board from illegally infringing upon the power of the General Assembly to oversee its own affairs."⁴⁹ And Justice Brown could have added that controlling the Controlling Board is necessary, if the people of Ohio are to adequately oversee the General Assembly as it conducts *their* affairs. Thus, the Controlling Board breaches its clear public duty to abide by the Ohio Constitution when it acts beyond or inapposite to

⁴⁶ *State ex rel. Ohio Gen. Assembly v. Brunner*, 115 Ohio St.3d 103, 2007-Ohio-4460, 873 N.E.2d 1232, ¶ 8. *Eastlake v. Forest City Ents., Inc.* (1976), 426 U.S. 668, 673, 96 S.Ct. 2358, 49 L.Ed.2d 132, quoting *James v. Valtierra* (1971), 402 U.S. 137, 141, 91 S.Ct. 1331, 28 L.Ed.2d 678.

⁴⁷ See Affidavit of Jerry Cirino, attached hereto.

⁴⁸ Id.

⁴⁹ See *State ex rel. Meshel v. Keip* (1980), 66 Ohio St.2d 379 (Clifford Brown, concurring).

the expressed intentions of the Ohio General Assembly, and accordingly, policing Ohio's very structure of government demands that R.C. 127.17 must be strictly enforced.

ii. R.C. 127.17 imposes a clear public duty upon the Controlling Board, and its Medicaid Appropriation breaches that duty.

The State of Ohio Controlling Board's decision to acquire and appropriate the funds necessary to effectuate ACA Medicaid Expansion in Ohio, over the clear objection of the Ohio General Assembly, is not only unprecedented because it exceeds the Controlling Board's own authority, breaching the clear public duty imposed by R.C. 127.17 in the process. That statutory limit, carefully crafted to ensure the Controlling Board's constitutionality at the time of its creation, commands: "The Controlling Board shall take no action which does not carry out the legislative intent of the general assembly regarding program goals and levels of support of state agencies as expressed in the prevailing appropriation acts of the general assembly."

a. The Controlling Board's ACA Medicaid Appropriation is subject to R.C. 127.17.

As an initial matter, all of the Controlling Board's acts, including this one, are subject to R.C. 127.17. In expanding program funding and/or levels of support, the Controlling Board purported to act pursuant to R.C. 131.35. R.C. 131.35 generally provides "Controlling board authorization for a state agency to make an expenditure of federal funds constitutes authority for the agency to participate in the federal program providing the funds."

However, R.C. 131.35 is subject to, as it must be to be held a constitutional delegation of legislative authority, R.C. 127.17. In fact, the Department of Medicaid and Controlling Board publicly acknowledge that R.C. 131.35 is subject to R.C. 127.17: "Controlling Board authorization to expend money under R.C. 131.35 must accord not only with Article II, Section 22 of the Constitution, but also with the prohibition of R.C. 127.17 against the Board's taking any action that does not carry out

legislative intent 'regarding program goals and levels of support of state agencies as expressed in the prevailing appropriation acts"⁵⁰

b. The Controlling Board's ACA Medicaid Appropriation violates its R.C. 127.17 duty and must be vacated.

Given the General Assembly's clear action in opposition, the Controlling Board's appropriation and concomitant expansion of Ohio's Medicaid spending and program violates each element of the prohibition on "action which does not carry out the legislative intent of the general assembly regarding program goals and levels of support of state agencies as expressed in the prevailing appropriation acts of the general assembly." This statute is clear and not in need of construction or interpretation. Pursuant to R.C. 1.47, In enacting a statute, "it is presumed that: (A) compliance with the constitutions of the state and of the United States is intended; (B) the entire statute is intended to be effective; (C) a just and reasonable result is intended; (D) a result feasible of execution is intended."⁵¹

First, R.C. 127.17 requires that the Controlling Board carry out the intent "of the general assembly" only, and the Governor is not a member of the General Assembly. This is unique amongst Ohio statutes, in that (1) any alteration by the executive branch through line-item veto is deliberately excluded from consideration; and therefore (2) the bill passed by the General Assembly, rather than the text of the statute enacted, establishes the standard to which the Controlling Board must conform. While unique, this is as it must be, since the Controlling Board must, constitutionally, act as a proxy for the legislature alone, rather than for the legislature and the Governor. This point is further driven

⁵⁰ See *The Controlling Board: AN INFORMATIONAL BRIEF PREPARED FOR MEMBERS OF THE OHIO GENERAL ASSEMBLY BY THE LEGISLATIVE SERVICE COMMISSION STAFF*, May 22, 2013, available at <http://www.healthtransformation.ohio.gov/LinkClick.aspx?fileticket=WXPjoOhbDcU%3d&tabid=160>, re-published by "The Governor's Office of Health Transformation" on October 11, 2013 at <http://www.healthtransformation.ohio.gov/Budget/ExtendMedicaidServices.aspx>.

⁵¹ However, should any such construction or interpretation take place, it must take place within the context of the greater constitutional function that the statute serves. Further, if any of R.C. 127.17 were to be viewed as ambiguous, the Court should consider, pursuant to R.C. 1.49, "the object sought to be attained;" "[t]he circumstances under which the statute was enacted;" and "the consequences of a particular construction."

home by the possessive nature of the statute: the Controlling Board has a clear duty to abide by the legislative intent "of the General Assembly" as expressed by the acts "of the General Assembly." Thus, the Controlling Board was required to review and abide by, and this Court is required to judge the Controlling Board's conformance to its duty by, House Bill 59 - - the FY 2014-2015 Budget Bill - - as passed by the Ohio General Assembly on June 30, 2013, *before* any gubernatorial veto.

Second, the act mandates that the Controlling Board abide by the intent of the General Assembly "regarding program goals and levels of support of state agencies." In enacting House Bill 59, the General Assembly was crystal clear as to its program goals for Ohio Medicaid and the Department of Medicaid: Ohio Medicaid was not to expand Medicaid spending to the class of persons specified in the ACA (childless adults above the poverty line). Making this clear, the Ohio House of Representatives, on April 18, deliberately removed ACA Medicaid appropriation proposal from HB 59, and passed a budget without the expansion.⁵² The Senate did not reintroduce this "program goal." And In June of 2013, the Ohio House and Senate passed and submitted to the Governor, HB 59 - - the biennium budget bill - - with language expressly prohibiting ACA Medicaid expansion. That language provides as follows: "The [M]edicaid program shall not cover the group described in the 'Social Security Act,' section 1902(a)(10)(A)(i)(VIII), 42 U.S.C. 1396a(a)(10)(A)(i)(VIII)." This is a clear articulation of the General Assembly's "program goals" for Medicaid. Further, the General Assembly added over \$400M in additional Medicaid funding to Am. Sub. HB 59 as a result of removing from the budget the same appropriation requested by the Director of Medicaid.⁵³

Lest there be any doubt about the General Assembly's intended program goals and levels of support, on October 16, 2013, 38 state representatives, including all but one member of leadership and each of the six Legislator-Relators here, filed a formal protest in the Ohio House Journal to the then-

⁵² House Passes Budget Without Medicaid Expansion, By Jason Hart, April 19, 2013, available at <http://mediatrackers.org/ohio/2013/04/19/house-passes-budget-without-medicaid-expansion>

⁵³ Plaintiffs' Affidavit.

proposed Controlling Board expansion of Medicaid spending, declaring as follows: "We, the undersigned members of the Ohio House of Representatives, hereby protest the filing of a controlling board request by the Director of Medicaid, John McCarthy, seeking to appropriate additional funds specifically not appropriated in the prevailing appropriation act of the 130th General Assembly, Amended Substitute House Bill 59" since "the request does not carry out the clear intent of the General Assembly as indicated in its passage of Am. Sub.House Bill 59."⁵⁴

The Protest explain the acts of the General Assembly that comprise its intention not to expand Medicaid spending and programs in Ohio: "Here, the clear intent of the Ohio General Assembly not to appropriate the funds contained in the request was expressed in its prevailing appropriation act, Am. Sub. HB 59: 1) The General Assembly included the following prohibition in Am. Sub HB 59: "The medicaid program **shall not cover** the group in the "Social Security Act," section 1902(a)(10)(A)(i)(VIII)." (emphasis added). The requested appropriation seeks "[t]o cover individuals listed under Section 1902(a)(10)(A)(i)(VIII) of the Social Security Act" (emphasis added); 2) The General Assembly added over \$400M in additional Medicaid funding to Am. Sub. HB 59 as a result of removing from the budget the same appropriation currently being requested by the Director of Medicaid; 3) The General Assembly did not appropriate any funds "[t]o cover individuals listed under Section 1902(a)(10)(A)(i)(VIII) of the Social Security Act," even though estimated state costs to do so are \$13 to \$22M."⁵⁵ (Emphasis in original). The Protest concludes, and this Court must agree, that "[t]his request [to expand Medicaid through the Controlling Board] is thinly-veiled legislation creating new eligibility levels and funding levels for Medicaid. In fact, the request itself admits as much."⁵⁶

⁵⁴ See *Ohio House of Representatives Journal*, October 16, 2013, at 1262 (Clerk's Notation - A Protest). See Exhibit C to Relators' October 22, 2013 Complaint. (Emphasis in original).

⁵⁵ Id.

⁵⁶ Id.

The protest could have gone even further. For instance, it could have also mentioned that the House and Senate enacted Section 323.23 of HB 59, which "requires that legislation be introduced to *reform* Medicaid" to operate completely differently, rather than "doubling down" on the old system through ACA expansion. For instance, Section 323.23 requires reforms not permitted by the ACA conditions accepted by the Controlling Board: moving individuals to "employer-sponsored health insurance or the health insurance marketplace" and "provisions that seek to *lower* net state and federal costs for Medicaid and *reduce the number of individuals who enroll* over time."⁵⁷ This Section further demanded that the Medicaid Director seeks a waiver from the federal government, and forbids the Medicaid Director from "pursuing a Medicaid plan amendment" unless "the General Assembly enacts legislation authorizing implementation" by December 31, 2013.⁵⁸ The General Assembly never enacted any such legislation.

Third, the General Assembly specified the "levels of support for state agencies" by providing a specific allocation of funds to Medicaid. The General Assembly added over \$400M in additional Medicaid funding to Am. Sub. HB 59 as a result of removing from the budget the same appropriation requested by the Director of Medicaid.⁵⁹ Next, the General Assembly appropriated approximately \$6 Billion in federal dollars for Medicaid over two years, rather than the nearly \$9 Billion sought to effectuate the expansion.⁶⁰ Finally, there is consensus that by prohibiting the expanded coverage, the General Assembly prohibited a "level of support" for the Department of Medicaid of \$2.6 Billion greater than that appropriated - - even the Governor acknowledged that HB 59 - - On June 30, 2013, the Governor line-item vetoed what he described as the "Prohibition on Extending Medicaid

⁵⁷ See Comparison Document, House Bill 59, p. 385, attached hereto.

⁵⁸ Id.

⁵⁹ Plaintiffs' Affidavit.

⁶⁰ See Exhibit A, attached to Plaintiffs' October 22, 2013 Verified Complaint, October 21, 2013 Controlling Board Approval of Request No. MCD0100009 (citing "current appropriation amount" and "amount of increase or new fund.").

Coverage," referencing Section 5163.04, asserting "[t]he item would prohibit the Ohio Medicaid program from covering the group identified in 42 USC 1396(a)(10)(A)(i)(VIII)(i.e. all individuals who, as of January 1, 2014, are under 65 years of age, not pregnant, not entitled to or enrolled for benefits under Medicare Parts A or B, and whose income does not exceed 133 percent of the poverty line)," and "[t]his item also foregoes federal funding."⁶¹

*Fourth, the "prevailing appropriation acts of the general assembly" is HB 59 upon passage of both houses of the General Assembly and presentment to the Governor, and before and gubernatorial veto. This is made obvious because the phrase "of the general assembly" must be given meaning because "the entire statute is intended to be effective" (R.C. 1.47(B)); and "in determining the legislative intent of a statute it is the duty of this court to give effect to the words used in a statute, not to delete words used, or to insert words not used."*⁶² Further "prevailing" references the budget currently in force - - that enacted through HB 59, which is the "appropriation act." As Justice Clifford Brown explained in his concurring opinion in *State ex rel. Meshel v. Keip*, the budget bill enacted by the General Assembly is the measuring stick as to program levels and goals:

When the General Assembly by Am.Sub.H.B. No. 204 appropriated \$550,000 for FY 1981 for ORTA, it also appropriated \$1,127,812 for FY 1980. This constituted one unified program goal and level of support, within the meaning of R.C. 127.17, evidencing a single legislative intent to fund a high speed rail program.

The conclusion I reach is based upon a simple syllogism. It is as follows: A single legislative act appropriating funds for two fiscal years is one which establishes a specific legislative intent regarding program goals and levels of support for two fiscal years, but for a single purpose. (R.C. 127.17.) A law which establishes a specific legislative intent regarding program goals and levels of support for two fiscal years for a single purpose is a law which must be enforced by the courts as a unitary whole, so that all funds for both fiscal years are used for that single purpose, level of support and program goal. Therefore, the single legislative act, Am.Sub.H.B. No. 204, which appropriated to ORTA funds for two fiscal years, is a law which must be enforced by the courts as a unitary whole, so that all funds for both fiscal years are used for that single purpose, level of support and program goal, intended by the legislature. * * *

⁶¹ See Exhibit B, attached to Plaintiffs' October 22 Verified Complaint.

⁶² *Columbus-Suburban Coach Lines v. Public Util. Comm'n*, 20 Ohio St.2d 125, 127 (1969).

.Shifting funds back to FY 1980, as the Controlling Board did in this case, collides with the “program goals and levels of support * * * expressed * * * (by) the general assembly,” in Am.Sub.H.B. No. 204, in clear violation of R.C. 127.17.⁶³

One must note that the Justice references the budget bill itself, rather than the Ohio Revised Code, to determine legislative intent, for the purposes of R.C. 127.17. Thus, in summation, the clear legislative intent *of the General Assembly* regarding programmatic goals and levels of funding for Ohio's Medicaid program *expressed in HB 59 as submitted to the Governor* is (1) deliberate and conspicuous removal of expanded Medicaid spending from HB 59; (2) a prohibition on ACA Medicaid expansion and concomitant appropriation of ACA funds (with the understanding that appropriation of the funds carries with it the binding condition of expanded coverage); and (3) a level of support \$2.6 Billion lower than what the Governor requested - - the amount desired to effectuate the expanded spending and coverage.

However, on October 21, 2013 the Board authorized a request (1) proclaiming on its face that **"[t]his appropriation would provide Medicaid Coverage** to adults without dependent children between 0% and 138% of the Federal Poverty Level (FPL) and parents otherwise not covered by current Medicaid eligibility levels up to 138% FPL," referencing the Social Security Act's federal expansion of Medicaid coverage;" and (2) requesting \$2.6 Billion in federal funds with attached conditions, including mandated coverage of and spending on the expanded ACA population.⁶⁴ This was done within the course of a two hour hearing without testimony from opponents or meaningful debate on the duty to comply with R.C. 127.17, much less whether granting the request would so comply. Moreover, this was done within the context of eight months of robust legislative deliberation over the issue, at a time when the General Assembly was still vigorously considering other reforms that may better suit Ohioans.

⁶³ See *State ex rel. Meshel v. Keip* (1980), 66 Ohio St.2d 379 (Clifford Brown, concurring).

⁶⁴ See Exhibit A, attached to Plaintiffs' October 22 Verified Complaint.

Finally, it is no defense at all that the General Assembly could override the Controlling Board or the Governor's veto. Respondents have made that contention in the past, rightfully to no avail:

Respondents contend, however, that the Controlling Board can be delegated essentially legislative authority because the General Assembly can reenact any appropriation transferred by the board. The fact the General Assembly can reenact a law is irrelevant. If it were relevant, any agency could be granted unbounded discretion to make rules because the General Assembly could override those rules. Such a holding does not recognize the realities of our bicameral legislative process; it would allow a board of relatively small size to override the result of the rather involved legislative process. This is not proper under our Constitution.⁶⁵

And this holding is of course correct - - the General Assembly cannot be sent constantly scrambling to rectify the extra-constitutional decision of Ohio's many boards, commissions, and agencies. Moreover, overriding a gubernatorial veto requires a super-majority, meaning that the General Assembly's intent would only be reflected by a supermajority. However, (1) where this is this is required, such as the attachment of emergency clauses or the initiation of constitutional amendments, the Ohio Constitution specifically states as much; and (2) it is a matter of plain language and common understanding that a vote of 51 percent of the General Assembly conveys its intent.

Indeed, in *State ex. rel. Meshel v. Keip*, this Court concluded that a Controlling Board's "de-appropriation" of appropriated funds," so as to defeat a policy objective of the General Assembly, transgressed the limits of R.C. 127.17. Likewise here, the General Assembly carefully contemplated, and then rejected, the very federal funds (and all of their attached strings), that the Controlling Board now seeks to appropriate.

Along these lines, while not necessarily central to the adjudication of this case, it must be noted that any position that R.C. 5163.03(C)(2) authorizes the expansion of ACA Medicaid spending *without* the Controlling Board's appropriation fails, because a governor cannot line-item veto his or her way to Medicaid expansion authority that did not previously exist, nor void "the intent of the General

⁶⁵ See *State ex rel. Meshel v. Keip* (1980), 66 Ohio St.2d 379.

Assembly." R.C. 5163.03, as passed by the General Assembly in HB59, specifically made the authorization to expand medicaid coverage subject to R.C. 5163.04, which prohibited the subject medicaid expansion. The Governor lined out the word "R.C. 5163.04" in the clause limiting R.C. 5163.03 authority, in an effort to transform R.C. 5163.03 from a prohibition of authority, to a grant of authority, for the subject medicaid expansion. Such an action, of course, cannot have the effect of *authorizing* implementation of ACA Medicaid expansion because line item veto authority is limited to disapproval of "any item or items in any bill making an appropriation of money ..."⁶⁶ This makes it all the more important that Respondents are under a clear legal authority to carry out the provisions of R.C. 5163.03 and R.C. 5163.04.⁶⁷

Consequently, (1) the Controlling Board operates under a clear public duty to abstain from "action which does not carry out the legislative intent of the general assembly regarding program goals and levels of support of state agencies as expressed in the prevailing appropriation acts of the general assembly;" (2) the Controlling Board ignores that public duty insofar as it has and continues to maintain an unlawful and therefore unconstitutional appropriation of funds. At bottom, the Controlling Board authorization essentially ripped the decision from its proper place - - the hands of the political body closest to the people of Ohio, and then disregarded the intent of that body, and therefore, the people of Ohio.

The transgression here is flagrant and clear. And accordingly, the Controlling Board must be ordered to abide by the public duties imposed by the Ohio Constitution and R.C. 127.17. As a

⁶⁶ O. Const. Art 2, Section 16. "[P]rovisions in an appropriation bill which are separate and distinct from other provisions in the same bill...are items within the meaning of Section 16, Article 11 of the Ohio Constitution" *State ex rel. Brown, et al. v. Ferguson, et al.*, 32 Ohio St.2d 245, 252 (1972). See also *State ex rel. Akron Education Assn. v. Essex*, 47 Ohio St. 47, 51 (1976).

⁶⁷ The secretary of state is also under a clear legal duty to "safely keep laws passed by the General Assembly and other documents required to be deposited in the secretary's office and to ensure fulfillment of her various publication and distribution duties concerning enacted laws". *State ex rel. Ohio General Assembly v. Brunner*, 114 Ohio St. 3d 386, ¶27.

consequence, the Department of Medicaid is also under a clear public duty to, as this Court has ordered in the past, "consider the Controlling Board action as a nullity."⁶⁸

B. Relators maintain a clear legal right to the relief prayed for.

Here, Relators have established that the Controlling Board is under a clear legal right to abide by R.C. 127.17 and the Ohio Constitution, and further, that the Department of Medicaid is under a clear legal right to treat as a nullity the Controlling Board's Medicaid appropriation disregarding R.C. 127.17 and the Ohio Constitution.

Next, Relators maintain a clear legal right to enforce that duty. First and foremost, the State Representatives maintain a clear *private* right to enforce R.C. 127.17 against the Controlling Board. R.C. 127.17 commands: "The Controlling Board shall take no action which does not carry out the legislative intent *of the general assembly* regarding program goals and levels of support of state agencies as expressed in the prevailing appropriation acts of the general assembly." Thus, the Controlling Board is required to carry out the "legislative intent of the General Assembly" only. The six state representatives in this action are members of the Ohio General Assembly. Consequently, it is *Relators'* legislative intent that the Controlling Board is duty-bound to abide by, and thus, Relators maintain a clear legal right to vindicate their legislative intent. Further, it is *Relators'* legislative duty and authority that the Controlling Board has usurped.

For these reasons and more, Relators maintain private standing (and thus a clear legal right to enforce the Controlling Board's duty) under the traditional vestiges of legislator standing. In *State ex rel. Ohio General Assembly v. Brunner*, this Court confirmed that members of the General Assembly "have standing to sue, as legislators who voted with the majority for [the bill in question], to prevent

⁶⁸ See *State ex rel. Meshel v. Keip* (1980), 66 Ohio St.2d 379 ("In the case at bar, the Controlling Board, in effect, deappropriated the money. Because there is no express legislative intent to allow such action, the transfer of the \$355,541 *must be considered a nullity.*")

nullification of their individual votes."⁶⁹ Indeed, in Ohio, State Representatives frequently maintain mandamus actions to enforce legislation that they voted to pass or are entitled to vote on.⁷⁰ Here, both State Representatives Maag and Thompson voted for HB 59, which of course included the prohibition on ACA-expanded Medicaid spending. And each relator on this case worked to include the prohibition on Medicaid expansion that was presented to the Governor. Accordingly, these six state representatives maintain legislator standing to enforce their votes against the Controlling Board, and further, to stop the Controlling Board from usurping their authority.

Moreover, in a public action to enforce a public duty, *any beneficially interested Ohioan* maintains a "public right" to enforce a public duty. In *State ex rel. Meyer v. Henderson*, the court held that the Clerk of the city of Cincinnati was required, under an ordinance, to advertise for sealed proposals for the construction of a street railway. In discussing whether the clerk could be compelled by mandamus to perform this duty, upon the relation of a citizen and owner of property along the line of the proposed railroad, the court explained: as follows:

As regards the degree of interest on the part of the relator, requisite to make him a proper party on whose information the proceedings may be instituted, a distinction is taken between cases where the extraordinary aid of a mandamus is invoked, merely for the purpose of enforcing or protecting a private right, unconnected with the public interest, and those cases where the purpose of the application is the enforcement of a purely public right, where the people at large are the real party in interest, and, while the authorities are somewhat conflicting, yet the decided weight of authority supports the proposition that, where the relief is sought merely for the protection of private rights, the relator must show some personal or special interest in the subject matter, since he is regarded as the real party in interest and his rights must clearly appear. On the other hand, where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and, as such, interested in the execution of the laws.⁷¹

⁶⁹ *State ex rel. Ohio General Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3870 (2007).

⁷⁰ *See State ex rel. Gilmore v. Brown*, 6 Ohio St.3d 39 (1983).

⁷¹ *State ex rel. Meyer v. Henderson* (1883), 38 Ohio St. 644, at 648–649.

This Court has steadily adhered to the public action doctrine over the past century. In *State ex rel. Newell v. Brown*, the relator, as citizen, taxpayer, and elector of Cleveland Heights, filed an original action in prohibition in this court seeking to prevent the Secretary of State and the members of the Board of Elections of Cuyahoga County from placing on a ballot the names of certain candidates for the office of several judgeships. In allowing the action and ultimately finding R.C. 3513.256 unconstitutional, the court held, at paragraph one of the syllabus: “Ordinarily a person is not authorized to attack the constitutionality of a statute, where his private rights have suffered no interference or impairment, but as a matter of public policy a citizen does have such an interest in his government as to give him capacity to maintain a proper action to enforce the performance of a public duty affecting himself and citizens generally.”⁷² The court explained that “[w]here a public right, as distinguished from a purely private right, is involved, a citizen need not show any special interest therein, but he may maintain a proper action predicated on his citizenship relation to such public right. This doctrine has been steadily adhered to by this court over the years.”⁷³

Taking account of this body of robust precedent,⁷⁴ this Court concluded in 1999 that “the public action is fully conceived in Ohio as a means to vindicate the general public interest. The only question that remains is whether the present action should be allowed to proceed as a private action, a public action, neither, or both.”⁷⁵ For a more exhaustive treatment of public action standing in Ohio

⁷² *State ex rel. Newell v. Brown* (1954), 162 Ohio St. 147, 122 N.E.2d 105.

⁷³ *Id.* at 150–151, 54 O.O. at 393, 122 N.E.2d at 107.

⁷⁴ *Sheward*, supra., at 1084. (*State ex rel. Nimon v. Springdale* (1966), 6 Ohio St.2d 1, 4-5, 35 O.O.2d 1, 3, 215 N.E.2d 592, 595. (“In particular, the court in *Nimon* listed a long line of cases in support of the citizen/taxpayer action, and explained that ‘no case cited in the footnote involves (1) a municipal corporation; (2) Section 733.59, Revised Code, or any statute similar thereto; or (3) an extrastatutory demand upon, and refusal of, a county prosecutor, the Attorney General or other public legal officer to institute the suit.’”) See also *State v. Brown*, 38 Ohio St. 344 (mandamus granted on relation of elector to compel sheriff to give notice to qualified voters to elect a Common Pleas Court judge); *State ex rel. v. Tanzey*, 49 Ohio St. 656, 32 N.E. 750 (mandamus granted on relation of elector to compel board of elections to make and complete the abstract of votes); *State ex rel. Trauger v. Nash, Governor*, 66 Ohio St. 612, 64 N.E. 558 (mandamus granted on relation of elector, citizen and taxpayer to compel Governor to appoint a Lieutenant Governor).

⁷⁵ *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062.

and amongst other states, this Court is respectfully referred to the undersigned counsel's very recent briefing and oral argument in *ProgressOhio v. JobsOhio*, 2012-1272.⁷⁶

Here, each relator is a citizen who is beneficially interested in enforcing the Controlling Board's clear public duty to abide by the Ohio Constitution and R.C. 127.17. Meanwhile, the State Representative Relators are "beneficially interested" in having the General Assembly adhere to their intent, thus preserving their constitutional authority; and Right to Life groups are "beneficially interested" because they oppose the substance of the Controlling Board's action, and would seek to referendum the action, were this radical policy change undertaken by the Ohio General Assembly.

Consequently, Relators maintain standing and a clear legal right to enforce the Controlling Board's duty to abide by R.C. 127.17 and the Ohio Constitution, and the Department of Medicaid's duty to recognize the limitations of its appropriations.

C. Relators have no plain and adequate remedy at law.

Relators lack an adequate remedy in the ordinary course of law because there is no defined route for appealing a Controlling Board action and Declaratory relief is neither "speedy" nor "complete" here.

First, there is no path for appealing a Controlling Board decision. Although it has been deemed an "administrative" board by this Court, its decisions are not subject to R.C. 119 (administrative appeals of agency determinations). Meanwhile, the Controlling Board's enacting legislation, R.C. 127 *et. seq.*, does not established a means of appeal.

Second, seeking a declaratory action in a court of common pleas, followed by several appeals, even if available, would be insufficiently speedy. "[T]his court has recognized that the availability of a declaratory judgment or mandatory injunction action will not usually defeat a request for a writ of

⁷⁶ Online docket available at on this Court's website at <http://www.sconet.state.oh.us/Clerk/ecms/resultsbycasenumber.asp?type=3&year=2012&number=1272&myPage=searchbycasenumber%2Easp>

mandamus under certain conditions." Specifically, in *State ex rel. Fenske v. McGovern*, paragraph two of the syllabus provides: "The availability of an action for declaratory judgment does not bar the issuance of a writ of mandamus if the relator demonstrates a clear legal right thereto, although the availability of declaratory judgment may be considered by the court as an element in exercising its discretion whether a writ should issue. However * * * the availability of declaratory injunction is not an appropriate basis to deny a writ to which the relator is otherwise entitled."⁷⁷

Further this Court explained in *State ex rel. Merydith Constr. Co. v. Dean*, for a remedy at law to be "adequate," the remedy should be "complete in its nature," beneficial and "speedy."⁷⁸ Likewise, in *Zupancic*, this Court states "We note that there are instances where exigent circumstances may call for this court to exercise its jurisdiction to order a writ of mandamus in cases where an appeal is an available remedy."⁷⁹

To be sure, this Court has found the need for speedy relief to defeat the adequacy of declaratory judgment actions and appeals in non-elections cases of less sweeping exigency. In *State ex rel. Dollison v. Reddy*, this Court explained that "the mere existence of a declaratory judgment action as an alternative remedy does not justify a decision not to grant the writ in a case such as this. Here, there is no special reason why relator should be required to pursue the remedy of declaratory judgment. To the contrary, respondent's failure to carry out his statutory duties has impaired the registrar's ability to enforce R. C. 4507.40 and 4511.191. Those statutes are designed to protect the public safety by preventing the recurrence of traffic violations. The registrar cannot enforce those sections without legal counsel. Therefore, a speedy resolution is required, and it would be an abuse of discretion for a court

⁷⁷ *State ex rel. Fenske v. McGovern* (1984), 11 Ohio St.3d 129, 11 OBR 426, 464 N.E.2d 525

⁷⁸ *State ex rel. Merydith Constr. Co. v. Dean*(1916), 95 Ohio St. 108, 123, 116 N.E. 37, 41; *State ex rel. Butler v. Demis* (1981), 66 Ohio St.2d 123, 124, 20 O.O.3d 121, 122, 420 N.E.2d 116, 117 (the question for this court to decide is whether an alternative remedy is adequate under the circumstances).

⁷⁹ *Zupancic*, supra., at Footnote 2.

with mandamus jurisdiction to deny the writ and require relator to pursue the time-consuming course of bringing an action for a declaratory judgment in the Court of Common Pleas."⁸⁰

Here, there are sweeping exigent circumstances, and declaratory relief would not be sufficiently speedy, because this is a matter of exigency. On October 10, 2013, the Ohio Department of Medicaid, anticipating receipt of federal funds through the unlawful Controlling Board appropriation under review here, purported to commit Ohio to covering the billions of dollars in costs for a greatly-expanded population of entitlement recipients, effective January 1, 2014. Specifically, on a September 26, Ohio Director of Medicaid John McCarthy submitted to the Federal Government a proposed "State Plan Amendment" that proposed Ohio be obligated to expand Medicaid coverage and spending (by \$3 Billion over the next two years), effective January 1, 2014, as contemplated by the Patient Protection and Affordable Care Act. And on October 10, the Federal Government, through the Center for Medicare & Medicaid Services ("CMS"), approved a State Plan Amendment. Further, the ACA requires expansion of Medicaid spending and satisfaction of its other conditions in response to appropriation of the federal ACA funds. Thus, *as of this date*, Ohio is currently bound, effective January 1, 2014, to provide "Medicaid coverage for individuals with incomes below 133% of the Federal Poverty Level."⁸¹ (The very coverage that the General Assembly removed from the budget and then prohibited).

Consequently, absent a decision by January 1, the Ohio Department of Medicaid will begin to the process of unlawfully over-extending Ohio's Medicaid system through offering expanded coverage that there is no lawful appropriation to fund. Indeed, at the October 21 Controlling Board hearing, Director McCarthy testified that if the funds were not appropriated, he would set a course that would

⁸⁰ *State ex rel. Dollison v. Reddy*, 55 Ohio St.2d 59, 60-61, 378 N.E.2d 150, 151 (1978).

⁸¹ See October 10 State Plan Amendment. Emphasis added. Attached hereto.

render Ohio's Medicaid system insolvent at some point in 2014.⁸² Meanwhile, the Department of Medicaid is on the brink of administratively setting Medicaid eligibility standards, and beginning enrollment of the putatively expanded class of individuals - - all with reliance upon the federal funds that the Controlling Board has sought to appropriate and that the General Assembly has sought to prohibit. In the process, hundreds of thousands of Ohioans may reasonably rely upon, and be misled as to, their eligibility for Medicaid.

On this front, Respondents claim that if the appropriation is later found unlawful, the State can simply reverse course and "eliminate coverage for lower income Ohioans," even after inducing them to drop their private health care coverage and enroll in Medicaid. However, the State cannot embark on so flippantly deceive Ohioans as to their health coverage options in a period of such great flux. And this is not simply because doing so is cruel or unwise: there significant legal harms associated with inducing an Ohioan to drop his or her private health insurance and enroll in Medicaid, only to then reverse course - -it is estimated that two-thirds of Ohioans who would enroll in Medicaid under the expansion otherwise maintain private health insurance.⁸³

Many of these Ohioans maintain less expensive and more flexible insurance plans that do not meet all Affordable Care Act standards, but are grandfathered in by the ACA. However, once one leaves such a plan, he or she cannot return to it.⁸⁴ Thus, the State is quite misguided to suggest that it can simply induce Ohioans to enroll in Medicaid and then later, without harm, reduce the expanded population. Permanently removing Ohioans from the health plans of their choice - - plans to which

⁸² See footnote 2.

⁸³ See *Medicaid in Ohio: The Choice is Clear*, at p. 11, available at <http://www.medicaidcure.org/wp-content/uploads/2013/06/Medicaid-in-Ohio-The-Choice-is-Clear.pdf>

⁸⁴ See <https://www.anthem.com/health-insurance/ohio/health-plans/choose-the-right-health-plan/>, for instance, advising that Ohioans maintain "grandfathered" policies due to cost, flexibility, and the inability to return to such a plan once dropping it.

they cannot go back - - has real-world consequences for these Ohioans, perhaps hundreds of thousands of them, and should not be so carelessly disregarded.

These harms are in addition to The Director of Medicaid's position that a failed appropriation of the disputed funding, combined with the currently in-force State Plan Amendment and apparently soon-to-be expanded eligibility standards, would have the capacity to render Ohio's Medicaid system insolvent at some point in 2014. Further, even if Ohio could temporarily opt out of expansion "without penalty" from the federal government, the People of Ohio would then be required to cover the expansion costs itself - - costs not budgeted for by the General Assembly, and beyond the scope of the state's balanced budget.

However, a ruling from this Court prior to January 1, 2014 would avert such a crisis: it would afford the Department of Medicaid an opportunity to (1) reach a lawful solution for Ohio's Medicaid program with the Ohio General Assembly; (2) modify its State Plan Amendment with the federal government so as to not require coverage of the ACA-designated population (it took CMS just two weeks to grant the last State Plan Amendment) beginning on January 1; or (3) seek a waiver from the federal government. Absent such a ruling, the Department Medicaid may proceed in binding Ohio to offer expanded Medicaid coverage that will ultimately be unfunded - - an unmitigated disaster for all Ohioans. This Court must remember the following: while it is relatively easy to expand Medicaid and appropriate the federal funds at a later date, it is essentially impossible to cleanly extract Ohio from the expansion once it has begun.

Consequently, this matter features the equivalent of a ticking time-bomb for Ohio's budget and constitution: absent speedy relief that a declaratory judgment followed by several levels of appeal could and would not supply, Ohio risks the solvency of its entire state budget in response to the clearly unlawful acts of a small and obscure administrative body.

Moreover, the Controlling Board's appropriation is entangled with many other moving parts, and delay risks the likelihood of impermissible legislation and regulation in reliance upon the unlawful appropriation. For instance, one of the Controlling Board members who voted for the appropriation has already introduced legislation in reliance on the expanded Medicaid spending, and others are eager to re-appropriate those funds, if they are available.⁸⁵ Meanwhile, the Department of Medicaid maintains rulemaking authority, and is likely to attempt to promulgate coverage regulations predicated upon the lawfulness of the appropriation in the near future.

Next, declaratory relief not "complete." This is because the Controlling Board must be ordered to prospectively abide by the intent of the General Assembly as expressed in HB 59, that intent being to prohibit Medicaid expansion and concomitant receipt of ACA funds that require the expansion. Declaratory relief would not be binding. And a retrospective injunctive relief would not guide the Controlling Board's discretion in the future, or force it to vacate its authorization.

D. Relators' proper mandamus claim invokes this Court's original jurisdiction.

Finally, in their October 29 Opposition to Relators' Motion to Expedite, Respondents suggest that "they have valid arguments that this case is not even properly before this Court, both as a matter of the Court's original jurisdiction and as a matter of standing."⁸⁶ However, this Court maintains jurisdiction over this action for the simple reason that this is a proper action in mandamus, and a proper mandamus claim triggers this Court's original jurisdiction.

Section 2 of Article IV of the Ohio Constitution vests this Court with original jurisdiction in mandamus cases. In *State ex rel. Zupancic v. Limbach*, this Court explained, in response to an objection to the invocation of this Court's original jurisdiction in mandamus, "[w]e note initially that

⁸⁵ See Columbus Dispatch: *Many ideas for spending \$404 million*, by Catherine Candisky and Darrel Rowland. November 14, 2013..

⁸⁶ Respondents' October 29 Opposition to Relators' Motion to Expedite, p. 4.

this court's original jurisdiction is triggered when a party files a complaint in mandamus.⁸⁷ The Court added the following: “[w]here a petition stating a proper cause of action in mandamus is filed originally in the Supreme Court, and it is determined that there is no plain and adequate remedy in the ordinary course of the law by way of an appeal, the Supreme Court has no authority to exercise jurisdictional discretion and the refusal to exercise jurisdiction on the ground that either of the extraordinary remedies of statutory mandatory injunction (Section 2727.01 *et seq.*, Revised Code) or statutory mandamus (Section 2731.01 *et seq.*, Revised Code) is available in the Common Pleas Court, is constitutionally impermissible under the last sentence of Section 2 of Article IV of the Ohio Constitution. * * * ” (Citations omitted.) Accordingly, it should come as no surprise that this Court frequently and quite properly adjudicates mandamus actions originally filed before it.

In doing so, though not required, it has frequently emphasized the great public importance of the issues at hand. For instance, in *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Worker's Compensation*, the Court ruled on the constitutionality of H.B. 122, a statute providing that "every Ohio worker injured on the job must submit to an employer-requested chemical test, regardless of whether the employer has any reason to believe that the injury was caused by the employee's intoxication or use of controlled substances," explaining that "the combined 950,000 members of the AFL-CIO and UAW are potential subjects of the testing requirements contained in H.B. 122, requirements that relators allege are unconstitutional."⁸⁸ The Court added that “[t]his court has long taken the position that when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties,” and "as the statutory scheme at issue in *Sheward* affected every tort claim filed in Ohio, H.B. 122 affects every injured worker who seeks to participate in the workers' compensation

⁸⁷ *State ex rel. Zupancic v. Limbach* (1991), 58 Ohio St.3d 130, 131-134, 568 N.E.2d 1206, 1207-1209, Section 2(B)(1)(b), Article IV of the Ohio Constitution; R.C. 2731.02.

⁸⁸ 97 Ohio St.3d 504, 780 N.E.2d 981, 2002 -Ohio- 6717

system. It affects virtually everyone who works in Ohio. The right at stake, to be free from unreasonable searches, is so fundamental as to be contained in our Bill of Rights. H.B. 122 has sweeping applicability and affects a core right."⁸⁹

Similarly in *Sheward*, the relators alleged that Am.Sub.H.B. No. 350 represented a legislative assault on the doctrine of separation of powers, a fundamental principle of our democracy.⁹⁰

In *Sheward*, this court held that "[w]here the object of an action in mandamus and/or prohibition is to procure the enforcement or protection of a public right, the relator need not show any legal or special individual interest in the result, it being sufficient that the relator is an Ohio citizen and, as such, interested in the execution of the laws of this state."⁹¹

In each case, the Court observed that "the issues sought to be litigated are of great importance and interest to the public."⁹² And in each case, this Court voiced the need to diligently police situations "where there may be an intrusion into areas committed to another and coequal branch of government."⁹³ To the extent that these considerations may play an informal role, or that this Court views itself as maintaining discretion over whether to reach the merits of these claims, Relators submit that the issues presented here are equal to or greater than those at play in *Sheward* and *State ex rel. Ohio AFL-CIO*.

First, this appropriation by the Controlling Board, were it to be upheld, would dramatically alter the provision of health care and health care coverage in Ohio. It bears repeating that the Controlling Board's appropriation of ACA funds, an appropriation of nearly \$3 billion and an act which binds the people of the state to the federal government's strict conditions that accompanying the

⁸⁹ Id.

⁹⁰ *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062

⁹¹ Id. at paragraph one of the syllabus.

⁹² *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Worker's Compensation, supra, at 506.*

⁹³ *Sheward, supra.*

funds, dramatically shifts Ohio's health care policy: the Supreme Court authoritatively explained this shift, stating "[t]he Medicaid expansion, however, accomplishes a shift in kind, not merely degree. * * * Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage."⁹⁴ The high court further observed that the expansion is "an attempt to foist an entirely new health care system upon the States."⁹⁵ Thus, the Supreme Court has explained that a state's appropriation of ACA Medicaid funds results in "an entirely new health care system" for Ohio. This is consistent the Governor's Executive Budget, which characterizes the expansion of Medicaid spending through appropriation of ACA funds as "Ohio's Plan to Transform Medicaid and Health Care."⁹⁶

Secondly, this matter cuts to the core of separation of powers and policymaking in Ohio. As much of the Ohio House indicated on October 16, "Our protest is not about the merits or lack of merit in expanding Medicaid. Our protest goes to the fundamental form of government upon which our country was founded—a Republic of checks and balances and separation of powers. The General Assembly is a co-equal branch of government that made its intent abundantly clear. The controlling board request attempts to subvert that intent, and is contrary to the Ohio Constitution and current statutory law."⁹⁷ This matter features an administrative board's usurpation of the legislature's constitutional policymaking power on the most monumental of issues, the stripping of Ohioans' right to

⁹⁴ 132 S.Ct. 2566 (2012). In its Brief to the Supreme Court, the State of Ohio characterized the expansion of Medicaid in the manner the ACA and the Controlling Board have authorized as "a dramatic expansion in health care coverage effected by the Act."

⁹⁵ 132 S.Ct. 2566 (2012).

⁹⁶ See http://media.obm.ohio.gov/OBM/Budget/Documents/operating/fy-14-15/bluebook/budget/Highlights_14-15.pdf, p. 12.

⁹⁷ See Exhibit C to Relators' October 22, 2013 Verified Complaint.

check their elected officials through identifying and understanding legislators' position on this issue; and through extinguishment of Ohioans' referendum rights.

However, this Court has emphasized that "The first, and defining, principle of a free constitutional government is the separation of powers."⁹⁸ If left unchecked through meaningful judicial oversight, there is nothing to prevent the Controlling Board - - a small group of legislators and executive branch officials not representative of the General Assembly as a whole - - from dramatically supplementing, amending, or altering public program and policy goals and levels in a manner inconsistent with the General Assembly's intentions. This unprecedented end-run around the legislature must be prohibited if meaningful separation of powers and checks and balances are to remain intact in Ohio.

Thirdly, this issue affects many, if not all, Ohioans. The issue of expansion of Medicaid spending, as contemplated by the ACA, implicates the manner in which health care coverage will be provided to as many as 366,000 Ohioans (this number was produced by Medicaid Director McCarthy at the October 21, 2013 Controlling Board hearing) and the manner of public reimbursement for various health care providers.⁹⁹

Further, some health care experts anticipate that the appropriation would affect all Ohio consumers of private health care, positing "the Medicaid expansion will drive up premiums for other Ohioans, because hospitals will make up for the costs of Medicaid's underpayments by charging more to people with private insurance: a phenomenon known as "cost-shifting."¹⁰⁰ Meanwhile, the issue also implicates the interests of taxpayers - - the Supreme Court specifically cited the uncompensated

⁹⁸ *State v. Bodyke*, 2010-Ohio-2424.

⁹⁹ See Relators' October 22, 2013 Verified Complaint, at Paragraph 112.

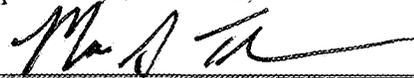
¹⁰⁰ See Forbes, *How Ohio's Medicaid Expansion Will Increase Health Insurance Premiums for Everyone Else*, by Avik Roy, February 8, 2013. Available at <http://www.forbes.com/sites/theapothecary/2013/02/08/how-ohios-medicaid-expansion-will-increase-health-insurance-premiums-for-everyone-else/>

"increased state administrative expenses," associated with expansion, and also suggested as tenuous the presumption 'that the Federal Government will continue to fund the expansion at the current statutorily specified levels,' observing 'it is not unheard of, however, for the Federal Government to increase requirements in such a manner as to impose unfunded mandates on the States.'¹⁰¹ Finally, Relators, in their capacities as State Representatives and Right to Life organizations, speak for nearly 1 million Ohioans.

V. CONCLUSION

For the foregoing reasons, this Court must require the Controlling Board and Department of Medicaid to abide by their clear public duties, the result being the treatment of the Controlling Board's October 22, 2013 appropriation of federal ACA Medicaid funds as void. Such a ruling is necessary to prevent serious injury to the most fundamental checks and balances inherent in Ohio's system of government, and should be issued without delay.¹⁰²

Respectfully submitted,

/s/ 

Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
208 E. State Street
Columbus, Ohio 43215
Tel: (614) 340-9817
Fax: (614) 365-9564
MThompson@OhioConstitution.org
Counsel for Relators

¹⁰¹ 132 S.Ct. 2566 (2012).

¹⁰² Relators respectfully renew their request for oral argument, so long as the Court's calendar may allow for it while also allowing for an expeditious ruling, on the expectation that it will help bring clarity to any questions the Court may have.

CERTIFICATE OF SERVICE

The foregoing was served upon the parties specified below this 15th Day of November, 2013:

Eric E. Murphy (0083284)

State Solicitor

Ryan L. Richardson (0090382)

Charity S. Robl (0075123)

Ohio Attorney General's Office

30 East Broad Street, 17th Floor

Columbus, OH 43215

(614) 466-8980

Eric.Murphy@ohioattorneygeneral.gov

Counsel for Respondents



Maurice A. Thompson

APPENDIX
AND
EXHIBITS

NOTARIZED OCTOBER 21,
2013 AFFIDAVIT OF STATE
REPRESENTATIVE MATT
LYNCH

STATE OF OHIO : ss.

COUNTY OF FRANKLIN

AFFIDAVIT

I, State Representative Matt Lynch, declare the following:

1. I have personal knowledge of the matters alleged in the Complaint.
2. The allegations contained herein are true and accurate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st day of October, 2013.

/s/ 
State Representative Matt Lynch



MAURICE THOMPSON
Notary Public, State of Ohio
My Commission Has No Expiration

**AFFIDAVIT OF CLEVELAND
RIGHT TO LIFE CHAIRMAN
JERRY CIRINO**

IN THE SUPREME COURT OF OHIO

STATE ex rel. CLEVELAND RIGHT TO LIFE, INC., et al.,	:	Case No. 13-1668
	:	
	:	
Relators	:	ORIGINAL ACTION IN
	:	MANDAMUS AND
v.	:	PROHIBITION
	:	
STATE OF OHIO CONTROLLING BOARD, et al.,	:	
	:	
	:	
Respondents.	:	

AFFIDAVIT OF JERRY CIRINO

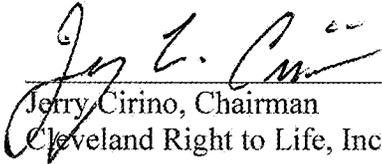
STATE OF OHIO : ss.

COUNTY OF FRANKLIN

1. My name is Jerry Cirino, and I am the Chairman of the Board of Directors of Cleveland Right to Life, Inc.
2. Due to my capacity as Chairman, I have personal knowledge of the matters attested to in this affidavit because they directly reflect my experience.
3. Further, I verify that the allegations contained in the Complaint in this case are true, as they relate to Cleveland Right to Life.
4. In particular, Paragraph 52 of the Complaint correctly asserts that "Cleveland RTL has invested significant resources in opposing the expansion of ACA Medicaid spending in Ohio and the receipt of federal funds associated with the ACA expansion because those funds, directly and/or indirectly, will be used to jeopardize unborn life."
5. Amongst the investment of resources made were and are discussions, organization, and plans to participate in an effort to subject to the ACA-Obamacare Medicaid expansion to referendum, and place the issue on the ballot before Ohio voters.
6. Accepting the conditions associated with appropriating the ACA-Obamacare funds effectuates the public policy of mandating the ACA-Obamacare contemplated Medicaid expansion in Ohio.
7. We have not initiated or participated in a referendum effort thus far because I do not believe that the Controlling Board's actions are subject to referendum, and accordingly, such an effort would be futile.

8. However, I do believe that the General Assembly's binding of Ohio to expand Medicaid would be subject to referendum.
9. Were the General Assembly to enact Medicaid expansion, through appropriating the conditioned ACA-Obamacare funds or otherwise, Cleveland Right to Life would take further concrete steps to participate in exercising our fundamental right of referendum to submit the enactment to Ohio voters.

November 14, 2013



Jerry Cirino, Chairman
Cleveland Right to Life, Inc.

Notary:



MAURICE THOMPSON
Notary Public, State of Ohio
My Commission Has No Expiration

**OFFICIAL OHIO SENATE
HOUSE BILL 59 COMPARISON
DOCUMENT**

***COMPARING, LINE BY LINE, FINAL EXECUTIVE, HOUSE,
AND SENATE PROPOSALS AND AMENDMENTS TO
BIENNIUM BUDGET***

(Relevant Medicaid Excerpts Only)

COMPARISON DOCUMENT

**House Bill 59
130th General Assembly**

**Main Operating Appropriations Bill
(FY 2014-FY 2015)**

**As Introduced
As Passed by the House
In Senate Finance
(LSC 130 0009-5)**

**Legislative Service Commission
May 28, 2013**

Introduction

The Comparison Document provides brief descriptions and fiscal estimates of the provisions that make up the executive recommended version and subsequent versions of the biennial main operating budget bill of the 130th General Assembly, House Bill 59. The document is arranged in alphabetical order by state agency. It also includes two nonagency items for which appropriations are made, Employee Benefits Fund (PAY) and Revenue Distribution Funds (RDF), as well as a Local Government Provisions (LOC) section for provisions that affect local governments and that are not entered in other agency sections. A Table of Contents follows this Introduction. Two indices are located at the end of the document. The first index gives the page number of each particular item within the sections; the second index lists cross-references by agency.

Generally within an agency's section, items that involve Revised Code changes come first, followed by items that involve uncodified (i.e., temporary) law provisions. The sections for the Department of Education and the Department of Taxation are first arranged by general topic areas. If an item affects more than one agency, it is described under one of the affected agencies, rather than all of the agencies. However, the other agencies are listed in the cross-referencing index at the end of the document. This index lists, for each agency, all entries that affect the agency but are not included in that agency's section as well as the page numbers for these entries. A reader who is interested in all provisions affecting a certain agency should consult the cross-referencing index in addition to the agency's section.

Each item is assigned a unique identification number. This number begins with an agency's three-letter Central Accounting System (CAS) code followed by a comparison document reference ("CD") and a number (DEVCD15, for example). A reader who wants to track an item across several versions of the Comparison Document may find the identification number useful.

The Comparison Document does not include appropriation amounts for the agencies. Please see the Legislative Service Commission's Budget in Detail spreadsheet for that information. For a complete discussion of the statutory changes in H.B. 59, see the Legislative Service Commission's Bill Analysis.

Executive	As Passed by the House	In Senate Finance
MCDCD32	Prescription Drug Rebates Fund Abolished	
R.C. 5111.942, (repealed), 5162.52, 323.370	R.C. 5111.942, (repealed), 5162.52, 323.370	R.C. 5111.942, (repealed), 5162.52, 323.370
Abolishes the Prescription Drug Rebates Fund and provides for the money that would otherwise be credited to it to be credited to the Health Care/Medicaid Support and Recoveries Fund.	Same as the Executive.	Same as the Executive.
MCDCD31	Health Care Compliance Fund Abolished	
R.C. 5111.946, (repealed), 5162.60, 5162.54, 323.380	R.C. 5111.946, (repealed), 5162.60, 5162.54, 323.380	R.C. 5111.946, (repealed), 5162.60, 5162.54, 323.380
Abolishes the Health Care Compliance Fund and provides for part of the money that otherwise would be credited to it to be credited to the Managed Care Performance Fund and the other part to be credited to the Health Care Services Administration Fund.	Same as the Executive.	Same as the Executive.
MCDCD53	Department of Medicaid Created	
R.C. 5160, 5124., 5161., 5162., 5163., 5164., 5165., 5166., 5167., 5168.120.02, Sections 209.50, 259.260, 323.10.10, 323.480, 610.20, 610.21	R.C. 5160, 5124., 5161., 5162., 5163., 5164., 5165., 5166., 5167., 5168.120.02, Sections 209.50, 259.260, 323.10.10, 323.480, 610.20, 610.21	R.C. 5160, 5124., 5161., 5162., 5163., 5164., 5165., 5166., 5167., 5168.120.02, Sections 209.50, 259.260, 323.10.10, 323.480, 610.20, 610.21
Creates the Ohio Department of Medicaid (ODM).	Same as the Executive, but provides for ODM to be designated as the single state Medicaid agency beginning July 1, 2013, rather than the 91st day after the bill is filed with the Secretary of State.	Same as the House.
Makes the Medicaid Director (ODM Director) the executive head of ODM.	Same as the Executive.	Same as the Executive.
Gives ODM and the ODM Director many of the same types of responsibilities and authorities as the Ohio Department of Job and Family Services (ODJFS) and ODJFS Director	Same as the Executive.	Same as the Executive.

	As Passed by the House	In Senate Finance
<p>Executive</p> <p>(2) Pay the provider the greater of the amount ODM intends to recoup from the provider for the claim, or if the third party and the provider have an agreement that requires the third party to pay the provider at the time the provider presents the claim to the third party, the amount that is to be paid under that agreement.</p>	<p>Same as the Executive.</p>	<p>Same as the Executive.</p>
<p>Fiscal effect: Potential savings.</p>	<p>Fiscal effect: Same as the Executive.</p>	<p>Fiscal effect: Same as the Executive.</p>
<p>MCDCD12</p>	<p>Medical Assistance Confidentiality</p>	
<p>R.C. 5160.99</p> <p>Provides that it is a misdemeanor of the first degree to violate a prohibition against using or disclosing information regarding a Medicaid, CHIP, or RMA recipient for any purpose not directly connected with the administration of those programs.</p>	<p>R.C. 5160.99</p> <p>Same as the Executive.</p>	<p>R.C. 5160.99</p> <p>Same as the Executive.</p>
<p>Fiscal effect: Potential increase in court costs and gain of fine revenue.</p>	<p>Fiscal effect: Same as the Executive.</p>	<p>Fiscal effect: Same as the Executive.</p>
<p>MCDCD52</p>	<p>Changes to Medicaid Eligibility</p>	
<p>R.C. 5162.03, 5101.18, 5111.014 (repealed), 5111.015 (repealed), 5111.0170 (repealed), 5111.0111 (repealed), 5111.0113 (repealed), 5111.0115 (repealed), 5111.0120 - 5111.0125 (repealed), 5111.70 to 5111.7011 (repealed), 5162.201, 5163.01, 5163.03, 5163.04, 5163.041, 5163.05, 5163.06, 5163.061, Sections 323.460, 323.470</p>	<p>R.C. 5162.03, 5101.18, 5111.014 (repealed), 5111.015 (repealed), 5111.0110 (repealed), 5111.0111 (repealed), 5111.0113 (repealed), 5111.0115 (repealed), 5111.0120 - 5111.0125 (repealed), 5111.7011 (repealed), 5162.201, 5163.03, 5163.04, 5163.041, 5163.05, 5163.06, 5163.061, Sections 323.460, 323.470</p>	<p>R.C. 5162.03, 5101.18, 5111.014 (repealed), 5111.015 (repealed), 5111.0110 (repealed), 5111.0111 (repealed), 5111.0113 (repealed), 5111.0115 (repealed), 5111.0120 - 5111.0125 (repealed), 5162.201, 5163.04, 5163.06, 5163.061, Sections 323.460, 323.470</p>
<p>Requires Medicaid to cover all mandatory eligibility groups.</p>	<p>Same as the Executive.</p>	<p>Same as the Executive.</p>
<p>Permits Medicaid to cover optional eligibility groups.</p>	<p>Same as the Executive, but (1) requires Medicaid to cover all of the optional eligibility groups that state statutes require Medicaid to cover, (2) permits Medicaid to cover any of the optional eligibility groups that state statutes expressly permit</p>	<p>Same as the House.</p>

Executive

As Passed by the House

In Senate Finance

Medicaid to cover or do not address whether Medicaid may cover, and (3) prohibits Medicaid from covering any optional eligibility group that state statutes prohibit Medicaid from covering.

Expressly permits Medicaid to cover the optional eligibility group, or one or more subgroups of the group, that is authorized by the Patient Protection and Affordable Care Act and is popularly known as the Medicaid expansion (nonpregnant individuals under age 65 with incomes not exceeding 133% of the federal poverty line) if the amount of the federal match available for the group is at least the amount specified in federal law as of March 30, 2010.

Requires Medicaid to cease to cover the Medicaid expansion group, and any subgroup, if the amount of the federal match available for the group or subgroup is reduced below the amount specified in federal law as of March 30, 2010.

Permits the ODM Director, if federal law or the U.S. Department of Health and Human Services requires the state to reduce or eliminate any tax, to (1) terminate Medicaid's coverage of the Medicaid expansion group and any subgroup or (2) alter the eligibility requirements for the Medicaid expansion group or subgroup in a manner that causes fewer individuals to meet the eligibility requirements.

Requires ODM, if Medicaid covers the expansion group or a subgroup, to establish cost-sharing requirements for members of the group or subgroup who are at least 18 years old and have countable income exceeding 100% of the federal poverty line.

Expressly permits Medicaid's eligibility requirements for aged, blind, and disabled individuals to be more restrictive than the eligibility requirements for the SSI program as authorized by the federal law known as the 209(b) option.

Permits the Medicaid Director to alter the eligibility requirements for, and terminate Medicaid's coverage of, one or more optional eligibility groups or subgroups beginning January 1, 2014.

Replaces the Executive provision with a provision that prohibits Medicaid from covering the expansion group and provides that it does not affect the Medicaid eligibility of any individual who enrolls in the MetroHealth Care Plus Medicaid waiver program.

No provision.

No provision.

No provision.

Same as the Executive.

Same as the Executive, but does not permit the ODM Director to alter the eligibility requirements for, and terminate the Medicaid program's coverage of, women in need of treatment for breast or cervical cancer, nonpregnant

Same as the House.

No provision.

No provision.

No provision.

Same as the Executive.

Same as the Executive, but does not permit the ODM Director to alter the eligibility requirements for, and terminate the Medicaid program's coverage of, the optional eligibility groups who qualify for Medicaid under the Medicaid Buy-In

Executive	As Passed by the House	In Senate Finance
<p>Repeals the law governing the Medicaid Buy-In for Workers with Disabilities program.</p> <p>No provision.</p> <p>No provision.</p> <p>Fiscal effect: Net impact of approximately \$500 million increase in costs in FY 2014 (\$23 million reduction in state share costs) and \$1.8 billion increase in costs in FY 2015 (\$68 million reduction in state share costs). The appropriations for GRF item 651525, Medicaid/Health Care Services, have been adjusted to account for these fiscal impact.</p>	<p>individuals who may receive family planning services and supplies, and low-income parents.</p> <p>Same as the Executive.</p> <p>Requires the ODM Director, in transitioning to the use of modified adjusted gross income and household income methodologies, to maintain Medicaid eligibility for women in need of treatment for breast or cervical cancer, nonpregnant individuals who may receive family planning services and supplies, and low-income parents other than such women, individuals, and parents with actual incomes exceeding 138% of the federal poverty line.</p> <p>Requires the ODM Director to implement a federal option that permits individuals to receive transitional Medicaid for a single 12-month period rather than an initial 6-month period followed by a second 6-month period.</p> <p>Fiscal effect: Approximately \$62 million increase in costs in FY 2014 (\$23 million increase in state share costs) and \$184 million increase in costs in FY 2015 (\$68 million increase in state share costs). The appropriations for GRF item 651525, Medicaid/Health Care Services, have been adjusted to account for these increases.</p>	<p>for Workers with Disabilities program.</p> <p>No provision.</p> <p>No provision.</p> <p>Same as the House.</p> <p>Fiscal effect: Same as the House.</p>

MCDCD25 Contracts for the Management of Medicaid Data Requests

<p>R.C. 5162.12, 5162.56</p> <p>Authorizes the ODM Director to enter into contracts with one or more persons to receive and process, on the Director's behalf, requests for Medicaid recipient or claims payment data, data from Medicaid audit reports, or extracts or analyses of any of the foregoing items made by persons who intend to use the items for commercial or academic purposes.</p>	<p>R.C. 5162.12, 5162.56</p> <p>Same as the Executive.</p>	<p>R.C. 5162.12, 5162.56</p> <p>Same as the Executive.</p>
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Executive

As Passed by the House

In Senate Finance

Fiscal effect: Same as the House.

Fiscal effect: OHT and ODM may incur some costs in assisting the General Assembly in developing Medicaid reform legislation. The actual fiscal effect on the Medicaid program and Ohio's health care delivery system will depend on any legislation enacted by the General Assembly.

MCDCD29 Quality Incentive Program to Reduce Avoidable Admissions

Section: 323.30

Permits ODM to implement, for FY 2014 and FY 2015, a quality incentive program to reduce the number of times that Medicaid recipients receiving certain home and community-based services are admitted to hospitals and nursing facilities or utilize emergency department services when the admissions or utilizations are avoidable.

Section: 323.30

Same as the Executive, but includes in the quality incentive program Medicaid recipients receiving nursing facility services.

Section: 323.30

Same as the House.

Fiscal effect: Savings of \$3.0 million (\$1.1 million state share) in FY 2015. The appropriations for GRF item 651525, Medicaid/Health Care Services, have been adjusted to account for these savings.

Fiscal effect: Same as the Executive.

Fiscal effect: Same as the Executive.

MCDCD30 Children's Hospitals Quality Outcomes Program

Section: 323.40

Permits the Medicaid Director to implement, during FY 2014 and FY 2015, a children's hospitals quality outcomes program that encourages children's hospitals to develop (1) infrastructures that are needed to care for patients in the least restrictive setting and promote the care of patients and their families, (2) programs designed to improve birth outcomes and measurably reduce neonatal intensive care admissions, (3) patient-centered methods to measurably reduce utilization of emergency department services for primary care needs and nonemergency health conditions, and (4) other reforms the Director identifies.

Section: 323.40

Same as the Executive.

Section: 323.40

Same as the Executive.