

In the
Supreme Court of Ohio

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

OPPOSITION TO RECONSIDERATION OF APPELLANTS

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Appellees (“the Districts”) offer no sound reason for the Court to reconsider its decision in this case. Most of their arguments in support of reconsideration are found in their merit brief, in conflict with this Court’s rule that “[a] motion for reconsideration shall not constitute a reargument of the case.” S. Ct. R. 18.02(B). Appellants (“the Department”) already addressed these points, and the Court has now resolved the legal question presented in the Department’s favor. Even setting that aside, the Districts’ arguments can be rejected on their own merits. The Districts advance two main reasons in support of their motion: (1) that the Court, in resolving a *legal* question, lost its way on the alleged *equities*, *see* Recon. Br. 5-12; and (2) that the Court’s opinion departed from established principles of law, *see id.* at 12-17.

The Districts’ first reasons are inappropriate grounds for resolving a legal question in any posture—reconsideration or otherwise. The second reason is simply wrong; the opinion did not create “new law.” The Court’s opinion applied Ohio’s Retroactivity Clause as it has been interpreted from its earliest days, *see Kumler v. Silsbee*, 38 Ohio St. 445, 447 (1882), to modern times, *see Johnston v. State*, 144 Ohio St. 3d 311, 2015-Ohio-4437 ¶ 22 (unanimously recognizing that a statute “may nonetheless constitutionally be given retroactive effect” so long as it “impairs only the rights of the state, and not those of individuals”).

The Districts ask this Court to cast aside legal principles “to produce equity.” *See* Recon Br. 3. The Department, though it respectfully disagrees with the concurring and dissenting opinions, accepts that those opinions are grounded in good-faith disagreements about the legal meaning of Ohio’s Retroactivity Clause, not efforts to referee the irrelevant question of which party here has a better claim to the more accurate data. The General Assembly resolved that policy debate when it passed the statute at issue here. The Court should deny the Districts’ motion.

A. The Districts mostly repeat arguments already briefed by the parties and considered by the Court.

The Court should not reconsider its decision because most of the Districts' arguments were advanced in their merit brief. The Court considered these points, and either rejected them or deemed them irrelevant to the legal question presented.

Enrollment numbers. Concerned that “the Court was influenced by and considered the equities advanced by the Department,” *see* Recon Br. 5, the Districts restate allegations about the 2005 student-enrollment count, *see id.* at 5-10. But these allegations were well-documented in the parties' merit briefs, and cannot serve as the basis for a motion for reconsideration.

The Districts need not be concerned about suggestions that they inflated their enrollment numbers, *see id.* at 5, because at the merits stage they stated that the Department's alleged assertions on this subject were “as offensive as they [were] wrong,” *see* Dist. Br. 6; *see id.* at 34 (“Let us be clear: there is *no* evidence that the Districts did anything improper.”). The Districts reiterated this point at argument. Video of Oral Arg. 25:50-26:15.

The Districts likewise have made the Court aware of their concerns with the formula the Department used to adjust the Districts' 2005 enrollment figures. On reconsideration, the Districts contend that the monthly counts used by the Department were “unreliable,” *see* Recon Br. 5, flawed, *see id.* at 6-7, and “conceptually distinct” from the formula used by the Districts, *see id.* at 6. They made each of these points in their merit brief. *See* Dist. Br. 6 (“The *Cincinnati* decision considered and rejected the claim that CSADM was more reliable than formula ADM, noting that they were two entirely different systems”); *id.* at 7 (discussing “flaws in the system” used to report community-school students); *id.* at 6 (“Formula ADM and CSADM capture different information, utilize different reporting methodologies, and do not yield identical results with respect to students attending community schools.”). Indeed, the Districts'

merit and reconsideration briefs recite the same “apples-to-oranges” metaphor and use the same block quote. *Compare* Recon Br. 10, *with* Dist. Br. 7. These are not new arguments.

The Districts’ reconsideration brief reprises their earlier arguments that the Department’s formula was bad and that their formula was good. Now, as then, they attempt to turn the Court’s focus away from the constitutional question and towards a constitutionally irrelevant data dispute. At this stage, the case is not at all about the Districts’ “claims to the moral high ground,” *see* Recon Br. 10. It is, as the Court correctly recognized, about whether Ohio’s Retroactivity Clause “protect[s] political subdivisions . . . that are created by the state to carry out the state’s governmental functions.” *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, Slip Opinion No. 2016-Ohio-2806 ¶ 2 (“Op.”).

Damages. The Districts also contend that this Court’s discussion of the funds at stake was “incomplete” because it did not recite dollar amounts for fiscal years 2006 and 2007. Recon Br. 10-12. This merely reprises content from the Districts’ merit brief. Dist. Br. 8 (“Likewise, the Districts here seek similar relief for the reductions to their FYs 06 and 07 guarantee funding based on their unlawfully lowered FY 05 funding.”). The Court’s opinion is not “incorrect” on this irrelevant point. If the opinion does not mention the specific total sought by the Districts, the Districts can hardly complain. When they themselves discussed these funds in their merit brief, they did not cite exact dollar figures. *See id.* To the extent they now assign more importance to this issue than they did in their merit brief, it is not a matter for reconsideration. If anything, their newfound emphasis about the dollars at stake highlights that all the disputed funds are, as Justice Pfeifer explained, “undistributed.” Op. ¶ 52 (Pfeifer, J., concurring).

Legal principles. Finally, the Districts’ motion rehashes their legal arguments. Recon Br. 12-17. The parties have exhausted these arguments, *see* Dep’t Br. 9-35; Dist. Br. 10-30;

Dep't Reply 2-13, which were carefully considered by the Court, *see* Op. ¶ 15 (summarizing the Districts' arguments). There is no reason for the Court to revisit the question of whether political subdivisions may claim the protection of Ohio's Retroactivity Clause.

First, the Districts return to cases already cited by the parties and discussed by the Court. The Districts profess concern for certain drive-by rulings that, at best, "appear to support" their position. Recon Br. at 13. The Court specifically addressed these cases, but concluded that they "lack precedential value" because they "are all silent on the threshold issue" of "whether political subdivisions have rights under Article II, Section 28." Op. ¶ 39. That the Districts' argument has already been presented can be seen by its adoption in Justice Pfeifer's concurring opinion. *See id.* ¶ 51 (Pfeifer, J., concurring).

The Districts also call attention to *Rubbermaid, Inc. v. Wayne County Auditor*, 95 Ohio St. 3d 358, 2002-Ohio-2338, which was not specifically cited in the Court's opinion. *See* Recon Br. 13-14. But they cited *Rubbermaid* in their merit brief. *See* Dist. Br. 32. Moreover, they seem to recognize that *Rubbermaid* stands for largely the same proposition as *Cincinnati School District Board of Education v. Hamilton County Board of Revision*, 91 Ohio St. 3d 308 (2001), which the Court cited at paragraph 38 of its opinion. *See* Recon Br. 14; *Rubbermaid*, 2002-Ohio-2338 ¶ 9 (concluding that the rationale in *Cincinnati* "applies with equal force to the instant situation"). *Rubbermaid* is no reason to revisit the Court's opinion.

Second, the Districts return to textual arguments already presented to the Court. *See* Recon Br. 15. Their merit brief urged the Court to apply the "plain language" of the Retroactivity Clause, *see* Dist. Br. 11-12, despite the fact that this Court has "long recognized that there is a crucial distinction between statutes that merely apply retroactively . . . and those

that do so in a manner that offends our Constitution,” *see Bielat v. Bielat*, 87 Ohio St. 3d 350, 353 (2000). The Court rejected this argument and should not revisit it now. *See Op.* ¶ 18.

Third, the Districts reheat arguments about the debates at the 1851 Constitutional Convention, citing no new material. *See Recon Br.* 16-17. The parties devoted roughly 12 pages to discussing the meaning of these debates at the merits stage. *See Dep’t Br.* 16-18; *Dist. Br.* 12-15, 17-19; *Dep’t Reply* 7-8. Then, as now, the Districts argued that the debates focused on the separation of powers, not individual rights. *Compare Dist. Br.* 17 (“When *Merrill* was briefly discussed by the Ohio delegates, it provoked no discussion regarding public versus private interests, but instead was considered in relation to the distinctions between *legislative and judicial* powers.”), *with Recon Br.* 17 (“Review of the Debates . . . demonstrates that the delegates focused extensively on the role of the judiciary and the limits that should be imposed on the legislature.”). Then, as now, the Districts argued that the Department’s citations to the debates were taken out of context. *Compare Dist. Br.* 18 (“But ODE’s references are to fleeting examples, without regard to context.”), *with Recon Br.* 16 (asserting that the debates have been mischaracterized). The Districts are rearguing a point they lost at the merits stage, and that is not a permissible ground for reconsideration.

B. The Districts’ “equities” arguments are irrelevant and inappropriate grounds for reconsideration.

The Court should decline the Districts’ invitation to abandon law in favor of perceived equity. Their motion assumes that the Court’s legal analysis would have been different if only the Court had correctly identified the allegedly malevolent actor. *See Recon Br.* 5 (stating that their purpose is to “clear-up any misunderstanding about the relative equities between the parties”). But this is a Court of law, not of policy. The Districts’ factual contentions about this particular dispute have no bearing on the meaning of Ohio’s Retroactivity Clause.

Equitable concerns, like the amount of funds at stake or “who is the bigger wrongdoer in this particular dispute,” are irrelevant to the legal question of what protection Ohio’s Retroactivity Clause affords to arms of the State. The Districts want to proceed so that their “claims to the moral high ground [can] be tested against law and public policy.” *Id.* at 10. Yet the entire point is that the General Assembly stepped in to end further intra-governmental squabbles, presumably so that the various arms of the State could get out of the courtroom and back into the classroom. The General Assembly could accomplish this because this Court has “recognized that political subdivisions are not entitled to all protections afforded by the Constitution.” *See Op.* ¶ 41; *Avon Lake City Sch. Dist. v. Limbach*, 35 Ohio St. 3d 118 (1988).

That is for good reason. The Districts’ equitable position matters to them today, but its *legal* position would govern the future, and with real consequences. The Districts’ theory would allow state entities to wield the Retroactivity Clause against private citizens. In one instance, a state agency sued private citizens over debts owed for a disabled relative who was committed to state care, arguing that the General Assembly’s forgiveness of those debts violated the Retroactivity Clause. *See State ex rel. Dep’t of Mental Hygiene & Corr., Bureau of Support v. Eichenberg*, 2 Ohio App. 2d 274, 274 (9th Dist. 1965). It could, as one Justice hypothesized at argument, empower state agencies to bring constitutional claims for budget changes enacted by the General Assembly. The Districts’ position, aside from being *legally* incorrect, would create *equitable* problems of its own. The Court should rebuff such short-sighted arguments.

C. The Court’s opinion properly applied established principles of law to reconcile Ohio’s cases on the Retroactivity Clause, and the Districts are wrong that “modern” decisions of this Court “uniformly” support their view.

The Court’s conclusion that political subdivisions lack rights under the Retroactivity Clause rests on numerous pillars of support. *See Op.* ¶¶ 17-46. The Department has already responded to the legal arguments in the Districts’ motion, and this Court has now rejected them.

The Department stands on its earlier briefs and the Court’s well-reasoned opinion, but offers the following short responses.

First, the Court’s opinion does not announce a rule that is “new to our modern jurisprudence,” as the Districts allege at page 12 of their motion. The Court’s prior cases on this question span from 1870 to 2015. *See* Op. ¶¶ 34-37; *State ex rel. Bates v. Richland Twp. Trs.*, 20 Ohio St. 362, 371 (1870); *Johnston v. State*, 2015-Ohio-4437 ¶ 22.

The Districts rely on the same opinions they did at the merits stage, but more interesting is the case they do *not* cite. Shortly before argument in this case, this Court decided *Johnston v. State*. *Johnston* unanimously held that a statute could “constitutionally be given retroactive effect” because it “impairs only the rights of the state and not those of individuals.” 2015-Ohio-4437 ¶ 22. That decision relied on *State ex rel. Sweeney v. Donahue*, 12 Ohio St. 2d 84 (1967), which in turn cited *Eichenberg*. *Johnston* goes unmentioned in the Districts’ motion, despite the fact that it purports to rely on “an unbroken line of modern Retroactivity Clause cases” ruling in their favor. Recon Br. 13. Now, as at the merits stage, the only cases the Districts can point to are cases that silently assumed the threshold question. But where the Court has actually confronted the question at issue here, it has “consistently [found] that the state is able to injuriously affect its own rights.” Op. ¶ 34.

Second, the Court did not bypass “[e]stablished principles” for the Retroactivity Clause specifically or for constitutional interpretation generally, as the Districts claim. Recon Br. 14-15.

With respect to the first point, the Court’s opinion in no way undermined the established retroactivity analysis. While it is true that cases like *Bielat* did not mention a threshold question about whether the Retroactivity Clause applies, that is because many such cases (like *Bielat*) do *not* involve a political subdivision. Take another doctrine as an example. For equal-protection

claims under rational-basis review, this Court applies a two-step test that does not include a threshold question about the plaintiff's status as a private or public entity. *See, e.g., Pickaway Cnty. Skilled Gaming, LLC v. Cordray*, 127 Ohio St. 3d 104, 2010-Ohio-4908 ¶ 19. This test is not somehow undercut by *Avon Lake*'s teaching that “[a] political subdivision, such as a school district, receives no protection from the Equal Protection or Due Process Clauses vis-à-vis its creating state.” 35 Ohio St. 3d at 122.

As for the second point, the Districts' hyperliteral reading of the Clause's text conflicts with specific cases and general rules. *See* Dep't Reply 3-4. The Department's reply brief explained that numerous constitutional clauses are interpreted by their acquired meaning. *Id.*; *see also, e.g., State v. Self*, 56 Ohio St. 3d 73, 79 (1990) (“Though [the Ohio Constitution's Confrontation Clause] uses the specific phrase ‘face to face,’ that phrase has not been judicially interpreted at its literal extreme.”). The dissent would adopt the Districts' plain-language view, *see* Op. ¶ 56 (O'Neill, J., dissenting), but is not faithful to its own strict construction. The dissent goes on to distinguish between “remedial or substantive” laws, two words found *nowhere* in the Clause. *See id.* ¶ 58 (O'Neill, J., dissenting). That distinction nevertheless flows from the text, because this Court long ago recognized that the term “retroactive laws” has an established meaning, and that remedial laws are “not within a just construction of its terms.” *See Rairden v. Holden*, 15 Ohio St. 207, 211 (1864) (looking to decisions interpreting the New Hampshire clause to define the term “retroactive laws”).

Third, the Court did not err when it looked to the 1851 convention debates. The Department's merit briefs argued, and the Court correctly found, that the debates focused on private parties and referred to preexisting authorities to identify the settled meaning of “retroactive laws.” *See* Dep't Br. 16-18; Op. ¶¶ 27-33. The Districts still cannot point to any

part of the debates that shows an emphasis on the rights of government bodies, nor can they deny that the delegates were aware of the settled meaning that the term “retroactive laws” had received in States that had adopted similar clauses. They nevertheless continue to push the argument that the debates focused only on the separation of powers. *See Recon Br.* 16-17.

The Districts’ quibbles with the Court’s references to the debates lack merit. The quotes from “the debate concerning the legislature’s ability to enact ‘curative’ laws” show that that the delegates—for and against the Clause in its various proposed iterations—cared about the consequences for *individuals*, not government bodies. *See Op.* ¶ 30. It matters not which proposals were ultimately successful; these exchanges show a concern for how the scope of the General Assembly’s power would affect private rights. *See* 2 J.V. Smith, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio* 240 (1851) (curative laws are a “power which may be used for the protection of private rights”); 1 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) (opposed to curative laws because “men’s rights should be settled by the law in force at the time they accrued”).

Moreover, the debates’ discussion of curbing legislative power must be considered with regard to the purpose of that check. The delegates were not debating limits on legislative power for the mere sake of strengthening the judiciary; they were doing so “in order that men might know what their rights and liabilities are.” *Id.*

D. The Court should not adopt the options proposed by the Districts.

The Districts propose several “options” for reconsideration, *see Recon Br.* 19-22, but the Court should decline all of them. The Court has correctly resolved the legal question of whether the General Assembly acted within its constitutional authority when it passed the Budget Provisions. There is no need for a trial; factual arguments about what happened between the

Department and the Districts have no bearing on the scope of the General Assembly’s power. Nor is there need for additional briefing or argument; the parties wrote lengthy briefs, and six *amici curiae* representing public interests filed two briefs supporting the Districts. The Court should also decline to take the extraordinary step of dismissing the case as improvidently accepted *after* it has issued a decision. The long line of cases discussed by the parties—from *Kumler* to *Rubbermaid* to *Johnston*—suggest that the Court’s decision resolved an important question of law that best reconciles all of the Court’s cases, old and new.

The Districts’ claim that the Court should enforce the law only *prospectively* is inappropriate here and would undermine the Court’s resolution of a dispute between two state entities. “[T]he general rule is that an Ohio court decision applies retrospectively unless a party has contract rights or vested rights under the prior decision.” *DiCenzo v. A-Best Prods. Co, Inc.*, 120 Ohio St. 3d 149, 2008-Ohio-5327 ¶ 25. Deviation from this general rule is “justified only under exceptional circumstances.” *Id.* ¶¶ 28, 47 (applying decision prospectively where retrospective application would impose severe financial burden on entities “years after the fact for an obligation that was not foreseeable at the time”). The Court has limited “decision[s] to prospective application only as a means of avoiding injustice in cases dealing with questions having widespread ramifications for persons not parties to the action.” *Medcorp, Inc. v. Dep’t of Job & Family Servs.*, 124 Ohio St. 3d 1215, 2009-Ohio-6425 ¶ 3. The Court must weigh 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 ¶ 42 (quoting *DiCenzo*, 2008-Ohio-5327, syl. ¶ 2). The Districts present almost no argument in support of their request. *See Recon Br.* 21-22.

The Court’s opinion does not create widespread ramifications for non-parties, so a prospective-only ruling is inappropriate here, even if the Districts were able to satisfy the three-part test (which they cannot). *See Medcorp*, 2009-Ohio-6425 ¶ 3. At argument, counsel for the Districts conceded that the statute of limitations likely foreclosed new claims by other school districts, and that this dispute was a “unique situation” that was “probably not significant to anybody else.” Video of Oral Arg. 34:40-35:10. The Department is not aware of any existing lawsuits that the ruling in this case would affect, and the Districts have certainly not alerted the Court to any.

Moreover, the Districts cannot satisfy any element of the applicable test. On the first element, the Districts cannot seriously contend that the Court’s opinion “establishes a new principle of law that was not foreshadowed in prior decisions.” *See Beaver Excavating*, 2012-Ohio-5776 ¶ 42. The Court’s opinion cites five Ohio decisions in which the State and its subdivisions were held to lack retroactivity rights. *See Op.* ¶¶ 35-37. These specific cases are supported by precedent like *Avon Lake*, which show “that political subdivisions are not entitled to all protections afforded by the Constitution.” *Id.* ¶ 41. The Districts suggest that the decision here is “not reasonably foreshadowed by *modern day* decisions.” *Recon Br.* 21 (emphasis added). That is not the test. Even if it were, the Districts would fail it, because in 2015 this Court unanimously held that a law could be given retroactive effect so long as it injures the State and not citizens. *See Johnston*, 2015-Ohio-4437 ¶ 22. If this decision was not “foreshadowed,” it is unclear what decision ever could be.

The second and third elements are likewise not met. With respect to the second element, retroactive application promotes the rule here—that the General Assembly may retroactively adjust school funding, *see* Op. ¶ 2—by allowing the legislature to do just that. As to the third, retroactive application of the decision will not cause an inequitable result, whereas a prospective-only application would. The Districts would take money from today’s budget in order to pay for students who were (purportedly) counted eleven years ago. That is the practical reality of the relief they seek. That irrational outcome underscores why the General Assembly stepped in to begin with. The rule of the case should apply to this case.

The Districts have not presented any legitimate reason for the Court to revisit its decision in this case. They also overstate the decision’s impact. As the State has maintained throughout this appeal, this case is not about whether school districts may sue under other constitutional or statutory provisions. It has no effect on the rights of private parties to bring constitutional claims. The Court’s limited ruling is that political subdivisions like the Districts lack rights under one specific constitutional provision: the Retroactivity Clause. *See* Op. ¶ 2.

Moreover, the decision does not damage the separation of powers in Ohio. The decision merely recognizes that, as with equal-protection and due-process issues, when the General Assembly acts retroactively in a manner that affects the State and its subdivisions, the check on its power is political, not constitutional.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Reconsideration of Appellants was served by regular U.S. mail this 26th day of May, 2016, upon the following counsel:

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