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Gregory v. Shurteff : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

Tom Gregory, *et al.*, Plaintiffs/Appellants, vs. Mark Shurtleff, *et al.*, Defendants/Appellees.	Sup. Ct. Dkt. No. 20110277-SC

PLAINTIFFS'/APPELLANTS' REPLY BRIEF

APPEAL FROM RULE 12(b)(6) JUDGMENT OF DISMISSAL ENTERED BY THIRD JUDICIAL DISTRICT COURT, THE HONORABLE L. A. DEVER PRESIDING

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III. OUTLINE OF ARGUMENT

Appellants were the plaintiffs below (hereinafter referenced simply as "plaintiffs"). Their complaint, which was dismissed pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, challenged the constitutionality of what the parties to this appeal, for convenience' sake, have called SB 2, an omnibus education bill. For purposes of this appeal, plaintiffs challenged the constitutionality of SB 2 on two separate and distinct grounds, one arising under the single-subject requirement of Utah Constitution, Article VI, § 22, and another under the clear-title mandate of that same provision.

In this reply brief, plaintiffs will address the violations of the single-subject and clear title requirements in turn. As to each, plaintiffs first respond to the arguments made by the appellees/defendants (hereinafter referenced simply as the "Attorney General"). Where the Utah Legislature, speaking in an *amicus* brief prepared by the Office of Legislative Research and General Counsel (hereinafter referenced alternatively as either the "OLRGC" or the "Legislature"), has supplemented (as distinct from merely repeating) the arguments of the Attorney General), plaintiffs will reply to those supplemental arguments after completing their consideration of the Attorney General's position.

Oftentimes in this reply, plaintiffs will assume that the reader is familiar with the analysis given as well as citations to authorities provided in their opening brief -- without restating those reasons or re-citing those authorities -- although

occasionally, but not always, there is a cross-reference to certain pages of that opening brief.

A. SB 2 VIOLATES THE SINGLE-SUBJECT RULE

Plaintiffs' complaint alleged that SB 2 violated Article VI, § 22's single-subject requirement for three independent reasons. These reasons, with supporting authorities, were elaborated in plaintiffs' opening brief in this Court. First, as interpreted by Utah cases and consistent with the preponderance of authorities elsewhere, single-subject rules in state constitutions are proscriptions against log-rolling and the use of riders. The legislative record, leading to enactment of SB 2, affirmatively showed that this law was the product of log-rolling and the use of riders. Second, SB 2 combined appropriations measures with substantive legal enactments. The preponderance of case law from other jurisdictions, as well as certain dicta in Utah's decisions, hold or suggest that this specific type of bundling offends the single-subject requirement because, by definition, money measures and substantive enactments are separate subjects and, in addition, given money's leverage, this constitutes a kind of *de facto* log-rolling or is tantamount to the use of riders. Third, putting aside all of these indicators of violations, and looking only to the face of SB 2, it contains more than one subject for purposes of Article VI, § 22. In order to pass muster under this sort of facial analysis, a bill does not contain a single subject, unless the components of the bill bear some necessary relation to each other -- horizontally -- as well as vertically to the umbrella of a generic subject such as "government operations," "election reform," or "education

budgets." The necessity of that horizontal relationship -- part to part -- as well as any relationship with the bill as a whole -- is weighed according to historical patterns, administrative implementation, and various codification schemes, among other considerations. Plaintiffs' complaint avers that, when so examined, the parts of SB 2 are largely irrelevant to each other.

The Attorney General begins his response to plaintiffs' three reasons, noted above, as he should, by giving a summary of the standards for judicial review of legislative enactments which are alleged to violate the single-subject requirement of Article VI, § 22, taking that synopsis from *Edler v. Edwards,* 95 P. 367, 368 (Utah 1908). *Edler* (and most subsequent applications of the single-subject side of Article VI, § 22) apply a four-factored standard: (i) The single-subject rule should be "liberally construed" (ii) so as to "guard" against the "real evil" which it was designed to prevent. (iii) Consistent with this prophylactic, remedial intent, the single-subject rule never should be ossified into a single or inflexible formula, but must be remain adaptable so as to address the peculiar circumstances and particular conditions of the case at hand. But (iv) applications of the rule which "hamper" the legislature from framing comprehensive measures respecting different parts of a unified subject should be avoided.

The Attorney General, however, fails to apply these factors to plaintiffs' first log-rolling argument, merely glosses the second, and then, when attempting to tackle the third, telescopes his analysis on number (iv) to the exclusion of the remaining mandates in (i), (ii), and (iii).

The Attorney General admits -- both in the trial court below and in his brief here[1] -- that the "real evil" which the single-subject rule is designed to prevent is the kind of logrolling or rider-tacking which is alleged in plaintiffs' complaint, an evil which, moreover, undercuts our constitution's mandates (which are articulated twice for emphasis in Utah Constitution, Article VI, §§ 1 and 22) that legislative enactments be the product of majority votes. But while plaintiffs argue that SB 2 is the product of logrolling and rider-tacking for three separate and distinct reasons -- use of popular measures as hostages to achieve the passage of already defeated bills, use of appropriations measures to the same end, and because SB 2, even on a facial review, contains unrelated, disparate parts -- the Attorney General completely ignores plaintiffs' first reason and elides the substance of the other two, appealing instead to the principle that legislatures should not be overly burdened in the means by which they are required to enact laws.

Plaintiffs agree that this latter consideration is one of four, under *Edler* and like opinions, to be considered by a court in passing on the constitutionality of a bill in light of the constraints of the single-subject rule. But all these precedents indicate that it is only one of four factors and perforce equal weight must be given to the other three. If the "real evil" is log-rolling and rider-tacking, and if the single-subject rule is to be "liberally construed" to prevent that evil, and if the

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[1] The Attorney General's admission on this score in the lower court was made at the hearing on defendants' motion to dismiss. The pertinent colloquy between court and counsel is reproduced in an excerpt of that transcript which is Appendix A to this reply brief. The Attorney General admits that the single-subject rule of Article VI, § 22, is directed at logrolling on pages 8-9 of his brief in this Court.

obvious reason for that liberality in construction is to allow for judicial flexibility in light of all the "circumstances" and "conditions" which may indicate that an enacted bill has been the product of the evil of logrolling and rider-tacking -- then something other than mantras about the content of a bill, once it is bundled with other legislation which has failed of enactment, must be considered.

As noted above, the Attorney General does not (because, in plaintiffs' view, he cannot) tackle the primary allegations of plaintiffs' complaint, that SB 2 started as 14 separate bills, that some of those bills were defeated, either by a majority vote in the House or by committee vote in the House and Senate, and then, in the latest hours of the legislative session, bundled with popular bills and an appropriations measure to achieve passage. These are "circumstances" and "conditions," on the face of the legislative record, evidencing the anti-majoritarian practice of log-rolling and rider-tacking in the classic sense.

This first reason, standing alone, is sufficient to sustain plaintiff's complaint from defendants' motion to dismiss for failure to state a claim, but plaintiffs advance two additional, independent reasons, "conditions," and "circumstances," showing that SB 2 violates the single-subject rule, neither of which are addressed persuasively by the Attorney General.

SB 2 bundled an appropriations measure with substantive legislation and this circumstance offends the single-subject rule because appropriations and laws, by definition, involve two different subject areas and also because the use of money measures as a fulcrum to leverage the enactment of ordinary laws (or, in

our case, already defeated proposals) is a text-book log-rolling and rider-tacking maneuver. Other jurisdictions with single-subject provisions in their state constitutions have recognized this constitutional (as well as practical) wisdom and that jurisprudence is cited in plaintiffs' opening brief. The authorities pointing to the same result in Utah also are set forth therein.

The Attorney General has no effective answer for this. He says that the same evil has been practiced in other Utah legislative sessions, citing to his memorandum in the lower court and that memo's purported reconstruction of historical events. But plaintiffs moved to strike these evidentiary submissions in the lower court, not only because they were out of line on a motion under Rule 12(b)(6), but also because they were offered without foundation and as hearsay. This motion was granted and those submissions should have no place or force on this appeal.[2]

More important, however, even if this history ultimately were admitted into the record of proceedings below, and even if, upon admission, it proved the legislative practice asserted by the Attorney General, it would mean nothing.

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[2] This is one of several instances where defendants and their *amicus* ally, speaking proverbially, want their cake and a bite from the apple too. The Legislature, in particular, insists that only the bill in question, independent of all contemporary or historical circumstances, may be consulted to determine whether a violation of the single-subject rule has occurred. Yet both the Attorney General and the OLRGC make an appeal to extra-statutory materials, such as the historical circumstances or legislative rulemaking, which, in their view, give context to the enactment of SB 2. But if these materials have relevance in resolving the present controversy over SB 2's validity or invalidity in light of § 22, they must be presented after laying a proper evidentiary foundation, after all Rule 12(b)(6) issues -- where the allegations of the complaint are assumed to be true -- are concluded.

Those laws, however they were enacted and whatever they provided, were not challenged in court on constitutional grounds and hence the judiciary, as the final arbiter of what is permissible under our state's constitution, has set no precedent in that regard. And prior legislative practices do not amend Article VI, § 22; Utah's Constitution may be amended only by following the process set forth in Article XXIII, § 1, a process which does not include repeated violations of a mandatory provision. *See generally, Powell v. McCormack,* 395 U.S. 486, 546 (1969) (that "an unconstitutional action has been taken before surely does not render that action any less unconstitutional at a later date"); *United States v. Morton Salt Co.,* 338 U.S. 632, 647 (1950) (once powers are "granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescribed by an unchallenged exercise").[3]

Finally, the Attorney General argues that *Thomas v. Daughters of the Utah Pioneers,* 197 P.2d 477 (Utah 1948), validates the combination of appropriations measures and substantive law, notwithstanding the strictures of the single-subject rule. Please see the Attorney General's Brief at pages 9-10. Plaintiffs respectfully disagree, however. As shown in plaintiffs' opening brief, the leading modern commentator on the single-subject rule reads *Thomas* to the opposite effect. Please see Plaintiffs' Opening Brief, at pages 27-28 & n. 13. Other Utah cases

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[3] A discussion respecting proposed amendments to the language which now is found in Article VI, § 22, for the historically-minded among us, can be found in Lowrie, "Single Topic and Clear Expression: A Legislative Error in Utah Constitutional Revision," 1971 UTAH L. REV. 512.

lean in a similar direction. Please see Plaintiffs' Opening Brief at page 28 & nn. 14 and 15. And the logic of the rule, as well as the great weight of case law and secondary authorities, supports plaintiffs' position on this appeal. Please see Plaintiffs' Opening Brief at pages 24-29.

Contrary to *Edler's* four-pronged admonition, summarized above, the Attorney General applies the single-subject rule using an inflexible, formulaic test, namely, whether the title of the bill describes a generic subject which matches the legislation's content. This approach won't wash for several reasons, however.

First, this approach conflates the single-subject and clear title requirements of Article VI, § 22, confusing both. These are separate and distinct constitutional prohibitions. Please see, for example, the OLRGC's *amicus* brief at page 2.

Second, any single-subject test which is confined narrowly to a comparison of title and contents, determining whether both relate to a generic subject such as education, will be inadequate to detect and repair the primary evil to which the single-subject rule is addressed, and therefore disregards *Edler's* injunction on this score, permitting too easy evasion of the proscription against logrolling and riders.

Third, the "education" test propounded by the AG ignores the "circumstances" and "conditions" of this case which are that the legislature in the first 43 days of the session treated education related subjects in 14 bills, expressing a legislative judgment that each was a single measure, and only at the last, when several of these 14 bills had gone down in defeat, were all joined in a bundled bill,

SB 2, so that, through anti-majoritarian log-rolling or riders, the defeated measures could be resurrected and passed into law.

Fourth, the education test ignores the further, salient "condition" that, even when conducting a facial analysis of a particular bill, appropriations measures and substantive laws are, by definition, two different subjects for purposes of § 22, and hence, SB 2 is about more than one subject.

Fifth and finally, invoking the generic title of "education bill," is insufficient under the case law of this Court which has demanded that the respective components of legislative enactments must have more than generic similarities in order to pass muster under the single-subject rule. Not only must the components of a bill be about the same subject, they also must be directly, integrally, horizontally, and functionally related. These requirements, in turn, are measured by yardsticks such as historical practice, choices for administration, placement in a codification scheme, the possible presence of legislative boondoggles, and so forth. As demonstrated in plaintiff's opening brief at pages 32-38, SB 2 fails even this superficial or facial analysis and remains invalid under Utah's version of the single-subject rule as applied by precedents from this Court and authorities everywhere.

The proscription against logrolling or riders at the heart of the single-subject rule is too easily evaded by the formulaic response that SB 2 is about "education." The cases in Utah, starting with *Edler,* and continuing to the present, never have adopted such an over-simple test. Indeed, those cases cry out for a

"liberal construction" of the single-subject rule, one that accounts for all the "conditions" and "circumstances" of a case, so that, in application, the single-subject rule strikes down laws which are the product of the very "evil," log-rolling and riders, which that constitutional prohibition was meant to interdict.

No one wants to see our legislature's "due process in lawmaking" unduly burdened with artificial constraints. But the single-subject rule is not an artificial constraint; it is an express limitation on how the legislature is allowed to conduct its business. And, as such, it is mandatory and prohibitory. *See,* Utah Constitution, Article I, § 26. Please also see plaintiffs' opening brief at pages 18-19 & n. 4. The legislative record in its simplest, most accessible form, as well as the bill itself, on its face, shows that SB 2 was the product of logrolling or victimized by riders. These circumstances and conditions plainly are alleged in plaintiffs' complaint. That complaint states a claim for relief under the single-subject rule.

The OLRGC, unlike the Attorney General, does not ignore or gloss over the first and second reasons which plaintiffs advance on the logrolling/rider front. The OLRGC instead insists that these arguments are inadmissible because only one approach -- a facial examination of the bill, as distinct from any scrutiny of legislative behavior in passing the bill -- may be employed in determining compliance with the single-subject rule. According to the OLRGC, this approach, looking at the face of the bill to determine whether it is about more than one subject, should be approved because it avoids the need to plumb the uncertain

depths of the legislative psyche and insures consistency with other constitutional provisions such as the Speech and Debate Clause found at Utah Constitution, Article VI, § 8.

Plaintiffs respectfully disagree with the OLRGC on this point for several reasons. First, the single-subject rule is designed to debar logrolling or the use of riders. All parties, plaintiffs and defendants, concur on this point. Language from Utah's cases underscore this point. Indeed, as demonstrated in plaintiffs' opening brief, the entire history of single-subject jurisprudence, the case law from other jurisdictions, and numerous commentators emphasize that single-subject provisions in state constitutions are intended to prevent logrolling and the use of riders. Logrolling and the use of riders are forms of legislative behavior, not something that in every instance will appear from the face of a bill. If logrolling or riders are the target, then judicial means sufficient to hit that target must be found. Those means perforce entail a look at what a legislature did behaviorally during the course of enactment, as well as the ultimate legislative product.[4]

In addition to this logic (that behavioral wrongs are shown by reflecting on the behavior itself as well as the outcomes of those wrongs), the Utah single-

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[4] What is more, as shown below, even the so-called facial approach to single-subject analysis requires examination into circumstances outside the four corners of the bill in question. Those circumstances include the legislative treatment of identical subjects on prior occasions, administrative practices in connection with the area under review, whether, in passing the bill, corrupting incentives might have been at play, and the like. Please see plaintiffs' opening brief at pages 32-38 & all nn. Hence, a look at legislative behavior which is related to passage of the bill appears to be inevitable -- even under the OLRGC's preferred method of single-subject analysis.

subject cases belie the OLRGC's position in this regard. Those cases consistently have held that there is no single formula for determining compliance with the single-subject rule and that courts should construe this constitutional requirement broadly, in consonance with its remedial purpose, adapting the rule to the "circumstances" and "conditions" of each case so as to prevent the evil, logrolling or riders, which the single-subject rule was designed to interdict. A single test, looking facially at the content of the bill, is contrary to this rule of construction, a rule which this Court has followed for over a century in dozens of cases.

The Legislature's method for ascertaining when violations of § 22 occur -- to look only at the bill on its face -- appears incongruous when viewed in light of other rules which have been developed by this Court in conjunction with the jurisprudence under Article VI, § 22, such as the so-called modified enrolled bill doctrine. That doctrine permits an examination of the record of proceedings in the journals which, as a constitutional requirement, must be kept by each house in the legislature. In our case, these journals, which detail the introduction and disposition of bills, including the 14 which are at issue here, show the legislative behavior, including the posting of several defeated bills as riders and other, log-rolling-type machinations, which implicate and demonstrate violations of the single-subject rule. *See, Jensen v. Matheson,* 583 P.2d 77, 79-80 (Utah 1978) (Utah generally follows modified version of enrolled bill doctrine, permitting use of journals in house and senate to prove or disprove violations under Article VI, § 22). *See also, McGuire v. U of Utah Medical Center,* 603 P.2d 786, 790 (Utah

1979) (Court uses floor debates to resolve dispute under Article VI, § 22). If only the content of the bill is germane to a determination of violations under Article VI, § 22, then why permit resort to this legislative history, a history which shows how legislators behaved, how the process was conducted, and, as *Edler* and its progeny would put it, the other "circumstances" and "conditions" that are relevant to application of the single-subject rule?

The OLRGC's concern about avoiding guesswork in terms of legislative intent is overstated. For the most part, there needn't be any guesswork, since, under Utah's modified version of the enrolled bill doctrine, discussed above, extra-record evidence will be kept to a minimum. Indeed, plaintiffs' allegations in the complaint are based upon the house and senate journals which afford an objective, not subjective, history of the progression of the 14 bills at issue here, how some were defeated by vote or in committee and then, through anti-majoritarian maneuver, were bundled, rider-like, with popular measures and appropriations features to achieve passage in an omnibus SB 2.

And even if evidence from legislative debates (or even extra-legislative statements, such as those made by Senate President Waddoups about SB 2 at a political convention) were admissible into evidence, the judicial branch can be trusted to show wisdom in the exclusion, admission, and weighing of all such materials in a case such as ours. Courts are called upon, as a matter of everyday practice, to do exactly this as they construe and give meaning to statutes and other expressions of legislative purpose. The OLRGC pleads for deference to the

legislature as that branch of government fulfills its constitutional role, but the same deference must be given to our judiciary as it stands independently to determine whether that legislative role constitutionally was fulfilled. Indeed, there well might be more uncertainty and hence guesswork in sorting a statute for single-subject purposes if courts must put on blinkers or turn a blind eye to any and all extra-textual materials.

The OLRGC's concern that overzealous application of the single-subject rule will blunt the give and take of legislative compromise -- a process which is essential to all lawmaking -- while having more force, being related to one of the four *Edler* factors -- shouldn't give the Court pause in this case. The OLRGC poses some interesting hypotheticals, taken from law review literature, and expresses some fears about the impact of a decision in this case respecting projected healthcare legislation which may be coming down the pike. But these hypothetical circumstances and imagined difficulties are not present in the case and controversy now before this Court -- and, in all events, are not amenable to advisory opinion-making by this Court. Indeed, this Court has decreed that every decision under Article VI, § 22, is *sui generis,* and stands alone. These decisions may give guidance as illustrations, but will have very little precedential value in the resolution of future disputes. Please see plaintiffs' opening brief at pages 14-15 & n. 2.

Our case poses no real (as distinct from hypothetical, imagined, or future) difficulties in parsing circumstances to prove whether logrolling or riders (as

opposed to what might be considered normal legislative compromises) occurred in the passage of SB 2. The facts as alleged, clearly appearing from the record of house and senate journals, are that 14 bills were believed to be single subject measures and treated as such by an entire legislature for at least 42 days of the 45 day session. Three or four of those bills failed -- by majority vote in one house or by committee vote in both houses. But for their bundling at the last minute with popular measures and an appropriations bill, as riders or through logrolling (the distinction, in this case, being semantic), they would not have succeeded in passage. The objective facts of this case, as alleged in plaintiffs' complaint, set forth a clear case of logrolling and the use of riders. Three or four of the 14 bills which ultimately were joined to create SB 2 were defeated or dead on arrival. Negotiations had ended. There was no need for "legislative compromise." They became law through anti-majoritarian bundling -- whether we call that log-rolling or riders or by any other name. These peculiar facts and particular conditions violated the essence of the single-subject rule in Article VI, § 22.

The OLRGC argues that there is nothing insidious about leaving appropriations bills until the last part of the legislative session and that this in fact is a necessary part of the budget-making process, since the correct figures can't be ascertained until there is a sense of what laws in need of funding actually will be passed, events which are not finalized until a session's end. While plaintiffs and the Court are enlightened by this description of the lawmaking process, it misses the point of the allegations in plaintiffs' complaint. Plaintiffs' complaint is not that

appropriations were finalized in the last days of the legislative session. They complain that the bills at issue were held and then bundled with appropriations measures, that the bills which had suffered defeat were tacked on as riders to this bundle of bills, and that all of this occurred in the final stages of the legislative session -- a circumstance which threatened a loss of the funding if legislators voted their disapproval of any of the bundled bills or the defeated proposals which rode on that bundle. In short, the substantive measures in SB 2, all of which had been presented and considered as separate bills, some of which went down to defeat in the forepart of the session, were bundled with certain appropriations measures so that the defeated bills, contrary to the will of the majority, could achieve passage. Some appropriations measures were used, with other popular measures, to leverage defeated bills into enactment.

For better or for worse, Article VI, § 22, is a limitation on the method by which the legislature may enact laws. That limitation, as read by this Court in the past, and by countless other courts over time, is a proscription of logrolling and riders. This court has said that, in order to apply the single-subject rule in furtherance of that purpose, the purpose of preventing this particular form of legislative "evil," the constitutional provision is to be read liberally, and adapted to the facts, circumstances, and conditions of each case. In all events, application of the rule is mandatory. We must remember that plaintiffs include many sitting and former legislators, who, because of this status, are not unsympathetic to the OLRGC's concerns about unduly hamstringing the lawmaking process. But these

legislators, like Senate President Waddoups, saw what happened in the passage of SB 2. Like Senator President Waddoups, they knew that SB 2's passage did not entail a "compromise" in the traditional, beneficial sense. They saw it for what it was, a log-rolling, rider-tacking maneuver. The Court, accordingly, must give anti-log-rolling and anti-rider meaning to Article VI, § 22, and this case, with our facts (not some future, imagined proceeding with as yet unknown facts) permits that application to a garden-variety example of the use of log-rolling and/or riders.

The OLRGC devotes a fourth of its *amicus* brief to showing that plaintiffs' analysis puts the Speech and Debate Clause, found at Article VI, § 8, in jeopardy. But this argument -- if taken too broadly -- would be a red herring and, in all events, is beside the point. The Speech and Debate Clause vouchsafes immunity for *individual* legislators under various circumstances. It does not excuse institutional violations of constitutional proscriptions like the single-subject rule -- proscriptions which have equal rank with the speech and debate clause in our state constitution. Indeed, the Legislature's invocation of the speech and debate clause, if interpreted broadly, proves too much in the circumstances of our case. Thus applied, it would excuse every form of constitutional excess by our state legislature, ranging from the limitations which § 22 imposes on the lawmaking process to violations of any number of provisions in Article I's declaration of rights.

But we understand the Legislature's argument to be not so broad -- rather, the argument seems to be that, if single-subject cases entail an exploration of

legislative motives, as opposed to facial analysis of the bill in question, a risk of impinging upon a legislator's speech and debate privilege will occur. But no such risk has materialized in our case. Plaintiffs have not sued any legislator in this proceeding. What is more, the likelihood that any such risk will materialize in the future, assuming this case goes forward, is improbable and nil. For one thing, since the journal record of legislative proceedings so clearly evidences logrolling and the use of riders -- plaintiffs do not intend to seek testimony from any legislator who would insist upon retaining his privilege. Indeed, since legislative debates, in the main, have been declared all but off-limits pursuant to the modified enrolled bill doctrine which is an adjunct to litigation under Article VI, § 22, *see, Jensen v. Matheson,* discussed *supra,* the availability of such testimony as evidence is severely circumscribed and any corresponding need to subpoena a legislator may have become much mooted. Nobody will even have to worry about invoking whatever privilege may be available through the speech and debate clause. And if such a legislator is served with process to compel testimony, and if the OLRGC's analysis of the scope of immunity which shields legislators from unwilling participation in these contests is vindicated, the privilege itself will protect legislators. In short, this lengthy argument addresses a circumstance which may never occur in order to make the point that, even if it does occur, the legislator will be protected by the privilege. Plaintiffs cannot see how the speech

and debate clause or a legislator who invokes it will be placed in jeopardy by these circumstances. It all seems merely to be a parade of imagined horribles.[5]

By disagreeing with the OLRGC's assertion that there must be a single test, facial examination of the enrolled bill, for determining whether a violation of the single-subject rule has occurred, plaintiffs are not disagreeing with Professor Rudd's assessment, as paraphrased by the Legislature, that "[t]he content of a bill can be objectively analyzed to determine whether it has one subject or multiple subjects." Please see the *amicus* brief at page 9. Indeed, plaintiffs' opening brief makes an objective, facial examination of SB 2 and shows how and why, under

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[5] Perhaps the legislature is worried about the quotation attributed to Senate President Waddoups in plaintiffs' complaint, a quotation which is repeated in their opening brief. In this quotation, Senate President Waddoups admits that, contrary to the argument made in the *amicus* brief, the combining of appropriations measures with substantive law at the end of the session in SB 2 was both out of the ordinary and improper.

This worry is premature, however, since we are only at the Rule 12(b)(6) motion stage of this litigation where allegations of logrolling must be accepted as true and evidentiary considerations are premature or irrelevant.

If plaintiffs' complaint states a claim under the single-subject rule, and if that claim goes to trial, and if plaintiffs attempt to prove that claim with this statement from Senate President Waddoups, and if that evidence is admissible as an exception to the enrolled bill doctrine, the speech and debate clause will not be any impediment to this evidentiary submission. The quotation is taken from a written handbill which Waddoups circulated at the Salt Lake County Republican convention. A delegate who received a copy at that time will so testify. And the plaintiffs who were legislators or legislative clerks when SB 2 was passed also will waive their privilege under the speech and debate clause and testify concerning these logrolling irregularities. In short, the legislature's worries are hypothetical at best and should not be entertained under the present, procedural posture of this case.

our state's case law and other authorities, when properly interpreted, that bill contains more than one subject. It contains more than one subject, on its face, because it combines appropriations measures with substantive law. And, in addition, it contains more than one subject because the separate sections of the bill have no necessary, integral, or functional relation with each other -- since they have not been treated together historically, they are administered by separate departments of state government, and they are codified in different parts of the state code. Moreover, there is a suggestion that the revival of one of the defeated bills may have been prompted by special lobbying interests.

Viewed in this light, SB 2 even runs afoul of the facial test announced in *Wirtz v. Quinn,* 953 N.E.2d 899, 905 (Ill. 2011) quoted approvingly on page 21 of the *amicus* brief. In *Wirtz,* the Illinois Supreme Court said that single-subject violations will not be found only so long as "'there is no blatant disunity among the provisions of the bill and there is a rational purpose for their combination in a single enactment. . . '" (internal citation omitted). There is a "blatant disunity" among the education subjects treated in SB 2. They have no necessary relation to each other, something that is called for when a "comprehensive" treatment of a single subject is in play. And there is no "rational purpose" for their combination in a single enactment. If there had been, they would have started together, rather than separately. The reason for their combination was to revive and enact those parts of SB 2 which previously had lacked majority support, suffering defeat, when standing alone.

Acknowledging that, under this Court's formulation of a facial test for single-subject propriety, the parts of an omnibus bill must relate or be germane to each other, the OLRGC states, conclusorily, at page 21 of the *amicus* brief, that "[e]ach of the parts of S.B. 2 are [sic] germane to one another and relate to the subject of public education." With respect, viewed facially, even superficially, under the traditional tests employed by single-subject authorities, they are not. Please see plaintiffs' opening brief at pages 32-38.

Indeed, drawing the conclusion that all parts of SB 2 relate to each other -- as well as to the subject of education -- cannot be accomplished, given the traditional tests respecting history, administration, codification, and boondoggling, absent evidence along those lines. Neither the Attorney General nor the OLRGC has or could supply that evidence at this Rule 12(b)(6) stage of the proceeding. As alleged in the complaint, this state's most expert institution insofar as public education is concerned, the Utah State Board of Education, passed a resolution stating that the omnibus character of SB 2 was inappropriate. Measured by the yardsticks which typically are used to assess the sufficiency or rationality of these connections -- history, choice of department for administration, codification, and

the possible presence of special interests -- the State Board's view has considerable force.[6]

B. SB 2 VIOLATES THE CLEAR TITLE RULE

The clear title portion of Article VI, § 22, affords a basis, separate and distinct from the single-subject rule, for invalidating legislation. The test articulated by this Court for determining whether the title of a bill is unclear and hence offensive to this aspect of § 22 is whether the manner in which a bill is "named" is misleading or productive of fraud or surprise. An under-inclusive title, one suggesting that a bill's contents are less than the legislation actually included, is one example of a bill, the title of which is misleading or productive of fraud or surprise. In the final analysis, whether a bill's title is misleading or otherwise improper is gauged by the understanding and circumstances, not only of legislators, but also of the public at large. In other words, the clear title rule is designed to protect legislators from the machinations of legislative cabals and it

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[6] These tests, the ones typically employed in so-called facial analyses of questionable bills, ironically call upon the judiciary to look past the four corners of the enactment to other circumstances, the history of treatment, departmental administration, and the like, to test the singularity of subject-matter under § 22. Hence, these tests within the facial test undercut the OLRGC's *amicus* position that there is only one criterion, the bill itself, by which this constitutional determination is made. These tests also underscore the Rule 12(b)(6) procedural context we are in at this stage of the proceeding. Plaintiffs' complaint alleges that, from a facial standpoint, and in light of these historical and administrative tests, SB 2 violates the single-subject rule. Whether the constituent parts of SB 2 are germane to each other may be determined, not by the conclusory statement of the OLRGC in an *amicus* brief, but by testimony and other evidence, including the expert testimony of the Utah State Board of Education and others, which will show that there is nothing comprehensive or rational in the least about the hodge-podge of segments in SB 2.

also is intended to safeguard citizens as one of several "sunshine" measures in Article VI, assuring transparency in the lawmaking process.

The Attorney General focuses exclusively on plaintiff's argument that SB 2's title, "Minimum School Budget Amendments," is under-inclusive, attempting to distinguish authorities such as *Pass v. Kanell,* 100 P.2d 972 (Utah 1940) and *Salt Lake City v. Wilson,* 148 P. 1104 (Utah 1915), and ignoring others such as *Ritchie v. Richards,* 48 P. 670 (Utah 1896). Plaintiffs respectfully submit that the Attorney General's attempt to distinguish these cases fails. As an "act related to motor vehicles" is to an "act for the registration of motor vehicles," so also is "minimum school budget amendments" to education in general or a variety of substantive provisions respecting policies in and provisioning for education.

But plaintiffs' argument, while stressing the under-inclusive nature of SB 2's title, involved much more. Plaintiffs pointed to all of the facts and circumstances which made SB 2's titling so misleading in nature and the product of surprise. These circumstances included, of course, the under-inclusive title. But they also included the misleading use of the word "amendments" in the title, the eleventh hour bundling of 14 measures into one, the re-titling or changing descriptions of some these measures in the process, and the irregular and hence startling joinder of this hodge-podge of substantive measures with an appropriations authorization. Even if the Court may take into account SB 2's long title for purposes of applying the clear title rule, as argued by the Attorney General, these additional circumstances were misleading and misled and,

certainly, in the nature of things, took all by surprise. The long title won't save SB 2 from these additional constitutional deficiencies which are germane to analysis of the clear title requirement.

In all events, the Attorney General does not come to grips with the constitutional text, the clear title language, in Article VI, § 22. That language speaks in terms of a title, singular, not titles, plural. The authors of Utah's Constitution may have selected the singular tense advisedly, given the purpose to be served by the clear title rule, since the fact of more than one title, as a circumstance standing alone, may breed ambiguity or confusion, misleading the legislators and citizens who are the objects of § 22's protection.

In that respect, plaintiffs emphasize that the clear title rule, together with its purposes to promote transparency and to the prevent all that is misleading or the misfortune of surprise, is designed to protect the public as well as legislators from what otherwise might prove an abusive process. Whatever the sophistication or understanding of legislators may have been, as they saw SB 2 log-rolled into law in the last days of the session, there were citizens who left their watch when they saw 4 of the 14 separately titled bills defeated in the forepart of those proceedings or who, even if they kept their post as sentinels, had their sight occluded by the "budget" and "amendments" title of SB 2, as well as the re-titling and/or burying of those defeated bills in the body of SB 2. Their rights to the sunshine of a clear title clearly were violated by the "misleading" "surprise" of SB 2. *See, e.g., Jensen*

v. Matheson, 583 P.2d 77, 80 (Utah 1978) (clear title rule designed to prevent "burying" or "obscuring" of proposed legislation).

The Attorney General responds to all of the above essentially by arguing that two Utah cases hold that the long title, as well as the short title, may be considered in making a determination whether the clear title provision of § 22 has been violated. But this response is unavailing for the following reasons.

First, in our case, if the long title can be and is considered in determining compliance with the clear title standards of § 22, that might show that SB 2's title was not, as plaintiffs maintain, under-inclusive. But it would not save SB 2's titles, short and long, from the allegations of the complaint that, taking all circumstances together, the naming of the bill was misleading and the product of surprise.

Second, the cases cited by the Attorney General, when carefully read, do not stand for the proposition that the long title may be taken into account -- or invariably considered -- in determining whether the clear title requirement has been satisfied. The Attorney General cites *Jensen v. Matheson,* 583 P.2d 77 (Utah 1978), for example. But *Jensen* dealt with circumstances where legislative leaders complained that § 22's requirement that certain bills be read, by title, on three

separate occasions in each house as conditions to passage had been violated[7] and, after resolving this controversy by reference to the modified enrolled bill doctrine, made inconclusive comments about why the reading of titles is important in view of § 22's clear title provision. These "further observations," as the court called them, were dicta, and, moreover, aside from re-stating the salutary purpose to be served by the clear title provision, left undetermined which of three titles identified in the text of the opinion -- "its so-called short title," "its official title," or "a descriptive title" -- *id.* at 80, ought to be read. And, finally, in making these "further comments," the Court was at pains to say that "[t]hese observations are general and we do not desire what is said herein to be understood as indicating any rigid formula." *Id.* Even application of the modified enrolled bill doctrine, the primary focus of this opinion, was subject to a variety of exceptions including "other machination in regard to the constitutionally required records." *Id.* The Court was wise to pose these caveats -- even though only dicta was involved -- since the three readings requirement, by the terms of § 22, can be and often is waived by a constitutionally required majority in each house, a circumstance that leaves legislators and the public to rely on a visual rather than auditory encounter with the title(s) of the bill in assessing their clarity.

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[7] This is clear from the context and text of the decision. The parties complaining of the legislation in that case were relying upon the voice recordings in each session to show that the titles of the bills in question had not been read three times, *id.* at 78, leading to an extended discussion of the so-called enrolled bill doctrine, *id.* at 78-80. At the tail end of this discussion -- coming to the language relied upon by the Attorney General -- the Court makes "further observations" about which title should be read in order to satisfy this three readings language, *id.* at 80.

The Attorney General also cites *McGuire v. U of Utah Medical Center,* 603 P.2d 786 (Utah 1979) for the proposition that this Court has used a bill's long title, as distinct from the short or official title, to assess constitutionality under the clear title language of § 22. But while the decision in *McGuire* references a synoptic title, the opinion does not tell us whether that was the bill's short, official, or only descriptor. From all that is revealed in the text of the opinion, this was the title of the bill and the only title subject to evaluation for purposes of § 22. In any event, *McGuire* did not address the questions presented in our case, the potentially controlling impact of the singular "title" in § 22, or whether, if any consideration of plural "titles" is allowed -- whether two or more titles within the same bill -- or 14 separate bill titles which have been collapsed, altered, and re-titled into one bill at the end of a session -- those multiple titles would offend the clear *title* language of § 22 -- or whether those multiple titles, on the facts of any given case, such as ours, are misleading, surprising, or otherwise offensive to constitutional standards. Finally, unlike our case, *McGuire* did not present other circumstances, such as last minute bundling of bills, some of which earlier had been defeated under separate titles. Such circumstances themselves might give rise to the sort of "burying or obscuring," which *Jensen v. Matheson,* 583 P.2d at 80, identified as inimical to the underlying purpose of the clear title standard.

IV. CONCLUSION

Plaintiffs' complaint adequately alleges the elements of log-rolling pursuant to the single-subject case law pertinent to Article VI, Section 22. Count one of the

complaint, therefore, states a claim upon which relief may be granted under Rule 12(b)(6). The complaint sufficiently alleges the elements of an unclear title violation under Article VI, Section 22. Count two of the complaint, therefore, states a claim upon which relief may be granted under Rule 12(b)(6). The lower court's ruling to the contrary, resulting in a judgment dismissing counts one and two of the complaint, should be reversed. This case thereafter should be remanded to the lower court for further pretrial proceedings and a trial on the merits of plaintiffs' claims.

Dated this 3rd day of January, 2012.

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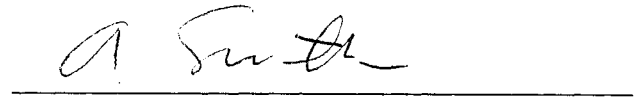
V. CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies that this reply brief complies with the word and line limitations found in Rule 24(f)(1)(A), Utah Rules of Appellate Procedure. The undersigned's word processing system indicates that, exclusive of the front page, table of contents, and table of authorities, the reply brief's word count is not greater than 6,752 words and the line count is not greater than 548 lines.

The undersigned further certifies that the foregoing Plaintiffs'/Appellants' Reply Brief, together with a disk containing a pdf formatted, searchable, electronic version of the same, was served this 3rd day of January, 2012, by mailing copies of the same, first class mail, postage prepaid, addressed to counsel for defendants/appellees, Jerrold S. Jensen, Assistant Attorney General, and Brent A. Burnett, Assistant Attorney General, 160 East 300 South, 5th Floor, P. O. Box 140857, Salt Lake City, Utah 84114-0857 and to counsel for the legislature, John L. Fellows and Robert H Rees, Utah State Capitol Complex, House Building, Suite W210, P. O. Box 145210, Salt Lake City, Utah 84414.



Tab A

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

TOM GREGORY, et al.,	: Case No. 080908814
Plaintiffs,	: Appellate Court No. 20110473
v	:
MARK SHURTLIFF, et al.,	:
Defendants.	: With Keyword Index

MOTION TO DISMISS MARCH 26, 2009

BEFORE

THE HONORABLE ROBERT FAUST

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* * *

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bill. He is dead right, and we have not tried to hide that. No one's hiding that. It's all a matter of public record. That is true, but he said - he wants to accuse me of saying, Well, this goes on all the time. The reason I attached the school finance bill for 2007 and for 2006 was to show that substantive law provisions are passed with the school finance bill. Is it 13 bills wrapped into one? No. Has that ever been done before? No. Does the Senate president like it? No. Is there room to disagree here on whether or not we politically like it? Yes, there is.

THE COURT: Well, let me ask you this question, Mr. Jensen. The Supreme Court has talked about how the court should look at these types of things. If we use that one little phrase in there that the court should look at what is the real evil that this particular section of the constitution is trying to remedy, what do you think the real evil is that they're trying to remedy by this constitutional section?

MR. JENSEN: Oh, I -

THE COURT: They argue that it's - logrolling is the real evil, and the court should look at that as part of the reason behind this particular section of the constitution.

MR. JENSEN: Well, I'm not going to adamantly disagree that this bill doesn't encompass logrolling. I

mean, I think that's part of the provision. But the question - I mean, I guess the question here is logrolling, but it's riders. It's combining different topics, and it's done in congress all the time. It's combining a subject totally unrelated to another bill, because that one is approved, and the rider may not get through on themselves. I mean, is that logrolling?

THE COURT: So I get - my question to you then is, it - as long as the defeated bill - let's use the example of the four defeated bills, which I think is probably more - clearly understandable for - in some people's views that this is not the correct way to do things, but let's use that as an example. They are the same type of - if we want to call it education issues and they're combined in this bill, because everyone knows - or at least argues that we need to pass this bill so we'll tack this unpopular section in here, and we'll pass the whole thing. Now, if it is said licensing of Pit Bulls or something else, then maybe that would have been an issue that we could say ah, obviously they're not connected. But their argument - the way I hear them arguing is is that it's the whole idea that things that wouldn't pass on their own is part of the real evil as well, not just the title. Not just the subject. Do you disagree that that's part of the real evil? Am I overstepping my bounds to say this is the real evil that the drafters of our constitution wanted to

avoid?

MR. JENSEN: No. I - no, I don't think you're overstepping it. I think that that is an evil that the constitutional provision is directed towards. I don't disagree with that. I guess the question is, did it happen here? And maybe we need an evidentiary hearing for that, but - so let me just address that. The SB-2 comes on the Senate floor, is passed by the Senate. It goes over to the House where one of these bills had been defeated. The bill is - it passes the first and second ring calendar, and then it's put on the third ring calendar meaning the bill's here. You have a chance to work at it. We'll debate it, in this case, tomorrow. It was - it went to a - it went to discussion on the full House. It was discussed at some time. The idea was mentioned that a bill was in here that had been defeated by the House as said on the - as a record on the floor of the House. The bill is amended. There are votes taken. The bill is amended, and passed, and is sent back over to the Senate. The Senate does not concur in the House amendment. It goes to conference.

I need to back up. The bill was introduced in the Senate, and the original bill is not voted on. There is a substitute offer. I'm sorry. So it's the first substitute. That goes over to the House. It is amended. It is decided in the House that - it includes the bill [inaudible] past.

It is amended. It goes to the Senate. The Senate does not concur in the amendment. They go to a House/Senate conference, and a second substitute is proposed, and it passes both houses. I'm going - I guess the question, given that fact situation, is that logrolling?

THE COURT: Uh-huh (affirmative).

MR. JENSEN: I mean did the Senate and the House have an opportunity to vote on it? Yes. Did they vote on it? Now they had a subsequent opportunity to vote on it? Yeah. We just had a legislative session. Nothing got undone. It didn't get taken out.

THE COURT: Okay.

MR. JENSEN: It's substantive law. It's there.

THE COURT: Okay. Anything else?

MR. JENSEN: Well, there are bills that are introduced in the legislature that have appropriations tied to them. They're fiscal known bills. Your Honor knows that. They - what I hear the argument here is that there shouldn't be any bills that have money attached to them. They argued, and that's not the way it works. There are bills. And they took money bills, and they wrapped them together to pass. But that is - that's a very common thing, and they all passed the last three days of the legislature. This is - and then the concept is not unique. The idea that all of these bills are wrapped into the school finance bill, I agree. That is