ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. JOBSOHIO,	:	**Case No. 12-1356**
Relator,	:	**ORIGINAL ACTION IN MANDAMUS**
v.	:	
DAVID GOODMAN, DIRECTOR, OHIO DEPARTMENT OF COMMERCE,	:	
Respondent.	:	

MEMORANDUM OF RELATOR JOBSOHIO IN OPPOSITION TO RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS

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I. INTRODUCTION

For over a year, Relator JobsOhio has been prevented from fully pursuing the important purposes of "promoting economic development, job creation, job retention, job training, and the recruitment of business to this state." R.C. 187.01. The benefits to be reaped throughout the State from JobsOhio's pursuit of those important public purposes have been stymied by a handful of private plaintiffs that—without any standing to do so—have raised an assortment of constitutional arguments casting a cloud over the validity of the Legislation[1] underlying JobsOhio's very existence.

As a direct result of those constitutional concerns, Respondent declined to execute the otherwise-final Franchise and Transfer Agreement, which would allow JobsOhio to proceed with its mission. Lacking any other complete legal remedy, JobsOhio commenced this action seeking a writ of mandamus compelling Respondent to execute the Agreement, and resolving all constitutional concerns regarding the Legislation once and for all.

Respondent has now submitted a lengthy and detailed Motion for Judgment on the Pleadings (the "Motion") advancing all of the constitutional arguments previously raised and advancing an additional constitutional challenge against the Legislation. Although Respondent's arguments here provide some additional clarity on the constitutional issues, they ultimately fail for the reasons explained at length in JobsOhio's August 10th Memorandum in Support of Writ of Mandamus.

These constitutional issues are now ripe for final resolution by this Court. The parties agree that this action raises pure issues of law, and furthermore agree that JobsOhio is entitled to

[1] As in Relator's Memorandum in Support of Writ, the "JobsOhio Act" refers to Am. Sub. H.B. 1 (129th General Assembly), Am. Sub. H.B. 153 (129th General Assembly), and R.C. Chapter 187; the "Transfer Act" refers to R.C. Chapter 4313; and the "Legislation" refers to all of those laws collectively.

the writ it seeks if the constitutional arguments lack merit. For the reasons explained below, each and every one of the constitutional challenges raised suffers from numerous defects, and therefore the Court should deny Respondent's Motion and issue a writ of mandamus compelling Respondent to execute the Franchise and Transfer Agreement.

II. LAW AND ARGUMENT

Although this case raises a broad range of constitutional issues, the procedural posture is quite narrow. JobsOhio is entitled to a writ of mandamus if: (1) JobsOhio has a clear legal right to the writ: (2) Respondent has a clear legal duty to execute the Franchise and Transfer Agreement; and (3) JobsOhio lacks an adequate remedy in the ordinary course of law. *See State ex rel. Lane v. City of Pickerington*, 130 Ohio St.3d 225, 226 (2011). The parties agree that the first and third requirements are met here. (Motion at 2-3.) The only issue before the Court, therefore, is whether Respondent has a clear legal duty to execute the Franchise and Transfer Agreement. And with respect to that issue, the parties agree that "there is no factual dispute requiring the presentation of evidence," as it raises pure questions of law. (Motion at 2 n.1.) This issue is therefore ripe for this Court's review.

Respondent's sole basis for denying that he has a duty to execute the Franchise and Transfer Agreement is that prior litigation has raised constitutional challenges against the Legislation, the merits of which no court has had an opportunity to address. (Complaint ¶¶ 51-52; Motion at 3.) Although Respondent's Motion does a thorough job of presenting and elucidating those constitutional challenges, it fails to overcome the heavy presumption in favor of constitutionality that all legislative acts enjoy:

> It is axiomatic that acts of the General Assembly are presumed valid under Ohio law and in cases of doubt should be held constitutional.

Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co., 128 Ohio St.3d 529, 536 (2011). As described below and in JobsOhio's Memorandum in Support of Writ, there is no doubt here that the Legislation is constitutional in its entirety. But even if there were any such doubts, they must be resolved by ***upholding*** the Legislation—not striking it down.

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

Respondent first claims that the JobsOhio Act violates Article XIII, Section 1 of the Ohio Constitution, which states that "[t]he General Assembly shall pass no special act conferring corporate powers." An act does not violate Article XIII, Section 1 unless it both (1) qualifies as a special act ***and*** (2) confers corporate powers. *See, e.g.*, *State ex rel. Kauer v. Defenbacher*, 153 Ohio St. 268, 280 (1950) ("Even a casual reading of the foregoing constitutional provision discloses that it is to apply only where corporate powers are conferred by 'special act.'"). The JobsOhio Act does ***neither*** and thus fully complies with the constitutional requirement.

1. The JobsOhio Act Is Not A "Special Act."

The first reason the JobsOhio Act does not violate Article XIII, Section 1 is because it is not a "special act." In this context, the term "special act" has a very particular meaning: "a special act, as distinguished from an act of a general nature, is one that is ***local and temporary*** in its operation." *State ex rel. Ohio Tpk. Comm'n v. Allen*, 158 Ohio St. 168, 172 (1952) (quoting *Defenbacher*, 153 Ohio St. at 270) (emphasis added); *see also Saxbe v. Alexander*, 168 Ohio St. 404, 409 (1959) (classifying an act authorizing the construction of a parking garage as "special" because it would not have "uniform operation throughout the state"). Respondent does not, and could not, show that the legislation here is "local and temporary," and thus his special act claim fails as a matter of law.

The parties agree on the historical circumstances that gave rise to the "special act" provision in Article XIII, Section 1. (*See* Motion at 6-7.) Members of Ohio's 1851 Constitutional Convention drafted this provision to quell the once-common practice of actually creating corporations via legislation—trifling acts that typically affected only isolated portions of the state and thus mattered little to the General Assembly as a whole. *See, e.g., Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51*, 284 (J.V. Smith reporter, 1851). Specifically, the drafters hoped to eradicate corrupt "log-rolling" schemes, *id.* at 351, and other provincial measures that were threatening to overrun the State legislature. *Id.* at 342. The goal of Article XIII, Section 1 was to ensure a fully-engaged legislative process:

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

Defenbacher, 153 Ohio St. at 280–81 (internal quotation marks and citations omitted).

Under this Court's rulings in *Allen* and *Defenbacher*, the JobsOhio Act plainly qualifies as a general, rather than a special, act. The JobsOhio Act is not "local and temporary in its operation," *Allen*, 158 Ohio St. at 172, but rather applies uniformly across the State. Unlike those localized, ephemeral measures that the Constitution's drafters feared, nothing in the JobsOhio Act limits JobsOhio's efforts geographically or temporally. To the contrary, JobsOhio's mission is to promote "economic development, job creation, job retention, job training, and the recruitment of business ***to this state***." R.C. 187.01 (emphasis added).

Consequently, JobsOhio is just as empowered to seek and support job creation and economic development in Franklin County as it is in Lima or in the rural southeastern parts of the State.

In passing the JobsOhio Act, all of the legislators in the General Assembly were considering a law that could affect their constituents, regardless of where they live or work in Ohio. The JobsOhio Act is thus not a special act and does not violate Article XIII, Section 1.

2. The JobsOhio Act Does Not Confer Corporate Powers.

Respondent's argument under Article XIII, Section 1 also fails for a second reason. That provision only prohibits a special act from "***conferring corporate powers***," and the JobsOhio Act does not confer corporate powers.

Soon after the Constitution's adoption, this Court had several opportunities to address the meaning of Article XIII, Section 1's "conferring corporate powers" language, and it consistently described that prohibition as two-fold: "The [G]eneral [A]ssembly cannot, by a special act, create a corporation[] . . . [or] confer additional powers upon corporations already existing." *State ex rel. Attorney Gen. v. City of Cincinnati*, 20 Ohio St. 18, 36 (1870). The JobsOhio Act does not "create" a corporation or "confer additional powers" on a corporation and therefore does not violate either restriction.

a. The JobsOhio Act Does Not "Create" A Corporation.

Unlike those special acts that the constitutional convention's members decried, *see, e.g.*, An Act to incorporate the Seneca Railroad Company, § 1, 1841-1842 Ohio Laws 109, 109 ("***Be it enacted by the General Assembly of the State of Ohio***, [t]hat . . . the Seneca Railroad Company, ***hereby incorporated***, ...") (second emphasis added), the JobsOhio Act does not "create" the JobsOhio corporation. Rather, it merely empowers the Governor to do so under

Ohio's nonprofit corporation laws. *See* R.C. 187.01 ("***The governor is hereby authorized to form a nonprofit corporation***, to be named 'JobsOhio[]' . . . .") (emphasis added).[2]

Moreover, nothing in the JobsOhio Act requires the Governor to take any action. It merely describes how the Governor should proceed ***if*** he decides to exercise this authority: by signing and filing articles of incorporation with the secretary of state—the same process required for all nonprofit corporations. *Compare* R.C. 187.01 ("The governor shall sign and file articles of incorporation for the corporation with the secretary of state."), *with* R.C. 1702.04(A) ("Any person . . . may form a corporation by signing and filing with the secretary of state articles of incorporation . . . ."). To be sure, JobsOhio did not come into existence when the General Assembly passed Am. Sub. H.B. 1 on February 1, 2011—it came into existence when Governor Kasich filed its articles of incorporation on July 5, 2011. *See* R.C. 187.01 ("The legal existence of the corporation shall begin upon the filing of the articles."). Accordingly, the General Assembly did not "create" JobsOhio via the JobsOhio Act, and the Act does not violate Article XIII, Section 1.

b. The JobsOhio Act Does Not "Confer Additional Powers."

The JobsOhio Act also does not violate Article XIII, Section 1 because it does not "confer additional powers" upon JobsOhio beyond those that all nonprofit corporations receive under R.C. Chapter 1702.

The meaning of the "conferring additional powers" limitation is simple and straightforward: to be unconstitutional, "the power attempted to be conferred by special legislation must be a ***new and additional power.***" *Korb v. Mitchell*, 2 Ohio N.P. 185 (Ham. Cnty. 1895) (emphasis added). "The reason for this rule is apparent, because to ***confer*** means to

[2] Respondent, in his motion, even concedes this distinction (Motion at 8 ("The JobsOhio Act at issue here . . . ***authorizes the creation of a private, non-profit corporation by the state.***")

invest with power, and no corporation could be said to be invested, by any act, with a power it already possessed." *Id.* (emphasis added). In this context, this Court has long distinguished between statutes that unconstitutionally ***confer*** corporate power and those that legitimately ***direct the exercise*** of an extant corporate power, be it naturally occurring or previously granted by general statute. *See, e.g., Sims v. Street R.R. Co.*, 37 Ohio St. 556 (1882) (upholding Cleveland ordinance authorizing railroad company to connect to local lines, because prior, general law had already granted city councils the ability to negotiate connections with railway companies); *Pa. & Ohio Canal Co. v. Comm'rs of Portage Cnty.*, 27 Ohio St. 14 (1875) (finding that statute allowing railroad company to abandon a canal did not offend Article XIII, Section 1, since the power to abandon property is an inherent power "that natural persons and private corporations may exercise at their pleasure").

Respondent cites a string of cases in which this Court held that the General Assembly had unconstitutionally conferred additional corporate powers on *municipal corporations*. *See State ex rel. Knisely v. Jones*, 66 Ohio St. 453 (1902) (General Assembly cannot pass special act authorizing the support of a police force specifically for the City of Toledo); *Platt v. Craig*, 66 Ohio St. 75 (1902) (General Assembly cannot pass special act authorizing "cities" to repair and build bridges, where the definition of "city" is effectively restricted to Toledo); *State ex rel. Attorney Gen. v. City of Cincinnati*, 20 Ohio St. 18 (1870) (General Assembly cannot confer corporate powers specifically on the city council of Cincinnati). But because these cases involve municipal corporations, they suffer from obvious factual inconsistencies, making comparisons to the instant scenario difficult. In fact, Respondent cites only one case involving a private corporation, *Cincinnati v. Trustees of Cincinnati Hospital*, 66 Ohio St. 40 (1902) (General

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(emphasis added)), but offers no evidence that such authorization is impermissible.

Assembly cannot pass special act authorizing local hospital board of trustees to funds a hospital extension by issuing bonds in the city's name). But if anything, *Trustees of Cincinnati Hospital*, in which the General Assembly explicitly granted an additional corporate power upon the hospital—to fund an expansion by issuing bonds in the name of the city—serves to distinguish the Legislation at hand, since it involves no such grant of power.

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

Respondent points out that the JobsOhio Act exempts JobsOhio from certain provisions of R.C. Chapter 1702. (Motion at 9 n.5, 10.) Yet Respondent fails to identify a single, ***additional*** corporate power that results from these exemptions. Indeed, none exists. Many of the exempted provisions would never apply to JobsOhio to begin with. For example, R.C. 1702.09 applies to any "religious society" that "has been continuously in existence since January 1, 1925." "Excusing" JobsOhio from an otherwise inapplicable requirement does not confer any additional power. In other instances, R.C. Chapter 187 exempts JobsOhio from a Chapter 1702 requirement, only to subject it to a more stringent alternative. For example, R.C. 187.03(A)

exempts JobsOhio and its board of directors from R.C 1702.03 (which provides the various purposes for which nonprofits may be formed), but R.C. 187.01 restricts JobsOhio to the following specified public purposes: "promoting economic development, job creation, job retention, job training, and the recruitment of business to this state."

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

In sum, Chapter 187 in no way expands JobsOhio's corporate powers beyond those contained in Chapter 1702 and thus does not "confer corporate powers" upon JobsOhio. And because the JobsOhio Act is neither a "special act" nor one that "confers corporate powers," it does not violate Article XIII, Section 1 of the Ohio Constitution.

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

Respondent's second argument invokes Article XIII, Section 2, but it is merely a corollary of the argument addressed above under Article XIII, Section 1 and therefore fails for the same reasons.

Article XIII, Section 2 states in relevant part that "[c]orporations ***may be formed*** under the general laws" (Emphasis added.) This provision does not restrict the General Assembly, but rather ***empowers*** the legislature to act. *Drake*, 11 Ohio St. at 26 (describing Article XIII, Section 2 as "an express ***authority*** to subsequent legislatures to pass general laws creating corporations")

(emphasis added); *see generally Katz v. Dep't of Liquor Control*, 166 Ohio St. 229, 232 (1957) (holding that the word "may" is "permissive" in nature, rather than "mandatory").

This grant of authority in Article XIII, Section 2 is simply the corollary of the restriction in Article XIII, Section 1. By definition, all laws are either "special" or "general." *Desenco, Inc. v. City of Akron*, 84 Ohio St.3d 535, 541 (1999). Section 1 simply prohibits the General Assembly from conferring corporate powers via the former, and Section 2 emphatically permits it via the latter. Indeed, this Court has recognized that Section 2 is actually superfluous because the Constitution already contains a general grant of legislative power that would include the ability to confer corporate powers. *Drake*, 11 Ohio St. at 26 ("The general grant of legislative power in the constitution of 1851, would have sufficed . . . ."). It is therefore not surprising that Respondent has not identified any instance in which an Ohio court has invalidated legislation for violating Article XIII, Section 2.

For all the reasons cited above, the JobsOhio Act is a general law and does not confer corporate powers. In contrast to "special acts," the JobsOhio Act has uniform operation throughout the State, and thus did not create the prospect of disinterested legislators—i.e., legislators who would cast votes but lack constituents who would feel the effect of the legislation. Moreover, it does not expand JobsOhio's powers beyond those that all Ohio nonprofit corporations have under R.C. Chapter 1702. The JobsOhio Act therefore fully complies with both Article XIII, Section 1 and Article XIII, Section 2.

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

Respondent faces a high hurdle in pressing his claim that the 60-day window for filing claims under R.C. 187.09(C) violates Article I, Section 16's Open Courts provision and that hurdle has not been cleared here. (Motion at 10-12.) In addition to the heavy presumption of

constitutionality afforded to all statutes, in the context of statutes of limitations, this Court has expressly noted that "[t]he period within which a claim must be brought . . . is a policy decision best left to the General Assembly." *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 319 (2007). Respondent offers no good reason for this Court to invalidate the General Assembly's policy decision reflected in R.C. 187.09(C), and the Court should decline to do so.

In the very cases on which Respondent relies, (*see* Motion at 11), this Court has expressly reaffirmed that in reviewing statutes of limitation, just as with all statutes, "[i]t is axiomatic that acts of the General Assembly are presumed valid under Ohio law and in cases of doubt should be held constitutional." *Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co.*, 128 Ohio St.3d 529, 536 (2011) (rejecting constitutional challenge to statute of limitations). Likewise, in *Pratte v. Stewart*, 125 Ohio St.3d 473, 481 (2010), in the course of rejecting an Open Courts challenge to a statute of limitations, this Court observed that "[a]ny constitutional analysis must begin with the presumption of constitutionality enjoyed by all legislation, and the understanding that it is not this court's duty to assess the wisdom of a particular statute." *See also State ex re. Miami Overlook, Inc. v. Germantown*, 2011-Ohio-3419 (2d Dist.) (relying on presumption of constitutionality in rejecting Open Courts challenge to statute of limitations in R.C. 713.12).

If anything, this presumption of constitutionality is even stronger with regard to statutes of limitations than with other statutes. As this Court expressly observed in rejecting a claim that a statute of limitations is too short, the time period for bringing a claim is a "policy decision best left to the General Assembly":

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

Leininger, 115 Ohio St.3d at 319 (emphasis added); *see also In re Estate of Centorbi*, 129 Ohio St.3d 78, 85 (2011) ("Finally, and most importantly, 'the period within which a claim must be brought . . . is a policy decision best left to the General Assembly.'") (quoting *Leininger* and upholding statute of limitations).

Here, the General Assembly has exercised its policy judgment and concluded that given the speed at which JobsOhio's principal function (i.e., economic development) marches, potential litigants must quickly raise their constitutional challenges to any particular action that JobsOhio takes. To that end, R.C. 187.09(C) provides for a 60-day limitations period to assert constitutional challenges to JobsOhio's actions: "any claim asserting that any action taken by JobsOhio violates any provision of the Ohio Constitution shall be brought in the court of common pleas of Franklin county within sixty days after the action is taken." This language reflects the General Assembly's considered judgment that if JobsOhio's conduct purportedly violates the Constitution in connection with a particular economic development transaction, that issue must be addressed and resolved as soon as possible, so that JobsOhio can proceed with (or refrain from) the transaction as appropriate. Indeed, one could scarcely imagine how JobsOhio could function if its every decision—from how it secures funding, to its decisions to undertake particular transactions promoting its economic development objectives—are subject to challenge for years down the road.

Respondent's challenges to the statute fail to carry his heavy burden of establishing that the limitations period is unconstitutional. The starting point for his argument, for example, is *Kentz v. Harriger*, 99 Ohio St. 240 (1919) (*see* Motion at 11), which not only ***upheld*** the statute at issue, but did not even ***involve*** a statute of limitations question, but rather a qualified privilege question. *Id.* at 243 ("The ***sole question*** in this case is whether or not perjured testimony given

under oath before a grand jury is privileged, that is, protected by public policy, or whether it may be the basis of a civil action in malicious prosecution.") (emphasis added). Likewise, the language Respondent relies on from *Groch v. General Motors Corp.*, 117 Ohio St.3d 192 (2008)—that statutes providing "too little time to file suit" may violate the right-to-remedy clause (*see* Motion at 12)—is dicta at best, as the *Groch* court again ***upheld*** the statute of repose at issue. *See* 117 Ohio St.3d at 219. Nor does the instant case implicate this Court's language in *Flagstar, supra*, regarding laws that "completely foreclose a cause of action." (Motion at 11.) The limitations period here does not "completely foreclose" anything—it merely requires plaintiffs to assert any causes of action in a prompt and timely fashion, reflecting JobsOhio's need to participate in quickly-moving economic development activities.

JobsOhio does not dispute that parties must have an opportunity to seek a judicial remedy "at a meaningful time and in a meaningful manner," (Motion at 12) (*citing Hardy v. VerMeulen*, 32 Ohio St.3d 45, 47 (1987)), but R.C. 187.09(C) provides that opportunity. Certainly, there can be no question that in appropriate circumstances other Ohio statutes have adopted similarly short limitations periods. Revised Code 2117.12, for example, provides a two-month limitation period for a party to bring a challenge when a claim against an estate is rejected. As here, the General Assembly recognized the need for promptly addressing and resolving any issues preventing the final resolution of the underlying estate. Likewise, under R.C. 5739.13(B) a party has 60 days to challenge a sales tax assessment, while under R.C. 1515.24(D)(3), parties have ***only 30 days*** to challenge soil and water conservation district assessments.

Even more pertinent is the General Assembly's determination that where someone seeks to "set aside a conveyance by a corporation, on the ground that any section of the Revised Code applicable to the lease, sale, exchange, transfer, or other disposition of all, or substantially all, of

the assets of that corporation has not been complied with," then the challenge "shall be brought within ninety days after the transaction, or the action shall be forever barred." R.C. 1701.76(D). Much like here, the General Assembly has determined that promptness and finality are important to economic development activities and related business transactions. *See also* R.C. 4117.12(B) (90-day statute of limitations on unfair labor practice charges); R.C. 2117.061(E) (90-day statute for Medicaid claims against an estate); R.C. 4123.90 (180-day period to make worker compensation retaliatory discharge claim); R.C. 4112.02(N) (180-day period after conduct occurs to bring age discrimination claim); R.C. 4113.52(D) (180-day period for employee claims based on retaliatory conduct). No court has ever suggested that any of these statutory periods violates the Open Courts provision of the Ohio Constitution.

Respondent's attempts to distinguish these various statutes are unavailing. He claims, for example, that two of them, R.C. 1515.24(D)(3) and 5739.13(C), involve the time to challenge administrative decisions, and thus "are not statutes of limitations in the same sense as R.C. 187.09(C)." (Motion at 14.) Yet if a party does not file its court action within the time specified under those statutes, the party loses the ability to do so, which is the same effect of R.C. 187.09(C). In any event, the other statutes cited above clearly involve limitations periods directly analogous to R.C. 187.09. While some of those periods may be 180 days rather than 60 days, it is difficult to conceive that there would be a constitutional significance to that difference, and Respondent has certainly not pointed to any cases suggesting one exists.

Respondent's argument that some claims may be "time-barred before an injured party even becomes aware of them" fares no better. (Motion at 12.) When dealing with ***any*** statute of limitations period, no matter how long, there is always the possibility that claims may expire before discovery. Accordingly, Ohio courts have expressly rejected the notion that a statute of

limitations is unconstitutional merely "because the statute of limitations would have expired before [the plaintiff] discovered its claim." *State ex rel. Miami Overlook*, 2011-Ohio-3419 at ¶ 73 (*citing Pratte*, 125 Ohio St.3d at 473). Indeed, this Court has rejected the argument that a statute of limitations ***must*** include a discovery rule (i.e., a provision that the limitations period does not begin until the plaintiff has become aware of his or her cause of action). *See Pratte*, 125 Ohio St.3d at 473.

Moreover, even if the Court were to somehow conclude that, absent a discovery rule, R.C. 187.09(C) would be unconstitutional, that still would not provide a reason to strike down the statute. Rather, as the Court has done in other settings, the Court could interpret R.C. 187.09(C) to include such a rule. *See, e.g., Collins v. Sotka*, 81 Ohio St.3d 506 (1998) (reading two-year statute of limitations under R.C. 2125.02(D) to include discovery rule notwithstanding that the statute's plain language did not include such a rule). To be sure, this Court has indicated an appropriate hesitation to automatically imply such a discovery rule. *See Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491 (2006). But where a discovery rule is necessary to uphold the constitutionality of a statute, implying such a rule is consistent both with the Court's presumption that the General Assembly intends to act in a constitutional manner and with the Court's obligation to preserve the acts of a coordinate branch of government whenever possible. As such, R.C. 187.09 does not violate Article I, Section 16.

D. The Legislation Does Not Violate Article VIII, Section 4 Of The Ohio Constitution, Which Prohibits The State From Lending Its Aid And Credit To A Private Corporation.

Respondent's next argument is that the Legislation violates Article VIII, Section 4. However, Respondent's discussion of that provision fails to address the long history of Ohio decisions holding that the prohibitions in Article VIII, Sections 4 and 6 of the Ohio Constitution against State and local government aid to or involvement with private enterprise ***do not apply to***

nonprofit entities pursuing public purposes. Not surprisingly, every decision that Respondent has cited in support of his position deals with government aid to or involvement with ***for-profit*** enterprise.[3]

As discussed in JobsOhio's Memorandum in Support of Writ, there is a long line of decisions, starting with *State, ex rel. Leaverton v. Kerns,* 104 Ohio St. 550 (1922) (county appropriations to independent agricultural society for holding agricultural fair), and continuing through *State ex rel. Taft v. Campanella,* 50 Ohio St.2d 242 (1977) (county revenue bonds financing nonprofit healthcare facilities) and *State ex rel. Ohio Congress of Parents & Teachers v. State Board of Education*, 111 Ohio St.3d 568 (2006) (State funding of nonprofit corporations operating community schools), among others, in which this Court has consistently refused to apply the prohibitions of Article VIII, Sections 4 and 6 to governmental lending of credit in aid of or involvement with nonprofit entities pursuing public purposes.

Respondent also argues that the State has lent credit or created a joint venture in violation of Article VIII, Section 4 through its continued involvement with the Liquor Enterprise—including its reversionary interest in the Liquor Enterprise on termination of the franchise, its retention of regulatory authority and certain operations of the Liquor Enterprise, its potential

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[3] One of these cases, *Saxbe v. Brand*, 176 Ohio St. 44 (1964), which Respondent cites on page 15 of his Motion, did involve the State's loan of revenue bond proceeds to a nonprofit community improvement corporation, but the nonprofit was merely acting as an intermediary, financing the acquisition of manufacturing facilities for lease to a for-profit corporation. ***Because the nonprofit lender was simply a conduit through which the State was lending credit to a for-profit enterprise, the Court found the Leaverton doctrine was inapplicable.*** In contrast, the parties to the Franchise and Transfer Agreement are all either State or nonprofit entities. Moreover, *Saxbe* was effectively superseded by the 1974 passage of Article VIII, Section 13 of the Ohio constitution, which provided that the lending of aid and credit in support of industry, commerce, distribution, and research for the public purposes of, among other things, creating or preserving jobs and employment opportunities ***"shall not be subject to the requirements, limitations, or prohibitions of any other section of Article VIII,"*** provided there is no obligation or pledge of taxes.

receipt of Deferred Payments, and its covenant pursuant to the Transfer Act to maintain pricing for liquor so as to meet debt service coverage on JobsOhio's obligations. However, the transfer of the Liquor Enterprise franchise to JobsOhio pursuant to the Transfer Act is a conveyance of property and not a loan or joinder of property. The Transfer Act makes this abundantly clear:

> The characterization of any such transfer as a true sale and absolute conveyance shall not be negated or adversely affected by the acquisition or retention by the state of a residual or reversionary interest in the enterprise acquisition project, the participation of any state officer or employee as a member or officer of, or contracting for staff support to, JobsOhio or any subsidiary of JobsOhio, any regulatory responsibility of an officer or employee of the state, including the authority to collect amounts to be received in connection therewith, the retention of the state of any legal title to or interest in any portion of the enterprise acquisition project for the purpose of regulatory activities, or any characterization of JobsOhio or obligations of JobsOhio under accounting, taxation, or securities regulations, or any other reason whatsoever.

R.C. 4313.01(A). Therefore, the State's retention of regulatory authority and its provision of operating services to the Liquor Enterprise pursuant to contract do not constitute property rights, and its reversionary interest in the franchise on the Liquor Enterprise is a property interest separate from the franchise. *See* Restatement (First) of Property: Future Interests 153 (1996) (distinguishing between present and future—including reversionary—property interests).

The Deferred Payments JobsOhio is paying to the State are a minor component of the consideration the State is receiving for the franchise, and will be a percentage of the amount by which the Liquor Enterprise profits exceed an agreed-upon projected threshold if the combination of pricing for and control of operating expenses of the Liquor Enterprise generate additional revenue. The same is true of the State's price-maintenance covenant, (*see infra* Section E), which supports JobsOhio's capacity to borrow sufficient funds to purchase the franchise for the Liquor Enterprise and use franchise profits to effect its public purposes. Legislative authorization for pricing or rate covenants is not uncommon—an identical covenant supports the State's currently outstanding liquor bonds. *See* R.C. 151.40(F) & 166.08(R).

Moreover, a similar covenant is contained in R.C. 183.51(B), supporting the borrowing capacity of the entity purchasing the right to tobacco master settlement agreement payments.

Nevertheless, even if one were to so misconstrue the nature of the transfer as a lending of the State's credit to, or creation of a joint venture with, JobsOhio, the transfer would be permitted under the *Leaverton* line of cases because (1) JobsOhio is a nonprofit corporation organized for the public purposes of promoting economic development, job creation, job retention, job training, and the recruitment of business to the State, as set forth in the JobsOhio Act; and (2) the transfer will provide a source of funds for JobsOhio to effect these public purposes. Respondent's footnote 9 concedes this inescapable conclusion by quoting this Court's definition of a joint venture as "an association of persons with intent, by way of a contract . . . to engage in and carry out a single business adventure ***for joint profit***." *Ford v. McCue*, 163 Ohio St. 498 (1955) (emphasis added).

In making the case that the Deferred Payments create a joint venture, Respondent distinguishes *City of Cincinnati v. Dexter*, 55 Ohio St. 93 (1986), because the deferred payments to be made to the City for the sale of a railroad were based on gross railroad revenues, whereas the Deferred Payments will be measured by net revenues. A more significant distinction is that the private party in Cincinnati was operating the railroad ***for-profit***. By definition, the State, which will use its Deferred Payments for State purposes, and JobsOhio, which will use the remaining net revenues for pursuit of its defined nonprofit and public purposes, are not engaging in a joint enterprise for private profit. Article VIII, Section 4 is simply not applicable to the Liquor Enterprise transaction.

Respondent also attempts to distinguish *Grendell v. Ohio Environmental Protection Agency*, 146 Ohio App.3d 1 (9th Dist. 2001), on the basis that in *Grendell* the State and the

private company had disparate purposes, whereas the State and JobsOhio share the purpose of promoting job creation and economic development. In fact, it is the sharing of public purposes by the State and the nonprofit JobsOhio that makes Article VIII, Section 4 inapplicable to the transactions authorized by the JobsOhio Act and the Transfer Act.

Finally, in apparent reliance on *Saxbe*, Respondent claims that the State is indirectly lending its credit in aid of or otherwise assisting private enterprise, since JobsOhio will be able to use Liquor Enterprise profits to assist private enterprise.[4] But Article VIII, Section 13 exempts from the prohibitions of any other section of Article VIII the lending of aid and credit in support of private enterprise, even if done directly by the State, provided that the lending of aid and credit does not involve the pledge of "moneys raised by taxation." This Court has squarely held that the State's liquor profits (the exact funds at issue here) do not constitute "moneys raised by taxation" within the meaning of Article VIII, Section 13, and that the State may use the proceeds of its revenue bonds, payable from liquor profits, to lend its credit to and otherwise assist private enterprise for the purposes of job creation and preservation and economic development. *Duerk v. Donahey*, 67 Ohio St.2d 216 (1981).

In conclusion, the JobsOhio Act and the Transfer Act do not violate Article VIII, Section 4 of the Ohio Constitution. The prohibitions in that Section do not apply to the State's lending of its credit to or otherwise assisting a nonprofit corporation, such as JobsOhio, in effecting its public purposes.

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[4] Respondent speculates that JobsOhio may "invest" in private, for-profit businesses and that the constitutionality of such investment is ripe for consideration, notwithstanding that JobsOhio has made no such investments. It is also important to note that, because JobsOhio is an ***independent nonprofit*** corporate entity—not a subsidiary or agency of the State—any investment that JobsOhio might make from liquor enterprise revenues it receives under and during the period of the franchise, are not public funds and would not be an investment of public funds that could

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

Respondent next argues that the Transfer Act, in conjunction with the Franchise and Transfer Agreement, calls for appropriations extending beyond a biennium in violation of Article II, Section 22. (Motion at 20.) This argument has no merit—the Legislation does not make or require any appropriation beyond a biennium.

Article II, Section 22 of the Ohio Constitution provides that "[n]o money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years." This language prevents the current General Assembly from requiring a future General Assembly to appropriate money. It does not prohibit the General Assembly from authorizing a State contract that extends beyond the biennium, so long as the contract does not require a future appropriation. As this Court stated in *Sorrentino v. Ohio National Guard*:

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

53 Ohio St.3d 214, 217 (1990) (emphasis added) (quoting *State v. Medbery*, 7 Ohio St. 522, paragraph two of the syllabus (1857)).[5] Thus, so long as the legislation does not ***require*** a future appropriation, there is no violation of Article II, Section 22.

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violate the constitutional restrictions on the use of such funds. In addition, any use by JobsOhio of its funds will be consistent with its nonprofit status and purposes.

[5] Respondent suggests that JobsOhio cannot rely on *Sorrentino* because the *Sorrentino* court ruled that the legislation then in question violated Article II, Section 22. (Motion at 22.) That position is entirely illogical. JobsOhio cites *Sorrentino*, not for its factual congruity, but rather for its clear interpretation of Article II, Section 22, which has never been questioned by subsequent decisions, and thus remains binding and helpful precedent for this Court.

Despite Respondent's claims to the contrary, no appropriation supporting JobsOhio extends beyond a biennium. In fact, the ***only*** directive in the Legislation to make expenditures supporting JobsOhio occurs in § 5 of Am. Sub. H.B. 1, as amended by § 605.10 of Am. Sub. H.B. 153, which orders the Director of the Ohio Department of Development to find in that Department's "unexpended and unencumbered fiscal year 2011 General Revenue Fund appropriation an amount not to exceed $1,000,000" for JobsOhio to use for "transition and start-up costs." But since the $1,000,000 appropriation is expressly restricted to fiscal year 2011 funds only, it cannot violate the two-year limitation in Article II, Section 22. Similarly, among the related transaction agreements (i.e., the Franchise and Transfer Agreement, the Operations Services Agreement, and the Agreement for Services), only the Agreement for Services involves State payments to JobsOhio (*see* Agreement for Services § 4), but that agreement is also limited to the current biennium (*see id.* § 5). Thus, neither the Legislation nor any related agreement authorizes or requires State appropriations beyond the current biennium.

Respondent does not cite any illicit long-term appropriation in the Legislation or the related agreements, and instead vaguely asserts that "the Transfer Act and Franchise and Transfer Agreement . . . unconstitutionally bind successive General Assemblies to multiple obligations . . . ." (Motion at 21.) Specifically, Respondent takes issue with two provisions: (1) R.C. 4313.01(C)(1)'s statement that "[t]he state may covenant, pledge, and agree in the transfer agreement, with and for the benefit of JobsOhio, that it shall maintain statutory authority for the enterprise acquisition project and the revenues of the enterprise acquisition project and not otherwise materially impair any obligations supported by a pledge of revenues of the enterprise acquisition project" (the "non-impairment covenant"); and (2) the Franchise and Transfer Agreement's pledge that the State will maintain wholesale and retail liquor prices at

levels that would allow JobsOhio to repay its debt (the "price-maintenance covenant"). Based on Respondent's citation of *State v. Medbery*, 7 Ohio St. at 522, and a 1996 Attorney General Opinion, 1996 Ohio Atty. Gen. Ops. No. 1996-060, Respondent appears to be arguing that these provisions create a "contingent debt" for future legislatures. Such an argument, however, distorts the meaning of the term "contingent debt" under the Ohio Constitution.

The *Medbery* and Attorney General opinions that Respondent cites stand for the general proposition that the General Assembly cannot, via contract, require future legislatures to make expenditures upon the occurrence of specified events because such an arrangement results in a contingent debt in violation of Article II, Section 22. In *Medbery*, for example, this Court ruled that the General Assembly could not enter into a five-year service contract for the State, since the contracting legislature could only appropriate revenues during its own two-year term. As the Court explained, so long as the counterparty held up its end of the bargain over the remaining three years, ***future legislatures would have to make payments under the contract for that term***, resulting in a contingent debt. In the Court's words, the problem was this:

> [T]he General Assembly exercise their discretion in determining, not only what claims against or debts of the State shall be paid, but the amount of expenses which may be incurred. ***If they authorize expenses or debts to be incurred, without an appropriation to pay them, and the expenses are incurred, those expenses create a debt against the State***, and it must remain such, until payment under an appropriation afterward made.
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> . . . .
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> ***[T]hat General Assembly have,*** by their contracts, not only ***determined that the expenditure should be made, and fixed the amount beyond the control of their successors***, but have also, in so doing, ***created a present liability against the State to pay specific sums of money*** at such a period that they could not, by appropriations, provide for payment.

Id. at 528, 538–39 (emphasis added).

Similarly, in the 1996 opinion, the Attorney General explained that any state contracts containing indemnification or make-whole clauses must limit those provisions to the biennium in which the contract is executed. Otherwise, ***future legislatures would be obligated to pay the indemnified party upon the occurrence of the specified loss***, again resulting in a contingent debt:

> These contracts, then, so far as the inhibition of the constitution relating to debts is involved, ***stand precisely upon the same ground as any other contracts for expenditure***, which the General Assembly have authorized, but provided no revenue and made no appropriations to meet the amount specified to be paid by the State when it becomes due. It is a contingent debt ripening into an absolute one, without money being set apart to meet and pay it.

Id. at 20 (emphasis added, quoting *Medbery*).

In contrast to the agreements mentioned in *Medbery* and the Attorney General Opinion, neither the non-impairment covenant nor the price-maintenance covenant authorizes future, conditional expenditures that might give rise to contingent debt. While these covenants may bind future General Assemblies from taking action in violation of their terms, such a covenant does not ***require*** the expenditure of moneys. As the Attorney General Opinion suggests, the policy underlying *Medbery* is not a general prohibition on one legislature subjecting another to the terms of the former's contracts, but rather, one legislature forcing another to open its coffers:

> The court found ***particular fault*** with the fact that the contracts, having been made for five years, would divest future General Assemblies of their appropriation and revenue raising responsibilities under [A]rticle II, § 22 and [A]rticle XII, § 4, and employed rather forceful language to express its concern in that regard . . . .

Id. at *20–21 (emphasis added). Indeed, "the capacity to contract is one of the essential attributes of sovereignty." *Matheny v. Golden*, 5 Ohio St. 361, 365 (1856) (upholding a contract between Ohio University and the state declaring that the land upon which the university sits "shall forever be exempted from all State taxes"). As was mentioned above, a nearly identical

price-maintenance covenant supports the State's outstanding liquor bonds. *See* R.C. 151.40(F) & 166.08(R).

In fact, covenants similar to those challenged in the Legislation appear frequently in the Revised Code. *See, e.g.*, R.C. 183.51(B) (state non-impairment covenant for the benefit of holders of bonds issued under the Tobacco Master Settlement Agreement); R.C. 3318.26(P)(1) (state price-maintenance covenant to operate state lottery so as to generate sufficient profits to pay bonds secured thereby); R.C. 6101.39 (state non-impairment covenant for benefit of holders of bonds issued by state's conservancy districts); R.C. 175.13(A) (state non-impairment covenant for benefit of holders of bonds issued by the state housing finance agency). Because these covenants do not authorize or require future legislatures to make expenditures, they do not create contingent debts in violation of Article II, Section 22.

The only monies whose application beyond the current biennium is affected by the Transfer Act and the Franchise and Transfer Agreement are the profits from the Liquor Enterprise, but this is not new. Those profits have for years been pledged to the payment of State revenue bonds issued under Article VIII, Section 13 of the Ohio Constitution and R.C. 151.40 and Chapter 166, all as approved by this Court in *Duerk*, to provide funds for economic development purposes. The Legislation and the Franchise and Transfer Agreement will cause all of these State bonds to be discharged and allow the liquor profits received under the franchise to be applied to the payment of JobsOhio's debt and the funding of job creation and economic development programs. As with these current commitments of liquor profits to State revenue bonds, this in no way requires or authorizes future appropriations from the State's general revenue fund.

Nothing in the Legislation or the accompanying agreements authorizes or requires the General Assembly to make an appropriation beyond the current biennium, and as such they fully comply with the requirements of Article II, Section 22.

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

Respondent next argues that the Transfer Act will cause the State to incur debt in excess of Article VIII's limits. This argument fails because any debt that might result from the Legislation is ***JobsOhio's*** debt—not the ***State's*** debt. And even if it were the State's debt, it would not violate Article VIII.

1. The Legislation Does Not Require Or Contemplate Any State Debt.

As JobsOhio explained in its Memorandum in Support of Writ, any argument under Article VIII fails for the fundamental reason that the Legislation does not require or contemplate any ***State*** debt. Any debt will be ***JobsOhio's*** debt, and despite several creative arguments by Respondent, the debt of a private, nonprofit corporation is simply not a State debt.

Respondent first argues that the price-maintenance covenant contained in the Transfer Act causes the State to incur debt in excess of constitutional limitations. As discussed in Section E, *supra*, under R.C. 4313.01(C)(1), the State may covenant to charge liquor prices so as to generate profits sufficient to cover JobsOhio's debt obligation. Respondent's classification of the covenant is incorrect. This covenant does not impose any payment obligation on the ***State***. The prices affected by the State's pledge will be paid by wholesale and retail purchasers of liquor, not the State. Respondent's claim also runs contrary to Ohio law:

> Some authorities hold that an obligation of a governmental unit to fix fees and rates so as to provide funds sufficient to service or liquidate revenue bonds issued to construct some public enterprise is an obligation or debt of the governmental unit. . . . But the weight of authority is to the contrary.

State ex rel. Public Institutional Building Authority v. Griffith, 135 Ohio St. 604, 617-18 (1939) (citations omitted).

Respondent next suggests that the State has incurred unconstitutional debt because the Transfer Agreement gives the State the ***option*** to cure any default of JobsOhio, including a default on JobsOhio's debt obligations. (Motion at 24.) Respondent mistakenly equates an option with an obligation and the curing of an event of default with the assumption of the defaulting party's obligations. As this Court noted in *Griffith,* the voluntary contribution of funds to the payment of debt service does not create debt:

> [I]t may be noted that a state or city may voluntarily, but not as a matter of obligation, make contributions from general revenue sources to the liquidation of revenue bonds payable solely from the income arising from the operation of the enterprise built or purchased from the proceeds of such bonds.

Id. at 614.

Respondent then contends that the State is so intertwined with JobsOhio that JobsOhio's debt should be attributed to the State. (Motion at 24.) But Respondent overlooks fundamental aspects of the Liquor Enterprise transfer. JobsOhio is issuing its ***own*** debt, as R.C. 1702.12(F)(5) authorizes all nonprofit corporations to do, and that debt will be payable solely from and secured by profits from the Liquor Enterprise. And the Franchise and Transfer Agreement itself clearly provides that JobsOhio's debt is not payable by the State:

> [JobsOhio and JobsOhio Beverage System] shall be responsible for obtaining any financing for the performance of their obligations under this Agreement, which financing shall comply with all requirements of this Agreement. [JobsOhio and JobsOhio Beverage System] each acknowledge that . . . the obligations of the State Parties [Division of Liquor Control and Office of Budget and Management] hereunder are not general obligations of the State of Ohio or the State Parties and that the full faith and credit, revenue, and taxing power of the State of Ohio is not pledged to the payment of amounts due hereunder . . . .

(Compl. at Ex. A at Ex. 5, § 16.1.)

As discussed above, the Liquor Enterprise transfer will be an absolute conveyance in exchange for a more than $1.4 billion payment to the State, resulting in both the Liquor Enterprise franchise and profits thereunder belonging to JobsOhio for the term of the franchise. R.C. 4313.01(A). No State funds will be pledged to the payment of JobsOhio's debt. Indeed, the State is precluded from assuming responsibility for JobsOhio's debts by Article VIII, Section 5 of the Ohio Constitution, which expressly prohibits the State from assuming the debts "of any corporation whatsoever, unless such debt shall have been created to repel invasion, suppress insurrection, or defend the state in war."

2. Even If JobsOhio's Debt Were State Debt, It Would Not Violate Article VIII.

Even if one were to improperly conflate the debts of JobsOhio with those of the State, any debt incurred in the Liquor Enterprise transaction would be exempt from the State's constitutional debt limitations under (a) Article VIII, Section 13 of the Ohio Constitution, and (b) the self-supporting debt exception first articulated in *Kasch v. Miller*, 104 Ohio St. 281(1922).

Exemption Under Article VIII, Section 13. Article VIII, Section 13 of the Ohio Constitution explicitly authorizes State borrowing to acquire "property" used to create or preserve jobs and employment opportunities and exempts such borrowings from constitutional debt limits so long as they are not tax-backed.[6]

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[6] "To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, to control air, water, and thermal pollution, or to dispose of solid waste, it is hereby determined to be in the public interest and a proper public purpose for the state or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, ***to acquire***, construct, enlarge, improve, or equip, and to sell, lease, exchange, or otherwise dispose of ***property***, structures, equipment, and facilities ***within the State of Ohio for industry, commerce, distribution***, and research, to make or guarantee loans ***and to borrow money and issue bonds or other obligations to provide moneys for the acquisition***,

Respondent argues that the transfer of the Liquor Enterprise franchise might not constitute the acquisition of "property" for purposes of Article VIII, Section 13. But an exclusive franchise such as the franchise on the Liquor Enterprise is inarguably property. *See Tpk. Co. v. Parks*, 50 Ohio St. 568 (1893) (holding that a turnpike franchise is property and that legislation authorizing its taking without due process was in violation of the due process clauses of the State and federal constitutions). This position is further supported by the 1998 Attorney General Opinion, 1998 Ohio Atty. Gen. Ops. No. 1998-034, which Respondent himself cites. (Motion at 15.) In this opinion, the Attorney General concludes that "property" can include "everything that is owned," including "everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal." Clearly, this would include the Liquor Enterprise franchise, the ownership of which is being transferred under R.C. Chapter 4313. Moreover, JobsOhio will use the profits from the Liquor Enterprise in furtherance of job creation and economic development—the very activities that Article VIII, Section 13 declares to be a proper public purpose of the State.

Respondent also posits that "while liquor profits may not constitute 'moneys raised by taxation' under Section 13, the reality is that Ohio taxpayers ultimately will foot the bill for JobsOhio's debts because ***liquor revenues that otherwise would come into the State treasury***

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construction, enlargement, improvement, or equipment, ***of such property***, structures, equipment and facilities. Laws may be passed to carry into effect such purposes and to authorize for such purposes the borrowing of money by, and the issuance of bonds or other obligations of, the state, or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, and to authorize the making of guarantees and loans and the lending of aid and credit, which laws, bonds, obligations, loans, guarantees, and lending of aid and credit shall not be subject to the requirements, limitations, or prohibitions of any other section of Article VIII, or of Article XII, Sections 6 and 11, of the Constitution, provided that moneys raised by taxation shall not be obligated or pledged for the payment of bonds or other obligations issued or

will now be used to pay JobsOhio's bondholders." (*Id.* (emphasis added).) But the Transfer Act ensures that ***no money will be diverted from the State treasury*** to pay JobsOhio's debt obligations. Under R.C. Chapter 4313, only profits from the Liquor Enterprise may be pledged for payment of JobsOhio's obligations. As required by R.C. 4301.12, the State's "liquor tax" will still be imposed on liquor revenues and deposited in the State's general revenue fund. And because other liquor revenues are not payable to the State treasury, *Duerk*, 67 Ohio St.2d at 216, there can be no expectation of those revenues being transferred to the general revenue fund. Consequently, there will be no diversion of general revenue funds to support the Liquor Enterprise or make payments on JobsOhio's debt.

Exception For Self-Supporting Special-Fund Debt. In *Kasch v. Miller*, 104 Ohio St. 281 (1922), this Court held that when the State issues debt to fund a project whose revenues are the sole payment source for all principal and interest on that debt, it does not violate constitutional debt limitations. Respondent argues that JobsOhio's debt does not meet the requirements for self-supporting special-fund debt under *Kasch*, but Respondent is wrong.

Respondent claims support for his position from *State ex rel. Public Institutional Building Authority v. Neffner*, 137 Ohio St. 390 (1940), in which this Court held that bonds issued by the Authority to finance an institution for the "feeble minded," though payable from rentals for the use of the institution by another department of the State, created State debt that was not exempt from constitutional limits. However, the *Neffner* decision was based entirely on the Court's conclusion that the rentals supporting bond debt service would be paid from moneys ***that had theretofore been available to the State general funds***. *Neffner* is not applicable to the Liquor Enterprise profits since it preceded—by more than thirty years—the voters' approval of

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guarantees made pursuant to laws enacted under this section." Article VIII, Section 13, Ohio

Article VIII, Section 13 and this Court's 1981 *Duerk* decision applying that constitutional provision.

JobsOhio's debt will be self-supporting. JobsOhio will use the proceeds of its debt to acquire a franchise in the Liquor Enterprise, and post-transfer Liquor Enterprise profits will be sequestered to provide payment of and security for that debt. Such debt, ***even if erroneously attributed to the State***, would clearly be self-supporting special-fund debt of the type approved in *Kasch* and exempt from the constitutional limits on State debt.

In summary, Respondent's argument that the Legislation violates Article VIII, Section 13 fails for numerous reasons: (1) JobsOhio is a nonprofit corporation, not a State agency, and its debt is not, and cannot become, State debt; (2) JobsOhio's debt, if erroneously attributed to the State, would be authorized under Article VIII, Section 13 of the Ohio Constitution, and (3) JobsOhio's debt, if erroneously attributed to the State, would fall within the self-supporting special-fund exemption from constitutional debt limits.

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

Respondent's final argument is that Am. Sub. H.B. 153, the biennial appropriations legislation that enacted the Transfer Act and made related amendments to Revised Code Chapter 187, violates Article II, Section 15(D)'s "one-subject" rule. This argument fails because the Liquor Enterprise Transfer, ***which is expected to generate a $500 million infusion to the State's General Fund***, is integral to the State's current biennial budget.

Article II, Section 15(D) provides that "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title." JobsOhio agrees with Respondent's discussion of the rule's origin—that it was drafted to serve as an anti-logrolling measure. *See State ex rel. Dix*

Constitution, emphasis added.

v. Celeste, 11 Ohio St.3d 141, 142–43 (1984). But Respondent's claim that "the Court has not hesitated to invoke the one-subject rule to invalidate legislation," (*see* Motion at 26), is simply wrong. The first time this Court addressed the one-subject rule, it described the rule as "directory only" and thus provided no grounds on which to challenge legislation. *Pim v. Nicholson*, 6 Ohio St. 180 (1856). The Court did not alter this position until 1984, when it added that "a manifestly gross and fraudulent violation of this rule will cause an enactment to be invalidated." *Dix*, 11 Ohio St.3d at 145.

Since *Dix*, Ohio courts have rarely found violations of the one-subject rule, since—as the "manifestly gross and fraudulent" language suggests—the standard remains highly deferential. *See, e.g., State ex rel. Willke v. Taft*, 107 Ohio St.3d 1, 6 (2005) (recognizing that, in employing the one-subject-rule test, the court will 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") (internal quotation marks and citation omitted); *City of Riverside v. State*, 190 Ohio App.3d 765, 784 (10th Dist. 2010) ("To avoid interfering with the legislative process, courts . . . indulge every presumption in favor of the constitutionality of legislation.").

When assessing the validity of legislation under Article II, Section 15, courts will consider not the plurality of subject matter, but rather its disunity. *Ohio Civ. Serv. Emps. Ass'n, AFSCME, Local 11, AFL-CIO v. State Emp't Relations Bd.*, 104 Ohio St.3d 122, 130 (2004) [hereinafter *SERB*]. And for legislation to rise to the level of a "manifestly gross and fraudulent violation" of Article II, Section 15, "a court must determine that the bill includes a disunity of subject matter such that there is no discernible practical, rational or legitimate reason for

combining the provisions in one Act." *Id.* (internal quotation marks and citation omitted). Moreover, appropriations bills like Am. Sub. H.B. 153 receive further deference due to their omnibus nature. *Simmons-Harris*, 86 Ohio St.3d at 16 ("Appropriations bills, of necessity, encompass many items, all bound by the thread of appropriations."). As such, when only part of an appropriations bill is challenged under the one-subject rule, the Court has generally restricted its analysis to those specific items rather than evaluating the unity of the bill as a whole. *Id.*; *SERB*, 104 Ohio St.3d at 131 (assessing the relationship between "the budget-related items" in an appropriations bill and the specifically challenged provision therein).

In this case, the Court may easily discern the General Assembly's practical, rational, and legitimate reasons for including both the Transfer Act and the related amendments to R.C. Chapter 187 (upon whose existence the Transfer Act relies), into Am. Sub. H.B. 153. Namely, Am. Sub. H.B. 153 expressly anticipates that the Franchise and Transfer Agreement will produce $500 million in revenues to appropriate during fiscal year 2012. Am. Sub. H.B. 153 (129th General Assembly), § 801.30 ("The revenue estimates for fiscal year 2012 assume receipt of $500,000,000 in cash from JobsOhio pursuant to section 4313.02 of the Revised Code, as enacted by this act, and the transfer of the enterprise acquisition project authorized therein."). *See also State ex rel. Ohio Roundtable v. Taft*, No. 02AP-911, 2003 WL 21470307 (10th Dist. June 26, 2003) (upholding the inclusion of authorization for Mega Millions Lottery in appropriations bill because the program, which was expected to generate $41 million for common schools, was a "revenue enhancement" for the state). Given that it was such a substantial source of funds for fiscal year 2012, the Transfer Act is practically, rationally, and legitimately linked to the State's biennial appropriations, justifying its inclusion in Am. Sub. H.B. 153.

This Court has rarely invoked the single-subject rule to invalidate appropriations bills, and the cases that Respondent cites are all readily distinguishable in that the challenged provisions did not have a material effect on the state budget. For example, *SERB* involved a challenge to the inclusion of a collective-bargaining limitation in an appropriations bill. 104 Ohio St.3d at 122. There this Court noted that even the appellant State Employee Relations Board could "offer[] little guidance regarding the manner in which the amendment . . . affects the state budget." *Id.* at 131. Similarly, in *Simmons-Harris v. Goff*, 86 Ohio St.3d 1 (1999), the Court rejected the General Assembly's attempt to promulgate a statewide School Voucher Program—"a significant, substantive program," but with little budgetary significance—by attaching it to an appropriations bill. *Id.* at 16. Clearly, the bills at issue in *SERB* and *Simmons-Harris* were unlike the Transfer Act and, at best, tenuously related to the State's budget.

Respondent asserts that Am. Sub. H.B. 153's length is indicative of a one-subject-rule violation. (*See, e.g.*, Motion at 29.) JobsOhio, however, has uncovered no Ohio case law invalidating a bill under Article II, Section 15(D) for its extensive length. *See, e.g.*, *In re Nowak*, 104 Ohio St. at 478 ("Of course, disunity of subject matter, not aggregation, is the polestar in assessing a violation of the one-subject rule."). Though certainly not binding on this Court, other states' high courts have also explicitly ruled that the length of a bill is not a paramount concern under a one-subject-rule analysis. *See, e.g.*, *Wirtz v. Quinn*, 953 N.E.2d 899, 905 (Ill. 2011) ("Neither the length of an act nor the number of provisions in an act is determinative of its compliance with the single subject rule."). Given the complexity of the State's biennial budget, it is only natural that Am. Sub. H.B. 153 was a lengthy bill. *Simmons-Harris*, 86 Ohio St.3d at 16. Such a characteristic has no bearing on its validity under Article II, Section 15(D).

Finally, to the extent that Respondent suggests that the General Assembly included the Transfer Act in Am. Sub. H.B. 153 as a tactical maneuver, (*see* Motion at 30), the legislative record debunks this allegation. Am. Sub. H.B. 1, the stand-alone act that authorized JobsOhio's creation, passed both houses by a healthy majority. (*See* JobsOhio's Mem. in Supp. 5.) Am. Sub. H.B. 153 included the Transfer Act provisions at the bill's introduction, and those provisions remained relatively unaltered throughout the entire legislative process.[7] In sum, Am. Sub. H.B. 153's legislative history negates Respondent's assertion that the Transfer Act's passage relied upon legislative strategy. Instead, the General Assembly included the Transfer Act in Am. Sub. H.B. 153 because it constituted a substantial source of revenue for the State and thus formed an integral part of the biennial budget.

In comparing the Transfer Act and related JobsOhio Act provisions in Am. Sub. H.B. 153 to the legislation discussed in the cases discussed above, it is clear that the former falls well within the bounds of Article II, Section 15(D). Unlike the provisions at issue in *SERB* or *Simmons-Harris*, the Transfer Act and related JobsOhio Act provisions in Am. Sub. H.B. 153 do not constitute a disjointed rider stuffed within the appropriations bill. Instead, much like the Mega Millions authorization in *Ohio Roundtable*, the Transfer Act was included in the appropriations bill because of its sizable contribution to the State's General Revenue Fund, which is subject to appropriation by the General Assembly. *See* Am. Sub. H.B. No 153 (129th General Assembly), § 801.30. An examination of the legislative record only furthers this

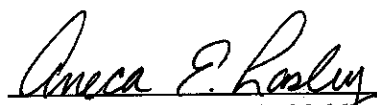
[7]*See* Legislative Serv. Comm'n, Comparison Document, Amended Substitute House Bill 153, 129th General Assembly, Main Operating Appropriations Bill (FY 2012-FY 2013), As Introduced, As Passed by the House, As Passed by the Senate, As Enacted 124–31 (2011), *available at* http://www.lsc.state.oh.us/fiscal/comparedoc129/asenacted/comparedoc-hb153-en.pdf.

conclusion. The Transfer Act and related JobsOhio Act provisions are thus inexorably related to the State's biennial budget and properly included the Am. Sub. H.B. 153.

III. CONCLUSION

For all the foregoing reasons, JobsOhio respectfully requests that the Court overrule the constitutional challenges raised against the Legislation by denying Respondent's Motion for Judgment on the Pleadings and issuing a writ of mandamus compelling Respondent to execute the Franchise and Transfer Agreement on behalf of the State of Ohio, as required by R.C. 4313.02(C)(2).

Respectfully submitted,



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CERTIFICATE OF SERVICE

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