

In the
Supreme Court of Ohio

14-0319

State ex rel. OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION, et al.,

Plaintiffs-Appellees,

v.

STATE OF OHIO, et al.,

Defendants-Appellants.

: Case No. 2014-_____
:
: On Appeal from the
: Franklin County
: Court of Appeals,
: Tenth Appellate District
:
: Court of Appeals
: Case No.12AP001064
:

MEMORANDUM IN SUPPORT OF JURISDICTION
OF STATE DEFENDANTS-APPELLANTS

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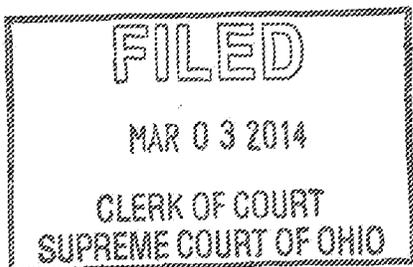
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INTRODUCTION

The Ohio Constitution requires the State to live within its means. Ohio Const. art. II, § 22; art. VIII, §§ 1-3; art. XII, § 4. Given the budget crisis leading up to its 2012-2013 budget (with expected expenditures far exceeding revenues), the General Assembly adopted many solutions to fix this deficit. One solution—which authorized the Department of Rehabilitation and Corrections (“the Department”) to obtain new revenue from an old program—is challenged here. That program, which has existed since 1995, allows the Department to contract with private entities to operate prison facilities. The biennial budget bill, Am. Sub. H.B. 153, expanded the program by authorizing the Department to sell five prisons so long as it followed the standards set by the bill. The budget apportioned some \$50 million to the general revenue fund from these sales, and the one sale that occurred ended up generating over \$72 million.

Despite these revenue-raising purposes, the Tenth District Court of Appeals held that Plaintiffs here stated claims that the prison-privatization provisions violated the Constitution’s one-subject rule and that the Department should be forced to undo the contracts that it had made and return the \$72 million. *State ex rel. Ohio Civ. Serv. Emps. Ass’n v. Ohio*, No. 12AP-1064, 2013-Ohio-4505 ¶¶ 8-24 (10th Dist.) (“App. Op.,” Ex. 4). Even worse, the Tenth District remanded for an “evidentiary hearing” about whether the over 3,000-page bill should be invalidated in its entirety for violating the one-subject rule, and further directed the trial court to conduct a line-by-line review of the bill to excise potentially offending sections. App. Op. ¶¶ 23-24. By doing so, the Tenth District resolved a substantial constitutional question in a manner that misapplied cases holding that revenue-raising provisions comfortably fit within appropriation bills under the one-subject rule. The Tenth District’s holding also casts a cloud over vital legislation, and leaves the General Assembly in the dark on what it may include in future bills making appropriations. The Court should take this important case to reverse.

STATEMENT OF THE CASE AND FACTS

A. As part of the 2012-2013 biennial budget bill, the General Assembly authorized the Department to raise revenue for the State by selling prisons.

In 1995, the General Assembly authorized the Department to contract with private entities for the operation and management of two of the State's prison facilities. R.C. 9.06(A)(1). To be valid, a contract had to meet the requirements set forth in the statute. *See* R.C. 9.06(B)-(I). As originally enacted, the State could pay private contractors to run the facilities so long as those contractors saved at least 5% in costs as compared to the Department's own management, thereby shrinking the Department's budgetary needs. *See* R.C. 9.06(A)(4).

In 2011, the General Assembly modified this existing prison-privatization program as part of the 2012-2013 biennial budget bill. *See* Am. Sub. H.B. 153. The General Assembly titled the bill "Appropriations – Fiscal Year 2012-2013 State Budget," with a subtitle that partially read: "to make operating appropriations for the biennium beginning July 1, 2011, and ending June 30, 2013; and to provide authorization and conditions for the operation of programs, including reforms for the efficient and effective operation of state and local government."

The bill gave the Department a two-year window to: (1) contract *only* for the private operation and management of five specific prison facilities, or (2) contract *both* for that private management *and* for the underlying sale of the facilities. *See* Am. Sub. H.B. 153 § 753.10(B)(1), (4). These prison-privatization provisions sought both to reduce the Department's operating costs (with the explicit requirement that private contractors save at least 5% in costs) and to provide additional revenue. If the Department sold any of the five prisons, the revenue would go into an "adult and juvenile correctional facilities bond retirement fund," and, from there, to one or more of the general revenue fund, the adult correctional building fund, or the juvenile correctional building fund. *See id.* § 753.10(C)(8), (D)(8), (E)(8), (F)(8), (G)(8); R.C. 5120.092.

The budget bill also set the guidelines for these revenue-generating, cost-cutting contracts. Among other things, a sold facility should be treated as being under the Department's control, R.C. 9.06(J)(1), and became subject to applicable taxes, R.C. 9.06(J)(3). The State retained the right to repurchase the facility if a contractor chose to sell it, became insolvent, or failed to meet its obligations. R.C. 9.06(J)(4)(a),(b); Am. Sub. H.B. 153, § 753.10(B)(2)(d). If a contract for operating the prison terminated, the operation responsibilities would transfer to another contractor or the Department. R.C. 9.06(J)(4)(c). Any contracts of sale also had to include provisions requiring a contractor to conduct preferential hiring of Department employees, *see* Am. Sub. H.B. 153, § 753.10(B)(2)(b), requiring the Department to transfer to the contractor certain supplies and equipment for running the prison, *id.* § 753.10(B)(2)(c), and requiring any deed of sale to contain various provisions, *see, e.g., id.* § 753.10(C)(2)-(7).

B. The Department relied on the budget bill to privatize two prison facilities.

The Department entered into two contracts under these provisions. It contracted with Corrections Corporation of America for the private operation of Lake Erie Correctional Facility in Conneaut, Ohio. (Compl. ¶ 1.) And it sold the facility to Corrections Corporation for over \$72 million. (*Id.*) The Department also privatized North Central Correctional Institution in Marion, Ohio. (*Id.* ¶ 2.) The Department contracted with Management and Training Corporation to privately operate this facility, but retained ownership of it. (*Id.*)

C. Plaintiffs sought a declaration that the prison-privatization provisions violated the Ohio Constitution's one-subject rule, but the trial court found no violation.

Most Plaintiffs in this case originally filed a suit before any prison privatizations had occurred, seeking a temporary restraining order to prohibit the Department from privatizing prisons under R.C. 9.06 and Am. Sub. H.B. 153 § 753.10. A trial court denied the motion,

finding that Plaintiffs' constitutional claim under the one-subject rule was not likely to succeed on the merits. Plaintiffs did not appeal and instead voluntarily dismissed their complaint.

A year after the budget bill went into effect, Plaintiffs Ohio Civil Service Employees Association (the union representing most of Ohio's public employees), several of its members impacted by the prison privatizations, and ProgressOhio.org sued numerous "State Defendants"—including the State, the Governor, the Attorney General, the Secretary of State, the Treasurer, the Auditor, the Department and its director, and the Department of Administrative Services and its director—as well as local officials and private contractors. (Compl. ¶¶ 6-45.) Plaintiffs alleged that the budget bill's prison-privatization provisions violated the Ohio Constitution's one-subject rule, right of referendum, and joint-venture rule. (*Id.* ¶¶ 122-50.) They sought a declaration that Am. Sub. H.B. 153 was unconstitutional *in its entirety* and that R.C. 9.06 and Am. Sub. H.B. 153 § 753.10 were unconstitutional *in particular*. (*Id.* ¶ 160.) They asked the court to rule that the prison-privatization contracts were "void," and to require the State Defendants to return the \$72 million. (*Id.* ¶¶ 159-64.)

Defendants filed motions to dismiss, which the trial court granted. *See State ex rel. Ohio Civ. Serv. Emps. Ass'n v. Ohio*, No. 12-CV-8716, at 25 (Ohio Ct. Com. Pl. Nov. 20, 2012) ("Com. Pl. Op.," Ex. 5). As relevant here, the trial court disagreed that the prison-privatization provisions violated the one-subject rule. *Id.* at 13-19. The court recognized its "limited" review of one-subject challenges, noting that it may invalidate a provision only if its disunity from the rest of a bill qualifies as "manifestly gross and fraudulent." *Id.* at 14-15, quoting *State v. Bloomer*, 122 Ohio St. 3d 200, 2009-Ohio-2462 ¶¶ 47-49. The court ultimately concluded that the most analogous cases were the Tenth District's decision in *State ex rel. Roundtable v. Taft*, No. 02AP911, 2003-Ohio-3340 (10th Dist.), and this Court's decision in *ComTech Systems, Inc.*

v. Limbach, 59 Ohio St. 3d 96 (1991). These cases, the court held, stood for the rule that “the introduction of a stream of revenue was sufficiently related to the core subject of revenues and expenditures to justify inclusion in an appropriations bill.” Com. Pl. Op. at 19, quoting *Roundtable*, 2003-Ohio-3340 ¶ 50. The court found this rule met here, because the “purpose of the privatization bill is to generate a stream of revenue to, in this instance, help balance the budget,” which was “certainly a connected subject to an appropriations bill.” *Id.*

D. The Tenth District reversed and remanded for an evidentiary hearing to determine whether the 2012-2013 biennial budget bill was invalid on a section-by-section basis.

On appeal, the Tenth District rejected all of Plaintiffs’ claims but the one alleging a violation of the one-subject rule. App. Op. ¶¶ 8-51. The court noted that, like most biennial budget bills, Am. Sub. H.B. No. 153 was “over three thousand pages long, containing amendments to over one thousand sections.” *Id.* ¶ 12. But, while Plaintiffs challenged the entire bill, their argument focused on R.C. 9.06 and Am. Sub. H.B. 153 § 753.10. *Id.* The court found that those provisions were unrelated to appropriations based on a right-of-referendum case. *Id.* ¶ 15, citing *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St. 3d 322, 2009-Ohio-4900. And it criticized the trial court’s reliance on *Ohio Roundtable* and *ComTech*. *Id.* ¶ 19. Those cases preceded *State ex rel. Ohio Civil Service Employees Association v. State Employment Relations Board*, 104 Ohio St. 3d 122, 2004-Ohio-6363, which had “expressly rejected the ‘notion that a provision that impacts the state budget, even if only slightly, may be lawfully included in an appropriations bill merely because other provisions in the bill also impact the budget.’” App. Op. ¶ 20, quoting *Ohio Civil Serv. Emps. Ass’n*, 2004-Ohio-6363 ¶ 33. The court held that while “the sale of state prisons no doubt impacts the state budget in some fashion, allowing them to lawfully be included in an appropriations bill would ‘render[] the one-subject rule meaningless in the context of appropriations bills because virtually any statute arguably

impacts the state budget, even if only tenuously.” App. Op. ¶ 20 (citation omitted). R.C. 9.06 and Am. Sub. H.B. 153 § 753.10 were also “significant and substantive” but were little more than “riders” as they made up only twenty pages. *Id.* ¶ 21. The court, in sum, saw “no rational reason” for combining the prison-privatization measures with the budget-related items. *Id.* ¶ 22.

Apart from Plaintiffs’ prison-privatization challenge, the court noted that their complaint cited a host of other allegedly disjointed provisions in Am. Sub. H.B. 153 in support of their claim that the *entire* bill was invalid. *Id.* ¶ 23. These broad allegations, the court found, “complied with the notice-pleading requirements in Civ.R. 8(A).” *Id.* The court thus held that the trial court must “hold[] an evidentiary hearing to determine whether the bill in question had only one subject.” *Id.* ¶ 24. It ordered a section-by-section analysis: “If, after holding an evidentiary hearing, the trial court finds any provisions constitute a manifestly gross or fraudulent violation of the one-subject rule, such that the provisions bear no common purpose or relationship with the budget-related items and give rise to an inference of logrolling, the court must sever the offending provisions.” *Id.* The court denied an application for reconsideration. *State ex rel. Ohio Civil Serv. Emps. Ass’n v. Ohio*, No. 12AP-1064 (10th Dist.) (Exs. 1-2).

**THIS CASE RAISES BOTH A SUBSTANTIAL CONSTITUTIONAL QUESTION
AND A QUESTION OF PUBLIC AND GREAT GENERAL INTEREST**

A. This Court has repeatedly accepted review over one-subject challenges precisely because those cases raise substantial constitutional questions.

The Court should hear this case because it involves the Ohio Constitution’s one-subject rule, and thus raises an important and recurring constitutional issue of statewide importance. Its importance is shown by the number of discretionary-review cases involving similar one-subject challenges that the Court has taken over the years. *State v. Bloomer*, 122 Ohio St. 3d 200, 2009-Ohio-2462; *State ex rel. Ohio Civ. Serv. Emps. Ass’n v. State Emp. Relations Bd.*, 104 Ohio St. 3d 122, 2004-Ohio-6363; *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1 (1999); *Hoover v. Franklin*

Cnty. Bd. of Commr's, 19 Ohio St. 3d 1 (1985). And its importance is shown by the many one-subject cases that the Court has taken from a certification by federal courts. *In re Nowak*, 104 Ohio St. 3d 466, 2004-Ohio-6777; *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546; *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948; *Holeton v. Crouse Cartage Co.*, 92 Ohio St. 3d 115 (2001); *Beagle v. Walden*, 78 Ohio St. 3d 59 (1997).

It is obvious why the Court has accepted so many challenges under the one-subject rule (and thus should review this case as well). A one-subject challenge, if successful, strikes down a provision duly enacted by the General Assembly. With such a consequential disruption of the political branches (and the policies that they deemed important enough to enact into law), there can be no room for error in the lower courts. Indeed, this cautious approach to striking down laws (which fully justifies review of the Tenth District's decision here) even bleeds over into the merits of that review. After all, as the Court has noted in other cases, "legislative enactments are entitled to a strong presumption of constitutionality," *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St. 3d 568, 2006-Ohio-5512 ¶ 20 (2006), and "every presumption in favor of the enactment's validity should be indulged." *Bloomer*, 2009-Ohio-2462 ¶ 48, quoting *Hoover*, 19 Ohio St. 3d at 6. This traditional deference to the General Assembly confirms that the Court should grant review so that it may consider whether the Tenth District exceeded its limited role of "determin[ing] whether [the bill] transcends the limits of legislative power." *Ohio Congress*, 2006-Ohio-5512 ¶ 20 (citation omitted).

B. The need for review is heightened where, as here, the challenged legal provisions are in a biennial budget bill and thus have public and great general interest.

The need for the Court's review is cemented by the type of bill at issue—a biennial budget bill. That this case concerns one of the most important types of legislation makes it one of public and great general interest. That is evident for numerous reasons.

First, a one-subject challenge to a budget bill increases the stakes exponentially. When the General Assembly passes a biennial budget, the bill affects the decisions of all state agencies and of the third parties contracting with state agencies over the next two years. State agencies must make decisions based on their expected appropriations, and they need assurance that the funds allocated will be in the State's coffers when the time comes to draw on them. Third parties that contract with the State likewise need assurance that they will get paid if they undertake their end of the bargain. In short, the uncertainty created by constitutional challenges to budget bills heightens this case's importance. *See LetOhioVote.org v. Brunner*, 123 Ohio St. 3d 322, 2009-Ohio-4900 ¶ 1 (recognizing that challenge to budget bill raised "important question"); *id.* ¶¶ 71-73 (Pfeifer, J., dissenting) (noting importance of "certainty in Ohio's budget"). Perhaps unsurprisingly, therefore, a healthy portion of the Court's one-subject docket has involved those types of bills. *See, e.g., Simmons-Harris*, 86 Ohio St. 3d 1; *Ohio Civ. Serv. Emps. Ass'n*, 2004-Ohio-6363; *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St. 3d 225 (1994).

Second, the specific procedural posture in which the Tenth District left this case makes the Court's review all the more important. To begin with, Plaintiffs seek to require the State Defendants to return the \$72 million received from the prison sale. (Compl. ¶ 160(H).) But when setting the available funds in the 2012-2013 budget, Am. Sub. H.B. 153 assumed that these sales would generate at least \$50 million for the general revenue fund. *See OBM, State of Ohio Executive Budget Fiscal Years 2012 and 2013*, at B-27 (Mar. 2011), available at <http://media.obm.ohio.gov/OBM/Budget/Documents/operating/fy-12-13/bluebook/Book1-Budget-FY2012-2013.pdf>. Thus, over a year and a half ago, the \$72 million was distributed to the general revenue fund and the adult correctional building fund. To require the State Defendants to come up with those funds now necessarily affects state programs and planning.

There is, after all, no free lunch. Likewise, Plaintiffs seek to undo the prison-privatization contracts that the Department entered. (*Id.* ¶ 160.) That, too, affects budget and planning. Am. Sub. H.B. 153’s appropriations, for example, were predicated on private management reducing some \$9.3 million from the Department’s budget for the bill’s fiscal years. *See* LSC, *Redbook* at 6 (Apr. 2011), *available at* <http://www.lsc.state.oh.us/fiscal/redbooks129/drc.pdf>.

In addition, the Tenth District allowed Plaintiffs to proceed with their efforts to strike down the entire 3,000-page budget bill “in its entirety.” (*Id.* ¶ 160(A)); *see* App. Op. ¶ 23. In particular, the court noted that the complaint satisfied relevant pleading standards when it alleged that the “entire bill was unconstitutional” and cited several allegedly dissimilar provisions. App. Op. ¶¶ 23-24. The Court should review this case before it allows such far-reaching proceedings to get underway. To even permit those proceedings exacerbates the problematic uncertainty.

Furthermore, by remanding this case for an “evidentiary hearing to determine whether the bill in question had only one subject,” *id.* ¶ 24, the Tenth District’s blanket order raises serious separation-of-powers concerns. It could be read to allow Plaintiffs to take discovery concerning the *intent* of legislators who passed the bill, thereby requiring excessive entanglement between the judicial and legislative branches. The Court has cautioned that if the courts were allowed “to look beyond the four corners of a bill and inquire into the doings of legislators,” the result would be “entanglement with the legislative process that far exceeds any legitimate judicial function.” *Nowak*, 2004-Ohio-6777 ¶ 72. Such a line of discovery would also be unworkable. If a court took evidence from a few legislators, it would not gain adequate insight into why a *majority* passed the bill. But taking evidence from every legislator, or even every legislator who voted in favor of a bill, would be impractical, and ultimately irrelevant to the question of whether the bill satisfies the deferential standard of review in a one-subject challenge.

Third, the Tenth District’s analysis creates substantial uncertainty going forward for future budgets. The law prior to the Tenth District’s decision was clear. As the trial court found, previous cases held that provisions connected to revenue generation “sufficiently related to the core subject of revenues and expenditures to justify inclusion in an appropriations bill.” Com. Pl. Op. at 19, quoting *State ex rel. Ohio Roundtable v. Taft*, No. 02AP911, 2003-Ohio-3340 ¶ 50 (10th Dist.); *ComTech Sys., Inc. v. Limbach*, 59 Ohio St. 3d 96, 99 (1991) (rejecting one-subject challenge to tax in appropriations bill because “the tax funds government operations described elsewhere in the Act”); *Riverside v. State*, 190 Ohio App. 3d 765, 2010-Ohio-5868 ¶ 44 (10th Dist.) (noting that “provisions in appropriations bills directly related to taxation and revenue generation have survived one-subject scrutiny”). So, for example, a budget bill could limit who could receive a commercial driver’s license, because, even though the regulation had no connection to revenue itself, it kept the State compliant with federal regulations necessary to receive federal funds. *See Solon v. Martin*, No. 89586, 2008-Ohio-808 ¶ 22 (8th Dist.) (“If the state had not complied with this federal provision, then it would have lost five per cent of the federal highway funds to which it would have otherwise been entitled.”).

The Tenth District lost its way by relying on precedent on the appropriation exception to the right of referendum. App. Op. ¶ 15, citing *LetOhioVote.org*, 2009-Ohio-4900 ¶¶ 28-29. That exception is narrow—limited to *pure* appropriations authorizing expenditures. The one-subject rule is not so limited and raises a different question. This Court has noted “that as long as a common purpose or relationship exists between topics, the mere fact that a bill embraces more than one topic will not be fatal.” *Bloomer*, 2009-Ohio-2462 ¶ 49. And a bill that addresses both the generation of funds for state agencies (i.e., the revenue side) and the appropriation of funds to

those agencies (i.e., the expenditure side) has such a common “relationship” (i.e., the budget). To hold otherwise would fundamentally alter how Ohio balances its budget every two years.

ARGUMENT

The Complaint made two one-subject claims, one narrow and one broad. Narrowly, it alleged that the prison-privatization provisions were unconstitutional and should be severed from Am. Sub. H.B. 153. (Compl. ¶¶ 132-33, 160(B).) Broadly, it asserted that the bill was “unconstitutional in its entirety” because of many allegedly divergent provisions. (*Id.* ¶¶ 130-31, 160(A).) Both arguments fail to state a claim.

State Appellants’ Proposition of Law I:

Provisions in a biennial budget bill that authorize state agencies to raise specific types of revenue do not violate the Ohio Constitution’s one-subject rule merely because they set the terms by which the state agencies may do so.

The Constitution provides: “No bill shall contain more than one subject, which shall be clearly expressed in its title.” Ohio Const. art. II, § 15(D). “The primary and universally recognized purpose of such provisions is to prevent logrolling”—where one legislator (Legislator A) agrees to vote for legislation of another (Legislator B) not because of the legislation’s merits, but in exchange for Legislator B voting for Legislator A’s different law. *State ex rel. Dix v. Celeste*, 11 Ohio St. 3d 141, 142 (1984). The rule also prevents “riders” attached to a large bill that will assuredly pass with or without those riders. *Simmons-Harris*, 86 Ohio St. 3d at 16.

That said, this Court’s “role in the enforcement” of this one-subject rule is “limited.” *Bloomer*, 2009-Ohio-2462 ¶ 48 (internal quotation marks omitted). “It must be strongly emphasized that the constitutional mandate that every bill shall have but one subject was imposed to facilitate orderly legislative procedure, not to hamper or impede it.” *Dix*, 11 Ohio St. 3d at 143. “To avoid interfering with the legislative process,” therefore, the Court “afford[s] the General Assembly great latitude in enacting comprehensive legislation by not construing the

one-subject provision so as to unnecessarily restrict the scope and operation of laws, or to multiply their number excessively, or to prevent legislation from embracing in one act all matters properly connected with one general subject.” *Bloomer*, 2009-Ohio-2462 ¶ 48 (internal quotation marks omitted). This makes good sense. All laws are made up of compromises among competing values (consider, for example, a law that creates a new cause of action but passes *only* because it contains a short statute of limitations). *Cf. Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (“Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice.”). And the dividing line between “good” compromises (those concerning a single subject) and “bad” compromises (those concerning different subjects) is not easy to see. It is one of degree rather than of kind.

Thus, to decide whether a provision violates the one-subject rule, the Court applies a test that is just as deferential—if not more so—as the Equal Protection Clause’s rational-basis test. The Court will strike down a provision only if it has such a “disunity of subject matter” with a bill “that there is ‘no discernible practical, rational or legitimate reason’” for including it in the bill. *Ohio Civ. Serv. Emps. Ass’n*, 2004-Ohio-6363 ¶ 28 (citation omitted). In other words, the provision’s disunity must be “manifestly gross and fraudulent.” *Beagle*, 78 Ohio St. 3d at 62.

Applying these deferential rules here, the prison-privatization provisions are rationally related to the biennial budget bill. Those provisions implement the bill’s purpose to make “reforms for the efficient and effective operation of state and local government.” Am. Sub. H.B. 153. They authorize prison sales to generate revenue that will be placed in, among others, the general revenue fund. Such revenue-generation purposes are a “practical, rational, [and] legitimate” reason for including the provisions in a budget bill. *Beagle*, 78 Ohio St. 3d at 62.

It is notable that this Court has already held that the General Assembly may include a tax in an appropriation bill. *See ComTech*, 59 Ohio St. 3d at 99. It would be incongruous to interpret the one-subject rule as treating tax increases as “good” compromises in budget bills, but alternative revenue-raising methods as “bad” compromises. Such policy decisions over the best way to pay for government are for the political branches, not the judicial branch. This concern with intruding on the political branches’ policy decisions is precisely why courts exercise care when reviewing one-subject challenges. *Dix*, 11 Ohio St. 3d at 143. That deference is due here.

Further, this Court correctly held that a revenue-generating provision like a tax has a common relationship with an appropriation. *See ComTech*, 59 Ohio St. 3d at 99. If the one-subject rule prohibited the General Assembly from including expenditures and revenue generators in the same bill, it would hamstring the General Assembly’s effort to balance the budget. It would, for example, be problematic to require the General Assembly to anticipate new revenue in the budget bill, but reserve implementing legislation for a different bill. If the implementing legislation failed, the General Assembly would have passed an unbalanced budget. Instead, the best path is the one the General Assembly chose here—to balance the budget by including appropriations and the revenue-based provisions to pay for them in the same bill.

The Tenth District mistakenly reached a contrary holding. It held that the prison-privatization provisions do “not concern the acquisition of a revenue stream, but, instead, the contractual requirements for prison privatization.” App. Op. ¶ 20. Not so. The provisions are related to the budget because they make revenue available (over \$72 million, as it turns out). These provisions thus present a materially different scenario than the one addressed in *Ohio Civil Service Employees Association*. There, the challenged part of the budget bill prevented employees from collective bargaining. The government failed to show that this law had any

relationship to the budget. 2004-Ohio-6363 ¶ 33. The prison provisions are different. They directly address revenue raising, and provide the necessary terms for doing so. That is more than a “slight” connection to appropriations; it provides the *very* funds for the appropriations.

State Appellants’ Proposition of Law II:

As long as a biennial budget bill, on its face, has a common purpose, courts should not permit evidentiary hearings to attack that bill in its entirety through an intrusive provision-by-provision analysis under the one-subject rule.

A bill should not be invalidated *in its entirety* under the one-subject rule so long as it has a “primary” subject. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 500 (1999), citing *State v. Hinkle v. Franklin Cnty. Bd. of Elecs.*, 62 Ohio St. 3d 145, 149 (1991). That rule will almost always be met for biennial budget bills—which will always have a “core subject of revenues and expenditures.” Com. Pl. Op. at 19, quoting *Roundtable*, 2003-Ohio-3340 ¶ 50. Thus, in *Simmons-Harris*, this Court invalidated a school-voucher program in a general budget bill rather than striking the bill in its entirety. *See* 86 Ohio St. 3d at 17. And in *Ohio Civil Service Employees Association*, this Court invalidated the collective-bargaining provision in a budget bill rather than invalidate the entire act. *See* 2004-Ohio-6363 ¶ 36.

Applying this law here, Plaintiffs’ full-scale attack on Am. Sub. H.B. 153 should have been decisively rejected. Like these other laws, Am. Sub. H.B. 153 has a “core subject of revenues and expenditures.” Com. Pl. Op. at 19, quoting *Roundtable*, 2003-Ohio-3340 ¶ 50. Whether or not the bill contains other provisions that, according to Plaintiffs, do not relate to this core subject provides no basis for invalidating the entire act. (Compl. ¶ 130.)

The Tenth District disagreed, holding that this facial attack stated a claim and ordering the trial court to conduct an evidentiary hearing considering a section-by-section analysis of the over 3,000-page bill “to determine whether [it] . . . had only one subject.” App. Op. ¶¶ 23-24. The court was mistaken. To begin with, such an evidentiary hearing could violate separation-of-

powers principles. An inquiry into legislative intent, for example, would “require[] [the Court to] perform the inherently legislative function of gauging the extent to which particular proposals are likely to generate political controversy or invoke political opposition.” *Nowak*, 2004-Ohio-6777 ¶ 72. Such an inquiry also would be impractical. Compelling testimony from legislators could violate the Speech and Debate Clause, *see Kniskern v. Amstutz*, 144 Ohio App. 3d 495, 496 (8th Dist. 2001), and, regardless, would interfere with their legislative duties.

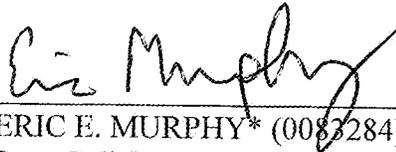
The Tenth District also suggested that the trial court’s section-by-section analysis gave it the authority to strike out *any and every* specific provision in the over 3,000-page bill that it found did not relate to the Am. Sub. H.B. 153’s core subject—even if these provisions had absolutely nothing to do with the Plaintiff prison employees or their alleged injuries. App. Op. ¶ 24. Such a review would be unprecedented. In essence, the Tenth District asked the trial court to issue an advisory opinion concerning the constitutionality of unrelated provisions—something this court has “consistently held” should not be done. *State ex rel. Barletta v. Fersch*, 99 Ohio St. 3d 295, 2003-Ohio-3629 ¶ 22. Indeed, Plaintiffs’ complaint rightfully did not ask for the Tenth District’s judicial line-item vetoes. Instead, it asked for severing the *particular* prison-privatization provisions allegedly causing them injury or for striking down the *entire* act, not for severing *irrelevant* provisions that they identified only in support of their broad claim. (Compl. ¶¶ 130-33, 160.) In short, a broad challenge to an entire budget bill fails if it has a common budgetary purpose, and trial courts have no authority to strike out provisions completely unrelated to the case in question. Those courts should leave specific challenges to specific provisions for justiciable controversies over those specific provisions.

CONCLUSION

For the foregoing reasons, the Court should take this case to reverse the decision below.

Respectfully submitted,

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Department of Rehabilitation and Correction and

Director Gary C. Mohr, Ohio Department of

Administrative Services and Director Robert Blair,

Treasurer Josh Mandel, and the Office of Budget

and Management and Director Timothy S. Keen

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of State Defendants-Appellants was served by U.S. mail this 3rd day of March, 2014, upon the following counsel:

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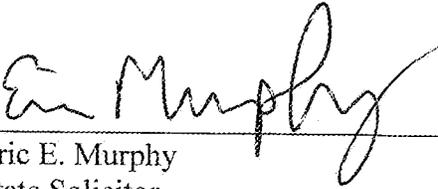
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APPENDIX

EXHIBIT 1

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Ohio Civil Service :
Employees Association et al., :

Plaintiffs-Relators :
-Appellants, :

v. :

State of Ohio c/o Mike DeWine et al., :

Defendants-Respondents :
-Appellees. :

No. 12AP-1064
(C.P.C. No. 12CV-8716)

(REGULAR CALENDAR)

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on January 16, 2014, it is the order of this court that the application for reconsideration is denied.

McCORMAC, J., SADLER, P.J., and CONNOR, J.

By: John W. McCormac
Judge John W. McCormac, retired, of the
Tenth Appellate District, assigned to active
duty under authority of the Ohio Constitution,
Article IV, Section 6(C).

EXHIBIT 2

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Ohio Civil Service	:	
Employees Association et al.,	:	
	:	
Plaintiffs-Relators	:	
-Appellants,	:	No. 12AP-1064
	:	(C.P.C. No. 12CV-8716)
v.	:	
	:	(REGULAR CALENDAR)
State of Ohio c/o Mike DeWine et al.,	:	
	:	
Defendants-Respondents	:	
-Appellees.	:	
	:	

MEMORANDUM DECISION

Rendered on January 16, 2014

James E. Melle, for appellants.

Michael DeWine, Attorney General, *Richard N. Coglianese* and *Erin Butcher-Lyden*, for appellees Governor John R. Kasich, the State of Ohio, Attorney General Mike DeWine, Secretary of State Jon Husted, Auditor David Yost, The Ohio Department of Rehabilitation and Correction and Director Gary Mohr, Treasurer of State Josh Mandel, Office of Budget and Management and Director Timothy S. Keen; *Michael DeWine*, Attorney General, and *William J. Cole*, for appellees Ohio Department of Administrative Services and Director Robert Blair.

Taft Stettinius & Hollister LLP, *Charles R. Saxbe*, *James D. Abrams* and *Celia M. Kilgard*, for appellees Corrections Corporation of America and CCA Western Properties, Inc.

Buckley King LPA, *Robert J. Walter*, *Thomas I. Blackburn* and *Diem N. Kaelber*, for Amicus Curiae Ohio Association of Public School Employees (OAPSE)/AFSCME Local 4, AFL-CIO, Fraternal Order of Police of Ohio, Incorporated, and American Federation of State, County, Municipal Employees Ohio Counsel 8.

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No. 12AP-1064

2

*Adam W. Martin, Sutter O'Connell, and Kevin W. Kita, for
appellee Management & Training Corporation.*

ON APPLICATION FOR RECONSIDERATION

MCCORMAC, J.

{¶ 1} Plaintiffs-appellants, Ohio Civil Service Employees Association et al., filed an application for reconsideration, pursuant to App.R. 26(A), of our October 10, 2013 decision in *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 10th Dist. No. 12AP-1064, 2013-Ohio-4505. In that decision, we affirmed in part and reversed in part the judgment of the Franklin County Court of Common Pleas granting the motion to dismiss of defendants-appellees, State of Ohio c/o Mike DeWine et al.

{¶ 2} The test generally applied to an application for reconsideration is whether the application calls to the court's attention "an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140 (10th Dist.1981), paragraph two of the syllabus. "An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens*, 112 Ohio App.3d 334, 336 (11th Dist.1996).

{¶ 3} In their application for reconsideration, plaintiffs argue this court did not fully consider whether plaintiffs' complaint stated a claim upon which relief could be granted that the challenged provisions of 2011 Am.Sub.H.B. No. 153 violate Ohio Constitution, Article VIII, Section 4. Plaintiffs additionally assert this court failed to consider whether the alternative claim in plaintiffs' complaint stated a claim upon which relief could be granted that the employees of the North Central Correctional Complex are public employees as defined in R.C. 4117.01(C).

{¶ 4} Contrary to plaintiffs' contentions, we do not find we inappropriately analyzed or failed to properly consider plaintiffs' claims. The October 10, 2013 decision reflects a discussion of both the Ohio Constitution, Article VIII, Section 4 claim, and the alternative claim. *Ohio Civ. Serv. Emps. Assn.* at ¶ 33-39, 41, 49. Although plaintiffs apparently disagree with the analysis used and conclusions reached by this court, such

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disagreement is an insufficient basis for granting an application for reconsideration. *Owens* at 336.

{¶ 5} Plaintiffs' application for reconsideration fails to demonstrate an obvious error in our prior decision or to raise an issue that we failed to consider or to fully consider in reaching our prior decision. Accordingly, we deny plaintiffs' application for reconsideration.

Application for reconsideration denied.

SADLER, P.J., and CONNOR, J., concur.

McCORMAC, J., retired, of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).

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THE STATE OF OHIO Franklin County, ss	} I, MARVELLEN O'SHAUGHNESSY, Clerk OF THE COURT OF APPEALS WITHIN AND FOR SAID COUNTY,
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL	
NOW ON FILE IN MY OFFICE. WITNESS MY HAND AND SEAL OF SAID COUNTY THIS <u>16th</u> DAY OF <u>Jan</u> , A.D. 20 <u>14</u>	
MARVELLEN O'SHAUGHNESSY, Clerk	
By <u>D. Meyer</u>	Deputy

EXHIBIT 3

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Ohio Civil Service :
Employees Association et al., :

Plaintiffs-Relators :
-Appellants, :

No. 12AP-1064
(C.P.C. No. 12CV-8716)

v. :

(REGULAR CALENDAR)

State of Ohio c/o Mike DeWine et al., :

Defendants-Respondents :
-Appellees. :

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on October 10, 2013, plaintiffs' first assignment of error is sustained in part and overruled in part and the second assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part and this cause is remanded to that court in accordance with law and consistent with this decision. Plaintiffs' motion to strike is rendered moot. Costs assessed equally.

McCORMAC, SADLER & CONNOR, JJ.

By John W. McCormac
Judge John W. McCormac

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).

EXHIBIT 4

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Ohio Civil Service :
Employees Association et al., :
 :
 Plaintiffs-Relators :
 -Appellants, : No. 12AP-1064
 : (C.P.C. No. 12CV-8716)
 v. :
 : (REGULAR CALENDAR)
 State of Ohio c/o Mike DeWine et al., :
 :
 Defendants-Respondents :
 -Appellees. :
 :

D E C I S I O N

Rendered on October 10, 2013

James E. Melle, for appellants.

Michael DeWine, Attorney General, *Richard N. Coglianesse* and *Erin Butcher-Lyden*, for appellees the State of Ohio, Attorney General *Mike DeWine*, Secretary of State *Jon Husted*, Auditor *David Yost*, The Ohio Department of Rehabilitation and Correction and Director *Gary Mohr*; *Michael DeWine*, Attorney General, and *Pearl M. Chin*, for appellee Governor *John Kasich*; *Michael DeWine*, Attorney General, and *William J. Cole*, for appellees Ohio Department of Administrative Services and Director *Robert Blair*.

Taft Stettinius & Hollister LLP, *Charles R. Saxbe*, *James D. Abrams* and *Celia M. Kilgard*, for appellees *Corrections Corporation of America* and *CCA Western Properties, Inc.*

Buckley King LPA, *Robert J. Walter*, *Thomas I. Blackburn* and *Diem N. Kaelber*, for Amicus Curiae *Ohio Association of Public School Employees (OAPSE)/AFSCME Local 4*, *AFL-CIO*, *Fraternal Order of Police of Ohio, Incorporated*, and *American Federation of State, County, Municipal Employees Ohio Counsel 8*.

APPEAL from the Franklin County Court of Common Pleas

EXHIBIT 4

MCCORMAC, J.

{¶ 1} Plaintiffs-appellants, Ohio Civil Service Employees Association et al., appeal from a judgment of the Franklin County Court of Common Pleas granting the motion to dismiss of defendants-appellees, State of Ohio c/o Mike DeWine et al. Because the trial court erred in granting the motion to dismiss, we reverse.

I. Procedural History

{¶ 2} Plaintiffs filed a complaint on July 9, 2012, alleging 2011 Am.Sub.H.B. No. 153 ("H.B. No. 153") as it related to section 753.10, section 812.20, and R.C. 9.06 violated three provisions of the Ohio Constitution: (1) the one-subject rule contained in Article II, Section 15(D); (2) the joint venture rule in Article VIII, Section 4 both on its face and as applied; and (3) the right to referendum in Article II, Section 1(C) because it stated R.C. 9.06 and section 753.10 as enacted were effective immediately and not subject to referendum. Plaintiffs additionally alleged H.B. No. 153 in its entirety was unconstitutional because it violated the one-subject rule. Finally, the individual plaintiffs sought declarations that they were "public employees" as defined in R.C. 4117.01(C).

{¶ 3} Plaintiffs filed an amended complaint on September 6, 2012, adding additional defendants and arguing that 2012 Am.Sub.S.B. No. 312 also unconstitutionally violated the one-subject rule. Plaintiffs sought relief in the form of a declaratory judgment, a preliminary and permanent injunction, and a writ of mandamus.

{¶ 4} Defendants filed a motion to dismiss, on September 7, 2012, arguing: (1) the trial court lacked jurisdiction under Civ.R. 12(B)(1); (2) plaintiffs lacked standing to bring the complaint; and (3) the complaint failed to state a claim upon which relief could be granted under Civ.R. 12(B)(6). After the parties fully briefed the issues, the trial court, on November 20, 2012, granted defendants' motion to dismiss, finding: (1) the court had jurisdiction over constitutional challenges to H.B. No. 153 but lacked jurisdiction over individual employee rights, including whether named individual plaintiffs were public employees under R.C. 4117.01(C); (2) plaintiffs had standing to pursue their constitutional claims; and (3) plaintiffs failed to state a claim that H.B. No. 153 violated the Ohio Constitution.

II. Assignments of Error

{¶ 5} Plaintiffs appeal, assigning two errors:

1. The trial court erred in dismissing Plaintiffs' First Amended Complaint because it stated a claim that:

A. R.C. 9.06 As Amended And R.C. 753.10 [sic] As Enacted In Am. Sub. H. B. No. 153 By The 129th General Assembly Violated Section 15(D), Article II Of The Ohio Constitution And Could Be Severed.

B. H. B. No. 153 Violated Section 15(D), Article II Of The Ohio Constitution Because Of The Many Unrelated Non-Economic Provisions And If Not Found Unconstitutional They Must Be Severed.

C. Section 4, Article VIII Of The Ohio Constitution Was Violated.

D. Section 812.20 Enacted in H. B. 153 Unlawfully Declared R.C. 9.06 And R.C. 753.10 [sic] Exempt From Referendum And Made Them Immediately Effective Thereby Precluding Any Referendum Effort In Violation Of Section 1c, Article II Of The Ohio Constitution.

E. Despite Inaction By The Plaintiffs A Violation Of The Right Of Referendum Could Be Remedied By Severance Of The Offending Provisions.

2. The trial court erred in dismissing Plaintiffs' First Amended Complaint because:

A. Record Evidence Is Required To Decide Whether Challenged Legislation And The Actions Taken Thereunder Are Unconstitutional As Applied And The Court May Not Consider Such Evidence On A Motion To Dismiss.

B. The Court Failed To Rule Whether Section 4, Article VIII Of The Ohio Constitution Was Unconstitutional As Applied And Whether Plaintiffs Alternative Claim That They Were Public Employees As Defined In R.C. 4117.01(C) Stated A Claim Upon Which Relief Could Be Granted.

For ease of discussion, we consolidate and consider plaintiffs' assignments of error out of order.

III. Constitutional Challenges

{¶ 6} Appellate review of the dismissal of a complaint under Civ.R. 12(B)(6) is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5.

{¶ 7} "A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint." *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, ¶ 11. To dismiss a complaint under Civ.R. 12(B)(6) for failing to state a claim upon which relief can be granted, it must be beyond doubt from the complaint that the plaintiffs can prove no set of facts entitling them to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus, following *Conley v. Gibson*, 355 U.S. 41 (1957). The allegations of the complaint must be construed as true; the allegations and any reasonable inferences drawn from them must be construed in the nonmoving party's favor. *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, ¶ 12, citing *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, ¶ 14.

A. *One-Subject Rule*

{¶ 8} Ohio Constitution, Article II, Section 15(D) provides: "No bill shall contain more than one subject, which shall be clearly expressed in its title." The one-subject rule exists to prevent the legislature from engaging in logrolling, which "occurs when legislators combine disharmonious proposals in a single bill to consolidate votes and pass provisions that may not have been acceptable to a majority on their own merits." *Riverside v. State*, 190 Ohio App.3d 765, 2010-Ohio-5868, ¶ 36 (10th Dist.), citing *State ex rel. Dix v. Celeste*, 11 Ohio St.3d 141, 142-43 (1984). "The one-subject provision attacks logrolling by disallowing unnatural combinations of provisions in acts, *i.e.*, those dealing with more than one subject, on the theory that the best explanation for the unnatural combination is a tactical one—logrolling." *Dix* at 143.

{¶ 9} The one-subject rule also operates to prevent the attachment of riders to bills that are " 'so certain of adoption that the rider will secure adoption not on its own merits, but on the measure to which it is attached.' " *Dix* at 143, quoting Ruud, *No Law Shall Embrace More Than One Subject*, 42 Minn.L.Rev. 389, 391 (1958). "The danger of riders is particularly evident when a bill as important and likely of passage as an appropriations bill is at issue." *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 16 (1999), citing Ruud at 413.

{¶ 10} "The one-subject rule is mandatory." *Riverside* at ¶ 37. See *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, ¶ 54 ("Since the one-subject provision is capable of invalidating an enactment, it cannot be considered merely directory in nature.").

However, enforcement of the one-subject provision remains limited by affording the General Assembly "great latitude in enacting comprehensive legislation" and beginning with the presumption that statutes are constitutional. *Dix* at 145. See *Hoover v. Franklin Cty. Bd. of Commrs.*, 19 Ohio St.3d 1, 6 (1985); *State ex rel. Ohio Civ. Serv. Emps. Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, ¶ 27.

{¶ 11} The constitutionality of an enactment depends "primarily, if not exclusively, on a case-by-case, semantic and contextual analysis." *Dix* at 145. Disunity of subject matter, not the mere aggregation of topics, causes a bill to violate the one-subject rule. *Nowak* at ¶ 59. Where the topics of a bill share a common purpose or relationship, the fact that the bill includes more than one topic is not fatal. *Ohio Civ. Serv. Emps. Assn.* at ¶ 28, citing *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 496 (1999), and *Hoover* at 6. "A manifestly gross and fraudulent violation" of the one-subject rule will cause an enactment to be invalidated. *Nowak* at paragraph one of the syllabus, modifying *Dix* at syllabus.

{¶ 12} H.B. No. 153 provides that its purpose is "to make operating appropriations for the biennium beginning July 1, 2011, and ending June 30, 2013; and to provide authorization and conditions for the operation of programs, including reforms for the efficient and effective operation of state and local government." (Text of Bill, at 11-12.) H.B. No. 153 is over three thousand pages long, containing amendments to over one thousand sections, enacting over two hundred sections, and repealing over one hundred sections. H.B. No. 153 encompasses a variety of topics, some of which potentially having little or no connection with appropriations.

{¶ 13} Whereas plaintiffs challenge the constitutionality of the entire bill, they specifically allege R.C. 9.06 as amended by H.B. No. 153 and section 753.10 as enacted by H.B. No. 153 violate the one-subject rule. The amendments to R.C. 9.06 in H.B. No. 153 contain various provisions effective upon the execution of a contract for the operation and management of a prison, including, but not limited to: subjecting the prison to real property tax, subjecting the gross receipts and income of the prison operator to gross receipt and income taxes of the state and its subdivisions, providing conditions before the contractor may resell or transfer the prison or terminate the contract, and providing that any action asserting R.C. 9.06 or section 753.10 of H.B. No. 153 violates the Ohio

Constitution must be brought in the Franklin County Court of Common Pleas. Section 753.10 similarly contains provisions effective upon the execution of a prison contract including: requiring the contractor to provide preferential hiring to employees of the Ohio Department of Rehabilitation and Correction, granting an irrevocable right to the state to re-purchase the prison upon specified triggering events, requiring the real estate to be sold as an entire tract and not in parcels, and requiring the proceeds of the sale of a prison be deposited in the state treasury to the credit of the Adult and Juvenile Correctional Facilities Bond Retirement Fund.

{¶ 14} Plaintiffs contend an appropriations bill containing statutory changes unrelated to appropriations violates the one-subject rule. Defendants respond that the single subject of appropriations unifies the topics in H.B. No. 153 and argue that although the Supreme Court of Ohio has provided a limited definition of appropriations for the purposes of the right of referendum, it does not violate the one-subject rule for an appropriations bill to include statutory changes not directly appropriating money. The trial court found the prison privatization provisions were not themselves appropriations, but concluded there was no disunity of subject since prison privatization was a "connected subject to an appropriations bill." (Decision, at 19.)

{¶ 15} An appropriation is "an authorization granted by the general assembly to make expenditures and to incur obligations for specific purposes." R.C. 131.01(F). "[T]he ordinary and common meaning of the phrase 'appropriation bill' is a 'measure before a legislative body which authorizes "the expenditure of public moneys and stipulating the amount, manner, and purpose of the various items of expenditure." ' " *State ex rel. LetOhioVote.Org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, ¶ 28, quoting *State ex rel. Akron Edn. Assn. v. Essex*, 47 Ohio St.2d 47, 49 (1976), quoting Webster's New International Dictionary (2d Ed.). Appropriations bills are "different from other Acts of the General Assembly" because they "of necessity, encompass many items, all bound by the thread of appropriations." *Simmons-Harris* at 16. The challenged prison privatization provisions of H.B. No. 153 "are not themselves appropriations for state expenses because they do not set aside a sum of money for a public purpose" and neither R.C. 9.06 nor section 753.10 as amended by H.B. No. 153 "makes expenditures or incurs obligations." *LetOhioVote.Org* at ¶ 29.

{¶ 16} In *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St.3d 225 (1994), the court addressed whether a bill violated the one-subject rule by making structural changes to the Industrial Commission of Ohio and Ohio Bureau of Workers' Compensation, appropriating funds for those administrative bodies, altering workers' compensation claims procedures, creating an employment intentional tort, and creating a child labor exception for the entertainment industry. *Id.* at 225-26. The court rejected the claim that the appropriation provision of the bill violated the one-subject rule, finding the inclusion of the appropriation was " 'simply the means by which the act is carried out, and the inclusion of such an appropriation does not destroy the singleness of the subject.' " *Id.* at 229, quoting *Dix* at 146. Nevertheless, the court severed the intentional tort and child labor provisions from the bill, finding a violation of the one-subject rule because the provisions "cannot be related to the common purpose of the bill." *Id.* at 230.

{¶ 17} In *Simmons-Harris*, the court examined provisions establishing the Pilot Project Scholarship Program, commonly known as the "School Voucher Program," included within a biennial appropriations bill. *Id.* at 1, 4. Because the school voucher program was a "significant, substantive program" comprising "only ten pages" of an appropriations bill totaling "over one thousand pages," the court found the program was "in essence little more than a rider attached to an appropriations bill." *Id.* at 16. Although the bill appropriated funds for the school voucher program, the court found the "creation of a substantive program in a general appropriations bill violates the one-subject rule." *Id.* at 17.

{¶ 18} In *Ohio Civ. Serv. Employees Assn.*, the court concluded the inclusion of a provision excluding certain employees from the collective bargaining process in a bill that was "loosely described as an appropriations bill" violated the one-subject rule. *Id.* at ¶ 32. The court rejected the contention that the single subject of appropriations bound the budget-related items and the exclusion of employees from the collective bargaining process, finding such a proposition "stretch[ed] the one-subject concept to the point of breaking." *Id.* at ¶ 33. Because the record did not contain an explanation for how the exclusion of Ohio School Facilities Commission employees from the collective bargaining process would "clarify or alter the appropriation of state funds," the court determined the challenged provision lacked a "common purpose or relationship" with the budget-related items in the appropriations bill. *Id.* at ¶ 34.

{¶ 19} Here, although the trial court noted "some parallels" between *Simmons-Harris* and the instant matter, it declined to find *Simmons-Harris* controlling with regard to the prison privatization aspects of H.B. No. 153. (R. 182-83; Decision, at 17.) Instead, the court applied *State ex rel. Ohio Roundtable v. Taft*, 10th Dist. No. 02AP-911, 2003-Ohio-3340, concluding that H.B. No. 153 did not violate the one-subject rule. In *Ohio Roundtable*, we found the inclusion in a "budget correction" bill of a provision authorizing the governor to enter into an agreement to operate statewide joint lottery games did not violate the one-subject rule. *Id.* at ¶ 17-18. In conducting a contextual analysis of the bill's history, we discussed the bill's "long and frequently amended history," noting that "[t]he state's financial situation worsened during the pendency of the bill, and it quickly became a vehicle for various other revenue and expenditure adjustments." *Id.* at ¶ 48. Because the lottery provisions were expected to generate a stream of revenue allocated to the funding of Ohio schools, the bill was "sufficiently related to the core subject of revenues and expenditures to justify inclusion in an appropriations bill" and therefore did not violate the one-subject rule. *Id.* at 50-51, citing *ComTech Sys., Inc. v. Limbach*, 59 Ohio St.3d 96 (1991).

{¶ 20} Following *Ohio Roundtable*, the Supreme Court of Ohio expressly rejected the "notion that a provision that impacts the state budget, even if only slightly, may be lawfully included in an appropriations bill merely because other provisions in the bill also impact the budget." *Ohio Civ. Serv. Emps. Assn.* at ¶ 33. Here, the subject of the various provisions in section 753.10 does not concern the acquisition of a revenue stream, but, instead, the contractual requirements for prison privatization. Because the record lacks guidance regarding the way in which the challenged provisions "will clarify or alter the appropriation of state funds," there appears to be no common purpose or relationship between the budget-related items in H.B. No. 153 and the prison privatization provisions. *Ohio Civ. Serv. Emps. Assn.* at ¶ 34. Although the sale of state prisons no doubt impacts the state budget in some fashion, allowing them to lawfully be included in an appropriations bill would "render[] the one-subject rule meaningless in the context of appropriations bills because virtually any statute arguably impacts the state budget, even if only tenuously." *Id.* at ¶ 33. *See also State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 499 (1999) (explaining that "[t]here comes a point past

which a denominated subject becomes so strained in its effort to cohere diverse matter as to lose its legitimacy as such").

{¶ 21} Recognizing that appropriations bills as a matter of course tie disparate topics together, the bill's provisions must nevertheless meet the test of an appropriation. A bill may " 'establish an agency, set out the regulatory program, and make an appropriation for the agency without violating the one-subject rule,' " but a general appropriations bill cannot constitutionally establish a substantive program related to the subject of appropriations only insofar as it impacts the budget. *Ohio AFL-CIO* at 229, quoting *Rudd* at 441; see *Ohio Civ. Serv. Emps. Assn.* at ¶ 33; *Simmons-Harris* at 17;. The prison privatization provisions contained in R.C. 9.06 and section 753.10 are significant and substantive. However, given that such provisions amount to approximately twenty of over three thousand pages in H.B. No. 153, they are "in essence little more than a rider attached to an appropriations bill." *Simmons-Harris* at 16.

{¶ 22} Other factors to consider in determining whether disunity exists between provisions of a bill include whether the challenged provisions are "inherently controversial" or "of significant constitutional importance." *Simmons-Harris* at 16. Arguably, the provisions in H.B. No. 153 authorizing the sale of several state prisons are similarly expansive in scope to the school voucher program rendered unconstitutional in *Simmons-Harris* and more expansive than the collective bargaining amendment in *Ohio Civ. Serv. Emps. Assn.* See *Ohio Civ. Serv. Emps. Assn.* at ¶ 35. Indeed, the importance of the prison privatization provisions "to those affected by it, however few, cannot be doubted." *Id.* Finally, no rational reason for the combination of the prison privatization provisions and the budget-related appropriations exists in the record, suggesting that the combination was for tactical reasons. See *Simmons-Harris* at 16-17, citing *Dix* at 145.

{¶ 23} Beyond the two sections relating to the privatization of prisons, plaintiffs assert other provisions in H.B. No. 153 violate the one-subject rule. The trial court, while noting that "a number of provisions of H.B. 153, as cited by Plaintiffs, 'appear' to clearly be at odds with the Single Subject Rule," declined to address those provisions, stating "[w]hether the other sections of H.B. 153 that are cited by Plaintiffs are actually in violation of the Single Subject Rule does not affect the outcome regarding the prison privatization portions of this bill (which is what Plaintiffs' action is really about)." (Decision, at 19.) Plaintiffs' amended complaint, however, claimed the entire bill was

unconstitutional and, as the trial court noted, listed several examples of provisions they alleged were violative of the one-subject rule. At the very least, the amended complaint thereby complied with the notice-pleading requirements in Civ.R. 8(A). *See Smith v. Kamberling*, 10th Dist. No. 12AP-693, 2013-Ohio-1211, ¶ 8-9; *Ford v. Brooks*, 10th Dist. No. 11AP-664, 2012-Ohio-943, ¶ 13.

{¶ 24} Because plaintiffs alleged a set of facts that if proved would entitle them to relief, the trial court erred in granting defendants' motion to dismiss the complaint for failing to state a claim upon which relief can be granted. *Hoover* at 6-7. Therefore, the trial court must continue proceedings consistent with this decision, including holding an evidentiary hearing to determine whether the bill in question had only one subject pursuant to Ohio Constitution, Article II, Section 15(D). *Id.* If, after holding an evidentiary hearing, the trial court finds any provisions constitute a manifestly gross or fraudulent violation of the one-subject rule, such that the provisions bear no common purpose or relationship with the budget-related items and give rise to an inference of logrolling, the court must sever the offending provisions. *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections*, 62 Ohio St.3d 145, 149 (1991) (concluding severance to be the appropriate remedy where possible to cure the defect and save those sections relating to a single subject). *See also Ohio Civ. Serv. Emps. Assn.* at ¶ 36.

B. Right of Referendum

{¶ 25} Ohio Constitution, Article II, Section 1 provides in pertinent part: "The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided." The right of referendum "applies to every law passed in this state and provides an important check on actions taken by the government." *State ex rel. Ohio Gen. Assembly v. Brunner*, 115 Ohio St.3d 103, 2007-Ohio-4460, ¶ 9.

{¶ 26} Subject to specified exceptions, laws do not take effect until 90 days after having been filed with the governor and the secretary of state in order to allow for the filing of a petition for referendum. Ohio Constitution, Article II, Section 1(C). *See also Ohio Gen. Assembly* at ¶ 9. Ohio Constitution, Article II, Section 1(D) lists exceptions to the general rule that all laws and sections of laws are subject to referendum, providing in

pertinent part: "Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. * * * The laws mentioned in this section shall not be subject to referendum."

{¶ 27} "The constitutional right of citizens to referendum is of paramount importance." *Ohio Gen. Assembly* at ¶ 8. "The referendum * * * is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.'" *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 673 (1976), quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971).

{¶ 28} Plaintiffs contend the trial court erred by dismissing their claim despite finding a violation of the right of referendum. The trial court found R.C. 9.06 and section 753.10 were not exempt from the right of referendum because they failed to meet the listed exceptions in Ohio Constitution, Article II, Section 1(D). However, the trial court concluded that plaintiffs could not avail themselves of the right of referendum because they admitted they made "no effort to seek, obtain, or file referendum petitions from or with the Secretary of State." (Decision, at 25.)

{¶ 29} As previously noted, R.C. 9.06 as amended by H.B. No. 153 and section 753.10 as enacted in H.B. No. 153 "are not themselves appropriations for state expenses because they do not set aside a sum of money for a public purpose." *LetOhioVote.Org* at ¶ 29. Further, nothing "would permit the referendum exception to apply to provisions that, once implemented, raise revenue to provide funds for an appropriation in another part of the act, even if * * * they are 'inextricably tied' or related to each other." *LetOhioVote.Org* at ¶ 35. Because the contested provisions do not fall within the exceptions to the right of referendum, pursuant to *LetOhioVote.Org*, R.C. 9.06 and section 753.10 violate the right of referendum.

{¶ 30} Defendants do not contest that R.C. 9.06 and section 753.10 violate the right of referendum, but continue to argue that plaintiffs' failure to file a referendum petition with the secretary of state within 90 days of the effective date of H.B. No. 153 is fatal to their claim. In support of this contention, defendants cite to *State ex rel. Ohioans for Fair Dists. v. Husted*, 130 Ohio St.3d 240, 2011-Ohio-5333, for the proposition that a

referendum petition must be timely filed within 90 days from the date the governor filed the bill in the office of the secretary of state.

{¶ 31} Here, because the record does not reflect that plaintiffs timely filed a petition for referendum or made any attempt to exercise such right, it was within the trial court's discretion to determine that they forfeited the right to referendum pursuant to *Ohioans for Fair Dists. Id.* at ¶ 1. Unlike *LetOhioVote.Org*, wherein the court granted an extension of time for the plaintiffs to file a referendum petition with the office of the secretary of state after the office rejected their first timely attempt to file, plaintiffs, in the present matter, admit they made no effort to file a referendum petition. In reaching this conclusion, we recognize that the filing of a referendum petition constitutes a significant investment of time and money. However, such obstacles, especially in consideration of plaintiffs' absence of action during the pendency of the present action, do not remove the requirement that a petition for referendum be timely filed before seeking relief for a violation of the right of referendum.

{¶ 32} Accordingly, the trial court did not err in dismissing plaintiffs' complaint as it related to the violation of the right of referendum in Ohio Constitution, Article II, Section 1(C).

C. Joint Venture

{¶ 33} Ohio Constitution, Article VIII, Section 4 provides, in pertinent part: "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."

{¶ 34} A joint venture is " 'an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill and knowledge, without creating a partnership, and agree that there shall be a community of interest among them as to the purpose of the undertaking, and that each coadventurer shall stand in the relation of principal, as well as agent, as to each of the other coadventurers.' " *Al Johnson Constr. Co. v. Kosydar*, 42 Ohio St.2d 29 (1975), paragraph one of the syllabus, quoting *Ford v. McCue*, 163 Ohio St. 498 (1955), paragraph one of the syllabus. The state, in compliance with Article VIII, cannot act as "the owner of part of a property which is

owned and controlled in part by a corporation or individual." *Alter v. Cincinnati*, 56 Ohio St. 47 (1897).

{¶ 35} However, Article VIII does not forbid all collaboration between the state and private enterprises. See *Grendell v. Ohio Environmental Protection Agency*, 146 Ohio App.3d 1, 10-11 (9th Dist.2001). "[T]he appropriation of public money to a private corporation to be expended for a public purpose is a valid act of the legislative body." *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 151 (1955). See also *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, ¶ 67; *Cincinnati v. Dexter*, 55 Ohio St. 93 (1896) ("A sale made in good faith, and for a fair value, under such circumstances, cannot properly be characterized as a loan of the credit of the municipality, directly or indirectly, to or in aid of the purchaser."); *State ex rel. Campbell v. Cincinnati St. Ry. Co.*, 97 Ohio St. 283, 309 (1918) (holding that a city "has the right to contract with the railway company for the operation thereof" and "has also the right to provide in the contract for the payment of all expenses of operation, depreciation, maintenance, etc., out of the gross proceeds received from all sources of operation of the road, under such terms and conditions as the city and its duly authorized officers and boards may deem to be for its best interests").

{¶ 36} Plaintiffs assert both a facial challenge and a challenge to the application of R.C. 9.06 and section 753.10. "To prevail on a facial constitutional challenge, the challenger must prove the constitutional defect, using the highest standard of proof, which is also used in criminal cases, proof beyond a reasonable doubt." *Ohio Congress of Parents & Teachers* at ¶ 21, citing *Dickman*, paragraph one of the syllabus. "To prevail on a constitutional challenge to the statute as applied, the challenger must present clear and convincing evidence of the statute's constitutional defect." *Ohio Congress of Parents & Teachers* at ¶ 21, citing *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329 (1944), paragraph six of the syllabus.

{¶ 37} Plaintiffs contend the payment of an annual ownership fee, the reservation of a right to repurchase the prisons, and the various regulatory provisions governing operation of the privatized prisons cause R.C. 9.06 and section 753.10 to violate the prohibition on joint ventures and also unconstitutionally extend the state's credit to a private enterprise. Defendants respond that the sale of a public facility, authorized by the

legislature and made in good faith and for fair-market value, is constitutional and cannot be characterized as a loan.

{¶ 38} Here, nothing in plaintiffs' complaint demonstrates that the challenged provisions result in the sort of partnerships or unions that the Ohio Constitution forbids. The state retains no ownership interest in the facilities to be privatized because the challenged provisions authorize the sale of the property as an entire tract by quit-claim deed. *Compare State ex rel. Eichenberger v. Neff*, 42 Ohio App.2d 69, 75 (10th Dist.1974) (finding an arrangement wherein "the land of the state is joined by the improvements of the lessee under the lease" violated Ohio Constitution, Article VIII, Section 4). Under the challenged sections, the state and private entities do not possess " 'equal authority or right to direct and govern the movements and conduct of each other.' " *Grendell* at 11, quoting *Ford* at 502-03. Plaintiffs point to no authority for the proposition that a contractual right to repurchase the property violates Ohio Constitution, Article VIII, Section 4. Finally, payment of the annual ownership fee by the state to the prison operators does not violate Article VIII, Section 4 because the Ohio Constitution " 'does not forbid the employment of corporations, or individuals, associate or otherwise, as agents to perform public services; nor does it prescribe the mode of their compensation.' " *Grendell* at 12, quoting *Taylor v. Ross Cty. Commrs.*, 23 Ohio St. 22, 78 (1872).

{¶ 39} Even accepting all of the allegations in the complaint as true and making all reasonable inferences in favor of plaintiffs, no set of facts in plaintiffs' complaint, if proven, would entitle them to relief. *See Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 193 (1988) (finding a court need not presume the truth of conclusions unsupported by factual allegations); *Pepper v. Bd. of Edn. of Toledo Pub. Schools*, 6th Dist. No. L-06-1199, 2007-Ohio-203, ¶ 13, 18. Accordingly, the trial court did not err in dismissing plaintiffs' complaint with regard to the allegations of a violation of Ohio Constitution, Article VIII, Section 4 both on its face and as applied.

{¶ 40} In conclusion, plaintiffs' first assignment of error as it relates to a violation of the one-subject rule is sustained, but as it relates to all other alleged errors is overruled.

IV. Alternative Claim

{¶ 41} Finally, plaintiffs assert that the trial erred in dismissing their complaint because they stated a claim that the employees working at the Marion prison complex are public employees as defined in R.C. 4117.01(C). Defendants respond that the State

Employment Relations Board ("SERB") has exclusive jurisdiction to determine whether an individual is a public employee as defined in R.C. 4117.01(C) and, as a result, plaintiffs lacked standing to pursue their constitutional and alternative claims.

{¶ 42} Standing is " 'a party's right to make a legal claim or seek judicial enforcement of a duty or right.' " *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶ 27, quoting Black's Law Dictionary (8th Ed.2004) 1442. Unless the party seeking relief establishes standing, a court cannot consider the merits of the party's legal claim. *Ohio Pyro* at ¶ 27; *U.S. Bank Natl. Assn. v. Gray*, 10th Dist. No. 12AP-953, 2013-Ohio-3340, ¶ 17, citing *Fed. Home Loan Mtge. Corp. v. Schwartwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 22.

{¶ 43} To establish standing, a plaintiff must have a personal stake in the matter he or she seeks to litigate. *League of United Latin Am. Citizens v. Kasich*, 10th Dist. No. 10AP-639, 2012-Ohio-947, ¶ 21, citing *Tiemann v. Univ. of Cincinnati*, 127 Ohio App.3d 312, 325 (10th Dist.1998). A plaintiff demonstrates his or her personal stake by alleging an actual, palpable injury caused by the defendant that has a remedy in law or equity. *Id.*, citing *Tiemann* at 325. An injury borne by the population in general is not sufficient to confer standing, but must be borne by the plaintiff in particular. *Id.*, citing *Tiemann* at 325, citing *Allen v. Wright*, 468 U.S. 737 (1984). *See also State ex rel. Walgate v. Kasich*, 10th Dist. No. 12AP-548, 2013-Ohio-946, ¶ 16.

{¶ 44} "R.C. Chapter 4117 established a comprehensive framework for the resolution of public-sector labor disputes by creating a series of new rights and setting forth specific procedures and remedies for the vindication of those rights." *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d 167, 169 (1991). R.C. 4117.12(A) provides that unfair labor practices are "remediable by the state employment relations board as specified in this section," but does not provide for the filing of an original complaint in common pleas court. "Ultimately, the question of who is the 'public employer' must be determined under R.C. Chapter 4117." *Franklin Cty. Law Enforcement Assn.* at 170.

{¶ 45} The trial court found that SERB was the proper jurisdictional vehicle to pursue questions involving public employees, but determined that SERB did not possess the authority to resolve whether the statutes in question were constitutional. The trial court also found that R.C. 9.06(K) conferred jurisdiction as to constitutional questions

regarding the challenged amendments to H.B. No. 153. As a result, the trial court concluded plaintiffs had standing to bring their claims since the trial court had jurisdiction, plaintiffs alleged a tangible injury in fact, and plaintiffs could not pursue remedies to their constitutional claims in another forum.

{¶ 46} Defendants do not contest that SERB would be unable to address the constitutional claims asserted by the plaintiffs. Instead, defendants assert without reference to authority that R.C. 9.06(K) does not supply the trial court with jurisdiction, but rather is a venue provision. R.C. 9.06(K) as amended in H.B. No. 153 provides: "Any action asserting that section 9.06 of the Revised Code or section 753.10 of the act in which this amendment was adopted violates any provision of the Ohio constitution . . . shall be brought in the court of common pleas of Franklin county." We conclude the trial court possessed jurisdiction to decide the constitutional claims raised by plaintiffs. *See Nibert v. Dept. of Rehab. & Corr.*, 119 Ohio App.3d 431, 433 (10th Dist.1997); *Wandling v. Ohio Dept. of Transp.*, 78 Ohio App.3d 368, 371 (4th Dist.1992).

{¶ 47} Defendants' contention that plaintiffs lacked standing to pursue their constitutional claims is also without merit. Defendants admit that SERB lacks the authority to resolve the constitutional claims asserted in this case, and simultaneously assert that plaintiffs cannot demonstrate an injury sufficient to confer standing because SERB is the only proper forum to address questions involving public employees.

{¶ 48} Here, unlike in *Walgate*, plaintiffs allege a direct, concrete injury different from that suffered by the public in general. *Id.* at ¶ 16. Since it would have been futile for plaintiffs to assert their constitutional claims before SERB, it would be a manifest absurdity to also prevent them from asserting their constitutional claims before the trial court. "Because administrative bodies have no authority to interpret the Constitution, requiring litigants to assert constitutional arguments administratively would be a waste of time and effort for all involved." *Jones v. Chagrin Falls*, 77 Ohio St.3d 456, 460-61 (1997). We therefore conclude plaintiffs had standing to pursue their constitutional claims at the trial court.

{¶ 49} Finally, because resolution of plaintiffs' alternative claim depends on interpretation of the scope of "public employer" as defined by R.C. Chapter 4117, the trial court did not err in finding SERB has exclusive jurisdiction over such interpretation and dismissing plaintiffs' complaint as to their alternative claim. *Franklin Cty. Law*

Enforcement Assn. at 169; *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 469 (1993). Accordingly, plaintiffs' second assignment of error is overruled.

V. Motion to Strike

{¶ 50} Plaintiffs filed a motion to strike materials in defendants' merit brief and appendix they allege were not part of the record. As it is unnecessary to rely on the materials plaintiffs seek to strike in order to reach the foregoing conclusions, we overrule as moot plaintiffs' motion to strike. *MP Star Financial, Inc. v. Cleveland State Univ.*, 10th Dist. No. 03AP-1156, 2004-Ohio-3840, ¶ 12, *aff'd*, 107 Ohio St.3d 176, 2005-Ohio-6183.

VI. Disposition

{¶ 51} Because plaintiffs' complaint sufficiently states a claim that the challenged legislation violates the one-subject rule of the Ohio Constitution, we conclude the trial court erred in granting defendants' motion to dismiss. Plaintiffs' first assignment of error is sustained in part and overruled in part and plaintiffs' second assignment of error is overruled. Plaintiffs' motion to strike is rendered as moot. Accordingly, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas and remand with instructions to continue proceedings.

*Judgment affirmed in part;
reversed in part and cause remanded.*

SADLER and CONNOR, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).

EXHIBIT 5

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO
GENERAL DIVISION

State, ex rel. Ohio Civil Service :
Employees Association, et al., :

Plaintiffs, : Case No. 12-CV-8716

Vs. : Judge Pat Sheeran

State of Ohio, et al., :

Defendants. :

DECISION AND ENTRY SUSTAINING MOTION TO DISMISS

Sheeran, J.

This case is before the Court on defendants' Motion to Dismiss the Complaint.

On July 9, 2012, plaintiffs filed a Complaint for Declaratory Judgment, for a Writ of Mandamus, and for injunctive relief. The gist of the Complaint is that the defendants privatized a state owned prison (Lake Erie Correctional Facility), by selling it to Corrections Corporation of America, a named defendant, and that the defendants privatized another state prison, the North Central Correctional Institution, by entering into a contract with defendant Management & Training Corporation, which would run that institution. One consequence of these acts is that the plaintiffs lost their jobs, incurring financial losses as a result of those actions. Plaintiffs contend that the State defendants are also unconstitutionally authorized to sell four other prisons.¹

This case was originally assigned to Judge Horton. A motion to transfer the case was filed by the Defendants. Judge Horton GRANTED the transfer, and in doing so held that this case was a re-filed case. Having reviewed that Decision, this Court has no disagreement with it.

¹ Complaint, at ¶55.

Plaintiffs contend that the statutory authority relied on by the State defendants in these privatization actions are unconstitutional on their face, and as applied to the employee plaintiffs. As a result of the alleged constitutional deficiencies, the actions taken by the State defendants were and are void and illegal, and that the sale of the prison facility must be “vacated and cancelled.”² The employee plaintiffs seek reinstatement and reimbursement for their losses. Plaintiff OCSEA also alleges the loss of over 270 bargaining unit members from the two prisons that have been privatized to date.

The bases for the claim of unconstitutionality are alleged violations of Article II, Section 15(D) of the Ohio Constitution (the “Single Subject” rule), Article VIII, Section 4 of the Ohio Constitution (“Prohibition Against Joining Property Rights”), and Article II, Section 1 and 1c of the Ohio Constitution (the “Right to Referendum”), as they relate to Ohio Revised Code sections 9.06, 753.10 and 812.20. The plaintiffs also ask that Am.Sub.H.B. No. 153 be declared unconstitutional in that it allegedly violates the Single Subject Rule.

In the alternative, plaintiffs ask for a declaration that the individuals now working in the affected prisons are public employees, as that term is defined in R.C. 4117.01(C).

On September 6, 2012, plaintiffs filed an Amended Complaint. The amended complaint added Josh Mandel, as the State Treasurer, the Office of Management and Budget, and its director, Timothy Keen, as parties defendant. The amended complaint also added a section on Sub.S.B. No. 321, arguing that it is unconstitutional in violation of the Single Subject Rule.³

The State Defendants filed a Motion to Dismiss on September 7, 2012. On September 13, 2012, the plaintiffs filed a Motion to file an Amended Complaint. This motion was filed in order to comply with the requirement that leave of court is required to amend a complaint once a

² Complaint, at ¶3.

³ Amended Complaint, at ¶¶137-141.

defendant has filed an answer or other responsive pleading. Plaintiffs noted that they erred in not realizing that three of the twelve defendants had filed an answer prior to the filing of the amended complaint. On November 2, 2012, this Court sustained the motion to amend the complaint. For purposes of this Motion, the plaintiffs and the defendants have agreed that the defendants' do not first have to file an Amended Answer, and that the original motion to dismiss applies to all parties, including the new ones who were added in the Amended Complaint.

Prefatorily, this Court will note that when considering a Motion to Dismiss, a court must presume all factual allegations contained in the complaint to be true and make all reasonable inferences in favor of the non-moving party. Dismissal of a claim pursuant to Civ. R. 12(B)(6) is only appropriate where it appears beyond a doubt that a plaintiff can prove no set of facts in support of his claim that would entitle him to relief.⁴

1. The Jurisdictional Argument: R.C. Chapter 4117

The first argument defendants raise is that this Court should dismiss the complaint based on a lack of jurisdiction; specifically, that R.C. Chapter 4117 grants the State Employee Relations Board (SERB) exclusive jurisdiction to determine who is a public employee.

Certainly, where a court lacks subject matter jurisdiction, it has no choice but to dismiss the complaint. However, the lack of jurisdiction must be "patent and unambiguous."⁵

Part of the relief requested in the amended complaint is for this Court to order that the individual plaintiffs herein are public employees for purposes of their wages and benefits, as

⁴ See, e.g. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St. 3d 190, 192, cited in, e.g. *Moore v. City of Middletown*, 133 Ohio St. 3d 55, 2012 Ohio 3897.

⁵ *State, ex rel. Smith, v. Frost* (1995), 74 Ohio St. 3d 107, 109; see also *State ex rel. FOP v. Court of Common Pleas* (1996), 76 Ohio St. 3d 287, 289 (writ of prohibition will be granted where court patently and unambiguously lacks jurisdiction).

defined in R.C. 4117.03. Defendants argue that the SERB has exclusive jurisdiction to determine who is a public employee.⁶

In *Franklin County Law Enforcement Ass'n. v. Fraternal Order of Police* (1991), 59 Ohio St. 3d 167, the Ohio Supreme Court affirmed the trial court's dismissal of a case where the plaintiffs sought injunctive relief that would restrain the FOP from conducting a vote, and would prevent any collective bargaining agreement until SERB designated the proper union representative. Other cases cited by the state defendants have similar holdings.

In their supplemental brief, defendants cite *Carter v. Trotwood-Madison City Bd. of Education* (2d App. Dist.), 2009 Ohio 1769, 181 Ohio App. 3d 764. Here, two retired teachers filed suit for an alleged breach of contract. The issue was whether the retired teachers were public employees. In affirming (but on other grounds) the decision of the trial court to dismiss the action, the court of appeals held that SERB has exclusive jurisdiction under R.C. Chapter 4117.

In numerous cases, courts have held that SERB has exclusive original jurisdiction over the issue of whether a particular entity is a "public employer" or whether particular parties or groups are public employees." (citations omitted).

The Ohio Supreme Court also stressed in *Franklin Cty. Law Enforcement* that "[u]limately, the question of who is the 'public employer' must be determined under R.C. Chapter 4117." 59 Ohio St. 3d 167, 170, 572 N.E. 2d 87. The Ohio Supreme Court, therefore, concluded that SERB had exclusive jurisdiction over the case, and that the trial court did not have jurisdiction. Id.

Id., at ¶¶58-59.

Plaintiffs' response to the jurisdictional issue is two-fold: First, R.C. 9.06 "squarely vested jurisdiction over the entire case in the Franklin County Common Pleas Court. 9.06(K)."⁷

This section reads in pertinent part as follows:

⁶ Defendants' motion to dismiss, at p. 6.

⁷ Plaintiffs' Supplemental Brief, at 1.

Any action asserting that section 9.06...or 753.10 of the act in which this amendment was adopted violates any provision of the Ohio constitution...shall be brought in the court of common pleas of Franklin county.

Defendants assert that this section is a venue statute, not a jurisdictional one. However, it has long been held in similarly worded sections involving appeals from state administrative agencies, are jurisdictional statutes. See, e.g. the appeals procedure from decisions of the state personnel board of review, as set forth in section 119.12 of the Revised Code. In *Hoffman v. Montgomery County Commissioners* (2d App. Dist. No. 7555), 1982 Ohio App. Lexis 12905, the Court of Appeals for Montgomery County noted that an administrative appeal brought under R.C. 119.12, which requires the case to be filed in the Franklin County Court of Common Pleas, but which in that particular case was filed in the Montgomery County Court of Common Pleas, was properly dismissed for lack of jurisdiction. The trial court there refused a request to transfer venue to Franklin County and the appeals court agreed, noting that since there was no jurisdiction, the action was not properly commenced, and therefore the Montgomery County court had no authority to change venue.

This Court does not see any significant difference between the two statutes. Had, for example, plaintiffs commenced this action in another common pleas court, *Hoffman* would require dismissal, not a change of venue.

Another case noting the jurisdictional requirement of statutorily mandated courts in which certain administrative appeals may be brought is *Nibert v. Department of Rehabilitation and Correction/London Correctional Institution* (10th App. Dist.), 119 Ohio App. 3d 431, 1997 Ohio App. Lexis 1761. Here, the Franklin County Court of Appeals affirmed the dismissal of a case because the action, governed by R.C. 124.34, should have been filed in the county in which the employee resided, and not in Franklin County. As in *Hoffman*, the appeals court noted that

this was a jurisdictional issue, not one involving venue. And the Tenth District made its ruling despite the fact that, as that Court noted, “the present case presents unusual and compelling circumstances for allowing a deviation from the established statutory and case law, [but] we may not ignore the mandate expressed in the first syllable of *Davis*.”⁸

Based on the foregoing, this Court finds that R.C. 9.06(K) is a jurisdictional statute, not one involving venue.

Having so concluded, does this finding conflict with the requirement that matters involving a determination of whether any individual plaintiffs are public employees be determined by SERB administratively? The language of the subsection states that “Any action asserting that [either section] violates...the Ohio constitution and any claim asserting that any action taken by the governor or the department of administrative services or the department of rehabilitation and correction pursuant to section 9.06...or section 753.10...violates any provision of the Ohio constitution or any provision of the Revised Code shall be brought in the [Franklin County common pleas court]. (Emphasis added).

This Court finds that there is no conflict. There is no contention that the actions of any of the defendants “violated” R.C. Chapter 4117. There may be circumstances from the sale of prisons that affect employees, but that does not mean that Chapter 4117 is violated, it merely means that Chapter 4117 is brought into play in order to determine the rights of those persons affected by the sale. However, it bears repeating that there is no allegation that Chapter 4117 itself has in any way actually been violated.

Based on the foregoing, this Court holds that it has jurisdiction on issues concerning the constitutionality of sections 9.06 and 753.10. However, that holding, as noted, does not preclude

⁸ *Nibert*, citing *Davis v. Board of Review* (1980), 64 Ohio St. 2d 102, syllabus paragraph 1. A reading of the case indeed shows the strong possibility of confusion in where to file the appropriate appeal.

SERB's jurisdiction concerning the rights of employees that relate to their employment status. In fact, section 9.06(K) does not affect SERB's jurisdiction at all. They are separate matters.

To summarize the opinion to this point: SERB has exclusive jurisdiction over employee rights, including whether or not the named individual plaintiffs are public employees. This Court has exclusive jurisdiction over the constitutional challenges to the privatization of Ohio prisons.

2. Standing

The next issue involves standing, specifically the question of whether any of the plaintiffs have standing to contest the legislative action. Since SERB has exclusive jurisdiction to determine the employee rights questions in this case, the issue becomes whether any plaintiff alleges anything in the Amended Complaint that would give that person (or organization) standing to contest the constitutionality of the statutes in question. Since the allegations of economic damages are to be determined administratively by SERB, there must be some other basis for standing in order for this case to proceed.

The Amended Complaint seeks declaratory and injunctive relief, as well as a request for a writ of mandamus. The writ of mandamus, requested in Count Three, asks for the reinstatement of the individual plaintiffs to the positions they held prior to the sale of, or private contracts entered into with, the private entities mentioned in the Amended Complaint. As concluded earlier, the reinstatement of the individual plaintiffs is a matter for SERB to determine. Therefore, there is no extraordinary writ before this Court in terms of the constitutionality of the prison sale.

In *ProgressOhio.org, Inc. v. JobsOhio* (10th App. Dist), 2012 Ohio 2655, 973 N.E. 2d 307, the Franklin County Court of Appeals upheld the dismissal of that case based on a lack of standing. In so holding, that Court spoke extensively on the issue of standing.

Under the doctrine of standing, a litigant must have a personal stake in the matter he or she wishes to litigate. [citation omitted]. Standing requires a litigant to have “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult***questions.” [Citations omitted]. In order to have standing, a plaintiff must demonstrate some injury caused by the defendant that has a remedy in law or equity. *Id.* The injury is not required to be large or economic, but it must be palpable. *Id.* Furthermore, the injury cannot be merely speculative, and it must also be an injury to the plaintiff himself or to a class. *Id.* An injury that is borne by the population in general, and which does not affect the plaintiff in particular, is not sufficient to confer standing. [citation omitted].

Id., at ¶8.

In this case, *if* SERB did not have exclusive jurisdiction of the employees’ status, with all the issues that relate to it, including the issue of economic loss, there is no doubt that the individual plaintiffs would have standing to pursue this claim. Clearly, they have a stake that is far more palpable than that of any injury allegedly borne by the population in general.

However, it is clear to this Court that SERB does have, to the exclusion of this Court, jurisdiction over those issues. Therefore, those alleged injuries, which are clearly significant claims, do not give the plaintiffs standing here.

Public right standing is one basis in which the constitutionality of a statute may be brought. It is an exception to the personal injury requirement one must otherwise allege in order to have standing. Public right “is conceived as an action to vindicate the general public interest.” *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 1999 Ohio 123.

A close reading of *ProgressOhio.org* indicates that it is not an absolute *requirement* that a plaintiff must seek an extraordinary writ. Or, to put it another way, “overwhelmingly” does not equate to “exclusively.”⁹ Having said that, however, the Tenth District made it clear that,

⁹ See *ProgressOhio.org* at ¶17. In fact, two paragraphs later, the Court of Appeals noted that the vehicle—injunctive relief or extraordinary writ—was “ultimately irrelevant.”

regardless of whether an extraordinary writ is sought or not, there must be “rare and extraordinary circumstances necessary to invoke public interest standing.”¹⁰

The examples cited in the above footnote, that is, where the challenge is to a statute that constitutes an “attack on the judiciary” or affects the right of “every worker” to participate in the Workers’ Compensation system, clearly indicate the nature and scope of the case of rare and extraordinary situations where public interest standing may be invoked. This case, no matter how one reads the Amended Complaint, fails to rise to that level.¹¹

Because the individual plaintiffs lack standing, ProgressOhio.org also lacks standing.

ProgressOhio.org, supra.

OCSEA’s standing is based on the economic injury that resulted from each of the individually named plaintiffs. Again, noting that the economic injury alleged would be sufficient to constitute a personal stake in the case, and thus make it a true adversarial proceeding, that injury is one that must be determined by SERB.

The analysis thus far has been quite straightforward, and would appear to require this Court to dismiss this case. Having said that, however, Plaintiffs raise an issue that is exceedingly troubling to this Court. Specifically, Plaintiffs note that the Collective Bargaining Agreement (CBA) between the parties cannot be utilized to provide an arbitrator authority to determine the rights of the parties. The Defendants argue that the CBA does provide the wherewithal to give Plaintiffs their just due.

¹⁰ Id., at ¶19. As examples, the Court cited *Sheward* (“an attack on the judiciary...[which] affected every tort claim in Ohio”) and *State ex rel. Ohio AFL-CIO v. Bur. Of Workers’ Comp.*, 97 Ohio St. 3d 504, 2002 Ohio 6717 (“statute at issue...affected every injured worker in Ohio seeking to participate in the worker’s compensation system.”). Statutes that affect a limited number of employees are not in that category.

¹¹ Id., at ¶31: “There is no question that appellants’ challenge raises significant concerns about at least some of the provision of the JobsOhio Act. However, in terms of great public interest, the most one can say about the challenged legislation is that it ‘makes significant changes to the organizational structure of state government.’ (citation omitted). *This is not enough of a public concern to confer standing on appellants.*” (Emphasis added).

Article 25 of the CBA governs the grievance procedure. The word “grievance” itself is given an expansive definition, “any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement.”¹² The procedure that follows “shall be the exclusive method of resolving grievances.”¹³

Plaintiffs note that the current CBA was in effect *before* the adoption of Am. Sub. H.B. No. 153 was adopted and argues that the CBA “could not...contain [the type of] specific language which identifies and preempts R.C. 9.06 or R.C. 753.10...”¹⁴

In *State ex rel. Ohio Association of Public School Employees v. Batavia Local School District Board of Education*, 2000 Ohio 130, 89 Ohio St. 3d 191, the collective bargaining agreement (cba) ran from March 1, 1996 through February 28, 1999. At the end of the 1998 academic year, i.e. June, 1998, the board of education (“board”) considered, then did, enter into a contract with a private company to provide bus transportation. The result of this act included the laying off of the fourteen persons who had held those positions. This led to a grievance being filed by some of the affected employees. The superintendent refused to reinstate those employees, and said employees filed for extraordinary relief in the Court of Appeals. That court granted summary judgment to the board. The Supreme Court, in a 4-3 decision, reversed.

The Supreme Court noted the interplay between public employees’ statutory rights and provisions of a collective bargaining agreement,¹⁵ noting that “when the [collective bargaining] agreement makes no specification about a matter pertaining to wages, hours and terms and conditions of employment, the parties are governed by all state or local laws addressing such

¹² Article 25, Section 25.01(A).

¹³ *Id.*

¹⁴ Plaintiffs’ Supplemental Brief after Oral Argument, at 3.

¹⁵ *Id.*, at 89 Ohio St. 3d 196.

terms and conditions of employment.”¹⁶ In other words, the CBA will prevail over the state statute, provided the CBA “*specifically exclude[s]* statutory rights to negate the application of those rights.”¹⁷ The Court’s decision makes it clear that a CBA’s “general layoff and recall provision” by itself was not sufficient to address the specific issue raised by the board’s action.

Another point of significance in this case is the Supreme Court’s noting that “[W]e must construe the language of the parties’ agreement to avoid a ‘manifest absurdity.’”¹⁸

This is, in essence, the point Plaintiffs are making here: the CBA could not reasonably have anticipated that one or more prisons would have been sold, and the rights of the employees would have been thus affected.¹⁹ Since the CBA could not “specifically exclude” statutory rights that did not exist at the time the CBA was entered into, it becomes a manifest absurdity to try to apply the CBA to a situation that could not reasonably have been foreseen. And if one only wishes to apply existing law (which, under *Batavia*, would seem to be required), that law (in effect now) expressly gives the State of Ohio the right to privatize one or more prisons. Where, then, is the proper forum for aggrieved employees to proceed?

The State Defendants note that the Plaintiffs have two options: the first is the grievance procedure, which has been discussed above, and the second is to pursue an unfair labor practice grievance under SERB, pursuant to R.C. 4711.11. The Defendants note that the CBA, under Article 39, addresses subcontracting. However, the provision quoted by the Defendants permits the employer “to contract out any work it deems necessary or desirable because of greater efficiency, economy, programmatic benefits or other related factors.”²⁰ While this provision is

¹⁶ Id.

¹⁷ Id. (Emphasis in original).

¹⁸ Id., at 198.

¹⁹ Plaintiffs’ Supplemental Brief after Oral Argument, *supra*, at 3.

²⁰ State Defendants’ Post Hearing Brief, at 5, quoting the CBA at Article 39.01.

not necessarily exactly on point, other sections relating to the sale, lease, assignment or transfer of any facility are covered under the CBA.²¹

This Court agrees, to an extent, with the State Defendants here. Clearly, there are articles in the CBA that relate to specific issues raised by the Plaintiffs. However, the underlying problem is that the grievance procedure does not and cannot decide the constitutionality of the statutes at issue here. And pursuing a SERB remedy is equally futile, since an administrator does not possess the authority to determine the constitutionality of a statute. As such, either route is, to all intents and purposes, manifestly useless.

This, therefore, brings us full circle in the discussion. SERB is the proper jurisdictional vehicle to pursue questions involving public employees. But pursuing a SERB resolution (or a grievance procedure) is, in this case at least, by definition useless. This brings this Court back to the *Batavia* decision's language that the law cannot require a "manifest absurdity."²²

The solution to this seeming dilemma goes back to the jurisdictional question. It must be remembered that the lack of jurisdiction must be "patent and unambiguous." To this Court, the lack of jurisdiction is probable, but under these circumstances it does not rise to the level of patent and unambiguous.

If this Court has jurisdiction, and given the above, it now must proceed as if it does, the issue of Standing must be reconsidered. Clearly, the lack of standing previously noted is based on the jurisdiction of SERB to determine the "public employee" questions. Absent the ability of this Court to consider the status of the employee plaintiffs, those persons, as well as the OCSEA,

²¹ Id., quoting Article 44.06 ("Successor"). Other provisions noted affect closure of a facility (Id., and see also Article 36); seniority (Article 16 of the CBA), Layoffs and bumping (Article 18), and the work week, schedules and overtime (Article 13).

²² Granted, the language in *Batavia* covered a different situation, the language of the parties' agreement. But the general principle of avoiding absurdity can hardly be considered novel.

and therefore ProgressOhio.org, did not have standing to bring this case. But since this Court now at least arguably has jurisdiction, the individual plaintiffs have standing.

ProgressOhio.org argues here that “standing for one is standing for all.”²³ See, e.g. *ACLU v. Grayson County* (6th Cir. 2010), 591 F.3d 837, 843, citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52, n.2 (2006). The 6th Circuit in *Grayson County*, after citing that rule, then noted, a few paragraphs later, that since “Meredith has standing, there is no need to address the standing of the other plaintiffs.”²⁴ The state defendants cite an earlier 6th Circuit decision indicating that the aforementioned principle is a “misstatement of the law,” but because the above decisions post-date *National Rifle Association of America v. Magaw*, 132 F.3d 272 (6th Cir. 1997), and because the United States Supreme Court has opined on the issue, this Court cannot ignore the more recent precedent.

Based on the foregoing, the plaintiffs have standing to pursue these claims. This Court will now proceed to the merits of the Motion to Dismiss.

3. The Single Subject Rule

This Court, in Case No. 2011 CV 10647, exhaustively considered whether or not the legislation contained in the bill involving the privatization of prisons violated the One Subject Rule. Because the Court therein conducted an exhaustive research of the precedents, and there has been nothing determined since that time that contradicts that finding, this Court will repeat that portion of the previous decision below. In so doing, the Court reiterates that it has Shepardized *State v. Bloomer* and has found no decisions from the appellate courts that have further discussed the One Subject Rule.

²³ Plaintiffs’ Memorandum Contra, at p. 16.

²⁴ *Id.*, at 843.

Article II, Section 15(D) of the Ohio Constitution reads as follows: "No bill shall contain more than one subject, which shall be clearly expressed in its title."

"The one-subject rule was added to our Constitution in 1851. It was one of the proposals resulting from the efforts of the Second Constitutional Convention, of 1850-1851. See Kulewicz, *The History of the One-Subject Rule of the Ohio Constitution* (1997), 45 *Cleve.St.L.Rev.* 591, 591-593. The genesis of support for this rule had its roots in the same concerns over the General Assembly's dominance of state government that formed the most significant theme of the Constitution of 1851. These concerns, illustrated earlier in this opinion, resulted in the placement of concrete limits on the power of the General Assembly to proceed however it saw fit in the enactment of legislation. The one-subject rule is one product of the drafters' desire to place checks on the legislative branch's ability to exploit its position as the overwhelmingly pre-eminent branch of state government prior to 1851."

The rule derives in part from the prevailing antipathy toward the manner and means by which the General Assembly exercised its pre-1851 power to enact special laws. By virtue of this power, the General Assembly "became heavily involved in the subsidization of private companies and the granting of special privileges in corporate charters. The General Assembly passed a number of Acts * * * designed to loan credit or give financial aid to private canal, bridge, turnpike, and railroad companies. * * * The public began to bemoan the taxes imposed on them for the benefit of private companies and the losses incurred by the state when subsidized corporations failed." *Id.* at 464, 715 N.E.2d 1062. Concurrently, special charters or bills of incorporation were often assured passage through a system of logrolling, i.e., the practice of combining and thereby obtaining passage for several distinct legislative proposals that would probably have failed to gain majority support if presented and voted on separately. *Id.* at 495-496, 715 N.E.2d 1062. In limiting each bill to a single subject, the one-subject rule strikes at the heart of logrolling by essentially vitiating its product.

In re Nowak (2004), 104 Ohio St. 3d 466, at ¶¶30-31. *Nowak* settled a long-standing issue by holding that the Single Subject rule was mandatory, not directory, in nature.

In recent years, the Ohio Supreme Court has considered this issue on numerous occasions. The most recent decision sets forth a number of general principles very clearly.

Our role in the enforcement of the one subject provision is limited. To avoid interfering with the legislative process, we must afford the General Assembly 'great latitude in enacting comprehensive legislation by not construing the one-subject provision so as to unnecessarily restrict the scope and operation of laws, or to multiply their number excessively, or to prevent legislation from embracing in one act all matters properly connected with one general subject.' *State, ex rel.*

Ohio Civ. Serv. Emps. Assn., AFSCME Local 11, AFL-CIO v. State Emp. Relations Bd., 104 Ohio St. 3d 122, 2004 Ohio 6363, 818 N.E. 2d 688, quoting *Dix*, 11 Ohio St. 3d at 145... We have further emphasized that “every presumption in favor of the enactment’s validity should be indulged.” *Hoover v. Franklin County Bd. of Commrs.* (1985), 19 Ohio St. 3d 1, 6...

State v. Bloomer (2009), 122 Ohio St. 3d 200, at ¶¶47 and 48.

Bloomer goes on to note that not every violation of the one-subject rule requires a finding of unconstitutionality. A violation must be “manifestly gross and fraudulent” before an enactment may be invalidated. *Id.*, at ¶49. So long as there is a common purpose or relationship between topics, “the mere fact that a bill embraces more than one topic will not be fatal.” *Id.*

Subsequent paragraphs in *Bloomer* give examples of statutes that were found not to violate the one-subject rule. Of particular interest to this decision is the example given in *State, ex rel. Willke, v. Taft* (2005), 107 Ohio St. 3d 1. There, the Supreme Court upheld a resolution proposing an amendment to the Ohio Constitution authorizing the issuance of general obligation bonds for (1) funding public infrastructure capital improvements, (2) research and development, and (3) the development of certain business sites and facilities. This combination of the three programs into one amendment was “seemingly the product of a tactical decision”,²⁵ this decision was “not so incongruous that it could not, by any reasonable interpretation, be considered germane to the purposes of statewide job creation and development.”²⁶

The Ohio Supreme Court contrasted the above decisions from those that invalidated certain statutes. Thus, in *State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward* (1999), 86 Ohio St. 3d 451, the Supreme Court struck down a tort reform bill that tried to “combine the wearing of seat belts with employment discrimination claims, class actions arising from the sale of securities with limitations on agency liability in actions against a hospital, [and] actions by a

²⁵ *Bloomer*, at ¶51, citing *Willke*, *supra*, at ¶38.

²⁶ *Id.*

roller skater with supporting affidavits on a medical claim.” *Id.*, at 497-498, quoted in *Bloomer, supra*, at ¶52. Of particular interest to this decision is the decision in *State, ex rel. Ohio Civ. Serv. Emps. Assn., AFSCME Local 11, AFL-CIO, v. State Emp. Relations Bd.*, 104 Ohio St. 3d 122. There, the Supreme Court invalidated a statutory provision that excluded certain employees from a collective bargaining process when that provision was enacted as part of an appropriations bill encompassing a wide range of budgetary concerns.²⁷

In *Nowak, supra*, the Supreme Court invalidated a provision that attempted to settle whether recorded mortgages were presumptively valid where those mortgages contained violations of other sections of the Revised Code such as having only one witness (former R.C. 5301.234). The basis for the invalidity was that the statute, which was included in an appropriations bill, simply had no common purpose or relationship with the remainder of the statute.

Another key component of *Nowak* is that where there is a clear disunity, no further evidence of fraud or logrolling is required. As that Court noted,

In other words, the one-subject provision does not require evidence of fraud or logrolling beyond the unnatural combinations themselves. Instead, "an analysis of any particular enactment is dependent upon the particular language and subject matter of the proposal," rather than upon extrinsic evidence of logrolling, and thus "an act which contains such unrelated provisions must necessarily be held to be invalid in order to effectuate the purposes of the rule." *Id.* at 145, 11 OBR 436, 464 N.E.2d 153. Otherwise, we are left with the anomalous proposition that a bill containing more than one subject does not violate a constitutional provision that prohibits a bill from containing more than one subject.

Id., at ¶71.

²⁷ Cited in *Bloomer*, at ¶52. The significance here is that this case also involved an appropriations bill. See also: *Akron Metropolitan Housing Authority Board of Trustees v. State of Ohio* (2008), Franklin App. No. 07 AP-738, 2008 Ohio — (rejecting "modifying local authority"/"authority to regulate local housing" as being too vague or not connected with the stated rationale.)

With these principles in mind, we turn to the instant case. R.C. 812.20 references the enactment, amendment or repeal of approximately 388 different sections and/or subsections of the Revised Code. As Plaintiffs point out in paragraph 50 of their Complaint, H.B. 153 contains many subjects that are quite diverse, among them the elimination of a prior felony as a bar to the issuance or renewal of a barber's license; the establishment of a gambling hotline; requiring school districts to implement merit-based pay regulations; the modification of the Rules of Evidence relating to expert testimony by a coroner or deputy coroner; creation of a check-off to permit taxpayers to donate all or part of their refund to the Ohio Historical Society; a prohibition of non-therapeutic abortions in specific places such as public hospitals and clinics; and the elimination of all collective bargaining rights for Ohio Turnpike employees.²⁸

In *Simmons-Harris v. Goff* (1999), 86 Ohio St. 3d 1, the Ohio Supreme Court otherwise upheld the constitutionality of the "school voucher program", except for finding that that section's inclusion into the appropriations bill violated the Single Subject Rule. The Supreme Court found a "blatant disunity" between the school voucher program and the remainder of the statutes in the bill. *Id.*, at 16.

The *Goff* decision is noteworthy because of some parallels with the instant case. As the Supreme Court noted,

Am.Sub.H.B. No. 117 contains many other examples of topics that "lack a common purpose or relationship." Am.Sub.H.B. No. 117 contained three hundred eighty-three amendments in twenty-five different titles of the Revised Code, ten amendments to renumber, and eighty-one new sections in sixteen different titles of the Revised Code. Baldwin's Ohio Legislative Service (1995) L-621-622.

Id., at 15 (footnote omitted).

²⁸ Plaintiffs Complaint lists more examples than are cited here. But the above is a fair sample.

The Supreme Court did not consider the constitutionality of the other sections of Am.Sub.H.B. No. 117, many of the provisions of which “appear [to be] unrelated”, *Id.*, but that was because the relief sought was limited to the school voucher program.

Here, Plaintiffs’ demand for relief asks that this Court declare H.B. 153 to be unconstitutional in its entirety.²⁹ However, the remainder of Count One strictly refers to those sections of the Revised Code that relate to the privatization of a portion of the prison system. In addition, Plaintiffs relate some, but not all, of the alleged violations of H.B. 153. This Court, therefore, will follow the lead of the Ohio Supreme Court in *Goff* and refrain from making a declaration as to the constitutionality of those sections of H.B. 153 that have not actually been argued here, at least insofar as the ruling on Plaintiffs’ Motion for a Temporary Restraining Order is concerned. This Court will note, however, that the same language used in *Goff*, i.e. “appear unrelated” certainly *appears* to apply in reference to the instances Plaintiffs cite in H.B. 153.

This Court, however, does not find *Goff* to be controlling as to the prison privatization aspects of H.B. 153 are concerned. In *State, ex rel. Roundtable, v. Taft* (2003), 2003 Ohio 3340, the Tenth District Court of Appeals faced the issue of whether the bill authorizing the Ohio Lottery Commission to participate in multi-state lotteries (the “MegaMillions” game) violated, inter alia, the Single Subject Rule. The Court of Appeals noted, first, that “[a]ssessment of an enactment’s constitutionality will be primarily a matter of a “case-by-case, semantic and contextual analysis,” citing *State, ex rel. Dix, v. Celeste* (1984), 11 Ohio St. 3d 141, 145.

Next, the Court of Appeals held that the statutory provisions authorizing the new lottery game would generate millions of dollars in revenue for Ohio schools, which was “a sufficient

²⁹ Amended Complaint, Count One, ¶168 (A).

common thread with...H.B. 405, which, by the time it was finally enacted, truly had become a budget correction bill primarily concerned with funding.” *Id.*, at ¶49.

In reaching this conclusion, the Court of Appeals cited *Comtech Systems, Inc. v. Limbach* (1991), 59 Ohio St. 3d 96, which held that the “introduction of a stream of revenue was sufficiently related to the core subject of revenues and expenditures to justify inclusion in an appropriations bill.” *Id.*, at ¶50.

Here, while it is clear that a number of provisions of H.B. 153, as cited by Plaintiffs, “appear” to clearly be at odds with the Single Subject Rule, *Goff, supra*, those provisions are considerably different than the sections before this Court that deal with prison privatization. As in *Roundtable*, the purpose of the privatization bill is to generate a stream of revenue to, in this instance, help balance the budget. This is certainly a connected subject to an appropriations bill.³⁰ At the very least, it is not a “manifestly gross or fraudulent” violation of the Single Subject requirement.

Whether the other sections of H.B. 153 that are cited by Plaintiffs are actually in violation of the Single Subject Rule does not affect the outcome regarding the prison privatization portions of this bill (which is what Plaintiffs’ action is really about). As Plaintiffs acknowledge, the remedy of severability exists in the event that any portion of a bill are found to be in violation of the Single Subject Rule.

Based on all the foregoing, this Court finds that the prison privatization portions of H.B. 153 are not in violation of the Single Subject Rule.

³⁰ Plaintiffs note in their Complaint that the prison privatization portions of H.B. 153 were attached by way of a “rider.” While there have been comments in a number of cases as to the suspect nature of a rider, whether this portion of H.B. 153 came to be a part of the bill as being part of the original legislation or by some other method, the fact is that the manner in which a court is to determine whether a violation of the Single Subject Rule exists is to examine whether a “disunity” exists between the contested section(s) and the bill in its entirety.

4. Prohibition Against Joining Property Rights

The next basis upon which Plaintiffs assert a Constitutional violation is in reference to Article Eight, Section 4 of the Ohio Constitution. That section reads in pertinent part as follows:

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 whatsoever.

In essence, the statutory provisions require the private contractor to operate and maintain the prison in a lawful manner.

R.C. 753.10 permits the director of the ODRC to award contracts for the operation and management of up to five (5) prison facilities. The provisions of this section authorize, inter alia, the Governor to execute the necessary deed(s) to the respective property.

In reviewing these statutes and comparing them to the Constitutional prohibition, this Court cannot conclude that the legislation at issue is in violation of this prohibition. The State of Ohio simply does not become a joint owner. Regulatory oversight—which occurs in many facets of state government—is not the same as joint ownership. Furthermore, because of the many constitutional requirements, under both the United States and Ohio Constitutions, relating to the operation of prisons and the treatment of prisoners, it seems clearly necessary for the State, in attempting to privatize a portion of the prison system, to create and enforce rules relating to the operation of such prisons. Finally, those cases cited by Defendants in their Memorandum In Opposition, at 11, are persuasive on this issue.

Based on the foregoing, the challenged legislation does not violate Article Eight, Section 4 of the Ohio Constitution.

5. Right of Referendum

Plaintiffs next allege that the R.C. 9.06, 753.10 and 812.20, as amended by H.B. 153, violate the Right of Referendum as that right is set forth in Article II, Section 1, 1c and 1d of the Ohio Constitution.

In pertinent part, Article II, Section 1 reads as follows:

The legislative power of the state shall be vested in a general assembly consisting of a senate and a house of representatives but the people reserve to themselves the power to...adopt and reject [laws] at the polls on a referendum vote as hereinafter provided.

Article II, Section 1c reads in pertinent part as follows:

No law passed by the general assembly shall go into effect until ninety days after it shall have been filed with the governor in the office of the secretary of state, except as herein provided.

Article II, Section 1d reads in pertinent part as follows:

Laws providing for tax levies, appropriations for the current expenses of state government and state institutions, and emergency laws necessary for the preservation of the public peace, health or safety, shall go into immediate effect. Such emergency laws upon a ye or nay vote must receive the vote of two-thirds of all the members elected to each branch of the general assembly, and the reasons for the necessity shall be set forth in one section of the law, which shall be passed only upon a ye or nay vote, upon a separate roll call thereon.

The Ohio Supreme Court has stated on numerous occasions that the right of referendum is “of paramount importance” to the citizens of Ohio. *State, ex rel. LetOhioVote.org, v. Brunner* (2009), 123 Ohio St. 3d 322, at ¶18, citing *State, ex rel. Ohio General Assembly, v. Brunner* (2007), 115 Ohio St. 3d 103.

Defendants do not deny the importance of the right of referendum, and they clearly cannot assert (nor do they) that H.B. 153 passed as an “emergency measure” as set forth in Article II, Section 1d of the Ohio Constitution. Defendants’ arguments are that none of the Plaintiffs, and no one either connected or not connected with this case has even begun the separate referendum process. Because no steps have been attempted to place the referendum on

the ballot, Defendants argue that Plaintiffs lack standing to “complain about the effective date of the budget bill and whether it infringes on the right to referendum.”³¹

Defendants’ arguments, as made in 2011, are of questionable validity. Before speaking to this action, the Court will review the questionable validity of those arguments when made in 2011. First, in order to commence a referendum action, one must follow the law which provides the means by which a referendum may occur.

The Ohio Constitution states that “No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state...” Article II, Section 1c, Ohio Constitution. This ninety day period is required because it is precisely that time period in which a referendum petition is to be filed with the Secretary of State. *Id.* Since the Ohio Constitution requires that the referendum petition be filed within ninety days “after any law shall have been filed by the governor in the office of the secretary of state”, it appears that once the law goes into effect, the right of referendum has ended.³²

In this instance, H.B. 153, by its own terms, went into effect *immediately*. Whether R.C. 9.06 and R.C. 753.10 can be considered to be exempt from the referendum requirement depends on whether they meet the stated exceptions to that requirement. Those exceptions are contained in Article II, Section 1d of the Ohio Constitution.

It is abundantly clear that the exceptions relating to “tax levies” and “emergency laws for the preservation of the public peace, health or safety” do not apply here. Therefore, the key question is whether the remaining exception, “appropriations for the current expenses of the state

³¹ Memorandum in Opposition, at 9.

³² This is one question that the Court has not had time to address. It appears that the 90 day requirement regarding both the filing of a referendum petition and the effective date of a non-emergency law is not coincidental, and the date the law goes into effect is the day the referendum right ends. If either of the parties disagrees, the Court would appreciate further information.

government and state institutions,” applies. Does the sale of prisons constitute an “appropriation”? Based on binding precedent, this Court holds that it does not.

One of the key questions before the Supreme Court in *State, ex rel. LetOhioVote.org, v. Brunner, supra* was the interpretation of this third exception—appropriations—to the referendum requirement.

First, the Court set the ground rules regarding the interpretation of that provision:

In construing these exceptions, "we must 'read words and phrases in context according to the rules of grammar and common usage.'" *State ex rel. Colvin v. Brunner*, 120 Ohio St. 3d 110, 2008 Ohio 5041, P 43, 896 N.E.2d 979, quoting *State ex rel. Lee v. Karnes*, 103 Ohio St. 3d 559, 2004 Ohio 5718, P 23, 817 N.E.2d 76. We liberally construe the powers of initiative and referendum to effectuate the rights reserved. *State ex rel. Evans v. Blackwell*, 111 Ohio St. 3d 1, 2006 Ohio 4334, P 32, 854 N.E.2d 1025. Further, "[i]n view of the great precaution taken by the constitutional convention of 1912 to set forth and safeguard, with the particularity of detail usually found only in legislative acts, the right of referendum, and the three exceptions thereto, our court should not deny the people that right, *unless the act in question is plainly and persuasively included within one of the three classes excepted from the operation of the referendum.*" (Emphasis added.) *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, 467-468, 1 Ohio Law Abs. 698, 141 N.E. 16. These exceptions to the general rule of referendum must be strictly, but reasonably, construed. *Id.* at paragraphs one and two of the syllabus.

Id., at ¶24. The emphasis noted in the paragraph was placed there by the Supreme Court.

The Supreme Court then defined what an “appropriation” is.

An appropriation is "an authorization granted by the general assembly to make expenditures and to incur obligations for specific purposes." R.C. 131.01(F). Similarly, in *State ex rel. Akron Edn. Assn. v. Essex* (1976), 47 Ohio St.2d 47, 49, 1 O.O.3d 28, 351 N.E.2d 118, we explained that the ordinary and common meaning of the phrase "appropriation bill" is a "measure before a legislative body which authorizes 'the expenditure of public moneys and stipulating the amount, manner, and purpose of the various items of expenditure.'" *Id.* at 49, quoting Webster's New International Dictionary (2d Ed.). See also Black's Law Dictionary (9th Ed.2009) 117-118 (defining "appropriation" to mean "[a] legislative body's act of setting aside a sum of money for a public purpose").

Id., at ¶28.

The Supreme Court expressly **rejected** the argument that because funds are generated—in that case by sales from video lottery terminals (and in this case by the sale of prison(s) and surrounding property)—that this makes them “appropriations.” By the definitions given by the Ohio Supreme Court, it is clear that generated funds from the sale of prison facilities cannot be “appropriations.”

It can also be argued that the sale of prisons and the revenue such a sale would provide are “inextricably linked” to appropriations, and therefore should be permitted as an exception to the referendum requirement. However, this precise argument was raised—and rejected—in *LetOhioVote.org*. The Supreme Court held:

There is no authority in our precedent that would permit the referendum exception to apply to provisions that, once implemented, raise revenue to provide funds for an appropriation in another part of the act, even if -- as the intervening respondents claim -- they are “inextricably tied” or related to each other.

Id., at ¶35.

Finally, it must be noted that the statutes in question are permanent in nature, and the Supreme Court in *LetOhioVote.org* held that any section of the law “which changes the permanent law of the state is subject to referendum under the powers reserved to the people by Section 1 of Article II, even if the law also contains a section providing for an appropriation for the current expenses of state government.” *Id.*, at ¶45.

Based on the foregoing, the contested statutes do not fit within any of the three exceptions to the referendum requirement set forth in the Ohio Constitution.

The conclusions that may be reached from the foregoing are that, first, the portion of H.B. 153 relating to R.C. 9.06 and R.C. 753.10 should have been subject to the referendum requirement, and second, that because they (and the rest of H.B. 153) went into effect

immediately, Plaintiffs had no recourse to the right of referendum.³³ Since Plaintiffs (and any other Ohio citizen) should have had that right, and because they could not have pursued it even if they wished based upon the manner in which this legislation was passed, this Court cannot say that they lack standing to make the arguments concerning the referendum issue. At the time of the filing of the 2011 case, the lack of recourse was most troubling to this Court.

Of course, intervening events have taken place since this Court first reviewed this issue last year. Specifically, Plaintiffs—or at least the ones involved in the earlier case—dismissed that case pursuant to Civ.R. 41(A), and it is admitted on both sides in oral argument on this Motion to Dismiss that there was no effort to seek, obtain, or file referendum petitions from or with the Secretary of State. Defendants' argument that the Plaintiffs have done nothing to exercise their right of referendum at any time does, after the passage of so much time, become telling. At this point, that is to say, by July of 2012, the Court agrees that this inactivity is fatal to the seeking of the referendum remedy.

Based on the foregoing, the Motion to Dismiss is SUSTAINED, and this case is dismissed. This is a final appealable order.

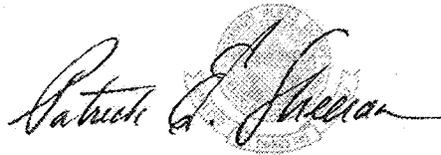
Copies to: all counsel.

³³ As noted supra, this conclusion assumes that a referendum action can only be brought during the time a bill has not become "effective."

Franklin County Court of Common Pleas

Date: 11-20-2012
Case Title: OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION ET AL -
VS- OHIO STATE ET AL
Case Number: 12CV008716
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in cursive script, reading "Patrick E. Sheeran", is written over a circular, textured seal or stamp.

/s/ Judge Patrick E. Sheeran

Court Disposition

Case Number: 12CV008716

Case Style: OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
ET AL -VS- OHIO STATE ET AL

Motion Tie Off Information:

1. Motion CMS Document Id: 12CV0087162012-09-0799970000
Document Title: 09-07-2012-MOTION TO DISMISS
Disposition: MOTION GRANTED