IN THE SUPREME COURT OF OHIO

MARYSVILLE EXEMPTED VILLAGE SCHOOLS BOARD OF EDUCATION,	:	Ohio Supreme Court Case No. 2023-0964
Appellee,	:	
v.	:	On Appeal from the Union County Court of Appeals, Third Appellate District
UNION COUNTY BOARD OF REVISION, ET AL.;	:	
THE RESIDENCE AT COOKS POINTE, LLC,	:	Court of Appeals Case No. 14-23-03
Appellant.	:	

BRIEF AMICUS CURIAE OF THE OHIO CHAMBER OF COMMERCE IN SUPPORT OF THE APPELLANT

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STATEMENT OF AMICUS INTEREST

Founded in 1893, the Ohio Chamber of Commerce ("the Ohio Chamber") is Ohio's largest and most diverse statewide business advocacy organization, representing businesses that range from sole proprietorships to some of the largest U.S. companies. The Ohio Chamber promotes and protects the interests of its more than 8,000 business members and works to build a more favorable business climate in Ohio by advocating for the interests of Ohio's business community on matters of statewide importance. Because businesses own real property and pay property taxes in the course of business, they have a strong interest in property-tax reform—in particular, the statutory provision at issue in this appeal that on its face prohibits school boards from taking appeals in property-tax valuation cases to the Ohio Board of Tax Appeals ("BTA").

In the present appeal, the Ohio Chamber will, in two respects, provide the court with the broader context for this court's consideration of the appeal. First, this brief will place the present appeal in the context of the legislative reforms the General Assembly enacted though Am.Sub. H.B. No. 126 ("H.B. 126"), which was passed in 2022 and became effective on July 21, 2022. Second, this brief will apprise the court of other appellate decisions rendered since H.B. 126 became effective on July 21, 2022.

To date, like the Third District in this case, two other appellate districts have mistakenly concluded that the appeal prohibition enacted as part of amended R.C. 5717.01 by H.B. 126 does not apply to decisions issued by a county board of revision ("BOR") immediately on H.B. 126's effective date, but instead only applies to later BOR decisions that determine original complaints and counter-complaints that school boards file after the effective date of H.B. 126. *See New Albany-Plain Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 10th Dist. Franklin Nos. 22AP-732 -733, 737 - 738, 743 – 744, 746 – 748, 749 – 751, 2023-Ohio-3806; *Olentangy Local Schools Bd. of Edn. v. Delaware Cty. Bd. of Revision*, 5th Dist. Delaware Nos. 23 CAH 01 0003,

0004, 2023-Ohio-3984; *Lancaster City School Dist. Bd. of Edn. v. Fairfield Cty. Bd. of Revision*, 5th Dist. Fairfield No. 23 CA 02, 2023-Ohio-3985. That context is especially important in this appeal because the statutory issue presented in this case is the same statutory issue decided in those other appellate decisions—yet the opinions of the other courts of appeals differ slightly in their reasoning from that of the Third District in the present appeal. The Ohio Chamber urges the court to issue a ruling in this case that disposes not only the present appeal, but also definitively resolves the underlying statutory issue as against the differing reasoning of other courts of appeals.

STATEMENT OF THE CASE AND THE FACTS

A. H.B. 126 enacted important property-tax reforms that enhance Ohio's competitiveness and business-friendly environment.

1. School boards' role in Ohio property-tax proceedings.

The background of this case lies in an unusual feature of Ohio property-tax law, which permits various political subdivisions such as the boards of education of school districts to file complaints with a county's BOR seeking to increase the valuation of other people's property for the purpose of increasing local property-tax revenue. Specifically, R.C. 5715.19 identifies "boards of education of any school district with territory in the county" as among the persons who may, under the particular circumstances described in the statute, file complaints— if the school district does not itself own or lease the property, the school district will ask for an increase in true value so that the property owner will pay greater tax, and thereby allow a greater amount of revenue to flow to the school district. Upon the filing of such a complaint, the BOR—which consists of the county auditor, the county treasurer, and a member of the board of county commissioners (or delegates of those officials)—has authority to modify the determination of the "true value," or market value, of the property. R.C. 5715.02, 5715.11, 5715.19(C).

If either the property owner or the school board disagrees with the BOR's decision, further appeals may be taken in certain circumstances. Property owners may appeal either to the BTA under R.C. 5717.01, or the local court of common pleas under R.C. 5717.05. By contrast, school boards have traditionally been limited to an appeal from the BOR to the BTA (until the enactment of H.B. 126). From the BTA, further appeal lies to the courts of appeals under R.C. 5717.04.

In recent years, property owners have aired concerns to the General Assembly that school boards were making excessive use of their appeal rights. The concern was that school boards took a shotgun approach by routinely filing complaints regardless of their individual merits or their overall revenue impact. In addition, property owners were concerned about complaints that would impose retroactive tax increases by establishing the property's value using a sale that occurred after the tax-lien date of the tax year at issue. Property owners pointed out that, by filing an excessive number of complaints and appeals, school boards impose litigation costs on owners that exceed the public importance of the property's valuation.

Additionally, property owners were concerned that school-board valuation appeals lead to retroactive tax increases in two respects. First, school boards may seek an increase based on a sale of the property that occurred months after the tax-lien date of a particular tax year. Second, school-board appeals from the BOR to the BTA can lead to the adoption of an increased valuation, and the imposition of additional taxes, during an appeals process that can extend years after the tax year at issue.

2. In H.B. 126, the General Assembly enacted reforms to diminish the adverse impact of property-tax litigation.

Rather than abolish school-board participation in property-valuation proceedings, the legislature in H.B. 126 imposed modest limits designed to restrict the efforts of school boards to the most important class of cases: instances when the property has sold in an arm's-length

transaction and the auditor has not used the sale price as the valuation of the property. And the legislature foreclosed the pursuit of retroactive tax increases by permitting school-board complaints only where the sale of the property occurred before the tax lien date of the year at issue. As a procedural safeguard, H.B. 126 also required school boards to approve the filing of a complaint in a public meeting as opposed to granting school-board attorneys the broad discretion to file complaints without specific consideration by the school board, and possible public input, in a public meeting.

Additionally, H.B. 126 enacted "thresholds" tied to the amount of value at issue, which were designed to limit sale-price complaints by school boards to those cases in which using the sale price would result in a substantial increase in valuation and taxation of the property—cases that could be said to be worth litigating from an economic standpoint. Finally, the legislature tried to foreclose an incentive for abusive "strike suit" litigation—as well as protect subdivisions other than the school districts—by prohibiting "private pay" agreements under which property owners would pay school boards a direct settlement amount in order to retain a lower tax valuation.

Last but not least, in H.B. 126 the legislature enacted the appeal prohibition provision at issue in this matter: subdivisions such as school boards would, after H.B. 126 became effective, no longer be permitted to appeal BOR decisions to the BTA—unless the school district was itself the owner or lessee of the property at issue. This provision could create a strong incentive for school boards to put on evidence of value at the BOR, a course of action that should facilitate quicker resolution of the valuation issue and limit the potential for retroactive property tax increases.

B. Facts of the present appeal

As in the amicus jurisdictional memorandum, the Ohio Chamber on the merits relies on the appellant's statement of the case and the facts, and emphasizes the following facts at the outset:

- H.B. 126 became effective on July 21, 2022, including the amended version of R.C. 5717.01;
- The BOR issued its decision on September 5, 2022, more than six weeks after H.B. 126 took effect;
- The school board in this case, Marysville Exempted Local School District Board of Education, filed its attempted appeal to the BTA on September 30, 2022, more than two months after H.B. 126 took effect.

ARGUMENT

Appellant's First Proposition of Law:

Under the plain reading of amended R.C. 5717.01, a board of education has no authority to appeal a decision of a board of revision issued after July 21, 2022. A court cannot delay the effectiveness of the legislation by reading into the statute a later effective date not expressly provided by the General Assembly.

A. Instead of immediately applying amended R.C. 5717.01's appeal prohibition, the appellate courts have mistakenly postponed its application to BOR decisions that address later-filed complaints.

To date, three of Ohio's appellate districts have considered when the appeal prohibition in amended R.C. 5717.01 becomes applicable. The appeal prohibition is set forth in a clause beginning with "except"—the clause is italicized below:

> An appeal from a decision of a county BOR may be taken to the board of tax appeals within thirty days after notice of the decision of the county BOR is mailed as provided in division (A) of section 5715.20 of the Revised Code. Such an appeal may be taken by the county auditor, the tax commissioner, or any board, legislative authority, public official, or taxpayer authorized by section 5715.19 of the Revised Code to file complaints against valuations or assessments with the auditor, *except that a subdivision that files an original complaint or counter-complaint under that section with respect to property the subdivision does not own or lease may not appeal the decision of the BOR with respect to that original complaint or counter-complaint.* * * *

All three courts of appeals have mistakenly concluded that the "except" clause does not apply to BOR decisions issued once H.B. 126's takes effect, but instead only applies to much later BOR decisions that address original complaints and counter-complaints *filed by school boards after the effective date of H.B. 126*. In reaching that conclusion, however, each court engaged in slightly differing lines of reasoning.

1. *This appeal: The Third District reasons that the use of the present tense postpones the applicability of the appeal prohibition.*

In this case, the Third District Court of Appeals stated three reasons for concluding that the "except" clause does not prohibit an appeal to the BTA where the school board filed the original complaint or counter-complaint before the effective date of H.B. 126. *First*, the appellate court attached the greatest importance to the tense of the verb "files" in the clause that H.B. 126 added: the present tense, according to the court of appeals, "indicates an intention that the statute only be prospectively applied" to appeals stemming from complaints or counter-complaints filed after the effective date of H.B. 126. *Marysville Exempted Village Schools Bd. of Edn. v. Union Cty. Bd. of Revision*, 3rd Dist. Union No. 14-23-03, 2023-Ohio-2020, ¶ 30. *Second*, the appellate court deemed it "critical" that "files" was tied to the filing of complaints and counter-complaints rather than to the filing of a notice of appeal to the BTA—according to the Third District, "[h]ad the amended statute made the filing of an appeal the operative act upon which the new prohibition on appeals was conditioned, the BTA's decision might have merit." *Id*. at ¶ 31. *Third*, the court of appeals devoted extensive discussion to the question whether the amended statute should apply "prospectively" or "retroactively," and concluded that the use of the present tense "files" along with the absence of an explicit authorization of retroactivity meant that the amendment applied only when the complaint or counter-complaint is filed after the effective date of H.B. 126. *Id*. at ¶32-35.

Based on all these considerations, the court of appeals held "that R.C. 5717.01 as amended by H.B. 126 is not applicable to the appeal filed in this matter with the Board of Tax Appeals, as the complaint and counter-complaint challenging the valuation of the property at issue were both filed prior to the July 21, 2022 effective date of the new version of R.C. 5717.01." *Id*. at ¶ 37.

2. The Tenth District Court of Appeals: the "except" clause's reference to "original complaint" and "counter-complaint" postpones application of the appeal prohibition.

In *New Albany-Plain Local Schools Bd. of Edn.*, 2023-Ohio-3806, a decision the Tenth District issued on October 19, 2023, the Tenth District reached the same general conclusion as the Third District but relied most heavily on the fact that the "except" clause of amended R.C. 5717.01 refers to a school board's having filed an "original complaint" or a "counter-complaint": the Tenth District concluded that by using those terms, which received formal definitions under H.B. 126 in amended R.C. 5715.19 for the first time, the legislature must have intended that the appeal prohibition would not immediately apply, but instead applied only to later BOR decisions that determined school-board "original complaints" and "counter-complaints" filed after the effective date of H.B. 126, which was July 21, 2022. *New Albany-Plain Local Schools Bd. of Edn.*, 2023-Ohio-3806, ¶ 35 and fn. 6.

Just like the Third District decision at issue in the present appeal, the Tenth District's holding effectively postpones the applicability of the appeal prohibition to matters relating to tax year 2022 and after. Currently pending before this court are four jurisdictional memoranda filed by several property owners aggrieved by the Tenth District's decision, see Nos. 2023-1538, 2023-1551, 2023-1554, and 2023-1555.

3. The Fifth District adopted elements of the Third District and Tenth District approaches.

On November 2, 2023, the Fifth District Court of Appeals issued two substantially identical decisions in two different counties of that appellate district. In both *Olentangy Local Schools Bd.*

of Edn. v. Delaware Cty. Bd. of Revision, 5th Dist. Delaware Nos. 23 CAH 01 0003, 0004, 2023-Ohio-3984, and *Lancaster City School Dist. Bd. of Edn. v. Fairfield Cty. Bd. of Revision*, 5th Dist. Fairfield No. 23 CA 02, 2023-Ohio-3985, the Fifth District distilled the eleven assignments of error advanced by the school boards to the issue: "Did the BTA properly apply the amended version of R.C. 5717.01 in finding the effective date, July 21, 2022, precluded school boards from filing appeals to the BTA involving property it did not own or lease even though the original complaint and/or counter-complaint was filed prior to the effective date?" *Olentangy Local Schools*, ¶ 18; *Lancaster City School Dist*., ¶ 17. In reaching its negative answer, the Fifth District primarily followed the Tenth District's reasoning that the enactment of formal definitions of "original complaint" and "counter-complaint" in H.B. 126 delayed the application of the "except" clause:

> Neither the codified nor the uncodified language [of H.B. 126] deemed complaints filed under the prior version of the statute as either an original complaint or a counter-complaint. Consequently, the new limiting language in R.C. 5717.01 does not apply to those previously filed cases.

Olentangy Local Schools, ¶ 30; *see also Lancaster City School Dist*., ¶ 29. Next, the Fifth District in both decisions proceeded to endorse elements of the Third District's reasoning in the present case, including the legislature's use of the present tense "files" and the tying of the appeal prohibition to the filing of complaints, rather than the issuance of decisions by the boards of revision. *Olentangy Local Schools,*. ¶ 32; *Lancaster City School Dist*., ¶ 31.

Just like the Third District decision at issue in the present appeal, the Fifth District's holding effectively postpones the applicability of the appeal prohibition to matters relating to tax year 2022 and after. Currently pending before this court is one jurisdictional memorandum filed by Caldera House, one of the property owners aggrieved by the Fifth District's decision in *Olentangy Local Schools*, 2023-Ohio-3984, see Supreme Court No. 2023-1605, and another

jurisdictional memorandum filed by Lancaster Energy Industrial, L.L.C., the property owner aggrieved by the Fifth District's decision in *Lancaster City School Dist*., 2023-Ohio-3985, see Supreme Court No. 2023-1602.

B. The plain language of the "except" clause prohibits school boards from appealing any board of revision decision issued after the effective date of H.B. 126.

Amicus Ohio Chamber urges the court to reverse based upon a holding that disposes of all the court-of-appeals decisions that have mistakenly postponed the applicability of amended R.C. 5717.01. To do so, this court should recognize that the process of applying the "except" clause is far more straightforward than the courts of appeals have acknowledged.

By its plain terms, the "except" clause prohibits an appeal by a subdivision such as a school board if two circumstances are present: first, the school board must have filed an "original complaint or counter-complaint under that section"—i.e., under R.C. 5715.19; second, the school board's "original complaint" or "counter-complaint" must have placed at issue "property the [school board] does not own or lease." In all the cases the courts of appeals have decided to date, both conditions have been satisfied. It follows that—contrary to the appellate decisions—the "except" clause barred the school-board appeals in each case.

Exemplary is the counter-complaint the Marysville Exempted Village School District Board of Education ("Marysville BOE") filed in this case. The appellant in this case is the owner of the property whose value is at issue, an entity called The Residence at Cook's Pointe, L.L.C. But The Residence did not file the original complaint in this matter; instead, the original complaint was a "third party complaint" by which the owners of other taxable property in Union County sought an increase in the tax valuation of The Residence's property. The Marysville BOE's counter-complaint agreed with the original complaint that The Residence's property was undervalued. For both original complaint and counter-complaint, the officially prescribed

complaint form DTE 1 required the respective complainants to designate their complaint an "original complaint," or a "counter complaint," and Marysville BOE duly marked "counter complaint" on the DTE 1 form that it filed in this case.

The Residence successfully defended at the board of revision, which issued its decision on September 5, 2022—more than six weeks after amended R.C. 5717.01 with its "except" clause took effect. Despite H.B. 126, Marysville BOE filed a notice of appeal to the BTA on September 30, 2023. Citing its earlier decision in *N. Ridgeville City Schools Bd. of Edn. v. Lorain Cty. Bd. of Revision*, BTA No. 2022-1152, 2022 Ohio Tax LEXIS 2518 (Oct. 31, 2022), the BTA held that the "except" clause barred Marysville BOE's appeal, and the BTA therefore dismissed.

That dismissal reflects a straightforward application of the plain language of the appeal prohibition to the circumstances presented. Yet instead of sustaining the dismissal, the appellate courts have strained their interpretation to arrive at a contrary result. Their interpretation is marred by two principal errors.

1. *The use of the present tense "files" in the "except" clause does not relate the time of filing to the effective date of H.B. 126.*

Close inspection reveals that the Third District's emphasis on the present tense—the "except" clause refers to a subdivision that "files" an original complaint or counter-complaint as opposed to one that "filed" such a complaint— is mistaken. First, the Third District's holding implicitly assumes that the verb tense in that context relates the time of filing to the effective date of H.B. 126 as a means of determining whether to apply the amended statute. But the court states no good reason to attribute that intention to the legislature, and as discussed below, there is a compelling reason not to. Simply put, the filing of an original complaint or counter-complaint is an action that is *always in the past* with respect to determining, at a later point in time, whether the

subdivision may appeal to the BTA. That is true regardless of which tense the legislature uses in drafting amended R.C. 5717.01.

Nor does the language the Third District quotes from *Smith v. Ohio Valley Ins. Co*., 27 Ohio St.2d 268 (1971) support that court's finding an *implied* relationship between the verb tense here and the effective date of H.B. 126. *Marysville Exempted Village Schools*, ¶ 33. *Smith* addressed the applicability of a 1970 enactment to insurance claims against an insurer whose insolvency pre-dated the effective date of the act. *Id.* at 275. This court had no difficulty concluding that, in accordance with the new law's explicit definition of "covered claims," some claims were covered and others were not. In distinguishing which insurance claims were and which insurance claims were not covered by the new act, this court did attach significance to the use of the present tense, *id*. at 276, but it did so in the context of a statute that *explicitly* related the "covered claims" to the effective date of the act: only those claims that "arise" on or after the effective date were subject to the new law. *Id*. By stark contrast, nothing in the language of H.B. 126 expressly ties the action of filing referred to in the "except" clause to the effective date of H.B. 126.[1] *Smith* provides no authority for a merely implied relationship between the verb tense and the effective date of the statutory amendment.

[1] The Third District also cites *Carr v. United States*, 560 U.S. 438, 447-448, 130 S.Ct. 2229 (2010) as authority for applying the "except" clause only with respect to original complaints and counter-complaints filed after the effective date of H.B. 126. But *Carr* interpreted a statute creating a criminal offense, in which one of the elements of the offense was a sex offender's *travel in interstate commerce* without registering as required, and the statute expressed that element in the present tense: the sex offender "travels" in interstate commerce, as opposed to "traveled" or "has traveled" in interstate commerce. When citing *Carr*, the Third District ignores a crucial part of the U.S. Supreme Court's reason for attaching significance to the present tense: "Taken in context, the word 'travels' in [the act at issue] is indistinguishable from the present-tense verbs that appear in myriad other criminal statutes to proscribe conduct on a prospective basis." 560 U.S. at 448 fn. 5. By contrast, the "except" clause at issue here does not involve a criminal-law prohibition of any action taken by a school board (or by anyone else)—it merely restricts the right of appeal on a prospective basis from the time H.B. 126 takes effect.

Most significantly, the court of appeals' insistence that the legislature would have used the past or perfect tense—"filed" or "has filed" an original complaint or a counter-complaint—to allow immediate application of the appeal probation is untenable. If, as the court of appeals assumes, the verb tense relates the time of the filing of a complaint to the effective date of H.B. 126, then using the past or perfect tense would have indicated that the amended statute applied *only* to complaints filed *before* the effective date of H.B. 126—and *not to complaints filed for later years*! Although school boards might, had the past tense been used, advocate and rejoice in such a reading during later tax years, it would lead to a result plainly at odds with the purpose of the enactment.

Contrary to the Third District's opinion, a fair reading of amended R.C. 5717.01 in the context of H.B. 126 calls for rejecting the premise that the verb tense of "to file" determines when the amendment applies. "A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012). Accordingly, the amended statute's "except" clause applies with respect to any BOR decision issued after the effective date of H.B. 126.

2. *Because property owners and school boards filed "original complaints" and "counter complaints" under R.C. 5715.19 long before H.B. 126 defined those terms, the "except" clause does not tie the appeal prohibition to later-filed complaints.*

Additionally, the three appellate courts err by attaching significance to the verbal linkage of the appeal prohibition with the filing of "original complaints" and "counter-complaints," which are terms *formally defined for the first time* in R.C. 5715.19 as amended by H.B. 126. Because those terms are first explicitly defined in H.B. 126, the appellate courts posit that the "except" clause postpones the appeal prohibition to later-filed complaints.

This interpretative step ignores a linguistic clue that forcefully points in the opposite direction. Instead of articulating the appeal prohibition by reference to "original complaints" and "counter-complaints" *as defined by* R.C. 5715.19, the "except" clause links the prohibition with

original complaints and counter-complaints filed "*under*" R.C. 5715.19. Had the legislature adopted the *as defined by* language, the plain language might provide support for the conclusion the appellate courts have reached given that, under H.B. 126's amendments, R.C. 5715.19 contained formal definitions of "original complaint" and "counter-complaint" for the first time.

But as discussed, parties using the DTE 1 form had already been filing "original complaints" and "counter complaints," and had been doing so "under" the prior version of R.C. 5715.19 years before the H.B. 126 amendments took effect. Indeed, not only did the official complaint form require parties to identify a complaint as an "original complaint" or "counter complaint" long before H.B. 126 was enacted, the pre-H.B. 126 case law also used that terminology to distinguish the initial filing under R.C. 5715.19(A) from the responsive filing under R.C. 5715.19(B). *See Groveport Madison Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Edn.,* 155 Ohio St.3d 247, 2018-Ohio-4286, ¶ 4 ("countercomplaint"); *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 147 Ohio St.3d 38, 2016-Ohio-3025, ¶ 9 (distinguishing the filing of an "original complaint" from filing a "countercomplaint"); *2200 Carnegie, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 135 Ohio St.3d 284, 2012-Ohio-5691, ¶ 17 (noting the filing of a "countercomplaint"); *Dayton Supply & Tool Co. v. Montgomery Cty. Bd. of Revision*, BTA No. 2003-G-1851, 2005 Ohio Tax LEXIS 859 (July 8, 2005), *3 (discussing whether board of education's complaint qualified as an "original complaint" or a "countercomplaint"), *reversed on other grounds*, 111 Ohio St.3d 367, 2006-Ohio-5852; *Licking Hts. Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision,* 154 Ohio St.3d 157, 2018-Ohio-3255*,* ¶ 9 (pre-H.B. 126 decision noting that "although the official complaint form uses the term 'countercomplaint' as does our case law, that word does not appear in the statute itself").

It follows that by its terms the "except" clause prohibits school-board appeals with respect to original complaints and counter-complaints that school boards filed *both before and after the enactment of H.B. 126*, unless the school board owned or leased the property whose value is at issue.

C. Because uncodified Section 3 of H.B. 126 does not specify when the "except" clause of amended R.C. 5717.01 becomes applicable, the plain language of the "except" clause calls for immediate application to BOR decisions issued after July 21, 2022.

As the Third District acknowledged, uncodified Section 3 of H.B. 126 "delineated when certain portions of the amended version of R.C. 5715.19 were to become operable."[2] *Marysville Exempted Village Schools*, ¶ 15. Notably absent from Section 3 is any statement prescribing when amended R.C. 5717.01 becomes applicable. In light of the legislature's omission of any mention of R.C. 5717.01 in Section 3, when does amended R.C. 5717.01, with its newly enacted appeal prohibition, apply?

The answer is simple: the appeal prohibition became applicable when H.B. 126 itself became effective on July 21, 2022. And it should be applied in accordance with its plain language, as just discussed: because the appeal prohibition was in effect when the BOR issued its decision in this case, the "except" clause barred Marysville BOE's appeal to the BTA.

[2] Broadly, Section 3 postponed the application of most of the newly enacted restrictions in R.C. 5715.19, with the exception of the prohibition against "private pay" settlement agreements, amended R.C. 5715.19(I): under Section 3 division (I) became applicable immediately.

Appellant's Second Proposition of Law:

Amended R.C. 5717.01 is prospective as written.

A. Applying the appeal prohibition of amended R.C. 5717.01 to BOR decisions issued after the effective date of H.B. 126 constitutes a purely prospective application of the statutory amendment.

In this case the Third District (and also the Fifth District in *Olentangy Local Schools* as well as in *Lancaster City School Dist.*) interpreted the "except" clause, in light of the use of the present tense and the reference to "original complaints" and "counter-complaints," to "signif[y] a legislative intent that the amended statute be *applied prospectively* to appeals stemming from *complaints* (emphasis sic) filed after the July 21, 2022 effective date of the new statute, as opposed to prohibiting appeals from complaints filed that were filed prior to that date." *Marysville Exempted Village Schools*, ¶ 36 (emphasis added). This court should reject that reasoning.

Notable in the quoted passage is the misguided theory that appeals "stem from complaints": more precisely, appeals "stem from" adverse decisions issued with respect to those complaints. Indeed, a party that files an original complaint or counter-complaint who prevails before the board of revision does not acquire a right to appeal, since that right accrues solely to a party aggrieved by the board of revision's decision. *Dayton Montgomery Cty. Port Auth. v. Montgomery Cty. Bd. of Revision*, 113 Ohio St.3d 281, 2007-Ohio-1948, ¶ 33; *Moskowitz v. Cuyahoga Cty. Bd. of Revision*, 150 Ohio St.3d 69, 2017-Ohio-4002, ¶ 11 (where board of revision adopted a reduced valuation from the value determined by the auditor's mass appraisal, the property-owning taxpayer was no longer aggrieved by the mass appraisal valuation and could not contest it through appeal).

Not only does the Third District erroneously tie the right of appeal from an adverse decision to the filing of the complaint that resulted in the decision, the Third District also errs by using the filing of the complaint at the board of revision as the point in time to use when determining whether the prohibition of appeal to the BTA is being applied *prospectively* as opposed to *retroactively*.

The appellate court states that "the H.B. 126 version of R.C. 5717.01 does not expressly mention retroactivity." *Marysville Exempted Local Schools*, ¶ 35. As the Fifth District notes in its decisions, R.C. 1.48 provides that "[a] statute is presumed to be prospective in operation unless expressly made retrospective." *Olentangy Local Schools*, ¶ 33; *Lancaster City School Dist*., ¶ 32. However, neither appellate court states a reason why the time of *filing the complaint* is the proper point of reference in determining whether the "except" clause is being applied retroactively as opposed to prospectively. In fact, both courts are wrong to do so.

Ohio law draws a "fundamental distinction * * * between a law changing accrued rights and a law that changes the remedy for those rights," *State ex rel. Slaughter v. Industrial Comm*., 132 Ohio St. 537, 542 (1937), and "the right of appeal given by statute" from one administrative body to a higher tribunal "must be classed strictly as a remedy." *Id*. at 544. Moreover, "[l]aws of a remedial nature providing rules of practice, course of procedure, or methods of review are applicable to proceedings conducted after the adoption of such laws." *Kilbeath v. Rudy*, 16 Ohio St.2d 70 (1968), paragraph two of the syllabus.

Under these precepts, any statutory restriction to the right to appeal to the BTA under amended R.C. 5717.01 should be applied to any such appeal attempted from a BOR decision that was issued after the effective date of H.B. 126—and Ohio law regards that application as a *prospective—not a retroactive*—application of the newly enacted statutory restriction. *See Denicola v. Providence Hosp*. 57 Ohio St.2d 115, 117-118 (1979) (a modified evidentiary rule, when applied to exclude testimony in a trial that occurred after its adoption, "was not retrospectively applied" but rather "it was properly applied prospectively, since the trial took place after its effective date"); *see also Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 2013-Ohio-1507, ¶ 20-21 (holding that the application of a new evidentiary law to proceedings

initiated and conducted after it became effective constituted "prospective," not retroactive, application for purposes of R.C. 1.48's mandate that laws be presumed to apply prospectively).

A sharp contrast should be drawn between the *remedial* right of a BTA appeal, which is at issue in the present case, and the *substantive* right at issue in one case that was cited by the Third District. In *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, this court interpreted a newly enacted requirement that persons convicted of certain offenses, who were given probation or released on parole, had to supply a DNA sample. The newly enacted provision spoke in the present passive tense, saying an offender who "is convicted" is subject to the newly enacted requirement, and the court viewed the present tense as either ambiguous or as negating an intent to impose the DNA requirement on persons convicted before the statute's effective date. *Id*. at ¶ 17.

The difference from the present case is striking and legally material: imposing a new condition of probation or community control after the initial sentencing involves a new substantive intrusion on the convicted person's liberty that would be *retroactive* if applied to someone already convicted and serving probation. By contrast, enforcing the restriction of a school board's remedial right to appeal to the BTA, when that legislation has taken effect before the BOR has issued its decision, constitutes a purely *prospective* application of the "except" clause.

B. Because the Marysville BOE cannot show an accrued or vested right of appeal as to a BOR decision that was issued after the effective date of H.B. 126, the BOE cannot claim a "saving" of its statutory right to appeal to the BTA.

Notably absent from the Third District's analysis is any reference to the "saving" of a right of appeal under the saving statute. *See* R.C. 1.58(A)(2), (4) (repeal does not affect any right or privilege acquired or accrued under the repealed statute). (Indeed, H.B. 126 did not actually *repeal* the BOE's pre-existing right of appeal under R.C. 5717.01; instead, H.B. 126 imposed a new restriction on the exercise of that right.) Because the BOR issued its decision after the effective

date of H.B. 126, there would be no "saving" of the appeal right inasmuch as the right of appeal had not yet accrued.

In particular, the BOE in this case cannot claim the benefit of the argument that prevailed in *Bode v. Welch*, 29 Ohio St. 19 (1875). Here is what happened in *Bode*: prior Ohio law permitted appeals to be taken from judgments issued by a justice of the peace, but new legislation repealed that right when the sum at issue was less than $100 (a more significant amount of money at that time than now). In the case before the court, judgment for $73.60 was entered shortly before the new legislation took effect, and the aggrieved party took an appeal and posted the required bond but did so after the new legislation took effect.

The first court to which appeal was taken dismissed it because of the new legislation. But the next appellate court reversed and allowed the appeal. On motion for leave to file a petition of error, this court affirmed the allowance of the appeal by denying the motion. This court's syllabus stated that the act that "takes away the right of appeal * * * does not apply to or affect cases where the judgment had already been rendered * * *," with the result that "appeals in such cases might be perfected after the date of the act." Accordingly, the court denied relief, and the appeal was permitted to proceed below.

By contrast with the situation in *Bode v. Welch*, Marysville BOE in this case—and the other school boards in the companion cases—cannot claim an accrued and vested right of appeal because the BOR in each case had not yet issued the decision from which appeal could be taken. As the Chief Justice's separate concurring opinion stated in *Bode*, "[t]he law in force at the date of the judgment gave the right of appeal," and "the right to appeal accrued the moment this judgment was entered * * *." 29 Ohio St. at 20-21. *Accord Nationwide Ins. Co. v. Ohio Dept. of Transportation*, 61 Ohio Misc.761, 766-767 (Ct. Claims 1990) ("no right to appeal arises, accrues,

or vests until one first receives an adverse judgment from a court").[3] It follows that, as already discussed, the plain language of amended R.C. 5717.01 prohibited its attempted appeal to the BTA.

CONCLUSION

For all the foregoing reasons, the court should reverse the decision of the court of appeals. Amicus Ohio Chamber additionally urges the court to adopt a holding that will dispose not only of the Third District decision, but of the parallel appeals in Nos. 2023-1538, 2023-1551, 2023-1554, 2023-1555, 2023-1602, and 2023-1605. After doing so, the court will be able to apply that holding to reverse in those cases as well.

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Respectfully submitted,

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[3] It may be that a school board confronting a BOR decision that was issued before H.B. 126's effective date of July 21, 2022 would assert an accrued right under the "saving" principle this court applied in *Bode*. But the present appeal does not involve such a situation, nor do the BTA dismissal orders that were reversed by the Tenth and the Fifth Districts involve that situation.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief amicus of the Ohio Chamber of Commerce in support of the appellant was served by U.S. Regular Mail, postage prepaid, and/or electronic mail this 8th day of January, 2024 upon the following:

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