

In the  
**Supreme Court of Ohio**

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

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**REPLY BRIEF OF APPELLANTS THE OHIO DEPARTMENT OF EDUCATION,  
STATE BOARD OF EDUCATION, AND DR. RICHARD ROSS**

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## INTRODUCTION

This case concerns the General Assembly's school-district funding formula for the 2005 to 2007 fiscal years. At that time, the Ohio Department of Education read state law as permitting it to depart from a school district's estimate of the charter-school students in the district's "October Count" based on what the Department viewed as more accurate numbers. The appellee districts ("Districts") filed suit because they interpret the then-existing law as requiring the Department to use the October Count whether or not it accurately counted students. Even though this statutory question has yet to be decided in this case, the Districts repeatedly assert that it is "not in dispute" that the Department engaged in "deliberate violations" of the law. Distr. Br. 1. That is mistaken. While one district court ruled against the Department in a different case, *Cincinnati City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 176 Ohio App. 3d 157, 2008-Ohio-1434 (1st Dist.), that case settled and the issue remains unresolved in the lower courts here.

Regardless, this appeal involves a constitutional question. It arose from the pleading stage because the General Assembly later made clear that it agreed *with the Department* on the statutory question. In 2007, it clarified that the Department may depart from an October Count. In later laws, it passed "Budget Provisions" that applied this clarification retroactively. This appeal asks whether those provisions comport with Article II, § 28's Retroactivity Clause. The Department's opening brief explained that they do because: (1) the Retroactivity Clause protects citizens and does not reach laws affecting state subdivisions, Dep't Br. 9-35, and (2) even if the Clause protected state subdivisions, it would not invalidate the Budget Provisions because school districts have no vested right to state money until the funds have been distributed, *id.* at 35-45.

The Districts' response overreads the Department's position. They claim, for example, that the Department's position raises a grave separation-of-powers concern. Distr. Br. 12-13. Yet they identify no case that has said the Retroactivity Clause affects the separation of powers.

*Cf. Bielat v. Bielat*, 87 Ohio St. 3d 350, 352-53 (2000). If it did, even a state agency could assert a retroactivity challenge against a law relieving a *private citizen's* debt to it. *Cf. State ex rel. Dep't of Mental Hygiene & Corr. v. Eichenberg*, 2 Ohio App. 2d 274, 275-76 (9th Dist. 1965). But the Retroactivity Clause protects the people from the government, not the government from the people. The Districts also argue that the Department seeks to end *all* school-funding suits *for all time*. Yet this case asks *only* whether the Districts have rights protected by the Retroactivity Clause. It does not ask whether other districts may sue under other constitutional provisions as in *DeRolph v. State*, 78 Ohio St. 3d 193 (1996), or other statutory provisions as in *State ex rel. Kenton City School District Board of Education v. State Board of Education*, 174 Ohio St. 257 (1963). Indeed, in the earlier *Cincinnati* litigation, the Department did *not* challenge the district's ability to assert the statutory claim; it disputed the district's view of the relevant state law. With the Budget Provisions, however, state statutory law is no longer in doubt.

All told, the Districts call the Department's position "astonishing," Distr. Br. 2, "offensive," *id.* at 6, "dangerous," *id.* at 21, "stunning," *id.* at 34, "blatantly unlawful," *id.* at 35, and "outrageous," *id.* at 42. Respectfully, the Districts can use these "extreme modifier[s]" only by misreading that position. *Bennett v. State Farm Auto. Ins. Co.*, 731 F.3d 584, 585 (6th Cir. 2013). *Bennett's* advice thus rings true here: Of all the reasons not to use such rhetoric, the "biggest reason" is because "the argument that [the Districts] deride[] . . . is instead correct." *Id.*

## ARGUMENT

### **A. The Retroactivity Clause does not protect political subdivisions, like school districts, that are created by the State to carry out its governmental functions.**

As the Department's opening brief showed, the Retroactivity Clause protects *private parties*, not *state subdivisions*. *First*, the settled meaning of "retroactive laws" in 1851 did not reach laws affecting public bodies. Dep't Br. 10-16. *Second*, the convention debates show that

the framers sought to protect private, not public, rights. *Id.* at 16-18. *Third*, the Constitution’s structure confirms this settled meaning. *Id.* at 19-23. *Fourth*, this Court’s cases, as well as the weight of out-of-state authorities interpreting parallel clauses, reinforce the Department’s position. *Id.* at 23-30. The Districts’ response on each of these four points is mistaken.

**1. The Districts wrongly assert that the meaning of the phrase “retroactive laws” in 1851 encompassed laws affecting state subdivisions.**

When the framers enacted the Retroactivity Clause in 1851, the phrase “retroactive laws” had a settled meaning excluding laws affecting state subdivisions. Dep’t Br. 10-16. This meaning was evidenced by cases recognizing that retroactivity bans do not apply “unless they operate on the interests of individuals or of *private* corporations.” *Merrill v. Sherburne*, 1 N.H. 199, 213 (1818). And it was evidenced by two principles: that a law was “retroactive” only if it took away *vested rights*, *Soc’y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814), and that the rights of public entities “can never become such vested rights as against the State that they cannot be taken away.” Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 192-93 (1868). The Districts’ counterarguments cannot overcome this settled meaning.

*First*, the Districts argue that the Retroactivity Clause’s language “is absolute” and cannot be read to “carve out” laws affecting state subdivisions. Distr. Br. 11-12. This assertion conflicts with specific cases and with general rules. Starting with specific cases, the Districts’ reading would require the Court to overturn a century’s worth of precedent on the Clause. “Though the language of [the Clause] provides that the General Assembly ‘shall have no power to pass retroactive laws,’” the Court has repeatedly held, “there is a crucial distinction between statutes that merely apply retroactively (or ‘retrospectively’) and those that do so in a manner that offends our Constitution.” *Bielat*, 87 Ohio St. 3d at 353. Indeed, the Court’s *first*

Retroactivity Clause case held that the Clause bars *only* a law that impairs accrued rights or imposes new duties, not a law that is “purely remedial in its operation.” *Rairden v. Holden*, 15 Ohio St. 207, syl. ¶ 2 (1864). If the Clause’s text can be read to distinguish between *substantive* and *remedial* laws, it can be read to distinguish between *private parties* and *state subdivisions*.

Turning to general rules, the Districts’ argument overlooks that courts interpret “a term of art with an established meaning” in conformity with that meaning. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). “Adhering to the *fair meaning* of the text (the textualist’s touchstone) does not limit one to the hyperliteral meaning of each word in the text.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 356 (2012). Many sections of the Ohio and U.S. Constitutions mean something other than what the Districts’ hyperliteralism would compel. The federal Contracts Clause, for example, does not distinguish between public and private entities, but the Supreme Court has always held that the clause does not protect state subdivisions. *City of Trenton v. New Jersey*, 262 U.S. 182, 188 (1923); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 629 (1819). Equal-protection and due-process protections do not make this distinction either, but this Court has also held that they do not apply to state subdivisions. *Avon Lake City School District v. Limbach*, 35 Ohio St. 3d 118, 122 (1988).

*Second*, the Districts assert that the Court’s old “dower” cases show that the Retroactivity Clause reaches state subdivisions. Distr. Br. 12-14. That conclusion does not follow from these cases. In 1834, the Court invalidated a deed selling a married couple’s lands on the technical ground that it did not include an affidavit stating that officials had explained the wife’s rights to her (whether or not they had done so). *Connell v. Connell*, 6 Ohio 353, 358 (1834). When the legislature passed curative laws to validate these deeds, this Court initially struck down the laws but later approved them. *Chestnut v. Shane’s Lessee*, 16 Ohio 599, 601-03, 610-13 (1847).

The Districts fail to explain the relevance of this history to the question here. The history shows why the Retroactivity Clause’s ban has an *exception* for laws authorizing courts to cure technical defects. Ohio Const. art. II, § 28. But it sheds little, if any, light on how to pick between the Department’s view (that the Clause’s ban does not apply to state subdivisions) and the Districts’ view (that it does). If anything, this history supports the Department. It shows that the Retroactivity Clause was passed amid a controversy over *private property* and so reinforces that it was designed to protect private rights. As this Court said, “[t]housands held lands by” deeds like the one invalidated by *Connell*, “and they felt secure and dreamed of nothing that could strip them of their titles or endanger their property.” *Chestnut*, 16 Ohio at 601.

The Districts retort that this history shows that the Clause protects *state courts*, not *private property*, by barring the General Assembly from making “judicial-like decisions.” Distr. Br. 12. Yet the Districts identify no case stating that the Clause enforces the separation of powers (as compared to vested rights, *Bielat*, 87 Ohio St. 3d at 353). If the Clause regulated separation of powers, the Court long ago would have said so. But its cases contradict this argument. As noted, the Court has held that the Clause permits remedial statutes, *Rairden*, 15 Ohio St. at 210-11, even though those statutes might raise separation-of-powers concerns. Cases from the sexual-predator context provide a good example. In that context, the Court rejected arguments that a retroactive law violated the Clause, *State v. Cook*, 83 Ohio St. 3d 404, 410-14 (1998), but later *distinguished* that case when holding that a different law violated the separation of powers because it reopened final court judgments (with nary a mention of the Clause in its separation-of-powers analysis), *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, syl. ¶¶ 2-3. Here, however, the General Assembly *respected* the separation of powers: It *exempted* cases that had gone to final judgment from the Budget Provisions’ reach. Dep’t Br. Appx. 132.

*Third*, the Districts rely on the Retroactivity Clause’s *location* in Article II (the legislative power) rather than Article I (the bill of rights) as evidence that the framers intended to reach state subdivisions. Distr. Br. 15-16. Yet the framers likely placed the Clause and its neighboring ban on “impairing the Obligation of Contracts” in the legislative-power article because that is where their *federal* counterparts, the ex post facto clause and the federal Contracts Clause, sit in the U.S. Constitution. U.S. Const. art. I, § 10. By 1851, the Supreme Court had already concluded that the federal Contracts Clause does *not* protect state subdivisions. *Dartmouth*, 17 U.S. at 629. There is no basis to interpret the state Contracts Clause differently to reach state subdivisions simply because it is in Article II. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849 ¶ 10. The same is true for the Retroactivity Clause.

*Fourth*, the Districts downplay the settled meaning of “retroactive laws” in 1851. They do not dispute that cases like *Merrill* limited retroactivity bans to private parties, but dismiss their statements as “dicta.” Distr. Br. 16. Whether dicta or not, these statements publicly articulate principles about retroactivity bans that show the bans’ meaning when the framers acted in 1851. They are thus useful evidence of that meaning. Regardless, their statements were compelled by the general rule that state entities lack vested rights against the State. Such a view was treatise law, Cooley, *supra*, at 192-93, and many cases made the point in statements that cannot be dismissed as “dicta,” see, e.g., *Maryland ex rel. Wash. Cnty. v. Balt. & Ohio R.R. Co.*, 44 U.S. 534, 550 (1845) (rejecting vested-rights claim because “counties are nothing more than certain portions of territory into which the state is divided for the more convenient exercise of the powers of government”); *Police Jury of Bossier v. Corp. of Shreveport*, 5 La. Ann. 661, 661 (La. 1850) (rejecting vested-rights claim because such a claim “grow[s] entirely out of the violation of contracts with, or the vested rights of[,] individuals or private corporations”).

**2. The Districts cite nothing from the convention debates proving that the founders cared about *public*, not just *private*, rights.**

As the Department’s opening brief indicated, the constitutional debates reinforce the settled meaning of “retroactive laws” because they show a focus on private rights and prove that the framers knew of the phrase’s meaning. Dep’t Br. 16-18. The Districts’ responses lack merit.

*Private Parties.* The Districts pejoratively call “fleeting” the debates’ references to protecting *private* parties. Distr. Br. 18. Yet the debates on the Clause were *universally* about private parties. Countless examples exist. In addition to the opening brief’s citations, for example, the debates about the dower cases turned on private rights. During a discussion of the cases, a delegate said that “[i]t matters not whether it is right or wrong—it has left the law in uncertainty and the rights of *individuals* dependent upon the opinions of the Supreme Court.” 1 J.V. Smith, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio* 268 (1851) (“*Debates* Vol. 1”) (emphasis added).

The Districts, moreover, identify *no* reference to protecting state subdivisions. As the Department noted, Dep’t Br. 18, the only reference of which it is aware distinguishes *public corporations* from private corporations because the State can retroactively affect the former. 2 J.V. Smith, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio* 270 (1851). The Districts critique this citation, noting that “the term ‘public corporations’ is [the Department’s],” not the delegate’s. Distr. Br. 18. Yes, the delegate used “municipal corporation.” But it means the same thing, as evidenced by his citation to a case from the “4th Ohio Rep.”—*Town of Marietta v. Fearing*, 4 Ohio 427 (1831)—which discussed the “well-settled distinction between private and public corporations.” *Id.* at 432.

*Preexisting Authorities.* The Districts next assert that the debates show that the phrase “retroactive laws” had no settled meaning in 1851 because some debaters claimed that the phrase

was *more* novel than the U.S. Constitution’s ex post facto ban. Distr. Br. 15. To be sure, the debates were, in fact, debates. Some wished to enact the familiar (and narrower) ex post facto ban, which applied *only* to criminal proceedings. *Calder v. Bull*, 3 U.S. 386 (1798). But even a delegate who preferred that narrow ban conceded that “[w]hen we are talking about terms and words, we must take them as they have received their force from usage.” *Debates* Vol. 1 at 268. He added that “[t]here is not a gentleman in this Assembly, who does not know that the term ex post facto has received from usage a particular meaning, and that the word *retro-active* has received a different meaning.” *Id.* (emphases added and deleted). When the delegates searched for the latter’s meaning, they landed on the one excluding public entities: Judge Nash directed them to *Merrill*. *Id.* at 269. Unsurprisingly, therefore, after Ohio became the fifth State to adopt a retroactivity ban, this Court followed the New Hampshire cases because the two States’ retroactivity bans were “substantially identical in signification.” *Rairden*, 15 Ohio St. at 211.

**3. The Districts miss the point of the Constitution’s structural clues about the Retroactivity Clause’s scope.**

The Districts next take aim at the Department’s structural arguments: When the framers granted constitutional protections to *governmental actors* they did so expressly (the Home Rule Amendments), but the constitutional education provisions (Article VI) show that the State is supreme over school districts. Dep’t Br. 19-23. The Districts mistakenly argue otherwise.

*Home Rule Amendments.* On Home Rule, the Districts paradoxically assert that their challenge to state law does “not attempt[] to challenge” state law. Distr. Br. 19. That is exactly what the Districts seek; they claim to have *constitutional* rights that can “not be divested” by a *statute*, *id.* at 3, and thus that the Budget Provisions are “beyond the reach of the General Assembly,” *id.* The Districts are not, as they claim, trying to “*enforce* state law,” *id.* at 19; they are trying to *trump* it. That is not something the Districts can do under the Retroactivity Clause

as evidenced by the Home Rule Amendments—which show that, when the framers sought to give *constitutional* rights to governmental actors, they did so *expressly*.

*Article VI.* On Article VI, the Districts must change the Department’s position to attack it. They claim that the Department seeks “[t]o read Article VI as overriding Article II.” *Id.* at 21. Not so. The Retroactivity Clause applies to any law, including an education law, that harms vested rights. Far from “overriding” the Retroactivity Clause, *id.*, Article VI reinforces its settled meaning: that it does not touch laws affecting *school districts* because they lack vested rights. The article shows why a school district (among the multitude of the State’s arms) is the *least* likely government entity to have retroactivity rights. School districts lack retroactivity rights against the State because they are ““mere instrumentalit[ies] of the state to accomplish its purpose in establishing and carrying forward a system of common schools throughout the state.”” *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St. 3d 568, 2006-Ohio-5512 ¶ 46 (citation omitted). Article VI creates school districts to implement state policy, not to fight it. The Department reads the Retroactivity Clause in a way that reconciles it with this Article VI goal; the Districts read the Clause in way that undercuts the Article VI goal.

**4. The Districts do not cite a single case holding that state subdivisions have constitutional rights under state *retroactivity* bans.**

The Department’s opening brief noted that cases uniformly hold that state subdivisions lack retroactivity rights. Dep’t Br. 23-30. The Districts do not cite a single case to the contrary. Instead, they make an irrelevant point that state subdivisions *generally* may sue state entities, and fail to distinguish the relevant cases on the *specific* question concerning retroactivity rights.

**a. The Districts spend pages on irrelevant cases asserting the undisputed point that school districts are juridical entities that may sue.**

Misconstruing the Department’s position, the Districts suggest that it broadly argues that “political subdivisions have no legally protected rights against the state or any of its agencies.”

Distr. Br. 22. There is a wide gap between that broad position (that subdivisions may *never* sue a state agency under *any* provision) and the Department’s narrow position (that school districts lack rights under the Retroactivity Clause). On the narrow position, the Districts fail to cite any cases conflicting with the uniform view that state subdivisions lack retroactivity rights.

*General Ability To Sue.* The Districts devote many pages to cases holding that they can sue state agencies. *See id.* at 23-26. But that *undisputed* proposition is not before the Court. None—not one—of these cases involves a challenge under a state *retroactivity ban*. Take two examples. As the Department has explained, Dep’t Br. 31-32, *Kenton* involved a *statutory* challenge to the Department’s view that a state law applied retroactively; the Court merely held that the Department misinterpreted that state law. 174 Ohio St. syl. ¶¶ 1-2. Likewise, similar to *DeRolph*, the Districts’ cited cases from Idaho involved whether a school district had the authority and standing to sue under Idaho Constitution’s *education* clause. *See Idaho Schs. for Equal Educ. Opp. v. Evans*, 123 Idaho 573, 585 (1993); *Idaho Schs. for Equal Educ. Opp. v. State*, 140 Idaho 586, 590-91 (2004). These two cases do not even *use* the word “retroactive.”

This very dispute proves that the Districts misrepresent the Department’s view. In the *Cincinnati* litigation, the Department did not suggest that a district lacked the authority to bring a *statutory* challenge; it instead argued that Cincinnati misread state law when arguing that the Department could not depart from the October Count. 2008-Ohio-1434 ¶ 11. Likewise, in this litigation, while the Department did challenge the parents’ standing, App. Op. ¶ 51, it nowhere challenged the Districts’ standing. It moved for judgment on the pleadings because the Budget Provisions bar the Districts’ claims. State subdivisions may sue state entities, but the Districts’ claims fail *on their merits*: the Retroactivity Clause does not invalidate the Budget Provisions.

*Specific Retroactivity Rights.* On the *narrow* question whether the Retroactivity Clause protects state subdivisions, the consensus view supports the Department. The Department cited cases from New Hampshire, Texas, Missouri, Louisiana, Georgia, Idaho, Massachusetts, and Tennessee—all States that had or have comparable retroactivity bans—to show that courts have limited retroactivity protection to private parties. Dep’t Br. 28-30 (citing, among others, *Savannah R-III Sch. Dist. v. Pub. Sch. Retirement Sys. of Mo.*, 950 S.W. 2d 854, 858 (Mo. 1997); *Town of Nottingham v. Harvey*, 120 N.H. 889, 898 (1980)). The Districts call these cases “cherry-picked” from “a mere eight states,” Distr. Br. 23, but the cases come from nearly all *ten* States with comparable bans. And the Districts’ effort to distinguish any of these cases falls flat: The intermediate appellate case that the Districts say criticized the Missouri Supreme Court’s *Savannah R-III* decision did not involve a retroactivity claim or even criticize that decision. *See P.L.S. ex rel. Shelton v. Koster*, 360 S.W.3d 805, 808-09 (Mo. Ct. App. 2011) (asking “whether a public school district is an ‘agency of the state’ for purposes of the State Legal Expense Fund”).

**b. The Districts fail to distinguish the only Ohio cases expressly confronting whether the Retroactivity Clause applies to subdivisions.**

With respect to this Court’s cases, the Department made two points: (1) the handful of cases that applied the Retroactivity Clause to public entities did so in “drive-by” rulings lacking precedential value on this point, Dep’t Br. 31-35 (citing cases); and (2) the cases that confronted the question ruled the Department’s way, *id.* at 23-26 (citing *Spitzig v. State*, 119 Ohio St. 117 (1928); *Kumler v. Silsbee*, 38 Ohio St. 445 (1882); *Bd. of Educ. v. McLandsborough*, 36 Ohio St. 227 (1880); *State ex rel. Bates v. Trs. of Richland Twp.*, 20 Ohio St. 362 (1870); *N.Y. Life Ins. Co. v. Bd. of Comm’rs of Cuyahoga Cnty.*, 106 F. 123 (6th Cir. 1901)).

In response to the first group of cases, the Districts baldly state—with as much analysis as the cases themselves—that this Court applied the Retroactivity Clause to state subdivisions.

Distr. Br. 27. The Districts thus fail to address the Department’s arguments why the cases’ *sub silentio* applications of the Clause are not precedential. Dep’t Br. 32-35. “The Court would risk error if it relied on assumptions that have gone unstated and unexamined” in these cases. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011). Indeed, the Court has already adhered to this view: *Avon Lake* held that subdivisions lack equal-protection rights, 35 Ohio St. 3d at 122, even though one drive-by case earlier found for a subdivision on such an equal-protection claim, *State ex rel. Crotty v. Zangerle*, 133 Ohio St. 532, 538-39 (1938) (per curiam).

In response to the second group of cases, the Districts distinguish them on their *facts* and suggest that they do not stand for the *legal* rule that state subdivisions lack retroactivity rights. Distr. Br. 27-30. They fail in these efforts. For most cases, including *McLandsborough*, *Bates*, *Eichenberg*, and *New York Life*, the Districts say only that the cases “did not turn on the status of the party claiming a violation of the retroactivity clause.” *Id.* at 28. Yet that was the *central* reason why the General Assembly could impose a new obligation or divest an old right. Take *Spitzig*. There, the General Assembly imposed a new duty on a county to reimburse a citizen injured in a building even though the county faced no liability at the time of the injury. 119 Ohio St. at 118, 123. If the county had been a private owner, the Court would not have allowed the legislature to “impose[] new . . . liabilities as to a past transaction.” *Bielat*, 87 Ohio St. 3d at 354. Similarly, in *Eichenberg*, the General Assembly relieved parties of “liability” owed to the Department of Mental Hygiene. 2 Ohio App. 2d at 275. If the department had been a private party, this would represent a classic violation. But “[t]he state has the power to waive its cause of action even though it could not affect such right as between citizens.” *Id.* at 276.

The Districts also argue that *Silsbee* concerned a state law requiring a city to fulfill a duty that was binding *when it arose*. Distr. Br. 29. Not so. The suit challenged the law precisely

because the city had no authority to enter the disputed contract when it had done so, and argued that the State could not retroactively validate the non-binding contract. To resolve whether the State could do so, the Court distinguished laws “recognizing or affirming the binding obligation of the state, *or any of its subordinate agencies*, with respect to past transactions” from laws “injuriously affecting *individuals*.” 38 Ohio St. at 447 (quoting *New Orleans v. Clark*, 95 U.S. 644, 655 (1877)) (emphases added). This public-versus-private rationale could not be plainer.

**5. The Districts cannot avoid this Court’s ruling at the jurisdictional stage by asserting invalid claims on behalf of private parties.**

In a half of a page, the Districts also argue that if their claims fail under the Retroactivity Clause, they have third-party standing to assert the rights of the parents, students, and teachers who joined this suit. Distr. Br. 30-31 (citing *E. Liverpool v. Columbiana Cnty. Budget Comm’n*, 114 Ohio St. 3d 133, 2007-Ohio-3759). This claim lacks merit for substantive and procedural reasons. As a matter of substance, the Districts get third-party standing backward. It requires a plaintiff to prove that the plaintiff “(i) suffers its own injury in fact, (ii) possesses a sufficiently close relationship with the person who possesses the right, and (iii) shows some hindrance that stands in the way of the claimant seeking relief.” *Util. Serv. Partners, Inc. v. Pub. Util. Comm’n*, 124 Ohio St. 3d 284, 2009-Ohio-6764 ¶ 49 (internal quotation marks omitted). Here, who “possesses the right” is dispositive. *Id.* The Districts challenge the amount of funds that state law required to be distributed to them, not to private plaintiffs. That is why the Tenth District asked whether the *private plaintiffs* had third-party standing to assert the *Districts’* rights. App. Op. ¶¶ 53-59. The Districts now counterintuitively assert the opposite—that they have third-party standing to assert the private plaintiffs’ rights. But neither their complaint nor their brief alleges how the private plaintiffs have any vested rights (e.g., “property right[s]”) independent of the Districts. *State ex rel. Jordan v. Indus. Comm’n*, 120 Ohio St. 3d 412, 2008-Ohio-6137

¶ 9 (citation omitted). The private plaintiffs’ lack of independent rights dooms the Districts’ third-party claim. *Huth v. Haslun*, 598 F.3d 70, 75 (2d Cir. 2010) (plaintiff cannot bring third-party claim where it fails to allege that the other party’s “constitutional rights were violated in any way”); *Hodak v. City of St. Peters*, 535 F.3d 899, 906 (8th Cir. 2008) (same).

As a matter of procedure, the Court should not consider this claim because it falls outside the proposition of law that the Court accepted. *04/29/15 Case Announcement*, 142 Ohio St. 3d 1447, 2015-Ohio-1591 (declining to review private-plaintiffs’ cross-appeal about standing). To consider whether the Districts can bring the claims of private plaintiffs would undermine the law of the case that those plaintiffs lack standing, and encourage future litigants to ignore this Court’s orders by continuing to litigate issues that the Court decided *not* to hear. *See Meyer v. United Parcel Serv., Inc.*, 122 Ohio St. 3d 104, 2009-Ohio-2463 ¶ 8 n.3 (noting that because the Court did not accept the cross-appeal, “the court of appeals’ determination [of the cross-appealed issue] . . . stands as conclusively established and is not within the scope of this appeal”).

**B. The Retroactivity Clause does not invalidate the Budget Provisions because those provisions do not impair the Districts’ reasonable expectations of finality.**

The Department’s opening brief established that even if the Retroactivity Clause applies to state subdivisions, the Budget Provisions do not impair the Districts’ reasonable expectations of finality. Dep’t Br. 35-45. Subdivisions have no such expectation in state funds that have yet to be *distributed*, *City of Cleveland v. Zangerle*, 127 Ohio St. 91, 92-93 (1933), particularly where the background law about the funds was unclear, *State ex rel. Bunch v. Indus. Comm’n*, 62 Ohio St. 2d 423, 428 (1980). Here, the challenged funds had not been distributed to the Districts, and the funding law was ambiguous. Thus, the lower court correctly held that the Budget Provisions did not impair a “vested” right, App. Op. ¶¶ 36-38, but erred in finding that they impaired a “substantive” one, *id.* ¶ 39. The Districts fail to overcome this analysis.

**1. The Districts wrongly rely on *Kenton*, a statutory case, to argue that they have a constitutional right to their view of a school-funding formula.**

The Districts rest on *Kenton* for their argument that they have a constitutional (vested or accrued) right to a funding amount calculated in accord with their view of state law. Distr. Br. 32-34. *Kenton* cannot bear the weight that the Districts (or the court below) place on it here.

a. *Kenton* addressed a question of *statutory*, not *constitutional*, interpretation. In 1960, state law said that if two school districts consolidated, they had a right to receive the amounts each would have received if they had remained separate *for the next three years*. 174 Ohio St. at 258. With this law in effect, *Kenton* consolidated with another district. *Id.* at 257. In 1961, the General Assembly amended the law to eliminate this guaranteed stream. *Id.* at 258-59. At issue in *Kenton* was whether the General Assembly meant for that 1961 change to apply retroactively to consolidations occurring before it. To resolve that *statutory* question, the Court cited the presumption then in R.C. 1.21 (now in R.C. 1.58) that the General Assembly does not intend to affect preexisting rights. *Id.* at 260-63. The Court held that this presumption was broad enough to encompass *Kenton*'s expectations. *Id.* at 262. Interpreting R.C. 1.21's "rights" language, it said that "[t]o be guaranteed a minimum amount of money would be a substantive right, whether the guarantee is to a political subdivision or to an individual." *Id.* at 261.

This holding does not help the Districts. *Kenton* did not resolve what qualifies as a *constitutionally* vested right. Using the lens of the modern two-part retroactivity test, *Bielat*, 87 Ohio St. 3d at 353, *Kenton* instead stopped at step one: It decided that the General Assembly did not intend for the statute to apply retroactively as a matter of statutory interpretation under R.C. 1.21's presumption against retroactivity. Here, however, the Districts concede that the Budget Provisions are "plainly intended to apply, and can only be applied, retroactively." Distr. Br. 31. So the *statutory* presumption against retroactivity cannot apply here, and *Kenton* is irrelevant.

There is nothing unusual about *Kenton*'s applying the statutory presumption to a law that could constitutionally apply backward. As its *normal* order of operations, this Court applies the statutory presumption before considering whether a law is remedial or substantive under the Constitution. *See Hyle v. Porter*, 117 Ohio St. 3d 165, 2008-Ohio-542 ¶¶ 7-8. Indeed, the Court has even applied the statutory presumption in a case in which it said the statute could constitutionally apply retroactively. *State ex rel. Sweeney v. Donahue*, 12 Ohio St. 2d 84, 86-87 (1967). In *Sweeney*, a retiring state employee sought to cash out unused vacation time from 1935 to 1965. State law historically extinguished unused vacation time each year, but the employee argued that a 1959 change gave him a deferrable right convertible into cash. This Court recognized that “a statute which impairs only the rights of the state may constitutionally be given retroactive effect.” *Id.* at 87. But it applied the statutory presumption against retroactivity, holding that the change did not apply to prior years. *Id.* In this way, the statutory presumption gives *greater* protection against backward-looking laws than the Retroactivity Clause provides.

This relationship in which a statute provides greater protection than the Constitution is not unique to R.C. 1.58 and the Retroactivity Clause. Consider, for example, the statutory rule of lenity and the void-for-vagueness doctrine in the criminal context. The statute may protect defendants even where the Constitution would not. *Compare State v. Siferd*, 151 Ohio App. 3d 103, 2002-Ohio-6801 ¶ 53 (3d Dist.) *aff'd*, 99 Ohio St. 3d 145, 2003-Ohio-2765 (“Ohio courts have uniformly rejected vagueness challenges to” Ohio’s RICO statute), *with State v. Stevens*, 139 Ohio St. 3d 247, 2014-Ohio-1932 ¶ 4 (2014) (pl. op.) (using rule of lenity to reverse RICO conviction). Or consider, in the federal context, the Religious Freedom Restoration Act (“RFRA”) and the First Amendment. RFRA provides religious-liberty protections against generally applicable laws, *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546

U.S. 418, 424 (2006), even if the First Amendment would not, *Emp't Div., Dept. of Human Res. of Ore. v. Smith*, 494 U.S. 872, 888 (1990). Statutes can and often do provide greater protection than the Constitution. *Kenton* involved a statute. It carries no lessons for the Constitution.

b. The Districts concede that *Kenton* involved a statute, but respond that “the salient conclusion in *Kenton* is that school districts have *substantive* rights by way of school funding statutes” and that this Court should automatically extend it to the constitutional context. Distr. Br. 33-34. That extension would conflict with this Court’s cases and with the Constitution itself.

The Districts’ reading of *Kenton* conflicts with repeated holdings that no litigant has “a vested right in having the law remain the same over time.” *E. Liverpool*, 2007-Ohio-3759 ¶ 33. Any rights accrued under a statute at time “1” are not insulated from change at time “2” (they are, though, statutorily insulated by R.C. 1.58’s clear-statement rule). Any right to a particular method of calculating prejudgment interest, for example, could be eliminated for a litigant whose case arose while that statute operated, but who sued after its change. *Longbottom v. Mercy Hosp. Clermont*, 137 Ohio St. 3d 103, 2013-Ohio-4068 ¶ 26; *see also State ex rel. Bouse v. Cickelli*, 165 Ohio St. 191, 193 (1956) (noting that “there is no vested right in an existing statute”). Likewise, *Cleveland* held that a “subdivision” had no constitutional “right” in undistributed funds, 127 Ohio St. at 92-93, even though R.C. 1.58’s clear-statement principle would apply to any claim of an implied statutory divestment before the funds had been distributed.

If anything, it is the Districts’ expansion of *Kenton* that raises constitutional concerns. They argue that one General Assembly could “lock in” a future General Assembly by guaranteeing school districts a right to receive a certain amount of funds beyond that General Assembly’s biennium. But one General Assembly lacks “the ability to bind future General Assemblies.” *Tobacco Use Prevention & Control Found. Bd. of Trs. v. Boyce*, 127 Ohio St. 3d

511, 2010-Ohio-6207 ¶ 15; *see State ex rel. Pub. Instit. Bldg. Auth. v. Griffith*, 135 Ohio St. 604, 619 (1939) (“No general assembly can guarantee the continuity of its legislation or tie the hands of its successors.”). The Districts fail to explain how *Kenton* comports with these cases if its presumption of statutory interpretation transforms into a constitutional command.

**2. The Districts fail to distinguish this Court’s cases holding that subdivisions have no vested rights in undistributed funds.**

As the Department noted, Dep’t Br. 40-41, the Districts have no right to the funds because *Cleveland, Outcalt v. Guckenberger*, 134 Ohio 457 (1938), and other cases hold that subdivisions lack vested rights in state money “at least until distribution is made.” *Cleveland*, 127 Ohio St. at 93 (“Until such distribution is made, the Legislature of Ohio is fully competent to divert the proceeds among those local subdivisions.”). The Districts assert a policy argument and a legal argument against applying these cases here. Distr. Br. 35-38. Both are wrong.

As for their policy argument, the Districts attack the Department by suggesting that these cases allow it to prevent “rights from ever vesting by the simple expedient of illegally withholding funds.” *Id.* at 35, *see id.* at 42-44. That response confuses the issue on appeal. The Department does *not* dispute that the Districts could sue it to determine whether it properly read the law in 2005 (as they have done and as Cincinnati did). But after the General Assembly *changed* the law to bar their arguments (as they concede), the Districts’ claim on appeal concerns the actions of the General Assembly. This appeal is not about whether the *Department* followed a “statutory mandate,” *id.* at 36; it is about whether the *General Assembly* passed a constitutional law. The Districts’ attack here is on the General Assembly, not the Department.

As for their legal argument, the Districts say that they are not “assert[ing] rights to an undistributed fund of money,” but rather to the underlying funding formula. *Id.* at 37. Yet arguing that school districts have a vested right to a funding formula is no different than arguing

that districts have a vested right to the funds themselves—an argument, the Districts concede, that this Court’s decisions foreclose. *See Cleveland*, 127 Ohio St. at 93. Indeed, all of this Court’s cases could be easily evaded through the Districts’ semantic exercise. The city in *Cleveland*, for example, could have argued that it did *not* assert a right to the “undistributed fund of money,” but to the old distribution formula that had preceded the challenged law redirecting the city’s funds to the county library and park districts. *Id.* at 92-93.

More narrowly, the Districts allege that “a portion” of their claims relate to funding that they *had* received, but that the Department later “clawed back” from their accounts. Distr. Br. 35. Not so. It is undisputed that no distributed funds were actually clawed-back from the Districts’ coffers. Instead, the Department only reduced “*future* payments due the Districts” in light of past overpayments. *Id.* (emphasis added). What happened here, then, is what the Districts later concede the General Assembly can do—take into account its prior overfunding in order to “legislat[e] prospective reductions in the Districts’ future school funding.” *Id.* at 41.

**3. The Districts wrongly suggest that the General Assembly’s amendments changed, rather than clarified, prior law.**

As the Department noted, Dep’t Br. 42-43, the General Assembly creates no retroactivity problem where it clarifies unclear law. The Districts do not dispute that point, but say that the legislature “changed” the law when it permitted the Department to depart from the October Count. Distr. Br. 39. Invoking issue-preclusion law (wrongly, *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St. 3d 193, syl. ¶ 1 (1983) (generally requiring mutuality)), the Districts cite the *Cincinnati* case rejecting the Department’s view as evidence that the later legislation changed the law. Distr. Br. 38. But this Court has rejected the notion that a statute must be read to have changed law solely because it departed from a lower court’s view. *Ackison v. Anchor Packing Co.*, 120 Ohio St. 3d 228, 2008-Ohio-5243 ¶ 26; *Bunch*, 62 Ohio St. 2d at 427.

The Districts respond that *Bunch* “did not involve retroactively impaired claims” because it “upheld legislation that affirmed the rights of [employees] to receive benefits free of contested setoff reductions.” Distr. Br. 40. But the workers’ compensation law in *Bunch* would have imposed new duties on the employer if it changed rather than clarified prior law. 62 Ohio St. 2d at 424. A case had held that an employer had a right to setoff for other payments paid to the injured worker; the law clarified that the employer had no setoff right. *Id.* at 427-28. The same is true here. Before the changes, it was unclear what authority the Department had to depart from October Counts. The General Assembly “formally” clarified that the Department had that authority. Legislative Serv. Comm’n, 127th General Assembly (2007-2008), at 22 (May 2008).

**C. The Districts assert three final arguments that are not before this Court.**

The Districts lastly assert that the Budget Provisions: (1) violate Article II, § 26’s Uniformity Clause, (2) do not affect their distinct “add-in” claims, and (3) do not affect Dayton’s claims given its settlement. Distr. Br. 45-48. But, as the Districts concede, “[t]he applicability of the Retroactivity Clause is the only issue before the Court.” *Id.* at 38. These other arguments were not addressed in the courts below, were not the subject of any proposition of law, and are for the trial court on remand. Dep’t Br. Appx. 52, Trial Court Decision, at 23 (Jan. 16, 2014).

**CONCLUSION**

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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