ORIGINAL

In the
Supreme Court of Ohio

STATE ex rel. LETOHIOVOTE.ORG, et al.,	:	Case No. 2009-1310
Relators,	:	Original Action in Mandamus
vs.	:	
OHIO SECRETARY OF STATE JENNIFER BRUNNER, et al.	:	
Respondents.	:	

MERIT BRIEF OF INTERVENOR-RESPONDENTS J. PARI SABETY, DIRECTOR, OFFICE OF BUDGET AND MANAGEMENT, AND MICHAEL A. DOLAN, DIRECTOR, OHIO LOTTERY COMMISSION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes, Rules and Constitutional Provisions

Other Authorities

INTRODUCTION

Section 265.10 of the budget bill for fiscal years 2010-2011, Am. Sub. H.B. 1 ("Budget Bill"), sets forth the biennial appropriations for the Department of Education. Included is the following line appropriation, found on page 2797 of the Bill:

LOTTERY PROFITS EDUCATION FUND GROUP

7017	**200612**	**Foundation Funding**	**$990,236,905**	**$1,277,271,428**

This line means that, over the next two fiscal years, all of the money in the Lottery Profits Education Fund—approximately $2.3 billion—will go directly to local school districts under the Foundation Funding formula described in Chapter 3317 of the Ohio Revised Code. And a significant portion of the money in the Lottery Profits Education Fund over that period—a projected $851.5 million—comes from the video lottery terminals, or VLTs, addressed on pages 1796-1802 of the Budget Bill ("VLT Provisions") (Rel. Ex. B).

At issue in this case is whether the VLT Provisions are immediately effective—as the General Assembly explicitly intended—or whether their effective date must be delayed for the next 15 months to allow the possibility of a referendum. In answering that question, it would be a mistake to view the right of referendum one-dimensionally, as Relators do. The referenda provisions in the Ohio Constitution actually protect two democratic interests. On the one hand, the Ohio Constitution enshrines a right of the people to participate directly in the democratic process on appropriate occasions. Ohio Const. art. II, § 1c. On the other hand, the Constitution guarantees Ohio's citizens a fundamental level of fiscal stability by withholding the referendum power from a broad array of laws, including emergency laws and laws that raise or spend money for purposes of state government—specifically, "[l]aws providing for tax levies [or] appropriations for the current expenses of the state government and state institutions." *Id.*, § 1d. At its core, this latter provision—Section 1d—is an anti-chaos provision. It is vital to ensuring a

stable and operational government for Ohio's citizens by protecting the flow of money into and out of the State's coffers once the General Assembly has dedicated the money to a particular governmental purpose.

Section 1d, Article II of the Ohio Constitution exempts the Budget Bill's VLT Provisions from the referendum process because the VLT Provisions generate and authorize the expenditure of money for local school districts. The net profits from the VLTs go into the Lottery Profits Education Fund, and from there to local schools; there are no intermediate steps. Indeed, constitutional and statutory provisions stipulate that the money cannot go anywhere else. The direct purpose of the VLT Provisions is to raise and seize upon all the net profits from VLTs and to appropriate them to a specific public function. The VLT Provisions therefore constitute an "appropriation" in two ways: (1) the VLT Provisions directly appropriate money to schools, because the Ohio Constitution makes clear that to raise money by lottery is, by definition, to spend it for education; and (2) the VLT Provisions are so inextricably tied to the Foundation Funding spending that they amount to an appropriation.

The simple fact is that the appropriation for schools made by the General Assembly in the biennial budget cannot go into immediate effect if the VLT Provisions are subject to referendum. It might as well be the $2.3 billion appropriation itself on the ballot, since even the possibility of a referendum—and certainly an actual one—will destabilize the whole appropriation for elementary, secondary, vocational, and special education by tying up an $851.5 million piece. What is more, the destabilization would not be limited to lottery profits appropriations or the education budget. An $851.5 million hole would create uncertainty about *all aspects of the biennial budget*. That is, if a referendum is ordered and the State has an $851.5 million shortfall, there will be a delay of unknown duration while the State figures out if it will generate more

revenue through further painful cuts or new taxes, neither of which would be subject to referendum. During the delay, State agencies will have no idea what spending they should undertake, because they will have no idea what level of funding they will ultimately receive. They will spend money, much as they did for three frightening weeks of interim budgets, not knowing if they are overspending; and if they ultimately do overspend, they will then have a compressed time frame in which to make cuts to compensate for the extra spending they had no idea they were engaged in.

Were the Court to take the unprecedented step of subjecting this appropriation to referendum, the very prospect of a referendum would create radical uncertainty and throw the State into an even greater fiscal crisis than it already faces. But Section 1d and Ohio law do not permit a referendum to be used to thwart an appropriation and spawn mass mayhem in this way. Rather, they require this Court to exempt the VLT provisions from referendum as an appropriation.

If the Court concludes, however, that the VLT Provisions are subject to referendum (and it should not), the Court nevertheless should avoid the constitutionally prohibited and fiscally disastrous result of preventing the immediate effectiveness of the $2.3 billion appropriation. It can do so by holding that the Lottery Commission has the authority to implement VLTs regardless of the Budget Bill's VLT Provisions. Indeed, in the referendum context, the Court has long favored addressing the ultimate substantive issue in a case where simply ruling on the procedural mandamus issues would not resolve the true controversy. See *State ex rel. Oberlin Citizens for Responsible Development v. Talarico,* 106 Ohio St.3d 481, 2005-Ohio-5061. Moreover, this Court has long refused to order a mandamus remedy that itself creates a constitutional quagmire. See *State ex rel. Sawyer v. O'Connor* (1978), 54 Ohio St.2d 380.

In sum, this case requires one of two resolutions. First and foremost, because the VLT Provisions constitute an appropriation, the Secretary of State's only duty was to follow the General Assembly's statement that the Provisions go into immediate effect. Relators therefore are not entitled to the requested mandamus relief. If, however, the Court concludes that mandamus relief is appropriate, the Court should not craft a constitutionally overbroad remedy—that is, the Court should not delay or disable a line appropriation that Section 1d, Article II of the Ohio Constitution makes clear goes into effect immediately. Rather, in that case, this Court should recognize the Lottery Commission's authority to implement VLTs under the law in effect before the Budget Bill's VLT provisions.

STATEMENT OF THE CASE AND FACTS

A. Lottery regulation has a long history in Ohio.

The long history of lottery regulation in Ohio is marked by a clear trend. While private gambling initiatives have consistently been disfavored, Ohio's citizens and their elected representatives have generally supported state-sponsored lottery activities that generate revenue for public projects.

The first Constitution of Ohio, adopted in 1802, made no reference to lotteries or gambling. See *Mills-Jennings of Ohio, Inc. v. Dep't of Liquor Control* (1982), 70 Ohio St.2d 95, 99. These activities were regulated only by statute. In 1805, the General Assembly outlawed various forms of gambling and, in 1807, made it "an offense to conduct a lottery 'without a special act of the legislature.'" *Id.* (quoting 5 Ohio Laws 91).

Between 1807 and 1828, the General Assembly authorized lotteries to raise money for an array of public projects. *Id.* For instance, funds from lotteries went "'to repair and secure the bank of the Scioto,'" "'to build a bridge across the mouth of the Muskingum river,'" and "'to improve the navigation of the Cuyahoga and Muskingum rivers.'" See 5 Ohio Laws (1806), 89,

105; 5 Ohio Laws (1806), 110; 5 Ohio Laws (1806), 74. The General Assembly also approved lotteries to benefit commercial enterprises that were important to the economic stability of certain regions. For instance, proceeds from an 1824 lottery were "to be used by one Oliver Ormsby to replace a steam mill destroyed by fire in the city of Cincinnati," 22 Local Laws (1823), 27, and proceeds from an 1828 lottery were used "to rebuild a woolen factory in Lancaster, Fairfield county, for the benefit of one Elisha Barret." 26 Local Laws (1827), 52. As shown by these legislative acts, the public policy of Ohio during this period included approval of lotteries for public purposes.

That changed in 1851, when the citizens of Ohio reined in the State's power to conduct lotteries for a period of time. Section 6, Article XV of the Constitution of 1851 provided that "lotteries, and the sale of lottery tickets, for any purpose whatever shall forever be prohibited in this State." This prohibition did not touch on other forms of gambling, which were addressed by statute rather than in the Constitution itself.

In 1973, however, the tide turned back in support of state-sponsored lottery activities for the benefit of the State. That year, the electorate approved an amendment to Section 6, Article XV of the Ohio Constitution authorizing the operation of a state lottery: "Lotteries, and the sale of lottery tickets for any purpose whatever, shall forever be prohibited in this State, except that the General Assembly may authorize an agency of the State to conduct lotteries, to sell rights to participate therein, and to award prizes by chance to participants, provided the entire net proceeds of any such lottery are paid into the general revenue fund of the state."

In 1987, the electorate further amended Section 6, Article XV to require that all State lottery proceeds be directed to education. The amendment permitted the General Assembly to "authorize an agency of the state to conduct lotteries, to sell rights to participate therein, and to

award prizes by chance to participants, provided that the entire net proceeds of any such lottery are paid into a fund of the state treasury that shall consist solely of such proceeds and shall be used solely for the support of elementary, secondary, vocational, and special education programs as determined in appropriations made by the General Assembly."

Following these directives, the General Assembly enacted R.C. Chapter 3770, which created a state agency, the State Lottery Commission, to administer the lottery. Under R.C. 3770.03(A), the "commission shall promulgate rules under which a statewide lottery may be conducted." The rules shall include "[t]he type of lottery to be conducted," "[t]he prices of tickets in the lottery," "[t]he number, nature, and value of prize awards," "the manner and frequency of prize drawings," and "the manner in which prizes shall be awarded." R.C. 3770.03(A)(1)-(3). The legislature further instructed the Commission to draft rules pertaining to ticket sales locations, revenue collection, sales agent compensation, and licensing. R.C. 3770.03(B)(1)-(5). The Commission's current rules are published in Chapters 3770 and 3770:1 of the Administrative Code.

The General Assembly has retained a prohibition on private gambling, subjecting violators to criminal penalties. See R.C. 2915.02; 2915.03; 2915.04. These provisions, however, do not touch on the State lottery, see R.C. 2915.02(C) ("This section does not prohibit conduct in connection with gambling expressly permitted by law."); 2915.04(C) (same), or to games conducted by registered charitable organizations, see R.C. 2915.02(D).

B. Through recent referendum attempts, private gambling proponents and corporate gambling interests have sought—but failed—to expand private gambling activities in Ohio.

Through proposed amendments to the Ohio Constitution, and through efforts to enact statutory changes in legislation, gambling proponents and corporate gambling entities have repeatedly tried, but failed, to expand private gambling activities in the State, beyond that offered

by the State lottery and charitable organizations. In 1990, these interests sought approval of a casino resort in the City of Lorain. In 1996, they proposed to legalize riverboat gambling across the State. In 2006, they sought permission to install slot machines at various locations. And in 2008, they proposed to construct a casino near the City of Wilmington.[1] Consistent with Ohio's long history of disfavoring private gambling activities—and refusing to allow corporate interests to write generous deals for themselves into the Ohio Constitution—the electorate rejected all four proposed amendments.

Yet another constitutional amendment trumpeted by these interests will be on the ballot this November. See *State ex rel. Scioto Downs, Inc. v. Brunner*, No. 2009-1294, 2009-Ohio-3761. Through this latest proposal, these interests seek to authorize casinos in Cincinnati, Cleveland, Columbus, and Toledo.

These constitutional amendments were proposed not because a *constitutional* modification is actually necessary to implement casinos in Ohio. Various statutory changes could authorize them (just as there have been statutory changes to bingo statutes and efforts to authorize tribal gambling). Rather, these interests have proposed *constitutional* amendments so that financial arrangements that are exceedingly favorable to the casinos can be locked into the Ohio Constitution and insulated from statutory modification. To date, Ohio's citizens have rejected these efforts.

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[1] For further information on these proposed amendments, see Ohio Issues Report: State Issue Ballot Information for the November 4, 2008 General Election, at 20-26, *available at* http://www.sos.state.oh.us/sos/upload/publications/election/Issues_08.pdf; Ohio Issues Report: State Issues Ballot Information for the November 7, 2006 General Election, at 25-29, *available at* http://www.sos.state.oh.us/sos/upload/elections/2006/gen/IssuesReport_2006.pdf; Secretary of State, Proposed Constitutional Amendments, Initiated Legislation, and Laws Challenged by Referendum, Submitted to the Electors (updated Jan. 23, 2007), *available at* http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf

C. On a bipartisan vote, the General Assembly passed, and the Governor signed, the Budget Bill for fiscal years 2010-2011, which seeks to raise and appropriate revenue through the installation of video lottery terminals at seven Ohio racetracks.

The issues presented by this case differ radically from the ballot issues described above. Whereas the failed ballot issue attempts were spearheaded by private and corporate interests to promote private gambling activities, the VLT initiative at issue here has been propounded by a bipartisan legislature and the Governor as a state-run lottery provision for a vital public purpose—namely, to help stanch the worst fiscal crisis in Ohio since the Great Depression.

Several weeks before the close of fiscal year 2009, Intervenor-Respondent Sabety informed the Governor and the General Assembly that, in light of declining tax revenues, they would need to compensate for an estimated $3.2 billion shortfall in the 2010-2011 biennial budget. See Ellis Aff. ¶ 9 (Int. Ex. D). The shortfall was in addition to the declines in state revenues identified by Sabety, and considered by the Governor and the General Assembly, at earlier stages of the budget process. *Id.* ¶¶ 5-8. Given their constitutional mandate to enact a balanced budget, state legislators and the Governor were faced with three difficult choices—raise taxes on Ohioans, cut public services and benefits, or identify additional revenue.

The Governor and lawmakers made numerous painful cuts in public services and benefits and also resolved to raise more revenue. On July 13, 2009, the Governor issued a directive to Intervenor-Respondent Dolan, as Lottery Director, instructing him to implement immediately a program to license the operation of VLTs at seven Ohio racetracks. See Directive to the Ohio Lottery, Implementing Video Lottery Terminals (July 13, 2009), at ¶ 4 (Rel. Ex. A). The Governor estimated that VLTs would generate $933 million in revenue and licensing fees for the State. *Id.* ¶ 2. This funding would then be directed to education. The Governor instructed Dolan that all net proceeds from VLTs "shall be deposited and utilized to benefit education programs in Ohio in the same manner as all other lottery net proceeds." *Id.* ¶ 4(f). He made the directive

contingent upon an acknowledgment from the General Assembly that the Lottery Commission had the authority to implement VLTs. *Id.* ¶ 5.

That same day, the General Assembly, through bipartisan action, passed the 2010-2011 biennial budget bill, Am. Sub. No. H.B. 1. The Budget Bill acknowledged the Lottery Commission's authority to implement VLTs. The General Assembly amended R.C. 3770.03(A) to provide that "[t]he state lottery commission shall promulgate rules under which a statewide lottery may be conducted, which includes, and since the original enactment of this section has included, the authority for the commission to operate video lottery terminal games." Am. Sub. H.B. 1, at 1796 (Rel. Ex. B). It also included additional language to that effect: "Any reference in this chapter to tickets shall not be construed to in any way limit the authority of the commission to operate video lottery terminal games." *Id.*

The General Assembly also amended R.C. 3770.21 to define a VLT as an "electronic device approved by the state lottery commission that provides immediate prize determinations for participants on an electronic display." *Id.* at 1801. The General Assembly further directed the Lottery Commission to include in any VLT rules the minimum level of investment required by licensees. *Id.* at 1801-02. The legislature also prohibited municipalities and other political subdivisions from assessing new license or excise taxes on the VLTs. *Id.* at 1802.

The plan to use VLT revenue to close the budget shortfall was founded on projections from the Office of Budget and Management ("OBM"). OBM based its projections on $455 million in licensing fees over the biennium ($65 million per racetrack), and roughly $478 million in revenue from VLT operations. Ellis Aff. ¶¶ 12-13 (Int. Ex. D). Together, those revenues are projected to exceed $933 million. *Id.* ¶ 14. After offsetting the expected decline in revenues to other Ohio Lottery activities due to competition with the VLTs, OBM projects an increase in

lottery net profits of $851.5 million. *Id.* ¶ 15. Thus, VLTs are expected to yield an estimated net total of $851.5 million in State revenues.

As explained above, Section 6, Article XV, of the Ohio Constitution mandates that the net proceeds of the Ohio Lottery must go entirely to education. The General Assembly has implemented that constitutional mandate by creating three funds. All of the gross proceeds of the Ohio Lottery are deposited into the State Lottery Gross Revenue Fund, which is used to pay expenses for lottery operations and prizes. R.C. 3770.06(A); Sabety Aff. ¶ 7 (Int. Ex. C). After the expenses have been paid, the remaining net proceeds are deposited into the State Lottery Fund. R.C. 3770.06(A); Sabety Aff. ¶ 8. From there, all net profits from lottery activities—that is, all of the money that is not needed to meet the Ohio Lottery's expenses and obligations—is transferred to the Lottery Profits Education Fund. R.C. 3770.06(B); Sabety Aff. ¶ 9.

Consistent with these constitutional and statutory provisions, the Budget Bill appropriates all of the net proceeds from the Ohio Lottery, including an estimated $851.5 million in net profits from VLTs, to elementary and secondary education. Sabety Aff. ¶ 14. Specifically, the Budget Bill allocates $990 million in fiscal year 2010 and $1.27 billion in fiscal year 2010 for Ohio schools, for a total of almost $2.3 billion over the biennium. See Am. Sub. H.B. 1, at 2797 (Int. Ex. A). All of that money is earmarked for Foundation Funding, which is distributed to local school districts based on the formula in Chapter 3317 of the Revised Code. (The Governor and General Assembly substantially revised the Foundation Funding formula in their ongoing efforts to meet this Court's mandate in *DeRolph v. State*, 78 Ohio St.3d 193, 1997-Ohio-84). The Budget Bill also appropriates $50,000 per year over the biennium to the Inspector General for VLT oversight. Am. Sub. H.B. 1, § 305.10, at 2866 (Int. Ex. B). The $2.3 billion in net lottery

proceeds is a critical part of the State's total contribution of $13,037,282,060 toward education in the current biennium.

The General Assembly expressly and deliberately specified that the VLT Provisions are "exempt from the referendum" because they "[are] or relate[] to an appropriation for current expenses within the meaning of Ohio Constitution, Article II, Section 1d." Am. Sub. H.B. 1, § 812.20, at 3112 (Rel. Ex. C).

The Governor signed the Budget Bill into law on July 17, 2009.

D. Relators filed a petition for a writ of mandamus.

Shortly after the Budget Bill's enactment, Relators formed the LetOhioVote.org ballot committee in an effort to seek a vote of the electorate on the VLT Provisions. On July 20, 2009, Relators petitioned this Court for a peremptory writ of mandamus against the Secretary of State. They argued that the VLT Provisions are subject to referendum under Section 1c, Article II of the Ohio Constitution and requested, among other relief, that the Court order the Secretary to set forth in her journals that the VLT Provisions shall not be effective for 90 days.

On July 23, 2009, Relators attempted to file a referendum petition and summary of the measure to the Secretary and the Attorney General. Under R.C. 3519.01(B), Relators must secure certifications from both officials before a referendum petition may be placed on the ballot. The Secretary declined to accept the filings, pursuant to Section 812.20 of the Budget Bill, which indicates that the VLT Provisions are not subject to referendum. The Attorney General did the same. Relators filed an Amended Complaint to include allegations regarding these attempted filings.

On July 24, 2009, Sabety and Dolan moved to intervene as Respondents, and Relators did not oppose the request. The Court granted the motions to intervene, and ordered that all parties proceed on an expedited briefing schedule.

ARGUMENT

Intervenor-Respondents' Proposition of Law No. I:

Section 1d, Article II, of the Ohio Constitution exempts from the referendum process the provisions of Am. Sub. H.B. 1 that address video lottery terminals.

Relators contend that the VLT Provisions, being immediately effective at the direction of the General Assembly, are unconstitutional because they deny Ohio citizens their right of referendum. This Court has long held that "all legislative enactments enjoy a presumption of constitutionality," *State ex rel. Taft v. Franklin Cty. Court of Common Pleas*, 81 Ohio St.3d 480, 481, 1998-Ohio-333, and that a party challenging the constitutionality of a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt, *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, ¶ 12. "[T]he court must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance asserted as unconstitutional." *State ex rel. Purdy v. Clermont Cty. Bd. of Elections* (1996), 77 Ohio St.3d 338, 345 (citation omitted). Relators cannot satisfy their heavy burden here.

A law passed by the General Assembly and signed by the Governor is not subject to the referendum process if it "provid[es] for tax levies [or] appropriations for the current expenses of the state government and state institutions," or if it is an "emergency law[] necessary for the immediate preservation of the public peace, health or safety." Ohio Const. art. II, § 1d. Relators insist that these are "narrow exceptions to the constitutional referendum power," and that "the long-standing referendum right . . . applies in all but the narrowest instances," Relators' Br. at 8, 15. To be sure, the exemptions in Section 1d are subject to a "strict, but reasonable, construction." *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, syl. ¶¶ 1, 2. But that does not mean that the exceptions are "narrow." In fact, quite the opposite is true: Because much of the General Assembly's work involves raising and spending revenue for the public welfare,

Section 1d exempts from the referendum process many laws intertwined with budgeting and appropriation activities. This includes the VLT Provisions. They are not subject to referendum because they raise and spend money for the purpose of public education.

A. The VLT Provisions generate and appropriate net proceeds for local school districts for elementary, secondary, vocational, and special education.

The Ohio Constitution authorizes a State-run lottery and provides that any lottery proceeds must benefit education in the State. Specifically, the Constitution requires that "the entire net proceeds of any such lottery [be] paid into a fund of the state treasury that shall consist solely of such proceeds and shall be used solely for the support of elementary, secondary, vocational, and special education programs as determined in appropriations made by the General Assembly." Ohio Const. art. XV, § 6.

Consistent with that constitutional command, R.C. 3770.06(B) creates the Lottery Profits Education Fund. Whenever the Director of the Office of Budget and Management ("OBM Director") determines that the money in the State lottery gross revenue fund are sufficient to meet the lottery's operational needs, she transfers the excess money to the Lottery Profits Education Fund. *Id.* The statute further provides that all of the money in the Lottery Profits Education Fund "shall be used solely for the support of elementary, secondary, vocational, and special education programs as determined in appropriations made by the general assembly." *Id.*

In this regard, the Lottery Profits Education Fund resembles other "special funds" that are dedicated to a particular purpose. For instance, Section 5a, Article XII of the Ohio Constitution directs that all fees, excises or license taxes "relating to the registration, operation or use of vehicles on public highways, or to fuels used for propelling such vehicles" shall be expended only for highway-related purposes, state enforcement of traffic laws, and reimbursing indigent persons injured in motor vehicle accidents on public highways. A related statute, R.C. 5501.05,

provides that money appropriated to the department of transportation from these fees and taxes must be spent according to the constitutional provision. In short, any money raised for these special funds must be spent for the specified purpose. That is no less true of lottery money. By virtue of the above constitutional and statutory provisions, all net lottery proceeds must directly benefit local school districts. Money from the Lottery Profits Education Fund cannot be, and is not, used for any other purpose. Put simply, to raise lottery money is to spend it for education.

The Budget Bill follows that direct money trail. The legislation confirms the Lottery Commission's "authority . . . to operate video lottery terminal games." Am. Sub. H.B. 1, at 1796 (Rel. Ex. B). The OBM Director must deposit net profits from the VLTs—along with net profits from other lottery functions—into the Lottery Profits Education Fund. R.C. 3770.06(B). And for fiscal years 2010 and 2011, the Budget Bill requires that some $2.3 billion flow directly from the Lottery Profits Education Fund to local school districts according to the Foundation Funding formula. See Sabety Aff. ¶ 13 (Int. Ex. C).

The allocation of money from the Lottery Profits Education Fund to local schools is uninterrupted. The Budget Bill earmarks $2.3 billion in the Lottery Profits Education Fund for Foundation Funding. As the Budget Bill reflects, other money is also earmarked for Foundation Funding, including funds from the General Revenue Fund ("GRF") as well as federal stimulus dollars. Am. Sub. H.B. 1, at 2796 (Int. Ex. A); Sabety Aff. ¶ 15. Twice monthly, the Ohio Department of Education ("ODE") calculates the amount of money owed to local school districts according to the Foundation Funding formula. Sabety Aff. ¶ 12. ODE then sends an invoice to the OBM Director for issuance of those funds. From there, the OBM Director instructs the State Treasurer to electronically transfer the requested funds to the local school districts. *Id.* The electronic transfers to the districts draw money from the various funds that contain money

earmarked for Foundation Funding. This is accomplished by the code strings for the electronic transfers, which specify how many dollars to draw from each fund, including the Lottery Profits Education Fund.

The Budget Bill's VLT Provisions therefore put money directly into the coffers of local school districts. The Lottery Commission will raise an estimated $851.5 million by VLTs, and the OBM Director will deposit those proceeds into the Lottery Profits Education Fund. Ellis Aff. ¶¶ 14-15 (Int. Ex. D). Line 200612 of the Budget Bill instructs that some $2.3 billion from the Lottery Profits Education Fund—more than $990 million in fiscal year 2010, and nearly $1.3 billion in fiscal year 2011—will go to local schools in the biennium. See Am. Sub. H.B. 1, at 2797 (Int. Ex. A).

B. The VLT Provisions constitute "appropriations."

Section 1d of Article II of the Ohio Constitution exempts the VLT Provisions from the referendum process because they are "appropriations." Relators argue that a law is an "appropriation" only if it "involves spending money," and that the VLT Provisions do not qualify because they "will ultimately *raise* revenue, not spend it." Relators Br. at 9. Relators are wrong, however, on two counts. First, the VLT Provisions *do* spend money, because, by definition, to raise money by means of the lottery is to appropriate it for education. Second, even if the VLT Provisions do not themselves spend money, they are inextricably tied to provisions that do. And under Ohio law, when an appropriation is inextricably tied to another provision in the same legislation, the mutually dependent provisions all are exempt from the referendum process. Put another way, the VLT Provisions serve no purpose but for appropriation line 200612; and appropriation line 200612 cannot allocate nearly $2.3 billion to local schools without the VLT Provisions. Finding that VLTs are appropriations—or are so inextricably tied to appropriations to be exempt from referendum—is fully consistent with this Court's law, and

conforms with the law of other states. And it will not—as Relators' argue—turn back the clock to allow laws to be exempt from referendum under Section 1d merely because they are inserted into an appropriations bill.

The purpose of Section 1d is to shelter the immediate flow of money into and out of the State's coffers. The Constitution exempts both tax levies and appropriations to ensure that the referendum process does not interfere with revenue or spending. After all, if every provision of law that generates revenue or spends money for State purposes were subject to a statewide vote, the business of the State would face interminable delays, if not utter gridlock. That is why the Constitution mentions the exemptions for tax levies and appropriations in the same breath as emergency measures—because dire consequences will follow if any of those laws are delayed by referendum.

To that end, the Ohio Constitution exempts from referendum "[l]aws providing for . . . appropriations for the current expenses of the state government." Ohio Const. art. II, § 1d. As a matter of pure textual interpretation, "providing for" the appropriation of funds is exactly what the VLT Provisions do. The revenue raised through the implementation of VLTs "provid[es] for" $851.5 million that is appropriated to local school districts from the Lottery Profits Education Fund.

But that is not the only text that confirms that the VLT Provisions are appropriations. The General Assembly has also delineated the circumstances under which an appropriation provision is exempt from referendum. First, Ohio law defines an "appropriation" as "an authorization granted by the general assembly to make expenditures and to incur obligations for specific purposes." R.C. 131.01(F). That definition comports with general legal definitions of the term as:

> The act by which the legislative department of government designates a particular fund, or sets apart a specified portion of the public revenue or of the money in the public treasury, to be applied to some general object of governmental expenditure, or to some individual purchase or expense. . . . The legislative designation of a certain amount of money as being set apart, allotted, or assigned for a specific purpose.

Black's Law Dictionary 102 (6th ed. 1990).

Moreover, Ohio law codifies the circumstances under which an "appropriation for current expenses"—as Section 1d, Article II of the Ohio Constitution uses that phrase—is exempt from the referendum process. The statute explains that a provision "goes into immediate effect" if: (1) it "is an appropriation for current expenses"; (2) it "is an earmarking of the whole or part of an appropriation for current expenses"; or (3) "[i]mplementation of the section depends upon an appropriation for current expenses that is contained in the act." R.C. 1.471(A)-(C). Under R.C. 1.471 and 131.01, then, a provision is exempt from referendum if it authorizes spending, earmarks money for spending, or depends on the exercise of spending power.

Those definitions and exceptions apply to the VLT Provisions. The Budget Bill includes spending for VLTs; it allocates $100,000 over the biennium for VLT oversight by the Inspector General. Am. Sub. H.B. 1, at 2866 (Int. Ex. B). More to the point, the Bill authorizes the raising of net lottery proceeds by means of VLTs, and the General Assembly has directed that those proceeds go to one place: schools. R.C. 3770.06; see also pp. 12-15, above. In short, the VLT provisions are inextricably intertwined with the line appropriation and therefore are part of the appropriation itself.

This Court's guidance under Section 1d—and particularly the lead case interpreting the provision, *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St.3d 225, 1994-Ohio-1—confirm that the VLT Provisions are not subject to referendum. At issue in *Voinovich* was a biennial appropriation bill for the Bureau of Workers' Compensation and the Industrial Commission. *Id.* at 225. In addition to the provisions that appropriated funds to the Bureau and Commission, the

legislation contained "nonappropriation provisions that amended substantive sections of the Ohio Revised Code dealing with workers' compensation." *Id.* at 226. Specifically, the legislation "abolished the five-member Industrial Commission of Ohio, created a new three-member Industrial Commission, [and] substantially amended the workers' compensation law." *Id.*

This Court held that the provisions of the legislation that substantively changed the permanent law of the State—those abolishing the Industrial Commission and amending the workers' compensation system, without regard to appropriations—were not exempt from the referendum process under Section 1d. Adopting Chief Justice O'Neill's dissent in *State ex rel. Riffe v. Brown* (1977), 51 Ohio St.2d 149, the Court stated the rule this way: "'Any section of a law which changes the permanent law of the state is subject to referendum under the powers reserved to the people by Section 1 of Article II, even though the law also contains a section providing for an appropriation for the current expenses of the state government and state institutions which under Section 1d, Article II, becomes immediately effective.'" *Voinovich*, 69 Ohio St.3d at 236 (quoting *Riffe*, 51 Ohio St.2d at 167 (O'Neill, C.J., dissenting)); see also *Laidlaw Waste Sys., Inc. v. Consol. Rail Corp.*, 85 Ohio St.3d 413, 416, 1999-Ohio-403. The central holding of *Voinovich*, then, was that some parts of a law—those appropriating funds—may be exempt from the referendum process even as other, unrelated sections are subject to it.

The *Voinovich* Court did not define what it meant by "a section providing for an appropriation," but under no definition would the contested provisions in *Voinovich* have qualified. The nonappropriation sections in that case abolished a state commission and replaced it with a different body. The provisions had nothing to do with revenue or spending. Likewise, the legislation in *Riffe* contained provisions pertaining to voting procedures that were unrelated to the appropriations elsewhere in the bill. *Riffe*, 51 Ohio St.2d at 149.

Other cases have followed the rule of *Voinovich* and the *Riffe* dissent: that the referendum process applies to provisions in an appropriations bill that make substantive changes to permanent law and that have no connection to revenue and spending. At issue in *State ex rel. Taft v. Franklin County Court of Common Pleas*, 81 Ohio St.3d 480, 1998-Ohio-333, was legislation enacted in 1997, Am. Sub. H.B. 697 ("H.B. 697"). H.B. 697 contained six sections. The first section levied a set of taxes and provided that half of the proceeds of the taxes would benefit schools. Section 2 stated that the new taxes set forth in Section 1 would go into effect only if Ohio voters approved the taxes at a special election in May 1998. Section 3 directed the Secretary of State to conduct the special election discussed in Section 2. Section 4 appropriated funds for the special election. Section 5 stated that the law was to go into immediate effect. And Section 6 made further revisions to the Revised Code consistent with the new taxes. (These amendments were mooted when the voters rejected the taxes).

Like Relators here, the relator in *Franklin County Court of Common Pleas* argued, among other things, that Sections 2, 3, and 5 of H.B. 697—the provisions that required the immediate implementation of a statewide vote—violated Sections 1c and 1d, Article II of the Ohio Constitution. The Court rejected that argument and explained: "The provision that Section 2, 3, and 5 of Am. Sub. H.B. No. 697 take immediate effect comports with the Constitution and R.C. 1.471(C) because implementation of the statewide election is dependent upon the appropriation in Section 4 of Am. Sub. H.B. No. 697." 81 Ohio St.3d at 484. In other words, because the contested provisions were inextricably tied to the appropriations sections, the referendum process was inapplicable. Similarly, in *State ex rel. Davies Manufacturing Co. v. Donahey* (1916), 94 Ohio St. 382, the question was whether a competitive-bidding requirement embodied in general appropriation legislation was subject to referendum. *Id.* at 384. Even though the competitive-

bidding requirement was not itself an appropriation, the Court held that it was inextricably tied to the appropriation, and therefore part of the appropriation and not subject to referendum. *Id.* at 385.

Relators and their amici want to obscure these precedents—and distort Respondents' position—by pretending that what is at stake in this case is whether we should return to a pre-*Voinovich* understanding of appropriations. The view that *Voinovich* rejected was that if a bill appropriated money—any money, anywhere in the bill—then everything in the bill was immune from referendum. That is not the view that the Respondents in this case propound. The Respondents are not suggesting that VLT Provisions are exempt from referendum because they happen to be in the same bill as other provisions that appropriate money. Rather, Respondents ask this Court to simply apply the law that it has long recognized: that provisions that are inextricably tied to a line appropriation *are, themselves, part of the appropriation*, and therefore exempt from referendum.

Like Ohio, other States recognize the principle that a law that raises revenue, and then appropriates it for a specific purpose, will be sheltered from the referendum power. The Michigan Constitution, for instance, exempts "acts making appropriations for state institutions" from the right of referendum. Mich. Const. art. 2, § 9. The Michigan Supreme Court has held that an act that levies a gasoline tax must be read "'in pari materia'" with an appropriation, and considered part of the appropriation, for purposes of the referendum power; the two provisions are inextricably bound together, and therefore both are exempt from referendum. *County Road Ass'n of Michigan v. Bd. of State Canvassers* (Mich. 1979), 282 N.W.2d 774, 780. As the Michigan Supreme Court correctly observed, "[i]f considered separately, without construing

them together, they would be unworkable"—specifically, the line appropriation "could not operate . . . without the funds" appropriated by the tax. *Id.* at 778 (citation omitted).

Likewise, the Maryland Constitution exempts from the referendum power "appropriation[s] for maintaining the State Government." Md. Const. Art. XVI, § 2. The Maryland Court of Appeals has long held that a "revenue raising and spending measure" is "embraced within the exclusionary provisions contained in the Referendum Amendment." *Kelly v. Marylanders for Sports Sanity, Inc.* (Md. 1987), 530 A.2d 245, 257 (comprehensive legislative scheme to raise funds to acquire and construct sports facilities at Camden Yards for Baltimore Orioles—including provisions authorizing Stadium Authority to issue bonds to raise revenue for the project—was exempt from referendum because it was inextricably tied to spending measures for the project). The Maryland court pointed out the constitutionally untenable result that would follow if the court attempted to detach the various provisions from one another. That is, if the revenue stream were cut off from the appropriation and subjected to referendum, it would be as if the appropriation itself were being referred—a result that Maryland's constitution, like Ohio's, plainly forbids. *Id.* at 260. "Considered apart, the stadium bills would not be workable to achieve the objective of the appropriation," and to sever the provisions "would scuttle the entire project by fatally undermining its dominant purpose—to finance the acquisition of a site upon which to construct sports stadiums." *Id.* at 263. Accordingly, the court concluded, the Legislature intended for the provisions to "function in tandem as a unitary solution to its singular objective—an objective which it timed for immediate implementation." *Id.* "The stadium bills . . . their various parts being mutually dependent upon one another, were manifestly designed to permit prompt negotiation with the Orioles for a long-term lease." *Id.*

These state supreme courts have correctly understood that the appropriations exception to the referendum power "ha[ve] as [their] *constitutional* purpose protecting from referendum the purpose or object of the *legislative* appropriation." *Id.* at 262 (emphasis in original). Otherwise, a tiny minority (in Ohio, six percent of the voting electorate) could suspend the operation of an otherwise valid appropriation by targeting its funding source for a referendum challenge. The resulting stay of the funding provision would torpedo the appropriation, causing an unanticipated reduction in money for essential state functions—in other words, fiscal mayhem—which is the very result the appropriations exception is supposed to prevent. *Id.* at 254, *County Road Ass'n*, 282 N.W.2d at 778-79.

The lesson of the case law, then, is that a provision in an appropriation bill falls within Section 1d's exemption when it is inextricably tied to a spending provision—when one cannot exist without the other. Relators are therefore wrong to insist, in effect, that a provision constitutes an "appropriation" only if it contains a dollar sign. This Court has already rejected that position. The contested provisions in *Franklin County Court of Common Pleas* and *Davies Manufacturing* did not contain dollar signs. And the provisions in *Voinovich* were fatal *not* because they lacked a dollar sign, but because they were completely *unrelated to* the appropriations. The VLT Provisions, by contrast, are linked inextricably to the Foundation Funding appropriation—so much so that the appropriation of nearly $2.3 billion from the Lottery Profits Education Fund to local schools cannot occur immediately, if at all, if Relators receive the relief they request. The direct purpose of the VLT Provisions is to raise and seize upon the revenue from VLTs and to appropriate it to educational purposes. This Court has never held that, despite the language of Section 1d, the referendum power can be used to block

appropriations in this way. It should therefore reject Relators' request to do so for the first time here.

C. Relators' interpretation of "appropriation" is untenable.

If Relators prevail, two sets of adverse consequences will follow. To begin with, settled law would change, and a vast number of spending-related provisions that long have been treated as exempt would be subject to referendum. What is more, the Budget Bill would be thrown badly off balance and a new budget crisis would ensue, triggering mass uncertainty and chaos among State agencies as to their actual budgets for the biennium. The very purpose of Section 1d is to safeguard the State and its citizens from such a fiscal emergency.

First, any rule that subjects the VLT Provisions to referendum would depart from this Court's precedent and dramatically expand Section 1d's application. Relators offer two definitions of "appropriation"—one from *Black's Law Dictionary*, the other from R.C. 131.01(F)—and extrapolate from those definitions that an appropriation must "involve[] spending money." Relators Br. at 9. But there are two problems with Relators' view. For one thing, the VLT Provisions *do* "spend money" for education, for the reasons explained above—namely, the VLT Provisions directly appropriate money to schools because the Ohio Constitution makes clear that to raise money by lottery is, by definition, to spend it for education. More fundamentally, Relators' reading of the term "appropriation" does not comport with this Court's case law. As explained in the previous section, this Court has long held that Section 1d exempts legislative provisions that are inextricably tied to appropriations such that the money cannot immediately be spent if the referendum process applies. See *Franklin County Court of Common Pleas*, 81 Ohio St.3d at 484; *Davies Mfg.*, 94 Ohio St. at 385. Relators cannot distinguish those cases (nor do they try) without eviscerating the rule they apply.

Instead of following this Court's interpretation of Section 1d, Relators maintain that, if the VLT Provisions are exempt from referendum, the General Assembly could "eviscerate Article II whenever it saw fit" by simply inserting an appropriation section into every piece of legislation. Relators Br. at 10 (citing *Riffe*, 51 Ohio St.2d at 158 (O'Neill, C.J., dissenting)). Relators' amici sound the same alarm. See Brief of Amici Curiae Buckeye Institute et al. 16 (warning that exempting the VLT Provisions "would invite the General Assembly to attach controversial measures to appropriations bills so as to avoid the check of Referendum"). But their alarm is a false one. No one argues that all of the provisions of the Budget Bill are exempt from referendum. *Voinovich* forecloses such an argument, and the General Assembly recognized as much both in R.C. 1.471 and in the Budget Bill itself, where it identified provisions that do not take immediate effect, see Am. Sub. H.B. 1, § 812.10, at 3112-13 (Rel. Ex. C). Rejecting Relators' mandamus request would merely confirm what this Court has previously held: that the referendum process does not apply to provisions that directly authorize expenditures or that are inextricably tied to appropriations.

Relators and their amici further suggest that democracy is on the line in this case, but their rhetoric rings hollow. The question has been raised, and Relators studiously have refused to deny, that a substantial source of their millions of dollars in financial support may well be derived from a few individuals and corporate interests that aim to install large casinos in the State. "[I]t is fundamental that a relatively miniscule group of people may not haphazardly place issues on the ballot, and, in effect, usurp the functions of elective officials." *Northeast Franklin Co. v. Cooper* (10th Dist. 1975), 45 Ohio App. 2d 137, 142.

More to the point, Relators' argument loses sight of other vital tools in our democracy. That is, referenda are not the only check on government. In addition to "the power of the vote,"

"our forefathers carefully fashioned some checks and balances that are equally a cornerstone to our system." *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 547 (Lundberg Stratton, J., concurring).

> The crafters of our Constitution recognized that sometimes our representatives need some distance from the voting so that they can make a decision that may not be popular at the moment, but may be best or right in the long haul. Thus, state representatives have close accountability with two-year terms, senators are more insulated by four-year terms, and the judiciary by six-year terms—still accountable but with greater freedom to act as necessary though it may not be popular.

Id. In short, a representative democracy was instituted to make difficult decisions. Section 1d strikes a balance between the values of direct democracy and the legislative imperative to respond to emergencies and to pay the way in a timely fashion for vital governmental services, thereby avoiding fiscal catastrophes. Indeed, this is why the people themselves, in enacting the referendum provisions, exempted such measures from its reach. In this way, Ohio's citizens have already spoken on the issue presented by this case and have already resolved that such fiscal mayhem is unacceptable. And in this respect, the Budget Bill does not brush off the democratic process; it is in fact a product of it.

Relators' mandamus request, if successful, would yield a second set of adverse consequences. The budget deal that included the plan to use VLT revenue marked the end of an appropriations process made all the more challenging by the State's worst economic crisis since the Great Depression. Declining tax revenues forced the General Assembly to make $3.2 billion in spending cuts. Many worthwhile state programs—particularly those financed from the General Revenue Fund, or GRF—have already been cut to the bone, if not to the marrow. And most of those GRF-funded agencies provide critical human services.

The Budget Bill is founded on a projection of $851.5 million in net revenue from VLTs. Some of that revenue is set to arrive in short order from licensing fees; the rest will follow in a

stream once the VLTs are in place next year. Ellis Aff. ¶¶ 12-15 (Int. Ex. D). If the VLT Provisions do not go into immediate effect, all of that revenue may be substantially delayed. And, of course, if the referendum passes, the revenue stream may never flow at all.

The result will be a gaping hole in the biennial budget. And in that event, the budget will be unbalanced, and the Governor and General Assembly will face dire options. Either the General Assembly will have to raise taxes, or the Governor will have to order additional cuts in GRF spending. Given that many state programs have already been drastically affected by cuts, further spending reductions will be devastating. Either way, the voters of Ohio will have no say, because neither tax levies nor unilateral executive spending cuts are subject to referendum.

Meanwhile, as the State determines how to generate more revenue, State agencies will have no idea what spending they should undertake because they will have no idea what level of funding they will ultimately end up with. If they overspend, they will then have a compressed time frame in which to make cuts to make up for the extra spending they had no idea they were engaged in—and, of course, there is no guarantee that such further cuts would even be feasible.

The very fact that the State's budget would be so severely thrown off balance by a referendum shows how closely the VLT Provisions are tied to appropriations. This is precisely the type of fiscal chaos Section 1d is meant to prevent. Accordingly, this Court should decline Relators' request to depart from the settled understanding of Section 1d in order to block a spending measure for the first time in the State's history.

D. Relators are not entitled to a writ of mandamus.

Because the VLT Provisions are an appropriation, the Secretary of State's only duty was to follow the law. And the law, as stated by the General Assembly, is that the VLT Provisions go into immediate effect. For that reason, and for the reasons explained more fully by the Secretary

of State, whose arguments Intervenor-Respondents adopt and incorporate in full, a writ of mandamus should not issue.

Intervenor-Respondents' Proposition of Law No. II:

The Lottery Commission has authority to implement video lottery terminals under the law that existed before the General Assembly enacted Am. Sub. H.B. 1.

If the Court concludes that the VLT Provisions do not go into immediate effect and are subject to referendum, there remains the problem of appropriation line 200612—the $2.3 billion in lottery funds allocated to elementary, secondary, vocational, and special education, $851.5 million of which comes from VLT implementation. As explained above, the VLT Provisions are inextricably intertwined with the education appropriation; one does not exist without the other. Therefore, for this Court to hold that the VLT Provisions do not go into immediate effect is necessarily to hold the same with respect to an $851.5 million piece of the $2.3 billion appropriation. The appropriation becomes a hostage to Relators' referendum effort.

But such a mandamus remedy would unquestionably be overbroad—indeed, the remedy would be, in part, unconstitutional—because staying the VLT provisions will inexorably stay the immediate effect of the line appropriation, which would violate Section 1d's mandate that appropriations become effective immediately. If the line appropriation, in full, is not immediately effective, there will be an $851.5 million hole in the biennial budget and an unknown number of months that agencies, local governments, and school districts will be in limbo. They will have no idea what revised funding levels the General Assembly and Governor will agree upon, and therefore, no guidance on how to manage their current spending. As the recent budget stalemate demonstrated, such uncertainty obstructs day-to-day operations, staff hiring, contract negotiations, and long-term planning—activities that are fundamental to the most basic operations of government.

In order for this Court to ensure that any mandamus remedy it crafts does not overreach unconstitutionally—that is, to ensure that any remedy does not stay the immediate effect of the line appropriation—the Court should confirm that the Lottery Commission has authority to implement VLTs regardless of the VLT Provisions in the Budget Bill. A plain reading of unamended R.C. 3770.03—which would remain in effect until the referendum process is complete and if it is successful—makes clear that the General Assembly already had given the Lottery Commission broad power to decide "[t]he type of lottery to be conducted" in the State and "the manner in which [lottery tickets] are to be sold." The Court should confirm that this unqualified grant of authority includes the option to immediately implement VLTs.

Indeed, although the Governor and the General Assembly included the VLT Provisions in hopes of reducing the prospect of litigation, both the Governor and the legislature ultimately agreed that the Lottery Commission could implement VLTs pursuant to unamended R.C. 3770.03. See Am. Sub. H.B. 1, at 1796 (Rel. Ex. B) (stating that the Lottery Commission has had "since the original enactment of this section . . . the authority . . . to operate video lottery terminal games"); Governor's Directive, at ¶ 3 (Rel. Ex. A) ("The General Assembly has indicated to me its intent to pass legislation which would expressly acknowledge that the Ohio Lottery has the authority to implement VLTs under the existing laws of the State of Ohio . . . .").

If the Court does not address the Lottery Commission's authority to implement VLTs under the unamended law, then the potential loss of the $851.5 million in VLT revenue would destabilize the $2.3 billion line appropriation to education and throw the entire 2010-2011 biennial budget into chaos, with the untenable constitutional and fiscal consequences described above. If, however, the Court makes clear that the Lottery Commission may go forward with VLT implementation under existing authority regardless of the referendum effort, then the scope

of a remedy ordering the opportunity for referendum would be properly tailored and constitutionally sound. Indeed, in the referendum context, this Court has favored addressing the ultimate substantive issue in a case where simply ruling on the procedural mandamus issues would not resolve the true controversy. See *State ex rel. Oberlin Citizens for Responsible Development v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, ¶¶17-19. It should do the same here.

A. The Lottery Commission's constitutional and statutory authority to implement VLTs preceded the Budget Bill.

The Ohio Constitution defines the Lottery Commission's authority in Section 6, Article XV. As discussed above, that section prohibits the operation of "lotteries" unless three conditions are satisfied: (1) the General Assembly authorizes the lottery; (2) "an agency of the state" "conduct[s]" the lottery, "sell[s] rights to participate therein," and "award[s] prizes by chance to participants," and (3) "the entire net proceeds of any such lottery" are "used solely for the support of elementary, secondary, vocational, and special education programs." Nothing in this section precludes the operation of a video-based lottery game, provided that the three conditions are satisfied.

The real issue in this litigation is whether or not the first condition was satisfied before the passage of the Budget Bill—that is, whether the General Assembly granted authority to the Lottery Commission to implement VLTs in the unamended version of R.C. 3770.03. Simply put, it did.

Unamended R.C. 3770.03(A) states that "[t]he state lottery commission shall promulgate rules under which a statewide lottery may be conducted." The General Assembly did not place any restraint on the Commission in the design of the lottery other than requiring the Commission to enact rules governing "[t]he type of lottery to be conducted," "[t]he prices of the tickets in the

lottery," and "[t]he number, nature, and value of prize awards, the manner and frequency of prize drawings, and the manner in which prizes shall be awarded to holders of winning tickets."

The language of this provision is unambiguous. The General Assembly told the Lottery Commission to enact rules governing the type of lottery games offered, their price, and the prizes offered, but it left the design, price, and prize up to the Commission. The statute does not limit the Commission to traditional paper-based games. In fact, quite the opposite: The statute gives the Commission express authority over "the *manner* in which [lottery tickets] are to be sold." Unamended R.C. 3770.03(B)(1) (emphasis added). This unfettered authority to design the type of game and manner of ticket includes the authority to implement video-based games.

As confirmation of the Lottery Commission's broad authority to design the type of lottery games offered, one need only examine the variety of games now in circulation. The lottery includes the more traditional number-match games, such as Pick Three, Pick Four, Rolling Cash Five, Classic Lotto, and Mega Millions®. To take one example, in the "Classic Lotto" game, participants select six numbers, from one through 49, which are then entered into a lottery terminal. O.A.C. 3770:1-9-53(B)(2). Alternatively, participants can select the "auto pick" function, whereby the terminal generates six random numbers. *Id.* The terminal then produces a ticket reprinting those numbers, which the participant purchases for $1. O.A.C. 3770:1-9-53(B),(C). The Lottery Commission conducts regular drawings, selecting a random assortment of numbers for each drawing. O.A.C. 3770:1-9-53(B)(3). If a participant's ticket matches three or more numbers selected during the appropriate drawing, he is entitled to a prize. O.A.C. 3770:1-9-53(D).

The Commission also offers Keno, a more complex number-match game. A participant (or the "auto pick" function) chooses anywhere from one to 10 numbers out of a pool of 80, O.A.C.

3770:1-9-55(B)(2), and the player then wagers between $1 and $20. O.A.C. 3770:1-9-55(C). The Lottery Commission conducts a computer-assisted drawing every four minutes in which 20 of the 80 numbers are selected, O.A.C. 3770:1-9-55(B)(4), and it broadcasts the drawing on monitors at locations across the state. The quantity of numbers matched determines the participant's prize. O.A.C. 3770:1-9-55(D).

The Lottery Commission also has used its statutory authority to design games that differ from traditional number-match games. For instance, the Commission offers instant-win "scratch-off" games that resemble casino-type activities such as slots, blackjack, and poker. Unlike the traditional number-match games, no drawing occurs. Instead, the holder of an instant game knows immediately whether she has won a prize. For instance, in the $1 "Slots of Luck" instant game, which is included as Exhibit E to Intervenor-Respondents' evidence, the participant has five "spins" on a printed slot machine. O.A.C. 3770:1-9-668(B). If the ticket reveals three identical symbols on the same spin, or a "WIN" symbol, the player wins a prize of between $1 and $100. The Lottery Commission predetermines the number of prizes in a given sales cycle for each game and then authorizes the printing of a corresponding number of tickets using random techniques. See O.A.C. 3770:1-9-668(E).

The Commission also offers instant computer-based EZPLAY™ games. In one such game, which is attached to Respondent-Intervenors' evidence as Exhibit F, the participant pays $3 to the sales agent, and a computer terminal generates a ticket consisting of nine poker "hands" and 24 playing cards. O.A.C. 3770:1-9-634(B). The participant then attempts to create one of the nine "hands" from the group of cards. If the participant succeeds in putting together one of the hands, he wins a prize. O.A.C. 3770:1-9-634(D). Unlike the traditional instant scratch-off

games, which use preprinted card stock, the EZPLAY™ games are instantaneously generated by a lottery computer at the time of purchase.

These instant games are far different from the traditional number-match lotteries, but the Lottery Commission has operated them since 1976 without challenge. That is so because, as discussed above, the Commission has broad authority to operate any "type of lottery" and specify "the manner" in which lottery tickets are sold. Unamended R.C. 3770.03(A)(1), (B)(1). As long as the game qualifies as a lottery—"consideration given," "a prize," and "the winning of the prize . . . determined by chance," *Fisher v. State* (8th Dist. 1921), 14 Ohio App. 355, 357—the Lottery Commission can offer it.

VLTs operate in that vein. The participant may insert coins, currency, or tokens into the VLT, which then creates a virtual or electronic game ticket that allows the participant to play the video lottery game. The VLT then generates a game on an electronic display—for instance, a slots-like game. The participant interacts with the game by touching the VLT screen or instruments on the terminal. If a winning combination of cards, numbers, or symbols emerges, the VLT will assign a credit to the participant. The participant can then use the credits to purchase further games on the VLT, or he can redeem credits for cash or other prizes. And, as it does now, the Lottery Commission would determine the price of each game, the prize structure, and the frequency of the payouts on the VLTs.

The VLT is functionally identical to an instant scratch-off or EZPLAY™ game. Take, for instance, the "Slots of Luck" instant game discussed above and attached as Exhibit E to Intervenor-Respondents' evidence. A participant buys the ticket for $1 from a sales agent; he scratches off his five hypothetical "spins" of the slot machine and learns immediately whether he has won a cash prize. Nothing the participant does after the point of sale will alter the outcome.

Months before the sale, the Lottery Commission adopted rules determining how many prizes will be distributed in the game, see O.A.C. 3770:1-9-668(E), and it distributed the winning instant tickets randomly throughout the lottery system. The only question is whether the participant was lucky enough to purchase a winner.

The same holds true for VLTs. A participant could insert, say, $1 into a VLT to generate a video-based slots-like game. His electronic display then shows "spins" and the player learns whether he has won. As with the instant scratch-off games, this VLT game is predetermined. As soon as the participant inserts his money, the computer generates a game with a predetermined outcome. In other words, the computer issues the equivalent of a virtual or electronic instant scratch-off ticket, nothing more. The computer randomly generates the games and their accompanying prizes based on rules adopted by the Commission and programmed into the VLT system. The difference between a VLT and an instant scratch-off game is simply form, not substance. And this is precisely why the machines are called video *lottery* terminals.

The Lottery Commission has well-established authority under unamended R.C. 3770.03 to determine "[t]he type of lottery to be conducted" and "the manner" in which lottery tickets are sold. Because VLTs are a "type of lottery," the Commission has authority to implement them with or without the Budget Bill.

B. The Court should recognize that authority in this case.

The Court should reach the merits of the Lottery Commission's authority to implement VLTs through unamended R.C. 3770.03 for three reasons. First, this Court will not order mandamus relief that itself creates a constitutional quagmire. For instance, in *State ex rel. Sawyer v. O'Connor* (1978), 54 Ohio St.2d 380, a group of city prosecutors sought mandamus against a common pleas court judge who, after taking a no-contest plea for driving while intoxicated, unilaterally reduced the charge to reckless driving. Although the Court criticized the

trial judge's actions as illegitimate, it refused to order the judge to vacate the conviction and issue new findings, noting that such an order would trench on the double jeopardy prohibition. *Id.* at 382-83. The same principle extends to this case. As explained above, a holding that the VLT Provisions are not immediately effective is tantamount to a holding that the education appropriation is not immediately effective, thereby contradicting the mandate of Section 1d. Although the Court need not deny mandamus on this ground, it should, at minimum, avoid issuing a constitutionally defective remedy. That is, the Court should recognize that the Lottery Commission has the authority pursuant to unamended R.C. 3770.03 to implement a video-based lottery, thereby allowing the appropriation to go into immediate effect regardless of the VLT Provisions in the Budget Bill.

Second, this Court often looks behind the procedural issues to ask whether, at the end of the day, the relators will achieve their ultimate goal. See, e.g., *Oberlin Citizens for Responsible Development*, 2005-Ohio-5061 at ¶ 31 (denying mandamus over auditor's failure to exercise ministerial duty and certify referendum petition because disputed ordinance was an administrative action not subject to referendum); *State ex. rel. Bona v. Village of Orange*, 85 Ohio St.3d 18, 1999-Ohio-461 (denying mandamus with respect to village clerk's failure to certify referendum petition because there was no evidence that village council would have repealed the disputed ordinance and because general election had already passed). The entire premise of Relators' campaign is their belief that the Budget Bill authorizes the Lottery Commission to implement VLTs. See Relators Br. at 2 (stating that the Budget Bill "authorize[s] the Ohio Lottery Commission to operate video lottery terminals"); Press Release, LetOhioVote.Org, Committee Petitions Supreme Court to Send VLT Plan to Voter (July 20, 2009) ("[T]he committee seeks the Court's affirmation of the peoples' right to vote on the video

slot machine scheme.") (Int. Ex. G); David Hansen, *Let's Vote on Video Slots*, Akron Beacon Journal, Aug. 2, 2008 ("The purpose of our lawsuit and our LetOhioVote.org campaign is to demand an opportunity to vote on the video slots plan . . . ."). But if the Lottery Commission already has authority to implement a video-based lottery, regardless of the VLT provisions in the Budget Bill, Relators' ultimate claims will be proven wrong because the disapproval of the VLT Provisions would not alter the legal landscape.

Third, all parties would be served by resolving the scope of the Lottery Commission's authority independent of the Budget Bill. Relators should want this dispute to be answered now, lest they spend $2.5 million on a referendum effort that might not resolve the issue of the VLTs' legitimacy. The same holds true for Intervenor-Respondent Sabety. If the Court concludes that the VLT Provisions do not go into immediate effect, and if it does not answer the question of the Lottery Commission's authority under the former law, there will be an $851.5 million hole in the biennial budget. Intervenor-Respondent Sabety would immediately be required to consult with the General Assembly and the Governor and develop strategies to compensate for the lost revenue. This process is time-consuming and difficult, and it would be completely unnecessary if the Lottery Commission's existing authority permits VLT implementation.

As for the Lottery Commission, staff members are diligently complying with the Governor's directive to "immediately take steps to implement VLTs." Governor's Directive, at ¶ 4 (Rel. Ex. A). They have already expended hundreds of hours working on administrative rules and licensing agreements. The sooner these are finalized, the sooner the badly needed revenue starts flowing. By defining the scope of the Lottery Commission's existing authority in unamended R.C. 3770.03, the Court will give clear guidance to the Commission as to whether it can continue these efforts, even if the VLT Provisions in the Budget Bill are placed on the ballot.

Finally, and most importantly, this Court should define the scope of the Lottery Commission's authority pursuant to unamended R.C. 3770.03 for the sake of Ohio's citizens. The General Assembly approved and the Governor signed the Budget Bill with the belief that VLT implementation would generate $851.5 million in education revenue over the biennium. If unamended R.C. 3770.03 gives the Lottery Commission authority to implement VLTs, then the machinery of state government can continue. If the Lottery Commission's authority to implement VLTs depends on the Budget Bill, state leaders must take immediate steps to compensate for the loss of $851.5 million in anticipated revenue. But if this issue is left unresolved, state agencies—and, ultimately, the citizens they serve—would suffer immediately from the uncertainty and chaos.

In short, under this Court's long-standing precedents, it is appropriate to resolve this issue now—and, in light of the fiscal and social consequences, it is imperative.

CONCLUSION

For the above reasons, the Court should deny Relators' mandamus request. In the alternative, if the Court grants a writ of mandamus, the Court should tailor its remedy to avoid delaying the immediate implementation of an appropriation in violation of the Ohio Constitution.

Respectfully submitted,

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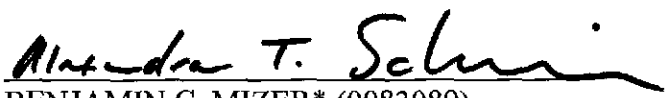

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Intervenor-Respondents J. Pari Sabety, Director, Office of Budget and Management, and Michael A. Dolan, Director, Ohio Lottery Commission, was served by electronic mail on this 10th day of August 2009 upon the following counsel:

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