

**IN THE COURT OF COMMON PLEAS
PAULDING COUNTY, OHIO**

BARBARA JEAN MORRIS, et al.)	
)	
<i>Plaintiffs,</i>)	Case No. CI-18-190
)	
v.)	Judge Tiffany R. Beckman
)	
THE STATE OF OHIO)	
)	
<i>Defendant.</i>)	

**THE OHIO ENVIRONMENTAL COUNCIL’S AMICUS BRIEF IN OPPOSITION
TO DEFENDANT THE STATE OF OHIO’S MOTION TO DISMISS**

The Ohio Environmental Council (OEC) submits this amicus curiae brief in opposition to Defendant The State of Ohio’s (hereinafter the “State”) Motion to Dismiss, and urges the Court to deny the State’s Motion to Dismiss. The question presented in this case is whether the General Assembly properly amended the Ohio Revised Code requirement for the minimum setback distance between a wind turbine and a habitable residence in 2014 through H.B. 483 (titled the “General MBR,” a general mid-biennium appropriations bill), or whether including the amendment in H.B. 483 violated Ohio's one-subject rule.¹ The one-subject rule provides, in relevant part, that, “[n]o bill shall contain more than one subject, which shall be clearly expressed in its title.” Ohio Constitution, Article II, Section 15(D). The Plaintiffs have submitted a viable claim that the State of Ohio violated Article II, Section 15(D) of the Ohio Constitution—the “one-subject rule”—when the legislature amended the minimum setback distance as part of H.B. 483, and therefore, the OEC respectfully urges the Court to deny the State’s Motion to Dismiss.

¹ The “one-subject rule” is also commonly referred to as the “single-subject rule”.

I. INTEREST OF AMICUS OHIO ENVIRONMENTAL COUNCIL

The OEC's interest in this case and unique perspective will fundamentally assist the Court in its consideration of the State's Motion to Dismiss because its mission is to protect Ohio's environment and ensure clean energy for all of the State's citizens. The OEC can best protect Ohio's environment and natural resources by pursuing a clean energy future for the state, including advocating for removal of any artificial barriers to that goal, which is why the OEC filed this amicus brief. To reduce climate change and mitigate its impacts, Ohio must reduce air pollution from the electric power sector, and therefore the OEC has a real and substantial interest in whether communities can utilize clean energy technologies, such as wind turbines. The OEC submits its amicus brief with a particular focus on the clean energy needs of Ohioans, and a desire to ensure they have access to a cleaner, sustainable future.

For decades, scientists have sounded the alarm that climate change is altering the way our environment and ecosystems function, and that the continued burning of fossil fuels, releasing more and more greenhouse gases into our atmosphere, damages our planet. But within the past year, scientists told us they were wrong about how much time we have to fix the problem--that in reality, our continued reliance on fossil fuels and our failure to take significant action to reduce greenhouse gas emissions has created even more dire circumstances than they originally predicted. The Intergovernmental Panel on Climate Change (IPCC), the top scientific body studying climate change, released a Special Report in October 2018 ("IPCC Special Report"), indicating that nations must take "unprecedented" action to cut carbon emissions over the next decade. IPCC, 2018, *Global warming of 1.5°C*, V. Masson-Delmotte, et al. World Meteorological Organization, Geneva, Switzerland, *available at* <https://www.ipcc.ch/sr15/>. The IPCC Special Report determined that the world must hold our warming below 1.5 degrees

Celsius to prevent the most damaging impacts of climate change, and that the world's annual carbon dioxide emissions (more than 40 billion tons per year) must be on an extreme downward slope by 2030 to prevent those impacts from materializing. *Id.* Yet, global emissions are still rising and we continue to burn fossil fuels, all while knowing a dramatic shift to carbon-free energy sources, like wind energy, is necessary for a sustainable future.²

Additionally, the United States' Fourth National Climate Assessment, released in November 2018, explicitly details future climate impacts to the Midwest and Ohio. U.S. Global Change Research Program, *Fourth National Climate Assessment*, Vol.II: Impacts, Risks, and Adaptation in the United States, Ch. 21: *Midwest*, available at <https://www.globalchange.gov/nca4>. Importantly, climate change risks are putting the Midwest's regional identity as an agricultural hub in jeopardy and threatens a major source of our food supply unless we take action to protect it from the effects of climate change. *Id.* The regional trend toward higher temperatures, more rain and more humid conditions will challenge field work and disease and pest control while heightening the potential for reduced harvests. *Id.* at 878. The shift toward increased precipitation and heightened late season moisture increases potential for and exacerbates the effects of invasive species, pests, and plant disease, but we can only partially overcome these issues through technological advances. *Id.* at 880-882.

Transitioning from extreme droughts to floods increases nitrogen levels in rivers, leading to harmful algal blooms that threaten our drinking water. *Id.* at 882. Flooding can also devastate communities by debilitating transportation and infrastructure. The impacts from increased temperatures and precipitation, as well as invasive species, affect ecosystem biodiversity

² The IPCC Report calls for human-caused emissions of carbon dioxide to be reduced by about 45 percent from 2010 levels by 2030, reaching net zero by 2050 in order to prevent the most damaging aspects of climate change from materializing. *IPCC, 2018: Summary for Policymakers*, Global warming of 1.5°C, available at https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_High_Res.pdf.

throughout our natural areas, especially our forests. And climate change will impact human health directly and indirectly, worsening existing health conditions and introducing new threats as a result of increased frequency and intensity of poor air quality days, increased temperatures, and heavy rainfall. *Id.* at 896-900.

These studies are clear--we must reduce greenhouse gas emissions quickly and efficiently to mitigate the worst impacts from climate change. Ohio is a major contributor to greenhouse gas emissions due to our heavy reliance on coal and natural gas to generate electricity. U.S. Energy Information Administration, *Rankings: Carbon Dioxide Emissions 2016*, available at <https://www.eia.gov/state/rankings/?sid=OH#series/226> (indicating that Ohio is ranked 6th highest in the country for carbon dioxide emissions); *see also* U.S. Energy Information Administration, *Ohio Net Electricity Generation by Source*, Sept. 2018, available at <https://www.eia.gov/state/?sid=OH#tabs-4>. Ohio has the opportunity to reduce its reliance on fossil fuels by increasing the percentage of wind-generated electricity in the state, but unfortunately, it has not been able to utilize that opportunity in a meaningful way since the passage of H.B. 483. The National Renewable Energy Laboratory (NREL) estimates that Ohio has over 55,000 megawatts (MW) of technical onshore wind potential (*see* NREL, *Renewable Energy Technical Potential*, available at <https://www.nrel.gov/gis/re-potential.html>), yet since 2014 the state has essentially had a moratorium on wind due to the reasons set forth in Plaintiff's Complaint. *Plaintiff's Complaint* at ¶¶ 10-28. Because the wind turbine setback distances were increased as part of an appropriations bill dealing with a variety of items completely unrelated to state energy policy, the OEC files this brief in support of the Plaintiffs' position and in opposition to the State's Motion to Dismiss. As the only non-profit environmental law center in the state of Ohio, the OEC is uniquely positioned to offer its expertise in this matter.

Shifting Ohio away from dirty energy sources will not only help combat the worst effects of climate change, including the negative impact to human health, but it will also boost the economies of the communities hosting those turbines by bringing jobs to the areas, stable lease payments to property owners, and needed tax revenue to school districts. Ohio must end what has effectively amounted to a moratorium on wind energy, and because the current setback restrictions were put in place in violation of the one-subject rule, this Court should deny the State's Motion to Dismiss.

II. STANDARD OF REVIEW

When a Court considers a Motion to Dismiss a mandamus action under Civ.R. 12(B)(6), it faces a high standard of review. If, after assuming all factual allegations of a complaint are true, including reasonable inferences made "in the relator's favor," the Court finds that beyond doubt no facts entitle the party to the requested writ, it may grant a Motion to Dismiss. *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 9. In the context of an alleged one-subject rule violation, the court focuses on the bill's subject.

Identification of a bill's subject is a matter of law, not for fact finding. *See State ex rel. Ohio Civ. Serv. Empls. Ass'n v. State* ("OCSEA 2016"), 146 Ohio St.3d 315, 2016-Ohio-478, 56 N.E.3d 913 ¶ 21. Yet, contrary to the State's assertion, allegations regarding whether certain provisions fall within a bill's subject are not conclusions of law, and must instead be based on an assumption of validity regarding the alleged facts in the complaint. *See Dunlop v. Ohio Dep't of Job & Family Servs.*, 2017-Ohio-5531, ¶ 10 ("However, we need not accept as true *unsupported conclusions* in a complaint," emphasis added).

III. ARGUMENT

The State's Motion to Dismiss should be denied. Plaintiffs have sufficiently established a violation of the one-subject rule to survive a motion to dismiss for the reasons that follow.

A. The One-Subject Rule ensures legislative efficiency and protects against riders, and the inclusion of the Wind Turbine Setback Provisions in H.B. 483 violates the One-Subject Rule.

Article II, Section 15(D) of the Ohio Constitution states: "No bill shall contain more than one subject, which shall be clearly expressed in its title." Prior to 1973, courts read the one-subject rule as merely directory in nature; yet following the formation of the Ohio Constitutional Revision Commission, the General Assembly separated the provision into its own section and reaffirmed its relevance, establishing "a basis for the court to reinvigorate it to ensure 'an orderly and fair legislative process.'" *Capital Care Network of Toledo v. Ohio Dep't of Health*, 153 Ohio St.3d 362, 2018-Ohio-440, ¶ 74 (dissent of Justice O'Connor, majority ruled provisions of law unconstitutional on other grounds).

Since the reformation of the Ohio Constitution, Ohio courts have conservatively applied the one-subject rule, only overturning legislative enactments when the various topics of a bill "lack a common purpose or relationship so that there is no discernible practical, rational or legitimate reason for combining the provisions in one Act." *Id.* at ¶ 75, citing *Beagle v. Walden*, 78 Ohio St.3d 59, 62, 1997-Ohio-234, 677 N.E.2d 506 (1997). Alternatively stated, a Court must invalidate an enactment if it identifies a "manifestly gross and fraudulent violation of the one-subject provision," causing blatant disunity of subject matter. *In re Nowak*, 104 Ohio St. 3d 466, 2004-Ohio-677, ¶ 54 (emphasizing that the one-subject provision of the Ohio Constitution cannot be viewed as "merely directory in nature").

The Supreme Court of Ohio repeatedly emphasizes that appropriations bills complicate application of the one-subject rule. *See State ex rel. Ohio Civ. Serv. Emps. Assn. v. State* (“OSCEA 2016”), 146 Ohio St.3d 315, 2016-Ohio-478, 56 N.E.3d 913, at ¶ 18, citing *State ex rel. Ohio Civ. Serv. Emps. Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.* (“OSCEA 2004”), 104 Ohio St.3d 122, 2004-Ohio-6363 ¶ 30. While appropriations bills fund the state’s programs, thus naturally addressing many topics under one common thread (appropriations), “they also can attract the attachment of riders because of their size and because they are certain to pass in some form.” *Id.*, citing *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 16, 1999 Ohio 77, 711 N.E.2d 203 (1999) (“the danger of riders is particularly evident when a bill as important and likely of passage as an appropriations bill is at issue.”). In the instant case, the State oversimplifies one-subject jurisprudence when it says “budget bills . . . are afforded special lenience.” *State’s Motion to Dismiss*, at 9.

In fact, the inclusion of the amendment to the setback distance in H.B. 483, now codified at R.C. § 4906.20(B)(2), (hereinafter, “Wind Turbine Setback Provisions” or “Setback Provisions”) exemplifies a “manifestly gross and fraudulent violation” of the one-subject rule. The Setback Provisions do not relate to the appropriations and revenues necessary for the operation of state government, but rather illustrate the very logrolling that the one-subject rule directs the legislature to avoid when structuring bills, especially appropriations bills. Furthermore, the State’s Motion to Dismiss relies on a misapplication of *OCSEA 2016* and a misinterpretation of the context and purpose behind the Wind Turbine Setback Provisions in question. Accordingly, when the Plaintiff’s Complaint is viewed in a light most favorable to its claims, the State has failed to prove beyond doubt that no set of facts could possibly prove the claims put forth in the writ of mandamus.

B. The Court should deny the Motion to Dismiss because the Wind Turbine Setback Provisions in House Bill 483 are the penultimate example of logrolling.

In order for a complaint to be dismissed, it must appear beyond doubt that the relator can prove no set of facts warranting the requested writ of mandamus. *Thornton* at ¶ 9. The State's Motion to Dismiss fails to meet this requirement primarily because it ignores a classic example of logrolling. The inclusion of the Wind Turbine Setback Provisions in a general appropriations bill, late in the legislative process and without public discussion, is the exact conduct the one-subject rule was designed to prevent. The State ignores the facts provided in the Plaintiffs' Complaint that support this conclusion.

In her dissent in *Capital Care Network*, Chief Justice O'Connor emphasized that the "universally recognized purpose of [one-subject] provisions is to prevent so-called 'logrolling.'" 2018-Ohio-440, ¶ 68 (majority found provisions unconstitutional on other grounds), *citing OSCEA 2004* at ¶ 26. Logrolling, which allows legislators to attach "riders" to pieces of legislation, is the "practice by which several matters are consolidated in a single bill for the purpose of obtaining passage for proposals which would never achieve a majority if voted on separately." *Hoover v. Franklin Cty. Bd. of Commrs.*, 19 Ohio St. 3d 1, 6, 19 Ohio B. 1, 482 N.E.2d 575 (1985). Logrolling, and our legislature's goal to protect against riders on bills, is an intentional protection that both limits legislative power and ensures its legitimacy. Most importantly, "it allows legislators to know exactly what they are voting on and prevents excessive measures, and accompanying government interference, from passage as part of omnibus bills." *Capital Care Network*, 2018-Ohio-440, at ¶ 69. The Wind Turbine Setback Provisions are a clear example of logrolling--an excessive measure inserted into an omnibus appropriations bill to avoid greater scrutiny by both the public and the General Assembly.

Simmons-Harris v. Goff emphasizes the danger of riders as especially relevant in the context of appropriations bills. 86 Ohio St.3d 1, at 16. In *Simmons-Harris*, the Court considered a School Voucher Program tacked onto an appropriations bill a rider for a variety of reasons, but primarily because it created a “substantive program in a general appropriations bill.” *Id.* at 17.

Similarly, the Wind Turbine Setback Provisions constitute a significant, substantive change to state law that effectively created a statewide moratorium on wind farm siting. Further, the provisions were intentionally inserted into the bill late in the process, without any testimony and very little discussion whatsoever.

For good reason, the State’s Motion to Dismiss contains no argument against the Plaintiffs’ claim that the Wind Turbine Setback Provisions were riders. The Provisions were submitted alongside dozens of other amendments, received zero public testimony, and there were multiple other legislative vehicles available for these Provisions that would not have violated the one-subject rule. *Plaintiffs’ Complaint* at ¶¶ 16-17, 19, 23-26. These elements support the claim that the Wind Turbine Setback Provisions were attached to H.B. 483 specifically because its proponents knew the bill would pass and intentionally used H.B. 483 as the vehicle to quietly push the amendment through. There is simply no evidence available for the State to provide a counter-argument.

1. Alongside dozens of other amendments, the House and Senate heard no public testimony regarding the Wind Turbine Setback Provisions.

The appropriations process at the General Assembly creates a number of procedural pitfalls for both the House and Senate. Given the immense scale of the bills passed, both in the initial phases and during the mid-biennium review, the committees often pass large amendments without allowing any time for public testimony. In the case of the Wind Turbine Setback Provisions, the Senate Finance Committee did not allow for *any* public testimony, instead

placing it deep within an omnibus package alongside dozens of other obscure amendments. *Plaintiffs' Complaint*, at 6. Other provisions in the omnibus package include amendments that actually deal with appropriations and budgets, such as funding for the Joint Medicaid Oversight Committee, limitations on the Controlling Board, and changes to appropriations for technology programs at the Development Services Agency. *H.B. 483*. The sudden inclusion of the Wind Turbine Setback Provisions without public testimony was called out at the time by media groups across Ohio, but because the Provisions were added at such a late hour, the bill passed without any ability to remedy that fact.³

The Wind Turbine Setback Provisions were included late in the legislative process for tactical reasons--mainly the hope that it would pass through the legislature in a bill certain to succeed without public comment or enough time for scrutiny by other legislative members. Ohio courts have rejected provisions for these reasons before. In *In re Holzer Consol. Health Sys.*, the Court emphasized that the invalidated provisions in questions were riders. Not only were the provisions not related to government spending, did not bear a relation to the topics preceding or following the provision, and did not relate to "utilization of government resources or how budgetary funds are to be disbursed," the record indicated "that the section was inserted into the bill late in the process and for what appear to be tactical reasons." *In re Holzer Consol. Health Sys.*, 2004-Ohio-5533 at ¶ 37. Likewise, the record demonstrates that the Wind Turbine Setback Provisions were included late in the process in order to sneak them through with as little attention or review as possible. Permitting substantive topics to be included in this manner as

³ See Kathiann M. Kowalski, *Industry: Setback changes will end new wind farms in Ohio*, Midwest Energy News, (June 19, 2014), <http://midwestenergynews.com/2014/06/19/industry-setback-changes-will-end-new-wind-farms-in-ohio/>; see also Paul Dvorak, *Gov. Kasich should veto wind energy-killing provision of H.B. 483 that jeopardizes \$2.5 billion investment in Ohio*, Wind Power Engineering & Development, (June 10, 2014), <https://www.windpowerengineering.com/environmental/gov-kasich-veto-wind-energy-killing-provision-h-b-483-jeopardizes-2-5-billion-investment-ohio/>.

part of appropriations bills sets a bad precedent for the state, taking the citizens out of the legislative process entirely, and makes even making it difficult for legislators to understand what is and is not part of a bill they're considering voting on.

The last minute inclusion of the Wind Turbine Setback Provisions violated the one-subject rule, which is in place to prevent this very thing from happening. The process by which these were passed as part of H.B. 483--complete absence of public dialogue and input on the subject, and legislators who had less than ten minutes of discussion--has stifled an entire industry in Ohio, and cost the state \$4.2 billion in economic development, not to mention prevented the 3,300 megawatts of clean, renewable wind power that was proposed to be built prior to the passage of H.B. 483. *Plaintiffs' Complaint* at ¶ 32.

2. There were legislative vehicles available for the Wind Turbine Setback Provisions that would not have violated the One-Subject Rule.

Also pending during this period in 2014 was S.B. 310, a non-MBR energy bill introduced by Senator Troy Balderson that proposed to freeze Ohio's Renewable Portfolio Standard (RPS) and Energy Efficiency Resource Standards (EERS). *Plaintiffs' Complaint* at ¶ 23. There was significant discussion about S.B. 310, with nine public hearings drawing testimony from dozens of stakeholders and provoking hours of discussion and debate about various energy matters in Ohio. *Plaintiffs' Complaint* at ¶ 24. On June 13, 2014, Governor Kasich signed S.B. 310 into law, just a few days before he signed H.B. 483, implementing the clean energy standards freeze.

As a bill that restricted state policy regarding Ohio's renewable energy economy, the Wind Turbine Setback Provisions would have integrated seamlessly into the subject matter of the bill.

S.B. 310 was particularly controversial and represented an already calculated compromise between proponents seeking to completely eliminate the renewable energy standards, an idea

previously proposed in S.B. 34 by Senator Kris Jordan (which would have repealed them) and in S.B. 58 by then-Senator Seitz (which would have effectively gutted them).

Any of these bills could have been amended or originally included the Wind Turbine Setback Provisions. In fact, months before the passage of H.B. 483, the public provided testimony on wind setbacks on bills unrelated to the appropriations process. It is clear that H.B. 483's Wind Turbine Setback Provisions were logrolled "riders" because testimony before a committee considering Senator Jordan's S.B. 34, which never passed through the General Assembly, permitted public testimony on wind setback requirements. Yet no provision related to wind setbacks was ever included in a version of S.B. 34. See *MBR Amendment Imposes New Siting Requirements for Wind Farms*, GONGWER, (May 20, 2014), https://www.gongwer-oh.com/programming/news.cfm?article_id=830970206; *State House Update: Wind Energy Dustup: Companies Clear Landowners to Testify On Renewable Energy Repeal*, Ohio Township Association, (Feb. 7, 2014), available at <https://ohiotownships.org/sites/default/files/020714.pdf>.

Similarly, Senator Seitz proposed a similar bill, S.B. 58, which would have modified numerous Ohio laws pertaining to renewable energy and energy efficiency, yet also did not include provisions that would have modified wind setbacks. Instead, Seitz used both bills as opportunities to bring in testimony in opposition to wind power, but neither of the bills, S.B. 34 and S.B. 58, ever included a wind setback revision. *Id.* And neither did S.B. 310, which was the ultimate compromise bill on energy that resulted from the prior attempts in S.B. 34 and 58.

Instead, the Wind Turbine Setback Provisions were inappropriately logrolled into a bill that was certain to pass—an appropriations bill, H.B. 483.

C. The Court should deny the Motion to Dismiss because The Wind Turbine Setback Provisions are not related to the operation of state government or appropriations.

The State's Motion to Dismiss rests on two arguments. First, it argues that the subject matter of H.B. 483 is that of appropriations and operation of state government. *State's Motion to Dismiss*, at 9. Specifically, the State argues that if "provisions help 'ensure the continued operation' of a state function or program, they do not violate the one-subject rule," even if those provisions have nothing to do with appropriations or the funding of the government. *Id.* Second, the State argues that the Wind Turbine Setback Provisions are merely part of a comprehensive plan for the operation of the Ohio Power Siting Board, thus fitting within the subject of H.B. 483. Both of these arguments fail, and the State's Motion to Dismiss should be denied.

The State relies heavily on *OSCEA 2016* to argue that budget bills are "not limited just to appropriations but encompass . . . 'the operations of the state government.'" *State's Motion to Dismiss*, at 9, citing *OSCEA 2016* at ¶ 16, 23. Yet, in *OSCEA 2016*, the Court specifically stated the primary subject of the bill in question was "balancing state expenditures against state revenues to ensure continued operation of state programs." *OSCEA 2016* at ¶ 23. This is further emphasized later in the opinion when the court writes that to reach its final conclusion, it kept "in mind the primary subject of H.B. 153—balancing state expenditures against state revenues to ensure continued operation of state programs." *Id.*, at ¶ 27. The *OSCEA 2016* case dictates that any discussion of the operation of state programs must occur in the context of balancing state expenditures against state revenues.

However, the State argues that budget bills can "include 'a large number of topics' for the purposes of bringing greater 'cohesion' and 'improvement' to state operations"--but such an interpretation would essentially render the one-subject rule meaningless. *State's Motion to Dismiss*, at 9, citing *OSCEA 2016*, at ¶ 17. If budget bills can include any topic that brings

“cohesion” and “improvement” to state operations, then the legislature could essentially argue for inclusion of *anything* in a budget, because everything the legislature proposes arguably touches the operation of the government in some way. Putting important limitations on such a broad reading, Ohio courts have ruled against such an interpretation. *See e.g., Simmons-Harris v. Goff*, 86 Ohio St.3d 1, at 16 - 17 (holding that the creation of a School Voucher Program, even though it related to the expenditure of state funds, violated the one-subject rule because it created a substantive program in a general appropriations bill); *see also In re Holzer Consol. Health Sys.*, 2004-Ohio-5533, ¶ 37 (holding that a program allowing the Director of Health to accept an application for relocation of up to 24 existing nursing home beds in Jackson County to Gallia County violated the one-subject rule); *see also City of Dublin v. State*, 118 Ohio Misc. 2d 18, 2002-Ohio-2431 (provisions in a biennial appropriations bill restricting municipal power to limit the use of “public ways” by utilities and cable operators violated the one-subject rule.)

1. The Wind Turbine Setback Provisions do not play the same appropriations and revenue role as the prison privatization provisions at issue in OSCEA 2016.

The State heavily relies on a comparison between the Wind Turbine Setback Provisions and the prison-privatization provisions involved in *OSCEA 2016*. In particular, the Motion to Dismiss emphasizes that the provisions under review, “required facilities to (1) demonstrate that they could operate with the required inmate capacity; (2) comply with the rules for the operation and management of corrections facilities; and (3) indemnify the state.” *State’s Motion to Dismiss*, at 9-10, citing *OSCEA 2016* at ¶ 30. What the State neglects to mention is that these criteria regulate contractors seeking to “operate and manage a *state correctional institution*” with a goal of ensuring “cost savings.” *OSCEA 2016* at ¶ 29, emphasis added. The provisions *specifically* required contractors to show they would save the public entity “5 percent over the projected cost to the public entity of providing the statutorily required services.” *Id.*

In addition to these conditions placed upon contractors, the prison-privatization provisions included offers for the sale of “five of Ohio’s corrections facilities in connection with contracts for the operation and management of those facilities.” *OSCEA 2016*, at ¶ 31.

Interestingly, the State appears to overlook this aspect of the prison-privatization provisions at issue in *OSCEA 2016*, even though these provisions provide the fundamental link between appropriations and state operations. The prison-privatization provisions satisfied the one-subject rule because they “decreased expenditures by public entities and [provided] means for revenue generation that can fund the operation of other programs and matters described in the bill.” *OSCEA 2016*, at ¶ 34.

However, the Wind Turbine Setback Provisions contain no such link between appropriations and state operations. The entire change to R.C. § 4906.20(B)(2)(a) modifies the setback distance from a turbine to the nearest habitable, residential structure to instead measure the setback distance from a turbine to the property line of adjacent properties. This language does not connect to any appropriations made in the H.B. 483 whatsoever. More importantly, and contrary to the State’s claim, the language does not relate to the operation of the Ohio Power Siting Board (OPSB) either--it only relates to the operation of private actors, namely, companies attempting to site wind farms.

2. The OPSB’s application review does not change based upon setback distances, and the Wind Turbine Setback Provisions do not affect the agency’s operations.

Alternatively, even if operations of state programs, disconnected from appropriations and funding, are permissible subjects within an appropriations bill, the Wind Turbine Setback Provisions do not help “ensure the continued operation” of a state function or program. See *State’s Motion to Dismiss*, at 9. The State argues that conditions for state programs that bring “cohesion” and “improvement” to those programs are valid for inclusion in budget bills. *State’s*

Motion to Dismiss, at 11. However, the Wind Turbine Setback Provisions are not conditions on the OPSB; rather, they are conditions placed on companies developing their applications for presentation to the OPSB. R.C. § 4906.20(B)(2)(a) prescribes “a minimum setback for a wind turbine of an economically significant wind farm,” thereby placing a requirement upon a proposed wind farm that an applicant must satisfy in its application. The functional operation and review of the OPSB does not change whether the setback provision is 600 feet, 800 feet, 1200 feet, or whether it is from the property line or the nearest habitable structure--the OPSB simply checks to ensure wind farm applicants have complied with whatever distance is mandated under Ohio law.

The State accurately describes the comprehensive state program implemented for the certification and enforcement of the conditions for major utility facilities, including wind farms. However, it misidentifies conditions placed upon those facilities as equivalent to “conditions placed upon state programs.” If the breadth of the one-subject rule were to spread so far that the conditions placed upon private actors in pursuit of establishing businesses satisfied the definition of “state operations,” then the one-subject rule would lose all force and anything regulating a private entity or citizen in the state could seemingly be included in an appropriations bill. Instead, the Court should follow the logic presented in *City of Dublin v. State*, 118 Ohio Misc. 2d 18, 2002-Ohio-2431.

In *City of Dublin v. State*, the Franklin County Court of Common Pleas rejected the State’s argument that it properly included regulations limiting the power of political subdivisions to control utilities and cable operators in an appropriations bill. The State claimed that the regulations related to appropriations because they “prevent some municipalities from collecting revenue from utility companies and cable operators . . . [or] prevent other municipalities from

increasing their fees for such use of their rights-of-way.” *Id.* at ¶ 45. In its decision, the Court recognized how far the State had to stretch to make any connection to appropriations, an indicator that the General Assembly engaged in logrolling. *Id.* at ¶ 47. Accordingly, the Court held the provisions violated the one-subject rule.

In the instant matter, the State does not even argue that particular appropriations provisions in H.B. 483 relate to the funding of the Ohio Power Siting Board, or any other entity. It instead attempts to link the Wind Turbine Setback Provisions to state operation before arguing that conditions on state operation are valid sections of an appropriations bill. However, the Wind Turbine Setback Provisions do not even relate to a state operation, so this argument fails just as the claims in *Dublin v. State* did.

In fact, the floor discussion for H.B. 483 indicates that the Wind Turbine Setback Provisions were intended for the “health and safety” of Ohioans, rather than to bring “cohesion” and “improvement” to state operations. During the extremely brief testimony regarding the provision, then-Senator William Seitz emphasized that H.B. 483 is about “health and safety,” and justifies the inclusion of the Wind Turbine Setback Provisions through that lens. *See* Senator William Seitz, address to the Ohio Senate (May 21, 2014), *available at* Ohio Channel, <http://www.ohiochannel.org/video/senate-session-may-21-2014-part-2> (Last accessed December 21, 2018).⁴ Senator Seitz describes the “health and safety impacts” of wind turbines, including snow throw, shadow flicker, and sound impacts.

At no point does Senator Seitz emphasize how the setbacks would improve the operation of the Ohio Power Siting Board or mention any relationship between the Wind Turbine Setback Provisions to appropriations. *Id.* Instead, he focused on the need to restrict placement of

⁴ The Plaintiffs’ Complaint cites this video as well to establish the lack of testimony regarding the Wind Setback Provisions. *See Plaintiffs’ Complaint*, at ¶ 21

turbines to protect rural residents of Ohio. *Id.* Any argument that the Wind Turbine Setback Provisions bring “cohesion” and “improvement” to the State of Ohio’s operations is a red herring and should be rejected.

3. Controversial subjects are inappropriate riders to appropriations bills.

Ohio courts have repeatedly held that riders attached to appropriations bills are inappropriate vehicles for inherently controversial legislation, and especially so when tenuously connected to appropriations. In *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 16, 1999 Ohio 77, 711 N.E.2d 203 (1999), a school voucher program that would have allowed parents to send their students to nonpublic schools using state dollars violated the one-subject rule when included in a general appropriations bill. In its analysis, the Court noted that the one-subject rule ensures intelligible legislation, and its application is particularly important “when the subject matter is inherently controversial and of significant constitutional importance. *Id.*

Additionally, in *City of Dublin*, the Court cited *Simmons-Harris*, noting that resolving an inherently controversial subject through attachment to an appropriations bill as a rider is an inappropriate avenue for such legislation. The proposed laws included in the appropriations bill would have modified the ability of local political subdivisions to utilize home rule, and the Court held that not only was the connection to appropriations flimsy, it was inappropriate to include an inherently controversial topic in such a manner. *City of Dublin v. State*, at ¶ 29.

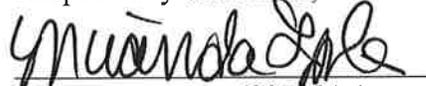
IV. CONCLUSION

The one-subject rule exists to ensure the topics contained in a bill have a common purpose or relationship, and is an intentional protection to both limit legislative power and ensure its legitimacy. The one-subject rule is especially important when reviewing appropriations bills like H.B. 483, upon which the Wind Turbine Setback Provisions were attached despite having no

identifiable relationship to appropriations. The Wind Turbine Setback Provisions were added without any time for public input, and were only discussed on the floor of the Senate for approximately ten minutes, at which time Senator Skindell protested the lack of any public debate on the matter.

The State has failed to prove beyond doubt that no facts entitle the Plaintiffs to the requested writ; in fact, the facts provided by Plaintiffs make a solid case to the contrary. Therefore, the OEC respectfully urges the Court to deny the State's Motion to Dismiss.

Respectfully submitted,



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