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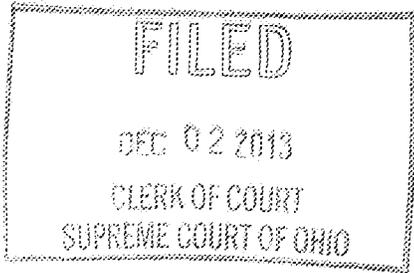
IN THE SUPREME COURT OF OHIO

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|---|---|---------------------------|
| 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' REPLY BRIEF

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I. INTRODUCTION

Nothing argued by Respondents or their *amici* alter the duty of this Court to order the Controlling Board to abide by the General Assembly's prohibition on expanded ACA Medicaid spending in Ohio.

Respondents insist that when the General Assembly created the Controlling Board, it created a monster. One not beholden to its creator, from whom its *only* authority derives, and with the power to enact, whether directly or indirectly, transformational policies expressly rejected and never approved by the legislative branch. This insistence ignores the constitutionally-required principal-agent relationship between the General Assembly and Controlling Board, reflected in this Court's prior recognition that "[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."¹ 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."²

Indeed, the Respondents' own brief demonstrates that the purpose for which the Controlling Board was devised it to fill in "minor" and "day-to-day" details when the General Assembly is not in session. 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 leaves Respondents pleading with the Court to abstain from applying the plain language, and instead remove key words of the governing statute, R.C. 127.17, so that they may prevail. Lost on Respondents are the realities that (1) this Court cannot and must not rewrite statutes; and (2) it particularly must not do so where the revisions would render *the entire concept of the Controlling Board*

¹ *State ex rel. Meshel v. Keip* (1980), 66 Ohio St.2d 379, citing *Matz*, *infra*, at pages 280-281.

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

unconstitutionally-untethered from the General Assembly's control. And since Respondents' meaningful attempts to apply R.C. 127.17 to the facts at hand are entirely reliant upon first changing the words of that statute, each of those attempts fail.

Likewise failing are the procedural hurdles Respondents attempt to erect as a backstop (1) the six State Representatives clearly maintain private standing: they took action that has the legal effect of binding the Controlling Board's authority, and the Board, which is beholden to them, has responded by ignoring their action in a matter that usurps their official duties and negates their work; and (2) no other remedy at law would be sufficiently complete or speedy, or is required to be pursued.

Finally, Relators would be remiss if they did not acknowledge the *policy* arguments advanced by the many self-interested *amici*. Those policy arguments may well be important. And these supporters of ACA Medicaid expansion may be well-organized and well-funded - - enough so to file these briefs. However, this Court is not the domain for these well-organized organizations policy arguments and influence: Respondents and their *amici* can and should direct such resources and arguments toward advancing their position through legitimate and lawful means, which they still may do after Relators prevail.

For instance, on September 19, 2013, the Ohio Ballot Board approved for circulation an initiative petition to expand Medicaid coverage and spending in Ohio, through use of the very same ACA funds appropriated by the Controlling Board. Respondents' *amici* should be using their clout to back that perfectly lawful effort, or at the bare minimum seeking to further persuade and influence a well-intentioned legislature, rather than attempting to jam their transformational health care policy preferences first through the Controlling Board, and now through this Court.

At the end of the day, the Ohio Constitution expressly articulates the options by which major public policy can be advanced *without* the General Assembly. The initiative and referendum are amongst those options. The Controlling Board is not. Because the Constitution requires "the people, through their elected representatives in the legislature," to craft transformational policies, this Court must order the Controlling

Board to vacate its October 21, 2013 appropriation, and abide by the General Assembly's intent, as expressed in House Bill 59.

II. LAW AND ANALYSIS

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

A. The Controlling Board's expansion of Medicaid is inconsistent with the very purpose of the Controlling Board.

While Respondents assert that their position "comports with the purpose to be accomplished by the legislation creating the Controlling Board,"³ their own brief and attachments demonstrate otherwise. Respondents' Exhibit C, a manual prepared by LSC for members of the General Assembly, explains the very limited purposes for which the Controlling Board exists: "if appropriations were to be more detailed, a means of making adjustments to them *when the General Assembly was not in session* seemed to be needed,"⁴ along with the means to authorize the expenditure of "*unanticipated* revenue."⁵ Meanwhile, Respondents' Exhibit D, The Controlling Board manual prepared by the State, frames the purpose of the Controlling Board by explaining "[i]magine bringing the entire legislature together *each time some minor adjustment needed to be made* to a budget plan;" "the Controlling Board is a mechanism for handling *certain limited day-to-day adjustments*;"⁶ and "these modification are likely to be *relatively minor* - but if some changes to the act is required, *then the legislature must convene*."⁷ Indeed, the State's manual acknowledges that this Court has already held that "the purpose" of any appropriation must be "reasonably within that authorized *by the General Assembly*."⁸

Here, the ACA Medicaid expansion funds were anything but unanticipated: whether or not to receive and appropriate them was hotly debated by the General Assembly before it expressly prohibited their

³ See Respondents' Merit Brief, at p. 30.

⁴ See Respondents' Exhibit C: *The Controlling Board: AN INFORMATIONAL BRIEF PREPARED FOR MEMBERS OF THE OHIO GENERAL ASSEMBLY BY THE LEGISLATIVE SERVICE COMMISSION STAFF*, May 22, 2013. Emphasis added. Also cited in Relators' Merit Brief, p. 17.

⁵ *Id.*, at p. 4.

⁶ See Respondents' Exhibit D: Controlling Board Manual, p. 7.

⁷ See Respondents' Exhibit D: Controlling Board Manual, p. 7

⁸ *Id.*, a p. 11, citing *State ex rel. Brown v. Ferguson*, 32 Ohio St.2d 245, 250 (1972).

receipt in HB 59. Meanwhile, this is not a "minor" or "limited day-to-day" adjustment: this is appropriation of nearly \$3 Billion dollars, with attached federal conditions that the Supreme Court of the United States and the Governor's office characterize as "transforming" Ohio's entire health care system. Further, it is common knowledge that the Executive Branch turned to the Controlling Board because the legislature would not give it exactly what it wanted, when it wanted it - - not because the legislature was out of session, or because members were simply unavailable to make the trip down to Columbus.

Finally, Respondents have the temerity to attach to their Brief the Controlling Board's 2010 appropriation of \$361 million in new federal "race to the top" funds.⁹ However, those funds, unlike here, were *truly unanticipated*, because they accrued from a federal grant award in response to a competition for funds.¹⁰ Also, unlike here, the General Assembly did not pass a budget bill with an express prohibition on receipt of those funds. Consequently, the use of the Controlling Board here, to impose a transformative health care system on all Ohioans over the express objection of the General Assembly, is entirely unprecedented and inconsistent with the limited and minor purposes for which the Board was created.

B. A gubernatorial line-item veto is not and cannot alter the "legislative intent of the general assembly. . . as expressed in . . . acts of the general assembly."

On this front, Respondents' arguments rest entirely upon *State ex rel. Pub. Utilities Commission of Ohio v. Controlling Board*. They triumphantly waive around this Court's two-page 1935 decision -- a decision on whether the Controlling Board can appropriate funds not permitted by any law or statute -- as though it were a magic wand discovered in the deep recesses of the earth that guarantees them victory here.¹¹ They contend as though it would have been "unconstitutional" for the Controlling Board to have even voted "no" on the Medicaid Appropriation, because this would have been "overriding the effect of the Governor's Veto."¹² Specifically, they urge "the Court has already held that an act would be unconstitutional if it directed the Controlling Board to ignore the Governor's veto," and from this they draw the conclusion that "if

⁹ See Respondents' Exhibit I.

¹⁰ *Id.*

¹¹ 130 Ohio St. 127 (1935). See Respondents' Brief, p. 2 ("The Court itself rejected Relators' argument decades ago . . . Relators perhaps did not know of the Court's *PUCO* decision . . . *PUCO* itself resolves this case[!]).

¹² Respondents' Brief, at p. 24.

this Court interpreted 'prevailing appropriation acts' to mean the enrolled bill that ignores the Governor's vetoes rather than the enacted law that takes the veto into account, it would render R.C. 127.17 unconstitutional."¹³ Respondents then proceed to entirely miscast this ruling as suggesting that the Controlling Board is bound to vote in a manner consistent with the policy preferences demonstrated by the Governor's veto alone.¹⁴

i. Respondents are forced to stretch precedent beyond its meaning.

However *PUCO* simply acknowledges the agreeable principle that because there was no law or statute permitting it "there is no appropriation for the items to which transfers are sought to be made."¹⁵ Thus, the Controlling Board could not there and cannot now appropriate funds without a law or statute empowering it to do so. And this is of course true. What *PUCO* does not mean is that the Controlling Board *can or must* make appropriations that the General Assembly has forbidden, simply because the Executive Branch has vetoed the legislative prohibition.

This renders Respondents' contention that "disregarding the Governor's veto would, to say the least, encroach on his constitutional prerogatives," utterly absurd: a veto is not a mandate to appropriate funds; nor could it be under the Ohio Constitution, since the legislature alone maintains "the power of the purse." The Controlling Board cannot do what the legislature cannot or will not do. And what the legislature did not and would not do, even after months of robust debate, was appropriate ACA Medicaid expansion funds.

Moreover, R.C. 127.17 did not exist at the time, so there was no need for the Court to address it, or the *further* limit that it necessarily places on the Controlling Board's authority: it, as a "board created by the Legislature," may not act in a manner expressly rejected by the General Assembly.

Indeed, the Court explained, "[i]f the transfers requested were made, that would be tantamount to the enactment of an appropriation by the Controlling Board," and such action would be "unconstitutional."¹⁶ Likewise here, approving the ACA Medicaid appropriation would be tantamount to the enactment of an

¹³ Id.; see also p. 26.

¹⁴ Id., at p. 27.

¹⁵ Id., at p. 2.

¹⁶ Id.

appropriation by the Executive Branch by and through the Controlling Board, without and over the express prohibition of the legislative branch. This too is of course unconstitutional. Consequently, *PUCO* does nothing to advance Respondents' position, but does in fact bolster Relators' position by demonstrating that the Controlling Board's authority is necessarily narrowly-circumscribed by the Ohio Constitution.

ii. Respondents' improperly attempt to use the Governor's veto to create appropriations authority.

The crux of Respondents argument is that the Governor's line-item veto of the General Assembly's express prohibition on expanded ACA Medicaid spending in Ohio created new appropriation authority for the Controlling Board. In arguing so, the Respondents are seeking to establish a legal fiction: a line-item veto can only delete appropriations; it cannot add them. In *State ex rel. Brown v. Ferguson*, this Court explained quite clearly that a line-item veto cannot change the meaning of non-vetoed items, it can merely delete "provisions in an appropriation bill which are separate and distinct from other provisions in the same bill, insofar as the subject, purpose, or amount of the appropriation is concerned," and the test of legitimacy is whether "both provisions could stand alone" whereby "[n]either section is dependent upon the other."¹⁷ Thus to read the Governor's line-item veto as causing *remaining* sections of HB 59 to *now suddenly* authorize a policy or appropriation rejected by the General Assembly would be to vest a general policymaking power in the Governor's office, by way of the narrow power of line-item veto. Such a reading is impermissible.

iii. The Controlling Board is the agent of the Legislative, not Executive, branch.

Respondents arguments ignore the fact that R.C. 127.17 establishes, as this Court has held it is constitutionally-required to do, a principal-agent relationship between the General Assembly and the Controlling Board, where it requires the Board to abide by the legislative intent *of the General Assembly* as expressed in the acts *of the General Assembly*. As the United States Supreme Court explains "An essential element of agency is the principal's right to control the agent's actions."¹⁸ "If the relationship between two

¹⁷ 32 Ohio St.2d 245, 291 N.E.2d 434 (1972).

¹⁸ *Hollingsworth v. Perry*, 133 S.Ct. 265 (2013), citing 1 Restatement (Third) of Agency § 1.01, Comment f (2005).

persons is one of agency ..., the agent owes a fiduciary obligation to the principal."¹⁹ And principals cease to act as agents when they "answer to no one [and] they decide for themselves, with no review."

Here, the Controlling Board's obligation is to its principal: the General Assembly only. And the executive branch has no right to control the actions of the legislature's agent. The General Assembly's only specific act related to this appropriation was to rather clearly prohibited expansion of ACA Medicaid spending in Ohio. R.C. 127.17 solidifies that the Controlling Board carries a fiduciary obligation to honor that intention.

Relatedly, Respondents contend that after a Governor's veto, "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," can only be demonstrated through three-fifths of the General Assembly overriding the Governor's veto. This principles ignores the plain meaning and constitutional limits of the Controlling Board because it empowers the Board to ignore the legislature while the Executive Branch makes policy and appropriations at variance with the appropriations bill it passed.

To Respondent, it is irrelevant whether 100 percent of the General Assembly passed a budget bill with a clear prohibition before presenting an appropriation matter to the Governor, or whether as much as 59 percent of the General Assembly votes to override the Governor's veto. However, the Respondents then begin to cite a series of isolated statements regarding the "legislative intent of the General Assembly" as demonstrated by bills passed by as little as 51 percent of the General Assembly.²⁰

Moreover, this Court has already rejected this argument in *State ex rel. Meshel v. Keip*: it is immaterial 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 in this Court: "The fact the General Assembly can reenact a law is irrelevant."²¹ And this holding is of course correct - - 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 required, such as the attachment of emergency

¹⁹ 1 Restatement § 1.01, Comment *e*.

²⁰ Relators' Merit Brief, at p. 26-27.

²¹ See *State ex rel. Meshel v. Keip* (1980), 66 Ohio St.2d 379.

clauses or the initiation of constitutional amendments, the Ohio Constitution specifically states as much,²² 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.

Ultimately, the Respondents overextend the power of the Executive Branch's line-item veto, and undersell the constitutional authority of the legislative branch to govern appropriations, as well as the principal-agent relationship necessarily existing between the legislature and Controlling Board. As a result, their theory that the "legislative intent of the General Assembly" must be derived from acts of the Governor necessarily fails. The Controlling Board remains bound by the General Assembly's prohibition, and may not treat a line-item veto as creating new public policy with sweeping policy and appropriation implications. The Board today remains in breach of those duties.

C. While Relators' analysis gives meaning to each word of R.C. 127.17, Respondents' analysis requires this Court to delete important words from the Statute.

Next, Respondents attempt to cloak their construction of R.C. 127.17 in a form of *faux* textualism that gives rise to their general thesis: "The Court should interpret R.C. 127.17 to direct the Controlling Board to adhere only to the acts signed into law by the Governor, not to conflicting provisions vetoed by him."²³ However, this mind-bending "application"-"construction"-"interpretation" (Respondents cannot decide whether the statute is ambiguous or not) lacks credibility, and cannot possibly prevail as against the straightforward use of all words employed in Relators' analysis.

R.C. 127.17, carefully crafted to ensure the Controlling Board's constitutionality and fidelity to the General Assembly, 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." The phrase "General Assembly" is utterly unambiguous: Section 1, Article II of the Ohio Constitution defines it as "consisting of a senate and

²² See Section 1, Article 16 and Section 16, Article II: each require approval of "three-fifths of members elected to each house.

²³ Respondents' Brief, p. 23.

house of representatives." The "General Assembly" plainly does not include the Governor. Thus, "the intent of the general assembly" also excludes acts of the Governor.

The Respondents' concede that their proposed view of the statute would narrow the meaning of this limit to "prevailing appropriation acts" at most, but ideally, "enacted laws" only. This unnatural and ends-oriented construction fails because it changes and eliminates key words in the statute: the words, "of the general assembly."

Thus, attempting to evade the reality that Controlling Board acts must reflect the intentions of the General Assembly alone as expressed in the budget bill presented to the Governor, Respondents offer a proposed construction of R.C. 127.17 that looks like this:

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~~.

Respondents' proposed construction of R.C. 127.17 would render the phrase "of the General Assembly," which appears twice for emphasis, entirely meaningless, thereby transgressing the plain language, any reasonable construction of the text, and the axiom that all words in statute must be given meaning and effect.

However, a state agency or court may not simply strike through a substantive portion of a duly enacted statute when construing or enforcing it. In Ohio, "in resolving this question of statutory interpretation, courts must first look to the language of the statute itself."²⁴ Further, "courts read statutes and regulations with an eye to their straightforward and commonsense meanings,"²⁵ and when it is possible to "discern an unambiguous and plain meaning from the language of a statute, [a court's] task is at an end."²⁶ "Every word in the statute is presumed to have meaning, and [courts] must give effect to all the words to avoid an interpretation which would render words superfluous or redundant."²⁷

²⁴ See *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 237, 110 S.Ct. 2356 (1990).

²⁵ *Henry Ford Health Sys. v. Shalala*, 233 F.3d 907, 910 (6th Cir.2000).

²⁶ *Barilik v. United States Dep't of Labor*, 62 F.3d 163, 166 (6th Cir.1995) (*en banc*).

²⁷ See *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112, 111 S.Ct. 2166 (1991).

Further, "the entire statute is intended to be effective;" and "[i]n 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."²⁸ Not a single word may be deleted because "the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute it is inserted to accomplish some definite purpose."²⁹ Accordingly, "[i]n looking to the face of a statute or Act to determine legislative intent, significance and effect should be accorded to every word, phrase, sentence and part thereof, if possible."³⁰ "Inclusion of a term as a modifier is meaningful," and must be concluded to have modified the words with which it is associated.³¹ For this reason, "in reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment."³²

Here, the plain language of the act is at variance with Defendants' preferred construction.

Those who enacted R.C. 127.17 knew that the Governor maintained the power of line-item veto. Accordingly, they could have simply stated "The Controlling Board shall take no action which does not carry out the law." However, that is obviously not what they wrote: they deliberately rejected this to maintain the constitutionally-required principal-agent relationship between the General Assembly alone and the Controlling Board.

Respondents produce no justification for insisting on that this Court exclude the words "of the General Assembly" twice; and nor could they. The most they can say is that *Courts*, when adjudicating *enacted laws*, judge the General Assembly's intent by what it enacted, and when making this argument, they cannot bring themselves to quote the actual language of R.C. 127.17.³³ The obvious response to this is two-fold. *First*, the Controlling Board *is* required to review what *the General Assembly* enacted through HB 59 as passed and submitted to the Governor. *Second*, the Controlling Board *is not a court*: its job is *not* to adjudicate Ohio law - - instead, it is an agent of the General Assembly, created by it and beholden to it only,

²⁸ *Columbus-Suburban Coach Lines*, *supra.*; *Wheeling Steel Corp.*, *supra.* Emphasis Added.

²⁹ *State ex rel. Cleveland Elec. Illum. Co. v. Euclid* (1959), 169 Ohio St. 476, 479, 482.

³⁰ *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, paragraph five of the syllabus; R.C. 1.47(B).

³¹ *State v. Wilson*, 77 Ohio St.3d 334, at 336, 337.

³² *MacDonald v. Bernard* (1982), 1 Ohio St.3d 85, 89, 1 OBR 122, 125, 438 N.E.2d 410, 413.

³³ Respondents' Merit Brief, p. 36.

and required to abide by both the law enacted and the intent of the General Assembly alone. This leaves the Respondents, failing to recognize the uniqueness of the principal-agent relationship between the legislature and the Board, muttering their standard fallback language about an "unprecedented" "revolutionizing the Revised Code."³⁴

D. While Relators' analysis gives meaning to each word of R.C. 127.17, Respondents' analysis requires this Court to rewrite the Statute.

That the Respondents would have the Court *even further* depart from the plain language of R.C. 127.17 would be an understatement. They use "interpret" as a synonym for "re-write" and "ignore," insisting (1) "This Court should interpret R.C. 127.17 to direct the Controlling Board only to enacted laws;" (2) "binding laws;" (3) "actually enacted appropriation laws;" and (4) "enacted laws with legal effect."³⁵

First and foremost, this approach fails for the same reasons as above: it includes the intentions and acts of the Governor, when R.C. 127.17, as it must, binds the Controlling Board to act as an agent for the General Assembly alone. In addition, this approach fails because Respondents impermissibly attempt to separate the words of the statute into isolated silos, divorced from the constitutional context of Ohio's separation of powers principles, as well as from modifying words such as "of the General Assembly." However, Dictionary definitions of single words, taken from Respondents' no-doubt hand-picked dictionaries, out of context and without respect to the entirety of the statute, cannot change the statute's meaning: "in reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment."³⁶

Even then, this approach fails on its own terms. Respondents claim that the phrase "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" means "the law." But if this were true, why didn't the General Assembly just use the phrase "the law"? It's certainly more concise. And the term "law" is used throughout the Ohio Constitution, so the drafters of R.C. 127.17 knew how to use it.

³⁴ Id., at p. 37.

³⁵ Respondents' Brief, p. 24.

³⁶ *MacDonald v. Bernard* (1982), 1 Ohio St.3d 85, 89, 1 OBR 122, 125, 438 N.E.2d 410, 413.

Respondents further contend that the Ohio Constitution only uses the term "act" with reference to enacted law.³⁷ This is dead wrong, and Respondents are forced to mislead the Court as to the language of Section 16, Article II to prove their point.³⁸ Indeed, It is *unfathomable* that Respondents would even attempt to make this argument. Under the Ohio Constitution, an "act" is as such after passed by the General Assembly but *before* signed by the Governor; and is a "Law" after signed by the Governor or otherwise enacted into law. numerous Sections of Article II of the Ohio Constitution - - Sections 1c, 15(A), 26 - - create prohibitions on government conduct by using the phrase "no law." These same section differentiate a "bill" from an "act," and an "act" from "law." Most prominently, Section 16, Article II states "If the governor approves an act, he shall sign it, it becomes law and he shall file it with the secretary of state." Thus, the "act" of the General Assembly is generally understood to be the passed and presented Bill that appears before the Governor for his approval or rejection - - here, HB 59 before the Gubernatorial vetoes. And this makes sense: the Governor's veto is obviously not an "act of the General Assembly," and must be excluded.

Of equal importance, the Ohio General Assembly knew how to write the word "act" without reference to an act "of the General Assembly." This is proven by the language that the legislature uses elsewhere in granting authority to the Controlling Board. In R.C. 127.14 and R.C. 127.15, the legislature empowered the Controlling Board to act, subject to R.C. 127.17, to "authorize, with respect to the provisions of any appropriation act* * *" and to "authorize any state agency for which an appropriation is made, in any act making appropriations for capital improvements* * *." Thus, the legislature knew how to craft a definition in the way that the Respondents ask this Court to construct R.C. 127.17: elsewhere in Controlling Board legislation they used the term "act" rather that "act of the General Assembly." That the legislature knew how to use such a term, and used it elsewhere, but deliberately refrained from using it in R.C. 127.17, is strong evidence that the legislature fully intended the this statutory limitations to be tethered *not* to the

³⁷ Respondents' Merit Brief, at p. 29.

³⁸ Id., at p. 30.

final act after the Governor's intervention, but as the law states, to the final act of the *General Assembly alone* - - HB 59 as passed and presented to the Governor.

Recognizing the tenuousness of their reliance on the word "act," Respondent next assert "[b]y Modifying 'act' with 'prevailing,' the General Assembly removed all doubt that it sought for the Controlling Board to follow passed acts that have become, and remain, the effective law of this State."³⁹ This assertion is a non-sequitur: the word "prevailing" simply is not the magic wand that Respondents claim. *First*, even ignoring the phrase "of the General Assembly," the "act" that is the biennium budget bill undergoes numerous amendments and iterations before passed out of the House, and then the Senate, before reconciliation by both houses of the General Assembly. Only then is it voted upon. After all of these versions, modifications and amendments, the act receiving an affirmative vote of each house is "prevailing."

E. The avoidance canon favors Relators, not Respondents.

Recognizing the their proposed application fails to pass the straight-face test, Respondents next ask this Court to utilize the avoidance cannon to re-write R.C. 127.17. Respondents suggest that enforcing the plain meaning of R.C. 127.17 would "trigger the serious constitutional problem" of permitting the Controlling Board to "ignore the Governor's veto."⁴⁰ Such arguments should remind the Court of local governments' contentions in *Norwood v. Horney* that "public use" limitation on takings of property in the Ohio Constitution should be construed as "public purpose" to permit a more expansive realm of takings.⁴¹ The Court rejected such a re-wording there, and should similarly reject this effort to expand government power beyond its constitutional boundaries through semantic games.

More directly, Respondents' plea fails to recognize that a Governor's line-item veto is not policymaking - - it is simply the removal of certain items from the budget, rather than the creation of *new* policies that must be followed by the Board. Nobody disputes that the Controlling Board may not appropriate funds that the Governor has vetoed from the budget. But when the General Assembly prohibits an appropriation, the Controlling Board is *still* bound to abide by the General Assembly's policies, even if

³⁹ Respondents' Merit Brief, p. 26.

⁴⁰ Respondents' Brief, at p. 34.

⁴¹ See 110 Ohio St.3d 353 (2006), at 374.

removed, because the Controlling Board is an agent of the General Assembly, and it would be wrongly acting instead as an agent of the Executive Branch were it to make an appropriation expressly forbidden by the General Assembly (the Governor and Legislature must settle this dispute before the Controlling Board may act). Put another way, the Board may not authorize appropriations (1) vetoed by the Governor; OR (2) expressly forbidden by the General Assembly. This is the only understanding consistent with the Ohio Constitution and the Controlling Board's limited and minor purposes.

Indeed, the Respondents are ignoring that this Court has already determined this issue in Relators' favor: 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."⁴² 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 an *agent* of the General Assembly. Thus, stringent enforcement of R.C. 127.17 is critical to our entire constitutional order.

Further, under our system of checks and balances, the Governor is not a king: he cannot create appropriations authority out of thin air over the opposition of the General Assembly, through use of the line-item veto. Indeed the Ohio Constitution "evinces a strong reaction to the executive autocracy that prevailed under the Ordinance of 1787."⁴³ Accordingly, the Controlling Board's duty to abide by the General Assembly's express prohibitions on particular appropriations is not "ignoring the Governor's right to veto items in appropriation acts."⁴⁴ Instead, it simply recognizes our constitutional order: the General Assembly controls appropriations; the Controlling Board is the agent of the General Assembly and not the Governor; and the Governor cannot create appropriation authority for the Controlling Board, through veto or otherwise. Indeed, the Respondents make their claims as though the Controlling Board was *mandated* by the veto to vote "yes" on the Medicaid appropriation.

⁴² See *State ex rel. Meshel v. Keip* (1980), 66 Ohio St.2d 379.

⁴³ *Sheward*, *supra*.

⁴⁴ *Id.*, at p. 27.

Finally, Respondents ask this Court to remove the requirement that the Board abide by enact laws and in addition the unambiguously-expressed intentions of the General Assembly. Under Respondents' radical proposal, the Controlling Board could appropriate funds (with public policy conditions attached) even if the appropriation and its conditions are expressly opposed by the very constitutional body that created it.

Thus, Respondents' proposed limiting construction is not "limiting" at all: instead, it would dramatically expand the scope of the administrative Board's authority, well beyond that contemplated at the time of its creation, or constitutionally-permitted. Ohio precedent firmly states "a court cannot cure invalidity merely by striking such limiting language, if the elimination of such limiting language *would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative encroachment.*"⁴⁵ Removing the Controlling Board's link to the General Assembly through effectively reading the phrase "of the General Assembly" out of R.C. 127.17 dramatically extends the scope of the Controlling Board's power, rendering it a *second* legislature unto itself. This would authorize an entirely new system of lawmaking in Ohio - - one not authorized or contemplated by the Ohio Constitution. But of course the purpose of a "limiting" or "narrowing" construction is to "limit" or "narrow" the reach of the statute, rather than to expand it.⁴⁶

Courts oppose "creat[ing] a program quite different from the one the legislature actually adopted,"⁴⁷ and accordingly, Respondents' construction must be rejected; and the plain language of R.C. 127.17 must be applied. That language compels the Controlling Board to abide by the General Assembly's prohibition on the expanded Medicaid spending contemplated by the ACA.

F. Once R.C. 127.17 is properly applied, it is clear that the Controlling Board is breaching its duty.

Respondents conclude that, once they re-write the words of R.C. 127.17 to state "the appropriation act that passed into law," and/or "the prevailing appropriation act that became law," and/or "the legally

⁴⁵ Id., at p. 7, PageID#673.

⁴⁶ *U.S. v. Skilling*, 130 S.Ct. 2896, 2933 (2010).

⁴⁷ *Sloan v. Lemon*, 413 U.S. 825, 834 (1973).

effective appropriation laws,"⁴⁸ the Controlling Board has complied with its duty. Indeed, were the Court to entirely change almost all of the words in the statute as Respondents' suggest, they may be entitled to prevail. But because the Court cannot do that, its analysis of Respondents' application of R.C. 127.17 to the Controlling Board's action must necessarily be truncated.

Once this Court applies the actual words used in R.C. 127.17, this case is straightforward. As Relators' Merit Brief thoroughly demonstrates, review of Section 5163.04 of HB 59 makes it clear that the Controlling Board is breaching its clear legal duty to act as an agent for the General Assembly.

The Respondents do cite to some very vague and generalized provisions of the HB 59 that appear "in the general background chapter for the Medicaid program" indicated that the Medicaid Director may spend funds that are "available."⁴⁹ However, the General Assembly's express prohibition on expanded Medicaid spending as contemplated by the ACA is far more specific and precise, and it is an accepted rule of statutory construction, as articulated in R.C. 1.51, that "[i]f a general provision conflicts with a special or local provision . . . the special or local provision prevails as an exception to the general provision."

Needless to say here, the General Assembly was aware of and debated the precise ACA funds at issue, and expressly rejected them. The bottom line is that Respondents' position is only workable if this Court changes the words of R.C. 127.17 in a way that breaches constitutional separation of powers principles, ignores the General Assembly's actually-expressed intent and crowns the Executive Branch with seemingly-unlimited policymaking and appropriation authority.

Lastly, however, Respondents do attempt to argue that even considering the General Assembly's removal of the Controlling Board's appropriation from the budget and express prohibition on the appropriation, the Controlling Board still may have complied with legislative intent.⁵⁰ More specifically, the Respondents claim that the Medicaid Director has the power to expand Medicaid coverage due to the Governor's line-item veto, and because the Director took some action toward that expansion, the Board has

⁴⁸ Respondents' Merit Brief, p. 31.

⁴⁹ Respondents' Merit Brief, p. 32-33.

⁵⁰ Respondents' Merit Brief, p. 38.

simply done something not prohibited in funding that expansion.⁵¹ This fails first because (1) the General Assembly, as the Governor's veto statement itself acknowledged, expressly prohibited appropriation of ACA Medicaid expansion funds irrespective of the Medicaid Director's conduct; (2) appropriation of the ACA funds carries with it the condition that Medicaid coverage be expanded, meaning that the Controlling Board's appropriation effectively expanded Medicaid in Ohio; and (3) the funding of the expansion with the ACA federal funds is the only way by which the expansion could take place, since the General Assembly did not authorize state funds for this venture. The Controlling Board's appropriation, as the conduit to the condition-laden federal ACA funds, is the centerpiece of the clearly-prohibited expansion; and this is why the Executive Branch was forced to use the Controlling Board in the first place.⁵²

G. Relators maintain standing here.

On standing, Respondents misguidedly contend that the State Representative-Relators maintain only a generalized grievance, and do not maintain legislator standing.

First, the State Representative Relators clearly maintain private standing - - and it need not be "legislator standing": it is simply "standing." There is an injury: at least several of these Relators (1) were elected to make the decision, on behalf of their constituents regarding ACA Medicaid expansion; (2) vigorously debated the issue and took uniquely individual efforts to have included within House Bill 59 a prohibition on expanded Medicaid spending in a legal environment where the Controlling Board is required to abide by such a prohibition; (3) voted for HB 59; (4) now suffer from their work and their vote related to the Medicaid expansion impermissibly ignored by the Controlling Board; and (5) now suffer from having their public policymaking authority on a preeminent policy issue usurped by the Controlling Board. These harms are unique to legislators.

⁵¹ Id., at p. 38.

⁵² Respondents are incorrect that restricting the Controlling Board to abide by legislative intent while the Medicaid authority has discretion (not a mandate) to expand the Medicaid population creates an anomaly: the Medicaid Director may expand, but his authority is bridled by the availability of funds that have been lawfully appropriated by the legislature or can be authorized by the Controlling Board - - the ACA funds are simply not amongst those.

Next, there is causation: the Controlling Board's October 21 appropriation negated the work these legislators completed, and usurped their policymaking authority. And finally, there is redressability: requiring the Controlling Board to abide by the General Assembly's intent, as expressed by Medicaid expansion prohibition, restores the value of the work the legislators performed in procuring that prohibition, and restores the proper balance of power between them and an administrative Board that is expected to serve as their agent. Consequently, legislative Relators maintain standing.

Moreover, Respondents are wrong to suggest that Relators lack public right mandamus standing. For such standing, all that is required is sufficient allegation of the elements of mandamus, alongside (at least statutorily), a "beneficial interest in the subject matter of the action." In addition, Respondents are wildly misguided in asserting that something extra beyond a viable mandamus claim is necessary to maintain standing in this Court: Section 2(B)(3), Article IV of the Ohio Constitution clearly provides that there shall be no such extra qualifications "or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court."

Finally, although not essential to its analysis, to the extent that this Court views it helpful, this is a "rare and extraordinary" case of "public importance" for the reasons articulated in Relators' Complaint and Merit Brief, and now throughout the briefs of Respondents' many *amici*. This matter raises grave constitutional concerns at the heart of our form of representative government, and adjudicates how, if at all, a transformative health care policy that affects everyone can or must be implemented: if this case were not a quintessential public right case, then that standard would have lost its meaning.

H. There is no adequate remedy at law, and this is far from a "disguised" declaratory relief action.

The "real object sought" here is not and could not be "declaratory judgment and a prohibitory injunction," as the Respondents assert.

As an initial matter, under Ohio courts' jurisprudence, it is currently uncertain whether *any* Ohioan could maintain an action like this as an action for declaratory and injunctive relief - - that issue, albeit

without legislators with private individualized standing, is pending before this Court.⁵³ Indeed, the State's own track record on these matters demonstrates its position to be that no Ohioan, through declaratory and injunctive relief, may pursue matters such as this, and that such matters *must* be initiated through mandamus.⁵⁴ Some Ohio Courts, at the State's behest, have, at minimum, interjected vast uncertainty as to whether declaratory or mandamus relief is proper; and this uncertainty will remain unresolved until this Court decided *ProgressOhio v. JobsOhio*. In the interim, it remains ironic and prejudicial for the State to now entirely flip its position to suit its litigation interests *sub judice*. This Court can no doubt appreciate the difficult position this creates for litigants.

Moving beyond the irony, the "true nature of the claim" here is one rightfully in mandamus. To support their view, Relators cite to only precedent adjudicating the constitutionality of *enacted statutes and ordinances*.⁵⁵ But this is a critical distinction: the Controlling Board's action is an exercise of "quasi-legislative exercise of power" by a clearly "inferior tribunal" - - a "board." This Court *defines* mandamus 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."⁵⁶ 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,⁵⁷ and further the Controlling Board's authority is sufficiently limited to its constitutional confines only 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."⁵⁸

⁵³ See, generally, *ProgressOhio v. JobsOhio*, 2012-Ohio-1272.

⁵⁴ See the State of Ohio's June 25, 2013 Merit Brief, repeatedly asserting that the Appellant were are and required to bring their claims as mandamus claims.

⁵⁵ Respondents' Merit Brief, p. 19.

⁵⁶ *State ex rel. Zupancic v. Limbach* (1991), 58 Ohio St.3d 130, 131–134, 568 N.E.2d 1206, at 1207–1209

⁵⁷ *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.

⁵⁸ *Id.*

Furthermore, *none* of Respondents arguments can counter the realities that declaratory and injunctive relief would not be "complete" or "speedy," as Relators fully demonstrate in their Merit Brief. The fact of the matter is that under the Respondents' approach, the Ohio General Assembly and proponents and opponents of the pending ballot initiative to expand Medicaid would be caught in limbo as to Ohio's health care policy as this matter navigated its way through the system. Meanwhile, the State would have already wrongfully offered government benefits, along with all of the inducement to drop one's private health insurance, only to have to later retract the offers made.

Nor would declaratory relief be "complete." As Respondents Merit Brief demonstrates, there is a considerable dispute over the authority vested in state agencies by the Governor's line-item veto of the General Assembly's prohibition on ACA Medicaid expansion. Respondents suggest that this veto *creates* appropriation authority and policy. But a veto that would do that would exceed the powers granted in Section 16, Article II. Accordingly, this Court's order will be necessary to direct affirmative duties not just related to the October 21, 2013 Controlling Board appropriation, but likely beyond. The duty to defer to the General Assembly by recognizing the limitations of gubernatorial appropriation, insofar as the Governor cannot and did not hear create appropriation authority, is a quintessential matter for mandamus, and a matter that no Ohioan may maintain the capacity to bring through declaratory and injunctive relief.

Finally, in issuing writs compelling compliance, this Court emphasizes that "constitutional prohibitions cannot be treated casually or ignored."⁵⁹ In *Ryan*, the Court held "this court ... orders ... that a writ issue compelling respondents to comply with the provisions of Sections 6 and 13 of Article VIII of the Ohio Constitution."⁶⁰ Meanwhile, this Court emphasizes "we will not elevate form over substance,"⁶¹ and holds "where the allegations of a petition are sufficient to warrant the general relief sought, the form of the prayer is immaterial."⁶²

⁵⁹ *State ex rel. Ryan v. City Council of Gahanna*, 9 Ohio St 3d 126, 459 NE 2d 208 (1984)

⁶⁰ *Id.*

⁶¹ *Hollon v. Clary*, 104 Ohio St.3d 526, 2004 -Ohio- 6772.

⁶² *Blackwell v. Bachrach* (1997)(*Syllabus by the Court*):

III. 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 21, 2013 appropriation of federal ACA Medicaid funds as void.

Respectfully submitted,

/s/


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CERTIFICATE OF SERVICE

The foregoing was served upon the parties specified below this ²⁴th Day of ~~November~~ ^{December}, 2013:

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