

IN THE SUPREME COURT OF OHIO

**STATE OF OHIO, ex rel.
JOBSONIO
41 South High Street, Suite 1500
Columbus, Ohio 43215,**

Relator,

v.

**DAVID GOODMAN,
DIRECTOR, OHIO DEPARTMENT
OF COMMERCE
77 South High St., 23rd Floor
Columbus, Ohio 43215--6123**

Respondent.

Case No. 12-1356

**ORIGINAL ACTION IN
MANDAMUS**

MEMORANDUM IN SUPPORT OF WRIT OF MANDAMUS

Aneca E. Lasley (0072366), Counsel of Record
Gregory W. Stype (0020557)
SQUIRE SANDERS (US) LLP
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215
Tel: (614) 365-2830
aneca.lasley@squiresanders.com
greg.stype@squiresanders.com

Douglas R. Cole (0070665)
ORGAN COLE + STOCK LLP
1335 Dublin Road, Suite 104D
Columbus, OH 43215
Tel: (614) 481-0902
drcole@ocslawfirm.com

Attorneys for Relator JobsOhio

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In consideration for this transfer, the Franchise and Transfer Agreement requires JobsOhio, upon the granting of the franchise, to make a payment to the State currently calculated at more than \$1.4 billion (the “Closing Payment”). The Franchise and Transfer Agreement also provides for JobsOhio to pay the State a percentage of the growth in profits realized from the Liquor Enterprise each year during the term of the franchise (the “Deferred Payments”). To fund the Closing Payment, JobsOhio will issue its own bonds or otherwise borrow money as permitted under R.C. § 1702.12(F)(5) of Ohio’s nonprofit corporation law. JobsOhio’s bonds or other borrowing will be repayable solely by JobsOhio—not the State—from Liquor Enterprise revenues received by JobsOhio after it begins operating the Liquor Enterprise.

Under R.C. § 4313.02(C)(2), Respondent David Goodman, as Director of the Ohio Department of Commerce (the “ODC”), is required to execute the Franchise and Transfer Agreement on behalf of the State. The terms of the Franchise and Transfer Agreement have been negotiated and agreed upon by Relator, Respondent, and the Director of the Ohio Office of Budget and Management (the “OBM”), Timothy Keen, and the Franchise and Transfer Agreement has been executed by all parties except Respondent. Respondent has declined to execute the Franchise and Transfer Agreement on the grounds that there have been concerns raised regarding the constitutionality of the Legislation, the merits of which this Court has not had the opportunity to address.

Relator seeks a peremptory writ of mandamus compelling Respondent to execute the Franchise and Transfer Agreement, and the facts here satisfy all three legal requirements for such a writ. First, Relator has a clear legal right to have Respondent execute the Franchise and Transfer Agreement. Revised Code Chapter 4313 explicitly authorizes the State to enter into the Franchise and Transfer Agreement, and the parties have negotiated and agreed upon all of its

terms. As it stands, the Franchise and Transfer Agreement has been signed on behalf of JobsOhio and by OBM Director Keen, and simply awaits Respondent's signature in order to take effect. Until the Franchise and Transfer Agreement has been executed, JobsOhio cannot issue its own bonds or otherwise borrow money to fund the more than \$1.4 billion Closing Payment to the State and receive the franchise on the Liquor Enterprise. Further, because JobsOhio will use future profits from the Liquor Enterprise to fund its job creation and economic development activities, JobsOhio lacks the resources to fully pursue those activities as contemplated in the Legislation unless and until the Franchise and Transfer Agreement is executed and the franchise has been granted.

Second, Respondent has a corresponding legal duty to execute the Franchise and Transfer Agreement. Revised Code § 4313.02(C)(2) explicitly states that Respondent "*shall* execute the Franchise and Transfer Agreement on behalf of the state" (emphasis added). Similarly, § 229.10 of Am. Sub. H.B. 153 orders that the agreement "shall be executed by [Respondent] upon its completion." While the Franchise and Transfer Agreement must comply with the Ohio Constitution, R.C. § 4313.02(G), the potential constitutional challenges referred to by Respondent have no merit whatsoever. In light of the Statewide economic development and job creation benefits to be obtained through the Legislation, it is imperative that all such constitutional concerns be resolved swiftly and conclusively.

Finally, Relator has no adequate alternative remedy at law. It is unclear if and when an appropriate legal action regarding the constitutionality of the JobsOhio Act and the Transfer Act might be brought. Even if and when such an action is brought, it would not afford Relator timely or complete relief. An action in mandamus is the only appropriate remedy to compel a public

official to perform a required duty. Every delay in granting that remedy forfeits job creation and economic development opportunities by JobsOhio for Ohio's citizens.

II. FACTUAL BACKGROUND

A. The General Assembly Passed The JobsOhio Act In Early 2011, And Amended It In June Of Last Year.

On February 1, 2011, the Ohio House of Representatives passed Am. Sub. H.B. 1 (129th General Assembly)—the legislation that enacted Chapter 187—by a healthy majority (59-37), and the Senate overwhelmingly passed (31-2) that same legislation on February 16, 2011. The Governor signed the bill into law two days later. On May 5, 2011, the House of Representatives passed Am. Sub. H.B. 153 (129th General Assembly) by an equally healthy majority (59-40), and the Senate passed (23-10) that same bill in June of that year.

The JobsOhio Act does not create any corporate entity or confer special corporate powers. Rather, it “authorize(s) the Governor to form a nonprofit corporation that would perform such state economic development functions as directed by law.” (Am. Sub. H.B. No. 1 (129th General Assembly) (Title); *see also* R.C. § 187.01.) Pursuant to the JobsOhio Act, that nonprofit corporation—called JobsOhio—has “the purposes of promoting economic development, job creation, job retention, job training, and the recruitment of business to this state.” R.C. § 187.01. The Act provides that JobsOhio will be “organized and operated in accordance with Chapter 1702 of the Revised Code.” (Ohio's Nonprofit Corporation Law, subject to certain exceptions set forth in R.C. Chapter 187.) *Id.*

Revised Code Chapter 187 also provides that, if the Governor decides to form the nonprofit corporation, the Governor “shall sign and file articles of incorporation” for JobsOhio. R.C. § 187.01. Once the articles of incorporation are filed, the Governor is required to appoint a nine-member board of directors, each of whom must meet certain qualifications. R.C. § 187.02.

Consistent with JobsOhio's status as a nonprofit corporation, the statute expressly provides that "[d]irectors and employees of JobsOhio are not employees or officials of the state." *Id.* At the same time, certain key employees (e.g., the chief investment officer) are required to file financial disclosures with the Ohio Ethics Commission. *Id.* JobsOhio's directors are also subject to added conflict-of-interest restrictions that do not apply to directors of other nonprofit corporations. *See* R.C. § 187.06.

The General Assembly also provided a funding mechanism to defray the initial costs that JobsOhio incurs. In Section 5 of Am. Sub. H.B. 1 (129th General Assembly), the General Assembly ordered the Director of the Ohio Department of Development (the "ODOD") to find in that Department's "unexpended and unencumbered fiscal year 2011 General Revenue Fund appropriation an amount not to exceed \$1,000,000" for JobsOhio to use for "transition and start-up costs."

B. The JobsOhio Act Authorizes The ODOD To Enter A Services Contract With JobsOhio.

In addition to authorizing the Governor to form JobsOhio, R.C. Chapter 187 also directs the Director of the ODOD to enter into a services contract with JobsOhio. More specifically, R.C. § 187.04 provides for the Director of the ODOD to "execute a contract with JobsOhio for the corporation to assist the director and the department of development with providing services or otherwise carrying out the functions and duties of the department" The statute expressly states that JobsOhio's function under this contract will be advisory. "[T]he approval or disapproval of awards shall remain functions of the department [of development]," and "[a]ll contracts for grants, loans and tax incentives shall be between the department and the recipient." *Id.* The statute also provides that "JobsOhio may not execute contracts obligating the department

for loans, grants, tax credits or incentive awards” *Id.* Indeed, the statute specifically requires that the contract between JobsOhio and the Department include the following language:

JobsOhio shall have no power or authority to bind the state or to assume or create an obligation or responsibility, expressed or implied, on behalf of the state or in its name, nor shall JobsOhio represent to any person that it has any such power or authority, except as expressly provided in this contract.

R.C. § 187.04(B)(3).

That statute further provides that any contract between the ODOD and JobsOhio is effective only for the then-current biennium, but subject to renewal or amendment in future biennia. R.C. § 187.04(A). Also, once JobsOhio and the ODOD have agreed to a contract, the contract is subject to Controlling Board approval. *Id.*

C. The Transfer Act Authorizes The State To Undertake A Liquor Enterprise Transaction With JobsOhio.

In addition to the contract with the ODOD, the General Assembly also enacted a separate statute (the Transfer Act) authorizing the State to negotiate and execute a transaction between JobsOhio and the Ohio Division of Liquor Control. In particular, R.C. Chapter 4313 authorizes the State to enter into the Franchise and Transfer Agreement through which it grants JobsOhio (or in this case JobsOhio Beverage System, a wholly-owned nonprofit subsidiary of JobsOhio), in exchange for a payment from JobsOhio to the State, a franchise on the Liquor Enterprise for up to 25 years. Lest there be any question about the legal character of the franchise transfer accomplished through the Franchise and Transfer Agreement, the General Assembly declared in R.C. § 4313.02(A):

Any such transfer shall be treated as an absolute conveyance and true sale of the interest in the enterprise acquisition project purported to be conveyed for all purposes, and not as a pledge or other security interest. The characterization of any such transfer as a true sale and absolute conveyance shall not be negated or adversely affected by the acquisition or retention by the state of a residual or reversionary interest in the enterprise acquisition project, the participation of any state officer or employee as a member or officer of, or contracting for staff

support to, JobsOhio or any subsidiary of JobsOhio, any regulatory responsibility of an officer or employee of the state, including the authority to collect amounts to be received in connection therewith, the retention of the state of any legal title to or interest in any portion of the enterprise acquisition project for the purpose of regulatory activities, or any characterization of JobsOhio or obligations of JobsOhio under accounting, taxation, or securities regulations, or any other reason whatsoever. An absolute conveyance and true sale or lease shall exist under this section regardless of whether JobsOhio has any recourse against the state or the treatment or characterization of the transfer as a financing for any purpose. Upon and following the transfer, the state shall not have any right, title, or interest in the enterprise acquisition project so transferred other than any residual interest that may be described in the Franchise and Transfer Agreement

In connection with the transfer, R.C. § 4313.02(E) requires the Director of the OBM and the Director of the ODC, subject to Controlling Board approval, to contract with JobsOhio to provide for the continuing operation of the Liquor Enterprise by the State's Division of Liquor Control, at JobsOhio's expense and subject to the contract's performance standards. In other words, State employees will continue to perform many of the actual operational functions under this contract, and JobsOhio will compensate the State for the performance of those functions.

The Closing Payment, currently calculated at more than \$1.4 billion, to be made by JobsOhio in consideration for the Liquor Enterprise franchise, includes \$500,000,000 which the General Assembly has already appropriated for the State's General Revenue Fund. *See* Am. Sub. H.B. No. 153 (129th General Assembly), Section 801.20; R.C. § 4313.02(B)(2). The balance of the Closing Payment will be used to discharge more than \$750,000,000 of the State's currently outstanding bonds that are payable from and secured by profits of the Liquor Enterprise and to satisfy approximately \$100,000,000 of financial commitments made under the State's Clean Ohio Logistics and Distribution, and Advanced Energy programs. R.C. § 4313.02(B)(1). The State will also receive additional payments even after JobsOhio begins operating the Liquor Enterprise. Each year during the franchise, JobsOhio will pay to the OBM a Deferred Payment equal to 75% of the Liquor Enterprise's incremental profits for that fiscal year (i.e., 75% of any

profits exceeding of \$257,500,000—the Liquor Enterprise’s fiscal year 2012 profits—adjusted annually for inflation). These payments are in addition to the Closing Payment and the substantial benefits that JobsOhio’s activities are expected to bring to the State and its citizens in the form of job creation and economic development.

D. The Franchise and Transfer Agreement Between JobsOhio And The State Has Been Fully Negotiated But Not Executed By Respondent Goodman.

In accordance with R.C. § 187.01, the Governor filed articles of incorporation for Relator JobsOhio on July 5, 2011. (Complaint ¶¶ 22.) The Governor thereafter appointed nine persons to serve as the Board of Directors for Relator JobsOhio, as required by R.C. § 187.02. (*Id.* ¶ 23.)

Promptly after formation, JobsOhio began negotiating the terms of a services contract (the “Agreement for Services”) with the ODOD, as R.C. § 187.04 requires. (*Id.* ¶ 25.) Terms of the Agreement for Services, which include detailing JobsOhio’s duties to procure capital investment and new employment opportunities throughout the State, were finalized in January 2012, and JobsOhio signed the Agreement on January 20, 2012. (*Id.* ¶ 26.) The Controlling Board of the State of Ohio approved the Agreement for Services on January 30, 2012; ODOD Director Christiane Schmenk signed and executed the Agreement that same day. (*Id.* ¶ 27.)

Pursuant to R.C. § 187.02(E), JobsOhio, the OBM, and the ODC also negotiated another services contract (the “Operations Services Agreement”), delegating duties between JobsOhio and the State Division of Liquor Control in operating the State’s Liquor Enterprise. (*Id.* ¶ 29.) The parties finalized the terms of the Operations Services Agreement in early 2012, and JobsOhio signed the agreement on January 20, 2012. (*Id.* ¶ 30.) The Controlling Board of the State of Ohio approved the Operations Services Agreement on January 30, 2012. (*Id.* ¶ 31.)

Commencing in September 2011, Relator JobsOhio and Director Keen negotiated the terms of the Franchise and Transfer Agreement under R.C. Chapter 4313. (*Id.* ¶ 33.) As

required by R.C. § 4313.02(C)(2), Director Keen consulted with Respondent Goodman during negotiations regarding the terms of the Franchise and Transfer Agreement. (*Id.* ¶ 34.)

JobsOhio and Director Keen have reached agreement on all terms of the Franchise and Transfer Agreement and concluded their negotiations. (*Id.* ¶ 35.) JobsOhio and Director Keen signed the Franchise and Transfer Agreement on August 7, 2012. (*Id.* ¶¶ 37-38.) JobsOhio then sent a letter to Respondent Goodman enclosing the signed Franchise and Transfer Agreement and asking Respondent to execute the Franchise and Transfer Agreement as required by R.C. § 4313.02(C)(2). (*Id.* ¶ 40.)

JobsOhio received a letter from Respondent Goodman on August 9, 2012, stating he was declining to execute the Franchise and Transfer Agreement. (*Id.* ¶ 41.) Respondent stated that, despite having been consulted during the negotiation of the Franchise and Transfer Agreement, he believes his oath of office precludes him from executing the Franchise and Transfer Agreement due to the existence of constitutional challenges that have been made to the Legislation, the merits of which this Court has not had an opportunity to address. (*Id.* ¶ 42.)

The letter from Respondent identifies seven constitutional challenges that have been made regarding the JobsOhio Act and the Transfer Act:

- (1) Whether the JobsOhio Act violates Article XIII, Section 1, which forbids the General Assembly from conferring corporate powers via special act;
- (2) Whether the JobsOhio Act violates Article XIII, Section 2, which requires all corporations to be formed under the general laws;
- (3) Whether the JobsOhio Act violates Article I, Section 16, which requires the courts to be open so injured parties may obtain a remedy by due process;
- (4) Whether the Legislation authorizes the State to lend credit to a private corporation, in violation of Article VIII, Section 4;
- (5) Whether the Transfer Act would require legislative appropriations extending past a biennium, in violation of Article II, Section 22;

(6) Whether the Transfer Act would result in the State's issuing debt in excess of limits provided in Article VIII; and

(7) Whether Am. Sub. H.B. 153 violates the "one-subject rule" of Article II, Section 15.

(*Id.* ¶ 44.)

Although these constitutional challenges are baseless, no court has had an opportunity to review their merits and, as noted by Respondent Goodman, the constitutional concerns have been characterized as "understandable" and "significant" by two lower courts. (*Id.* ¶ 42.) Respondent Goodman, therefore, is unwilling to execute the Franchise and Transfer Agreement until the Ohio Supreme Court is at least given an opportunity to address the merits of the constitutional challenges. As noted by Respondent Goodman, this Court has undertaken review of challenged legislation via a mandamus action under similar circumstances. *See, e.g. State ex rel. Duerk v. Donahey*, 67 Ohio St.2d 216 (1981); *see also State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 62 Ohio St.3d 111 (1991); *State ex rel. Ohio Funds Mgmt. Bd. v. Walker*, 55 Ohio St.3d 1 (1990); *State ex rel. Shkurti v. Withrow*, 32 Ohio St. 3d 424 (1987); *State ex rel. Bd. of Cnty. Comm'rs v. Mong*, 12 Ohio St.3d 66 (1984). Respondent also recognized that providing this Court with the opportunity to review these constitutional challenges now could: (1) remove any cloud of uncertainty; (2) allow JobsOhio to move forward more directly with its more than \$1.4 billion bond offering to fund the 25-year transfer; and (3) enable JobsOhio to maximize the resources available for job creation and economic development throughout Ohio. (*Id.* ¶ 43.)

Continuing delay in the execution of the Franchise and Transfer Agreement will harm JobsOhio and all Ohio taxpayers. JobsOhio will use profits from the franchise on the Liquor Enterprise to fund its job creation and economic development activities; unless and until the Franchise and Transfer Agreement is executed, JobsOhio cannot fund the Closing Payment to the

State and receive a franchise on the Liquor Enterprise, and will therefore lack the resources to fully pursue those activities. (*Id.* ¶ 48.)

III. LAW AND ARGUMENT

There are three requirements for a writ of mandamus to issue: (1) the relator must have a clear legal right to the requested relief; (2) the respondent must have a clear legal duty to perform the act; and (3) the relator must lack an adequate remedy in the ordinary course of the law. *State ex rel. Lane v. City of Pickerington*, 130 Ohio St. 3d 225, 226 (2011). All of these requirements are satisfied in this case.

A. **JobsOhio Has A Clear Legal Right To Have Respondent Execute The Franchise and Transfer Agreement.**

The Transfer Act specifies the rights and duties of JobsOhio and the State with respect to the Franchise and Transfer Agreement, and gives JobsOhio a clear legal right to have Respondent Goodman execute the Franchise and Transfer Agreement under the present circumstances. First, R.C. § 4313.02(A) authorizes the State to enter into the Franchise and Transfer Agreement, by which it will grant to JobsOhio a franchise on the Liquor Enterprise for up to 25 years. Revised Code § 4313.02(B) then provides that Director Keen, in consultation with Respondent, is to negotiate the terms of the Franchise and Transfer Agreement with JobsOhio on behalf of the State:

The director of budget and management, in consultation with the director of commerce, may, without need for any other approval, negotiate terms of any documents, including the Franchise and Transfer Agreement, necessary to effect the transfer and the acceptance of the transfer of the enterprise acquisition project.

Once the terms are negotiated, R.C. § 4313.02(C)(2) provides that Director Keen and Respondent Goodman “shall execute the Franchise and Transfer Agreement on behalf of the state.” Similarly, § 229.10 of Am. Sub. H.B. 153 orders that the agreement “shall be executed by [Respondent] upon its completion.”

JobsOhio has fulfilled all of its obligations under R.C. Chapter 4313. Pursuant to R.C. § 4313.02, JobsOhio began negotiating the terms of the proposed Franchise and Transfer Agreement with Director Keen in September 2011. (Complaint ¶ 33.) The parties have now concluded their negotiations and have agreed to all terms of the proposed Franchise and Transfer Agreement. (*Id.* ¶ 35.) JobsOhio and Director Keen signed the Franchise and Transfer Agreement on August 7, 2012. (*Id.* ¶¶ 37-38.) Having fully negotiated the terms of the Franchise and Transfer Agreement and satisfied all prerequisites under R.C. Chapter 4313, JobsOhio has the right to request Respondent Goodman execute the Agreement and may enforce its right through a writ of mandamus. *See State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm'n*, 117 Ohio St.3d 441, 445 (2008) (relator had clear legal right supporting mandamus relief where request was authorized by statute).

Absent such relief, JobsOhio—and the public—will be directly and irreparably harmed. JobsOhio will use the profits its earns on the liquor franchise to pursue the public purposes for which it was created, including “promoting economic development, job creation, job retention, job training, and the recruitment of business to this state.” R.C. § 187.01. Unless and until the Franchise and Transfer Agreement is executed, Relator JobsOhio cannot fund the Closing Payment and receive a franchise on the Liquor Enterprise, and thus lacks the resources to fully pursue those public purposes. (Complaint ¶ 48.)

B. Respondent Has A Clear Legal Duty To Execute The Franchise and Transfer Agreement.

The Transfer Act not only gives JobsOhio the right to request Respondent Goodman to execute the Franchise and Transfer Agreement; it imposes upon Respondent a clear legal duty to do so under the current circumstances. As described above, once the terms of the Franchise and

Transfer Agreement have been negotiated, Respondent Goodman must execute the Franchise and Transfer Agreement:

The director of budget and management and the director of commerce *shall* execute the Franchise and Transfer Agreement on behalf of the state.

Id. (emphasis added). Section 229.10 of Am. Sub. H.B. 153 likewise orders that the Agreement “shall be executed by [Respondent] upon its completion.” This Court has recognized that the word “shall” creates a mandatory duty that supports mandamus relief:

Use of the word “shall” defeats the commission’s argument that it may deny a party the right to obtain a subpoena until a later time. Accordingly, the commission has a clear legal duty to issue a subpoena upon the request of a party being investigated. The second requirement for granting a writ of mandamus has been met.

State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm’n, 117 Ohio St. 3d 441, 446 (2008); *State ex rel. Botkins v. Laws*, 69 Ohio St. 3d 383, 385 (1994) (“It is axiomatic that when used in a statute, the word ‘shall’ denotes that compliance with the commands of that statute is mandatory unless there appears a clear and unequivocal legislative intent that it receive a construction other than its ordinary usage.”); *State ex rel. Plain Dealer Pub. Co. v. Barnes*, 38 Ohio St. 3d 165, 167 (1988) (“The word ‘shall’ establishes a mandatory duty, absent a clear and unequivocal intent that it receive a construction other than its ordinary meaning.”).

The mandatory language of R.C. § 4313.02(C)(2) imposes a clear legal duty on Respondent Goodman to execute the Franchise and Transfer Agreement. Respondent, however, has declined to do so for the sole reason that there have been constitutional challenges made to the JobsOhio Act and the Transfer Act, the merits of which this Court has not had an opportunity to decide. As noted above, seven constitutional challenges have been raised:

- (1) Whether the JobsOhio Act violates Article XIII, Section 1, which forbids the General Assembly from conferring corporate powers via special act;
- (2) Whether the JobsOhio Act violates Article XIII, Section 2, which requires all corporations to be formed under the general laws;
- (3) Whether the JobsOhio Act violates Article I, Section 16, which requires the courts to be open so injured parties may obtain a remedy by due process;
- (4) Whether the Legislation authorizes the State to lend credit to a private corporation, in violation of Article VIII, Section 4;
- (5) Whether the Transfer Act would require legislative appropriations extending past a biennium, in violation of Article II, Section 22;
- (6) Whether the Transfer Act would result in the State's issuing debt in excess of limits provided in Article VIII; and
- (7) Whether Am. Sub. H.B. 153 violates the "one-subject rule" of Article II, Section 15.

There is no merit to these constitutional challenges, each of which is addressed separately below. As this Court has observed, "[a] court's power to invalidate a statute is a power to be exercised only with great caution and in the clearest of cases." *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 130 (2008) (quotations omitted). Laws are entitled to "a strong presumption of constitutionality." *Id.* Here, the Legislation fully complies with the Ohio Constitution, and therefore Respondent has a clear legal duty to execute the Franchise and Transfer Agreement that this Court may compel through a writ of mandamus.

1. The JobsOhio Act Does Not Violate Article XII, Section 1 Of The Ohio Constitution, Which Mandates That The "General Assembly Shall Pass No Special Act Conferring Powers."

The first constitutional argument cited in Respondent's August 9 letter is that R.C. Chapter 187 violates the mandate in Article XIII, Section 1 that "[t]he General Assembly shall pass no special act conferring powers." This allegation is incorrect. This Court has repeatedly held that a law does not violate Article XIII, Section 1 unless it both (1) confers corporate powers *and* (2) qualifies as a special act. Because it has a statewide impact and does not expand

JobsOhio's corporate powers beyond those conferred by Ohio's general nonprofit corporation statutes, the JobsOhio Act does neither.

The term "special act" in Article XIII, Section 1 of the Ohio Constitution has a very particular meaning: "a special act, as distinguished from an act of a general nature, is one that is local and temporary in its operation." *State ex rel. Ohio Tpk. Comm'n v. Allen*, 158 Ohio St. 168, 172 (1952) (quoting *State ex rel. Kauer v. Defenbacher*, 153 Ohio St. 268, 270 (1950)).

The history of Article XIII, Section 1 reinforces the specific requirements for a "special act." Records from Ohio's 1851 constitutional debates reveal that convention members penned this provision to stem the then-prevalent practice of creating companies via specific legislative enactments of a localized character, which were thus inconsequential to the legislature as a whole. *See, e.g., Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51*, 284 (J.V. Smith reporter, 1851) (expressing members' desires that there be "no more special acts of incorporation"); *id.* at 342 (discussing scenarios that may require a "special act of incorporation"). As the drafters explained, such individualized acts of incorporation threatened to perpetuate corrupt "log-rolling" schemes, *id.* at 351, and overrun the State legislature with entirely provincial initiatives that failed to incite meaningful legislative debate. *Id.* at 342.

This Court has been exceedingly mindful of the policies underlying Article XIII, Section 1 when addressing constitutional challenges under that provision. For example, in a leading case on "special acts," *State ex rel. Kauer v. Defenbacher*, 153 Ohio St. 268, this Court examined Article XIII, Section 1 challenges to the "Turnpike Act," which created the Ohio Turnpike Commission and appropriated money to the State Highway Department for a feasibility study. Before engaging in its analysis, the Court reflected on the purpose of Article XIII, Section 1:

There was a definite reason for this constitutional provision. It was the desire of the people to have all acts, conferring corporate powers, affect or be likely to affect the interest of the constituents of each and every individual member of the General Assembly, so that his interest in his constituents would call his attention to the effect of the proposed enactments upon them, as well as upon the people of other localities. . . . [T]hese sections were to relieve the people of the evils of special legislation[]—legislation which was enacted by the votes of representatives who were indifferent to the subject because the legislation did not affect their constituencies.

Id. at 280–81 (internal quotation marks and citations omitted). The Court held that the Turnpike Act did not violate Article XIII, Section 1 because the project was neither temporary nor local in its operation and thus not a “special act.” *Id.* at 281–82 (“There is no provision in the act to indicate that it is not to be effective as a part of the law of this state indefinitely . . . [and] [n]othing in the act requires the commission to undertake, or prevents it from undertaking, projects in any particular locality of the state.”).

In contrast, *State ex rel. Saxbe v. Alexander*, 168 Ohio St. 404 (1959), illustrates when a law is a “special act.” In *Saxbe*, the Court reviewed a state act approving the issuance of revenue bonds to build a public parking garage underneath the Ohio Statehouse. The Court quickly recognized that the law’s limited geographical scope rendered it special: “Obviously, the legislation, by its very terms, dealing, as it does, with the subject of off-street parking for the general public in Columbus **does not have uniform operation throughout the state**” *Id.* at 409 (emphasis added). Again, the question was whether the challenged legislation raised local or statewide interest, and a public parking garage in Columbus likely mattered little to legislators from outside that vicinity.

These decisions establish that the JobsOhio Act is not a “special act” in violation of Article XIII, Section 1. Like the Turnpike Act in *Defenbacher*, nothing in the Legislation limits JobsOhio’s activities geographically or temporally—JobsOhio is just as empowered to seek and support job creation and economic development in Franklin County as it is in downtown Toledo

or the rural southeastern parts of the State. In fact, JobsOhio's mission is to promote "economic development, job creation, job retention, job training, and the recruitment of business *to this state.*" R.C. § 187.01 (emphasis added). In passing the JobsOhio Act, legislators weighed in on a law that could affect their constituents, regardless of where they live or work in Ohio. The JobsOhio Act is not a special act.

Though the JobsOhio Act is of a valid, general nature, any challenge to the Act under Article XIII, Section 1 also fails for a second independent reason: the Legislation does not "confer corporate powers" within the meaning of this constitutional provision. Ohio's courts have long distinguished between statutes that unconstitutionally *confer* corporate power and those that legitimately *direct the exercise* of corporate power already granted by general statute. *See, e.g., Sims v. Street Railroad Co.*, 37 Ohio St. 556 (1882). *Sims* involved a challenge to a city ordinance under which Cleveland permitted the defendant Street Railroad to connect its tracks to local lines owned by another company. Plaintiffs, stockholders of the defendant railroad company, challenged the ordinance on Article XIII, Section 1 grounds, among others. The Court, in deciding the matter, highlighted that *before* Cleveland enacted its ordinance, the State legislature had already passed a general law enabling city councils to grant permission to any street railroad "to extend [its] track on any street or street where the said council shall deem such extension beneficial to the public." *Id.* at 568. In the Court's interpretation, the only conferring of corporate power occurred in this earlier general act: it conferred upon railroads the power to extend their tracks into cities—subject to cities' rights to dictate when that power would be exercised. Thus, Cleveland, in enacting its ordinance, was not granting the defendant any new corporate power. *Id.* at 570. *See also Pa. & Ohio Canal Co. v. Comm'rs of Portage*

Cnty., 27 Ohio St. 14 (1875) (finding that statute does not violate the Ohio Constitution where it does not “enlarge” the corporate powers that a corporation has).

The meaning of Article XIII, Section 1’s “conferring corporate powers” language is simple and straightforward: to be unconstitutional, “the power attempted to be conferred by special legislation must be a new and additional power.” *Korb v. Mitchell*, 2 Ohio N.P. 185 (Ham. Cnty. 1895). “The reason for this rule is apparent, because to *confer* means to *invest* with power, and no corporation could be said to be invested, by any act, with a power it already possessed.” *Id.* (emphasis added).

Much like the Cleveland City Council in *Sims*, the General Assembly, in passing the Legislation, did not confer any new corporate power upon JobsOhio. Instead, JobsOhio’s corporate powers arise from Chapter 1702 of the Revised Code, which confers general corporate powers upon all Ohio nonprofit corporations. Revised Code Chapter 187 does not increase JobsOhio’s powers any further. Of course, R.C. Chapter 187 and R.C. Chapter 4313 provide that the State may enter into certain transactions with JobsOhio, but JobsOhio’s power to transact is no greater than that of any other nonprofit corporation. The State may elect to undertake certain transactions with JobsOhio that it does not undertake with other nonprofit corporations, but such a decision does not “confer corporate powers” any more than when the State opts to award a construction contract bid to one contractor rather than another.

Furthermore, the fact that portions of R.C. Chapter 187 exempt JobsOhio from certain specific provisions of R.C. Chapter 1702 does not mean the legislation unconstitutionally confers corporate powers. These exemptions do not increase or expand JobsOhio’s corporate powers. Many of the excepted provisions would not apply to JobsOhio to begin with. For example, R.C. § 1702.09 applies to any “religious society” that “has been continuously in existence since

January 1, 1925.” “Excusing” JobsOhio from such otherwise inapplicable requirements has no bearing on the extent of its corporate powers. In other instances, R.C. Chapter 187 excepts JobsOhio from a Chapter 1702 requirement, only to subject it to a more stringent alternative. For example, R.C. § 187.03(A) excuses JobsOhio and its board of directors from R.C. § 1702.03 (which provides the various purposes for which nonprofits may be formed), but R.C. § 187.01 restricts JobsOhio—if it is created by the Governor by filing articles of incorporation under Chapter 1702—to a single specified purpose: “promoting economic development, job creation, job retention, job training, and the recruitment of business to this state.”

This previous example demonstrates a broader point: the JobsOhio Act carefully and narrowly delineates the range of corporate powers that JobsOhio would otherwise have under Chapter 1702 in order to effect its statutory public purposes. In choosing its board of directors, for example, JobsOhio faces constraints that other nonprofits do not. *See* R.C. § 187.02. JobsOhio’s directors are also subject to conflict-of-interest provisions inapplicable to directors of other nonprofit corporations. *See* R.C. § 187.06. Lastly, the JobsOhio board is bound by ethics reporting requirements that do not constrict officers of other nonprofits. *See* R.C. § 187.03. In sum, Chapter 187 does not expand JobsOhio’s corporate powers beyond those contained in Chapter 1702 and thus does not “confer corporate powers” upon JobsOhio.

Because the JobsOhio Act is neither a “special act,” nor one that “confers corporate powers,” it does not violate Article XIII, Section 1 of the Ohio Constitution.

2. The JobsOhio Act Does Not Violate Article XIII, Section 2 Of The Ohio Constitution, Which Requires All Corporations To Be Formed Under The General Laws.

The second allegation cited in Respondent’s August 9, 2012 letter is that the JobsOhio Act violates Article XII, Section 2 of the Ohio Constitution. That provision provides that “corporations may be formed under the general laws.” This is not a limitation on the General

Assembly's power, but a grant of power. There have been no cases identified in which a court has struck down an Ohio statute for violating this "general laws" provision, and the JobsOhio Act certainly complies with this provision.

This provision simply operates as the flip side of the prohibition on "special acts conferring corporate powers" in Section 1, addressed above. Thus understood, Section 1 prohibits "special acts conferring corporate powers," while Section 2 expressly allows "general laws" in that regard. For all the reasons cited above, though, the JobsOhio Act is a general law. In contrast to "special acts," the JobsOhio Act has uniform operation throughout the State, and thus does not create the prospect of disinterested legislators—i.e., legislators who would cast votes but lack constituents who would feel the effect of the legislation.

Because the JobsOhio Act meets the constitutional definition of a general law rather than a special act, it does not—indeed cannot—violate Article XIII, Section 2 any more than it violates Article XIII, Section 1.

3. The JobsOhio Act Does Not Violate Article I, Section 16, Which Requires The Courts To Be Open So Injured Parties May Obtain A Remedy By Due Process.

The third constitutional challenge cited in Respondent's letter is that Chapter 187 violates the open-courts provision under Article I, Section 16. This argument appears to be based on a theory that the 60-day period under R.C. § 187.09(C) to challenge actions taken by JobsOhio is unconstitutionally short. There is no law supporting this argument.

In assessing a challenge to the length of the limitations period, the Ohio Supreme Court's recent admonition in *Leininger v. Pioneer Nat'l Latex*, 115 Ohio St.3d 311 (2007), bears repeating:

Leininger contends that the short statute of limitations of R.C. 4112.02 (and of R.C. 4112.05, which also has a six-month statute of limitations) detracts from the remedial scheme of R.C. Chapter 4112. *The period within which a claim must be brought, however, is a policy decision best left to the General Assembly.*

Id. at 319 (emphasis added). Here, the General Assembly has concluded that given the speed at which JobsOhio's principal functions—job creation and economic development—march, potential litigants must quickly voice their constitutional challenges to any particular action that JobsOhio takes. If JobsOhio's conduct is purportedly violating the Constitution in connection with a particular transaction, Ohio lawmakers want that issue to be raised and resolved as soon as possible, so that JobsOhio can move forward (or not) as appropriate.

There can be no question that other Ohio statutes have adopted similarly short limitations periods, in some cases even shorter than the one at issue here. Revised Code § 2117.12, for example, provides a two-month limitation period for actions following rejection of a claim against an estate. Likewise, R.C. § 5739.13(B) provides 60 days to challenge a sales tax assessment, while under R.C. § 1515.24(D)(3), parties have *only 30 days* to challenge soil and water conservation district assessments. And R.C. § 1701.76(D) imposes a 90-day statute of limitations for a challenge to a corporate conveyance. *See also* R.C. § 4117.12(B) (90-day statute of limitations on unfair labor practice charges; R.C. § 2117.061(E) (90-day statute for Medicaid claims against an estate); R.C. § 4723.90 (180-day period to make worker compensation retaliatory discharge claim); R.C. § 4112.02(N) (180-day period to bring age discrimination claim); R.C. § 4113.52(D) (180-day period for employee claims based on retaliatory conduct). No court has ever suggested that any of these statutory periods violates the open-courts provision of the Ohio Constitution.

Additionally, the legislation does not violate Article I, Section 16 merely because of the possibility that individuals could lose their ability to pursue a claim before they knew that they

had one. Ohio courts have expressly rejected the notion that a statute of limitations is unconstitutional merely “because the statute of limitations would have expired before [the plaintiff] discovered its claim.” *State ex rel. Miami Overlook, Inc. v. Germantown*, 2011-Ohio-3419 ¶ 73 (2d Dist.) (citing *Pratte v. Stewart*, 125 Ohio St.3d 473 (2010)). Likewise, in *Pratte*, the Ohio Supreme Court rejected the argument that a statute of limitations *must* include a discovery rule (*i.e.*, a provision that the limitations period does not begin until the plaintiff has become aware of his or her cause of action). Additionally, even though a discovery rule is not compelled, *see Pratte*, a court could conclude that the statute here implicitly includes such a rule. *See, e.g., Collins v. Sotka*, 81 Ohio St. 3d 506 (1998) (reading two-year statute of limitations under R.C. § 2125.02(D) to include discovery rule notwithstanding that statute’s plain language did not include such rule). Such a determination would, of course, eviscerate any argument based on the loss of undiscovered claims.

In short, the Legislation provides a specific mechanism for raising challenges to JobsOhio’s actions, and that mechanism fully complies with Article I, Section 16.

4. The Legislation Does Not Violate Article VIII, Section 4 Of The Ohio Constitution, Which Prohibits The State From Lending Aid or Credit to Private Corporations.

The fourth constitutional argument cited in Respondent’s refusal letter is that the Legislation violates the prohibition in Article VIII, Section 4 of the Ohio Constitution against the State lending aid or credit to private corporations. This allegation appears to be that the appropriation of State funds pursuant to the JobsOhio Act for transition and startup costs of

JobsOhio somehow constitutes an equity investment by the State in JobsOhio.¹ This allegation is without merit. The prohibitions in Article VIII, Section 4 regarding State assistance to private enterprise do not apply to a nonprofit entity pursuing public purposes, such as JobsOhio.

Article VIII, Section 4 of the Ohio Constitution limits the extent to which the State may assist private enterprise:

The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever.

As the history of this provision illustrates, Article VIII, Section 4 was not designed to impose an absolute prohibition against public assistance to private enterprise but was targeted at using public credit to aid private enterprise. *Grendell v. Ohio Environmental Protection Agency*, 146 Ohio App.3d 1 (9th Dist. 2001) (holding that the legislation requiring private contractors to provide E-Check inspections of emission control systems did not constitute a violation of Article VIII, Section 4). In particular, this prohibition arose as a response to “Ohio and its subdivisions undert[aking] the financing of railroad and canal companies by lending credit to and purchasing stock in aspiring new ventures.” *Id.* When those ventures failed, “public debt soared and heavy taxation followed.” *Id.* As such, “Article VIII has been said to be an expression of concern with placing public tax dollars at risk to aid private enterprise.” *Id.*

¹ The Legislation has previously been attacked as violating Article VIII, Section 4 for the additional reason that JobsOhio will use public funds to invest in private companies. Because JobsOhio has not used *any* funds—let alone *private funds*—to make equity investments in any private for-profit corporation, this argument is not ripe for review. It is worth noting, however, that, because JobsOhio is a *private* corporate entity—not a subsidiary or agency of the State—any investment that JobsOhio might make from liquor profits earned post-transfer, which constitute private money, would not be an investment of public funds and could not violate the constitutional restrictions on the use of public funds.

In contrast, it is well-established that the appropriation of public money to a private nonprofit corporation to be expended for a *public* purpose does not violate Article VIII, Sections 4 or 6.² *State ex rel. Leaverton v. Kerns*, 104 Ohio St. 550 (1922). Ninety years ago in *Kerns*, this Court determined that Article VIII, Sections 4 and 6 did not apply to the payment of county funds to an independent agricultural society for costs of holding a county agricultural fair, stating clearly that Sections 4 and 6 apply only to public assistance to private for-profit business enterprises:

The sections of the constitution above referred to forbidding financial aid, or the loan of credit of the state, relate to private business enterprises, and, while they would forbid furnishing financial aid to any agricultural *business*, an agricultural fair is upon an entirely different basis, being a public institution designed for public instruction, the advancement of learning and the dissemination of useful knowledge.

Id.

Nearly three decades after *Leaverton*, this Court again applied this “public purpose” doctrine in *Defenbacher*, 153 Ohio St. 268, where it held that a State appropriation to the commission for a turnpike project study did not violate Article VIII, Section 4—regardless of whether the Ohio Turnpike Commission was a corporation.

This court has held that, while that portion of the section forbids the giving or loaning of the State’s credit to or in aid of a private business enterprise, it does not prohibit such gift or loan to a public organization created for a public purpose.

Id. at 282; *see also State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955) (upholding state appropriations to veterans organizations for the public purpose of “the rehabilitation of war veterans and the promotion of patriotism”); *see also, e.g., State ex rel. Taft v. Campanella*, 50 Ohio St.2d 242 (1977) (upholding the issuance of conduit revenue bonds under R.C. Chapter 140

² Article VIII, Section 6 contains a prohibition similar to Section 4 that applies to Ohio’s political subdivisions.

to finance and refinance the cost of healthcare facilities of a private nonprofit hospital); R.C. Chapter 3377 (providing for the issuance of conduit revenue bonds to finance facilities for private nonprofit colleges and universities); and R.C. § 149.30 (providing for a contract with and appropriations to the nonprofit Ohio Historical Society to perform public historical and archivist functions).

This Court most recently applied the public purpose doctrine in *Ohio Congress of Parents & Teachers v. State Board of Education*, 111 Ohio St.3d 568 (2006). The Court confirmed that the legislature may validly appropriate public funds to a private nonprofit entity for a public purpose, holding that “community schools” further the State’s public system of education and are thus engaged in a public purpose, notwithstanding that the schools are private, nonprofit corporations.

Building on ninety years of precedent, the Legislation here unquestionably does not violate Article VIII, Section 4 because JobsOhio is a nonprofit corporation created for a public purpose. Pursuant to R.C. § 187.01, JobsOhio was created as a nonprofit corporation “with the purposes of promoting economic development, job creation, job retention, job training, and the recruitment of business to the state.” The Ohio Constitution has long recognized job creation and economic development as valid “public purposes.” Article VIII, Section 13, approved by Ohio’s voters in 1974, authorizes the State to, among other things, issue revenue bonds to finance projects that will “create or preserve jobs and employment opportunities,” finding that this is a “proper public purpose.” More recently, Article VIII, Section 2p of the Ohio Constitution, approved by the voters in 2005, authorizes the State to provide financial support for development projects, finding that these are “proper public purposes of the state and local governmental entities and are necessary and appropriate means to create and preserve jobs and

enhance employment and educational opportunities; to improve the quality of life and the general and economic well-being of all the people and businesses in all areas of this state.”

Ohio’s Revised Code contains many similar provisions expressly recognizing job creation and economic development as public purposes. *See, e.g.*, R.C. Chapter 165 (implementing Article VIII, Section 13 by permitting the state and political subdivisions to issue industrial development bonds “in furtherance of the public purposes of the state to create or preserve jobs and employment opportunities and to improve the economic welfare of the people of the state”); R.C. § 307.692 (“The legislative authority of a county may appropriate moneys from its general fund to be expended by the county or by joint agreement with one or more other political subdivisions or by private, nonprofit organizations *for the public purpose of encouraging economic development of the county or area . . .*” (emphasis added)); R.C. § 505.80 (granting the same power to a township’s board of trustees); R.C. § 715.70 (governing contracts creating tax-exempt, joint economic development districts for the “public purpose” of “facilitat[ing] new or expanded economic development in the state or the district); R.C. Chapter 4582 (authorizing port authorities to issue debt for “[a]ctivities that enhance, foster, aid, provide, or promote . . . economic development . . . within the jurisdiction of the port authority”).

In passing the JobsOhio Act, the General Assembly recognized that the appropriation to fund start up activities and the transfer of the Liquor Enterprise would serve the public purpose of fostering job creation and the State’s economic development. Because the appropriation and the transfer will promote public purposes, and not aid a private, for-profit business, it does not violate any Constitutional limitation on the State lending aid or credit.

5. The Legislation Does Not Violate Article II, Section 22, Which Limits Appropriations To A Biennium.

The fifth constitutional argument cited in Respondent's refusal letter is that the Legislation creates an appropriation that extends beyond a biennium in violation of Article II, Section 22. This allegation is wholly without merit. The Legislation makes no appropriation beyond a biennium and, as a further matter, the transaction provides for payments to—not from—the State.

Article II, Section 22 of the Ohio Constitution provides that “[n]o money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years.” This language prevents the current General Assembly from requiring a future General Assembly to appropriate money. As this Court stated in *Sorrentino v. Ohio National Guard*,

This court has long held “[t]hat no officers of the state can enter into any contract, except in cases specified in the constitution, whereby the general assembly will, two years after, ***be bound to make appropriations either for a particular object or a fixed amount***—the power and the discretion, intact, to make appropriations in general devolving on each biennial general assembly, and for the period of two years.”

53 Ohio St.3d 214, 217 (1990) (emphasis added) (quoting *State v. Medbery*, 7 Ohio St. 522, paragraph two of the syllabus (1857)). So long as the legislation does not require a future appropriation, there is no violation of Article II, Section 22.

Here, no appropriation supporting JobsOhio extends beyond a biennium. Nor do any of the agreements (i.e., the Franchise and Transfer Agreement, the Operations Services Agreement, or the Agreement for Services) contemplate such an appropriation. The only directive in the Legislation to make expenditures in support of JobsOhio occurs in § 5 of Am. Sub. H.B. 1, as amended by § 605.10 of Am. Sub. H.B. 153, which orders the Director of the ODOD to find in that Department's “unexpended and unencumbered fiscal year 2011 General Revenue Fund

appropriation an amount not to exceed \$1,000,000” for JobsOhio to use for “transition and start-up costs.” (Complaint ¶ 24.) Since the \$1,000,000 appropriation is expressly limited to only fiscal year 2011 funds, it cannot violate the 2-year limitation in Article II, Section 22.

The Agreement for Services between JobsOhio and the ODOD also provides for payments to JobsOhio. (Agreement of Services § 5.) That provision, however, cannot violate Article II, Section 22, given that the term of that Agreement is limited to the current biennium. R.C. § 187.04(A); Agreement of Services § 4.

In contrast to the purpose for which appropriations are made—the authorization of expenditures *by* the State—the Franchise and Transfer Agreement and the Operations Services Agreement provide for payments *to* the State. The Franchise and Transfer Agreement provides for a Closing Payment by JobsOhio to the State of more than \$1.4 billion—\$500,000,000 of which is to be deposited into the State’s General Revenue Fund for appropriation by the General Assembly. Similarly, Article 2 of the Operations Services Agreement provides for payments by JobsOhio *to* the Division of Liquor Control in an amount equal to the annual Expense Budget needed for the Division to continue operating the Liquor Enterprise under that Agreement. The expenditure of these receipts by the Division of Liquor Control is expressly made “subject, to the extent required by applicable law, to the State’s regular biennial appropriations process.” (Operations Services Agreement § 2.3(j)).

Finally, JobsOhio’s receipt and disbursement of Liquor Enterprise profits during the 25-year franchise term cannot be subject to appropriation at all since these monies are not received from the State. Instead, post-transfer Liquor Enterprise profits will go to JobsOhio, not to the State. The funds will be coming from liquor merchants and their customers, and not from the State treasury; therefore, there is no appropriation involved.

In summary, with the exception of the up to \$1,000,000 in support of JobsOhio from appropriations from the single fiscal year 2011 and payments under the Agreement for Services, the term of which is limited to a single biennium, the proposed liquor transaction calls for the State to receive money, not expend it or distribute it pursuant to an appropriation. Thus, the transaction does not violate Article II, Section 22.

6. The Transfer Act Will Not Cause The State To Incur Debt In Excess Of The Limits Imposed By Article VIII.

The sixth constitutional argument cited in Respondent's August 9 letter is that the Liquor Enterprise transaction will cause the State to incur debt in excess of the limits imposed by Article VIII of the Ohio Constitution. However, the transaction does not authorize any State debt, and even if the debt represented by JobsOhio's bonds or other borrowing to fund the Closing Payment could be attributed to the State, that debt would not violate constitutional limits.

Article VIII Sections 1, 2, and 3 place constitutional limits on the type and amount of debt the State may incur. The JobsOhio Act does not authorize, and the Liquor Enterprise transaction does not require, the issuance of either State debt or State-backed debt. JobsOhio will indeed incur *its own debt*—as R.C. § 1702.12(F)(5) authorizes all nonprofit corporations to do—to pay the Closing Payment. This debt will be payable from and secured by Liquor Enterprise revenues received by JobsOhio after it completes the Liquor Enterprise transfer. Post-transfer and during the 25-year franchise period, these Liquor Enterprise revenues belong to JobsOhio and not the State, since the franchise is “an absolute conveyance and true sale” of the Liquor Enterprise. R.C. § 4313.02(A). As such, it is clear that the State is not incurring a secured debt, but is merely receiving a payment from JobsOhio in exchange for a franchise on the Liquor Enterprise, an asset that constitutes valuable consideration. *See Tpk. Co. v. Parks*, 50 Ohio St. 568 (1893) (holding that a turnpike franchise is property and that legislation authorizing its

taking without due process was in violation of the due process clauses of the State and federal constitutions).

Furthermore, even if one were to somehow conflate the debts of JobsOhio with those of the State,³ any debt incurred in the Liquor Enterprise transaction would be exempt from the State's constitutional debt limitations. Article VIII, Section 13 of the Ohio Constitution explicitly authorizes State borrowing to acquire property used to create or preserve jobs and employment opportunities and exempts such borrowings from constitutional debt limits so long as they are not tax-backed:

*To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, to control air, water, and thermal pollution, or to dispose of solid waste, it is hereby determined to be in the public interest and a proper public purpose for the state or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, to acquire, construct, enlarge, improve, or equip, and to sell, lease, exchange, or otherwise dispose of property, structures, equipment, and facilities within the State of Ohio for industry, commerce, distribution, and research, to make or guarantee loans and to borrow money and issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment, of such property, structures, equipment and facilities. **Laws may be passed to carry into effect such purposes and to authorize for such purposes the borrowing of money by, and the issuance of bonds or other obligations of, the state, or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, and to authorize the making of guarantees and loans and the lending of aid and credit, which laws, bonds, obligations, loans, guarantees, and lending of aid and credit shall not be subject to the requirements, limitations, or prohibitions of any other section of Article VIII, or of Article XII, Sections 6 and 11, of the Constitution,** provided that moneys raised by taxation shall not be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted under this section.*

³ This would seem impossible under Article VIII, Section 5 of the Ohio Constitution which expressly prohibits the State from assuming the debts of "any corporation whatsoever unless such debt shall have been incurred to repel invasion, suppress insurrection or defend the state in war."

Id. (emphasis added.)

JobsOhio's purposes, expressed in the JobsOhio Act, clearly fall within the scope of Article VIII, Section 13. Moreover, this Court has already held that profits from the State Liquor Enterprise, which would be the sole source of security and payment for JobsOhio's debt, do not constitute "moneys raised by taxation" within the meaning of this section (even when the Liquor Enterprise is in the hands of the State). *See Duerk*, 67 Ohio St.2d 216 (upholding the constitutionality of legislation permitting the State to issue bonds payable from liquor profits to make loans to private businesses under authority of Article VIII, Section 13). Indeed, under this authority the State has issued in excess of \$800 million of bonds for economic development purposes that are payable solely from Liquor Enterprise profits.

Additionally, the limitations in Sections 1 through 3 of Article VIII of the Ohio Constitution do not apply to self-supporting debt (i.e., debt incurred to acquire a particular property, and whose debt service will be paid from revenues generated by that property). *See, e.g., Kasch v. Miller*, 104 Ohio St. 281, 288 (1922) (holding that, when the State issues debt to fund a project whose incremental revenues are the sole payment source for all principal and interest expenses on that debt, it does not violate Article VIII, Section 3's limitations). Here, JobsOhio will use the proceeds of its borrowing to pay for the franchise it will receive on the Liquor Enterprise, and post-transfer Liquor Enterprise profits payable to JobsOhio under that franchise will provide the source of payment and security for debt service. Such a borrowing, ***even if attributed to the State***, would clearly be a self-supporting borrowing of the type approved in *Kasch*. In this situation, Ohio's courts "fail to perceive, even by a strained construction," how such a debt would violate the constitution's debt limits. *Id.* "The debt . . . is not a state debt; the bonds . . . entail no obligation upon the state which it is required, either legally or morally, to

assume; the mortgage attaches to no property owned by or purchased with the revenues of the state.” *Id.*

In summary, any debt incurred by JobsOhio to pay the Closing Payment will be debt *of JobsOhio*, not a debt of the State. JobsOhio is a nonprofit corporation, not a State agency, and its debt is not, and cannot become, State debt. However, even assuming that the debt of JobsOhio could somehow be attributed to the State, it would be authorized under Article VIII, Section 13 of the Ohio Constitution, or self-supporting debt, and thus exempted from constitutional debt limits.

7. Amended Substitute House Bill 153 Does Not Violate the “One-Subject Rule” of Article II, Section 15.

Respondent’s final constitutional concern involves Article II, Section 15(D)’s one-subject rule as it applies to the sections of Am. Sub. H.B. 153 that enact the Transfer Act and make related amendments to Revised Code Chapter 187. Respondent’s reservations, however, are misplaced. Courts will only enforce the one-subject rule in instances of “manifestly gross and fraudulent violations.” *In re Nowak*, 104 Ohio St.3d 466 (2004). Moreover, the inclusion of the Transfer Act and the related amendments to R.C. Chapter 187 in Am. Sub. H.B. 153 (an appropriation bill) does not violate the one-subject rule, since the Liquor Enterprise Transfer, which is expected to generate hundreds of millions of dollars for the State, forms an integral part of the State’s budget.

Originally passed as an anti-logrolling measure, *see State ex rel. Dix v. Celeste*, 11 Ohio St.3d 141, 142–43 (1984), Article II, Section 15(D), in relevant part, states that “[n]o bill shall contain more than one subject, which shall be clearly expressed in its title.” In enforcing the section, however, “courts afford the General Assembly great latitude in enacting comprehensive

legislation and indulge every presumption in favor of the constitutionality of legislation.” *City of Riverside v. State*, 190 Ohio App.3d 765, 784 (10th Dist. 2010).

When assessing the validity of legislation under Article II, Section 15, courts will consider not the plurality of subject matter, but rather its disunity. *Ohio Civ. Serv. Emps. Ass’n, AFSCME, Local 11, AFL-CIO v. State Emp’t Relations Bd.*, 104 Ohio St.3d 122, 130 (2004) [hereinafter *SERB*]. For legislation to qualify as a “manifestly gross and fraudulent violation” of the rule, “a court must determine that the bill includes a disunity of subject matter such that there is no discernible practical, rational or legitimate reason for combining the provisions in one [a]ct.” *Id.* (internal quotation marks and citation omitted.) The test is thus undeniably deferential to the legislature.

As an additional matter, appropriations bills like Am. Sub. H.B. 153, by virtue of their omnibus nature, pose special challenges for the courts to evaluate under Article II, Section 15. “Appropriations bills, of necessity, encompass many items, all bound by the thread of appropriations.” *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 16 (1999). As such, the courts have only rejected provisions of appropriations bills where controversial or parochial matters have been inserted for apparently tactical purposes. *See SERB*, 104 Ohio St.3d 122 (invalidating a single-sentence collective-bargaining limitation included within a 226-page appropriations bill); *Simmons-Harris*, 86 Ohio St.3d 1 (striking down politically-charged school voucher program, “a significant, substantive program” tucked into a 1,000-page bill as “little more than a rider”); *In re Holzer Consol. Health Sys.*, No. 03AP-1020, 2004 WL 2341322 (10th Dist. Oct. 19, 2004) (finding no practical relationship between appropriations bill and provision allowing for Department of Health to review request to relocate nursing home beds in Jackson County). Conversely, provisions that have a clear impact on the budget—such as providing new

revenue—will survive judicial scrutiny. *See, e.g., State ex rel. Ohio Roundtable v. Taft*, No. 02AP-911, 2003 WL 21470307 (10th Dist. June 26, 2003) (upholding inclusion of Mega Millions lottery authorization in appropriation bill, since lottery proceeds would provide \$41 million for common schools).

In comparing the Transfer Act and related JobsOhio Act provisions in Am. Sub. H.B. 153 to the legislation discussed in the aforementioned cases, it is clear that the former falls well within the bounds of Article II, Section 15. Unlike the provisions at issue in *SERB* or *Simmons-Harris*, the Transfer Act and related JobsOhio Act provisions in Am. Sub. H.B. 153 do not constitute a disjointed rider hidden within the appropriations bill. Instead, much like the Mega Millions authorization in *Ohio Roundtable*, the Transfer Act is expressly expected to provide \$500,000,000 to the State's General Revenue Fund which is subject to appropriation by the General Assembly. *See* Am. Sub. H.B. No 153 (129th General Assembly), § 801.20. The Transfer Act and related JobsOhio Act provisions are thus inexorably related to the State's finances and properly included the Am. Sub. H.B. 153.

C. Relator Has No Adequate Remedy In The Ordinary Course Of Law.

A court cannot issue mandamus relief if “there is a plain and adequate remedy in the ordinary course of the law.” R.C. § 2317.05. Here, mandamus relief is appropriate because JobsOhio has no other means to compel Respondent to execute the Franchise and Transfer Agreement.

While the constitutional questions discussed above could potentially be addressed in an action for declaratory judgment, a declaratory judgment is not an adequate remedy. This Court has consistently held that “if declaratory judgment would not be a complete remedy unless coupled with extraordinary ancillary relief in the nature of a mandatory injunction, the availability of declaratory judgment does not preclude a writ of mandamus.” *State ex rel. Ohio*

Gen. Assembly v. Brunner, 114 Ohio St.3d 386, 392 (2007). In *Brunner*, for example, the Secretary of State refused to treat legislation passed by the General Assembly as a duly enacted law on the ground that the Governor still had the opportunity to veto the bill. The relator sought a writ of mandamus to establish the validity of the law and to compel the Secretary of State to enroll the law in accordance with her statutory duties. The Secretary argued that a declaratory judgment would be an adequate remedy to establish that the bill was a valid law. This Court disagreed, holding that a declaratory judgment alone would be insufficient to compel the Secretary to perform her duties:

In this case, a declaratory judgment would not be complete without a mandatory injunction ordering the secretary to treat Am.Sub.S.B. No. 117 as a duly enacted law. *See State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 1, 2006 Ohio 4334, 854 N.E.2d 1025, P39 (“Because a mandatory injunction is an extraordinary remedy, it does not constitute an adequate remedy in the ordinary course of law”). Therefore, relators do not have an adequate remedy in the ordinary course of law by way of a declaratory judgment.

Id.

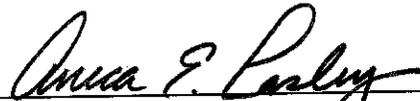
Brunner is directly analogous to this case. JobsOhio not only seeks to establish that the JobsOhio Act and the Transfer Act are constitutional; it also seeks to compel Respondent to execute the Franchise and Transfer Agreement. A declaratory judgment could address the constitutionality of the legislation, but a declaratory judgment standing alone would be incomplete without a mandatory injunction ordering Respondent to execute the Agreement. Because JobsOhio lacks an adequate remedy in the ordinary course of law, a writ of mandamus is the appropriate form of relief to compel Respondent to perform his statutory duties. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 163-64, 228 N.E.2d 631 (1967) (“Mandamus will lie to permit a private individual to compel a public officer to perform an official act where he is under a clear legal duty to do so, and where such relator has an interest . . . [he] is being

denied . . . by reason of the public officer's failure to take action to perform that which he is under a clear legal duty to perform.”).

IV. CONCLUSION

For all the foregoing reasons, Relator respectfully requests that the Court issue a writ of mandamus compelling Respondent to execute the Franchise and Transfer Agreement on behalf of the State of Ohio, as required by R.C. § 4313.02(C)(2).

Respectfully submitted,



Aneca E. Lasley (0072366), Counsel of Record
Gregory W. Stype (002035)
SQUIRE SANDERS (US) LLP
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215
Tel: (614) 365-2830
aneca.lasley@squiresanders.com
greg.stype@squiresanders.com

Douglas R. Cole (0070665)
ORGAN COLE + STOCK LLP
1335 Dublin Road, Suite 104D
Columbus, OH 43215
Tel: (614) 481-0902
drcole@ocslawfirm.com

Attorneys for Relator JobsOhio