

IN THE SUPREME COURT OF OHIO

STATE, EX REL.	:	
STATE OF OHIO	:	
	:	
Relator,	:	
	:	
v.	:	CASE NO. 03-0447
	:	
THE HONORABLE JUDGE	:	ORIGINAL ACTION FOR WRIT OF
LINTON D. LEWIS, JR., et al.	:	PROHIBITION
	:	
Respondents.	:	

**MOTION TO INTERVENE OF RESPONDENTS-INTERVENORS, THE
DeROLPH PLAINTIFFS AND THE OHIO COALITION FOR EQUITY &
ADEQUACY OF SCHOOL FUNDING**

Pursuant to Civ.R. 24, the Plaintiffs in *DeRolph v. Ohio* (July 1, 1994), Perry C.P. No. 22043, unreported (“*DeRolph*”) (hereinafter “*DeRolph* Plaintiffs”)¹ and the Ohio Coalition for Equity & Adequacy of School Funding (hereinafter “Coalition”),² (collectively, hereinafter “Intervenors”) hereby move this Court to intervene of right in the above-captioned case, to participate in any further proceedings, and hereby submit the attached Answer to the State’s Complaint for Writ of Prohibition.³ The purpose of this Motion is to ensure

¹ The *DeRolph* Plaintiffs are identified with particularity in Plaintiffs’ First Amended Complaint, attached as Exhibit C to Plaintiffs’ Motion for Compliance Conference, Exhibit F to Relator’s Complaint.

² The Coalition is a duly constituted regional council of governments whose mission is to ensure a constitutional system of school funding. The Coalition has actively supported the cause of the original Plaintiffs in *DeRolph v. Ohio* (July 1, 1994), Perry C.P. No. 22043, unreported, and has represented their interests throughout this case.

³ This Motion is accompanied by such Answer pursuant to S.Ct.Prac.R. X(2), which states that the Ohio Rules of Civil Procedure shall be followed unless this Court’s rules provide otherwise, and pursuant to Civ.R. 24(C).

that the voices of Ohio's school children in this seminal case are not silenced at this late juncture in their fight to obtain a constitutional system of school funding.

I. THE INTERESTS OF OHIO'S SCHOOL CHILDREN ARE CRITICALLY JEOPARDIZED BY THE INSTANT PROCEEDINGS, AND, ABSENT INTERVENTION, THOSE INTERESTS ARE UNREPRESENTED.

This timely motion to intervene is made under Civ.R. 24(A), which states, in relevant part, as follows:

Upon timely application anyone shall be permitted to intervene in an action * * * when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The *DeRolph* Plaintiffs and the Coalition have a profound interest in the property or transaction that is the subject of the present action by Relator (hereinafter "State"). The end goal of both the State's Emergency Motion for Stay of Proceedings and its accompanying Complaint for Writ of Prohibition is to prevent the *DeRolph* Plaintiffs from seeking a compliance conference. It is self-evident that the *DeRolph* Plaintiffs and the Coalition have an interest in pursuing the injunctive relief originally sought in *DeRolph* and in opposing the State's efforts to subvert the proper exercise of jurisdiction by the Perry County Court of Common Pleas (hereinafter "Trial Court") to monitor progress pursuant to *DeRolph v. State* (2002), 97 Ohio St.3d 434, 2002-Ohio-6750 ("*DeRolph IV*"). See *State ex rel. Smith v. Frost* (1995), 74 Ohio St.3d 107, 108,

656 N.E.2d 673, 675-676 (“[intervenor] has an interest relating to the property which is the subject of the action, since it instituted the action which led to the permanent injunction entered by [respondent] that relators seek to vacate * * *”). See, also, *American Sand & Gravel, Inc. v. Theken* (1987), 41 Ohio App.3d 98, 534 N.E.2d 896 (permitting landowners to intervene as a matter of right in a company’s appeal of a zoning board’s denial of a request for an increase in a nonconforming use of land); *State ex rel. LTV Steel Co. v. Gwin* (1992), 64 Ohio St.3d 245, 247, 594 N.E.2d 616, 618 (“[intervenor] also has an interest in defending against the argument that he lacked standing in the underlying case, which relator asserts as a reason for allowing a writ of prohibition”). Accordingly, the *DeRolph* Plaintiffs and the Coalition have satisfied the first element necessary to intervene in the present action.

The *DeRolph* Plaintiffs and the Coalition are also clearly situated in a manner that the disposition of the present action will, as a practical matter, impair or impede their ability to protect the interests set forth above. If the State’s Emergency Motion for Stay of Proceedings and the related Complaint for Writ of Prohibition are granted, Intervenors will effectively be denied any meaningful opportunity to protect those interests. By definition, the relief sought by the State’s Complaint for Writ of Prohibition will cut off access to the courts by the *DeRolph* Plaintiffs and the Coalition, and will undermine Intervenors’ goal of attaining the constitutional rights so recently articulated by the Supreme Court in *DeRolph IV*. See *State ex rel. Smith v. Frost*, 74 Ohio

St.3d at 108 (“[o]ur disposition of relator’s mandamus action may impair [intervenor’s] ability to protect its interest”). See, also, *Blackburn v. Hamoudi* (1986), 29 Ohio App.3d 350, 354, 505 N.E.2d 1010, 1014 (“[w]hile the claim may be shown to be without merit, * * * it is not required that the interest be proven or conclusively determined before the motion is granted. [Intervenor] is entitled to its day in court on its claim and we refuse to decide the issues presented in the first instance”).

Finally, neither the *DeRolph* Plaintiffs’ nor the Coalition’s rights are adequately represented by existing parties. The sole Respondents named in the State’s Complaint for Writ of Prohibition are the Honorable Judge Linton D. Lewis, Jr. (hereinafter “Judge Lewis”) and the Trial Court. Neither Judge Lewis nor the Trial Court has interests remotely parallel to those of the *DeRolph* Plaintiffs or the Coalition. If the *DeRolph* Plaintiffs and the Coalition are denied in their efforts to intervene in this matter, the school children of Ohio will be without a voice in a proceeding that may have untold impact on their constitutional rights to an equitable and adequate system of school funding. Therefore, the *DeRolph* Plaintiffs and the Coalition have far exceeded their “minimal burden to establish that [their] interest may not be adequately represented by the current respondents.” *State ex rel. Smith v. Frost*, 74 Ohio St.3d at 108.

Judicial interpretation of Civ.R. 24 has made clear that the rule “should be liberally construed to permit intervention.” *Ohio Dept. of Adm. Serv., Office*

of *Collective Bargaining v. State Emp. Relations Bd.* (1990), 54 Ohio St.3d 48, 51, 562 N.E.2d 125, 128, citing *Blackburn v. Hamoudi*, 29 Ohio App.3d 350. See, also, *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d at 247. Under the liberal construction so required by the above authorities, the *DeRolph* Plaintiffs and the Coalition clearly possess the right to intervene in the above-captioned case.

II. THERE IS NO LEGAL BASIS FOR THE STATE’S REQUESTED WRIT OF PROHIBITION, AND THE STATE’S EMERGENCY MOTION FOR STAY OF PROCEEDINGS IS LIKEWISE UNWARRANTED.

On March 24, 1997, this Court first found Ohio’s school funding system unconstitutional and directed the State Defendants to remedy the defects identified by the Court. “By our decision today we send a clear message to lawmakers: the time has come to fix the system.” *DeRolph v. State* (1997), 78 Ohio St.3d 193, 212, 677 N.E.2d 733 (“*DeRolph I*”). Over three years later, that direction to the State was repeated again: “The General Assembly, in particular, must look beyond the political considerations involved, and must provide Ohio’s school children with a thorough and efficient system of common schools as the Ohio Constitution requires.” *DeRolph v. State* (2000), 89 Ohio St.3d 1, 37, 728 N.E.2d 993, 1021 (“*DeRolph II*”). On December 11, 2002, this Court, for the fourth time, recognized the State’s continuing failure to comply with this Court’s directives: “*DeRolph I* and *II* are the law of the case, and the current school-funding system is unconstitutional.” *DeRolph IV* at 435. (Emphasis added.)

The State has yet to comply with this Court's directives. Rather than meaningfully endeavor to address the structural defects in Ohio's school-funding system repeatedly identified by this Court, the State's most recent response has been to *reduce* the level of funding available to Ohio's schools.

Incredibly, the State now comes to this Court seeking "emergency relief" barring Respondent Trial Court from even considering a motion to convene a conference among the parties. In effect, the State asks this Court to now abandon well established principles of jurisprudence and give it a free pass to continue to violate the constitutional rights of the *DeRolph* Plaintiffs.

But there is no "patent and unambiguous" lack of jurisdiction on the part of Respondents, and the State is not entitled to a writ of prohibition. The fact that this Court did not specifically retain jurisdiction following the *DeRolph IV* decision, as it had in prior proceedings in this case, resulted, as a matter of law, in the reversion of jurisdiction to the Trial Court. No additional directive of this Court was necessary to invest jurisdiction in the Trial Court to "carry this judgment into execution" as directed by the express terms of this Court's Judgment Entry and Mandate.

As further described in the *DeRolph* Plaintiffs' Motion For Compliance Conference (hereinafter "Plaintiffs' Motion for Compliance Conference"), the Trial Court's remedial jurisdiction is established by the Ohio Constitution, by those laws governing actions for declaratory judgments and injunctive relief,

and by this Court's Judgment Entry and Mandate. The lack of additional directives from this Court is legally inconsequential.

A. **A Writ of Prohibition Is An Extraordinary Remedy That is Unwarranted In This Case.**

As set forth in Plaintiffs' Motion for Compliance Conference, Respondents have multiple grounds for exercising jurisdiction over Plaintiffs' Motion for Compliance Conference following this Court's holding in *DeRolph IV*. While the Supreme Court is imbued by the Ohio Constitution with original jurisdiction to issue a writ of prohibition, this Court's previous holdings make clear that "a writ of prohibition is an 'extraordinary remedy which is customarily granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies.'" *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 73, quoting *State ex rel. Henry v. Britt* (1981), 67 Ohio St.2d 71, 73, 21 Ohio Op.3d 45, 47, 424 N.E.2d 297, 298-299 and *State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas* (1996), 74 Ohio St.3d 536, 540, 660 N.E.2d 458, 461 ("[p]rohibition is an extraordinary writ and we do not grant it routinely or easily"). See, also, *State ex rel. Staton v. Franklin Cty. Common Pleas Court* (1965), 5 Ohio St.2d 17, 21, 34 Ohio Op.2d 10, 13, 213 N.E.2d 164, 167, ("[i]t is well established that the extraordinary writ of prohibition may not be employed as a convenient short cut to a final determination of the rights of litigants, or as a substitute for appeal, or to prevent the rendering of erroneous judgment by a court in a cause which it is authorized to adjudicate, or in the place of the available ordinary,

adequate remedies”). Here, the State has an adequate remedy by way of appeal if Plaintiffs’ Motion for Compliance Conference is ultimately granted and final orders are made in accordance therewith, and the extraordinary circumstances justifying prohibition accordingly are not present.

B. The Scope Of This Court’s Review Is Limited To Determining Whether the Trial Court “Patently and Unambiguously” Lacks Jurisdiction.

While the State’s broad-ranging Complaint would have the Supreme Court reconsider the merits of *DeRolph IV* and revive long-resolved issues such as separation of powers, the singular issue before this Court is whether the Trial Court “patently and unambiguously” lacks jurisdiction to entertain Plaintiffs’ Motion for Compliance Conference. This Court previously made clear that “a writ of prohibition ‘tests and determines ‘solely and only’ the subject matter jurisdiction’ of the lower court.” *State ex rel. Tubbs Jones*, 84 Ohio St.3d at 73, quoting *State ex rel. Eaton Corp. v. Lancaster* (1988), 40 Ohio St.3d 404, 409, 534 N.E.2d 46, 52. See, also, *State ex rel. Staton v. Franklin Cty. Common Pleas Court* (1965), 5 Ohio St.2d 17, 21 (prohibition is a writ which attacks, or raises or tests, *only the question of the jurisdiction of the court*).

Moreover, the standard for issuance of a writ of prohibition is a very high one. This Court confines its inquiry to whether the Trial Court “patently and unambiguously” lacks subject-matter jurisdiction to consider Plaintiffs’ Motion for Compliance Conference. See *State ex rel. Natalina Food Co. v. Ohio*

Civil Rights Comm. (1990), 55 Ohio St.3d 98, 100, 562 N.E.2d 1383, 1385 (“[relator] cites no statutory or constitutional authority that definitively prevents [respondent] from exercising jurisdiction * * *”). Not only has the State failed to provide any definitive authority that would prevent Respondents from exercising jurisdiction, but there is a vast body of jurisprudence that clearly supports the exercise of jurisdiction by the Trial Court. See Plaintiffs’ Motion for Compliance Conference attached as Exhibit F to the State’s Complaint.

C. The State Has Premised Its Request For A Writ Of Prohibition On The Incorrect Framework For Analyzing Such Requests

Before endeavoring to swallow up the rule with the narrow exception to that rule, the State makes passing note in its Memorandum in Support that: “[t]he three traditional elements required for a writ of prohibition are that: (1) a court is about to exercise judicial or quasi-judicial power; (2) the court is without jurisdiction to exercise that power; and (3) the relator has no adequate remedy in the ordinary course of law.” See Memorandum in Support of Relator’s Complaint for Writ of Prohibition, at 2, citing *Goldstein v. Christiansen* (1994), 70 Ohio St.3d 232; *State ex rel. Levin v. Sheffield Lake* (1994), 70 Ohio St.3d 104; *State ex rel. Columbus Southern Power Co. v. Sheward* (1992), 63 Ohio St.3d 78. Notwithstanding this brief acknowledgment of the standard framework for analyzing the propriety of a writ of prohibition, the State attempts to invoke a narrow exception applicable

only under the extremely limited circumstance “[w]here a court ‘patently and unambiguously’ lacks jurisdiction to proceed.” See Memorandum in Support of Relator’s Complaint for Writ of Prohibition, at 2. See *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d at 74 (“we have created a limited exception in cases where there appears to be a total lack of jurisdiction of the lower court to act”). What the State’s own cited authorities reveal, however, is that the sparing use of this exception is inapposite here.

D. The Trial Court Must Be Granted The Opportunity To Determine Its Own Jurisdictional Authority.

As illuminated by the leading case relied upon by the State, it is well-settled that: “a court having general jurisdiction of the subject matter of a case possesses authority to determine its own jurisdiction, and a party challenging the court’s jurisdiction has an adequate remedy at law via appeal from the court’s holding that it has jurisdiction.” *Goldstein v. Christiansen*, 70 Ohio St.3d at 235, citing *State ex rel. Bradford v. Trumbull Cty. Court* (1992), 64 Ohio St.3d 502, 597 N.E.2d 116; *State ex rel. Pearson v. Moore* (1990), 48 Ohio St.3d 37, 548 N.E.2d 945. See, also, *State ex rel. Smith v. Avellone* (1987), 31 Ohio St.3d 6, 7, 508 N.E.2d 162, 163 (“[g]enerally, a writ of prohibition will not issue against a court having jurisdiction over the subject matter of an action pending before it to deprive such court of the authority vested in it by the laws of Ohio to determine its own jurisdiction as to the specific issues raised therein”). (Internal citations omitted.) Indeed, a presumption attaches that a court of general jurisdiction, such as the Trial Court, lawfully acquired and

exercised its jurisdiction, and the Supreme Court should afford deference to a trial court's determination of its own jurisdiction. *City of Middleburg Heights v. Brown* (1986), 24 Ohio St.3d 66, 68, 493 N.E.2d 547, 549, citing *Paulin v. Sparrow* (1915), 91 Ohio St. 279, paragraph one of the syllabus.

E. The Constitution And Laws Of Ohio Grant Respondents Clear Jurisdiction To Consider Plaintiffs' Motion For Compliance Conference.

The Trial Court derives its authority from the Ohio Constitution and laws enacted in furtherance of the constitutional grant of judicial power. See Section 4, Article IV of the Ohio Constitution (granting original jurisdiction to common pleas courts over “[a]ll justiciable matters * * * as may be provided by law”). See, also, R.C. Chapter 2721; R.C. 2305.01. The source of the Trial Court's jurisdiction is thus the Ohio Constitution and not, as the State asserts, a reviewing court's use (or not) of the word “remand” upon the resolution of an appeal.⁴

⁴ In its Memorandum in Support, the State goes to great lengths to attempt to distinguish such cases as *Carey v. Kemper* (1887), 45 Ohio St. 93, as cited in Plaintiffs' Motion for Compliance Conference, on the grounds that absent such remand, no “further proceedings” whatsoever are permitted. See Memorandum in Support of Relator's Complaint For Writ of Prohibition, at 7, 9. Whereas the State would have this Court stretch the term “further proceedings” beyond all reasonable meaning, the term is clearly used where additional proceedings *in furtherance of an unresolved or inchoate* issue are necessary. Where, as in the *DeRolph IV* appeal on the issue of declaratory relief, an appellate issue is definitively resolved, no further proceedings are necessary *on that issue*. A lack of remand, however, clearly does not deprive a trial court of jurisdiction to take further action not inconsistent with the mandate of a superior court. See *International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co.* (1990), 67 Ohio App.3d 672, 675 (“[w]e agree that the trial court may not alter or disobey the mandate from an appellate court. We do not agree that the trial court may not take additional action in the case not specifically authorized by the mandate.”). The absence of the term “remand” in *DeRolph IV* thus

The State seeks to cob together comments from various members of the Court in support of the argument that the “case is over.” See Memorandum in Support of Relator’s Complaint for Writ of Prohibition, at 8. What the State overlooks is that the jurisdiction of a common pleas court following a decision of the Supreme Court is determined by operation of law, not by the “intent” of individual Justices. Certainly, the Supreme Court can choose to retain jurisdiction, as it did in earlier decisions in this case, for further proceedings. But if the Court chooses not to retain jurisdiction, as it did in *DeRolph IV*, the effect of that decision, and the mandate that follows, is to re-vest jurisdiction in the trial court for execution. This Court’s Judgment Entry could not be clearer—the order to “carry this judgment into execution”—the Court’s final words in this case—was both directed to the Trial Court and had the effect of relinquishing the appellate jurisdiction of this Court and reviving the dormant jurisdiction of the Trial Court.

The Judgment Entry represented the order of the Court. That it may differ from what individual Justices may have believed or intended is legally inconsequential because the result—the re-vesting of remedial jurisdiction in the Trial Court—follows as a matter of law. The exercise of that jurisdiction is consistent with the Court’s Judgment Entry and with accepted principles of jurisprudence.

in no way diminishes the Trial Court’s authority to enforce the judgment, and the State’s attempts to draw distinctions here are spurious and inconsequential.

As considered at length in Plaintiffs' Motion for Compliance Conference, there are numerous bases for the Trial Court to exercise jurisdiction here, each of which is considered briefly in turn below.

1. The Trial Court Unquestionably Had Original Jurisdiction Over Plaintiffs' Request For Declaratory And Injunctive Relief; That Jurisdiction Was Stayed Only Pending the State's Unsuccessful Appeal.

It is unquestioned here that the Trial Court had original jurisdiction over *DeRolph* Plaintiffs' requests for declaratory and injunctive relief in *DeRolph*. Aside from the stay during the pendency of an appeal which has since been resolved, nothing has acted to divest the Trial Court of its proper jurisdiction over the parties in *DeRolph*.

As described in Plaintiffs' Motion for Compliance Conference, the original complaint before the Trial Court in *DeRolph* sought both declaratory and injunctive relief. The law is well established that complaints for injunctive relief are appropriate in conjunction with declaratory judgment actions. Accordingly, the Trial Court had initial jurisdiction to issue appropriate orders designed to bring about a remedy following its initial determination that Ohio's school funding system was unconstitutional. In fact, the Trial Court did issue such orders as part of its initial decision on July 1, 1994 in *DeRolph*. But for the appeal that followed the Trial Court's decision, the Trial Court had jurisdiction to both make and enforce remedial orders to the *DeRolph* Defendants.

Reduced to its essential terms, the State's argument before this Court today is that *because* the Trial Court's decision was appealed and no specific remand orders were issued by this Court, the Trial Court is now divested of the jurisdiction it had before the appeal. Such a result clearly flies in the face of established principles of appellate law. Appellate courts do not execute judgments, and in all but the most extraordinary of circumstances do not retain jurisdiction following decisions on appeal. The State's argument would enable any defendant to evade an unfavorable trial court judgment through the mechanism of an appeal, regardless of whether the appeal was successful; according to the flawed logic of the State, the mere fact of the appeal would be sufficient to immunize the defendant from the consequences of the judgment, even if the appeal itself was unsuccessful.

Not only is the State's request wholly lacking in precedent, it also seeks a result that would be in direct conflict with Section 16, Article I of the Ohio Constitution.⁵ This Court, as an appellate court in *DeRolph*, was under no obligation to retain jurisdiction or, for that matter, to issue any remedial orders. The fact that the Court chose to do so in *DeRolph I* and *II* was appropriate at those earlier stages of this case. By contrast, the Court's decision not to retain jurisdiction after *DeRolph IV* appears to reflect the finality of the Court's judgment, the impending change in the Court's

⁵ Section 16, Article I of the Ohio Constitution provides, in part: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

membership, and the Court's understandable frustration with the State's arrogant refusal to comply.

By today's request, the State seeks far more than a mere ruling on issues of the Trial Court's jurisdiction. The State seeks a ruling that would leave the *DeRolph* Plaintiffs *no* judicial forum in which to enforce its now-well-established rights to a constitutional school funding system.

2. The Trial Court Never Lost Jurisdiction Over Its 1999 Orders.

The State attempts to argue that subsequent decisions of this Court deprived the Trial Court of authority to enforce its 1999 orders requiring the *DeRolph* Defendants to “submit proposals for complying with the Order of this Court and the directives of the Ohio Supreme Court.” See Memorandum in Support of Relator's Complaint for Writ of Prohibition, at 10. At the same time, the State recognizes that this Court, in *DeRolph II*, expressly affirmed the decisions of the Trial Court “consistent with the foregoing opinion.” *DeRolph II* at 38. What is patently missing from the State's argument is any suggestion of exactly how the Trial Court's direction to the *DeRolph* Defendants to “submit proposals” is conceivably “inconsistent” with this Court's very explicit remedial directives in *DeRolph II*, or for that matter, with the Court's final *DeRolph IV* decision. The Court's *DeRolph II* decision was but one stage of the quartet of decisions culminating in the December 11, 2002 *DeRolph IV* decision. This Court's stay of the Trial Court's remedial order remained in effect until the issuance of the *DeRolph IV* decision, at which time

it expired by its own terms. At that time, jurisdiction reverted to the Trial Court. The Trial Court's orders demand compliance with, not departure from, this Court's decisions and are entirely consistent with those decisions.

Whether it chooses to enforce its 1999 orders or issues new remedial orders, the only certainty is that no order of the Trial Court may alter or vary this Court's judgment. The Trial Court's orders were appropriate when first issued, and are appropriate today. The State has an adequate remedy at law with respect to those orders by way of appeal. The State's ill-advised efforts to preempt consideration of issues within the lawful discretion of the Trial Court should be rejected.

3. R.C. 2721.09 Clearly Provides Subject-Matter Jurisdiction For The Trial Court To Grant Further Relief Based Upon The Declaratory Judgment In *DeRolph IV*.

As demonstrated in Plaintiffs' Motion for Compliance Conference, the law is well established that a common pleas court may not only declare the rights of the parties in a declaratory judgment action brought under R.C. Chapter 2721, but it also may order injunctive relief consistent with the rights so declared. R.C. 2721.09 specifically authorizes the filing of additional pleadings seeking further relief following a judicial declaration of rights, and thus confers subject-matter jurisdiction on the Trial Court to entertain

Plaintiffs’ Motion.⁶ As Ohio law explicitly provides for a procedure to make effective rights established by declaratory judgment, the State is hard-pressed to argue that the Trial Court is without any semblance of jurisdiction with regard to a simple compliance conference.

F. The State Has An Adequate Remedy At Law And Accordingly Is Not Entitled To the Requested Writ.

As the foregoing discussion reveals, the Trial Court plainly does not “patently and unambiguously” lack jurisdiction over Plaintiffs’ Motion for Compliance Conference. The State’s entire analysis, being premised on an inapplicable standard, is thus inapposite here. Rather, we must look to the traditional framework for considering the propriety of a writ of prohibition—a framework quickly sidestepped by the State for the obvious reason that the State cannot meet its terms.

As the State itself cited in its Memorandum in Support of its Complaint, one of three elements required for the issuance of a writ of prohibition is that the State must have no adequate remedy in the ordinary course of law. See Memorandum in Support of Relator’s Complaint for Writ of Prohibition, at 2.

⁶ Additional pleadings are not required where, as in *DeRolph*, the initial complaint included claims for injunctive relief. *Peltz v. City of South Euclid* (1967), 11 Ohio St.2d 128, 40 O.O.2d 129, 228 N.E.2d 320 (permanently enjoining the enforcement of an ordinance “to the extent of its constitutional infirmity”); *American Life & Acc. Ins. Co. of Ky. v. Jones* (1949), 152 Ohio St. 287, 40 O.O. 326, 89 N.E.2d 301 (interpreting G.C. 12102-8, predecessor to R.C. 2721.09, as providing authority to grant any further necessary or proper relief following an entry of declaratory judgment); *Clermont County ADAMH Boards v. Hogan* (1995), 1995 Ohio App. LEXIS 4795, *aff’d in part, rev’d in part* on other grounds, (1997), 79 Ohio St.3d 358, 1997 Ohio 31, 681 N.E.2d 1322, citing *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App.2d 34, 62, 409 N.E.2d 258 (“[a] trial court has continuing authority under R.C.2721.09 and its

But it is apparent that the State would have an adequate remedy in the ordinary course of law on appeal if the Trial Court entertains Plaintiffs' Motion for Compliance Conference and that exercise of jurisdiction is later deemed excessive. See *Goldstein v. Christiansen*, 70 Ohio St.3d at 235, citing *State ex rel. Bradford v. Trumbull Cty. Court*, 64 Ohio St.3d at 597; *State ex rel. Pearson v. Moore*, 48 Ohio St.3d at 37 (“a party challenging the court’s jurisdiction has an adequate remedy at law via appeal from the court’s holding that it has jurisdiction”).⁷ Accordingly, the State cannot establish one of the essential elements of a writ of prohibition, and its request for same must be denied.

G. The Interests Of Justice Do Not Warrant Expedited Consideration Of The State’s “Emergency” Motion For Stay Of Proceedings.

The State has requested that this Court issue an “emergency” stay of any proceedings in the Trial Court and cites to S.Ct.Prac.R. XIV as the basis for such motion. However, the State has not shown that the interests of justice warrant immediate consideration of its motion. More importantly, the State has not shown that a stay should be issued in this case pending disposition of its Complaint for a Writ of Prohibition.

general equity powers to fashion any remedy necessary to assure the enforcement of its decree”).

⁷ Moreover, as the Supreme Court recognized in *Pearson*, even where (as here) the potential action challenged in a writ of prohibition is not itself subject to a final, appealable order, sufficient review warranting the denial of a writ “may be had in the event [a determination] becomes permanent.” *State ex rel. Pearson v. Moore*, 48 Ohio St.3d at 38, citing *Tilford v. Crush* (1988), 39 Ohio St.3d 174, 529 N.E.2d 1245.

The State contends that while Respondents will have twenty-one days to respond to the instant complaint, the State will be required to respond to Plaintiffs' Motion for Compliance Conference prior to this time, and it speculates that it "seems likely that the Trial Court will schedule a conference before [the Supreme Court] has the opportunity to decide whether to issue the alternative writ." The State, accordingly, asserts that an emergency stay must be ordered to prevent the *DeRolph* Plaintiffs from intruding upon the ongoing process of balancing the current state budget and the General Assembly's prerogative to determine how best to respond to this Court's decision.

An emergency stay, however, is simply not warranted in the matter before this Court. The *DeRolph* Plaintiffs have merely filed a motion with the Trial Court *to schedule* a conference to ensure that the State initiates the process of formulating a school funding system that complies with the mandates of this Court. Nothing in Plaintiffs' Motion for Compliance Conference could possibly constitute "interference with the legislative process and the authority of the executive." Moreover, the Trial Court's exercise of jurisdiction, if ultimately found to be improper, could be undone on appeal.

The State has not demonstrated the existence of irreparable harm or that the interests of justice are such that a stay should be issued pending disposition of its complaint for a writ of prohibition. Accordingly, the State's Emergency Motion for a Stay of Proceedings should be denied.

III. THE STATE'S COMPLAINT AND MOTION ARE PREMISED UPON MISREPRESENTATIONS CONCERNING THE PLAINTIFFS' MOTION TO THE TRIAL COURT.

The State has manifestly misrepresented to this Court the purpose and substance of the *DeRolph* Plaintiffs' approach to the Trial Court. According to the State, "it is boldly presumptuous for the Plaintiffs to suggest that [the Trial Court] somehow has the jurisdiction to modify this Court's final decision." Memorandum in Support of Relator's Complaint for Writ of Prohibition, at 10. But the notion that the *DeRolph* Plaintiffs asked the Trial Court to *modify* the decision of this Court in *DeRolph IV* is absolutely false.

A. The Plaintiffs Seek No More Than Compliance with this Court's Decision in *DeRolph IV*.

The *DeRolph* Plaintiffs' Motion for Compliance Conference that prompted the State's extraordinary alarm and led to this action asks only that the State be directed to prepare a report and participate in a conference concerning the manner of its compliance with the directives and mandates of this Court. As the *DeRolph* Plaintiffs stated to the Trial Court in their Memorandum in Support, "[t]his is an exceedingly modest request, especially in light of the fulsome scope of the remedy to which Plaintiffs are entitled." See Plaintiffs' Motion for Compliance Conference, at 14.

Far from attempting to modify or retry *DeRolph IV*, Plaintiffs have sought only a compliance conference. The State, by comparison, here demands the freedom to continue to violate the constitutional commands as declared in

that decision, without judicial interference. The arrogance of the State is startling.

Following more than a decade of litigation, the *DeRolph* Plaintiffs have prevailed. They are now entitled—and the Trial Court has the authority—to require the State to cease its infliction of unconstitutional educational deprivation and commence the development and implementation of a school funding system compliant with the Ohio Constitution. Yet, the State would reduce *DeRolph IV* to a nullity and the *DeRolph* Plaintiffs to seeking reform through the legislative process. See Memorandum in Support of Relator’s Complaint for Writ of Prohibition, at 1. The State’s suggestion is no less absurd than if the Topeka Board of Education had taken the position in 1954, *after* the United States Supreme Court had ruled, that the judiciary could not compel it to desegregate the schools; unless the *Brown* plaintiffs could persuade the Kansas legislature to do otherwise, the segregation just declared unconstitutional by the Supreme Court would persist. But the judiciary is not powerless against the tyranny of the State, and judicial declarations *are* enforceable.

B. The State Complaint And Motion Are Permeated With Distortions Concerning Plaintiffs' Motion.

The State has permeated its Complaint and Motion with a distorted representation of the *DeRolph* Plaintiffs’ filing to the Trial Court, perhaps because it cannot otherwise justify its refusal to submit to the judiciary. The State’s authorities virtually all stand for the proposition that a trial court’s

authority, after judgment has been rendered by an appellate court, is limited to the execution of the mandate. Memorandum in Support of Relator's Complaint for Writ of Prohibition, *passim*. The State variously quotes authorities for the proposition that a trial court may not "review" the judgment of a higher court, may not act "contrary" to the mandate of a higher court, may not entertain proceedings to "challenge" the judgment rendered in the higher court, may not "retry" the case, is limited to carrying into execution the final judgment rendered by the higher court, and may not take any action inconsistent with the mandate and judgment of the higher court. *Id.* at 4, 7-10. The *DeRolph* Plaintiffs, however, have not asked the Trial Court to do any of these things. To the contrary, the foregoing propositions of the State concerning the authority of a trial court *are all consistent with the Plaintiffs' Motion for Compliance Conference*, and none supports the position the State seeks to advance here.

To reiterate, the State's position is *not* that it should not be compelled by the Trial Court to take actions inconsistent with *DeRolph IV*. The State's position is that it cannot be compelled to take actions *consistent* with *DeRolph IV*. The State's position is all the more contemptible given that it responds to a request of the *DeRolph* Plaintiffs that is so relatively minor—seeking only reports and a conference—as compared to the immensity of the State's *DeRolph IV* obligations.

The forthright declarations of defiance by the executive and legislative branches initially heard in the immediate wake of *DeRolph IV* have now given way to a subtler—but very familiar—legal argument that a remedy is beyond the authority of the judiciary. That argument must be rebuffed.

IV. THE STATE’S ARGUMENT THAT ENFORCEMENT OF THIS COURT’S DECISION VIOLATES THE “SEPARATION OF POWERS” DOCTRINE IS UNFOUNDED.

Throughout the *DeRolph* litigation, the doctrine of “separation of powers” has been raised by the State in its continued attempts to avoid any accountability. One Justice observed, “‘Separation of powers’ is a misnomer. There is no explicit declaration concerning separation of powers in either the federal constitution or our state Constitution. * * * [I]t is clear that the concept of the separation of powers is a political doctrine rather than a technical rule of law.” *DeRolph III* at 327 (Douglas, J. concurring), decision vacated by *DeRolph IV*.

Here, the State uses the “separation of powers doctrine” essentially to argue that the courts have no power to enforce an order against either of the other two branches of government. This argument turns the doctrine of separation of powers on its head by leaving the judiciary powerless and ineffective.

The State’s view of separation of powers is that the legislative and the executive branches must be able “to preserve the status quo and prevent needless interference with the legislative process and the authority of the

executive.” [The State’s] Emergency Motion For Stay of Proceedings Pending Resolution of Relator’s Request For Writ of Prohibition, at 1. Significantly, the “status quo” the State would preserve has already been declared by this Court to violate the Ohio Constitution.

The law of this case clearly establishes that the judiciary has the power and the obligation to rule on the constitutionality of legislation and to protect constitutional rights. Without the associated powers to enforce their judgments, Ohio courts would be eviscerated.

The State must be judged by its actions and not by its words. Ohio has not had a constitutional school funding system since July 1, 1994. The State has been directed to remedy that circumstance by *two* decisions of the Trial Court and *four* decisions of this Court. That the State now comes to this Court seeking to avoid judicial scrutiny and "preserve the status quo" demonstrates why that scrutiny is essential. What the State really is asking is not that the separation of powers be observed, but that it be abandoned.

This Court has recognized that it is both right and proper for the judiciary to protect and enforce the constitutional rights of our citizens

Under the long-standing doctrine of judicial review, it is our sworn duty to determine whether the General Assembly has enacted legislation that is constitutional. *Marbury v. Madison* (1803), 5 U.S. 137, * * * 2 L.Ed. 60. * * * We refuse to undermine our role as judicial arbiters and to pass our responsibilities onto the lap of the General Assembly.

DeRolph I at 198. This bedrock principle of judicial review is applicable to all Ohio courts of general jurisdiction, with this Court as final arbiter. This

Court has made its final statement in response to the *DeRolph* challenge, and there is no longer any question about the unconstitutionality of Ohio's school funding system. What remains, however, is a remedy for the *DeRolph* Plaintiffs. As noted in Plaintiffs' Motion for Compliance Conference, it is an equally clear bedrock principle of our judicial system that it is the duty of the judicial system to afford a remedy. As the United States Supreme Court noted in *Marbury*, 5 U.S. at 163:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

* * *

"In all other cases," [Blackstone] says, "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."

A. The State's Argument Leaves the Judiciary Powerless to Enforce Clearly Established Legal Rights.

As this Court confirmed in *DeRolph II*, it is not sufficient for the judiciary merely to declare constitutional rights without also ensuring that remedial action ensues.

[W]hile it is for the General Assembly to legislate a remedy, courts *do* possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional. If it did not, then the power to find a particular Act unconstitutional would be a nullity. As a result there would be

no enforceable remedy. A remedy that is never enforced is truly not a remedy.

DeRolph II. (Emphasis sic.)

This Court warned in *DeRolph II* that the now-final declaration of *DeRolph* Plaintiffs' rights will be a nullity without orders reasonably designed to bring about enforcement of those rights. All that the Trial Court has been asked to do is to begin the monitoring process by convening a conference and requiring the State to advise the Court and *DeRolph* Plaintiffs as to when and how it intends to comply with *DeRolph IV* and the 1999 orders of the Trial Court. Given the *absolute obligation* of the State to comply with the directives of the Supreme Court, the *DeRolph* Plaintiffs' request adds virtually nothing to the obligations already borne by the State. Otherwise stated, the request was hardly burdensome, and to the extent that the State intends in good faith to respond to *DeRolph IV*, there is no reason for the State to oppose it.

B. The Ohio Supreme Court Has Recognized That Judicial Intervention is Necessary To Preserve Constitutional Rights Of Ohio's Citizens.

This Court has stated, without reservation, as follows:

The Constitution of this state is the bedrock of our society. It expressly directs the General Assembly to secure a thorough and efficient system of common schools, and it does so expressly because the legislature of the mid-nineteenth century would not. As R. P. Ranney, a delegate from Trumbull County, put it, "I desire to lay a plan such as within certain limits the Legislature shall be bound to carry out." *Id.* at 16.

We realize that the General Assembly cannot spend money it does not have. Nevertheless, we reiterate that the constitutional mandate must be met. The Constitution protects

us whether the state is flush or destitute. The * * * provisions of the Ohio and United States Constitutions protect and guard us at all times. Harman Stidger, a delegate from Stark County, said, “If we should leave everything to the Legislature, why not adjourn this convention sine die, at one?” *Id.* at 11. The same could be said of this court and the Ohio Constitution.”

DeRolph IV at 436-7.

CONCLUSION

There is no longer room for debate regarding the unconstitutionality of Ohio’s school funding system. After more than a decade of litigation, the merits of the *DeRolph* challenge were conclusively determined by this Court on December 11, 2002. It is now absolutely beyond dispute that the constitutional rights of Ohio’s school children are violated on a daily basis. It is likewise beyond dispute that the violators of these rights are none other than officials in the executive and legislative branches of our state government.

In these circumstances, there should be no divergence in the respective missions of the *DeRolph* Plaintiffs and the courts. And although the State is represented in these proceedings by the Attorney General of the State of Ohio, that office rightfully should be seeking to enforce the clearly declared rights of the children rather than attempting, as it is in these proceedings, to impede them. The conduct of those who unashamedly violate the law should be as intolerable to the Attorney General as it is to the *DeRolph* Plaintiffs, and as between the lawbreakers and their victims—Ohio’s school children—the Attorney General’s duty is clear. The state officials who arrogantly defy the

Supreme Court do so in bad faith and have no legal entitlement to representation by that office. Rather, the *DeRolph* Plaintiffs, as the champions of the children, and the Attorney General, as the champion of the law, should have common cause at this critical and historic moment.

In previous generations, there were officials who, to the lingering shame of their respective states, refused to enforce the desegregation decrees of the federal courts. Today, there are officials in this state who similarly disdain the authority of the judiciary. We believe the rule of law ultimately will prevail, and we ask the Court not to interfere with the proceedings sought by the *DeRolph* Plaintiffs in the Trial Court, brought for the purpose of monitoring compliance with this Court's judgment and mandate in *DeRolph IV*.

For all of the foregoing reasons, the Coalition and the *DeRolph* Plaintiffs respectfully request that this Motion to Intervene of right be granted. The doors of the courthouse should not now be closed to those representing the interests of the school children in the school funding challenge which they initiated.

Respectfully submitted,

Nicholas A. Pittner (0023159) Counsel of Record
John F. Birath, Jr. (0022024)
Sue W. Yount (0034514)
Quintin F. Lindsmith (0018327)
Susan B. Greenberger (0010154)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
Attorneys for Intervenors

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Intervene of Respondents-Intervenors, the *DeRolph* Plaintiffs and the Ohio Coalition for Equity & Adequacy of School Funding, has been served upon Roger F. Carroll, Counsel of Record, Assistant Attorney General, 30 East Board Street, 16th Floor, Columbus, Ohio 43215-3428, via regular U.S. Mail postage prepaid, this _____ day of March, 2003.

Sue W. Yount