In the
Supreme Court of Ohio

YOUNGSTOWN CITY SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,	:	Case No. 2018-1131
	:	
	:	On Appeal from the
Appellants,	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
STATE OF OHIO, *et al.*,	:	
	:	Court of Appeals
Appellees.	:	Case No. 17AP-775

MERIT BRIEF OF APPELLEES STATE OF OHIO, THE OHIO DEPARTMENT OF EDUCATION, AND THE SUPERINTENDENT OF PUBLIC INSTRUCTION

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INTRODUCTION

It is emphatically the province of the judicial department to interpret the laws. But it is primarily the province of the *legislative* department to oversee the process by which those laws are made. That is why this Court has always taken a very narrow view of its power to police compliance with the constitutional provisions governing the legislative process, such as the three-reading rule. This division of authority is a matter of respect between coordinate branches: just as the legislature must not intrude on the judicial power by supervising the writing of judicial opinions, the courts should not intrude on the legislative power by supervising the writing of the laws. It also reveals the practical wisdom of the Constitution's drafters, who recognized that courts are far better positioned to review the legislature's *product* than its *process*. Finally, the decision to leave the legislative process largely to the legislature likely reflects the longstanding observation that "'[l]aws, like sausage, cease to inspire respect in proportion as we know how they are made,'" *Such v. State*, 950 A.2d 1150, 1152 n.1 (R.I. 2008) (citation omitted)—which implies that the lawmaking process ought not be expounded upon in judicial opinions.

This is a case about the process the General Assembly used to enact the "Underperforming Schools Bill," Am. Sub. H.B. 70 (131st G.A.), which is a bill to improve education in underperforming school districts. As initially introduced, the bill would serve this purpose by facilitating the creation of "community learning centers"—schools that,

in coordination with individuals and businesses throughout their communities, would provide "developmental, family, and health services to students, families, and community members." *See* H.B. 70, § 1 (§ 3302.16). As the bill moved toward enactment, legislators introduced additional provisions designed to further the bill's purpose of educational improvement. Relevant here, they amended R.C. 3302.10. The revised provision would transfer "operational, managerial, and instructional" control over persistently failing schools from school boards to "academic distress commissions." Am. Sub. H.B. 70, § 1 (§ 3302.10(C)(1)). These commissions would provide a lifeline to the students in persistently underperforming school districts—for example, the Youngstown City School District, where (to pick one of the many statistics that could illustrate the point) just *one percent* of graduating students in the 2013 class met basic standards for college readiness. Convinced of the bill's merits, the General Assembly passed the revised bill and Governor Kasich signed it a few weeks later.

The appellants—the Youngstown City School District Board of Education, one taxpayer, and several organizations—sued to enjoin the law. Their appeal to this Court presents two questions. The first question involves the "three-reading rule," which requires each house to consider a bill three times before passing it. Ohio Const., art. II, § 15(C). Everyone agrees that each house of the General Assembly considered some version of the Underperforming Schools Bill three times before its passage. The question is whether the General Assembly nonetheless violated the three-reading rule by

failing to have each house consider it *three more times* after amending the bill to include the section on academic distress commissions. The answer is no. According to this Court's precedents, an amendment retriggers the General Assembly's obligations under the three-reading rule *only if* "there is no longer a common purpose or relationship between the original bill and the bill as amended." *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St. 3d 225, 233 (1994). Here, the Underperforming Schools Bill retained the very same "common purpose" from its first introduction to its ultimate passage: improving education in underperforming districts.

The second question is whether the Underperforming Schools Bill violates Article VI, Section 3 of the Ohio Constitution by transferring authority from school boards to academic distress commissions. Again, the answer is no. That section of the Constitution says, in relevant part, "that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education." This Court has confirmed what the section's text makes clear: Section 3 governs the "size and organization" of school boards, as opposed to their "power and authority." *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St. 3d 568, 2006-Ohio-5512 ¶ 47. Thus, the Underperforming Schools Bill's reallocation of "power and authority" from school boards to academic distress commissions could not have violated Section 3 of Article VI.

The trial court and Tenth District correctly decided both issues, concluding that the General Assembly violated neither the three-reading rule nor Section 3 of Article VI. This Court should affirm. The Youngstown City School District Board of Education has neither a legal right nor an equitable claim to relief.

STATEMENT OF THE CASE AND FACTS

1. From its introduction through its enactment, the Underperforming Schools Bill focused on improving education in underperforming schools.

As first proposed, the bill focused on improving underperforming school districts by establishing "community learning centers"—schools that would "participate[] in a coordinated, community-based effort with community partners to provide comprehensive educational, developmental, family, and health services to students, families, and community members." *See* H.B. 70, § 1 (131st G.A.) (as introduced). Districts would be able to qualify for assistance in establishing community learning centers with respect to schools that showed certain indicia of underperformance. *See id*. (§ 3302.17(A)(1)-(5)). The House considered this version of the bill on February 18, February 25, and May 19, 2015, and passed it after its third consideration. *See* Appendix to Appellants' Brief ("App'x") 30.

The "Senate read and considered H.B. 70 two times," on May 20 and May 27, 2015, "and then sent it to the Senate Education Committee." *See* App'x 30. That committee prepared amendments to the bill designed to further advance education reform

in underperforming districts. *See* Sub. H.B. 70 (as reported by the Senate Education Committee). As ultimately passed by the Senate and enrolled, the bill retained a method for establishing community learning centers, and expanded schools' eligibility for these centers. Am. Sub. H.B. 70, pp. 20–23. The enrolled version also adopted stylistic and clarifying changes to several sections of the code relating to school performance. *Id.* at 4, 7, 23, 29 (amending R.C. 133.06, 3302.036, 3310.02, 3310.035). And the amendments added definitions and made conforming changes to other sections. *Id*. at 7, 8, 26–27, 29–30 (amending R.C. 3302.01, 3302.04, 3310.03, 3311.29). But the main alterations consisted of amendments to R.C. 3302.10, which governs the role of "academic distress commissions" in helping to improve underperforming schools. *Id.* at 12-20.

The Senate read and considered the now-revised bill a third and final time on June 24, 2015. *See* App'x 30. It passed the bill (as Am. Sub. H.B. 70) the same day. *See id.* The bill then returned to the House, which concurred in the Senate amendments on the same day. *See id.* Governor Kasich signed the bill about a month later, on July 16, 2015. *See id.* The law took effect on October 15, 2015. *See id.*

2. Because the dispute in this case centers around the Underperforming Schools Bill's amendments to R.C. 3302.10, it is worth elaborating on what the revised section says. First, the section identifies the lowest-performing school districts as those that (1) received an overall grade of "F" on the state report card for three consecutive years, or (2) had been managed by an "academic distress commission" for four years before the

bill's effective date. R.C. 3302.10(A). As the second of these criteria suggests, the amended R.C. 3302.10(A) did not create "academic distress commissions" out of whole cloth; Ohio law already recognized them. But the amendments to R.C. 3302.10 expanded the powers of these commissions with respect to schools that met one of the two just-mentioned criteria, and created specific, graduated consequences for prolonged poor performance.

The Underperforming Schools Bill additionally ensured, as it did with respect to community learning centers, that academic distress commissions would benefit from significant community involvement. The revised statute requires that each commission be composed of five members: three appointed by the Superintendent of Public Instruction (one of whom must live in the county); a teacher employed by the district and appointed by the local school-board president; and a final member appointed by the mayor of the municipality in which the majority of the district is located. R.C. 3302.10(B)(1). This commission is charged with appointing a CEO with operational, managerial, and instructional control of the failing district. R.C. 3302.10(C)(1). More concretely, the CEO is empowered to make decisions regarding personnel, budgets, class sizes, and more. *Id*.

The CEO's primary responsibility is the development and implementation of a plan for academic improvement. R.C. 3302.10(E)(2). But he or she can act neither instantly nor unilaterally; indeed, the CEO "serve[s] at the pleasure of the commission,"

R.C. 3302.10(C)(1), and is thus subject to the commission's oversight. *See Edmond v. United States*, 520 U.S. 651, 664 (1997) ("The power to remove officers, we have recognized, is a powerful tool for control."). On top of that, the CEO must consult with community members and consider their input throughout the process. R.C. 3302.10(E).

To illustrate the degree of community involvement, consider the process that the CEO goes through before submitting an academic-improvement plan. That process takes several months. Within 30 days of being appointed, the CEO must "convene a group of community stakeholders" to help "develop expectations for academic improvement" and "assist the district in building relationships with organizations in the community." R.C. 3302.10(E)(1). Within 90 days, the CEO must convene similar groups for each school that the district operates. *Id*. After these consultations, and within that same 90-day period, the CEO must submit an academic-improvement plan to the commission. R.C. 3302.10(E)(2). The commission then has 30 days to either approve or suggest modifications to the plan. *Id.* If the commission suggests modifications, the CEO has 15 days to "resubmit the plan, whether revised or not." *Id.* The commission then has another 30 days to approve the plan. *Id.* The plan goes into effect only after all this is completed. *Id.*

Once the plan is in effect, many of the next steps turn on school performance. If a district receives a grade of "D" or "F" on the state report card, the CEO can respond in a number of ways, ranging from changing the school's "mission," to replacing "a major-

ity of the school's staff," to "permanently clos[ing] the school." R.C. 3302.10(H)(1)(a), (c), (f); *see also* R.C. 3302.10(I), (J). Districts that fail to improve over several years are mandated to undergo serious changes. For example, if a district receives a "D" or "F" during the fourth school year after the commission's creation, the local mayor will appoint a new board of education for the district, R.C. 3302.10(K)(2), selected from a slate of candidates nominated by a panel of local school officials, parents, and community leaders, R.C. 3302.11(C)-(D). The new board will face a referendum election after the school district performs well enough to shed the commission's oversight. R.C. 3302.11(G).

3. The Youngstown City School District is the sort of persistently underperforming district that the General Assembly passed the Underperforming Schools Bill to address. In January 2010, after years of failing report cards, the District was put under the oversight of an academic distress commission under the previous version of R.C. 3302.10. *See* Ohio Dep't of Educ., Youngstown City Schools Academic Recovery Plan, *available at* https://perma.cc/SLP2-MRN9. But the District has continued to perform poorly and receive failing report cards. *See* Defs. Hr'g Exs. A, C-M. In fact, Youngstown students *fell further behind* during the years the District operated under the original academic distress commission's improvement plan. *See* Hr'g Tr. at 495-96. At the trial in this case, Dr. Chris Woolard—senior executive director for accountability and continuous improvement at the Ohio Department of Education, *id.* at 464—attributed this

to the fact that the law before the Underperforming Schools Bill did not allow a strong leader to enact change because the leader was caught between the commission and the school board. *Id.* at 505 ("[O]ne of the biggest weaknesses of the structure . . . in place previously before House Bill 70 is that you really need strong change-oriented leadership," and "that school leader [was] essentially stuck between working for a board, but also working for an academic distress commission.").

Whatever the cause, the District struggled badly. Just *1 percent* of the 2013 class's *graduating* students met basic standards for college preparedness—never mind the ones who failed to graduate. *See* Defs. Hr'g Ex. A. The District received an "F" for student graduation during the four years preceding the Underperforming School Bill's passage. *See id.* And the District met none of the basic proficiency indicators in the 2013–14 school year. *See* Hr'g Tr. at 491; Defs. Hr'g Ex. M, at 3. Dr. Woolard testified that Youngstown's poor performance on these metrics could not be blamed on poverty alone. *See* Hr'g Tr. at 494-95 ("[T]here are lots of districts and schools that are showing growth even though they have high levels of poverty."). Recognizing the dire situation in the schools, parents in the district who were able to move their children to other schools did: between 2010 and 2014, enrollment in the Youngstown City School District fell by 21 percent. Defs. Hr'g Ex. A.

Youngstown's students needed help, and the Underperforming Schools Bill provided it—not least by amending R.C. 3302.10 to allow for the sort of strong leader that the previous version of the academic distress commission law did not.

4. The Youngstown City School District Board of Education—joined by a single taxpayer and three organizations—sued to disrupt the aid that the bill offers to students in failing districts. This brief collectively refers to these plaintiffs, who are the appellants here, as "the District." The District alleged that the General Assembly violated the three-reading rule in Article II, Section 15(C) of the Ohio Constitution. Compl. ¶¶ 28-38. That section states that "[e]very bill shall be considered by each house on three different days" before being passed, and mandates that each consideration "shall be recorded in the journal of the respective house." The District conceded that each house considered a version of the Underperforming Schools Bill three times, and that each house's journals recorded three considerations. Compl. ¶¶ 19, 22-24. But the District claimed that the Senate's amendments—which occurred after it had already considered the bill twice—were so extreme that they turned the first version of the bill into a new "bill" that required three *new* days of consideration in each house. *Id.* ¶ 35.

The District additionally alleged that the new R.C. 3302.10(A) violated Article VI, Section 3 of the Ohio Constitution, which gives each school district "the power by referendum vote to determine for itself the number of members and the organization of the district board of education." The District claimed that the new law violated this provi-

sion by transferring authority from local school boards to the State in cases where an academic distress commission is appointed. Compl. ¶¶ 39-46.

In light of these alleged violations, the District sought preliminary and permanent injunctions. The trial court denied the motion for a preliminary injunction after holding a two-day hearing. *See* App'x 88-105. It concluded that the District had not established any of the four elements relevant to evaluating injunctive relief. *See* App'x 91–102. For the same reason, the trial court later denied a permanent injunction and entered final judgment for the State. App'x 32–46.

5. The Tenth District affirmed. It rejected the three-reading rule argument on the merits. *See Youngstown City School Dist. Bd. of Educ. v. State*, 2018-Ohio-2532 ¶ 4 (10th Dist.) ("App. Op."). The Tenth District pointed to this Court's precedents, under which "'amendments which do not vitally alter the substance of a bill do not trigger a requirement for three considerations anew.'" *Id*. ¶ 12 (quoting *Hoover v. Bd. of Cnty. Comm'rs*, 19 Ohio St. 3d 1, 5 (1985)). A bill is "vitally altered" only if "'there is no longer a common purpose or relationship between the original bill and the bill as amended.'" *Id*. ¶ 14 (quoting *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St. 3d 225, 233 (1994)). And the Underperforming Schools Bill, the court held, retained its common purpose throughout: "the specific subject of improving under-performing schools." *Id*. ¶ 21; *see also id*. ¶ 23.

True enough, the bill grew in "length and complexity." *Id*. ¶ 18. But the bill began and ended as a bill about educational improvement. *Id.* ¶ 21. The House first proposed accomplishing this goal through the creation of "community learning centers"—an idea that the Senate "retained," while adding provisions relating to "academic distress commissions" designed to further improve failing schools. *Id*. ¶ 20. To strike down a law under these circumstances, the Tenth District said, would violate this Court's warning to avoid "polic[ing] every detail of the legislative amendment process when bills are passed containing a consistent theme." *Id*. ¶ 23 (quoting *Voinovich*, 69 Ohio St. 3d at 234). And it would be especially inappropriate given the "significant debate and discussion" that occurred "before each chamber adopted the final version" of the bill, which showed that the General Assembly adhered to the rule's "underlying purpose" of encouraging careful deliberation. *Id*. ¶ 23 n.2.

The court further rejected the District's argument under Article VI, Section 3. *Id.* ¶¶ 25-30. That provision, it explained, "'governs the questions of size and organization, *not* the power and authority, of city school boards.'" *Id*. ¶ 27 (quoting *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St. 3d 568, 2006-Ohio-5512 ¶ 47) (emphasis added). Thus the General Assembly could not have violated that provision by limiting the school board's power and authority. *Id*. Moreover, even if the provision could be read to prohibit depriving local school boards of *all* their power, the Underperforming Schools Bill did not do that. *Id.* ¶ 29. To the contrary, the law did not

disrupt certain school board powers, such as the power to "adopt a resolution seeking to impose an additional tax levy, subject to approval by the electors of the district." *Id*.

The court additionally held that the District failed to satisfy the remaining injunction factors. *Id.* ¶¶ 39-44. The District did not point to any irreparable injury, *id.* ¶ 39, and produced no evidence that an injunction would be in the public interest and leave third parties (such as the affected children) unharmed, *id.* ¶ 44.

Judge Tyack filed a short dissent, disagreeing with the majority only as to its analysis of the three-reading rule. He would have held that the legislature violated the rule by quickly adding substantial length to the Underperforming Schools Bill and passing it without having each house consider the bill three more times. *Id*. ¶¶ 47–49 (Tyack, J., dissenting).

ARGUMENT

The District appeals the lower courts' denials of its request for a permanent injunction. "'An injunction is an extraordinary remedy in equity where there is no adequate remedy available at law. It is not available as a right but may be granted by a court if it is necessary to prevent a future wrong that the law cannot.'" *City of Toledo v. State*, 154 Ohio St. 3d 41, 2018-Ohio-2358 ¶ 15 (citation omitted). So even if a party seeking an injunction prevails on the merits, courts must consider three other factors in deciding whether to award injunctive relief: (1) whether the challenger "will suffer irreparable injury" without an injunction; (2) whether any "third parties will" be "unjustifi-

ably harmed if the injunction is granted"; and (3) whether "the public interest will be served by an injunction." *See Szuch v. FirstEnergy Nuclear Operating Co.*, 2016-Ohio-620 ¶ 49 (6th Dist.); *Proctor & Gamble Co. v. Stoneham*, 140 Ohio App. 3d 260, 267 (1st Dist. 2000); *accord Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987). The moving party bears the burden of proving these factors, none of which is dispositive, by "clear and convincing evidence." *Szuch*, 2016-Ohio-620 ¶ 49. "'The grant or denial of an injunction is solely within the trial court's discretion and, therefore, a reviewing court should not disturb the judgment of the trial court absent a showing of a clear abuse of discretion.'" *Toledo*, 2018-Ohio-2358 ¶ 15 (citation omitted).

The District's brief does not mention these governing principles, instead focusing entirely on the success-on-the-merits factor. It does not even attempt to meet the District's burden to prove a threat of "irreparable injury," the lack of harm to third parties, or service of "the public interest." The Tenth District held that the District could not satisfy these factors. App. Op. ¶¶ 39–44. Rightly so, given the disruption that restoring the school board's authority would have for students in Youngstown. Regardless, the District has forfeited any arguments to the contrary. *Util. Serv. Partners, Inc. v. Pub. Utils. Comm'n*, 124 Ohio St. 3d 284, 2009-Ohio-6764 ¶ 54.

The District's case thus rests entirely on the success-on-the-merits factor. Assuming for the sake of argument that it would be proper to award a permanent injunction based on that factor alone, the District's arguments still fail, because the General As-

sembly violated neither the three-reading rule nor Section 3 of Article VI when it passed the Underperforming Schools Bill.

The State's Proposition of Law No. 1:

> *Amendments that do not violate the one-subject rule, or that would not violate the one-subject rule if included in the same bill as the text they amend, do not "vitally alter" a bill for purposes of the three-reading rule—and in any event, the three-reading rule is directory, not mandatory.*

The three-reading rule in Article II, Section 15(C) of the Ohio Constitution provides:

> Every bill shall be considered by each house on three different days, unless two-thirds of the members elected to the house in which it is pending suspend this requirement, and every individual consideration of a bill or action suspending the requirement shall be recorded in the journal of the respective house.

This Court has interpreted this text as permitting judicial review under an exceptionally deferential test. Under that test, legislative amendments to a bill that the General Assembly has already considered "trigger a requirement for three considerations anew" *only when* they "vitally alter the substance of [the] bill." *Hoover v. Bd. of Cnty. Comm'rs*, 19 Ohio St. 3d 1, 5 (1985). The General Assembly "vitally alters" a bill only if "there is no longer a common purpose or relationship between the original bill and the bill as amended." *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St. 3d 225, 233 (1994). This test is parallel to the one this Court uses to adjudicate violations of the one-subject rule, Ohio Const., art. II, § 15(D), which requires that the provisions of every bill share a "*common purpose or relationship*." *State ex rel. Ohio Civ. Serv. Emps. Ass'n v. State*, 146

Ohio St. 3d 315, 2016-Ohio-478 ¶ 17 (emphasis added). It thus follows that an amendment constitutes a "vital alteration" only if it would violate the one-subject rule to include the amended text and the original text in the same bill.

Here, the original bill and the final, amended version share the "common purpose" of improving education in underperforming districts. Because the bill retained its common purpose of improving education in underperforming districts both before and after the Senate's amendments, those amendments were not "vital alterations" that restarted the General Assembly's obligations under the three-reading rule. This is confirmed by the (apparently undisputed) fact that including the final Underperforming Schools Bill in the same bill as the original version would not violate the one-subject rule.

Although the State wins under the Court's precedent, this Court should use this case as a vehicle to restore the three-reading rule's directory character, and hold that courts may not review whether a bill was "vitally altered." In other words, if the legislative journals say that the General Assembly considered a bill on three separate days, that should be the end of the judicial inquiry.

Either way, this Court should affirm the Tenth District's judgment.

A. The General Assembly complied with the three-reading rule when it enacted the Underperforming Schools Bill—and in any event, this Court should hold that the question is non-justiciable.

The General Assembly did not violate this section when it passed the Underperforming Schools Bill. That is true under both this Court's precedent and the section's original meaning.

1. The General Assembly complied with this Court's precedents interpreting the three-reading rule when it passed the Underperforming Schools Bill.

a. The three-reading rule requires each house of the General Assembly to consider every bill on three separate days before passing it. Ohio Const., art. II, § 15(C). It further requires each house to record the dates that it considered a bill in its journal. *Id.* So the question whether the General Assembly complied with the three-reading rule is easy when neither house makes any amendments to the bill after its initial proposal: courts can simply check the journals and see if they indicate three readings.

But a complication can arise if either house amends the bill between readings, as almost always occurs. Why? Because the Court has held that some amendments may so substantially alter a bill that it becomes a "new bill," requiring three *new* days of consideration (or suspension of the three-readings requirement by a two-thirds vote) in each house. The complication, then, is distinguishing between amendments that make an altogether new bill—in other words, amendments that trigger the three-reading rule anew—and those that do not.

This Court's precedent draws this distinction with the "vital alteration" test. Under that test, amendments "trigger a requirement for three considerations anew" *only if* they "vitally alter the substance of a bill." *Hoover*, 19 Ohio St. 3d at 5. And the General Assembly "vitally alter[s]" a bill only when "there is no longer a common purpose or relationship between the original bill and the bill as amended." *Voinovich*, 69 Ohio St. 3d at 233 (emphasis deleted). This standard is quite purposely deferential. The difference between "a valid bill that is heavily amended" and "an invalid one that is 'vitally altered' . . . is one of degree." *Id*. And if the courts were to closely "police" that difference of degree, they would impinge upon the legislature's constitutional authority to "freely alter, amend, or reject bills" during the legislative process. *Id*. (citing Ohio Const., art. II, § 15(A)). To avoid this "dangerous and impracticable" intrusion, courts must demand nothing more than a "common purpose or relationship" between the original and amended bills. *Id.*

This Court's cases show just how deferential the test is. The Court has identified a vital alteration in just one case: *Hoover*, 19 Ohio St. 3d 1. There, the General Assembly initially considered a bill "pertaining to criminal non-support," before deleting all of its text and replacing it with unrelated provisions "'to facilitate the financing, acquisition, and construction of hospital and health care facilities for the use of non-profit entities.'" *Id*. at 5. Since the amendment created a law "*completely different in content*" from the original bill, it constituted a vital alteration. *Id.*

The post-*Hoover* case law casts doubt on whether anything short of a complete replacement of one bill with another can violate the rule. Take, for example, *Voinovich*. That case held that the General Assembly did not vitally alter a bill appropriating funds to the Bureau of Workers' Compensation when it added revisions to "substantive sections of the Ohio Revised Code dealing with workers' compensation." 69 Ohio St. 3d at 225, 234. This was so, it said, because the amended bill retained the original bill's "common purpose to modify the workers' compensation laws." *Id*. at 234. That broad framing of the purpose shows how extreme an amendment must be to trigger a requirement for three new readings. So does the Court's decision in *Comtech Systems, Inc. v. Limbach*, 59 Ohio St. 3d 96 (1991) (per curiam). That case explained that, because "[r]aising and spending revenue are at the heart of an appropriations bill[,] adding a new taxable transaction does not vitally alter" such a bill. *Id*. at 100.

Voinovich and *Comtech* show that a "common purpose" can exist a high a level of generality. Amendments relating to the same general subject matter—whether "worker's compensation," "appropriations" or "education"—do not constitute "vital alterations." This deferential approach stays true to *Hoover*'s warning that courts should find three-reading rule violations in only extreme circumstances. *See Hoover*, 19 Ohio St. 3d at 5.

This Court's cases addressing the one-subject rule further inform the meaning of the vital-alteration test. That Rule, which likewise appears in Section 15 of Article II,

provides that "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title." Ohio Const., art. II, § 15(D). And to assess whether a bill contains one subject or many, courts look to whether the bill contains a "common purpose or relationship." *Ohio Civ. Serv. Emps. Ass'n*, 2016-Ohio-478 ¶ 17. This of course mirrors the vital-alteration test, which asks whether there is "a *common purpose or relationship* between the original bill and the bill as amended." *Voinovich*, 69 Ohio St. 3d at 233 (emphasis added). Thus, an amendment is a "vital alteration" only if it would violate the one-subject rule to include the amended text and the original text in the same bill.

It makes sense for these two clauses to work in tandem. Both govern the legislative process, meaning both must be subject to a deferential test, lest the judiciary unduly interfere with the operation of a coordinate branch. *Compare State v. Bloomer*, 122 Ohio St. 3d 200, 2009-Ohio-2462 ¶¶ 48-50 (one-subject rule), *with Voinovich*, 69 Ohio St. 3d at 233 (three-readings rule). This is not to say that the sections are identical, or "redundant." *Contra* Amicus Br. of E. Cleveland City School District, *et al.*, 16. The two do not overlap at all in a case where the General Assembly passes a multi-subject bill without ever amending it, since in that case the "vital alteration" question never arises. And in cases where the General Assembly does pass an amended bill, the two rules serve distinct-yet-complementary goals: The three-reading rule (because of the vital-alteration test) requires bills to retain a common purpose throughout the legislative process as the General Assembly debates them, while the one-subject rule requires the bill's ultimate

provisions to share a common purpose. The first rule requires that a common purpose exist over time; the latter requires a common purpose at one time in particular (namely, enactment).

The cases applying the "common purpose" requirement in the one-subject rule context, just like the cases doing so in the vital-alteration context, reveal a highly deferential test. *See Bloomer*, 2009-Ohio-2462 ¶ 50. For example, they stress that bills can include "more than one topic," "as long as a common purpose or relationship exists between [those] topics." *Id*. ¶ 49. Thus, this Court in *Bloomer* upheld a law that addressed "two unrelated topics"—"the sealing of juvenile court records and postrelease control"—because both topics "concern[ed] the rehabilitation of persons who have violated Ohio's criminal laws and their reintegration into society." *Id.* ¶¶ 46, 55. Consider also *Comtech*, the case that found no "vital alteration" under the three-reading rule where the General Assembly amended an appropriations bill to include a new tax. 59 Ohio St. 3d at 100. The challengers in that case separately argued that including these two provisions in the same bill violated the one-subject rule. *See id.* at 99. The Court rejected that argument: because budget bills "deal[] with the operations of the state government," they can include *any* provision that addresses that same, very broad subject without violating the one-subject rule. *Id*. *Comtech* thus shows that the General Assembly does not vitally alter a bill when the amended text could be included with the original text without violating the one-subject rule.

b. The Underperforming Schools Bill is constitutional under the foregoing principles, because there is "a common purpose or relationship between the original bill and the bill as amended." *Voinovich*, 69 Ohio St. 3d at 233. The original and amended bills shared the same purpose: improving educational achievement in struggling districts. The House's original bill set out to do this with "community learning centers." The amended bill *retained* the provisions concerning community learning centers, but sought to further improve education in failing districts by increasing the power of academic distress commissions. In other words, the amended bill did not even change tactics for achieving the House's original purpose, it just added some more.

Voinovich compels this conclusion. After all, that case held that the General Assembly's amendment did not vitally alter the original bill even though the original and amended bills shared only a very general purpose ("modify[ing] the workers' compensation laws") that they advanced through drastically different means (appropriations in the original bill, and appropriations plus substantive legal changes in the amended bill). *Id.* at 234. By comparison, the General Assembly here pursued a more specific purpose (advancing educational achievement in failing districts) through more closely related means (community-focused structures). If *Voinovich* remains good law, then no three-reading rule violation occurred in this case.

The analogy to the one-subject rule demonstrates the General Assembly's compliance with the three-reading rule. There is no plausible argument that the Senate vio-

lated that rule by adding provisions dealing with academic distress commissions to a bill addressing community learning centers. Even if those two structures could be considered different topics, it would not matter: "[A]s long as a common purpose or relationship exists between topics, the mere fact that a bill embraces more than one topic" does not lead to a one-subject rule violation. *Bloomer*, 2009-Ohio-2462 ¶ 49. And both of the topics at issue here share the common purpose of improving education in underperforming schools. That purpose is far more specific than other shared purposes to which this Court has pointed in rejecting challenges under the one-subject rule—for example, the purpose of "deal[ing] with the operation of the state government." *ComTech*, 59 Ohio St. 3d at 99. Indeed, this case is comparable to *Bloomer*, in that the legislature employed two different means for advancing the same general purpose. The law in *Bloomer* addressed sealing juvenile records and postrelease control in hopes of addressing prisoner "rehabilitation and reintegration," 2009-Ohio-2462 ¶¶ 46, 53, while the Underperforming Schools Bill's provisions dealing with community learning centers and academic distress commissions both aim to improve underperforming districts.

The weakness of any one-subject rule challenge to the Underperforming Schools Bill may explain why the District has never, at any level, argued that the law violated the one-subject rule by providing for both academic distress commissions and community learning centers. And since both could be included in the same bill without violat-

ing the one-subject rule, so too could the General Assembly amend a bill containing just one to include the other without making a "vital alteration."

2. The Court should eliminate the "vital alteration" test, restoring the three-reading rule's directory character.

The foregoing is enough to resolve the three-reading challenge. But the Court should go further. It should hold that courts may not review a bill's compliance with the three-reading rule other than to determine that the legislative journals show consideration in each house on three separate days. This admittedly would require this Court to overrule *Hoover*, but this is an area in which overruling is appropriate. *See Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849 ¶¶ 42–48. If nothing else, the Court should limit *Hoover* to its facts, holding that an amendment "vitally alters" a bill only when it completely replaces all of the bill's text with different text on an unrelated subject.

This section first illustrates that *Hoover* misinterpreted the three-reading rule, before explaining why *Hoover* ought to be overruled.

a. The modern three-reading rule is the product of a 1973 constitutional amendment. But the rule long predates that amendment. Indeed, the amendment slightly altered a pre-existing three-reading rule that Ohioans included in the 1803 Constitution and retained at all times thereafter. So, it is impossible to understand the meaning of Section 15(C) without first understanding the way in which this Court—not to mention the General Assembly and the general public—interpreted its predecessors.

After all, "words or phrases that have already received authoritative construction by [a] jurisdiction's court of last resort . . . are to be understood according to that construction" if repeated in a newly enacted provision. Antonin Scalia & Bryan A. Garner, *Reading Law* § 54, p.322 (2012); *accord Riffle v. Physicians & Surgeons Ambulance Serv., Inc.*, 135 Ohio St. 3d 357, 2013-Ohio-989 ¶ 19; *Clark v. Scarpelli*, 91 Ohio St. 3d 271, 278 (2001). This presumption rests on a commonsense point: if people want to change a well-established pre-existing rule, they generally do so unambiguously.

Begin at the beginning. Ohio's 1803 Constitution contained a three-reading rule in Section 17 of Article I. It read: "Every bill shall be read on three different days in each house, unless, in case of urgency, three-fourths of the house where such bill is so depending, shall deem it expedient to dispense with this rule." No court ever interpreted this provision. But the People retained it in the 1851 Constitution, adding a requirement that each reading be "full[] and distinct[]." *See* Ohio Const., art. II, § 16 (1851). This version, like the 1803 version it superseded, governed the legislative process: "Every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three-fourths of the House in which it shall be pending, shall dispense with this rule." *Id*.

Just a few years later, in 1854, this Court held that the three-reading rule is "directory." In other words, the rule's "observance . . . by the assembly is secured by their sense of duty and official oaths, and not by any supervisory power of the courts." *Mil-*

ler v. State, 3 Ohio St. 475, 476 (1854); *see also Lehman v. McBride*, 15 Ohio St. 573, 604 (1863); *State ex rel. Robeson v. Jacobi*, 52 Ohio St. 66, 75 (1894). This meant the General Assembly, not the courts, had to police compliance with the rule. "Any other construction," the Court explained, "would lead to very absured [sic] and alarming consequences." *Miller*, 3 Ohio St. at 483. For example, it would require courts to scour the legislative record looking for signs that one of the three required readings was insufficiently "full[]." *See id.* In modern terms, the rule created the sort of "judicially unadministrable" standard that suggests its drafters intended to leave enforcement to a non-judicial actor. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015). *Miller* went on to recognize that reading the rule to create a judicially enforceable promise would make it "obviously . . . impossible to know what is the statute law of the State." 3 Ohio St. at 483. Laymen—the very people expected to conform with and entitled to rely upon enacted laws—would have to speculate as to whether some clue in a legislative journal would make an apparently valid law invalid. Applying these principles, *Miller* refused to invalidate a law despite its being included in an amended bill that the General Assembly read just once after replacing everything but the "enacting clause" in the original bill. *Id*. at 479.

As time went on, *Miller* incited little controversy. This Court relied on its reasoning when holding that another procedural requirement, the one-subject rule, was directory rather than mandatory. *See Pim v. Nicholson*, 6 Ohio St. 176, 179-80 (1856). In the

General Assembly, "first and second readings by title only became routine." David M. Gold, *Rites of Passage: The Evolution of the Legislative Process in Ohio, 1799–1937*, 30 Cap. U. L. Rev. 631, 647 (2003). The General Assembly carried on this tradition through the time of the 1973 amendment. *See* George B. Marshall, *Life History of a Bill in the Ohio Legislature*, 11 Ohio St. L.J. 447, 450–51 (1950); 2 Ohio Constitutional Revisions Comm'n 1970–1977, *Proceedings Research* 822, 1022–23. And while it is hard to find controversy surrounding the three-reading rule's meaning, it is easy enough to find praise for leaving its enforcement to the General Assembly. As one up-and-coming state legislator explained: "[U]nder [the] exhausting pressure" of the end of a legislative term, "there are bound to be some discrepancies between the bills which are passed and the bills as they are actually enrolled." Howard M. Metzenbaum, *Judicial Interpretation of Constitutional Limitations on Legislative Procedure in Ohio*, 11 Ohio St. L.J. 456, 460 (1950). "To look behind the enrolled bill would result in the invalidating of a great many statutes and it is doubtful if any useful public purpose would be served." *Id*. Decisions such as *Miller* "created a workable framework which permit[ted] legislator and practitioner alike to understand and cope with legislative procedure in Ohio." *Id*. at 461.

This was the state of the law in 1973, when Ohioans amended the three-reading rule to take on the form it has today. The amended version changed very little—and none of its changes relate to the rule's directory character. The new version replaced the "archaic" phrase "shall be . . . *read*" with "shall be *considered*." 2 Ohio Constitutional

Revisions Comm'n, *above*, at 867. It replaced the provision allowing for each house to "displace" the rule by a supermajority vote with a provision allowing for the General Assembly to "suspend" the rule, which more accurately describes what the General Assembly does when it votes to proceed without three readings. *Id*. at 870. And the new three-reading rule required each House to record each separate consideration in its legislative journals. But the revised language nowhere states or suggests an intent to overrule *Miller*. The provision is thus properly read to retain the directory character of its predecessor. Scalia & Garner, *above*, at § 54, p.322; *accord Riffle*, 2013-Ohio-989 ¶ 19; *Clark*, 91 Ohio St. 3d at 278.

In fact, the three-reading rule's directory character was clearer after 1973 than when this Court decided *Miller*. Whatever the provision meant at the time of *Miller*, judicial opinions and legislative practice over the next 120 years left Ohioans with little doubt as to what they were getting when they agreed to the 1973 amendments: a directory procedural requirement, the enforcement of which would fall to the General Assembly in all cases where the journals recorded three separate considerations in each house.

b. Notwithstanding all this, *Hoover* interpreted the amended three-reading rule as mandatory. 19 Ohio St. 3d at 4–6. Indeed, it went even further, holding that whether an amendment alters a bill enough to make it a new bill is a justiciable question, to be reviewed under the "vital alteration" test discussed above. *Id.* at 5. Its reasoning is bad-

ly flawed, hampers reliance on enacted laws, and erodes the separation of powers. This Court should overrule it.

First, consider the flaws in *Hoover*'s reasoning. The *Hoover* Court acknowledged that the three-reading rule was widely understood to be directory for over a century before the 1973 amendment. *See id.* at 3-4. But the new rule was different, it said, because it provided that every consideration "*shall be recorded in the journal* of the respective house." *Id*. at 4 (quoting Ohio Const., art. II, § 15(C)). This created "an inherently reliable immediate source by which the legislature's compliance may be readily ascertained without any undue judicial interference." *Id*. Without any citation to the historical record, it asserted that the "obvious purpose" of this new recording requirement was to permit judicial review. *Id*. It then declared—again, without explanation—that courts may review the journals to see whether an amendment "vitally alter[ed]" the original bill so as to create an altogether new bill requiring three new readings in each house. *Id.* at 4-5.

Hoover's reasoning does not withstand scrutiny. First, there is no good reason for concluding that adding one more procedural requirement (the recording requirement) to a directory section of the Constitution would make *the entire section* mandatory. If Ohioans meant to upend over a century of jurisprudence and legislative practice, one would expect them to do so much more clearly. Just as legislatures are presumed not to "alter the fundamental details of a regulatory scheme in vague terms or ancillary provi-

sions," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), state citizens should be presumed not "to adopt … fundamental change[s]" to their constitutions through "implication," *Cal. Redevelopment Ass'n v. Matosantos*, 267 P.3d 580, 601 (Cal. 2011). On top of that, even if *Hoover* were right in asserting (without support) that the People "obvious[ly]" intended to make *something* reviewable by including the recording requirement, *see* 19 Ohio St. 3d at 4, the most one can infer is that courts may review the limited question of whether the legislature recorded the dates of consideration. Nothing justifies allowing courts to go beyond that, as they do when they review *the substance of amendments* for vital alterations. That is perhaps why *Hoover* gives no explanation for its "vital alteration" rule, which rests on *ipse dixit*.

In fairness to the *Hoover* Court, its opinion perhaps illustrates the axiom that bad facts make bad law. The legislative journals at issue in that case showed that the General Assembly had replaced every jot and tittle of the original bill on criminal nonsupport with a wholly unrelated law on hospital acquisition. *See id.* at 5. The Court held that this alteration—the most extreme alteration even imaginable—violated the three-reading rule. *Id.* It is clear enough that this constitutes an altogether "new" bill, which must have made it tempting to make the three-reading rule mandatory. Unfortunately, as *Hoover*'s lack of reasoning suggests, there was no legal justification for indulging that temptation.

All of this establishes that *Hoover* was wrongly decided. That leaves only the question whether it ought to be overruled. It should be. For one thing, *Hoover* interpreted a constitutional provision, and "the doctrine of *stare decisis* is less important in the constitutional context than in cases of either pure judge-made law or statutory interpretation." *City of Rocky River v. State Emp't Relations Bd.*, 43 Ohio St. 3d 1, 6 (1989). While serious reliance interests might counsel in favor of retaining wrongly decided precedents, there is no plausible claim to reliance here: the Court has considered the three-reading rule in just three cases after *Hoover*, never once invalidating the law before it. Indeed, if anything, reliance counsels in favor of overruling the case. As *Miller* recognized, citizens and businesses cannot be expected to review the legislative journals for compliance with the three-reading rule, especially when compliance is judged by the vague "vital alteration" standard. 3 Ohio St. 3d at 483. Far from fostering reliance, *Hoover* makes it more difficult to rely on the law, since no one can assume that a bill signed by the governor is good law until this Court assesses the presence or absence of "vital alterations." Finally, a precedent's claim to stare decisis is limited when it is not just wrong, but "badly reasoned." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). As explained above, *Hoover*'s vital-alteration test is supported by no reasoning at all.

c. In sum, "the substance of the" three-reading rule "has remained intact since its adoption," when its framers understood it "as a matter of legislative procedure enforced by the General Assembly, not by the judiciary. This court should return to that

understanding." *Capital Care Network of Toledo v. Ohio Dep't of Health*, 153 Ohio St. 3d 362, 2018-Ohio-440 ¶ 49 (French, J., concurring). Failing that, it should cabin *Hoover* to its facts, holding that the General Assembly retriggers its obligations under the three-reading rule *only* when it completely replaces the text of the bill with the entirely different text of an unrelated bill.

B. The District's contrary arguments all fail.

The District argues that the Senate's amendments "vitally altered" the original bill. But to make this argument, it defines the "purpose" of the original bill so narrowly that almost *any* amendment would constitute a vital alteration. It then asks the Court to consider a host of other factors—ranging from the number of new pages in the revised bill to the behind-the-scenes politics that led to the passage of the Underperforming Schools Bill. The District even claims that the three-reading rule contains a "procedural prong" under which the Court must make a freewheeling inquiry into whether the General Assembly "honored" the three-reading rule's "animating" purposes.

If this Court were to accept the District's arguments, it would transform the three-reading rule into a totality-of-the-circumstances test—an inherently unpredictable test that has no place in constitutional review, especially in the context of a provision, like this one, where "predictability is at a premium." *State v. Rushton*, 395 P.3d 92 ¶ 71 (Utah 2017) (Lee, J., concurring in judgment); *accord City of Arlington v. FCC*, 569 U.S. 290, 307 (2013) (explaining that a "totality-of-the-circumstances test . . . is really, of

course, not a test at all but an invitation to make an ad hoc judgment"). That cannot be squared with *Hoover* itself, which adopted the strict vital alteration test precisely to avoid this sort of entanglement with the legislative process. Therefore, the District's arguments fail.

1. The District's narrow definition of the Underperforming Schools Bill's "purpose" would transform the vital-alteration test.

a. The District's primary tack on appeal is to define the "purpose" of the original bill so narrowly that *any* amendment unrelated to community learning centers would constitute a vital alteration. It says that the original bill's "purpose was to establish community learning centers." Dist. Br. 13. The final bill, however, "completely rewrote the law for academic distress commissions—a subject not mentioned in the original bill." Dist. Br. 14. The District says this new approach contradicted the old one: rather than encouraging "local control and cooperation with no reference to academic distress commissions or R.C. 3302.10," the new bill permitted an academic distress commission to seize control over a local district. Dist. Br. 13; *accord* Amicus Brief of E. Cleveland Educ. Ass'n, *et al*. 9.

There are at least three fatal problems with this argument.

First, it contradicts this Court's precedent. *Voinovich* confirms that courts must define the "common purpose" with regard to the bill's overarching goal (such as educational reform) rather than the means of accomplishing it (such as community learning centers). *Voinovich* found that the Senate did not "vitally alter" a bill appropriating

funds to the Bureau of Workers' Compensation when it amended the bill to revise "substantive sections of the Ohio Revised Code dealing with workers' compensation." 69 Ohio St. 3d syl. at 225. In rejecting the three-reading-rule challenge, the Court explained that the amended bill "retain[ed] its common purpose to modify the workers' compensation laws." *Id*. at 234. *Voinovich* illustrates that the "common purpose" is to be defined at a rather general level: In that case, "modification of workers' compensation laws," rather than "appropriations to the Bureau of Workers' Compensation"; in this one, "improving education in failing schools," rather than "allowing for the creation of community learning centers." Narrowly defining the interest would hamstring the legislature's ability to make amendments at all. The difference between "a valid bill that is heavily amended" and a vitally altered bill "is one of degree," and giving the courts "a duty to police any such difference of degree" would entail "setting dangerous and impractical precedent." *Id*. at 233.

Second, the "vital alteration" test is *supposed to* make it exceptionally difficult to prove a violation of the three-reading rule. Even *Hoover* appeared to recognize this when announcing the rule. 19 Ohio St. 3d at 5. It follows that litigants cannot be permitted to define the purpose of the "original bill" so that it simply describes that bill's contents. If the test permitted that, then almost every substantive amendment to a bill would destroy its "common purpose." Yet that is the test the District seeks.

Third, the argument rests on the false premise that the amended Underperforming Schools Bill ceases to involve the community. It is true enough that the original bill anticipated significant community involvement with the aptly named "community learning centers." But so did the amended bill. It *retained* the House's plan to expand the use of community learning centers. And while the Senate amended the bill to empower academic distress commissions, it ensured that the community would be significantly involved in its operations. For one thing, no district is subject to academic distress commission *at all* unless it shows persistently poor performance for a number of years. R.C. 3302.10(A). So the bill assures that the vast majority of communities lose no power to these commissions. The rest will have significant local involvement in the commission itself. The president of the local school board and the mayor of the city in which the majority of the district is located each appoint a member to the five-member commission (which must count among its members a local teacher and a county resident). R.C. 3302.10(B)(1)(b)-(c). That commission then chooses a CEO. The statute assures the CEO's responsiveness to the community, because the CEO serves at the commission's pleasure and is *required* to meet with "a group of community stakeholders" within 30 days of taking office. R.C. 3302.10(E)(1). This is to assist in the CEO's creating an academic-distress plan. *Id.* The CEO must then, within 90 days, meet with similar groups for each affected school. R.C. 3302.10(E)(1)-(2). If the district continues to fail, the mayor appoints a new school board from a slate of nominees assembled by a panel

of local school officials, parents, and community leaders. R.C. 3302.11(C)–(D). Once the district improves, the public gets to take a referendum vote on the new school board. R.C. 3302.11(G). In sum, community involvement is no less important in the amended bill than it was in the original.

b. The District insists that its approach to narrowly defining the bill's purpose is necessary to avoid making part of the three-reading rule superfluous. Specifically, it points to the clause that permits either house to suspend the rule by a vote of "two-thirds of the members elected to" that house. The District argues that, under the State's understanding of the three-reading rule, "a mere majority could nullify Article II, Section 15's process for suspending the Three Reading Rule." Dist. Br. 15.

This misunderstands the nature of *Hoover*'s vital-alteration test. That test goes to whether an amendment changes a bill so substantially that the General Assembly's obligations under the three-reading rule are triggered "anew." *Hoover*, 19 Ohio St. 3d at 5. The test has nothing to do with *what those obligations are*: Each house must consider every bill on three separate days *unless* it votes by a two-thirds majority to suspend the rule's operation. So, rather than making the suspension process "superfluous," the vital-alteration test attempts to identify the amendments that require either suspension of the rule or three new readings.

It is true enough that the State's *alternative* argument—its argument for making the rule directory again, *see above* at 24–32—would eliminate judicial consequences for

disregarding the two-thirds requirement. It would not, however, make that requirement superfluous. Instead, the requirement would retain its force, and the responsibility for policing compliance with it would fall to the General Assembly. To illustrate, consider legislative practice under the 1851 Constitution. The three-reading rule under that Constitution contained a similar suspension requirement. Ohio Const., art. II, § 16 (1851). Yet, even though *Miller* held that the entire Rule was "directory," the General Assembly did not ignore it—to the contrary, the legislature invoked that requirement to dispense with three readings. *See* Gold, *Rites of Passage*, 30 Capital L. Rev. at 647, 649. This confirms that "directory" is not synonymous with "superfluous."

c. The District's remaining arguments in support of finding a vital alteration are irrelevant. For example, it stresses that the 1973 amendments replaced the requirement to "read" a bill with a requirement to "consider" it. Dist. Br. 17–18. The State agrees, but what does this have to do with the question whether an amendment is "vital"? The District also notes, *see* Dist. Br. 7, that the amendments expanded the bill from 10 pages to 77. *Compare* H.B. 70 *with* Am. Sub. H.B. 70. This overlooks that most of those new pages contain ancillary sections of the Revised Code to which the bill makes only minor alterations. *See* Am. Sub. H.B. 70 (as enrolled), pp. 1-11, 24-30. Regardless, this Court has never suggested that whether an amendment vitally alters a bill turns on or is even informed by the number of new pages. To the contrary, *Voinovich* found no "vital alteration" where the General Assembly passed amendments that turned a four-page ap-

propriation bill into a bill of more than 200 pages. *See Voinovich,* 69 Ohio St. 3d syl. at 225; 145 Ohio Laws pt. 2, 2990 (120th G.A.).

2. The three-reading rule does not have a "procedural prong."

a. The District additionally argues that the three-reading rule contains a "procedural prong" that requires the Court to decide whether the General Assembly complied with the rule's overarching "purpose" of preventing "'hasty action.'" Dist. Br. 12 (citation omitted); *accord* Amici Brief of E. Cleveland Educ. Ass'n 10–12; Amici Brief of Ohio School Bds. Ass'n, *et al*. 9–10; *see also* Amicus Brief of E. Cleveland City Sch. Dist. Bd. of Educ. 9 (arguing that the procedural prong is the third step in a three-step test).

There is no "procedural prong." If there were, it would violate the principle that a statute may be struck down only when there is a "clear conflict . . . between the statute and some specific provision of the constitution," as opposed to "a conflict between said statute *and the general spirit* of the constitution." *Mahoning Valley Ry. Co. v. Santoro*, 93 Ohio St. 53, 55 (1915) (emphasis added). The Court long ago explained the wisdom of this principle: "The spirit of the Constitution is like any other spirit. We cannot see it, nor handle it, consequently we do not know much about it. We are too prone to insist that the spirit of the Constitution is what we think it ought to be." *Bd. of Elections v. State*, 128 Ohio St. 273, 283 (1934). It is thus "dangerous for any court to hold that an act of the General Assembly contravenes the spirit, but not the letter, of the Constitution." *Id*.

In accord with this longstanding approach to constitutional adjudication, no case recognizes the supposed "procedural prong." Indeed, *Hoover* insisted that the vital-alteration test would impose no great burden because it is objective and susceptible of easy proof; it depends entirely on the degree of change indicated by the legislative journals. *See* 19 Ohio St. 3d at 4. *Hoover*'s defense of the vital-alteration test would make little sense if the test allowed any of the hundreds of common pleas judges around the state to look behind the legislative journals to assess whether the General Assembly moved with too much haste and too little deliberation.

The District claims support from *Voinovich*, which cited Justice Douglas's concurrence in *Hoover* for the proposition that "'the purpose of the 'three reading' rule is to prevent hasty action and to lessen the danger of ill-advised amendment at the last moment.'" 69 Ohio St. 3d at 233 (quoting *Hoover*, 19 Ohio St. 3d at 8 (Douglas, J., concurring)). But *Voinovich* "look[ed] to the underlying purpose of the three-consideration provision" to understand the meaning of *Hoover*'s "vital alteration" test. *Id.* It did not, as the District thinks, suggest that courts must independently verify that the General Assembly acted with appropriate deliberation. The rule's purposes (and the vital alteration test) are satisfied so long as there remains "a common purpose or relationship between the original bill and the bill as amended." *Id*. That test picks out most or all cases in which the General Assembly gives no consideration to the underlying issues, without

"plac[ing] this court in the position of directly policing every detail of the legislative amendment process when bills are passed containing a consistent theme." *Id*. at 234.

To be sure, *Voinovich* noted the lack of any "'hasty action'" in the case before it. *Id*. But that should not be interpreted to set forth an independent "procedural prong." Indeed, a procedural prong would permit exactly the sort of "direct[] policing . . . of the legislative amendment process" that *Voinovich* disclaimed. *Id*. This case nicely illustrates *Voinovich*'s reasons for refusing to conduct such an inquiry. The District's brief, and the briefs of some amici, consist largely of lengthy discussions about behind-the-scenes politicking that allegedly led to the passage of the final bill. But such politicking is hardly rare. If the Court accepts the District's argument, it will mark a significant intrusion into the legislative process—one that will likely hamper, rather than improve, candid discussion, as elected representatives will have to bear in mind the risk that a stray remark in a closed-door meeting will turn up in a published opinion. The District denies that its rule leads to such consequences, Dist. Br. 22–23, but it provides no limiting principle.

For better or worse, our Constitution mostly entrusts the messy process of legislating to the legislative branch. Even if the three-reading rule is mandatory rather than directory, *but see above* at 24–32, the Court must confine itself to enforcing the rule's letter rather than its spirit.

b. Finally, even if there were a "procedural prong," it would be satisfied in this case. As the Tenth District explained in a passage that the District never refutes, the "extensive record" in this case "establishes that members of the Senate and House were made aware of the speed with which the amendments had been adopted and the concerns arising from that process." App. Op. ¶ 23 n.2. "Thus, although the amendments proceeded quickly there was significant debate and discussion before each houses adopted the final version." *Id*. Any review for compliance with the three-reading rule must be deferential enough that, on this record, no court could "conclude that the underlying purpose of the Three Reading Rule was violated." *Id*.

* * *

The District's brief speaks as though this case presents the question of how legislators *ought to* deliberate, in an ideal world, before passing legislation. But that is not our world, and that is not this case. The question here is whether the General Assembly "vitally altered" an educational-reform bill by amending it to add more provisions reforming education. It did not. This Court should affirm the Tenth District's judgment.

The State's Proposition of Law No. 2:

> *The General Assembly does not violate Article VI, Section 3 by reducing the authority of local school boards—especially when it does not completely divest them of all power.*

The second proposition of law involves Article VI, Section 3 of the Ohio Constitution. This provision empowers those who live within a school district to determine the size and select the members of that district's school board:

> Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds: provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts.

The District says the General Assembly violated this provision by creating a process through which power could be transferred from school boards to academic distress commissions. Dist. Br. 24–28. But Section 3 says nothing at all about the school boards' powers. "Section 3, Article IV [sic] governs questions of size and organization, not the power and authority, of city school boards." *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St. 3d 568, 2006-Ohio-5512 ¶ 47. This Court should affirm the Tenth District's decision finding no Section 3 violation.

A. Article VI, Section 3 of the Ohio Constitution empowers school districts to elect school board members; it does not vest any authority in school boards.

Article VI, Section 3 "governs questions of size and organization, not the power and authority, of city school boards." *Ohio Congress*, 2006-Ohio-5512 ¶ 47. This Court has recognized for more than a century that a school board "is a mere instrumentality of the state to accomplish its purpose in establishing and carrying forward a system of common schools throughout the state." *Bd. of Educ. v. Volk*, 72 Ohio St. 469, 485 (1905). And even though Section VI provides for the organization of boards, those boards have

"'only such powers as are conferred by statute.'" *Ohio Congress*, 2006-Ohio-5512 ¶ 47 (quoting *Bd. of Educ. v. Bd. of Educ.*, 167 Ohio St. 543, 545 (1958)).

Those principles resolve this case. The second proposition of law presents the question whether the Underperforming Schools Bill violated Section 3 by transferring power from local school boards to academic distress commissions. *See* R.C. 3302.10. It did not, and it could not have. The transfer of power at issue has nothing to do with the "size and organization" of the school boards. *Ohio Congress*, 2006-Ohio-5512 ¶ 47. Since Section 3 does not speak to "the power and authority" of school boards, and because school boards have "'only such powers as are conferred by statute,'" *see id.* (citation omitted), the General Assembly could not have violated Section 3 by reallocating that power. The Tenth District correctly so held, and it ought to be affirmed.

B. The District's contrary arguments—along with those of its amici—fail.

The District does not dispute much of the foregoing. It nonetheless argues that it is entitled to reversal, contending that the Underperforming Schools Bill takes *all* the powers of school boards subject to academic distress commissions and transfers them to the State. This, the District says, violates Section 3. Dist. Br. 25–26. The argument fails, for two reasons. First, Section 3 permits the General Assembly to transfer all power from school boards to the State. Second, the Underperforming Schools Bill does not even permit the complete transfer of school boards' powers.

1. As an initial matter, nothing in Section 3 suggests a limit on the amount of power that the General Assembly can transfer from school boards. Again, that section governs the *composition* of school boards—it does not mandate any residual degree of power. Those who wrote and ratified the Constitution had good reason for leaving the General Assembly with authority to transfer control over local school districts to the State. First, this authority constitutes a vital check on the performance of local school boards. Ohio's constitution divides power between multiple entities, thus creating the "checks and balances" that are "fundamental to our democratic form of government." *State ex rel. Dann v. Taft*, 109 Ohio St. 3d 364, 2006-Ohio-1825 ¶ 55. Section 3 is a case in point. That provision empowers school districts to "determine . . . the number of members and the organization" of their local school boards, while checking that power by leaving in place the General Assembly's authority to determine the amount of control those boards may exercise. *See Ohio Congress*, 2006-Ohio-5512 ¶¶ 43–47.

In addition, there is the matter of practicality. Everyone accepts that boards of education are "'mere instrumentalit[ies] of the state,'" with "'only such powers as are conferred by statute.'" *Id*. ¶ 47 (citations omitted). And so everyone agrees that the General Assembly can limit the power of school boards. The *disagreement* concerns the degree of limitation the General Assembly may impose. But how is the judiciary supposed to resolve that question, given that the Constitution's text never addresses the issue and thus provides no guidance? Must courts identify the difference between per-

missible and impermissible transfers of power with a standardless, Goldilocks-style inquiry into whether the removal of school-board power is too much or just right? Neither the District nor its amici propose a principled, judicially administrable line. There is none, as Section 3's text shows, and so the People wisely left the question to the General Assembly.

The District stresses language from *Ohio Congress* noting the challengers' failure to prove "that the powers of city school districts ha[d] been usurped." Dist. Br. 27 (quoting 2006-Ohio-5512 ¶ 47). This, it says, implies that a law usurping *all* the power of a local board would be unconstitutional. But the quote has to be read in context. It appears in the last sentence of the very same paragraph where the Court stressed that Section 3 does not govern "the power and authority" of city school districts, and in which it reaffirmed that school boards have "'only such powers as'" the General Assembly "'confer[s] by statute.'" *Ohio Congress*, 2006-Ohio-5512 ¶ 47 (citation omitted). The final sentence of the paragraph should not be read to contradict all that precedes it. Instead, it should be read to mean that the law under consideration did not take from the school boards any powers that they could rightfully claim, without committing to what those powers were or whether any existed at all.

2. Regardless, the issue does not arise here, because the Underperforming Schools Bill *does not* strip the District of all its powers. To take just one example, and as the Tenth District recognized, nothing in the bill deprives the local board of its authority

under R.C. 5705.21 to "adopt a resolution seeking to impose an additional tax levy." App. Op. ¶ 29.

The District disputes this, saying that the statute's broad language is best read as transferring to the State *all* the authority of affected school boards. Dist. Br. 25–26. There are two problems with this argument. First, the statute removes from the board only its "operational, managerial, and instructional control" over the district. R.C. 3302.10(C)(1). Read in the context of an education bill concerned with educational performance, this is best read to give academic distress commissions control over educational policy, not taxing decisions.

Second, to the extent there is any doubt about this, it is resolved by the principle that a "statute should not be declared unconstitutional unless it appears beyond a reasonable doubt that the legislation and constitutional provision are clearly incompatible." *Ohio Congress*, 2006-Ohio-5512 ¶ 20 (alterations and quotation marks omitted). The Tenth District's reading—under which the reallocation of operational, managerial, and instructional authority does not take from school boards their power to issue levies—is certainly a reasonable reading. Thus, even if Section 3 requires leaving school boards with *some* power to act, there is nothing "clearly incompatible" about Section 3 and R.C. 3302.10(C).

CONCLUSION

The Court should affirm the Tenth District's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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