

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.	:	
	:	Court of Appeals
State Board of Education of Ohio, et al.,	:	Case Nos. 14AP-93
	:	14AP-94
Appellants.	:	14AP-95

MOTION FOR RECONSIDERATION OF APPELLEES

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MOTION FOR RECONSIDERATION OF APPELLEES

The Appellee School Districts ("the Districts") hereby move pursuant to S.Ct.Prac.R. 18.02 for reconsideration of the Opinion entered by this Court on May 4, 2016. The following Memorandum is submitted in support of this Motion.

Respectfully submitted,

/s Susan B. Greenberger

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Districts believe the Court's decision may have been premised on a fundamental misunderstanding, urged on the Court by Appellants ("the Department"), concerning the events that gave rise to this case. In its submissions to the Court, the Department repeatedly sought, through the use of innuendo and unsubstantiated assertions, to taint the Districts as wrongdoers. The Department tells a tale of districts that reported inflated enrollment numbers that resulted in the Department paying them more than was due. Thus, according to the Department, it simply recalculated the Districts' funding based on the more accurate enrollment figures. At the core of the Department's story is an insinuation that the Districts come to the Court with unclean hands: they engaged in misconduct and now seek to recover the resulting ill-gotten gains by exploiting an unintended loophole in the law that would enable them to keep funds that were never meant for them in the first place.

The story would be compelling if true. But it is untrue in every meaningful respect: (1) the Districts did *not* inflate their enrollment numbers; (2) beyond the unlawfulness of the data substitution, the community school counts substituted by the Department were inapt, unreliable and not in the nature of a "correction"; (3) the statutorily-mandated ADM, reported by the Districts, yielded exactly the amount of funding intended by the ADM methodology; whereas the monthly reporting methodology used by community schools had been proposed to *and rejected by* the legislature for use by school districts (precisely because it would produce reduced funding); and (4) it is *the Department*—not the Districts—that engaged in wrongdoing and then asserted a radical legal proposition to avoid accountability for, or even scrutiny of, its wrongdoing.

The Districts do not know whether the Court was influenced by the Department's distorted telling of the underlying dispute. But echoes of the distortions appear in the Court's opinions. "Believing the CSADMs to be more accurate, the Department recalculated those school districts' school-foundation funding for that fiscal year." Opinion at ¶ 7. Likewise, Justice Pfeifer both at oral argument and in his concurring opinion suggests that the equity argument advanced by the Department may have been of concern. "The ODE was not powerless to dispute enrollment figures submitted by the districts and to adjust the funds to be distributed." Opinion at ¶52 (Pfeiffer, J., concurring). Indeed, this Court issued a holding, based on the Department's fictional proposition of law—that the General Assembly has the constitutional authority to adjust local school funding retrospectively—even though the General Assembly itself *never* adjusted the Districts' funding here, retrospectively or otherwise.

The issues in this case arise from a motion for judgment on the pleadings. As this Court knows, all material allegations in the complaint are to be construed as true, with all reasonable inferences to be drawn therefrom in favor of the nonmoving party. *See Whaley v. Franklin County Bd. of Comm'rs*, (2001) 92 Ohio St.3d 574, 581. Thus, the inference from the allegations in the Complaint must be that ADM is more accurate, and that no adjustments were necessary.

If the Department's rendering of this story was believed by the Court, the Court would likely also have believed that its decision produced equity. The decision would then have aligned with the Retroactivity Clause cases cited by the Court for the principle that political subdivisions are not protected by the Clause. It can fairly be said that in each of those cases, the principle was applied so as to produce equity—not to deny it.

The Districts respectfully submit that the Court's decision is premature at best, in that it forecloses the opportunity to test and judge the Department's claim to the high road. At worst, as the Districts believe to be the case, the decision produces gross inequity for thousands of school children, many already disadvantaged, who have lost and are continuing to lose educational opportunities to which the law entitled them. In addition, the legal analysis from which these injustices flow required the Court to create new law that destabilizes the rights and responsibilities of political subdivisions and their constituencies throughout Ohio. The Districts do not want, and believe the Court would not want, such significant consequences and harms to flow based on an erroneous understanding of the underlying events that gave rise to this case and where the equities now lie.

It also appears that the Court has misunderstood the magnitude of the harm inflicted on these Districts and their students as a consequence of the Department's failure to comply with law. As summarized by the Court, the three Districts collectively suffered a loss of \$7,982,379 due to the Department's failure to fund them as then required by law. In fact, the amount of unlawful funding reductions by the Department was far greater, *totaling* \$35,598,840. This understates the magnitude of the department's unlawful activity by over \$27 million.

II. ANALYSIS

This Court has invoked the reconsideration procedures set forth in S.Ct.Prac.R. 18.02 to "correct decisions which, upon reflection, are deemed to have been made in error." *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St.3d 539, 541, 697 N.E.2d 181 (1998), quoting *State ex rel. Huebner v. W Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995). *See also, State ex rel. Mirlisena v. Hamilton Cty. Bd. of Elections*, 67 Ohio St.3d 597, 622 N.E.2d 329 (1993) (reasoning contained in dissenting opinion adopted by a majority of this Court pursuant to a motion for reconsideration).

The Decision here has been made in error, to the extent the Court was influenced by and considered the equities advanced by the Department with respect to the veracity of the Districts' ADM count. The Districts come to this Court with clean hands and advance the argument below in order to clear-up any misunderstanding about the relative equities between the parties.

Reconsideration is also warranted because the Court failed to apply pre-existing law and, instead, unnecessarily announced a new law that radically upends the relationships between governmental units throughout the state. This error is compounded considering this Court's holding confers upon the General Assembly the authority to engage in an act (retroactively reduce school district funding) it never actually attempted to do here.

A. The *only* wrongdoing in this case is the Department's. The Districts and their students are victims; their hands are clean.

1. The Districts did *not* inflate their enrollment numbers.

The pleadings establish that each District certified its respective FY 05 Formula ADM to the Department *in accordance with law*. (See complaints at ¶ 29.) There was never any assertion of improper conduct on the part of the Districts in connection with their certification of the respective October counts. At the time in question, the Department had the authority to audit the Districts' ADM. *See* former R.C. 3317.031. The record reflects no such audit(s) occurred, and there has never been *any* allegation that the Districts' certifications were somehow improper.

2. Beyond the unlawfulness of the data substitution, the community school counts substituted by the Department were also inapt, unreliable, and *not* in the nature of a "correction."

The student counting methodology mandated by statute for school districts at the times relevant to this litigation is known as "average daily membership" ("ADM"). ADM is a "snapshot" approach to measuring enrollment in which students are counted at one time, early in

the school year, and school funding is premised on that count. By contrast, community school funding is based on ongoing reports of student attendance throughout the year.

The two approaches to counting students are conceptually distinct. In practice, they naturally produce different student counts, as they are intended to do. Utilizing the data generated by community schools, based on a rolling count of students, in a funding formula for school districts premised on the ADM snapshot approach is nonsensical. The trial court noted in the *Cincinnati* case that that doing this is the equivalent of substituting "an accounting of apples where a statute requires a count of oranges." *Cincinnati City Sch. Dist. Bd. of Edn. v. State Bd. of Edn.*, Hamilton C.P. No. A0603908 (Nov. 22, 2006), 2006 Ohio Misc. LEXIS 3555, at p. *27 (hereafter "*Cincinnati* trial court decision").

The Department explains the substitution by noting that the two sets of data were discrepant—as they were bound to be—and then indicating that it "believed" the community school data to be more accurate, an explanation repeated by the Court. (Opinion at ¶7.) But this benign explanation of the Department's conduct invites skepticism, given its patent illogic—and all the more so given the Department's failure to use the statutorily provided audit process that *was* available to it to challenge the data reported by the Districts, had the Department believed such a challenge to be justified.

The Department's claim that the data produced by the community school reporting system was more accurate for purposes of calculating ADM-based school district funding is not just illogical, given ADM-based funding is statutorily required to be based on ADM. It is additionally suspect in light of the multiple known flaws in the CSADM system. As the *Cincinnati* trial court went on to say when in connection with its apples-and-oranges metaphor,

"the proposed substitution [of apples for oranges] is not improved by an inability to verify or substantiate what the count of apples would be for the particular week in question. *Id.*

The following are only some of the many defects in the community school reporting system that rendered the data from that system comprehensively unreliable for *any* purpose—even the community school funding for which it was intended—as shown by evidence produced in the *Cincinnati* case:

- Community schools were funded in advance of opening, based on enrollment "projections" by the community school. Ohio Adm. Code 3301-102-06(B)(1)(b) (as then in effect).
- The CSADM system permitted community schools to both create and delete records reflecting nonexistent, "phantom" students for payment purposes, as well as the assignment of multiple student identification numbers (SSID) to the same student. Once deleted, the records were no longer contained within ODE's data base. (DeMaria depo. at 116.)
- ODE expressly directed community schools to *delete* incorrect records previously created by the community school in the CSADM reporting system, *meaning the records were permanently deleted and incapable of being retrieved* by Department personnel or anyone else, making it impossible to track the origins of erroneous information that may already have produced funding consequences. See, e.g., 2004 CSADM Manual issued by the Department at page 30.

If the Department believed the Districts incorrectly reported enrollment data, a belief that has not been advanced in this case, it had a variety of measures to deal with and correct the numbers. Instead, the Department chose to abandon the snapshot counting methodology statutorily mandated and substituted instead the results of its structurally flawed CSADM reporting system, to the vast detriment of the Districts.

The Districts recount the foregoing not to prove the blameworthiness of the Department but rather to show that there is good reason to question the Department's account of these events and to let that account be tested at trial. Without such testing, the motivation for, and the extent, and consequence of, the Department's violations of law may never fully be known.

The Districts implore the Court to let them have their day in court – and require of the Department more than the current self-serving explanation that seems insidiously to blame the victims.

- 3. The "snapshot" enrollment data reported by the Districts pursuant to statute yielded exactly the amount of funding intended by the ADM methodology enacted by the legislature. By contrast, the rolling attendance data reported by community schools and substituted by the Department was *known* to produce less funding for districts such as these—and had already been proposed to *and rejected* by the legislature for such use.**

The community school funding methodology, based on a rolling count of students, obviously and predictably produced different data than the ADM snapshot approach mandated for school district funding by statute. It is also noteworthy that the community school approach was *known* to produce lower student counts and correspondingly lower levels of funding. *Cincinnati* trial court decision at p. *20. In other words, it is no accident that when the Department illegally chose to fund the Districts using data produced by the CSADM system rather than the ADM data reported by the Districts, the Districts' funding fell, and precipitously.

The evidence in the *Cincinnati* case established that the Department was aware of these consequences of using rolling student counts as opposed to a one-time ADM count. *Cincinnati* trial court decision at p. *25, note 1. The General Assembly had already considered a shift away from the snapshot ADM approach used for school district funding in connection with H.B. 95 (the state budget bill for the 2004-2005 biennium), *but had rejected the change*, which the Legislative Service Commission had determined would significantly “decrease state base cost funding for districts experiencing declining enrollment,” which was exactly the circumstance of most urban districts, including these Districts.

In short, when the Department substituted CSADM for ADM data, the substitution was bound to produce exactly the result that it did: lower funding for the Districts. This was not an

unexpected impact of the substitution, *and it was not an indication that the Districts had misreported their data*. The impact was predictable, and it was one the legislature had chosen *not* to inflict.

As there was is no evidence of any reporting errors on the part of the Districts or of any unintended funding produced by the ADM system enacted into law, it is absolutely wrong to describe the Department's conduct in substituting CSADM data for ADM data as a "correction." It was not. The substitution simply represented a preference on the part of the Department for apples, when the legislature mandated, and the Districts reported, oranges.

4. It is the Department—not the Districts—that engaged in wrongdoing and then asserted a radical legal proposition to avoid accountability for, or even scrutiny of, its wrongdoing.

The circumstances recounted above reflect an absence of evidence for the allegation that the Districts inflated their enrollment counts, a lack of rational explanation for the Department's acknowledged "departure" from law, and a predictable loss of funding for the urban districts—rejected by the legislature—as a result of that departure. On one side, we have an agency that broke the law, and on the other we have the victims of the Department's unlawful actions—the Districts and their students. The Court's decision breaks with precedent to protect the former at the expense of the latter. Illegal and, we would argue, abusive agency conduct is not only permitted but, by virtue of having been retroactively blessed, is shielded from public scrutiny.

This Court has recognized that "[a] fundamental premise of American democratic theory is that government exists to serve the people. In order to ensure that government performs effectively and properly, it is essential that the public be informed and therefore able to scrutinize the government's work and decisions." *Kish v. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶ 15, citing *Barr v. Matteo*, 360 U.S. 564, 577, 79 S.Ct. 1335, 3 L.Ed.2d

1434 (1959) (Black , J., concurring); Moyer, *Interpreting Ohio's Sunshine Laws: A Judicial Perspective* (2003), 59 N.Y.U. Ann. Surv. Am. L. 247, fn.1, citing letter to W. T. Barry (Aug. 4, 1822), in 9 *The Writings of James Madison* 103 (Hunt Ed.1910) 103). The Court's decision obstructs these principles, leaving the nature and consequence of the Department's betrayal of law with respect to these Districts unexamined, untested, and at least implicitly endorsed.

By comparison, if this case were allowed to proceed without regard to the retroactive legislation, the Department's insinuations regarding the Districts and its claims to the moral high ground could be tested against law and public policy in the light of day. With regard to the Department's claim that CSADM information was more accurate than ADM, Judge Nelson stated in the *Cincinnati* case that:

* * * it is undisputed that [CSADM] records were deleted * * *. ODE "maintains no independent record" of this deleted information. * * * If it is not appropriate for an administrative agency to substitute an accounting of apples where a statute requires a count of oranges, the proposed substitution is not improved by an inability to verify or substantiate what the count of apples would be for the particular week in question.

Cincinnati trial court decision at p. *26-27.

Denying the Districts the opportunity to contest the Department's position serves no good purpose, and as discussed *infra*, is not required by the law as it existed prior to the Court's decision. Shielding this and other agencies from public scrutiny erodes the public trust in government—already at a low point—and risks further lawlessness by agencies emboldened by this case.

B. The amount of funds recouped and withheld by the Department from the Districts is substantial.

The magnitude of the funds at stake in this case is substantially understated. In total, the majority opinion identifies the amount as \$7,982,379 for all of the three years at issue. *See* Opinion at ¶ 8. But this amount reflects only the amount of the loss for FY 05 and omits the

additional reductions made for fiscal years 2006 and 2007. (Complaints at ¶ 39.) The amount of the claimed loss for FY 06 was: for Toledo, \$4,188,504; for Dayton, \$4,477,862; and for Cleveland, \$4,640,792. (Complaints at ¶ 46.) The amounts claimed for FY 07 were: for Toledo, \$4,190,156; for Dayton, \$1,495,214; and for Cleveland, \$4,641,688. *Id.* at ¶ 47. While the magnitude of the loss is large in dollar value, the true cost—the lost educational opportunities for the pupils in these districts—is inestimable. If the Decision was based upon incorrect or incomplete facts, as it appears was the case, reconsideration is warranted in the interest of justice.

The concurring opinion, while correct in application of the constitutional law principles, apparently misperceived both the fundamental nature of the District’s claim for relief as well as the timing of the events leading to that claim. The concurring opinion states, “[t]he school districts in this case had no vested right or reasonable expectation of finality in the Ohio Department of Education’s treatment of funds that were *as yet undistributed*.” Opinion at ¶ 52. (Emphasis added). Based apparently on that premise, the concurring opinion joined the majority. However, the allegations before the Court, which must be taken as true, establish that \$10,226,563 for FY 05 had been distributed to the Districts. (Complaints at ¶¶ 35, 39.) Later, in the next fiscal year, the Department began the “clawback” of those funds as well as additional, subsequent reductions for FY 06 and 07. *Id.* To the extent that “actual receipt” was key to establishing the Districts’ claims, they had received a substantial amount of the total funds at issue.

But, “actual receipt of funds” was never essential to the claims in this case, as the Districts sought only to have their funding for each of the years in question calculated in accordance with the law in effect at the time. (Complaints at ¶¶ 49, 53.) Thus, the concurring opinion addressed that which was not before the Court and suggested a guiding principle that

would enable the Department, as well as any other state agency charged with the duty to distribute funds, to avoid its statutory obligations by simply withholding those funds—thus preventing the ripening of any claim for recovery. This fundamental misperception further supports the need for reconsideration.

C. The Decision calls into question established principles of law.

The authority of the General Assembly to *prospectively* change the rights and responsibilities of Ohio’s political subdivisions, including its school districts, has never been at issue. The right at issue in this case, the right to have school funding calculated in accordance with the legislated calculation formula, then in effect, was created by statute and the formula, accordingly, could be changed by statute. But statutes can create rights for political subdivisions, no less than for individuals, and the retroactive destruction of those rights by legislation results in harm in both instances.

Because political subdivisions are created by law to deliver public services, the harm from retroactive destruction of their established rights is magnified far beyond individual harm from a retroactive law applied individually. Here, the retroactive Budget Language purported to retroactively legitimize the Department’s unlawful departure from the legislated school funding formula, resulting in diminished educational opportunities for each and every one of the pupils enrolled in those school districts. (*See Complaints at p. 4.*)

The rule of law announced by the majority decision, that the Retroactivity Clause has no application to any political subdivision in Ohio, has immediate application to the Districts. That rule of law, new to our modern jurisprudence, also serves to impact that rights and responsibilities of literally thousands political subdivisions in Ohio, and those whom they serve.¹

¹ Cities, townships and counties alone, amount to over two thousand separate entities. Indeed, there are many more if all political subdivisions are included.

But a change in the law of such enormous magnitude and widespread impact, a "nuclear option," as characterized by Justice Pfeifer, is both unnecessary to this case, and deleterious to our jurisprudence. Opinion at ¶ 53.

1. Modern decisions uniformly support application of the Retroactivity Clause in favor of political subdivisions.

The Districts' position is supported by a line of cases in which this Court had consistently applied an unbroken line of modern Retroactivity Clause cases to prevent retroactive legislation from harming political subdivisions. The majority opinion noted these cases appear to support a finding that political subdivisions are entitled to the protection granted under the Retroactivity Clause. Decision at ¶ 38, citing *Hamilton Cty. Commrs. v. Rosche*, 50 Ohio St. 103, 33 N.E. 408 (1893); *State ex rel. Crotty v. Zangerle*, 133 Ohio St. 532, 14 N.E.2d 932 (1938); and *Cincinnati Sch. Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 91 Ohio St.3d 308, 744 N.E.2d 751 (2001).

This Court's decision in *Rubbermaid, Inc. v. Wayne County Auditor*, 95 Ohio St.3d 358, 2002-Ohio-2338, 767 N.E.2d 1159 is also relevant. *Rubbermaid*, like *Cincinnati*, applied the Retroactivity Clause to protect a county board of revision from having to consider re-filed tax appeals that were previously dismissed. Significantly, this Court found that the county taxing officials possessed a significant right that was stripped from them by the statute in question. This Court noted:

Prior to the enactment of this legislation, county officials had a vested legal right to have Rubbermaid's complaint dismissed as invalid, since it was filed by an unauthorized individual. The legislation strips county officials of this right. Furthermore, it imposes new and additional burdens on counties to defend against what would have been an invalid complaint in the absence of the new law. Therefore, under the rationale of *Mirge*, R.C. 5715.13 and R.C. 5715.19, HN8as amended by Sub.H.B. No. 694, violate Section 28, Article II of the Ohio Constitution.

Rubbermaid, at ¶ 9. As in the *Cincinnati* tax decision, the *Rubbermaid* analysis did not expressly articulate the rationale for applying the long-accepted tests for determining unconstitutional retroactivity to the case at hand.

The majority and concurring opinions also fail to comment on or recognize its decision in *State ex. rel. Kenton City School Dist. Bd. of Edn. v. State Bd. of Edn.* 174 Ohio St. 257, 189 N.E.2d 72 (1963). Although not expressly relying on the Retroactivity Clause, this Court held that funding rights acquired by the school district under R.C. 3317.02 could not be removed by subsequent amendment of that statute. *Kenton* clearly stands for the proposition that school districts can acquire and litigate funding rights created by the legislature and that subsequent legislation does not extinguish those accrued rights.

2. Established principles for the analysis of the Retroactivity Clause have been bypassed.

At the time this case was filed, the established Retroactivity analysis involved only two questions: (1) was the law expressly made retroactive in application; and (2), did it impair substantive rights. See *Bielat*, 87 Ohio St.3d at 353. A substantive statute is one that “impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.” *Id.* at 354; see, also, *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 106-107, 522 N.E.2d 489 (1988). Here, there was no question that the Budget Language was retroactive, nor is there any question that the right asserted by the Districts—the right to have their funding calculated in accordance with the law in effect at the time—was substantive. None of the five cases cited above was expressly overruled by this Court.

If permitted to stand, the majority decision will, at best, cast doubt on the future viability of all of these decisions. But, the *Rubbermaid* decision, no less than *Cincinnati* and the other

decisions of this Court applying the Retroactivity Clause to political subdivisions, especially when read in light of the prohibitive language of the retroactivity clause (“The General Assembly shall have no authority...”) lends credence to Justice Pfeifer’s questioning the majority opinion’s assumptions that these opinions lack precedential value. (Decision at ¶ 53.) And while the majority opinion did not expressly overrule any of these cases, they are, by implication, no longer valid if in fact the Retroactivity Clause has no application to political subdivisions.

3. Established principles of statutory and constitutional construction have been bypassed.

This Court has long recognized that the primary goal of legislative (or constitutional) analysis is to determine the intent of the enacting body. *See State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees*, 72 Ohio St.3d 62, 65, 647 N.E.2d 486, 488 (1995). In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished. *State v. S.R.*, 63 Ohio St.3d 590, 594-595, 589 N.E.2d 1319 (1992). If the meaning of the statute is unambiguous and definite, it must be applied as written, and no further interpretation is necessary. *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 584, 651 N.E.2d 995, 997 (1995); *State ex rel. Savarese v. Buckeye Local Sch. Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545 (1996).

The Department has urged the Court to ignore the plain language of Section 28 and re-script that provision to a version more to its liking. If the majority decision is permitted to stand, the clear language of Section 28 will change from “[t]he general assembly shall have no power to pass retroactive laws...” to “[e]xcept as relates to political subdivisions, the general assembly shall have no power to pass retroactive laws...” At the Department’s urging, the Court will have conferred a power on the General Assembly that was denied it by the framers.

4. The Debates do not support the conclusion that the framers intended to withhold application of the Retroactivity Clause from political subdivisions.

The Retroactivity Clause is clear and unambiguous and requires no interpretation. To the extent it does require interpretation, as the Opinion concludes, then the Court's reliance on the Department's characterization of the Constitutional Convention must be reconsidered in the interest of justice because the Department's characterization is without support and thus incorrect.

The Opinion cites, at ¶ 28, the comments of Mr. Nash, who shortly after delivering the quoted passage that uses the word "individuals," launches into a lengthy diatribe against the legislature usurping the powers of the courts and calling for limiting legislative authority to providing rules for future conduct only. 1 Debates 268-270. Likewise, in ¶ 29 of the Opinion another delegate, Mr. Ranney, is quoted in a passage that includes the word "men," but the Opinion does not address the fact that Mr. Ranney was speaking out against language that was ultimately not adopted, and that the thrust of his argument was that it was the courts, and not the legislature, that should "sit in judgment upon events which have long since gone past[]" as the legislature should instead "attend[] to [its] appropriate functions of prescribing rules of action for the future." 2 Debates 591.

The Opinion also fails to address the separation of powers concerns discussed by the delegates. Paragraph 30 of the Opinion cites a quote from Mr. Vance, who was arguing (unsuccessfully) to remove the restriction entirely from applying to the legislature. 1 Debates 265. The succeeding quotes, mentioned in ¶ 30, were from Mr. Hitchcock and Mr. Stanton, respectively, and represent a position that was *rejected* by the delegates. In fact, a vote was taken after Mr. Stanton's comments on an amendment to remove the prohibition on retroactive

legislation, and the delegates immediately rejected his arguments by a vote of 42-50. 2 Debates 241. Then, in ¶ 31 of the Opinion, the Court again quotes Mr. Nash, who did cite to *Merrill*. But his point in citing the case was that it “leaves the rights of parties to be adjudicated, according to the laws in force at the time these rights accrued and no subsequent law can vary or change these rights between party and party.” 1 Debates 269.

Review of the Debates on the issue of the Retroactivity Clause demonstrates that the delegates focused extensively on the role of the judiciary and the limits that should be imposed on the legislature. There is no support for the belief that the framers intended to withhold application of the Retroactivity Clause from political subdivisions. The plain language of the Clause, adopted from those debates, reinforces that belief.

As noted, the Debates did not consider, nor do the reported comments support, the conclusion that the framers intended to withhold the protection of the Retroactivity Clause from political subdivisions. Likewise, the other state decisions relied on by the Department for the same principles are dicta. Beyond that, our courts have rejected the notion that the meaning of our constitution may be defined by the courts of other states. *Good v. Zercher*, 12 Ohio 364 (1843).

The Department offered a revisionist and inaccurate version of the history of debates leading to the enactment of Article II, Section 28, suggesting that the framers “knew” that political subdivisions had no rights and that such a conclusion had been well accepted in other states prior to 1852. The Court was again invited to depart from accepted principles of statutory construction to reach a conclusion suitable to the Department.

III. RAMIFICATIONS

The ramifications of the decision go far beyond the impact on the three Districts. The majority has done serious harm to the separation of powers doctrine in Ohio. The separation-of-

powers doctrine "implicitly arises from our tripartite democratic form of government and recognizes that the executive, legislative, and judicial branches of our government have their own unique powers and duties that are separate and apart from the others." *State v. Thompson*, 92 Ohio St.3d 584, 586, 752 N.E.2d 276 (2001). The doctrine's purpose "is to create a system of checks and balances so that each branch maintains its integrity and independence." *Id.*

This court has vigilantly guarded the role of the judiciary from legislative encroachment and has not hesitated to reject legislation which would supplant that role. "The first, and defining, principle of a free constitutional government is the separation of powers. *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 39, citing *Evans v. State*, 872 A.2d 539, 543 (Del. 2005). In *Kilbourn v. Thompson*, 103 U.S. 168, 190-191 (1880) the United States Supreme Court stated:

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to government, whether State or national, are divided into the three grand Departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these Departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own Department and no other.

The very reason the retroactivity prohibition was added to the Constitution was to prevent the harms that retroactive laws are so capable of inflicting—picking winners and losers, without regard to justice; inducing public mistrust of lawmakers; "legalizing the acts of officers who have by neglect or design failed to do their duty" (See J.V. Smith, *Report of the Debates of Proceedings of the Convention for the Revision of the Constitution of the State of Ohio* (1851) Vol. 1, at 277)—all ills that flow from the retroactive legislation here in issue. When a legislature

is free to judge and determine consequences, or lack thereof, for past acts, *unbound by the laws in place at the time of the acts*, the incursion on the role of the judiciary is not just of theoretical interest. Instead, such circumstances are conducive to real injustice.

As was noted at the Constitutional Convention, the legislature is "the most unsafe of all tribunals, to pass upon such an investigation, for in the very nature there must be an *ex parte* case." *Id.* at 280. This is exactly what happened here. The legislature enacted the retroactive law at the eleventh hour, without opportunity to hear from the Districts, examine the evidence, and test the equities of the Department's violations and the harms consequently suffered by the Districts and their students. As applied here, the majority opinion permits the General Assembly to retroactively eliminate the Districts' claims and assume the role of judge and jury with no hearing, and no consideration. According to the framers, this is the very evil that Section 28 was enacted to prevent.

By permitting the General Assembly unbridled power to retroactively impact all of Ohio's political subdivisions, the majority decision will also empower rogue state agencies to ignore their statutory responsibilities, as was the case here. Legislative forgiveness of any wrongdoing will always be possible. If that forgiveness occurs within the bowels of the multi-thousand page state budget, without public comment or debate, the principles of open government and public accountability have suffered as well. But when applied to the next case, it will also mean the Court has ceded its judicial power to the General Assembly. Since Section 28 has no application to political subdivisions, the court will lack jurisdiction to entertain future claims. The legislature has become supreme in matters of the rights of political subdivisions.

IV. OPTIONS UPON RECONSIDERATION

The Districts agree with Justice Pfeiffer's conclusion that the "nuclear option" is unnecessary. This Court has a wide range of options available to it by way of reconsideration.

First, the Court could simply vacate the majority and concurring opinions and adopt the dissenting opinion of Justice O’Neill. While the districts believe this the most appropriate, it is by far not the only option available to the Court.

The Court may wish to consider whether it should have accepted jurisdiction. The significant underlying factual dispute, regarding the nature of the Department’s action, together with the desire of all members of the Court to reach a decision that is just, equitable and legally sound suggests that this case simply was not ripe for review and that acceptance at this stage was premature. Reconsideration may well lead to the determination that jurisdiction was improvidently accepted. S.Ct.Prac.R. 7.10. The ultimate facts can best be determined by permitting the case to go to trial. If, based on the facts determined at trial, the Court believes that there are substantive issues of constitutional law raised by those facts, it will no doubt have the opportunity to address the application of the Retroactivity Clause in light of those facts.

As another option, the Court may also wish to consider the possibility of making its decision prospective in application. *See Medcorp, Inc. v. Ohio Dept. of Job & Family Servs.*, 124 Ohio St.3d 1215, 2009-Ohio-6425, 921 N.E.2d 239. The Court has observed that in certain circumstances, it has the authority to apply its decision prospectively only:

An Ohio court has discretion to apply its decision only prospectively after weighing the following considerations: (1) whether the decision establishes a new principle of law that was not foreshadowed in prior decisions, (2) whether retroactive application of the decision promotes or retards the purpose behind the rule defined in the decision, and (3) whether retroactive application of the decision causes an inequitable result.

Beaver Excavating Co. v. Testa, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, ¶ 42, quoting *DiCenzo v. A-Best Prods. Co., Inc.*, 120 Ohio St.3d 149, 2008-Ohio-5327, 897 N.E.2d 132 (2008), paragraph two of the syllabus.

The criteria for prospective application are appropriate here, as the decision creates new law not reasonably foreshadowed by modern day decisions. Thus, if upon reconsideration the Court determines to continue the ruling announced on May 4, justice would best be served by making that ruling prospective only in application.

The Court could also direct further briefing or argument of the case before undertaking further deliberation of the very significant issues presented here. Certainly those who would be affected by a determination that the Retroactivity Clause does not apply to political subdivisions should have an opportunity to be heard on that issue before such a determination becomes final.

Finally, there is a middle ground the Court could take that is perhaps most consonant with the entirety of the case law and other historical record concerning the Retroactivity Clause. That is to understand the Clause as first and foremost adopted for the purpose of serving justice and constraining injustice. Elimination of the evils at which the Clause was aimed cannot be achieved through a formulaic focus on the identity of the party asserting the Clause—or indeed on any other absolutist criteria invoked to differentiate constitutionally permitted from constitutionally prohibited retroactive legislation.

The prior jurisprudence of this Court, old as well as modern, interpreted the Clause in a way that enforces the just obligations of government. That is what the Districts seek here. Absent reconsideration, the outcome produced by the Opinion—stripping political subdivisions of the Clause's protections—is inconsistent with the holdings of modern precedent and inconsistent with the intent and purposes of the Clause. The injustices wrought, to these Districts and their many students, will be multiplied in future years as other political subdivisions and their respective citizens discover that they are now vulnerable to legislative and executive abuses of a kind previously understood by all—including this Court—to be impermissible under the

Constitution. The law as it previously stood served justice, deterred legislative abuses, was consistent with the Clause's *raison d'être*, and as a practical matter worked, yielding stable relationships and predictability among governmental units throughout the state. The law announced in the Opinion yields injustice for these Plaintiffs and will in the future yield the same for countless others, while permitting lawlessness by state agencies to go unremedied.

Whatever course of action is determined appropriate by the Court, we urge that reconsideration be granted in light of the circumstances set forth in the foregoing memorandum.

V. CONCLUSION

As is evident from the foregoing, the Opinion contains factual inaccuracies, and appears to rely, at least in part, upon those inaccuracies in reaching the legal conclusions advanced in the case. For those reasons alone, reconsideration is warranted.

The more important and compelling reason for reconsideration are twofold. First is the inequitable result that comes from permitting the legislature to enact retroactive legislation to deny the Districts their day in court. The facts demonstrate that the Department has ignored its statutory mandate and has, as a consequence, taken millions of dollars, intended by the legislature for the education of our children, and diverted those funds to other purposes. Those facts cast the Department as the wrongdoer, a state agency acting in violation of its clear mandate under Ohio law. The facts alleged in the complaint, together with the established principles of law would support the district's claims for relief by way of mandamus.

But the Districts will never get their day in court because the Opinion has fashioned new law. In so doing, the Opinion not only changes the rules for the Districts, it also changes the rules for the literally thousands of Ohio political subdivisions having nothing at all to do with this case. Removing the protections of the Retroactivity Clause from all of Ohio's political subdivisions portends vast consequences that may not have been fully considered by the Court

nor envisioned by any of us. Unlike a decision construing legislation, which the General Assembly is often able to correct through subsequent legislation if it disagrees, correction here requires another amendment to the Constitution, a much more difficult task. Thus the consequences of this decision are far more significant than most.

The Court did not have to fashion new law to bring justice to the parties in this case. If the districts can prove their case, they deserve to prevail. If not, then the Department prevails. But, the loss of protection from retroactive laws for political subdivisions adversely impacts all of us – the ones ultimately served by those political subdivisions. The Opinion re-defines the Constitution and threatens the delicate balance of the separation of powers doctrine. What the legislature wins, the judiciary loses and in the end, we all pay the price.

For these reasons, the Motion for Reconsideration should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was filed via the Court's electronic filing system and served via electronic mail this 16th day of May, 2016, upon the following:

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