

In the  
**Supreme Court of Ohio**

State ex rel. OHIO CIVIL SERVICE	:	Case No. 2014-0319
EMPLOYEES ASSOCIATION, et al.,	:	
	:	On Appeal from the
Appellees/Cross-Appellants,	:	Franklin County
	:	Court of Appeals,
v.	:	Tenth Appellate District
	:	
STATE OF OHIO, et al.,	:	Court of Appeals
	:	Case No.12AP-1064
Appellants/Cross-Appellees.	:	

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**THIRD MERIT BRIEF OF  
STATE APPELLANTS/CROSS-APPELLEES**

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## INTRODUCTION

The parties' dueling Merit Briefs could not paint a more divergent role for the courts when policing the Ohio Constitution's "one-subject rule" in the context of the bills passed every two years to balance the state budget and operate the state government. *See* Ohio Const. art. II, § 15(D). The State Defendants' Merit Brief showed that the Court has adopted a deferential rule allowing those bills to include all items that may rationally affect the state budget, including the prison-privatization provisions at issue in this case (which were added to both generate revenue and cut spending). Plaintiffs' Merit Brief responds that the Court should adopt an "appropriations-only" test for those bills, one that prohibits the General Assembly from including *any* substantive changes within them, and they even go so far as to say that the State Defendants seek a "radical departure" from the Court's one-subject standards.

The law and the facts both prove that it is Plaintiffs who seek the radical departure. Legally, Plaintiffs' appropriations-only test conflicts with cases upholding laws that "add[ed] [an] appropriation provision" to a bill making substantive changes. *State ex rel. Dix v. Celeste*, 11 Ohio St. 3d 141, 145 (1984); *ComTech Sys., Inc. v. Limbach*, 59 Ohio St. 3d 96, 99 (1991). And while Plaintiffs begrudgingly acknowledge the cases requiring great deference to the legislature under the one-subject rule, *see State v. Bloomer*, 122 Ohio St. 3d 200, 2009-Ohio-2462 ¶ 48, they offer *no* explanation how their test at all comports with that deference. Factually, Plaintiffs' appropriations-only test conflicts with the political branches' traditional method of operating, as the General Assembly has long balanced the budget with biennial bills including both appropriations and operational changes. By prohibiting the General Assembly from balancing the budget in this way, Plaintiffs mistakenly read the one-subject rule to "hamper" rather than "facilitate" "orderly legislative procedure." *Dix*, 11 Ohio St. 3d at 143. Their need to argue for a broad restriction shows that the Court should reverse the Tenth District.

Plaintiffs’ two cross-appeal claims fare no better. They initially assert that the prison-privatization provisions violate Article VIII, Section 4’s ban on the State “lending its credit” to, or becoming a “joint owner or stockholder” in, private enterprise. But Plaintiffs did not plead a lending-of-credit claim. Even if they had, they have not shown that the State “lent its credit” (e.g., became a surety for, or used borrowed funds to assist, private enterprise) by selling a prison to a private company and then contracting with that company to use its private prison. Nor do Plaintiffs’ alleged facts demonstrate that the State’s prison sale rendered it a “joint owner or stockholder.” The very fact that the State must pay the private company to use its prison proves the opposite—that the two remain separate entities dealing with each other at arm’s length (just as with any other contract in which the State seeks property, goods, or services from a private party in exchange for consideration). Indeed, Plaintiffs’ argument reads Section 4 so broadly that it would require constant judicial supervision over *every* conceivable contract between the State and a private party, including, for example, an ordinary transaction for office supplies.

Finally, Plaintiffs’ argument that courts have jurisdiction to consider their claim that they are “public employees” under R.C. Chapter 4117 conflicts with black-letter law. Time and again, this Court has said that threshold questions under R.C. Chapter 4117 (such as whether an employer is a “public employer”) trigger the exclusive jurisdiction of the State Employment Relations Board (“SERB”). See *Franklin Cnty. Law Enforcement Ass’n v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St. 3d 167, 170 (1991). Plaintiffs do not explain why the Court should create an exception for them, one that would cause confusion over the procedure for resolving these claims to the detriment of employers and employees alike.

#### **COUNTERSTATEMENT OF THE CASE AND FACTS ON CROSS-APPEAL**

As shown in the State Defendants’ Merit Brief (at 5-10), this case concerns the budget bill for Fiscal Years 2012-2013, Am. Sub. H.B. 153. That bill modified Ohio’s prison-

privatization program by authorizing the Department of Rehabilitation and Corrections (“the Department”) to privatize five facilities either (1) by contracting out for their private operations or (2) by both privatizing those operations and selling the prisons. Am. Sub. H.B. 153 § 753.10(C)-(G). The Department ultimately contracted with Corrections Corporation of America (“CCA”) to operate the Lake Erie Correctional Facility, and sold the facility to CCA for over \$72 million; it contracted with Management and Training Corporation (“MTC”) to operate the North Central Correctional Institution. Am. Compl. ¶¶ 1-2. Plaintiffs—a union, its former members, and ProgressOhio.org—sued the State Defendants as well as local officials and private contractors. *Id.* ¶¶ 6-48. The State Defendants described Plaintiffs’ claim under the one-subject rule in their Merit Brief, and elaborate here only on the two claims in Plaintiffs’ cross-appeal.

**A. Plaintiffs’ claim under Article VIII, Section 4 of the Ohio Constitution**

Plaintiffs’ complaint alleged that the prison-privatization provisions violated Section 4 of Article VIII of the Ohio Constitution. The section includes two bans, each aimed at a different form of state entanglement with private enterprise. Section 4 states initially that “[t]he credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever,” and then that “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.” Ohio Const. art. VIII, § 4. The first ban (the “lending of credit” prohibition) bars the State from using its borrowing power for a private entity. The second ban (the “joint ownership” prohibition) bars it from jointly owning a company with a private entity.

The complaint alleged that the decision to privatize prisons violated the “joint ownership” clause; it did not allege that the privatizations violated the “lending of credit” clause. *See* Am. Compl. ¶¶ 1-2, 4, 154-58, 168(D). Specifically, Plaintiffs alleged that the State had “joined” its property with CCA and MTC. *See id.* at 33 (section heading titled “Joinder of Property Rights”);

*id.* ¶¶ 156-57 (alleging that the State Defendants’ actions make the State “a joint owner, created an ‘individual association’ and/or mixed its property rights with the rights of CCA [and MTC] . . . to such an extent that the result violates the prohibition in Section 4, Article VIII of the Ohio Constitution against joining public and private property rights”).

The State Defendants moved to dismiss this claim when they moved to dismiss the one-subject claim. Plaintiffs’ opposition described their claim as asserting that the State violated Section 4’s “prohibition . . . against joining public and private property rights.” Pls.’ Opp. to Mot. to Dismiss at 27-32 (Ohio Ct. Com. Pl. Oct. 5, 2012). The trial court dismissed this claim. It agreed that the statute required CCA and MTC to comply with various regulations, but found that “[r]egulatory oversight . . . is not the same as joint ownership” and that nothing else made the State a “joint owner” of the prisons. *See State ex rel. Ohio Civ. Serv. Employee Ass’n v. Ohio*, No. 12-CV-8716, at 20 (Ohio Ct. Com. Pl. Nov. 20, 2012) (“Com. Pl. Op.”).

The Tenth District affirmed. *State ex rel. Ohio Civ. Serv. Employees Ass’n v. Ohio*, 2013-Ohio-4505 ¶¶ 33-40 (10th Dist.) (“App. Op.”). It recognized that Section 4 permits the State to contract with private parties on terms the State deems proper to assist it in performing its many functions. *Id.* ¶ 35 (citing cases). And, like the trial court, it saw “nothing in plaintiffs’ complaint demonstrat[ing] that the challenged provisions result in the sort of partnerships or unions that the Ohio Constitution forbids.” *Id.* ¶ 38. “The state retains no ownership interest” in the sold prison because “the sale of the property as an entire tract” was “by quit-claim deed” leaving no state interest. *Id.* Further, the Tenth District found, the alleged Annual Ownership Fee paid by the State to CCA did not violate Section 4 because the State may contract with private actors to perform services and set the “mode of their compensation” as the State sees fit. *Id.* (quoting *Grendell v. Ohio EPA*, 146 Ohio App. 3d 1, 12 (9th Dist. 2001)).

**B. Plaintiffs’ claim that they qualify as “public employees” under R.C. 4117.01(C)**

In addition to their constitutional claims, the individual Plaintiffs sought a declaration that they were “public employees” under R.C. 4117.01(C), and entitled to the wages, benefits, and protections provided by the relevant collective bargaining agreement. *See* Am. Compl. ¶¶ 5, 159-66, 168(M). Plaintiffs also requested that the court restore their public-employment status, and order CCA and MTC to recognize them as public employees. *Id.* ¶ 172(I).

The trial court found that SERB had exclusive jurisdiction over whether Plaintiffs qualified as “public employees.” Com. Pl. Op. at 7. The Tenth District affirmed, holding that under this Court’s decision in *Franklin County Law Enforcement Association v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St. 3d 167 (1991), “SERB has exclusive jurisdiction” to interpret “the scope of ‘public employer’ as defined by R.C. Chapter 4117.” App. Op. ¶ 49 (citing *Franklin Cnty.*, 59 Ohio St. 3d at 169).

**ARGUMENT ON APPEAL**

**State Appellants’ Proposition of Law 1:**

*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 State Defendants’ Merit Brief made four points (at 11-35): (1) that this Court has long granted great deference to the General Assembly under the one-subject rule; (2) that, in the appropriations context, a bill’s subject includes state operations and that a provision in such a bill need only have a rational connection to the budget; (3) that the prison-privatization provisions satisfy these rules because they have a direct budget connection (in generating revenue and cutting costs); and (4) that the Tenth District’s contrary reasoning interpreted the one-subject rule too strictly. In response, Plaintiffs’ Merit Brief both proposes their own one-subject test and criticizes the State Defendants’ test. *See* Pls.’ Merit Brief at 18-31 (subsequent short citations to

Plaintiffs’ arguments are to Plaintiffs’ Merit Brief unless otherwise indicated). As for their own test, Plaintiffs argue (at 18-21) that the Court should define the subject of bills that balance the budget every two years as “appropriations” and permit only “appropriations” in the bills. As for the State Defendants’ test, Plaintiffs argue (at 21-31) that it disrespects this Court’s cases. Both arguments are mistaken.

**A. Plaintiffs’ test—requiring the biennial bills paying for governmental operations to include only appropriations—conflicts with traditional precedent and practice.**

Plaintiffs argue (at 18-21) that this Court should treat Am. Sub. H.B. 153 as an “appropriations” bill, and allow only “appropriations” (i.e., spending grants) in the bill. This new approach conflicts with this Court’s cases and with the General Assembly’s practices. Unsurprisingly, therefore, Plaintiffs’ authorities do not support their narrow view.

**1. Plaintiffs’ appropriations-only test conflicts with specific cases, with legislative practice, and with general principles.**

This Court’s specific cases, the General Assembly’s traditional practices, and the standard deference owed to the legislative body all prove that Plaintiffs lack support for their argument that the biennial bills providing for state operations may contain only “appropriations.”

*Specific Cases.* The Court has already defined the subject of these kinds of biennial bills as “the operations of the state government.” *ComTech Sys., Inc. v. Limbach*, 59 Ohio St. 3d 96, 99 (1991). Lower courts, too, have emphasized that a “biennial budget bill” “addresses the complex, but single subject of the state budget.” *Solon v. Martin*, 2008-Ohio-808 ¶¶ 22-23 (8th Dist.); *City of Riverside v. State*, 190 Ohio App. 3d 765, 2010-Ohio-5868 ¶ 44 (10th Dist.) (French, J.) (noting that “revenues and expenditures compose the core of an appropriations bill”). This Court (and the lower courts) have never suggested that the General Assembly must limit these kinds of budget bills solely to spending appropriations.

Indeed, the Court has rejected Plaintiffs’ appropriations-only test three times. In *State ex rel. Dix v. Celeste*, 11 Ohio St. 3d 141 (1984), the challenger argued (like Plaintiffs here) that a bill violated the one-subject rule “by adding [an] appropriation provision” to provisions changing substantive law. *Id.* at 145. This Court disagreed because the “appropriation in [the bill] fund[ed] directly the operations of programs, agencies, and matters described elsewhere in the bill.” *Id.* Likewise, in *ComTech*, the Court upheld the inclusion of a *substantive* tax in a budget bill, holding that the bill may contain “a new object of taxation because the tax funds government operations described elsewhere in the Act.” 59 Ohio St. 3d at 99. And in *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St. 3d 225 (1994), the Court upheld provisions in a bill that “fund[ed] the Bureau of Workers’ Compensation and the Industrial Commission” and “amend[ed] the procedural and substantive law underlying the compensation of injured workers.” *Id.* at 229. None of these cases could survive Plaintiffs’ appropriations-only test.

*Legislative Practice.* Historical practice also undercuts Plaintiffs’ appropriations-only test. Across many administrations from different political parties, the General Assembly and Governor have balanced the state budget every two years through bills containing both appropriations and operational amendments. For example, Am. Sub. H.B. 1 (Am. Sub. H.B. 153’s predecessor signed by Governor Strickland) exceeded 3,000 pages and contained an exhaustive list of changes. *See* Am. Sub. H.B. 1 (2009). And Am. Sub. H.B. 291, the budget bill including the tax upheld in *ComTech*, contained many substantive provisions. *See* 1983 Ohio Laws 2872, 2872-3382 (Am. Sub. H.B. 291). It is too late in the day for this Court to suddenly call into question the way the political branches have balanced the budget every two years. *Cf.* *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (noting, when interpreting the Recess

Appointments Clause, that the Court “must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached”).

*General Principles.* Plaintiffs’ appropriations-only test cannot be reconciled with general principles. Plaintiffs’ Merit Brief pays lip service (at 21-22) to the need for deference in the area, noting that judicial review must be “‘limited.’” *State v. Bloomer*, 122 Ohio St. 3d 200, 2009-Ohio-2462 ¶ 48 (quoting *State ex rel. Ohio Civil Service Employees Ass’n v. State Employment Relations Board* (“OCSEA”), 104 Ohio St. 3d 122, 2004-Ohio-6363 ¶ 27). But Plaintiffs do not explain how their test comports with that deference. Their argument does not even cite the governing standard, which requires not just a one-subject violation but also a “manifestly gross and fraudulent” one. *In re Nowak*, 104 Ohio St. 3d 466, 2004-Ohio-6777 syl. ¶ 1. Unlike Plaintiffs, the Court should not treat its call for deference as a mere platitude—to be recited and then promptly ignored when deciding actual cases. Instead, this deference plays a role in identifying the proper framework: “[I]n order to accord appropriate deference to the General Assembly in its law-making function, a subject for purposes of the one-subject rule is to be liberally construed as a classification of significant scope and generality.” *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 498 (1999).

The broad subject that the courts have identified for budget bills—e.g., “the operations of the state government,” *ComTech*, 59 Ohio St. 3d at 99—implements this deferential standard. A direct (not just a rational) connection exists between revenues and expenditures. Most accountants (even most families) would view it as irrational *not* to consider their revenue when planning their spending. As for state government, Ohioans viewed it as sufficiently important for their elected representatives to consider the two together that they placed a balanced-budget requirement in the Ohio Constitution. *See* Ohio Const. art. XII, § 4; *id.* art. VIII, § 3.

Plaintiffs' narrow subject, by contrast, contains all of the subjectivity concerns—noted by the State Defendants' Merit Brief (at 11-19)—inherent in an aggressive view of the one-subject rule. Plaintiffs, for example, offer no *reasoning* why they chose “appropriations” as the level of generality at which to define the bill's subject. They could have just as easily (and arbitrarily) picked an even narrower standard, such as appropriations for economic development, *cf. Dix*, 11 Ohio St. 3d at 146, or appropriations for the Department. Courts must be cautious when relying on a litigant's narrow view of the subject, as “the permissible content of a ‘subject’ is infinitely and essentially malleable.” Daniel H. Lowenstein, *Initiatives & the New Single Subject Rule*, 1 Elec. L.J. 35, 47 (2002). Similarly, Plaintiffs' Merit Brief fails to explain (at 22) why a decision to balance the budget through a prison-privatization program qualifies as “unfettered logrolling,” whereas a decision to balance the budget through a tax increase qualifies as healthy compromise, *ComTech*, 59 Ohio St. 3d at 99. Courts should be equally cautious against allowing challengers to present disagreements with legislative policy choices under the guise of the one-subject rule.

## **2. Plaintiffs' authorities do not support their appropriations-only rule.**

Given that Plaintiffs' approach would change the manner in which the General Assembly operates, it should come as no surprise that they have cited nothing supporting their rule. *First*, Plaintiffs argue (at 18-19) that the Ohio Constitution uses the term “appropriation” rather than “budget” in various provisions, ranging from a referendum provision, *see* Ohio Const. art. II, § 1d, to a debt provision, *see id.* art. VIII, § 2h. Notably absent from Plaintiffs' list, however, is the provision at issue here. The one-subject rule itself uses the term “subject,” not “appropriation,” to define a bill's permissible scope. Ohio Const. art. II, § 15(D). If our framers had wanted to limit bills making appropriations *solely* to appropriations, they would have said so. Several state constitutions do exactly that, noting that “[a]ppropriation bills shall be limited to the subject of appropriations.” Ill. Const. art. 4, § 8; Alaska Const., art. II, § 13; Colo. Const. art.

V, § 32; Okla. Const. art. V, § 56. To adopt Plaintiffs’ view, this Court would have to add this language by judicial fiat. But the text of the Ohio Constitution may be modified only by the people, not by the courts. *See Hoffman v. Knollman*, 135 Ohio St. 170, 181 (1939).

*Second*, Plaintiffs say (at 19) that *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St. 3d 322, 2009-Ohio-4900, compels their test. But *LetOhioVote* is irrelevant. It involved the constitution’s *right-of-referendum* provision (which includes an exception for appropriations, Ohio Const. art. II, § 1d); it did not consider the *one-subject* provision (which says nothing about appropriations). 2009-Ohio-4900 ¶¶ 25-50. Further, this Court “strictly” construes that appropriations exception, *id.* ¶ 24, whereas it “liberally construe[s]” the one-subject rule so as not to “hamper the legislature or to embarrass honest legislation.” *Nowak*, 2004-Ohio-6777 ¶ 46 (citation omitted). The effects of the two provisions also could not be more different. A holding that a law does not fall within the appropriations exception permits a *referendum* on the law; a holding that a law violates the one-subject rule *invalidates* the law. In short, it speaks volumes that Plaintiffs’ best case interprets a different constitutional provision that contains different language, is subject to different rules of construction, and triggers a different remedy.

*Third*, Plaintiffs argue (at 19-20) that *OCSEA* and *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1 (1999), illustrate that a bill containing appropriations may contain *only* appropriations. Not so. While *OCSEA* struck down a provision in a budget bill that excluded employees of the Ohio School Facilities Commission from the collective-bargaining process, 2004-Ohio-6363 ¶ 36, it did not cast doubt on other *substantive* provisions in that law, *id.* ¶ 3. Plaintiffs’ view—that the law could include *only* appropriations—would have led the Court to invalidate the law’s changes to “over 90 sections of the Revised Code.” *Id.* As for *Simmons-Harris*, the Court “recognize[d] that appropriations bills . . . are different from other” laws because they, “of

necessity, encompass many items, all bound by the thread of appropriations.” 86 Ohio St. 3d at 16. It nowhere says that the only thing related to one appropriation is another appropriation.

*Fourth*, Plaintiffs invoke (at 27-28) out-of-state cases. Yet these cases either follow different standards that are incompatible with this Court’s standards or involve laws unlike Am. Sub. H.B. 153. In *Baiardi v. Tucker*, a trial court struck down a provision in an appropriations bill that “change[d] the statutory process for privatizing prison facilities” because the Florida Supreme Court had elsewhere adopted a rule barring *substantive* provisions in *appropriations* bills. No. 2011 CA 1838, 2011 WL 8559903, at 3 (Fla. 2d Cir. Ct. Sept. 30, 2011), *appeal dismissed sub nom Bondi v. Tucker*, 93 So. 3d 1106 (Fla. Ct. App. 2012) (lack of jurisdiction); *see Brown v. Firestone*, 382 So. 2d 654, 664 (Fla. 1980). As noted, this Court’s cases reject that strict rule. *See AFL-CIO*, 69 Ohio St. 3d at 229; *ComTech*, 59 Ohio St. 3d at 97, 99. The Court should follow this Court’s cases, not a conflicting case from a Florida trial court.

Plaintiffs’ Illinois case also has nothing to say here. *People v. Cervantes*, 723 N.E.2d 265 (Ill. 1999), involved a one-subject challenge to a *non-appropriations bill* with a “neighborhood safety” subject. *Id.* at 267. The Illinois Supreme Court invalidated a provision in the bill creating a licensing scheme for private detention centers. *Id.* at 269-70. After discerning the bill’s subject as “address[ing] ‘the main problems we’re having on our streets these days,’ specifically in relation to ‘gangs, drugs and guns,’” *id.* at 270, the court found that the licensing provisions were unrelated to “neighborhood safety.” *Id.* at 272-73. This case might help Plaintiffs if Am. Sub. H.B. 153 were about neighborhood safety. But it is about state operations.

**B. The State Defendants’ test—requiring a rational connection to the state budget—is the only one that reconciles all of the Court’s cases.**

Plaintiffs accuse the State Defendants of presenting a “wolf in sheep’s clothing” (at 18), asserting a “novel argument” (at 20), “advocat[ing] for a new broad rule” (at 25), and seeking

“radical changes” (at 27). Their arguments do not match their rhetoric. When making these assertions, they ignore cases that undercut their view, misconstrue other cases on which they rely, and assert slippery-slope and *stare-decisis* rationales that cut the State Defendants’ way.

*Cases Against Plaintiffs’ Position.* When attacking the State Defendants’ test, Plaintiffs ignore or reject some of the Court’s cases. As the State Defendants showed (at 20-25), each component of their two-part test originates with this Court. For the definition of the “subject,” the Court has said that budget bills have a broad state-operations subject. *See ComTech*, 59 Ohio St. 3d at 99. For the connection to this subject, the Court has adopted a deferential rational-basis test. *See Beagle v. Walden*, 78 Ohio St. 3d 59, 62 (1997). Plaintiffs ignore the rational-basis cases and merely claim (at 28-29) to distinguish *ComTech*. Factually, they say the revenue-generating law in *ComTech* “only amended the definition of a retail sale” and “did not enact a new tax”; legally, they say it preceded *Simmons-Harris* and *OCSEA*. They are mistaken on the facts. *ComTech* “held that a *newly created* sales tax on certain computer services and equipment, included in the biennial budget bill, did not violate the one-subject rule.” *Riverside*, 2010-Ohio-5868 ¶ 44 (emphasis added). Plaintiffs’ legal claim is irrelevant. A case does not lose precedential value with age. Neither *Simmons-Harris* nor *OCSEA* even cited *ComTech*, let alone overruled it. That Plaintiffs must now call for *ComTech*’s demise proves that only the State Defendants offer a test compatible with *all* of the Court’s cases, not just *some* of them.

This is made plain by Plaintiffs’ efforts (at 29) to confront the Tenth District’s *Riverside* decision, which upheld limits on *municipal* taxation in the *state* budget bill. 2010-Ohio-5868 ¶ 52. That case, they say, did not “discuss *Simmons-Harris* and its application to controversial substantive programs.” They are wrong. *See id.* ¶ 44 (discussing *Simmons-Harris*). Plaintiffs also assert that *Riverside* was overruled by *LetOhioVote*. But, as noted, *LetOhioVote* concerned

the right to referendum. In short, *Riverside* confirms that this Court has adopted a rational-effect-on-the-budget test because it applied that very test. 2010-Ohio-5868 ¶¶ 45-46, 48.

*Cases Cited By Plaintiffs.* Plaintiffs mistakenly assert (at 23-24) that the State Defendants' test requires the Court to overrule *Simmons-Harris* and *OCSEA*. Yet those cases comport with the test the State Defendants propose. *Simmons-Harris* concerned a school voucher program for the Cleveland City School District. 86 Ohio St. 3d at 1. There, the State argued that the one-subject rule allowed the General Assembly to include in the budget bill any new substantive legislation accompanied by an appropriation. The Court rejected the notion that "a substantive program created in an appropriations bill is immune from a one-subject-rule challenge as long as funds are also appropriated for that program." *Id.* at 17. Unlike here, in *Simmons-Harris* the State nowhere argued that the voucher program *affected* the budget in any way. Because the appropriated funds might have otherwise been appropriated to the school district directly (rather than to the children), the State gave no indication that the law had an impact on revenues or expenditures by even a single *penny*. Thus, no rational budgetary connection had been shown.

In any event, two details distinguish *Simmons-Harris* from this case and most others. Contrary to Plaintiffs' claims (at 23, 25), the prison-privatization provisions were neither "riders" nor "leading-edge" legislation. *See Simmons-Harris*, 86 Ohio St. 3d at 16. The provisions were not "riders" snuck into the bill; they were included within the as-introduced version of the bill and were well-publicized components of Am. Sub. H.B. 153's effort to eliminate a massive deficit. While Plaintiffs characterize (at 10) the wide publicity as "obscure media accounts" (articles in the Columbus Dispatch and Cleveland Plain Dealer, among others), they cannot show that the provisions were a "fraudulent" inclusion in the bill. *Nowak*, 2004-Ohio-6777 syl. ¶ 1; *cf.*

*Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 960 (9th Cir. 2010) (taking judicial notice of newspapers to show what was in public realm); *Ieradi v. Mylan Labs, Inc.*, 230 F.3d 594, 598 n.2 (3d Cir. 2000) (same). Additionally, the prison-privatization provisions modified an existing program; they cannot be described as the “creation of a substantive program.” *Simmons-Harris*, 86 Ohio St. 3d at 17. While Plaintiffs retort that the sales option was new (at 30), that option amended the program, it did not create a *new* one. And it is the privatization (not the sales) that caused Plaintiffs’ alleged injuries.

Plaintiffs’ reliance on *OCSEA* fares no better. As noted, that case invalidated a provision in a budget bill eliminating collective-bargaining rights for certain employees. 2004-Ohio-6363 ¶ 36. The State “offered little guidance regarding the manner in which [that provision] affect[ed] the state budget,” and the Court could uncover no “explanation whatever as to the manner in which the [provision] will clarify or alter the appropriation of state funds.” *Id.* ¶ 34. As the Tenth District found, therefore, *OCSEA* applied the State Defendants’ test. *See Riverside*, 2010-Ohio-5868 ¶ 47. While Plaintiffs now say (at 24) that the provision at issue had a direct effect on the state budget, *OCSEA* expressly held just the opposite. *See* 2004-Ohio-6363 ¶¶ 33-34.

*Plaintiffs’ Slippery Slope.* Plaintiffs argue (at 20-21) that the State Defendants’ test is “so broad that almost nothing would be excluded from an Appropriations Bill,” and they hypothesize collective-bargaining laws that could be included within it. If anything, however, it is Plaintiffs’ test that would create an intolerable slippery slope. They admit (at 22) that their approach would require the General Assembly to excise all revenue-raising measures from budget bills. If those measures do not pass, or only pass with modifications, the General Assembly might violate Ohio’s requirement to balance its budget. Plaintiffs’ position would result in a proliferation of reductionist legislation, severely hampering the efficacy of the General Assembly. Yet Plaintiffs

do not cite a single state, municipal, or other governmental entity in Ohio—particularly one operating under a balanced-budget requirement—that operates in the fashion Plaintiffs require. Regardless, their hypotheticals are overblown. They claim (at 20) that the General Assembly could change collective-bargaining laws in a budget bill. To do so, however, the State would have to identify a rational budgetary connection. And *OCSEA* said the State failed at this effort once before in the collective-bargaining context. *See* 2004-Ohio-6363 ¶¶ 34, 36.

*Stare Decisis.* Plaintiffs end (at 31) their critique of the State Defendants’ test with a call to *stare decisis*. This argument is ironic on two levels. At the most basic level, it is Plaintiffs’ test that would require this Court to overrule prior decisions. Only by adopting the State Defendants’ standards will the Court reconcile its cases in this area. More generally, the Court only entered the one-subject thicket by *overruling* a longstanding decision holding that the one-subject rule raised a directory (or political) question that was not justiciable by the courts. *See Pim v. Nicholson*, 6 Ohio St. 176, 180 (1856). The Court justified its reversal, moreover, on the ground that the broad deference that the courts should give the General Assembly adequately protected it from judicial micromanagement. *See Nowak*, 2004-Ohio-6777 ¶¶ 32-54. Even if any ambiguity exists about the meaning of this Court’s cases, therefore, *stare decisis* points toward resolving the ambiguity in a manner that comports with the longstanding deference to the General Assembly, not in a manner that exacerbates tension between the branches.

**C. When assessed under proper legal standards, the prison-privatization provisions are directly, not just rationally, related to Am. Sub. H.B. 153’s budgetary subject.**

Plaintiffs have good reason to argue for an appropriations-only test. They can attempt to invalidate the prison-privatization provisions only by arguing (at 25) that “none of those statutes are appropriations.” Once the Court rejects this test, it becomes obvious that these provisions pass muster. They are directly, not just rationally, related to Am. Sub. H.B. 153’s budgetary

subject. The prison-sale provisions provide a revenue stream. The sale of the Lake Erie facility raised over \$72 million. Am. Comp. ¶ 1. Likewise, the private-management provisions were aimed at reducing the costs of housing prisoners by requiring that the private contractor “convincingly demonstrate” it could achieve a 5% cost savings. R.C. 9.06(A)(4). Finally, legislative history confirms that the General Assembly affirmatively *relied* on these provisions to help balance the Department’s budget. See Legislative Service Commission, *Redbook* at 6 (Apr. 2011), available at <http://www.lsc.state.oh.us/fiscal/redbooks129/drc.pdf>.

**State Appellants’ Proposition of Law 2:**

*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.*

The State Defendants provided (at 35-42) two reasons why the Tenth District erred in remanding this case for the trial court to evaluate Am. Sub. H.B. 153’s *facial* validity and undertake a *line-by-line* analysis to excise other provisions. For one thing, this Court has instructed that courts may not invalidate bills in their *entirety* if they have a primary subject. Biennial budget bills satisfy this test because their primary subject is the budget. For another, this Court has held that courts should not consider the constitutionality of unchallenged provisions over which a plaintiff lacks standing. Instead, courts should dismiss challenges once they find both that a bill has a primary subject and that the provision causing the plaintiff’s injury is related to it. In response, Plaintiffs do not meaningfully address this Proposition of Law. Citing a few cases, they conclusorily state (at 31) that the Tenth District properly remanded for a determination “whether provisions should be severed or whether the entire bill may be declared void.” Their half-hearted argument does not justify the Tenth District’s relief.

**A. Plaintiffs offer no arguments to support the Tenth District’s suggestion that their complaint stated facts showing Am. Sub. H.B. 153’s *facial* invalidity.**

The State Defendants showed (at 38-39) that Plaintiffs had not stated a claim for *facial* invalidation because Am. Sub. H.B. 153 has a primary budgetary subject. The authorities that Plaintiffs cite (at 31) provide no basis to hold the contrary. *Sheward* involved facts likely never to arise again. The Court struck down an entire bill because “any possible identifiable core would not be worthy of salvation” given that the *core* provisions were unconstitutional on separation-of-powers grounds. 86 Ohio St. 3d at 501. Here, Plaintiffs do not suggest that Am. Sub. H.B. 153’s budget-related provisions are otherwise invalid. As for *State ex rel. Hinkle v. Franklin County Board of Elections*, 62 Ohio St. 3d 145 (1991), it did *not* invalidate an entire bill: It “sever[ed] the offending portion of the bill” to “save the portions of [the bill] which [did] relate to a single subject.” *Id.* at 149. Lastly, *Akron Metropolitan Housing Authority Board of Trustees v. State*, 2008-Ohio-2836 (10th Dist.), did not involve a budget bill. It concerned a bill that amended provisions concerning metropolitan housing authorities and zoning regulations, and also adopted a new provision allowing charter-school students to participate in extracurricular activities at school districts. 2008-Ohio-2836 ¶¶ 2-5. After finding these provisions unrelated, the court could not discern which was the primary one. *Id.* ¶ 27. Here, the primary subject is “the operations of the state government.” *ComTech*, 59 Ohio St. 3d at 99.

For good measure, the State Defendants note that Plaintiffs elsewhere cite (at 26-27; Pls.’ Supp. at 31-32) other provisions they say are unrelated to the bill’s subject. These other provisions do not show that the bill *as a whole* lacks a primary subject. It contains thousands of appropriations to dozens of agencies, which more than suffice to establish its budgetary core. *See* Am. Sub. H.B. 153 §§ 203.10-620.40. In sum, what the Court said in *OCSEA* applies here. “[T]here can be no doubt” that a budget bill has a primary subject. 2004-Ohio-6363 ¶ 34.

**B. Plaintiffs provide no explanation to support the Tenth District’s suggestion that they may challenge all provisions of the budget bill on a line-by-line basis.**

The State Defendants also showed (at 39-42) that the Tenth District mistakenly ordered a novel line-by-line assessment conflicting with the Plaintiffs’ complaint, with the method for resolving one-subject challenges adopted by *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, and with standing rules. Plaintiffs’ conclusory responses lack merit.

*Plaintiffs’ Complaint.* The complaint nowhere sought to invalidate any particular provision other than the prison-privatization provisions. Plaintiffs admit this. Their Statement of the Case says (at 13) they “asked for the severance of the prison privatization provisions and/or that H.B. 153 in its entirety be declared unconstitutional.” Their Argument (at 31) says they “asked for severance of the prison privatization provisions.” Plaintiffs respond (at 31) that Civ. R. 54(C) makes up for their failure to plead broader claims because it allows the Court to grant unpleaded “relief.” This argument is, to say the least, an aggressive reading of that rule.

It is well established that the federal analogue should not be read to place “no limitations” on relief; instead, any “relief must be based on what is alleged in the pleadings and justified by plaintiff’s proof.” Charles Alan Wright et al., *Federal Practice & Procedure* § 2662 (3d ed. 1998); *cf.* Civ. R. 54(C) cmt. (1994) (noting the state rule is identical). Further, the scope of relief is *claim-specific*; the new remedy must be based on the same claim. *See USX Corp. v. Barnhart*, 395 F.3d 161, 165 (3d Cir. 2004) (noting that the rule “is not designed to allow plaintiffs to recover for claims they never alleged”). Plaintiffs’ challenges to other provisions are new *claims*, not new *relief* for claims against the prison-privatization provisions.

Plaintiffs’ reading of Civ. R. 54(C) also conflicts with the Court’s cases. *Groch* squelched a one-subject challenge after determining that the bill had a primary subject and that the challenged provision related to it. 2008-Ohio-546 ¶ 210. Yet if Civ. R. 54(C) permitted a

plaintiff challenging *one* provision to challenge *any* provision, the Court should have proceeded to address the other provisions that were allegedly “so unrelated to [the bill’s] primary subject as to violate the one-subject rule.” *Id.* Likewise, *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, noted that it could not consider the constitutionality of an entire bill under the one-subject rule because the plaintiff challenged only three provisions. 2007-Ohio-6948 ¶ 79. Yet if Civ. R. 54(C) permitted a plaintiff challenging a specific provision to challenge *all* others, the Court should have considered the facial challenge.

*Plaintiffs’ Standing.* Plaintiffs’ complaint pleaded no facts showing that they had standing to challenge anything other than the prison-privatization provisions. The harms that Plaintiffs allege to give them standing—the employment changes for the individual Plaintiffs resulting from the privatizations, *see* Am. Compl. ¶¶ 69-123—would not be redressed by striking down those other provisions. *Compare Arbino*, 2007-Ohio-6948 ¶¶ 83-84 (refusing to consider constitutionality of specific provision because plaintiff lacked standing), *with Hinkle*, 62 Ohio St. 3d at 150-51 (permitting challenge against specific provision because plaintiff had standing). In response, Plaintiffs do not even assert that they have standing to challenge the other provisions. But they proceed to challenge them nevertheless—conclusorily suggesting (at 22, 25) that this Court should now sever provisions permitting the State to sell the Ohio Turnpike and provisions authorizing the State to transfer liquor operations and revenues to JobsOhio.

Plaintiffs’ arguments provide good examples why the Tenth District’s line-by-line approach was mistaken. As for the provisions concerning the Ohio Turnpike, they were repealed. *See* Am. Sub. H.B. 51 § 101.102 (2013) (repealing R.C. 126.60 to R.C. 126.605). Plaintiffs offer no theory how the never-implemented authority to sell the Ohio Turnpike in a repealed law injured them. Instead, they seek an improper advisory opinion. *See State ex rel.*

*Barletta v. Fersch*, 99 Ohio St. 3d 295, 2003-Ohio-3629 ¶ 22. As for the provisions concerning JobsOhio, keep in mind that one of the Plaintiffs is ProgressOhio.org. See Am. Compl. ¶ 19. That entity previously “concede[d]” that it has “no personal stake” against JobsOhio. *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St. 3d 520, 2014-Ohio-2382 ¶ 8. And, just months ago, this Court rejected its standing to challenge JobsOhio. See *id.* ¶¶ 26-27. Suddenly after that decision, Plaintiffs seek to transform this litigation against prison privatization into litigation against JobsOhio. The Court should not permit litigants to avoid the effects of its judgments in this way. If ProgressOhio lacks standing to challenge JobsOhio in a suit actually against JobsOhio, it lacks standing to challenge JobsOhio in a suit against something else.

### **ARGUMENT ON CROSS-APPEAL**

#### **State Cross-Appellees’ Proposition of Law 1:**

*The State does not violate Article VIII, Section 4 of the Ohio Constitution when it contracts with a private entity for the purchase or sale of property, goods, and services.*

The State’s sale of the Lake Erie Correctional Facility to CCA comports with Article VIII, Section 4 of the Ohio Constitution (which prohibits the State from lending its credit to, or becoming a joint owner of, private businesses). It is undisputed that Section 4 permits the State to sell its property to private parties and to contract with private parties for services. That is all that happened here—the State’s contract with CCA sells the prison to CCA and purchases from CCA the right to use CCA’s private facility to house the State’s prisoners. Plaintiffs, by contrast, wrongly argue (at 32-38) that two constitutionally permissible contracts suddenly become constitutionally impermissible when added together. That is mistaken.

**A. Section 4’s plain text, its original public meaning, and this Court’s cases interpreting it all show that it does not regulate a state contract with a private entity for the purchase, sale, or use of real property, goods, or services.**

Section 4’s plain meaning, the historical abuses against which it was enacted, and this Court’s cases all prove that the constitutional proscription does not regulate the State’s contract with a private entity for the purchase, sale, or use of real property, goods, or services.

**1. Section 4’s text does not regulate contracts between the State and private entities for the purchase, sale, or use of real property, goods, or services.**

“The first step in determining the meaning of a constitutional provision is to look at the language of the provision itself,” *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 520 (1994), as that language would be understood “in [its] usual, normal, or customary” usage, *State ex rel. Taft v. Franklin Cnty. Ct. Com. Pl.*, 81 Ohio St. 3d 480, 481 (1998). Here, Section 4’s language shows that it does not cover contracts with private entities for the State’s purchase or sale of real property, goods, or services. In full, Section 4 provides:

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.

Ohio Const. art. VIII, § 4. This text contains two prohibitions in two clauses.

Section 4’s first clause prohibits the State from “giv[ing] or loan[ing]” the State’s “credit” to a private entity. *Id.* This language should be broken down into its two parts—(1) the “giv[ing]” or “loan[ing]” of (2) state “credit.” The meaning of “giving” and “loaning” is obvious, requiring the State to provide something for free (“give”) or to grant the temporary use of something on expectation of its return (“loan”). See Noah Webster, *A Dictionary of the English Language: Abridged from the American Dictionary* 186, 225 (University ed. 1845). Further, the State’s “credit” means the State’s “ability to borrow” or a “loan of money” to the State. *State ex rel. Saxbe v. Brand*, 176 Ohio St. 44 syl. ¶ 1 & 46-47 (1964) (citing Burrill’s

1859 Law Dictionary); John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union* 383 (3d ed. 1848) (defining “credit” as “[t]he ability to borrow, on the opinion conceived by the lender that he will be repaid”); 4 Francis Lieber, *Encyclopedia Americana, A Popular Dictionary of Arts, Sciences, Literature, History, Politics and Biography* 8 (1849) (same). Putting the two together, Section 4’s lending-of-credit ban restricts the State from providing to a private party both the State’s “ability to borrow” (i.e., acting as a *surety* or *guarantor* for that party) or the State’s “loan of money” (i.e., financing that party with funds received through *state borrowing*). See *Saxbe*, 176 Ohio St. at syl. ¶ 1; cf. David M. Gold, *Public Aid to Private Enterprise Under the Ohio Constitution: Sections 4, 6, and 13 of Article VIII in Historical Perspective*, 16 U. Tol. L. Rev. 405, 410 (1985) (“The term ‘loan of credit’ was common in the nineteenth century.”).

Section 4’s second clause prohibits the State from becoming a “joint owner” or “stockholder” in “any company or association.” This language, too, has two parts, requiring the State to be (1) a “joint owner” or “stockholder” in (2) a “company” or “association.” A “joint owner” is someone who shares an ownership interest in something with others. See Henry Campbell Black, *A Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence* 662 (2d ed. 1910) (defining “joint” as “[u]nited; combined; undivided”); *id.* at 865 (defining “owner” as “the person in whom is vested the ownership, dominion, or title of property”). Under Section 4, moreover, the “ownership” is not just of *anything*, but of a “formed” *juridical entity*—e.g., a “company” or “association.” Ohio Const. art. VIII, § 4; see Bouvier, *Law Dictionary*, at 273 (defining “company” as “association of a number of individuals for the purpose of carrying on some legitimate business”). That fact is

clarified by the reference to “stockholder,” a term of art meaning someone who owns “shares of stock” in a *company*. Black, *A Law Dictionary*, at 1112.

As the plain language of both prohibitions shows, neither says anything about the State’s ability to enter into a contract with a private party concerning the purchase, sale, or use of real property, goods, and services. If that were Section 4’s intent, the framers would have used far different language, broadly barring the State from contracting with private parties, not narrowly barring it from lending credit or jointly owning a company. Just as Section 4’s language cannot be interpreted to prohibit the government from undertaking any business activities on its *own account*, see *Walker v. City of Cincinnati*, 21 Ohio St. 14, 55 (1871), it also cannot be interpreted to prohibit state contracts with private parties that do not involve either lending the State’s borrowing power or owning a business association with a private company.

The narrow domain of Section 4’s two prohibitions is further illustrated by the plain language of nearby Section 6—a broader restriction governing *municipalities* rather than the *State*. Like Section 4, Section 6 prohibits a municipality from “becom[ing] a stockholder in any joint stock company, corporation, or association,” and, like Section 4, Section 6 prohibits a municipality from “loan[ing] its credit to, or in aid of, any such company, corporation, or association.” Ohio Const. art. VIII, § 6. Unlike Section 4, however, Section 6 additionally prohibits a municipality from “rais[ing] money for” private entities. *Id.* (emphasis added); see *Grendell v. Ohio EPA*, 146 Ohio App. 3d 1, 8 (9th Dist. 2001) (noting that the two provisions are “not identical”); cf. *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate

inclusion or exclusion.” (citation omitted)). This language adds that municipalities (unlike the State) also may not raise *any* funds (not just *borrowed* funds) for private parties.

**2. Section 4’s original public meaning confirms that it was not intended to regulate contracts between the State and private entities for the exchange of real property, goods, or services.**

The history of Section 4, passed during Ohio’s 1851 Second Constitutional Convention, confirms that it was not publicly understood as regulating a contract between the State and a private entity for real property, goods, or services. To the contrary, Section 4 was passed in response to concerns about the State using its *borrowing power* either (1) to lend to private entities or (2) to invest directly in those entities. *See Walker*, 21 Ohio St. at 53-54.

In Ohio’s early years, its economy struggled because its nascent transportation infrastructure could not quickly deliver goods to market. *See Gold*, 16 U. Tol. L. Rev. at 408; Harry N. Scheiber, *Ohio Canal Era: A Case Study of Government and the Economy, 1820-1861*, at 7 (1968). This created demand for infrastructure improvements financed by state and municipal borrowing. *Gold*, 16 U. Tol. L. Rev. at 408. “[T]wo common methods of providing public financial assistance” developed. David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. Pa. L. Rev. 265, 278 (1963). Under the first method, public authorities would give their *borrowing power* to private railroad and canal companies. Sometimes, they would “guaranty” the private bonds of those companies (i.e., agree to pay on default). *See id.* at 278-79. Other times, they would provide the companies with “public bonds” (i.e., give them certificates indicating that the government agreed to pay a certain amount, which the companies then sold to lenders to obtain a cash infusion). *See id.*; *Gold*, 16 U. Tol. L. Rev. at 410. Under the second method, the public authorities would make direct *investments* in the private railroad and canal companies. Typically, the government would purchase “stock subscriptions” from the companies in

exchange for its public bonds. Pinsky, 111 U. Pa. L. Rev. at 279. Ohio’s “Loan Law” of 1837 provides an example of both funding methods. Under that law, the General Assembly *required* the State, if certain statutory factors were met, to give railroad companies public bonds and to purchase the private stock of canal companies. *See* 35 Ohio Laws 76, 76 (1837).

In only a few years, the Loan Law exploded the public debt, which rose from \$400,000 in 1825 to over \$17 million in the 1840s. *See* Ernest L. Bogart, *Internal Improvements and State Debt in Ohio: An Essay in Economic History* 243 tbl. II cont’d. (1924). This debt burden caused widespread cries for constitutional reform, *see* Pinsky, 111 U. Pa. L. Rev. at 265, leading to the Second Constitutional Convention beginning in 1850. The convention debates reflected this concern with the use of the government’s borrowing power to finance private companies. *See* Gold, 16 U. Tol. L. Rev. at 411; 1 *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51*, at 469 (1851) (“And sir, we ask now, that debt-contracting, loan-laws, and money-squandering may forever be put an end to—that the whole system may be dug up by the roots, and no single sprout ever permitted to shoot up again.”); *id.* at 472 (noting opposition to any further increase in state debt).

Sections 4 and 6 of Article VIII arose out of this convention. Like Ohio, most States also passed similar clauses in the 1800s targeting similar practices. *See* Ralph L. Finlayson, *State Constitutional Prohibitions Against Use of Public Financial Resources in Aid of Private Enterprises*, 1 *Emerging Issues St. Const. L.* 177, 179 n.3 (1988) (citing 41 state provisions). “Three principal types” of clauses emerged across the country, all of which are evidenced in Section 4 or Section 6. Pinsky, 111 U. Pa. L. Rev. at 278. Section 4’s lending-of-credit and joint-ownership bans “were a direct response to [the] two common methods of providing public financial assistance” illustrated by Ohio’s Loan Law—public borrowing for, or purchasing stock

in, private entities. *Id.* Neither, however, “erect[ed] any barrier against loans or donations financed out of current taxation, or against gifts of land.” *Id.* at 279. That is where Section 6’s raising-of-money clause kicked in—to prohibit such practices by *municipalities*. Unlike Ohio, moreover, other constitutions prohibited their state (not just their municipal) governments from lending or donating to private entities. *See, e.g.*, N.Y. Const. art. 7, § 8(1); Ky. Const. § 177.

This history makes clear that the lending-of-credit and joint-ownership prohibitions were not publicly understood as affecting the ability of the State to contract with a private party for the purchase, sale, or use of real property, goods, or services. Far from it, they were designed to prohibit the *specific* abuses adopted by the Loan Law of 1837—the use of *public borrowing* to finance, or invest in, private companies. *Cf.* Pinsky, 111 U. Pa. L. Rev. at 280 (noting that “each change in each state was a direct reaction to the specific evils which had manifested themselves in that and perhaps neighboring jurisdictions”). Indeed, that Section 6 included a *broader* raising-of-money ban illustrates that Ohioans viewed municipal practices as raising greater concerns and requiring greater regulation than state practices. *See Walker*, 21 Ohio St. at 53-54.

**3. This Court’s cases confirm that Section 4 does not prohibit the State from contracting with private entities for the purchase, sale, or use of real property, goods, or services.**

Not surprisingly given Section 4’s plain text and original meaning, the Court has never held that it prohibits the State from contracting with a private entity for the purchase, sale, or use of real property, goods, or services. Rather, when interpreting Sections 4 (or even its broader Section 6 cousin), the Court has held both that the State (or a municipality) may sell its property and that the State (or a municipality) may contract with private parties for goods or services.

This Court has long recognized that Section 4’s lending-of-credit and joint-ownership provisions (and even Section 6’s raising-of-money provision) do not restrict the power of the government to sell property. *See, e.g., State ex rel. Bruestle v. Rich*, 159 Ohio St. 13, syl. ¶ 10

(1953); *City of Cincinnati v. Dexter*, 55 Ohio St. 93, 109-10 (1896). Such sales are “a different thing from investing public money in the enterprises of others, or from aiding them with money or credit.” *Taylor v. Ross Cnty. Commrs.*, 23 Ohio St. 22, 34 (1872); *cf. State v. Medbery*, 7 Ohio St. 522, 537 (1857) (“All will admit that the state may at any time sell [its public works].”). This rule comports with nationwide practice. Florida courts, for example, have said that “[w]hether or not legally authorized contracts for the sale of land by [the government] are wise as a matter of policy is solely in the discretion of the officers of the [the government] to determine, and such discretion will not be interfered with by the courts, unless there is a showing of illegality, fraud, or abuse of authority.” *Bailey v. City of Tampa*, 111 So. 119, syl. (Fla. 1926); *see also, e.g., City of Clovis v. Sw. Pub. Serv. Co.*, 161 P.2d 878, 882 (N.M. 1945) (finding that municipality may sell public utility to a private entity); *Churchill v. City of Grants Pass*, 141 P. 164, 166-67 (Or. 1914) (finding that municipality may sell railroad to a private entity).

Likewise, this Court has long recognized that Sections 4 and 6 do “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.” *Taylor*, 23 Ohio St. at 33. Thus, it has noted that the government may lease property from private entities for government use. *See, e.g., Alter v. City of Cincinnati*, 56 Ohio St. 47, 64 (1897) (noting that a public entity “may lease from an individual or corporation any property of which it may need the use”); *State ex rel. McElroy v. Baron*, 169 Ohio St. 439, 444 (1959) (upholding lease). This rule, too, comports with nationwide practice. *See, e.g., Citizens for Clean Air v. City of Spokane*, 785 P.2d 447, 458 (Wash. 1990) (upholding services contract with a garbage-incinerator company); *Walinske v. Detroit-Wayne Joint Bldg. Auth.*, 39 N.W.2d 73, 81-82 (Mich. 1949) (rejecting contention that municipalities were unconstitutionally lending their credit by entering into contracts for

professional services and leasing building); *see also, e.g., State v. Inter-Am. Ctr. Auth.*, 84 So. 2d 9, 15 (Fla. 1955); *Aven v. Steiner Cancer Hosp.*, 5 S.E.2d 356, 362 (Ga. 1939).

**B. Because Section 4 allows the State to contract with private parties for the purchase, sale, or use of real property, goods, or services, it permitted the Department’s sale of a prison to CCA and contract with CCA to use that privately owned prison.**

Plaintiffs’ complaint alleged that the Department’s sale of the Lake Erie prison to CCA and its contract for CCA to manage that prison (as well as the Department’s contract with MTC to privately manage the North Central facility) violated the “joint ownership” clause of Article VIII, Section 4. Am. Compl. ¶¶ 4, 156-57, 168(D). Yet Plaintiffs’ claim has transformed between the filing of their suit and the filing of their brief. They now assert (at 32-37) only that the Department’s prison sale to CCA violates Section 4; they make no argument that the State’s privatization agreement with MTC does so. Even with respect to CCA, Plaintiffs rely only on what appears to be a lending-of-credit claim concerning the Annual Ownership Fee, not on a joint-ownership claim. This evolution shows that Plaintiffs raise arguments in search of a claim. The Court should reject their revised version just as the lower courts rejected their earlier ones.

**1. The prison-privatization provisions comport with the joint-ownership ban.**

The complaint fails to state a joint-ownership claim because, as both lower courts found, “[t]he State of Ohio simply does not become a joint owner.” Com. Pl. Op. at 20; *see App. Op.* ¶ 38. Neither the prison sale itself nor the contract for the State to house its prisoners in the privately owned and operated prison show any such joint ownership.

*Sale of Prison.* The State cannot be described as a joint owner of the Lake Erie facility because, through the sale, it *divested* its ownership—e.g., its “right, title and interest”—of the prison. Pls.’ Supp. at 3; Am. Sub. H.B. 153 § 753.10(C)(2). Its deed “conveys a grantor’s *complete* interest or claim in certain real property.” Black’s Law Dictionary 503 (10th ed. 2014) (emphasis added); *see App. Op.* ¶ 38; *Whitt v. Whitt*, 2003-Ohio-3046 ¶ 20 (2d Dist.). Indeed,

Plaintiffs admit (at 37) that the State conveyed “all of [its] right, title and interest in real estate.” This total sale distinguishes this case from those in which courts have been troubled by the “commingling” of public and private property. *See McElroy*, 169 Ohio St. at 444; *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 466 (1959); *Alter*, 56 Ohio St. at 66. “The property interests of each party are separate and not commingled in a single enterprise.” *Grendell*, 146 Ohio App. 3d at 10. Nor, by selling the prison, has the State become a “stockholder” in any company. Instead, the complaint’s allegations make this case just like those where courts have held that governments may sell property without violating restrictions on associating with private entities. *See Dexter*, 55 Ohio St. at 109-10; *City of Clovis*, 49 N.M. at 275; *Bailey*, 111 So. at syl.

*Use of Prison.* The contract between the State and CCA *both* for CCA’s care of the State’s prisoners *and* for the State’s use of the prison do not show any joint ownership. It shows the opposite. The very fact that the State must enter into a contract with CCA proves that the parties have not entered into any illegal association. After all, “a public entity may, indeed, hire a private company to perform a public service.” *Grendell*, 146 Ohio App. 3d at 12. That is all the complaint shows. Just as the State may enter into an arm’s length contract with a testing company to run a vehicle-emissions program for automobile owners, *see id.*, so too it may enter into an arm’s length contract with a company for the use of a private prison. Further illustrating that the State and CCA are simply parties on different sides of a contract (and nothing more), CCA and its employees do *not* receive any state-law immunity against liability, *see* R.C. 9.06(B)(15), and do *not* share costs with the State for claims arising out of running the facility, *see* R.C. 9.06(D)(1)-(5). At day’s end, what this Court decided over a century ago decides this case: “The constitution does not forbid the employment of corporations, or individuals, associate or otherwise, as agents to perform public services.” *Taylor*, 23 Ohio St. at 78.

**2. The prison-privatization provisions comport with the lending-of-credit ban.**

The complaint likewise fails to state a lending-of-credit claim. To begin with, as noted, it does not even *plead* a lending-of-credit claim. Rather, the complaint alleged only an unlawful joinder of property. *See* Am. Compl. ¶ 4 (claiming that the statutes violate “the ‘Prohibition Against Joining Property Rights’ in Section 4, Article VIII”); *id.* at 33 (section heading titled “Joinder of Property Rights”); *see also id.* ¶¶ 156-57, 168(D). The failure to plead this argument shows that it has not been adequately asserted. Regardless, even if Plaintiffs had pleaded it, their alleged facts do not establish any unlawful lending of the State’s credit.

*Sale of Prison.* When the State sold the Lake Erie facility, it *received* from CCA over \$72 million. *See* Am. Compl. ¶ 1; Pls.’ Supp. at 2, 7. This sale thus did not lead the State to lend its credit to CCA. None of the State’s funds, let alone the State’s *borrowed* funds, were expended with the sale. It was CCA, not the State, that expended the funds.

*Use of Prison.* Nor does the State’s contract with CCA for the State’s use of CCA’s prison violate the lending-of-credit prohibition. Most notably, that prohibition does not “prescribe the mode of [the] compensation” that the State pays private entities in exchange for their services. *Grendell*, 146 Ohio App. 3d at 12 (quoting *Taylor*, 23 Ohio St. at 78). Here, as Plaintiffs’ cited materials show, the State contracted with CCA to provide two things. On the one hand, the State agreed to pay CCA for its *services* in operating and managing the prison. Pls.’ Supp. at 2. This “O&M” fee (a per diem, per prisoner amount) pays for prison operations and for the care of the prisoners. It is a fee that must be paid no matter who owns the prison. The State, for example, agreed to pay MTC a similar O&M fee for operating the *state-owned* North Central facility. *Id.* This contract for services does not create an illegal lending of credit. Indeed, state and local entities commonly contract with private companies to perform a wide variety of public services such as firefighting and emergency transportation. *See, e.g., R.C.*

307.05 (permitting county commissioners to “enter into a contract with . . . private ambulance owners”); R.C. 9.60(B) (permitting “private fire compan[ies]” to “contract with any governmental entity in this state or another jurisdiction to provide fire protection”).

On the other hand, because CCA now owns the *private* Lake Erie facility by paying the State over \$72 million for it, the State paid it an additional “Annual Ownership Fee” (something it does not pay MTC) for the ability to *use* CCA’s prison. *See* Pls.’ Supp. at 2. Otherwise, CCA would be permitting the State to use its private prison for free. So the State pays “for costs (e.g., purchase price recovery, renovation and fixed equipment) associated with the ownership[] of the [facility] and the use of [it] to house [Department] inmates.” Pls.’ Supp. at 25-26; *see also id.* at 27 (noting that a contractor “may be paid an Annual Ownership Fee for the ownership, if applicable, and use of the Institution to house [Department] inmates”). And while the State could have calculated the separate O&M and use fees jointly, it preferred to *separate* the two to ensure that it could change the *private manager* of the private prison (if, for example, a manager proved ineffective) even while the *private owner* remained the same. This type of fee for gaining access to real property (similar to paying rent) also does not create a prohibited lending of credit. *Cf. Alter*, 56 Ohio St. at 64 (public entity “may lease from an individual or corporation any property of which it may need the use”); *McElroy*, 169 Ohio St. at 444 (same).

In sum, this case falls squarely within the rule that Section 4 permits a contract between the State and a private entity for the purchase, sale, or use of real property, goods, or services.

**C. Plaintiffs’ arguments would require the courts to micromanage every contract between the State and private parties for goods or services.**

Plaintiffs now argue (at 32-37) that the State Defendants violated Section 4 *only* by agreeing to pay CCA the Annual Ownership Fee—referring to this fee as an improper “subsidy” to CCA for its ownership of the prison. This shows that, at the least, Plaintiffs concede their

claim with respect to the State's contract with MTC. *See State v. Quarterman*, 140 Ohio St. 3d 464, 2014-Ohio-4034 ¶ 18 (“Appellate courts generally will not consider a new issue presented for the first time in a reply brief.”). Furthermore, Plaintiffs’ arguments concerning CCA misconstrue both their factual materials and their legal authorities.

Start with the facts. Plaintiffs repeatedly make assertions that (at 37) the State “receives nothing in return” for the Annual Ownership Fee, or that (at 32) the State is merely “paying for CCA’s ownership costs” even though “the State does not own the prison.” Plaintiffs’ own cited contractual provisions (not to mention basic economics) show this to be untrue. Plaintiffs’ “subsidy” theory might make sense if the State continued to pay the fee even after housing its prisoners elsewhere. But the State continues to use CCA’s prison to house the State’s prisoners. Indeed, the State has an *exclusive* arrangement with CCA, which has agreed not to care for any out-of-state prisoners at the privately owned facility. Pls.’ Supp. at 26; *see also* R.C. 9.06(A)(4) (noting that “[n]o out-of-state prisoners may be housed in any facility that is the subject of a contract entered into under this section”). If the State did not pay the fee, CCA would be permitting the State to use CCA’s property for free. In other words, it is precisely because, as Plaintiffs say (at 32), “the State does not own the prison” that the State now must pay for the right to use it (unlike with the state-owned prison managed by MTC). The fee is analogous to a rent payment. *Cf.* Black’s Law Dictionary, at 1024 (defining “lease” as “[a] contract by which a rightful possessor of real property conveys the right to *use and occupy* the property in exchange for consideration” (emphasis added)). Under Plaintiffs’ view, unless CCA permits the State to use its prison property *for free*, the State is paying a “subsidy” to CCA. Such a baseless legal conclusion cannot state a claim. *See State ex rel. Hickman v. Capots*, 45 Ohio St. 3d 324, 324 (1989). The Ohio Constitution does not compel the State to be a squatter.

Regardless, even assuming that Plaintiffs' factual allegations justified their legal conclusion that the State has paid CCA a subsidy, Plaintiffs misinterpret Section 4 by saying (at 33) that a subsidy *automatically* violates that provision. Plaintiffs forget that it is Section 4, not Section 6, that is at issue here. Section 4's lending-of-credit prohibition does not prohibit *all* payments from the State to private entities. It prohibits only the State from *borrowing* money and then giving or loaning the *borrowed funds* to private entities. *Cf. Saxbe*, 176 Ohio St. at 46-47 (invalidating economic-development program in which proceeds from *revenue bonds* were loaned to private companies); *see also Florida v. Dixon*, 594 So. 2d 295, 297 (Fla. 1992) (noting that "pledging of public credit" means "the assumption by the public body of some degree of direct or indirect obligations to pay a debt of the third party" (citation omitted)); *Utah Tech. Fin. Corp. v. Wilkinson*, 723 P.2d 406, 412 (Utah 1986) (same); *Grout v. Kendall*, 192 N.W. 529, 531 (Iowa 1923) (same). Indeed, if all payments automatically violated the lending-of-credit ban, the framers would have served no purpose by adding the "raising money" ban in Section 6. Here, however, despite the need to allege state borrowing, Plaintiffs nowhere assert that the State pays CCA with *borrowed funds* as opposed to *regular appropriations*. Nor could they. The contract itself notes that its length may not exceed any biennium because "[t]he current General Assembly cannot commit a future General Assembly to any expenditure." Pls.' Supp. at 26.

Furthermore, the contract at issue here was "made in carrying out the public purpose" of housing the State's prisoners, not for some private business purposes. *McElroy*, 169 Ohio St. at 444. Contracts for public purposes like that have long been permitted. *See id.* (permitting contract between private company and government concerning port). As this Court has said, "the 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 Perkins v. Stockert*, 45 Ohio App. 2d 211, 218 (2d Dist. 1975) (“The fact that private individuals may, and probably will, derive an income or profit is not significant in the determination of what constitutes a public purpose.”).

Plaintiffs’ discussion of the case law does not show the contrary. They cite (at 34-35) *C.I.V.I.C. Group v. Warren*, 88 Ohio St. 3d 37 (2000), to suggest that the State has violated Section 4. But that case is far afield of this one. There, as Plaintiffs note, the City of Warren agreed to pay 20% of a private developer’s construction costs for building streets, water lines, and utilities in a new subdivision, and issued bonds backed by tax revenues to lend to the developer for its construction costs. *Id.* at 37-38, 40. The Court held “[t]hese actions by the city ‘raise money for’ and ‘loan its credit to or in aid of’ private corporations,” but did not distinguish between the two prohibitions. *Id.* at 40 Today’s case, by contrast, involves Section 4, which does not include the raising-money prohibition. And Warren’s use of taxpayer-backed *bonds* to finance a private developer qualified as a (classic) “lending of credit.” But nothing like that happened here. Plaintiffs mistakenly argue that the State has subsidized CCA and, regardless, identify no public bonds that the State has issued to finance CCA. *See also State ex rel. Tomino v. Brown*, 47 Ohio St. 3d 119, 119-21 (1989) (noting that municipality legally lent its credit for a public purpose by using *borrowed funds* to subsidize the poor’s low-income housing).

Plaintiffs’ effort (at 36-37) to distinguish *Grendell*, by comparison, relies on *factual* differences that are *legally* irrelevant. They claim (at 36) that in *Grendell*, “no State asset was sold” before the parties signed the challenged services contract. But Plaintiffs do not explain why a permissible sale contract and a permissible services contract become impermissible when undertaken *together*. If the two are permissible separately they are permissible jointly. Plaintiffs next note (at 36) that the contractors in *Grendell* paid money to the State, whereas the State pays

money to CCA. But that is because the *automobile owners* who had their car emissions checked in *Grendell* paid the fee (split between the State and contractor) for the services; Plaintiffs cannot seriously be arguing that Section 4 requires the State to have its *state prisoners* pay a fee to CCA for their lodging. Once it is recognized that the State must pick up the tab, this case is just like any other where the State “employ[s]” corporations “as agents to perform public services.” *Taylor*, 23 Ohio St. at 78. Plaintiffs also note (at 37) that *Grendell* cited *Taylor* for the proposition that a services contract does not implicate Section 4’s prohibitions, because it “is a different thing from . . . aiding [private enterprise] with money or credit.” 23 Ohio St. at 78. CCA, however, *is* providing the State with services—the *use and management* of CCA’s prison.

Lastly, Plaintiffs say (at 37) “[t]his is the first time in Ohio’s history that the State has sold a prison.” True enough. But a sale is a sale. And this is *not* the first time the government has sold something “big.” In *Dexter*, the City of Cincinnati sold a whole railroad. *See* 55 Ohio St. at 109. This Court did not decide to invalidate that sale merely because it was the first time a government had sold such a thing. Rather, it upheld the sale even under the more restrictive Section 6. *Id.* at 109-10. The same result must follow under the less restrictive Section 4.

### **State Cross-Appellees’ Proposition of Law 2:**

*SERB has exclusive jurisdiction to determine whether an employee qualifies as a “public employee” within the meaning of R.C. 4117.01(C).*

#### **A. SERB has exclusive jurisdiction to resolve all matters under R.C. Chapter 4117.**

Passed in 1983, “[t]he current 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.” *State ex rel. Cleveland v. Sutula*, 127 Ohio St. 3d 131, 2010-Ohio-5039 ¶ 16 (citation omitted). The chapter gives public employees the right to form employee organizations to represent them in

collective bargaining with their employers about wages, hours, and the like. R.C. 4117.03(A). It also establishes the State Employment Relations Board (“SERB”) to resolve disagreements under R.C. Chapter 4117, most often when an employee alleges that an employer or union committed an unfair labor practice by violating the chapter’s provisions. R.C. 4117.11(A)-(B).

Given this comprehensive scheme, the Court long ago held that SERB “has exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117.” *Franklin Cnty. Law Enforcement Ass’n v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St. 3d 167, syl. ¶ 1 (1991). The Court has broadly identified the things “committed” to SERB, noting that its jurisdiction extends to all “matters within R.C. Chapter 4117 in its entirety.” *Sutula*, 2010-Ohio-5039 ¶ 20 (citation omitted). Thus, “if a party asserts claims that arise from or depend on the collective bargaining rights created by R.C. Chapter 4117, the remedies provided in that chapter are” exclusive and exclusively within SERB’s domain. *Franklin Cnty.*, 59 Ohio St. 3d at syl. ¶ 2. Only “[i]f a party asserts rights that are independent of” the chapter may the party’s complaint “be heard in common pleas court” without first resorting to SERB. *Id.*

Under this divide, the Court has repeatedly dismissed claims brought in court that raise issues under R.C. Chapter 4117. The Court, for example, has dismissed a claim asserting that an employer “ignore[d] a valid binding collective-bargaining agreement,” *Sutula*, 2010-Ohio-5039 ¶ 21; *State ex rel. Fraternal Order of Police, Ohio Labor Council, Inc. v. Ct. Com. Pl. of Franklin Cnty.*, 76 Ohio St. 3d 287, 289-90 (1996), or that a “union breached its duty” to fairly represent the employee, *State ex rel. Ohio Dep’t of Mental Health v. Nadel*, 98 Ohio St. 3d 405, 2003-Ohio-1632 ¶ 22. The Court has, by contrast, permitted claims that arose independent of R.C. Chapter 4117 such as *constitutional* or *public-records* claims depending on the Ohio

Constitution and Public Records Laws, not R.C. Chapter 4117. *See Franklin Cnty.*, 59 Ohio St. 3d at 172; *Keller v. Columbus*, 100 Ohio St. 3d 192, 2003-Ohio-5599 ¶¶ 13-14.

Most relevant, “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.’” *Carter v. Trotwood-Madison City Bd. of Educ.*, 181 Ohio App. 3d 764, 2009-Ohio-1769 ¶ 58 (2d Dist. 2009) (citing cases), *jur. denied*, 122 Ohio St. 3d 1504, 2009-Ohio-4233. This Court has twice said that whether a particular employer qualifies as a “public employer” under R.C. 4117.01(B) is reserved for SERB’s initial determination. It has said so both when choosing between a board of commissioners or a sheriff as the relevant “public employer,” *Franklin Cnty.*, 59 Ohio St. 3d at 170, and when determining whether the Ohio Historical Society must adhere to R.C. Chapter 4117, *see Ohio Historical Soc’y v. State Employment Relations Bd.*, 66 Ohio St. 3d 466, 469 (1993). Relatedly, the Court has held that it is for SERB to determine whether a particular union qualifies as the “representative” of an employee. *Consolo v. Cleveland*, 103 Ohio St. 3d 362, 2004-Ohio-5389 ¶ 12. And lower courts have agreed that the question of who qualifies as a public employee is likewise for SERB to answer initially. *See Carter*, 2009-Ohio-1769 ¶¶ 58-60 (citing cases).

None of this is to say that courts have no role to play. But their role only gets triggered *after* SERB has made its initial determination and an aggrieved party has taken an administrative appeal to the courts. *See, e.g., Hamilton v. State Employment Relations Bd.*, 70 Ohio St. 3d 210, 214 (1994) (upholding SERB’s public-employee determination); *Doctors’ Prof’l Ass’n v. State Employment Relations Bd.*, 2004-Ohio-5839 ¶ 27 (10th Dist.) (same).

**B. The courts lack jurisdiction over Plaintiffs’ request for a judicial determination that they qualify as “public employees” under R.C. 4117.01(C).**

For two reasons, Plaintiffs’ complaint shows that they seek relief depending on, not independent of, R.C. Chapter 4117. They both ask for a threshold determination about whether they are public employees and seek remedies that originate with R.C. Chapter 4117.

*Public-Employee Status.* The complaint seeks “a declaration that the individuals currently working in [the private prisons] are public employees as defined in R.C. 4117.01(C).” Am. Compl. ¶ 5. In a section titled “R.C. 4117.01(C),” it asserts that Plaintiffs “satisfy the definition of a public employee” under R.C. Chapter 4117. *Id.* ¶¶ 159-66; *see also id.* ¶ 168(M) (requesting that the court declare that Plaintiffs “are public employees as defined in R.C. 4117.01(C)”). Accordingly, this case is like the “numerous cases” in which courts have found that it is for SERB to determine the “public” status of a particular employer or employee. *Carter*, 2009-Ohio-1769 ¶ 58; *see Franklin Cnty.*, 59 Ohio St. 3d at 170. Plaintiffs’ efforts to have the *courts*, not *SERB*, initially determine their “public” status conflicts with these cases.

*Requested Remedy.* Plaintiffs’ underlying *remedy* likewise falls within SERB’s domain. They do not seek a declaration that they are “public employees” for the sport of it. They seek that declaration because they prefer the terms of the collective-bargaining agreement that would apply to them if they were public employees. *See* Am. Compl. ¶ 162 (noting that Plaintiffs “are not afforded the benefits and emoluments of public employees, will not be paid according to the wage scale applicable to state public employees in the applicable CBA and will not receive the applicable benefits”). Accordingly, this case is just like the others in which a plaintiff has alleged that an employer has violated the relevant collective-bargaining agreement and seeks judicial relief for the alleged violation. *See Sutula*, 2010-Ohio-5039 ¶ 21. Indeed, the Court has *already* held that SERB has jurisdiction over claims brought in a court of common pleas alleging

that a prison closure violated the terms of the collective-bargaining agreement applicable to the relevant prison employees who were laid off. *See State ex rel. Wilkinson v. Reed*, 99 Ohio St. 3d 106, 2003-Ohio-2506 ¶¶ 17-21. This case is on all fours with that one.

**C. Plaintiffs’ contrary arguments mistakenly rely on a venue provision and effectively seek to overrule black-letter law.**

Plaintiffs’ contrary arguments lack merit. *First*, they argue the merits, asserting (at 38-39) that they *are* public employees because the definition of “public employee” in R.C. 4117.01(C) reaches those “working pursuant to a contract between a public employer and a private employer.” But this initial (mistaken) argument puts the cart before the horse. Whether or not they are public employees is the very question reserved for SERB. *See Franklin Cnty.*, 59 Ohio St. 3d at 170. The merits in no way help Plaintiffs establish jurisdiction.

*Second*, Plaintiffs wrongly argue (at 39) that R.C. 9.06(K) offers them a reprieve from SERB’s jurisdiction. R.C. 9.06(K) provides that a suit 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 of the Revised Code or section 753.10 of the act in which this amendment was adopted violates any provision of . . . the Revised Code” must be brought “in the court of common pleas of Franklin county.” R.C. 9.06(K). This language is best read as a venue provision, directing litigants to Franklin county (rather than others) for claims that courts may hear. Further, Plaintiffs’ claim does not even assert a violation by one of the specified actors. If anything, their allegations are (wrongly) asserted against their present *employers*. Finally, even if there were a conflict between R.C. Chapter 4117 and R.C. 9.06(K), R.C. Chapter 4117 “prevails over any and all other conflicting laws, resolutions, provisions, present *or future*, except as otherwise specified in this chapter or as otherwise specified by the general assembly.” R.C. 4117.10(A) (emphasis added). Nowhere does R.C. 9.06(K) “specify” that it trumps

SERB's jurisdiction. So R.C. Chapter 4117's rules—including its exclusive jurisdiction for SERB—control. *See Franklin Cnty.*, 59 Ohio St. 3d at 170.

*Third*, Plaintiffs argue (at 39-40) that their public-employee claim does not *expressly* invoke a provision under R.C. Chapter 4117 within SERB's exclusive jurisdiction. The Court has seen this argument before. Other plaintiffs have repeatedly claimed they were not “really” asserting claims under R.C. Chapter 4117 and were instead asserting other kinds of challenges—such as a declaratory-judgment action, *see Ohio Historical Soc'y*, 66 Ohio St. 3d at 469, or a tort claim, *see Nadel*, 2003-Ohio-1632 ¶ 21. This Court rejected those arguments, noting, for example, that plaintiffs cannot bypass SERB by seeking a declaratory judgment about the meaning of R.C. Chapter 4117. The “Declaratory Judgments Act . . . was not intended to be used to circumvent such comprehensive agency processes.” *Ohio Historical Soc'y*, 66 Ohio St. 3d at 469. If a plaintiff's *factual* allegations bring the claim within R.C. Chapter 4117, it does not matter what *legal* label the plaintiff puts on it. *Wilkinson*, 2003-Ohio-2506 ¶ 16 (rejecting plaintiffs' reliance on statute outside R.C. Chapter 4117); *Franklin Cnty.*, 59 Ohio St. 3d at 170 (same). That rule applies here. Indeed, Plaintiffs expressly rely on R.C. Chapter 4117 so this case is even more straightforward. *See* Am. Compl. at 34 (section titled “R.C. 4117.01(C)”).

*Fourth*, Plaintiffs oddly argue (at 42) that because they are so clearly *not* public employees, “there is a total lack of jurisdiction in SERB” for determining whether they *are*. That makes no sense. Plaintiffs are conceding their public-employee claim on the *merits* to establish *jurisdiction* in the courts over that claim. But R.C. Chapter 4117 provides only a single definition of “public employee”; it does not establish one for jurisdiction and another for the merits. Thus, to the extent the Court agrees with Plaintiffs, it simply means that the dismissal of

this claim *without* prejudice on jurisdictional grounds should be turned into a dismissal of this claim *with* prejudice on the merits that Plaintiffs are not public employees.

### CONCLUSION

The Court should reverse the Tenth District's decision that Plaintiffs stated a claim that Am. Sub. H.B. 153 violated the one-subject rule. The Court should, by contrast, affirm the Tenth District's decision that Am. Sub. H.B. 153 comported with Article VIII, Section 4, and that the courts lack jurisdiction to consider Plaintiffs' public-employee status. The Court should thus reinstate the trial court's judgment dismissing Plaintiffs' complaint in its entirety.

Respectfully submitted,

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