ORIGINAL

IN THE
SUPREME COURT OF OHIO

TOLEDO CITY SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,	)	Case No. 2014-1769
Appellees,	)	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	)	
STATE BOARD OF EDUCATION OF OHIO, *et al.*,	)	Court of Appeals Case Nos. 14AP-93, 14AP-94, 14AP-95
Appellants.	)	

BRIEF OF AMICI CURIAE THE OHIO SCHOOL BOARDS ASSOCIATION, THE BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS, THE OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, THE OHIO EDUCATION ASSOCIATION, AND THE OHIO FEDERATION OF TEACHERS IN SUPPORT OF APPELLEES

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INTRODUCTION

This appeal poses the question of whether Ohio's General Assembly can constitutionally enact an uncodified law retroactively shielding the Ohio Department of Education ("ODE") from liability for its unauthorized adjustment of school districts' funding that resulted in the Toledo, Dayton, and Cleveland school districts in this case losing approximately $40,000,000 in funding over three fiscal years. *Amici curiae*, the Ohio School Boards Association ("OSBA"), the Buckeye Association of School Administrators ("BASA"), the Ohio Association of School Business Officials ("OASBO"), the Ohio Education Association ("OEA"), and the Ohio Federation of Teachers ("OFT") write in support of the Appellees.

OSBA is a nonprofit 501(c)(4) corporation dedicated to assisting its members to more effectively serve the needs of students and the larger society they are preparing to enter. All but three of the more than 700 school district boards throughout Ohio are members of OSBA, whose activities include extensive informational support, advocacy, board development and training, legal information, labor relations representation, and policy service and analysis.

BASA, a statewide 501(c)(6) organization representing over 95% of school district superintendents in Ohio, is dedicated to assisting its members to more effectively serve the needs of school administrators and their school districts. BASA provides extensive informational support, advocacy, and professional development in an effort to support their professional practice.

OASBO is a statewide organization representing over 1,200 school business officials in Ohio. OASBO is a nonprofit 501(c)(6) corporation dedicated to assisting its members to more effectively serve the needs of the boards of education and school administration of their school districts. OASBO provides extensive informational support, advocacy, professional development, business services and search services for school business officials.

OEA is a professional association whose affiliated local associations currently represent more than 121,000 educators, faculty members and support professionals working in Ohio's schools, colleges, and universities. OEA works to help improve public education and the lives of Ohio's children. In fiscal years 2005-2007, the period at issue in this litigation, OEA had an average of just over 109,000 active members employed in public elementary and secondary schools in Ohio; this included approximately 1,450 members working for Appellee Dayton City School District during each of those years.

OFT is a union of professionals that envisions an Ohio where all citizens have access to the high quality public education and public services they need to develop to their full potential. OFT champions the social and economic wellbeing of its members, Ohio's children, families, working people and communities. OFT is committed to advancing these principles through community engagement, organizing, collective bargaining and political activism, and especially through the work of its members.

STATEMENT OF FACTS

Amici curiae adopt, and hereby incorporate by reference, the statement of facts set forth in the brief of the Appellees, Toledo City School District Board of Education, et al.

ARGUMENT

Proposition of Law:

Prior jurisprudence and public policy concerns require this Court to find that the Retroactivity Clause protects school districts and other political subdivisions from retroactive enactments of the General Assembly.

A. A Plain Reading of the Retroactivity Clause Supports Its Application to School Districts.

This Court has held that, when "construing the Constitution, we apply the same rules of construction that we apply in construing statutes." *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 13 (quotation omitted). Accordingly, when construing the

Constitution, this Court "first looks to the language * * * and the purpose to be accomplished." *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, 173, 661 N.E.2d 1049 (1996) (quotation omitted). "It is equally well settled that words used * * * are to be taken in their usual, normal and customary meaning." *Id.* Also, provisions "must be construed, if possible, to operate sensibly and not to accomplish foolish results." *State ex rel. Saltsman v. Burton*, 154 Ohio St. 262, 268, 95 N.E.2d 377 (1950).

The plain language of the Retroactivity Clause indicates that it applies to all retroactive laws passed by the General Assembly, regardless of the entity affected. The Retroactivity Clause reads, in relevant part: "The general assembly shall have no power to pass retroactive laws." Ohio Constitution, Article II, Section 28. Black's Law Dictionary defines "retroactive" to mean "[t]he quality, state, or condition or having relation or reference to, or effect in, a prior time." *Black's Law Dictionary* (10th Ed. 2015). On its face, the provision forbids the General Assembly from passing any law having relation or reference to, or effect in, a prior time, including retroactive laws that harm the fiscal integrity of political subdivisions.

More specifically, this Court has opined that a Constitutional provision can affect school districts differently than other entities only when the provision's plain language sets forth such intent. In *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, this Court considered the applicability of Article VIII, Section 5 of the Constitution to school districts. *State ex rel. Ohio Congress of Parents & Teachers,* 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 72. In relevant part, Article VIII, Section 5 reads: "[t]he state shall never assume the debts of any county, city, town, or township, or of any corporation whatever * * *." Ohio Constitution, Article VIII, Section 5. The Court found "Ohio's school districts are not included within this provision's prohibition, for Section 5, Article VIII does not forbid the state's assumption of the debt of political subdivisions that are not of the types named." *State ex rel.*

Ohio Congress of Parents & Teachers at ¶ 72, citing *Butler County Transp. Improvement Dist. v. Tracy*, 120 Ohio App.3d 346, 359, 697 N.E.2d 1089 (12th Dist. 1997) (holding that Section 5, Article VIII does not apply to many types of political subdivisions in Ohio, such as school districts, regional water and sewer authorities, solid waste authorities, or transportation-improvement districts).

Applying *State ex rel. Ohio Congress of Parents & Teachers* to this case, because the Retroactivity Clause does not expressly exclude school districts or any other political subdivisions, those entities are entitled to legal protection under that clause. Moreover, the language in Article VIII, Section 5, which was drafted at the same Constitutional Convention as the Retroactivity Clause, demonstrates that the drafters of the Constitutional provisions were deliberate in excluding certain political subdivisions from Constitutional prohibitions and protections when they intended to do so. Because the drafters of the Constitution did not specifically exempt political subdivisions from protections of the Retroactivity Clause, this Court should find it applies to school districts.

B. This Court Has an Established History of Using the Retroactivity Clause to Protect the Fiscal Integrity of Political Subdivisions from Unconstitutional Legislative Action.

This Court began applying the Retroactivity Clause to protect political subdivisions soon after the Constitutional Convention of 1851, during which the Retroactivity Clause was drafted and subsequently adopted. In 1893, in *County Commissioners of Hamilton County v. Rosche,* this Court reviewed a law passed by the General Assembly granting certain entities the right to recover previously rendered overpayments of taxes from "unexpended funds belonging to said county in the county treasury." *Rosche,* 50 Ohio St. 103, 110, 33 N.E. 408 (1893). In holding that a county was protected by the Retroactivity Clause, this Court stated that "a statute like the one under consideration, the object of which is to alter the existing law respecting the right of a

taxpayer to demand and recover from the public money erroneously or mistakenly paid by him, contravenes section 26 of article 2 of the constitution of 1851." *Id.* at 115.

Relying on *Rosche*, this Court continued throughout the twentieth century to utilize the Retroactivity Clause to protect political subdivisions. In 1938, this Court again applied this clause to invalidate a law requiring counties to refund penalties and interest paid on taxes to certain entities. *See State ex rel. Crotty v. Zangerle*, 133 Ohio St. 532, 14 N.E.2d 932 (1938) ("[T]he Rosche Case requires this court to hold that the statute involved in the instant case is retroactive in its nature and therefore violative of Section 28 of Article II of the Constitution of Ohio."); *see also State ex rel. Outcalt v. Guckenberger*, 134 Ohio St. 457, 17 N.E.2d 743 (1938) (holding part of a tax penalty forgiveness statute unconstitutional for violating the Retroactivity Clause thereby protecting the financial integrity of political subdivisions).

More recent decisions by this Court have re-affirmed that the Retroactivity Clause may be applied to protect political subdivisions. For example, in *Perk v. City of Euclid*, this Court held that the Retroactivity Clause invalidated an uncodified law passed by the General Assembly for the purpose of permitting "forgiveness of an accrued tax debt, lawfully owing and not previously remissible." *Perk*, 17 Ohio St.2d 4, 7, 244 N.E.2d 475 (1969). Notably, in *Perk*, the city of Euclid argued that the precedents set in *Rosche* and *Zangerle* "do not apply to political subdivisions which are the tax creditors as well as the tax debtor, as the subdivisions are entitled to distribution of the very tax moneys which they owe." *Id.* at 7-8. With its argument, the city of Euclid presented this Court with the opportunity to reach the same conclusions now advanced by Appellants – that the Retroactivity Clause does not apply to political subdivisions. *Id.* However, this Court continued to follow the precedent it set in *Rosche* and utilized the Retroactivity Clause to protect one political subdivision, even to the detriment of another. *Id.*

This Court has a long-standing and consistent practice of protecting political subdivisions by invalidating laws that violate the Retroactivity Clause. Appellants' arguments are contrary to more than a century of cases directly applying the Retroactivity Clause in situations that protect the fiscal integrity of political subdivisions.

C. Public Policy Supports Applying the Retroactivity Clause to Protect the Fiscal Integrity of Political Subdivisions, Particularly School Districts.

Public policy concerns demand that the Retroactivity Clause continue to be utilized to protect political subdivisions. Permitting the General Assembly to retroactively adopt and cure ODE's unsanctioned actions would introduce an untenable element of instability into Ohio's school funding system. Forcing school districts to cope with such fundamentally unsettled finances could create harsh consequences for some districts. Without the assurance of financial stability, districts could be impeded from upgrading classroom technology or purchasing necessary instructional supplies and materials. These consequences could be especially acute for districts that are heavily dependent upon state funding. For instance, the Dayton City School District's reliance on state funding has increased from 42.3% of the district's total revenue in FY 2006 to 62.55% of the district's total revenue in FY 2014. *See* ODE, *District Profile Reports*, http://education.ohio.gov/Topics/Finance-and-Funding/Finance-Related-Data/District-Profile-Reports (accessed August 31, 2015).

It is undisputed that ODE unilaterally recalculated the Formula ADM of school districts during FY 2005, and recouped what it deemed "overpayments" to the districts by reducing foundation payments in the middle of the fiscal year. In that year, ODE improperly withheld approximately $1,857,311 from the Cleveland Metropolitan School District, approximately $3,576,948 from the Toledo City School District, and approximately $4,792,304 from the Dayton City School District. These losses were compounded by the foundation formula in the

following fiscal years, ultimately costing Appellees approximately $40,000,000 in school district funding.

The practical implications of retroactive changes to a public school district's state funding allotment should be obvious. Under Ohio law, school districts must adopt a budget for each fiscal year (which starts July 1) by January 15 of the preceding fiscal year. R.C. 5705.28(A)(1). To meet this deadline, they also must complete their internal budgeting process, preparing "an estimate of contemplated revenue and expenditures for the ensuing fiscal year," by the preceding December 1. R.C. 5705.28(C)(1). School districts necessarily base their plans for capital improvements, supplies, hiring – all aspects of providing public education – on the contemplated revenue from all sources, including the State of Ohio, in advance of each fiscal year. The calculation of the State's funding based on the formula for reducing a district's allocations because of enrollment in community schools is taken into account. However, retroactive reductions, coming after financial plans are in place and requiring repayment or recoupment from already-tight budgets for succeeding years, can be damaging or even devastating.

ODE's unilateral decision to rely on CSADM and recoup foundation funding resulted in substantial losses for school districts, including the three Appellee districts of Cleveland, Dayton and Toledo, with accompanying substantial impacts. As an example, due in part to the allocation of funds to community schools as well as other financial pressures, the Dayton City School District faced a $30 million deficit for fiscal year 2008, even before the demand from the ODE to repay tens of millions for the years 2005 to 2007. As the local press reported, the district was forced to close two elementary schools, eliminate 500 employment positions – including more than 300 teachers and other professionals – and make other cuts in services and programming.

See Dayton Business Journal, *Dayton to close two elementary schools* (May 29, 2007), http://www.bizjournals.com/dayton/stories/2007/05/28/daily15.html (accessed August 31, 2015).

Additionally, as a result of such fiscal uncertainty, districts could be inhibited in their efforts to create accurate five-year projections of operational revenues and expenditures, because ODE could significantly alter a district's revenue unexpectedly and at any time. Disturbing the reliability of five-year forecasts would make sound fiscal planning and budgeting excessively difficult because this forecast is the basis upon which most financial decisions are made. *See* R.C. 5705.391(B) (requiring every board of education to create a five-year forecast). Some districts could be faced with an inability to expend funds on certain contracts. Under Ohio law, a district cannot enter into a "qualifying contract" until it meets the certification requirements under R.C. 5705.412; failure to certify a "qualifying contract" results in its nullification. *See Empire Gas Corp. v. Westerville Bd. of Edn.*, 102 Ohio App.3d 613, 657 N.E.2d 790 (10th Dist. 1995). Without a reliable five-year forecast, it could be very difficult for school districts to correctly identify and certify "qualifying contracts" because the implementing statute relies heavily on calculations and projections based on this forecast. *See* R.C. 5705.412 (requiring the certification to aver that the District's current projected revenue is sufficient to pay its personnel and programs for the entire scholastic year). The question of retroactivity of the 2009 Budget Bill provisions is more than an arcane exercise in statutory interpretation and Constitutional law but, instead, is an issue that has substantial real-world implications for the affected districts.

While the case at bar specifically deals with ODE's unauthorized actions pertaining to school funding, accepting Appellants' arguments would set a precedent encouraging ODE and other executive agencies to take similarly unsanctioned actions and later press for ratification by the General Assembly when challenged in court. For instance, ODE could retroactively revise teacher evaluation procedures without statutory authority and rely on the General Assembly to

legislatively "cure" resulting litigation. Alternatively, under the precedent ODE urges this Court to set, the Department of Taxation could unilaterally revoke the sales tax exemption provided to all political subdivisions under R.C. 5739.02(B)(1), and the General Assembly could ratify the change in an uncodified section of the budget bill several years later. Setting such a precedent would create the potential for vast, unpredictable, negative effects on the management of political subdivisions.

ODE's decision to substitute CSADM counts over districts' ADMs without enacting a rule or seeking legislative change raises other public policy concerns, as well. ODE claims it substituted unverified CSADM counts for public school ADM counts in FY 2005 because the frequency of CSADM counts made them more accurate, but this theory does not comport with real-world examples. For instance, in June 2015, the Auditor of State released a special audit of the General Chappie James Leadership Academy, confirming that this community school misreported its attendance by 220 students over a three-year period. *See* Auditor of State, *General Chappie James Leadership Academy Special Audit* (June 15, 2015).[1] The faulty CSADM reports resulted in ODE overpaying the charter school by $1,179,879 over the three year period. *Id.* In October of 2014, the Auditor of State also conducted an unannounced headcount at 30 community schools. *See* Auditor of State, *Report on Community School Student Attendance Counts* (January 22, 2015).[2] The results revealed that seven community schools had significantly erroneous CSADM counts ranging from 34% over-reporting of attendance to 100% over-reporting of attendance (i.e., a community school reported having students when it, in fact,

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[1] Also available at https://ohioauditor.gov/auditsearch/detail.aspx?ReportID=115447 (accessed 8/31/2015).

[2] Also available at https://ohioauditor.gov/auditsearch/detail.aspx?ReportID=112654 (accessed 8/31/2015).

had none). *Id.* An additional nine community schools were identified as erroneously reporting CSADM counts with error rates ranging from 10% to 56%. *Id.*

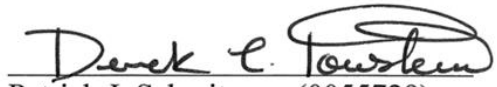
The Auditor's report does not indicate the districts of residence of the students at issue, but the General Chappie James Leadership Academy was located in the City of Dayton and many of its students likely resided within the Dayton City School District, by far the largest district in Montgomery County. Therefore, the over-reporting of student attendance by this community school – which the Auditor of State concluded was likely the result of "fraud and not simple bookkeeping errors" – almost certainly led to improperly reduced funding for the Dayton Public Schools. *See* Auditor of State, *General Chappie James Leadership Academy Special Audit* at 8 (June 15, 2015). Notably, although the Auditor's report covered the three-year period from 2011 to 2014, it found that some of the misreporting went back as far as 2007, one of the years at issue in this case. *Id.*

ODE's unilateral decision to alter a statutory scheme without any formal public input – be it through legislative enactment, the rulemaking process that governs executive agencies, or public comment on proposed policy interpretation – created real and serious consequences for the school districts at issue. Obtaining later-enacted permission from the General Assembly does not rectify ODE's failure to comply with statutory provisions, and this Court should avoid setting a dangerous precedent by endorsing ODE's actions in this case.

CONCLUSION

The Ohio School Boards Association, the Buckeye Association of School Administrators the Ohio Association of School Business Officials, the Ohio Education Association, and the Ohio Federation of Teachers urge this Court to affirm the decision of the Franklin County Court of Appeals. This Court should avoid setting a precedent allowing executive agencies to take unauthorized and unchecked actions that destabilize the fiscal operations of Ohio's political subdivisions.

Respectfully Submitted,



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