Principles of Statutory Interpretation

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I. Textual and legislative canons

- Begin with the plain meaning of the text, and end there if possible.
  - Except when the text suggests an absurd result or a scrivener’s error.
  - See *State v. Traylor*, 100 Miss. 544 (1911).

- If the plain meaning is ambiguous, determine legislative intent.
  - R.C. 1.49.

- When the legislature amends a statute, it is presumed that a change in the law is intended.
  - Drafting strategy:
    - Avoid making unnecessary changes to the statute.
    - Legislative statements that no substantive change is intended may be insufficient.

- A statute is presumed to be prospective.
  - Ohio Const. Art. II, Sec. 28.
  - R.C. 1.48.

- A just and reasonable result is intended.
  - A strained or forced construction is not favored.
  - Avoid inconsistent or absurd results.
  - A result feasible of execution is intended.
  - R.C. 1.47.

- An unrepealed statute does not become defunct by reason of desuetude (disuse).
  - See *State v. French*, 460 N.W.2d 2 (Minn. 1990).
  - Drafting strategy:
    - Check for existing statutes that may affect the goal of the current draft.
    - Do not assume that a defunct statute that is left on the books will not affect new legislation.

- Repeal of a repealing statute does not revive prior law.
  - R.C. 1.57.
• Remedial laws are to be liberally construed.
  o An ambiguous statute that is intended to remedy a problem should be interpreted broadly, instead of narrowly, in order to address the problem more fully.
  o R.C. 1.11.

• A statute is presumed to be severable.
  o If part of a statute is ruled unconstitutional, the unconstitutional part should be "severed" and the remaining law should still be enforced, if possible.
  o R.C. 1.50.

• Computation of time
  o Time is computed by excluding the first and including the last day, except that when the last day falls on a Sunday or a legal holiday, the act may be done on the next succeeding day that is not a Sunday or a legal holiday. (R.C. 1.14.)
  o If a number of months is to be computed by counting the months from a particular day, the period ends on the same numerical day in the concluding month as the day of the month from which the computation is begun, unless there are not that many days in the concluding month, in which case the period ends on the last day of that month. (R.C. 1.45.)

II. Contextual canons

• The entire statute is intended to be effective.
  o Statutes in pari materia (addressing the same subject matter) must, if possible, be construed to give full effect to each and to gather legislative intent from the whole of the enactments.
  o A statute is to be construed as a whole to give a consistent, harmonious, and sensible effect to all its parts.
  o R.C. 1.47(B).
  o Drafting strategy:
    - Be aware of surrounding statutes that may affect the draft, even if they do not seem to be directly related to the topic.
    - Be clear and specific so that a court will not need to look beyond the immediate statute to interpret the intended meaning.
• **Surplusage Canon**
  o Every word and provision is to be given effect.
  o Avoid redundant or superfluous phrasing.

• **Presumption of Consistent Usage**
  o Interpret the same or similar terms in a statute the same way.
  o A change or difference in terminology is considered meaningful.
  o Drafting strategy:
    ▪ Use terminology that is consistent with the terms used in existing statutes that have the same meaning.
    ▪ In new drafts, use the same term in the same way each time.

• **Specific provisions prevail as an exception to general provisions.**
  o But, exceptions should be read narrowly.
  o R.C. 1.12 and 1.51.
  o Drafting strategy:
    ▪ When creating an exception to a general provision, explicitly "notwithstanding" the general statute in the exception or add "except as provided in" to the general statute.

• If statutes are irreconcilable, the statute with the latest effective date prevails.
  o If the statutes have the same effective date, the statute prevails that is latest in its passage by the legislature.
  o R.C. 1.52.

### III. Grammar, syntax, and linguistic inferences

• Follow the ordinary usage of terms, unless they are given a specified or technical meaning.
  o R.C. 1.42.

• Punctuation is meaningful.
  o Consider using the Oxford (serial) comma to make your writing more clear.
  o See *O’Connor v. Oakhurst Dairy*, 851 F.3d 69 (5th Cir. 2017).
• The Rule of Negative Implication (expressio unius est exclusio alterius)
  o The inclusion of certain items implies the exclusion of others.
  o Omitted-Case Canon (casus omissus pro omissio habendus est)
    ▪ A matter not covered is to be treated as not covered.
  o Presumption of Nonexclusive "Include"
    ▪ "Including" implies that that which follows is a partial, not an
      exhaustive listing of all that is subsumed within the stated category.
    ▪ It is not necessary to say, "including, but not limited to ..."
    ▪ See In re Hartman, 2 Ohio St. 3d 154 (1983) and Phelps Dodge Corp. v.
      NLRB, 313 U.S. 177 (1941).

• Noscitur a sociis ("It is known from its associates.")
  o Interpret a general term to be similar to more specific terms in a series.
  o See State v. Kasnett, 34 Ohio St. 2d 193 (1973) and Dolan v. U.S. Postal Service,

• Ejusdem generis ("of the same kind")
  o Interpret a general term to reflect the class of objects reflected in more specific
    terms accompanying it.
  o See Sierra Club v. Kenney, 429 N.E. 2d 1214 (Ill. 1981) and Treasure Island
    Catering Co. v. State Bd. of Equalization, 120 P. 2d 1 (Cal. 1941).

• Doctrine of the Last Antecedent
  o Relative or qualifying words and phrases, where no contrary intention
    appears, are construed to refer solely to the last antecedent with which they
    are closely connected.
  o See U.S. v. Palmer, 16 U.S. 610 (1818) and People v. McPherson, 619 P.2d 38
    (Colo. 1980).
  o Drafting strategy:
    ▪ Use divisions to apply qualifiers only to the terms to which they apply.
    ▪ E.g., instead of "To get dessert, you must eat ham and eggs that are
      green," say, "To get dessert, you must eat both of the following:
        (A) Green eggs;
        (B) Ham."

• The singular includes the plural.
  o R.C. 1.43(A).
• The masculine includes the feminine.
  o But, LSC's policy is to use gender-neutral language.
  o R.C. 1.31 and 1.43(B).

• Words in the present tense include the future tense.
  o R.C. 1.43(C).

IV. Extrinsic sources of authority

• Legislative history
  o The courts may examine LSC analyses, committee testimony, floor speeches, press releases, etc.
  o The interpretation of one member of the General Assembly who voted for a bill is not enough to determine the intent of the entire General Assembly in passing the bill.
  o See Meeks v. Papadopulos, 62 Ohio St. 2d 187 (1980); State v. Lowe, 112 Ohio St. 3d 507 (2007); and State v. Smith, 80 Ohio St. 3d 89 (1997).
  o Drafting strategy:
    ▪ Be aware that the courts may look to LSC analyses and memoranda to interpret a statute.
    ▪ If the analysis is necessary to understand the statute, the statute should be drafted more clearly.

• Agency interpretations
  o Defer to an executive agency's interpretation of the laws that govern the agency, especially when there is express delegation of rule-making duties to the agency.
  o Unless the agency's interpretation is contrary to the plain meaning of the statute or is unreasonable.
  o Drafting strategy:
    ▪ Be aware of existing agency rules and directives that may impact a statute.
    ▪ If an agency's current interpretation is contrary to the drafter's intent, the drafter should clarify the statute.

• Constitutional issues
  o Legislation is intended to be constitutional.
    ▪ Avoid interpretations that would render a statute unconstitutional.
o Separation of powers
  - Avoid interpreting an ambiguous statute in such a way that it would violate the constitutional separation of powers.

o Due process
  - The Rule of Lenity
    - Do not apply punitive sanctions if there is ambiguity as to the underlying criminal liability or criminal penalty.
    - Also applies to civil sanctions that are punitive or when the underlying liability is criminal.
    - R.C. 2901.04(A).
    - See *State v. Straley*, 2014-Ohio-2139 (2014) and *State v. Traylor*, 100 Miss. 544 (1911).
  - No criminal penalty imposed without a showing of specific intent.
  - Rule against interpreting statutes to be retroactive, even if the statute is curative or restorative.
  - Do not interpret statutes to deny a right to a criminal jury trial.

o The courts have recognized a presumption in favor of judicial review, especially for constitutional questions, but not for agency decisions not to prosecute.

o The courts also follow a presumption against an exhaustion of remedies requirement for a lawsuit to enforce constitutional rights.
Sources and Additional Reading


Reed Dickerson, The Interpretation and Application of Statutes (Little, Brown and Company 1975). See WorldCat for library copies and BookFinder for copies for sale.

William N. Eskridge, Jr., Dynamic Statutory Interpretation (Harvard University Press 1994). See WorldCat for library copies and BookFinder for copies for sale.


Norman Singer and J.D. Shambie Singer, Sutherland Statutes and Statutory Construction (Thomson Reuters 2014). See WorldCat for library copies.


Panel Discussion:
Various Perspectives on Statutory Interpretation

Fred Nelson
Ohio Attorney General

Representative Robert Cupp
Ohio House of Representatives

Judge Melody Stewart
Ohio Court of Appeals

Fred Nelson is the Senior Advisor and Director of Major Litigation for Ohio Attorney General Mike DeWine. His prior government service includes work in the federal government as Majority Counsel for a subcommittee of the U.S. Senate Judiciary Committee, as Deputy Assistant Attorney General for the Office of Legal Policy in the Reagan Justice Department, as Associate White House Counsel under the first President Bush, and as the first Chief of Staff and Legal Counsel for Cincinnati Congressman Steve Chabot. Mr. Nelson was elected Judge of the Hamilton County Court of Common Pleas in 2002 and served in that capacity from 2003 – 2009. He was valedictorian of his class at Hamilton College and graduated with honors from Harvard Law School.

State Representative Robert R. Cupp currently represents the 4th House District of Ohio. He earned his political science and law degrees from Ohio Northern. Representative Cupp has served as an elected official in all three branches of government and at both the local and state levels: as an Allen County commissioner, a four-term state senator, a court-of-appeals judge, and a justice of the Supreme Court of Ohio. He also served as a city prosecutor, and as Chief Legal Counsel to Ohio Auditor of State, Dave Yost. In addition to his public service, Representative Cupp engaged in the private practice of law in Lima for more than 25 years and has taught courses in leadership studies, judicial process, and state education policy at Ohio Northern University.

Judge Melody Stewart was elected to the Ohio Court of Appeals – Eighth Appellate District in 2006 and twice reelected. She has over 30 years of combined administrative, legal, and academic experience in a number of private and public settings. Judge Stewart earned a Bachelor of Music degree from the College-Conservatory of Music at the University of Cincinnati; her law degree as a Patricia Roberts Harris Fellow from the Cleveland-Marshall College of Law, Cleveland State University; and her Ph.D. as a Mandel Leadership Fellow at Case Western Reserve University’s Mandel School of Applied Social Sciences. She is currently a member of the board of the Ohio Supreme Court’s Judicial College and is chair of the Ohio Capital Case Attorney Fee Council.
No. 16-1901

KEVIN O'CONNOR; CHRISTOPHER O'CONNOR; JAMES ADAM COX; MICHAEL FRASER; ROBERT MCNALLY,

Plaintiffs, Appellants,

v.

OAKHURST DAIRY; DAIRY FARMERS OF AMERICA, INC.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. Nancy Torresen, Chief U.S. District Judge]

March 13, 2017
BARRON, Circuit Judge. For want of a comma, we have this case. It arises from a dispute between a Maine dairy company and its delivery drivers, and it concerns the scope of an exemption from Maine's overtime law. 26 M.R.S.A. § 664(3). Specifically, if that exemption used a serial comma to mark off the last of the activities that it lists, then the exemption would clearly encompass an activity that the drivers perform. And, in that event, the drivers would plainly fall within the exemption and thus outside the overtime law's protection. But, as it happens, there is no serial comma to be found in the exemption's list of activities, thus leading to this dispute over whether the drivers fall within the exemption from the overtime law or not.

The District Court concluded that, despite the absent comma, the Maine legislature unambiguously intended for the last term in the exemption's list of activities to identify an exempt activity in its own right. The District Court thus granted summary judgment to the dairy company, as there is no dispute that the drivers do perform that activity. But, we conclude that the exemption's scope is actually not so clear in this regard. And because, under Maine law, ambiguities in the state's wage and hour laws must be construed liberally in order to accomplish their remedial purpose, we adopt the drivers'
narrower reading of the exemption. We therefore reverse the grant of summary judgment and remand for further proceedings.

I.

Maine's wage and hour law is set forth in Chapter 7 of Title 26 of the Maine Revised Statutes. The Maine overtime law is part of the state's wage and hour law.

The overtime law provides that "[a]n employer may not require an employee to work more than 40 hours in any one week unless 1 1/2 times the regular hourly rate is paid for all hours actually worked in excess of 40 hours in that week." 26 M.R.S.A. § 664(3). The overtime law does not separately define the term, "employee." Instead, it relies on the definition of "employee" that the Chapter elsewhere sets forth.

That definition, which applies to the Chapter as a whole, provides that an "employee" is "any individual employed or permitted to work by an employer," id. at § 663(3). However, the definition expressly excludes a few categories of workers who are specifically defined not to be "employee[s]," id. at § 663(3)(A)-(L).

The delivery drivers do not fall within the categories of workers excluded from the definition. They thus are plainly "employees." But some workers who fall within the statutory definition of "employee" nonetheless fall outside the protection of the overtime law due to a series of express exemptions from
that law. The exemption to the overtime law that is in dispute here is Exemption F.

Exemption F covers employees whose work involves the handling -- in one way or another -- of certain, expressly enumerated food products. Specifically, Exemption F states that the protection of the overtime law does not apply to:

The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:
(1) Agricultural produce;
(2) Meat and fish products; and
(3) Perishable foods.

26 M.R.S.A. § 664(3)(F). The parties' dispute concerns the meaning of the words "packing for shipment or distribution."

The delivery drivers contend that, in combination, these words refer to the single activity of "packing," whether the "packing" is for "shipment" or for "distribution." The drivers further contend that, although they do handle perishable foods, they do not engage in "packing" them. As a result, the drivers argue that, as employees who fall outside Exemption F, the Maine overtime law protects them.

Oakhurst responds that the disputed words actually refer to two distinct exempt activities, with the first being "packing for shipment" and the second being "distribution." And because the delivery drivers do -- quite obviously -- engage in the "distribution" of dairy products, which are "perishable
foods," Oakhurst contends that the drivers fall within Exemption F and thus outside the overtime law's protection.

The delivery drivers lost this interpretive dispute below. They had filed suit against Oakhurst on May 5, 2014 in the United States District Court for the District of Maine. The suit sought unpaid overtime wages under the federal Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., and the Maine overtime law, 26 M.R.S.A. § 664(3).¹ The case was referred to a Magistrate Judge, and the parties filed cross-motions for partial summary judgment to resolve their dispute over the scope of Exemption F. After hearings on those motions, the Magistrate Judge ruled that Oakhurst's reading of Exemption F was the better one and recommended granting Oakhurst's motion. The District Court agreed with the Magistrate Judge's recommendation and granted summary judgment for Oakhurst on the ground that "distribution" was a stand-alone exempt activity.²

¹ The delivery drivers also made claims based on other provisions of Maine wage and hour law. 26 M.R.S.A. § 621-A (timely and full payment of wages); id. § 626 (payment of wages after cessation of employment); id. § 626-A (penalties provisions). These claims appear to rise or fall based on the success of the overtime claim, so we do not consider them separately.

² After granting Oakhurst's motion for partial summary judgment on the meaning of Exemption F, the District Court dismissed all of plaintiffs' state law claims. At the same time, the federal claims were all dismissed without prejudice. As a result, we have appellate jurisdiction over the District Court's order under 28 U.S.C. § 1291.
The delivery drivers now appeal that ruling. They raise a single legal question: what does the contested phrase in Exemption F mean? Our review on this question of state law interpretation is de novo. See Manchester Sch. Dist. v. Crisman, 306 F.3d 1, 9 (1st Cir. 2002).

II.

The issue before us turns wholly on the meaning of a provision in a Maine statute. We thus first consider whether there are any Maine precedents that construe that provision.

Oakhurst identifies one: the Maine Superior Court's unpublished opinion in Thompson v. Shaw's Supermarkets, Inc., No. Civ. A. CV-02-036, 2002 WL 31045303 (Me. Sup. Ct. Sept. 5, 2002). In that case, the Superior Court ruled that Exemption F "is clear that an exemption exists for the distribution of the three categories of foods," id. at *3, as a matter of both text and purpose, id. at *2.

But, a Superior Court decision construing Maine law would not bind the Maine Law Court, and thus does not bind us. See generally King v. Order of United Commercial Travelers of Am., 333 U.S. 153, 159-62 (1948) (rejecting an unreported state trial court decision as binding on federal courts); Keeley v. Loomis Fargo & Co., 183 F.3d 257, 269 n.9 (3d Cir. 1999) (finding a state trial court decision to be "at most persuasive but nonbinding authority," with the federal court instead
"look[ing] to the plain language of the statute and our own interpretation . . . in predicting how the state supreme court" would rule). Moreover, the Superior Court's decision in Thompson was appealed to the Maine Law Court, which declined to follow the Superior Court's approach and instead decided the case on different grounds altogether. See Thompson v. Shaw's Supermarkets, Inc., 847 A.2d 406, 409 (Me. 2004).

Nevertheless, the reasons that the Superior Court decision in Thompson gave -- even if not adopted by the Maine Law Court -- figure prominently in the arguments that Oakhurst now presents to us on appeal. We thus consider those reasons in the course of our analysis, to which we now turn.

III.

Each party recognizes that, by its bare terms, Exemption F raises questions as to its scope, largely due to the fact that no comma precedes the words "or distribution." But each side also contends that the exemption's text has a latent clarity, at least after one applies various interpretive aids. Each side then goes on to argue that the overtime law's evident purpose and legislative history confirms its preferred reading.

We conclude, however, that Exemption F is ambiguous, even after we take account of the relevant interpretive aids and the law's purpose and legislative history. For that reason, we conclude that, under Maine law, we must construe the
exemption in the narrow manner that the drivers favor, as doing so furthers the overtime law's remedial purposes. See Dir. of Bureau of Labor Standards v. Cormier, 527 A.2d 1297 (Me. 1987).

Before explaining our reasons for reaching this conclusion, though, we first need to work our way through the parties' arguments as to why, despite the absent comma, Exemption F is clearer than it looks.

A.

First, the text. See Harrington v. State, 96 A.3d 696, 697-98 (Me. 2014) ("Only if the statute is reasonably susceptible to different interpretations will we look beyond the statutory language . . . ."). In considering it, we do not simply look at the particular word "distribution" in isolation from the exemption as a whole. We instead must take account of certain linguistic conventions -- canons, as they are often called -- that can help us make sense of a word in the context in which it appears. Oakhurst argues that, when we account for these canons here, it is clear that the exemption identifies "distribution" as a stand-alone, exempt activity rather than as an activity that merely modifies the stand-alone, exempt activity of "packing."

Oakhurst relies for its reading in significant part on the rule against surplusage, which instructs that we must give independent meaning to each word in a statute and treat none as
unnecessary. See Stromberg-Carlson Corp. v. State Tax Assessor, 765 A.2d 566, 569 (Me. 2001) ("When construing the language of a statute . . . [w]ords must be given meaning and not treated as meaningless and superfluous."). To make this case, Oakhurst explains that "shipment" and "distribution" are synonyms. For that reason, Oakhurst contends, "distribution" cannot describe a type of "packing," as the word "distribution" would then redundantly perform the role that "shipment" -- as its synonym -- already performs, which is to describe the type of "packing" that is exempt. See Thompson, 2002 WL 31045303 at *2 ("[I]t is not at all clear how packing for shipment would be different from packing for distribution."). By contrast, Oakhurst explains, under its reading, the words "shipment" and "distribution" are not redundant. The first word, "shipment," describes the exempt activity of "packing," while the second, "distribution," describes an exempt activity in its own right.

Oakhurst also relies on another established linguistic convention in pressing its case -- the convention of using a conjunction to mark off the last item on a list. See The Chicago Manual of Style § 6.123 (16th ed. 2010) (providing examples of lists with such conjunctions). Oakhurst notes, rightly, that there is no conjunction before "packing," but that there is one after "shipment" and thus before "distribution." Oakhurst also observes that Maine overtime law contains two
other lists in addition to the one at issue here and that each places a conjunction before the last item. See 26 M.R.S.A. § 664(3) ("The regular hourly rate includes all earnings, bonuses, commissions and other compensation . . ." (emphasis added)); id. at § 664(3)(A) (exempting from overtime law "automobile mechanics, automobile parts clerks, automobile service writers and automobile salespersons as defined in section 663" (emphasis added)).

Oakhurst acknowledges that its reading would be beyond dispute if a comma preceded the word "distribution" and that no comma is there. But, Oakhurst contends, that comma is missing for good reason. Oakhurst points out that the Maine Legislative Drafting Manual expressly instructs that: "when drafting Maine law or rules, don't use a comma between the penultimate and the last item of a series." Maine Legislative Drafting Manual 113 (Legislative Council, Maine State Legislature 2009), http://maine.gov/legis/ros/manual/Draftman2009.pdf ("Drafting Manual"); see also Jacob v. Kippax, 10 A.3d 1159, 1166 (Me. 2011) (invoking the Drafting Manual to help resolve a statutory ambiguity). In fact, Oakhurst notes, Maine statutes invariably omit the serial comma from lists. And this practice reflects a drafting convention that is at least as old as the Maine wage and hour law, even if the drafting manual itself is of more recent vintage. See, e.g., Me. Stat. tit. 26, § 663(3)(G)
(1965) ("processing, canning or packing"); Me. Stat. tit. 26, § 665(1) (1965) ("hours, total earnings and itemized deductions").

B.

If no more could be gleaned from the text, we might be inclined to read Exemption F as Oakhurst does. But, the delivery drivers point out, there is more to consider. And while these other features of the text do not compel the drivers' reading, they do make the exemption's scope unclear, at least as a matter of text alone.

The drivers contend, first, that the inclusion of both "shipment" and "distribution" to describe "packing" results in no redundancy. Those activities, the drivers argue, are each distinct. They contend that "shipment" refers to the outsourcing of the delivery of goods to a third-party carrier for transportation, while "distribution" refers to a seller's in-house transportation of products directly to recipients. And the drivers note that this distinction is, in one form or another, adhered to in dictionary definitions. See New Oxford English American Dictionary 497, 1573-74 (2001); Webster's Third New International Dictionary 666, 2096 (2002).

Consistent with the drivers' contention, Exemption F does use two different words ("shipment" and "distribution") when it is hard to see why, on Oakhurst's reading, the legislature did not simply use just one of them twice. After
all, if "distribution" and "shipment" really do mean the same thing, as Oakhurst contends, then it is odd that the legislature chose to use one of them ("shipment") to describe the activity for which "packing" is done but the other ("distribution") to describe the activity itself.

The drivers' argument that the legislature did not view the words to be interchangeable draws additional support from another Maine statute. That statute clearly lists both "distribution" and "shipment" as if each represents a separate activity in its own right. See 10 M.R.S.A. § 1476 (referring to "manufacture, distribution or shipment"). And because Maine law elsewhere treats "shipment" and "distribution" as if they are separate activities in a list, we do not see why we must assume that the Maine legislature did not treat them that way here as well. After all, the use of these two words to describe "packing" need not be understood to be wasteful. Such usage could simply reflect the legislature's intention to make clear that "packing" is exempt whether done for "shipment" or for "distribution" and not simply when done for just one of those activities.3

3 We also note that there is some reason to think that the distinction between "shipment" and "distribution" is not merely one that only a lawyer could love. Oakhurst's own internal organization chart seems to treat the two as if they are separate activities.
Next, the drivers point to the exemption's grammar. The drivers note that each of the terms in Exemption F that indisputably names an exempt activity -- "canning, processing, preserving," and so forth on through "packing" -- is a gerund. By contrast, "distribution" is not. And neither is "shipment." In fact, those are the only non-gerund nouns in the exemption, other than the ones that name various foods.

Thus, the drivers argue, in accord with what is known as the parallel usage convention, that "distribution" and "shipment" must be playing the same grammatical role -- and one distinct from the role that the gerunds play. See The Chicago Manual of Style § 5.212 (16th ed. 2010) ("Every element of a parallel series must be a functional match of the others (word, phrase, clause, sentence) and serve the same grammatical function in the sentence (e.g., noun, verb, adjective, adverb).”). In accord with that convention, the drivers read "shipment" and "distribution" each to be objects of the preposition "for" that describes the exempt activity of "packing." And the drivers read the gerunds each to be referring to stand-alone, exempt activities -- "canning, preserving . . . ."

By contrast, in violation of the convention, Oakhurst's reading treats one of the two non-gerunds ("distribution") as if it is performing a distinct grammatical
function from the other ("shipment"), as the latter functions as an object of a preposition while the former does not. And Oakhurst's reading also contravenes the parallel usage convention in another way: it treats a non-gerund (again, "distribution") as if it is performing a role in the list -- naming an exempt activity in its own right -- that gerunds otherwise exclusively perform.4

4 We note that the other Maine statutory list that uses these same two words -- "distribution" and "shipment" -- does assign each of them the same grammatical function. See 10 M.R.S.A. § 1476(2)(A)(3) (referring to "manufacture, distribution or shipment"). And when the Maine legislature has elsewhere listed the activity of "distribution" alongside other activities that appear in the gerund form, it has used the gerund "distributing." See, e.g., 9 M.R.S.A. § 5003(5) ("for purposes of raising and distributing money"); 10 M.R.S.A. § 9021(1) ("business of manufacturing, brokering, distributing, selling, installing or servicing manufactured housing"); 32 M.R.S.A. § 13702-A(24) ("dispensing, delivering or distributing prescription drugs").

Oakhurst did point out at oral argument that there are provisions of Maine labor law in which a single noun is included at the end of a list predominately comprised of gerunds. But none of the provisions that Oakhurst points to have the unique structure that Exemption F would have under Oakhurst's reading, in which a contested term is grammatically parallel with some list items but not others, and yet is used, as Oakhurst contends, to serve a different grammatical function than the term to which it is parallel. Instead, Oakhurst's examples are of more garden-variety lists. See, e.g., 26 M.R.S.A § 1043(1)(A)(1) (referencing "the raising, shearing, feeding, caring for, training and management of" various animals); id. at § 1043(1)(A)(4) (referencing "hatching or processing of poultry, transportation of poultry; grading of eggs or packing of eggs, transportation of eggs; the processing of any meat product or the transportation of any meat product"). Moreover, the provisions that Oakhurst cites are not ambiguous as to whether the non-gerund terms are in fact stand-alone list items. The
Finally, the delivery drivers circle back to that missing comma. They acknowledge that the drafting manual advises drafters not to use serial commas to set off the final item in a list -- despite the clarity that the inclusion of serial commas would often seem to bring. But the drivers point out that the drafting manual is not dogmatic on that point. The manual also contains a proviso -- "Be careful if an item in the series is modified" -- and then sets out several examples of how lists with modified or otherwise complex terms should be written to avoid the ambiguity that a missing serial comma would otherwise create. See Drafting Manual at 114.

Thus, the drafting manual's seeming -- and, from a judge's point of view, entirely welcome -- distaste for ambiguous lists does suggest a reason to doubt Oakhurst's insistence that the missing comma casts no doubt on its preferred reading. For, as the drivers explain, the drafting manual cannot be read to instruct that the comma should have been omitted here if "distribution" was intended to be the last item in the list. In that event, the serial comma's omission would give rise to just the sort of ambiguity that the manual provisions Oakhurst references are unambiguous, so the principle of parallel construction -- an aid to resolving statutory ambiguities -- would never come into play with respect to those provisions.
warns drafters not to create. Still, the drivers' textual points do not account for what seems to us to be Oakhurst's strongest textual rejoinder: no conjunction precedes "packing." Rather, the only conjunction in the exemption -- "or" -- appears before "distribution." And so, on the drivers' reading, the list is strangely stingy when it comes to conjunctions, as it fails to use one to mark off the

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5 For related reasons, the consistent omission of serial commas in the various other statutory lists that Oakhurst points to is not all that probative. None of Oakhurst's examples are of lists in which the missing comma creates an ambiguity as to what the final list item is. Thus, the omission of the serial comma in those lists does not show the legislature would have omitted the comma in this list, as the omission of the comma from this list does create an ambiguity.

Before leaving our discussion of serial commas, we would be remiss not to note the clarifying virtues of serial commas that other jurisdictions recognize. In fact, guidance on legislative drafting in most other states and in the Congress appears to differ from Maine's when it comes to serial commas. Some state legislative drafting manuals expressly warn that the absence of serial commas can create ambiguity concerning the last item in a list. One analysis notes that only seven states -- including Maine -- either do not require or expressly prohibit the use of the serial comma. See Amy Langenfeld, Capitol Drafting: Legislative Drafting Manuals in the Law School Classroom, 22 Perspectives: Teaching Legal Res. & Writing 141, 143-144 (2014); see also Grace E. Hart, Note, State Legislative Drafting Manuals and Statutory Interpretation, 126 Yale L.J. 438 (2016). Also, drafting conventions of both chambers of the federal Congress warn against omitting the serial comma for the same reason. See U.S. House of Representatives Office of the Legislative Counsel, House Legislative Counsel's Manual on Drafting Style, No. HLC 104-1, § 351 at 58 (1995) (requiring a serial comma to "prevent[] any misreading that the last item is part of the preceding one"); U.S. Senate Office of the Legislative Counsel, Legislative Drafting Manual § 321(c) at 79 (1997) (same language as House Manual).
last listed activity.

To address this anomaly, the drivers cite to Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts (2012), in which the authors observe that "[s]ometimes drafters will omit conjunctions altogether between the enumerated items [in a list]," in a technique called "asyndeton," id. at 119. But those same authors point out that most legislative drafters avoid asyndeton. Id. And, the delivery drivers do not provide any examples of Maine statutes that use this unusual grammatical device. Thus, the drivers' reading of the text is hardly fully satisfying.6

IV.

The text has, to be candid, not gotten us very far.

6 The drivers do also contend that their reading draws support from the noscitur a sociis canon, which "dictates that words grouped in a list should be given related meaning." Dole v. United Steelworkers of Am., 494 U.S. 26, 36 (1990) (citation omitted). In particular, the drivers contend that distribution is a different sort of activity than the others, nearly all of which entail transforming perishable products to less perishable forms -- "canning," "processing," "preserving," "freezing," "drying," and "storing." However, the list of activities also includes "marketing," which Oakhurst argues undercuts the drivers' noscitur a sociis argument. And even if "marketing" does not mean promoting goods or services, as in the case of advertising, and means only "to deal in a market," see Webster's Third New International Dictionary of the English Language 1383 (2002); see also id. (providing additional definitions, including "to go to market to buy or sell" and "to expose for sale in a market"); it is a word that would have at least some potential commonalities with the disputed word, "distribution." For that reason, this canon adds little insight beyond that offered by the parallel usage convention.
We are reluctant to conclude from the text alone that the legislature clearly chose to deploy the nonstandard grammatical device of asyndeton. But we are also reluctant to overlook the seemingly anomalous violation of the parallel usage canon that Oakhurst's reading of the text produces. And so -- there being no comma in place to break the tie -- the text turns out to be no clearer on close inspection than it first appeared. As a result, we turn to the parties' arguments about the exemption's purpose and the legislative history. See Berube v. Rust Eng'g, 668 A.2d 875, 877 (Me. 1995) ("Our purpose in construing a statute is to give effect to the legislative intent as indicated by the statute's plain language, and we examine other indicia of legislative intent, such as its legislative history, only when the plain language is ambiguous.").

A.

Oakhurst contends that the evident purpose of the exemption strongly favors its reading. The whole point of the exemption, Oakhurst asserts (albeit without reference to any directly supportive text or legislative history), is to protect against the distorting effects that the overtime law otherwise might have on employer decisions about how best to ensure perishable foods will not spoil. See O'Connor v. Oakhurst Dairy, No. 2:14-CV-192-NT, 2016 WL 1179252, at *5 (D. Me. Jan. 26, 2016) (Magistrate Judge's conclusion that "the purpose of
the exemption for employees engaged in the production and
distribution of perishable foods can only be to achieve the most
efficient possible production and delivery given the nature of
the product"). And, Oakhurst argues, the risk of spoilage posed
by the distribution of perishable food is no less serious than
is the risk of spoilage posed by the other activities regarding
the handling of such foods to which the exemption clearly does
apply.

Oakhurst then goes on to argue that legislative
history supports this supposition about what the legislature
must have intended in crafting the exemption. Oakhurst points
out that the overtime law, which was enacted in 1965, piggybacks
on the definition of "employee" set forth in the wage and hour
law, which had been enacted four years earlier. Oakhurst then
notes that this pre-existing definition of "employee" contained
a carve-out that excluded workers involved in the handling of
"aquatic forms of animal and vegetable life" but that in all
other respects looks a lot like what became Exemption F. In
particular, that carve-out applied to workers "employ[ed] in
loading, unloading or packing . . . for shipment or in
propagating, processing (other than canning), marketing,
freezing, curing, storing or distributing" various "aquatic
forms of animal and vegetable life." P.L. 1961, ch. 277, §
3(F).
Oakhurst thus argues that Exemption F clearly was intended to expand upon the existing carve-out by adding activities (such as "canning") and goods (namely, meats, vegetables, and "perishable foods" more generally). And, for that reason, Oakhurst contends that it makes no sense to read Exemption F, as the delivers drivers do, to have deleted an activity -- "distributing" -- that the carve-out had included.

B.

We are not so sure. Any analysis of Exemption F that depends upon an assertion about its clear purpose is necessarily somewhat speculative. Nothing in the overtime law's text or legislative history purports to define a clear purpose for the exemption.

Moreover, even if we were to share in Oakhurst's speculation that the legislature included the exemption solely to protect against the possible spoilage of perishable foods rather than for some distinct reason related, perhaps, to the particular dynamics of certain labor markets, we still could not say that it would be arbitrary for the legislature to exempt "packing" but not "distributing" perishable goods. The reason to include "packing" in the exemption is easy enough to conjure. If perishable goods are not packed in a timely fashion, it stands to reason that they may well spoil. Thus, one can imagine the reason to ensure that the overtime law creates no
incentives for employers to delay the packing of such goods. The same logic, however, does not so easily apply to explain the need to exempt the activity of distributing those same goods. Drivers delivering perishable food must often inevitably spend long periods of time on the road to get the goods to their destination. It is thus not at all clear that a legal requirement for employers to pay overtime would affect whether drivers would get the goods to their destination before they spoiled. No matter what delivery drivers are paid for the journey, the trip cannot be made to be shorter than it is.

Of course, this speculation about the effect that a legal requirement to pay overtime may or may not have on increasing the risk of food spoilage is just that. But such speculation does make us cautious about relying on what is only a presumed legislative purpose to generate a firm conclusion about what the legislature must have intended in drafting the exemption.

Moreover, insofar as the legislative history does shed light on that purpose, it hardly supports Oakhurst's account in any clear way. Significantly, Exemption F does not simply copy the language from the carve-out in the 1961 definition of "employee" that bears on whether "distribution" is an exempt activity. Instead, the legislature made some seemingly significant changes to the language of that carve-out -- changes
that Oakhurst overlooks.

The relevant language in the 1961 definition of "employee" reads: "employment in the . . . packing of such products for shipment" and "in . . . distributing" the products. By using two prepositions, "for" and "in," the text of that carve-out clearly separated the activities of packing products for shipment and of distributing those products, with the consequence that each activity was plainly excluded from the definition of "employee." Exemption F, however, deletes the second preposition, "in," and thereby strips the new language of the clarity of the old with respect to whether the activity of "distribution" is a stand-alone exempt activity or not. And Exemption F also changes the word "distributing" to the word "distribution," and thereby makes the activity of "distribution" parallel in usage to "shipment," which, of course, modifies the exempt activity of packing and does not name an exempt activity on its own.

If Oakhurst's understanding of the legislative history were right, then there would have been no reason for the legislature to have made these revisions. After all, these revisions change the old language in ways that only serve to sow doubt as to whether the activity of "distributing" that plainly had been excluded from the definition of "employee" was intended to name a standalone, exempt activity in Exemption F.
Moreover, the legislature actually revised the 1961 definition of "employee" just months after enacting the overtime law and thus Exemption F. And the legislature made that revision in a manner that runs contrary to Oakhurst's account. For while the 1961 version of the definition of "employee" excluded workers engaged in "packing . . . for shipment" and "in . . . distributing" "aquatic animal and vegetable life" products, see Me. Laws 1961, c. 277, § 3(F), the revised version removed the reference to "distributing" altogether, see Me. Laws 1965, c. 410, § 663(3)(G). The result was thus to draw the very distinction between those workers who were engaged in packing products and those workers who were engaged in distributing them that Oakhurst contends we should presume the legislature could not possibly have intended to make in crafting Exemption F.

Of course, Exemption F, unlike this revised version of the carve-out from the definition of "employee," refers not just to "packing," or even just to "packing for shipment." It refers to "packing for shipment or distribution." But if Exemption F is indeed modeled on the 1961 definition of "employee" -- as Oakhurst contends -- then we would expect Exemption F at least to use the gerund form of the word "distribution" in referring to that activity. That is the form that the legislature used in the exemption from the earlier definition of "employee" and that the legislature has used to refer to all the other exempt
activities in Exemption F.

C.

To be clear, none of this evidence is decisive either way. It does highlight, however, the hazards of simply assuming -- on the basis of no more than supposition about what would make sense -- that the legislature could not have intended to craft Exemption F as the drivers contend that the legislature crafted it. Thus, we do not find either the purpose or the legislative history fully clarifying. And so we are back to where we began.

V.

We are not, however, without a means of moving forward. The default rule of construction under Maine law for ambiguous provisions in the state's wage and hour laws is that they "should be liberally construed to further the beneficent purposes for which they are enacted." Dir. of Bureau of Labor Standards v. Cormier, 527 A.2d 1297, 1300 (Me. 1987). The opening of the subchapter of Maine law containing the overtime statute and exemption at issue here declares a clear legislative purpose: "It is the declared public policy of the State of Maine that workers employed in any occupation should receive wages sufficient to provide adequate maintenance and to protect their health, and to be fairly commensurate with the value of the services rendered." 26 M.R.S.A. § 661. Thus, in accord with
Cormier, we must interpret the ambiguity in Exemption F in light of the remedial purpose of Maine's overtime statute. And, when we do, the ambiguity clearly favors the drivers' narrower reading of the exemption.

Oakhurst counters that this default rule of construction does not apply when the question concerns whether a wage and hour law means to create an exemption at all. Rather, Oakhurst argues, the rule applies only when the issue concerns the scope of an exemption that does exist. See, e.g., Marsug v. Cadete Enters., 807 F.3d 431, 438 (1st Cir. 2015) ("The burden is on the employer to prove an exemption from the FLSA's requirements, and the remedial nature of the statute requires that [its] exemptions be narrowly construed against the employers seeking to assert them." (alteration in original) (citation omitted)); Connelly v. Franklin Mem. Hosp., 1993 Me. Super. LEXIS 243, *3 (Me. Super. Ct. Oct. 1, 1993) ("[An] exemption from overtime pay requirements is construed narrowly, with employers claiming exemption having the burden of proof that employees fit plainly and unmistakably within the exemption."). Thus, Oakhurst contends that the rule has no application here, as the dispute centers on whether "distribution" is exempted, and not what constitutes "distribution."

But we see no basis for so confining the application
of this maxim of Maine law. Cormier did not by terms set forth that limit on the potential application of the rule that it announced. And, in fact, Cormier itself applied the maxim to resolve an ambiguity that did not concern the scope of an exemption at all. Cormier instead applied it to determine whether, for purposes of Maine overtime law, the word "employer" should be construed to treat closely related entities operating under common ownership as a single "employer" under 26 M.R.S.A. § 664(3). 527 A.2d at 1298.

Oakhurst also argues that this default rule of construction applies only when courts apply law to facts and so does not apply to purely legal question about whether "distribution" describes an exempt activity or is an exempt activity that is at issue here. But, in construing "employer," Cormier was not simply making -- as Oakhurst would have it -- a factual judgment as to "whether economic reality and the totality of the factual circumstances supports a finding that multiple companies could be treated as one employer." Rather, Cormier first resolved a purely legal dispute over the meaning of "employer," and it did so with reference to this rule of construction.

Specifically, the defendants in that case were challenging a ruling that various corporate entities and partnership controlled by a single family -- collectively known
as Funtown USA -- constituted a single "employer." 527 A.2d at 1297-99. That designation mattered because it meant that overtime would have to be paid to any employee who worked forty hours a week for Funtown USA as a whole, even if the employee did not work that many hours for any one of Funtown USA's various entities. The defendants contended "that the 'joint employer' concept is foreign to Maine law, and is not set forth or described in any state statute" and thus that "once it is established that the entities are legally distinct and not shams, the inquiry should end." 527 A.2d at 1299.

The Superior Court in Cormier ruled, however, that the term "employer" in the overtime law did encompass the joint-employer concept. Id. And the Maine Law Court agreed, holding that the Superior Court's "balancing of the several factors that resulted in its ultimate conclusion was a logical, coherent and legally sufficient mode of analysis." Id. at 1300. And it was in the course of embracing that legal conclusion regarding the proper resolution of the ambiguous term "employer" that Cormier deployed the canon: "Remedial statutes should be liberally construed to further the beneficent purposes for which they are enacted." Id.

To be sure, once Cormier answered the legal question about the meaning of "employer" under § 664(3), Cormier did go on to apply law to fact. In particular, Cormier analyzed
whether the particular legal entities at issue in the case were in fact properly characterized as constituting a "joint employer" given their ties to one another. Id. at 1301-02. But there is no indication that, in concluding that the various entities that comprised "Funtown USA" were in fact a joint employer, id. at 1297-98, Cormier held that that the rule of liberal construction may be deployed only to resolve questions pertaining to the application of law to fact.

Because Cormier does not state the rule of liberal construction as if it is one that may be used to resolve only some ambiguities in Maine's wage and hour laws, and because Cormier itself applies the rule to resolve a purely legal question, we see no basis for concluding that we are free to ignore this rule of construction in resolving the ambiguity that we confront. Thus, notwithstanding the opacity of the text and legislative history, we do not believe certification of a question regarding the proper resolution of the ambiguity in Exemption F would be the appropriate course. See Maurice v. State Farm Mut. Auto. Ins. Co., 235 F.3d 7, 10 (1st Cir. 2000) ("Our practice . . . has been to refrain from certification of state-law issues when we can discern without difficulty the course that the state's highest court likely would follow."). Rather, in accord with Cormier, we adopt the delivery drivers' reading of the ambiguous phrase in Exemption F, as that reading
furthers the broad remedial purpose of the overtime law, which is to provide overtime pay protection to employees.

Given that the delivery drivers contend that they engage in neither packing for shipment nor packing for distribution, the District Court erred in granting Oakhurst summary judgment as to the meaning of Exemption F. If the drivers engage only in distribution and not in any of the stand-alone activities that Exemption F covers -- a contention about which the Magistrate Judge recognized possible ambiguity -- the drivers fall outside of Exemption F's scope and thus within the protection of the Maine overtime law.

VI.

Accordingly, the District Court’s grant of partial summary judgment to Oakhurst is reversed.
SYLLABUS:  

1. A county board of elections is a “political subdivision,” as that term is used in R.C. 9.481(B)(1), and is therefore prohibited from requiring its employees, “as a condition of employment, to reside in any specific area of the state.”

2. A county board of elections is prohibited by R.C. 9.481(B)(1) from requiring its employees, as a condition of employment, to reside within the boundaries of the county. R.C. 9.481(B)(1) does not prohibit a county board of elections from appointing officers or employees in accordance with provisions in R.C. Chapter 3501 that impose residency requirements upon those officers or employees.
October 3, 2017

OPINION NO. 2017-033

The Honorable Julia R. Bates
Lucas County Prosecuting Attorney
700 Adams Street, Suite 250
Toledo, Ohio 43604-5659

Dear Prosecutor Bates:

We have received your request regarding the application of R.C. 9.481 to a county board of elections. R.C. 9.481(B)(1) prohibits a political subdivision from requiring its employees, “as a condition of employment, to reside in any specific area of the state.” You ask whether R.C. 9.481(B)(1) applies to a county board of elections, and, if so, whether a county board of elections may require any of its employees to reside within the boundaries of the county.

A “political subdivision,” as used in R.C. 9.481(B)(1), “means municipal corporations, townships, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.” R.C. 2743.01(B); see also R.C. 9.481(A)(1) (“[a]s used in this section … ‘[p]olitical subdivision’ has the same meaning as in [R.C. 2743.01]”). A county board of elections is not a municipal corporation, township, county, or school district. Therefore, a county board of elections is a “political subdivision,” as that term is used in R.C. 9.481(B)(1), only if it constitutes a body “corporate and politic responsible for governmental activities” in a geographic area “smaller than that of the state to which the sovereign immunity of the state attaches.”

Neither R.C. 9.481 nor R.C. 2743.01 defines the phrase “body corporate and politic.” Cf. 1988 Op. Att’y Gen. No. 88-098, at 2-479 (the phrase, “body corporate and politic” “is not defined by [R.C. 2744.01(F)]¹ and is not otherwise precisely defined” (footnote added)). Therefore, we shall construe the phrase “body corporate and politic” “according to the rules of grammar and common usage,” and in accordance with any technical or particular meaning the

¹ The definition of “political subdivision” in R.C. 2744.01(F) is similar to the definition of “political subdivision” in R.C. 2743.01(B). R.C. 2744.01(F) states, in pertinent part, that “[p]olitical subdivision’ … means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state.”
phrase has acquired. R.C. 1.42. The Ohio Supreme Court has defined “[a] body corporate and politic,” to mean “a governmental body or public corporation having powers and duties of government.”

Hamilton Cnty. Bd. of Mental Retardation & Dev. Disabilities v. Prof’ls Guild of Ohio, 46 Ohio St. 3d 147, 150, 545 N.E.2d 1260 (1989); see also Wiesenthal v. Wickersham, 64 Ohio App. 124, 131, 28 N.E.2d 512 (Franklin County 1940) (“’[p]olitic’ is a derivative from a root signifying ‘citizen.’ It would seem therefore, that the phrase connotes simply a group or body of citizens organized for the purpose of exercising governmental functions”) (quoting Uricich v. Kolesar, 132 Ohio St. 115, 118, 5 N.E.2d 335 (1936)); Black’s Law Dictionary 167 (7th ed. 1999) (defining “body politic” as “[a] group of people regarded in a political (rather than private) sense and organized under a single governmental authority”). Black’s Law Dictionary 344 (7th ed. 1999) defines “public corporation” to mean “[a] corporation that is created by the state as an agency in the administration of civil government … [a]Iso termed political corporation.” See also Hamilton Cnty. Bd. of Mental Retardation & Dev. Disabilities, 46 Ohio St. 3d at 150 (relying upon Black’s Law Dictionary to define “public corporation”). Therefore, we construe the phrase, “body corporate and politic,” as used in R.C. 2743.01(B), to mean a governmental body that is responsible for carrying out powers and duties of government. Cf. 1988 Op. Att’y Gen. No. 88-098, at 2-479 (“for purposes of R.C. 2744.01(F), a body politic and corporate is merely a public entity which has been assigned certain corporate powers”). A county board of elections is thus a “political subdivision,” as that term is used in R.C. 9.481(B)(1), if it is a governmental body that is responsible for carrying out powers and duties of government in a geographic area smaller than that of the state to which the sovereign immunity of the state attaches.

A county board of elections is created by statute in every county in the state and operates only within the county in which it is established. R.C. 3501.06(A); see also 1981 Op. Att’y Gen. No. 88-098, at 2-56 (“[w]hile each board of elections derives its authority from the state itself, … it is empowered to exercise that authority only within the county where situated”). The Secretary of State is the chief election officer and responsible for appointing each of the four members of a county board of elections. R.C. 3501.04; see also R.C. 3501.05(A); R.C. 3501.06(A); State ex rel. Columbus Blank Book Mfg. Co. v. Ayres, 142 Ohio St. 216, 51 N.E.2d 636 (1943) (syllabus, paragraph two) (“[m]embers of the boards of elections act under the direct control of and are answerable only to the Secretary of State in his capacity as the chief election officer of the state”). Through its members, a county board of elections performs a vast number of duties that relate to the conduct of elections, including, but not limited to, establishing election precincts, R.C. 3501.11(A), providing for the purchase and maintenance of equipment used in voter registration and elections, R.C. 3501.11(C), appointing employees, R.C. 3501.11(D), “[m]ak[ing] and issu[ing] rules and instructions … as it considers necessary for the guidance of

2 In 1988 Op. Att’y Gen. No. 88-098, at 2-479, the Attorney General recognized that “the General Assembly’s designation of a public entity as a body corporate and politic does not confer upon such entity corporate powers in violation of Ohio Const. art. XIII, § 1,” and that “[t]he term ‘body corporate and politic’ does not … appear to be the equivalent of the word corporation, as that word is commonly understood.”
election officers and voters,” R.C. 3501.11(E), and investigating violations of R.C. Title 35 and “administer[ing] oaths, issu[ing] subpoenas, summon[ing] witnesses, and compel[ling] the production of … evidence in connection with any such investigation,” R.C. 3501.11(J). A county board of elections has the power to contract and like a typical corporate entity, may be sued. See, e.g., R.C. 3501.141(A) (authorizing a county board of elections to enter into a contract for group insurance policies for its employees when the board of county commissioners has denied coverage); R.C. 3501.301 (requiring a county board of elections to provide notice to “responsible suppliers within the state” to allow for bidding before entering into a contract for printing and furnishing supplies that exceeds $25,000); State ex rel. Nichols v. Vinton Cnty. Bd. of Elections, 20 Ohio St. 3d 1, 2, 484 N.E.2d 690 (1985) (recognizing that a decision by a board of elections with regard to the residence of a candidate for township trustee will be reviewed by a court only to determine whether the board’s decision “‘is tainted with fraud or corruption or resulted from an abuse of discretion or a clear disregard of the applicable law’” (quoting State ex rel. Morrison v. Franklin Cnty. Bd. of Elections, 63 Ohio St. 2d 336, 338-39, 410 N.E.2d 764 (1980))); Vill. of Beachwood v. Bd. of Elections of Cuyahoga Cnty., 167 Ohio St. 369, 148 N.E.2d 921 (1958) (considering whether a county board of elections should be enjoined from proceeding with an election during which electors may vote for the detachment of a certain portion of village territory); 1977 Op. Att’y Gen. No. 77-091 (syllabus, paragraph two) (“[a] board of library trustees and a board of elections may enter into a contract whereby library personnel and facilities would be used to conduct voter registration and the library would be reimbursed by the board of elections for the actual costs incurred”).

The election duties performed by a county board of elections constitute powers and duties of government. See Ayres, 142 Ohio St. 216 (syllabus, paragraph one) (“[u]nder the mandatory provisions of Section 2, Article X and Section 1, Article XVII of the Constitution of Ohio, and the statutes passed pursuant thereto, all matters pertaining to the conduct of elections are state functions”). A county board of elections performs these duties within a county, a geographic area smaller than that of the state. Thus, a county board of elections is a governmental body responsible for carrying out powers and duties of government in a geographic area smaller than that of the state to which the sovereign immunity of the state attaches, and therefore constitutes a “political subdivision,” as that term is defined in R.C. 2743.01(B) and used in R.C. 9.481(B)(1).3

3 Ohio courts have consistently construed the term, “political subdivision,” as defined in R.C. 2743.01(B), to encompass governmental entities that do not typically constitute political subdivisions in other circumstances. See, e.g., Howard v. Supreme Court of Ohio, Franklin App. Nos. 04AP-1093, et al., 2005-Ohio-2130, at ¶10 (finding that a court of common pleas is a political subdivision, as defined in R.C. 2743.01(B), even though it “is not a political subdivision in the ordinary sense”); Sams v. State, No. 98AP-645, 1999 Ohio App. LEXIS 807, at *6 (Franklin County Mar. 4, 1999) (the definition of political subdivision under R.C. 2743.01(B) encompasses the common pleas court). Cf. Jones v. Franklin Cnty. Sheriff’s Dep’t, No. CA99-01-004, 1999 Ohio App. LEXIS 2856, at *10 (Butler County June 21, 1999) (“[i]t is clear from a reading of R.C. 2744.01(F) that both the Sheriff’s Office and the Prosecutor’s Office are political sub-divisions as that term is defined”); Dalton v. Bureau of Criminal Identification &
See generally Votava v. City of Bowling Green, No. WD-76-33. 1977 Ohio App. LEXIS 10301, at *3 (Wood County June 17, 1977) (referring to a board of elections as a body politic).

Accordingly, we conclude that a county board of elections is a “political subdivision,” as that term is used in R.C. 9.481(B)(1), and is therefore prohibited from requiring its employees, “as a condition of employment, to reside in any specific area of the state.”

Your second question asks whether a county board of elections may require any of its employees to reside within the boundaries of the county. We have concluded that a county board of elections is a “political subdivision,” as that term is used in R.C. 9.481(B)(1), and is therefore prohibited from requiring its employees, “as a condition of employment, to reside in any specific area of the state.” A county is a specific area of the state. Therefore, a county board of elections is prohibited by R.C. 9.481(B)(1) from requiring its employees, as a condition of employment, to reside within the boundaries of the county.

A county board of elections is required or authorized to appoint and remove various officers and employees, including its director, deputy director, all registrars, precinct officials, and interpreters, R.C. 3501.09; R.C. 3501.11(D); R.C. 3501.22; R.C. 3501.221(A). Through its enactment of various provisions in R.C. Chapter 3501, the General Assembly has imposed residency requirements upon certain of these officers or employees. R.C. 3501.09, for example, requires that a county board of elections “select … resident elector[s] of the county” for the positions of director and deputy director of the board. The residency requirements imposed upon officers or employees of a county board of elections by the General Assembly do not implicate the provisions of R.C. 9.481(B)(1). The General Assembly is not a “political subdivision,” for the purpose of R.C. 9.481(B)(1), nor is a county board of elections imposing its own residency requirements in violation of R.C. 9.481(B)(1) by complying with these statutes.

Accordingly, we conclude that a county board of elections is prohibited by R.C. 9.481(B)(1) from requiring its employees, as a condition of employment, to reside within the boundaries of the county. R.C. 9.481(B)(1) does not prohibit a county board of elections from appointing officers or employees in accordance with provisions in R.C. Chapter 3501 that impose residency requirements upon those officers or employees.

Investigation, 39 Ohio App. 3d 123, 125, 530 N.E.2d 35 (Franklin County 1987) (“while the ‘court of common pleas of each county is an instrumentality of the state and is not a political subdivision within the ordinary meaning thereof,’ … the definition of political subdivision under R.C. 2743.01(B) encompasses the common pleas court and eliminates it from the definition of state under R.C. 2743.01(A)” (quoting Tymcio v. State, 52 Ohio App. 2d 298, 300, 369 N.E.2d 1063 (Franklin County 1977))); 1988 Op. Att’y Gen. No. 88-098, at 2-482 (“although a county bridge commission is not” specifically “designated by statute” a body corporate and politic, “the fact that it is clearly a public entity vested with various corporate powers qualifies it as a body corporate and politic for purposes of R.C. 2744.01(F”)).
Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. A county board of elections is a “political subdivision,” as that term is used in R.C. 9.481(B)(1), and is therefore prohibited from requiring its employees, “as a condition of employment, to reside in any specific area of the state.”

2. A county board of elections is prohibited by R.C. 9.481(B)(1) from requiring its employees, as a condition of employment, to reside within the boundaries of the county. R.C. 9.481(B)(1) does not prohibit a county board of elections from appointing officers or employees in accordance with provisions in R.C. Chapter 3501 that impose residency requirements upon those officers or employees.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General
THE STATE OF OHIO, APPELLANT, v. GONZALES, APPELLEE.

Criminal law—Cocaine-possession offenses—R.C. 2925.11(C)(4)(b) through (f)—State need not prove that weight of cocaine without filler meets the statutory threshold—Motion for reconsideration granted—Judgment reversed.

(Nos. 2015-0384 and 2015-0385—Submitted February 7, 2017—Decided March 6, 2017.)

APPEAL from and CERTIFIED by the Court of Appeals for Wood County, No. WD-13-086, 2015-Ohio-461.

ON MOTION FOR RECONSIDERATION.

O’CONNOR, C.J.

¶ 1 This matter is before us as a result of a motion for reconsideration filed by appellant, the state of Ohio.1 Appellee, Rafael Gonzales, filed a memorandum opposing reconsideration.2

¶ 2 In State v. Gonzales, 150 Ohio St.3d 261, 2016-Ohio-8319, ___ N.E.3d ___ (“Gonzales I”), the court determined that in prosecuting cocaine-possession offenses under R.C. 2925.11(C)(4)(b) through (f) involving mixed substances, the state must prove that the weight of the actual cocaine, excluding the weight of any filler materials, meets the statutory threshold.

¶ 3 The state contends that Gonzales I was decided in error and that it is based upon inconsistent application of the principles of statutory construction. A majority of the court grants the state’s motion for reconsideration. We now hold

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1 Amicus curiae Ohio Prosecuting Attorneys Association supported appellant’s request for reconsideration.
2 Amicus curiae Office of the Ohio Public Defender filed a memorandum opposing reconsideration.
that the entire “compound, mixture, preparation, or substance,” including any fillers that are part of the usable drug, must be considered for the purpose of determining the appropriate penalty for cocaine possession under R.C. 2925.11(C)(4). Accordingly, we vacate our decision in Gonzales I, answer the certified-conflict question in the negative, and reverse the judgment of the Sixth District Court of Appeals.

ANALYSIS

{¶ 4} To interpret a statute, we must first look at its language to determine legislative intent. Provident Bank v. Wood, 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (1973). When a statute’s meaning is clear and unambiguous, we apply the statute as written. Id. at 105-106. We must give effect to the words used, refraining from inserting or deleting words. Cleveland Elec. Illum. Co. v. Cleveland, 37 Ohio St.3d 50, 53-54, 524 N.E.2d 441 (1988). If a legislative definition is available, we construe the words of the statute accordingly. R.C. 1.42.

{¶ 5} But “words in a statute do not exist in a vacuum.” D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 19. This means that “our attention should be directed beyond single phrases, and we should consider, in proper context, all words used by the General Assembly in drafting [the relevant statute] with a view to its place in the overall statutory scheme.” Id.

{¶ 6} If a statute is ambiguous, the court may consider the legislative history and the circumstances under which it was enacted, as well as the consequences of a particular construction, among other things. R.C. 1.49. And we must presume that the General Assembly intended the entire statute to achieve a result that is feasible of execution. R.C. 1.47.

{¶ 7} R.C. 2925.11(C)(4) describes the cocaine-possession offense: “If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty
of possession of cocaine.” (Emphasis added.) The penalty sections of the statute then set forth increasing degrees of punishment depending on the weight of the cocaine possessed by an offender. R.C. 2925.11(C)(4)(a) through (f). Possession of any amount of the drug exceeding 5 grams is penalized more severely than a fifth-degree felony, id., and possession of an amount of the drug exceeding 100 grams is a first-degree felony, in which case the offender is also designated as a major drug offender and the court must impose a mandatory maximum prison term, id. at (C)(4)(f).3

¶ 8 The question before us is what should be weighed to determine an offender’s penalty.

¶ 9 Read as a whole, the plain language of R.C. 2925.11(C)(4)(b) through (f) penalizes an offender for the amount of cocaine possessed, and the amount of “cocaine” clearly encompasses the whole compound or preparation of cocaine, including fillers that are part of the usable drug.

¶ 10 The statutory definition of “cocaine” includes a “salt, compound, derivative, or preparation” of a substance that is a cocaine salt or base cocaine. R.C. 2925.01(X)(3). See also R.C. 3719.41 (Schedule II(A)(4)). This language is broad. The Sixth District concluded that the definition of “cocaine” does not include a mixture of cocaine and fillers. 2015-Ohio-461 at ¶ 45. But the statutory definition of cocaine plainly encompasses a compound or preparation that includes cocaine. And “compound” means “something (as a substance * * *) that is formed by a union of * * * ingredients.” Webster’s Third New International Dictionary 466 (1986).

Indeed, this is consistent with the nature of the cocaine used illegally in the United States, which is a compound of several ingredients:

[C]ocaine powder is derived by dissolving the coca paste in hydrochloric acid and water. To this mixture a potassium salt (potassium permanganate) is added. The potassium salt causes undesired substances to separate from the mixture. These substances are then discarded. Ammonia is added to the remaining solution, and a solid substance—the powder cocaine—separates from the solution. The powder cocaine is removed and allowed to dry. Prior to distribution, powder cocaine typically is “cut,” or diluted, by adding * * * one or more adulterants: sugars, local anesthetics (e.g., benzocaine), other drugs, or other inert substances. Consequently, the purity level of powder cocaine may vary considerably.

lidocaine, procaine, levamisole, baby laxatives or powder, and “anything that is white and powdered”).

¶ 12 Importantly, the fillers, or adulterants, that are part of powder cocaine are not intended to be removed before consumption. Indeed, the fillers are an inherent part of powder cocaine. Thus, the common usage of the term “cocaine” is consistent with the statutory definition that a compound or preparation of cocaine is still cocaine. Accordingly, the total weight of the drug, including any fillers that are part of usable cocaine, should be weighed to determine the appropriate cocaine-possession penalty under the statute.

¶ 13 Concluding otherwise would require us to insert the words “actual” or “pure” to describe the cocaine that is intended to be penalized by the statute. If the General Assembly had been concerned about purity, rather than total weight, it would have said so. In our limited role of statutory interpretation, we must refrain from inserting words to achieve a particular result. Cleveland Elec. Illum. Co., 37 Ohio St.3d 50, 524 N.E.2d 441, paragraph three of the syllabus.

¶ 14 Because we conclude that the statute is unambiguous, legislative history is not controlling here. However, contrary to what Justice Kennedy’s dissent asserts, even if the statute were ambiguous, a review of the legislative history and the circumstances under which the statute was enacted would support our conclusion. The Ohio Legislative Service Commission’s analysis of Am.Sub.H.B. No. 86, which amended R.C. 2925.11(C)(4), explains that one

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4 In fact, a short time following our decision in Gonzales I, legislation was proposed in the General Assembly to amend R.C. 2925.03 and 2925.11 “to provide that in determining the amount of cocaine for trafficking and possession offenses, it also includes a compound, mixture, preparation, or substance containing cocaine.” Title, Am.H.B. No. 4, as introduced in the 132d General Assembly, available at Ohio Legislature, House Bill 4, https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-4 (accessed Feb. 22, 2017). As unanimously passed by the House, Section 3 of that legislation states, “The General Assembly is aware of [Gonzales I]. It was not the intent of the General Assembly to require the State, in prosecuting cocaine offenses involving mixed substances, to prove that the weight of the cocaine meets the statutory threshold, excluding the weight of any filler materials used in the mixture.” Id.

¶ 15 Moreover, introducing a purity weight requirement for drug offenses involving cocaine would have been a significant departure from the statutory scheme as it had existed and been applied prior to September 2011, the effective date of 2011 Am.Sub.H.B. No. 86. But nowhere in the legislative analysis do the words “pure” or “purity” occur, and nowhere is there a description of the need for prosecutors to weigh the cocaine minus any fillers to determine the applicable penalty for cocaine possession. In fact, the Legislative Service Commission’s analysis explains that the drug-quantity threshold formerly used for cocaine that was not crack cocaine remained the basis for determining whether the major-drug-offender label should apply “regardless of the form of the cocaine involved.” Final Analysis at 68.


5 The equalization of the penalties for possession of crack and powder cocaine was driven in large part by the need to address the racial disparity in the drug-offender prison population, not by the need to address variances in cocaine purity. This critique of the two-tiered cocaine sentencing approach used prior to H.B. 86 has been widely observed:

¶ 17 But Justice Kennedy’s suggestion in her dissent that H.B. 86 incorporated a requirement that the state must establish proof of the weight of “pure” cocaine in order to reduce the prison population is, at best, speculative. Dissenting opinion at ¶ 61. None of the varied legislative approaches in H.B. 86 included the requirement that the prosecution prove the amount of “pure” cocaine to determine the appropriate cocaine-possession penalty. To the contrary, the Legislative Service Commission’s analysis is clear that the amendments did not affect the preexisting statutory scheme except to eliminate the distinction between

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Debates about the sentencing of crack possessors have been contentious for some time because of the disparity between the sentences applicable to crack offenders and those applicable to powder cocaine offenders in most jurisdictions, though crack and powder cocaine are simply different forms of the same drugs. This disparate treatment is usually discussed along racial lines and seen as a main contributor to racial disparities in imprisonment rates. For example, in its 2002 Report to Congress, the U.S. Sentencing Commission found that an “overwhelming majority” of crack offenders were black—91.4% in 1992 and 84.7% in 2000. Like the federal system, blacks have been disproportionately incarcerated in Ohio. The Ohio Office of Criminal Justice Services reported that at midyear 2005, Ohio incarcerated blacks at an alarming rate of 2,196 per 100,000 U.S. residents and incarcerated whites at a rate of 344 per 100,000 U.S. residents. Also similar to the federal system, Ohio law treats crack cocaine offenders much more harshly than it treats powder cocaine offenders.

(Footnotes omitted.) Exum, *Sentencing, Drugs, and Prisons: A Lesson From Ohio*, 42 U.Tol.L.Rev. 881, 886-887 (2011). See also Kimbrough v. United States, 552 U.S. 85, 98, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007) (describing the problems identified by the United States Sentencing Commission with the crack/powder sentencing disparity, including the perception that the system promoted unwarranted disparity based on race).
crack and powder cocaine and provide a “penalty for the offenses involving any type of cocaine.” Final Analysis at 65-66.

CONCLUSION

¶ 18 Giving effect to the statute as a whole and to the intent of the legislature as expressed in the words of the statute, we conclude that the applicable offense level for cocaine possession under R.C. 2925.11(C)(4) is determined by the total weight of the drug involved, including any fillers that are part of the usable drug. Thus, we answer the certified question in the negative, and we reverse the judgment of the Sixth District Court of Appeals.

Motion for reconsideration granted and judgment reversed.

O’DONNELL, FRENCH, and DEWINE, JJ., concur.

DEWINE, J., concurs, with an opinion.

FISCHER, J., concurs in part and dissents in part, with an opinion.

KENNEDY, J., dissents, with an opinion.

O’NEILL, J., dissents, with an opinion.

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DEWINE, J., concurring.

¶ 19 As the opinion concurring in part and dissenting in part states, reconsideration has traditionally been used “‘to correct decisions which, upon reflection, are deemed to have been made in error.’” Concurring-in-part-and-dissenting-in-part-opinion at ¶ 23, quoting State ex rel. Huebner v. W. Jefferson Village Council, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1996). And S.Ct.Prac.R. 18.02 contemplates that those corrections should come quickly. Parties have just ten days to bring to this court’s attention errors the court may have made in arriving at its decision; this court can thus fix a wrongly decided case immediately, before it is relied upon by lower courts and infects the entire justice system.

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A case wrongly decided in late December 2016 is still a case wrongly decided. The state filed its motion for reconsideration on January 3, 2017—to the current court—in accordance with the rule. It is the duty of this court to address the motion. And a majority of this court determines that State v. Gonzales, 150 Ohio St.3d 261, 2016-Ohio-8319, ___ N.E.3d ___, is fundamentally flawed. Far better for the administration of justice in Ohio to correct that erroneous holding now than to put off the task for a future case. Reconsideration exists for a very good reason; we should not employ it lightly, but we neglect our duty if we do not employ it to right wrongs when necessary.

FISCHER, J., concurring in part and dissenting in part.

Today, we announce two separate and distinct decisions in this case. First, the court grants the state’s motion to reconsider by a four-to-three vote. I dissent and would deny the motion to reconsider. Second, the court, on the merits of the case, reverses the judgment of the court of appeals by a five-to-two vote. I agree with that decision.

This court’s rules of practice provide that “[a] motion for reconsideration shall not constitute a reargument of the case.” S.Ct.Prac.R. 18.02(B). Traditionally, this court has used its reconsideration authority to “correct decisions which, upon reflection, are deemed to have been made in error.” State ex rel. Huebner v. W. Jefferson Village Council, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1996).

This court issued a number of decisions at the end of 2016 in which motions for reconsideration were not ripe for review until after the beginning of
this year. The timing of these motions places this court in the unusual position of being asked to put itself in the shoes of the previous court to determine whether that court erred in its deliberations to the extent that its decisions need to be corrected. Recognizing that I was not privy to the previous court’s deliberations and respecting the precedent established by that court’s decisions, I have voted to deny all motions asking this court to reconsider decisions issued before I took my seat on the bench.

¶ 25 Because this court grants the motion for reconsideration in this case, a new question arises that is separate and distinct from the question whether I should vote to grant reconsideration in a case decided by this court before I joined it: once a majority of the court has decided to grant reconsideration in such a case, should I participate in a decision on the merits of that case? I believe that it is my duty to do so.

¶ 26 Each of the justices of this court has been elected by the citizens of Ohio to participate in the cases before the court. An exception to this duty occurs when one of us feels compelled to disqualify himself or herself. In those cases, a visiting judge is appointed by the chief justice to take the recusing justice’s place in the case.

¶ 27 No ethical considerations prevent me from ruling on the merits of this case. Moreover, even if a visiting judge were to be appointed in my place in this case, that judge would be in a position identical to mine because he or she would not have participated in the original decision on the merits. As an elected member of this court, I have a duty to participate in this case, and there is no compelling reason for me to do otherwise.

¶ 28 In a sense, participating in the merits of a decision once a majority of the court votes to reconsider the case is no different from my participating in a case that comes before the court as a jurisdictional appeal that was accepted by the court last year and is scheduled for oral argument this year. Although I did not vote
to accept jurisdiction in those cases, I am expected to fully participate in the
decisions on the merits, and I have done so (except for those cases in which I have
recused myself for other reasons). I have also participated in a decision that
dismissed a case on the grounds that it had been improvidently accepted. In that
case, my vote to dismiss essentially means that after reconsidering the merits of the
case, I determined that the previous court’s decision to accept jurisdiction was in
error. My participation in the consideration of the merits in this case is similar.

{¶ 29} For these reasons, despite voting to deny the state’s motion for
reconsideration, I have concluded that it is my duty to participate in the merits
decision in this case, and I concur in the majority’s decision to reverse the judgment
of the court of appeals.

KENNEDY, J., dissenting.

{¶ 30} “Decisions are the hardest moves to make, especially when it’s a
choice between what you want and what is right.” Unknown.

{¶ 31} This court must respect the fact that the constitutional authority to
legislate was conferred solely on the General Assembly, Article II, Section 1, Ohio
Constitution, and that it is the province of the General Assembly to make policy
decisions, Groch v. Gen. Motors Corp., 117 Ohio St.3d 192, 2008-Ohio-546, 883
N.E.2d 377, ¶ 212. It is undisputed that “[j]udicial policy preferences may not be
used to override valid legislative enactments.” State v. Smorgala, 50 Ohio St.3d

{¶ 32} The legislature “is vested with the power to define, classify, and
prescribe punishment for offenses committed in Ohio.” State v. Taylor, 138 Ohio
St.3d 194, 2014-Ohio-460, 5 N.E.3d 612, ¶ 12. Accordingly, “[j]udges have no
inherent power to create sentences,” id., and instead “are duty-bound to apply
sentencing laws as they are written,” State v. Fischer, 128 Ohio St.3d 92, 2010-

{¶ 33} Because I must adhere to these time-honored principles that define this court’s role in our tripartite system of government, I cannot interpret the statutory scheme at issue to conform to my view of what Ohio’s public policy should be. Instead, I must interpret the words that the General Assembly chose, using rules of statutory construction. Accordingly, although I might prefer the outcome under the majority’s judgment, my fealty to the constitution, our precedent, and this court’s role in government require that I dissent from it.

Motion for Reconsideration

{¶ 34} The state of Ohio has moved for reconsideration of this court’s judgment in State v. Gonzales, 150 Ohio St.3d 261, 2016-Ohio-8319, ___ N.E.3d ___ (“Gonzales I”). Pursuant to S.Ct.Prac.R. 18.02, we have the authority to “correct decisions which, upon reflection, are deemed to have been made in error.” State ex rel. Huebner v. W. Jefferson Village Council, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1996). “We will not, however, grant reconsideration when a movant seeks merely to reargue the case at hand.” Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision, 139 Ohio St.3d 212, 2014-Ohio-1940, 11 N.E.3d 222, ¶ 9; S.Ct.Prac.R. 18.02(B) (“A motion for reconsideration shall not constitute a reargument of the case”).

{¶ 35} In an attempt to present an “obvious error,” see Dublin City Schools at ¶ 10, the state asserts that the court misapplied the rule of lenity and the canon of strict construction. The state contends that the lead opinion in Gonzales I applied the rule of lenity even though it found that the statute was unambiguous. In support, the state cites paragraphs 10 and 20 through 22 of Gonzales I. An examination of these paragraphs, however, exposes the fiction of the state’s assertion.

{¶ 36} The lead opinion’s reference to the rule of lenity in Gonzales I is limited to a general statement that the rule is used to interpret a statute when a statute
is determined to be ambiguous. \textit{Id.} at ¶ 10. In that opinion, the reference to the rule occurs before the discussion interpreting R.C. 2925.11(C)(4), the statute at issue in this case. Starkly absent from the lead opinion’s analysis of the statute is application of the rule of lenity. \textit{Id.} at ¶ 20-22. That opinion clearly states that nothing in the statute is deemed ambiguous. \textit{Id.} at ¶ 20, 22 (R.C. 2925.11(C)(4)(b) through (f) is “unambiguous on its face”). The rule of lenity is applied only when a statute is ambiguous. \textit{State v. Arnold}, 61 Ohio St.3d 175, 178, 573 N.E.2d 1079 (1991). Moreover, the lead opinion in \textit{Gonzales I} does not engage in any discussion or application of the rule of lenity when analyzing the statute. Therefore, there is no doubt that the lead opinion did not resolve the statute in favor of the defendant. \textit{Id.} at ¶ 20-22.

\{¶ 37\} The state also argues that the court used a “canon of strict construction” to infer legislative intent. However, this argument is contradicted by the express language of the lead opinion in \textit{Gonzales I}, which states, “The state fails to point to any ambiguity in the statute. Without that, we must simply apply the statute as it is written, \textit{without delving into legislative intent.”} (Emphasis added.) \textit{Id.} at ¶ 17.

\{¶ 38\} Accordingly, the state’s arguments are nothing more than red herrings. Failing to point to any obvious error, the state is merely seeking another bite at the apple. The precedent established in \textit{Gonzales I} should not be overturned without a thorough analysis under the tripartite test of \textit{Westfield Ins. Co. v. Galatis}, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, in a new case.

\{¶ 39\} Accordingly, I would deny the state’s motion for reconsideration. Nevertheless, because a majority of this court has granted reconsideration in this matter, I will address the merits.

\textit{Analysis of R.C. 2925.11(C)(4)}

\{¶ 40\} The General Assembly enacted a general provision prohibiting any person from knowingly obtaining, possessing, or using a controlled substance or a
controlled-substance analog. R.C. 2925.11(A). Penalties for doing so are based on the class and amount of the controlled substance or controlled-substance analog in an offender’s possession. R.C. 2925.11(C).

\{¶ 41\} At issue here is R.C. 2925.11(C)(4), which provides, “If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine.” Thereafter, possession of cocaine is categorized into a degree of felony depending on whether “the amount of the drug involved” equals or exceeds a specific number of grams but is less than a specific number of “grams of cocaine.” R.C. 2925.11(C)(4)(b) through (f).


\{¶ 43\} “When the statutory language is plain and unambiguous, and conveys a clear and definite meaning, we must rely on what the General Assembly has said.” Jones v. Action Coupling & Equip., Inc., 98 Ohio St.3d 330, 2003-Ohio-1099, 784 N.E.2d 1172, ¶ 12, citing Symmes Twp. Bd. of Trustees v. Smyth, 87 Ohio St.3d 549, 553, 721 N.E.2d 1057 (2000). However, when statutory language is ambiguous, the rules of statutory interpretation must be applied to determine the intent of the legislature. Wingate v. Hordge, 60 Ohio St.2d 55, 58, 396 N.E.2d 770 (1979).

\{¶ 44\} The majority concludes that the statute is unambiguous and that the legislative intent is that the phrase “grams of cocaine” in the subdivision establishing the degree of the offense means “grams of a mixture of cocaine and fillers.” To reach this interpretation, however, the majority claims that the mixture
of cocaine and adulterants is a compound. R.C. 2925.01(X) (cocaine includes “[a] salt, isomer or derivative * * * or a salt, compound, derivative, or preparation”). It therefore confuses the definition of “compound” with the definition of “mixture.” Majority opinion at ¶ 10 (“‘compound’ means ‘something (as a substance * * *) that is formed by a union of * * * ingredients’”), quoting Webster’s Third New International Dictionary 466 (1986). In Gonzales I, the dissenting opinion concluded that “a compound is a mixture.” Id., 150 Ohio St.3d 261, 2016-Ohio-8319, ___ N.E.3d ___, ¶ 42 (O’Connor, C.J., dissenting).

¶ 45 The majority is purposefully silent as to the actual effect of its decision and the dangerous precedent it creates, but astute readers of our opinions and those educated and knowledgeable about the rules of statutory construction will not be fooled. By reading the term “mixture” into the term “compound,” the majority abandons our strict rules of statutory construction, ignores definitions, and renders meaningless and superfluous the term “mixture” as used by the General Assembly in this provision and other provisions in the Revised Code.

¶ 46 The legislature has not defined the terms “compound” or “mixture.” R.C. 1.42 states, “Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.” The majority’s analysis fails to interpret the term “compound” properly. A general dictionary recognizes its definition in the scientific field of chemistry as “a chemically distinct substance formed by union of two or more ingredients (as elements) in definite proportion by weight and with definite structural arrangement (water is a [compound] of oxygen and hydrogen).” Webster’s Third New International Dictionary 466 (2002). This definition is not interchangeable with the term “mixture,” which is defined as “a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded
as retaining a separate existence—usu. distinguished from * * * compound.”  *Id.* at 1449.

{¶ 47} “[W]e may not restrict, constrict, qualify, narrow, enlarge, or abridge the General Assembly’s wording.’”  *Dillon v. Farmers Ins. of Columbus, Inc.*, 145 Ohio St.3d 133, 2015-Ohio-5407, 47 N.E.3d 794, ¶ 17, quoting *State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 18.  Instead, we are to give effect to “every word, phrase, sentence, and part of the statute,” *Carna* at ¶ 18-19, avoiding interpretations that would otherwise render a provision redundant, meaningless, or superfluous, *id.* at ¶ 19.

{¶ 48} The majority opinion neglects the effect of its conclusion that the substance created when cocaine and fillers are mixed is a compound.  The only reasonable interpretation of the majority’s decision is that the majority implicitly concludes that the term “mixture” has no meaning separate and apart from the term “compound.”  But the General Assembly has used both terms not only in R.C. 2925.11(C)(4) but in numerous other statutes.  *See, e.g.*, R.C. 2925.01(D) and (I), 2925.03(C), 3719.41, and 3719.44.

{¶ 49} Accordingly, in every statute in which the General Assembly has chosen to use both “compound” and “mixture,” the effect of the majority’s conclusion renders the term “mixture” superfluous.  This also means that when the legislature used the terms “compound” and “mixture” in the same sentence of a statute, the use of the term “mixture” was included in vain, not to accomplish a definite purpose.  *See State v. Wilson*, 77 Ohio St.3d 334, 336, 673 N.E.2d 1347 (1997).  This offends the well-established rule of statutory construction that “when language is inserted in a statute it is inserted to accomplish some definite purpose.”  *State ex rel. Cleveland Elec. Illum. Co. v. Euclid*, 169 Ohio St. 476, 479, 159 N.E.2d 756 (1959).  “‘The presumption always is, that every word in a statute is designed to have some effect, and hence the rule that, ‘in putting a construction upon any
statute, every part shall be regarded, and it shall be so expounded, as to give some effect to every part of it.’ ” (Emphasis sic.) Ford Motor Co. v. Ohio Bur. of Emp. Servs., 59 Ohio St.3d 188, 190, 571 N.E.2d 727 (1991), quoting Turley v. Turley, 11 Ohio St. 173, 179 (1860), quoting Commonwealth v. Alger, 61 Mass. 53, 89 (1851).

¶ 50 Our long precedent of statutory construction establishes that “the General Assembly, in enacting a statute, is assumed to have been aware of other statutory provisions concerning the subject matter of the enactment even if they are found in separate sections of the Code.” Meeks v. Papadopulos, 62 Ohio St.2d 187, 191-192, 404 N.E.2d 159 (1980), citing State ex rel. Darby v. Hadaway, 113 Ohio St. 658, 659, 150 N.E. 36 (1925). The use by the General Assembly of particular language in one part of a statute but not in another part demonstrates that it has chosen not to make that modification in the latter part of the statute. See Maggiore v. Kovach, 101 Ohio St.3d 184, 2004-Ohio-722, 803 N.E.2d 790, ¶ 27.

¶ 51 While the General Assembly has used both terms in R.C. 2925.11, it has used the term “compound” without using the term “mixture” in other statutes. See R.C. 4123.68(C) (“Any industrial process involving the use of lead or its preparations or compounds”) and (D) (“Any industrial process involving the use of mercury or its preparations or compounds”); R.C. 5739.01(FFF) (“ ‘Drug’ means a compound, substance, or preparation, and any component of a compound, substance, or preparation * * *”). Therefore, the legislature has demonstrated that it knows how to use these terms, and it has chosen to use only the term “compound” in R.C. 2925.01(X) to define “cocaine.”

¶ 52 If the General Assembly had intended the degree-of-felony classifications to include “compound, mixture, preparation, or substance containing cocaine,” then it could have easily included that language in those provisions or changed the definition of “cocaine” to include “mixture.” But the legislature did not. Instead, it limited the degree-of-felony classification to “grams of cocaine.”
only. “Cocaine,” of course, is limited by its definition in R.C. 2925.01(X), which
does not include the term “mixture.” We should not add the term “mixture” to the
definition by judicial fiat. See Clark v. Scarpelli, 91 Ohio St.3d 271, 291, 744
N.E.2d 719 (2001) (Cook, J., concurring in part and dissenting in part) (“the role of
a court is not to decide what the law should say; rather, the role of this court is to
interpret what the law says as it has been written by the General Assembly”
[emphasis sic]). As succinctly stated by the court in Dillon, this analysis “simply
gives effect to the statute as written.” 145 Ohio St.3d 133, 2015-Ohio-5407, 47
N.E.3d 794, ¶ 21.

¶ 53 The majority contends that interpreting the phrase “of cocaine” in
R.C. 2925.11(C)(4)(b) through (f) to mean only the drug, not a mixture, “would
require us to insert the words ‘actual’ or ‘pure’ to describe the cocaine that is
intended to be penalized by the statute.” Majority opinion at ¶ 13. But this assertion
is untrue.

¶ 54 The certified question recognizes that the issue is whether the state
“[m]ust * * * prove that the weight of the cocaine meets the statutory threshold
* * *.” (Emphasis added.) 143 Ohio St.3d 1402, 2015-Ohio-2747, 34 N.E.3d 131.
As argued by Gonzales, “if the relevant weight of cocaine exists in a ‘mixture,’ it
really doesn’t matter if the mixture is 10%, 20%, 70% or 99% pure since the offense
level is tethered to the weight of cocaine within the mixture, not purity per se.”
(Emphasis sic.) Instead, when the statute is read as written, it requires that the state
prove possession of five or more “grams of cocaine,” according to the definition of
“cocaine” in R.C. 2925.01(X):

(1) A cocaine salt, isomer, or derivative, a salt of a cocaine isomer
or derivative, or the base form of cocaine;
(2) Coca leaves or a salt, compound, derivative, or preparation of coca leaves, including ecgonine, a salt, isomer, or derivative of ecgonine, or a salt of an isomer or derivative of ecgonine;

(3) A salt, compound, derivative, or preparation of a substance identified in division (X)(1) or (2) of this section that is chemically equivalent to or identical with any of those substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves if the extractions do not contain cocaine or ecgonine.

This definition does not include filler material. Therefore, the majority’s conjecture that an opposing interpretation of the statute requires insertion of the term “purity” is merely an attempt to deflect from the fact that the majority has up-ended established rules of statutory construction to reach its result.

¶ 55 The error of the majority’s analysis is also demonstrated when other provisions of the Revised Code are examined. The grammatical framework of the possession-of-cocaine statute is mirrored in other possession statutes. Possession of hashish, R.C. 2925.11(C)(7), and trafficking of hashish, R.C. 2925.03(C)(7), and L.S.D, R.C. 2925.03(C)(5), contain the same language: “If the drug involved in the violation is * * * a compound, mixture, preparation, or substance containing [the respective drug] * * *.” Further, the degree-of-felony classifications categorize the violations based on whether “the amount of the drug involved” was a specific weight of hashish, R.C. 2925.11(C)(7) and 2925.03(C)(7), or of L.S.D., R.C. 2925.03(C)(5).

¶ 56 “Hashish” is defined as “the resin or a preparation of the resin contained in marihuana, whether in solid form or in a liquid concentrate, liquid extract, or liquid distillate form.” R.C. 2925.01(Z). “L.S.D.” is defined as “lysergic acid diethylamide.” R.C. 2925.01(Y). Accordingly, it is only the drugs hashish or L.S.D., as defined, that the legislature intended to be quantified to determine the
degree of felony for the violation. Nevertheless, the majority’s interpretation allows for the degree of felony for possession of cocaine and trafficking in cocaine to be quantified with something other than cocaine, as defined. This is clearly not the intent of the legislature.

¶ 57 In addition to my disagreement with the majority’s interpretation of the statute, I also do not agree that the language of the statute is unambiguous. When the language prohibiting possession of cocaine is read in conjunction with the corresponding penalty provision, the statute is ambiguous. See Symmes, 87 Ohio St.3d at 553, 721 N.E.2d 1057 (conflict among the appellate courts regarding the meaning of statutory phrase suggests that the language is ambiguous). Moreover, the conflicting interpretations advanced by the lead opinion and the dissent in Gonzales I, 150 Ohio St.3d 261, 2016-Ohio-8319, ___ N.E.3d ____, are strong support for concluding that the statute is ambiguous.

¶ 58 When a statute is ambiguous, the court may consider the matters listed in R.C. 1.49 to discern the legislature’s intent: the object that the legislature sought to attain, the circumstances surrounding the law’s enactment, the law’s legislative history, preceding law, the consequences of construing the law in a certain way, and the statute’s administrative construction.

¶ 59 “Although this court is not bound by” the analyses prepared by the Ohio Legislative Service Commission, “we may refer to them when we find them helpful and objective.” Meeks, 62 Ohio St.2d at 191, 404 N.E.2d 159. The Ohio Legislative Service Commission recognized that one aspect of 2011 Am.Sub.H.B. No. 86 (“H.B. 86”) was to eliminate “the distinction between the criminal penalties provided for drug offenses involving crack cocaine and * * * powder cocaine,” Ohio Legislative Service Commission, Am.Sub.H.B. 86, Bill Analysis as Introduced, at 4, available at http://www.lsc.ohio.gov/analyses/129/h0086-i-129.pdf (accessed Feb. 24, 2017), but a second aspect of the law was to remove the presumption of a term of incarceration for fourth-degree-felony drug offenses, Ohio
Heralded as a significant piece of legislation that would drastically reduce the prison population by ensuring that low-level, nonviolent drug offenders would not be subjected to mandatory prison terms, the director of the Department of Rehabilitation and Correction called H.B. 86 “a day of hope.” Johnson, Law to Cut Prison Population, Columbus Dispatch (June 30, 2011) 1B.

The statute signals the legislature’s intent to reduce the prison population by eliminating presumptive prison sentences for some nonviolent drug offenders: it requires that prosecutors prove the “grams of cocaine” and creates a presumption of incarceration for only those drug offenders who possess the specific number of grams of “cocaine” identified in R.C. 2925.11(C)(4), not those drug offenders whose product has only “some detectable amount” of cocaine. Compare State v. Chandler, 109 Ohio St.3d 223, 2006-Ohio-2285, 846 N.E.2d 1234, syllabus (under R.C. 2925.03(C)(4)(g), substance offered for sale must contain some detectable amount of a controlled substance before an offender can be sentenced as a major drug offender).

Additionally, R.C. 1.49 permits this court to examine preceding law to determine legislative intent. In previous iterations of R.C. 2925.01, “crack cocaine” and “cocaine” were separately defined. The now-deleted definition of “crack cocaine” was “a compound, mixture, preparation, or substance that is or contains any amount of cocaine that is analytically identified as the base form of cocaine or that is in a form that resembles rocks or pebbles generally intended for individual use.” Former R.C. 2925.01(GG), 2008 Sub.H.B. No. 195. The definition of “cocaine” remains unchanged; it does not include the term “mixture.”

These definitions demonstrate that the legislature knew how to define the term “crack cocaine” to include a mixture and to define the term
“cocaine” without using the term “mixture.” The General Assembly could have amended the definition of “cocaine” to include the term “mixture” when it deleted the definition of “crack cocaine,” but it did not. Accordingly, the legislature intended to not include the term “mixture” in its definition of “cocaine.” R.C. 2925.01(X).

{¶ 64} This interpretation of the statute is also consistent with the intent to eliminate the sentencing disparity. Final Analysis at 9. The General Assembly’s intent was to penalize offenders for the amount of the drug cocaine regardless of form. Penalizing an offender for the weight of cocaine, and not the filler material, ensures that offenders are penalized equally. An offender who possesses five grams of cocaine should receive the same penalty as the offender who has five grams of cocaine and ten grams of filler material.

{¶ 65} The rule of lenity, codified in R.C. 2901.04(A), must also be considered when a statute is ambiguous. It provides that sections of the Revised Code that define penalties “shall be strictly construed against the state, and liberally construed in favor of the accused.” R.C. 2901.04(A). The rule provides that a court will not interpret a criminal statute to increase the penalty it imposes on a defendant if the intended scope of the statute is ambiguous. See Moskal v. United States, 498 U.S. 103, 107-108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990), quoting Bifulco v. United States, 447 U.S. 381, 387, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), quoting Lewis v. United States, 445 U.S. 55, 65, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980) (“ ‘the “touchstone” of the rule of lenity “is statutory ambiguity” ’ ”); see also Arnold, 61 Ohio St.3d at 178, 573 N.E.2d 1079.

{¶ 66} Because the statute is ambiguous, the rule of lenity requires that the statute be construed so that it applies only to conduct that is clearly proscribed. Possession of cocaine, or of a “compound, mixture, substance, or preparation” containing cocaine, is proscribed. R.C. 2925.11(C)(4). Possession is a fifth-degree felony. R.C. 2925.11(C)(4)(a). However, if the cocaine equals or exceeds five
grams, possession is penalized as a fourth-, third-, second-, or first-degree felony, depending on the amount of the drug, not a compound, mixture, substance, or preparation containing the drug, that is in the offender’s possession. In this instance, the degree-of-felony classification for possession of cocaine can only be determined based on the grams of cocaine, as defined in R.C. 2925.01(X), and not filler material.

¶ 67 The state of Ohio argues that “the drafters made a probable slight faux pas” in amending the penalty provision and to read the statute in any way other than that the General Assembly requires a mere “aggregate weight” test “belies the legislative intent of the law.” This argument demonstrates the weakness of the state’s position in concluding that the statute is not ambiguous. A plain and ordinary meaning would not need to be categorized as a blunder or a gaffe. However, the “faux pas” argument is not credible, because the General Assembly used the same grammatical structure to define the level of felony penalties for possession of hashish and cocaine and trafficking in hashish, L.S.D., and cocaine. But the legislature did not use the same grammatical structure for possession of marijuana and heroin, see R.C. 2925.11(C)(3) and (6), and trafficking in marijuana and heroin, see R.C. 2925.03(C)(3) and (6). Therefore, it is not a “slight faux pas”; the same language is used throughout the statute in such a manner.

¶ 68 The state of Ohio also argues that interpreting the statute to require proof of the grams of cocaine as defined presents problems because no lab in Ohio conducts a quantitative or purity analysis of substances. However, the confines of statutory construction do not afford the judicial branch latitude to consider policy matters or outcome metrics in determining the meaning of a statute. Our interpretation of a statute cannot be concerned with whether the General Assembly issued an unfunded mandate. Our role is simply to give effect to the legislative intent as divined from the words used by the legislature. Solomon, 72 Ohio St.3d at 65, 647 N.E.2d 486.
{¶ 69} The argument of the attorney general, as amicus curiae, that “[t]he mere fact that the State’s premiere [sic] crime laboratory is not equipped to perform this analysis suggests that the General Assembly never intended to require purity testing in cocaine prosecutions,” is also unconvincing. In contrast to the state’s conjecture regarding the General Assembly’s intent, the intent of that body and the actions of the crime laboratory are not always aligned. The “state’s premier crime laboratory” stopped testing minor-misdemeanor quantities of marijuana in March 2016. Lemon, BCI’s End to Free Testing of Pot Starts Questions, Toledo Blade (Feb. 13, 2017), available at http://www.toledoblade.com/Police-Fire/2017/02/13/End-to-free-testing-of-pot-starts-questions.html (accessed Feb. 28, 2017). However, the General Assembly has not repealed minor-misdemeanor possession of marijuana. See R.C. 2925.11(C)(3)(a).

{¶ 70} Rightly or wrongly, the General Assembly used the specific language “grams of cocaine,” without any qualifiers. If the General Assembly had intended that the penalty for possession of cocaine depended on the weight for the mixture containing the cocaine, and not just the drug cocaine, the General Assembly had the opportunity to specify that requirement. Further, the legislature has the ability to amend the definition of “cocaine” to include the term “mixture,” similar to the former definition of “crack cocaine,” or amend the penalty provisions to include this language or delete the “of cocaine” language. See R.C. 2925.11(C)(3)(b) through (g) (possession of marijuana); R.C. 2925.11(C)(6)(b) through (f) (possession of heroin).

{¶ 71} “It is not the role of the courts ‘to establish legislative policies or to second-guess the General Assembly’s policy choices.’ ” Stetter v. R.J. Corman Derailment Servs., L.L.C., 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 35, quoting Groch, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 212. This court must respect the fact that the constitutional authority to legislate was conferred solely on the General Assembly. Article II, Section 1, Ohio Constitution.
Consequently, “the only sentence which a trial court may impose is that provided for by statute. A court has no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that provided for by law.” Colegrove v. Burns, 175 Ohio St. 437, 438, 195 N.E.2d 811 (1964).

Today, the majority turns its back on these treasured principles of our limited role in government to legislate from the bench.

¶ 72 Therefore, I dissent.

O’NEILL, J., dissenting.

¶ 73 Reconsideration of this case is improper. On December 23, 2016, we released State v. Gonzales, 150 Ohio St.3d 261, 2016-Ohio-8319, ___ N.E.3d ___ (“Gonzales I”). Justice Lanzinger authored a lead opinion that Justice Pfeifer and I joined. Justice Kennedy authored an opinion concurring in judgment only. Chief Justice O’Connor authored a dissenting opinion that Justices O’Donnell and French joined. Each of the opinions in Gonzales I was fully and carefully considered by the seven justices of the court. The only thing that has changed since Gonzales I is the makeup of the court. From this day forward, newly seated justices on this court have a license to reconsider that which they never considered in the first place.

¶ 74 Under S.Ct.Prac.R. 18.02(B), a motion for reconsideration shall not reargue the case. Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision, 139 Ohio St.3d 212, 2014-Ohio-1940, 11 N.E.3d 222, ¶ 9. The state’s motion for reconsideration is a transparent attempt to win this case, not based on the merits of its arguments, but based on the change in the makeup of this court following the 2016 election. I reject the state’s assertion that the lead opinion in Gonzales I misapplied any canon of statutory construction to arrive at its holding. Instead, the lead opinion applied the unambiguous language of the statute. Gonzales I at ¶ 17, 20, 22. While Justice Kennedy stated that the statute was ambiguous, she concurred
in the result requiring that the state prove the weight of the cocaine, not the weight of the cocaine and fillers, when proving the degree of the felony. Thus, a majority of the court in Gonzales I addressed the state’s arguments regarding what the statute should say and concluded that those arguments were insufficient to overcome what the statute clearly does say. Id.

¶ 75 Under R.C. 2925.11(C)(4)(a), possession of any amount of cocaine is a fifth-degree felony. To be guilty of a higher degree felony for possession of cocaine under the plain language of subdivisions (C)(4)(b) through (f) of R.C. 2925.11, an offender must possess five or more “grams of cocaine.” The statute establishes penalties for the possession of any type or any amount of cocaine, with increasing penalties for increasing quantities. That is the statutory framework that the General Assembly established. But baby formula, talcum powder, and baking soda, substances commonly mixed with cocaine, are not cocaine. The logic is unassailable. The possession of baby formula, talcum powder, or baking soda does not pose the same risk to the public’s health and safety as possession of cocaine does. The wisdom of this statutory framework is not the question to be answered by this court in this case. The statute is unambiguous and must be applied as written.

¶ 76 Gonzales I clearly articulated the correct path for the General Assembly if, in fact, the plain language of the statute does not adequately reflect the intent of the current General Assembly. Gonzales I at ¶ 22 (lead opinion) and ¶ 35 (Kennedy, J., concurring in judgment only) (if the General Assembly intended to include a mixture of cocaine and fillers for the weight threshold in the penalties for possession of cocaine, it can change the statute). And as of this writing, it is moving to amend the statute.6 This is as it should be. “[W]e must respect that the

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6 Am.H.B. No. 4 is pending in the 132d Ohio General Assembly. The Ohio Legislative Service Commission Bill Analysis states that as a result of this court’s decision in Gonzales I, the proposed
people of Ohio conferred the authority to legislate solely on the General Assembly.’” *Id.*, quoting *State v. South*, 144 Ohio St.3d 295, 2015-Ohio-3930, 42 N.E.3d 734, ¶ 28 (O’Connor, C.J., concurring).

¶ 77 The court’s work in this case was complete on December 23, 2016. A new majority, which includes a justice who took office in 2017, is issuing a decision allowing reconsideration that is not based on any argument that was not expressly addressed in the dissent in *Gonzales I*. There is nothing new here to be reconsidered. The only thing new is the make-up of this court following the November 2016 election. And that change is not sufficient grounds for granting reconsideration; doing so represents a flagrant departure from our own rules of practice.

¶ 78 To be clear, today’s majority opinion does a major disservice to the English language to arrive at a desired result. From this date forward, the statute in question will be read to mean that 2.99 grams of baby powder will now be considered to be 3.00 grams of cocaine if there is even a scintilla of the controlled substance found in the “mixture.” Good enough for government work? I think not. I dissent.

Paul A. Dobson, Wood County Prosecuting Attorney, and David T. Harold and Thomas A. Matuszak, Assistant Prosecuting Attorneys, for appellant.

Mayle, Ray & Mayle, L.L.C., Andrew R. Mayle, Jeremiah S. Ray, and Ronald J. Mayle, for appellee.

Timothy J. McGinty, Cuyahoga County Prosecuting Attorney, and Daniel T. Van, Assistant Prosecuting Attorney; and Dennis P. Will, Lorain County

legislation amends the law to remove the words “of cocaine” from R.C. 2925.03(C)(4)(c) through (g) and R.C. 2925.11 (C)(4)(b) through (f). Ohio Legislative Service Commission, Am.H.B. 4, *Bill Analysis As Passed by the House*, 2, available at https://www.legislature.ohio.gov/download?key=6510&format=pdf.
Prosecuting Attorney, and Matthew A. Kern, Assistant Prosecuting Attorney, urging reconsideration for amicus curiae Ohio Prosecuting Attorney’s Association.

NORTHEAST OHIO REGIONAL SEWER DISTRICT, APPELLANT, v. BATH TOWNSHIP ET AL.; THE CITY OF BEACHWOOD ET AL., APPELLEES.

[144 Ohio St.3d 387, 2015-Ohio-3705.]

Water and sewer districts—R.C. Chapter 6119—Sewer district has authority to establish regional stormwater-management program and to charge fees to implement stormwater-management program.


APPEAL from the Court of Appeals for Cuyahoga County, Nos. 98728 and 98729, 2013-Ohio-4186.

PFEIFER, J.

¶ 1 Appellant, the Northeast Ohio Regional Sewer District (the “Sewer District”), seeks to implement a regional stormwater-management program. Appellees, political subdivisions, and landowners within the Sewer District, argue and the court of appeals concluded that the Sewer District is not authorized to establish a stormwater-management program. We disagree and reverse the judgment of the court of appeals.

BACKGROUND

¶ 2 The Sewer District, a political subdivision of the state of Ohio, was formed in 1972 and includes as member communities all or parts of over 60 cities, villages, and townships in and around Cuyahoga County. In January 2010, the Sewer District adopted a plan to establish a regional stormwater-management program and a structure for fees to be charged to landowners within the Sewer District whose properties contain impervious surfaces. The Sewer District then filed an action in common pleas court against its member communities seeking a
declaratory judgment that it had the authority to implement the regional stormwater-management program and to impose the fees. Some of those member communities and several intervening landowners argued that the Sewer District lacked authority to implement the program and fees under R.C. Chapter 6119 and the Sewer District’s charter and that the fees were unconstitutional.

¶ 3 In April 2011, the trial court declared, upon a motion for partial summary judgment, that the Sewer District had authority under R.C. Chapter 6119 and its charter to enact a regional stormwater-management program. The court of appeals reversed. It properly concluded that as a creature of statute, the Sewer District’s authority is limited by the statutory scheme that created it. 2013-Ohio-4186, 999 N.E.2d 181, ¶ 40 (8th Dist.). The court of appeals stated that

the purpose of a regional water and sewer district is for “either or both” of the following purposes: “(A) [t]o supply water to users within or without the district”; and “(B) [t]o provide for the collection, treatment, and disposal of waste water within and without the district.”

(Brackets sic.) *Id.* at ¶ 43, quoting R.C. 6119.01(A) and (B).

¶ 4 The court of appeals concluded that although the statutory scheme “authorize[s] the Sewer District to collect, treat, and dispose of waste water entering the sewer system,” it “does not authorize the District to implement a ‘stormwater management’ program.” *Id.* at ¶ 43 and 46. This conclusion depends in large part upon the court’s pronouncement that “[t]he term waste water necessarily means water containing waste.” *Id.* at ¶ 44, citing *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App.3d 709, 2005-Ohio-4852, 840 N.E.2d 226 (1st Dist.).
{¶ 5} The trial court also concluded after a bench trial that the Sewer District is authorized by R.C. Chapter 6119 to charge fees to pay for the stormwater-management program. The court of appeals reversed, concluding that the fees were “not for the ‘use or service’ of a ‘water resource project.’ ”

{¶ 6} We granted the Sewer District’s discretionary appeal as to Proposition of Law No. I (asserting that the program and fees are authorized under R.C. Chapter 6119) and Proposition of Law No. II (asserting that the program and fees are authorized under the Sewer District’s charter). 138 Ohio St.3d 1413, 2014-Ohio-566, 3 N.E.3d 1216.

ANALYSIS

{¶ 7} Despite the great interests at stake, the issues in this case are exceedingly straightforward: (1) is the Sewer District’s regional stormwater-management program authorized by statute and by its charter? and (2) is the attendant fee structure authorized by statute and by the charter? We answer both questions in the affirmative.

I. The regional stormwater-management program is authorized by statute and by the Sewer District’s charter

{¶ 8} There are many sound policy reasons to support or oppose the creation of the Sewer District’s regional stormwater-management program and its attendant fee structure. The various party and amicus briefs are testaments to this. Although we appreciate their substantive significance, they are not germane to the legal issues before us.

{¶ 9} The parties do not dispute that the Sewer District is a valid creature of statute, authorized by R.C. Chapter 6119. The Sewer District’s ability to create a regional stormwater-management program must, then, have its basis in the statutory scheme, which provides only two valid purposes for a regional water or sewer district. The district must “supply water,” which the Sewer District does
not, or it must “provide for the collection, treatment, and disposal of waste water.”
R.C. 6119.01.

¶ 10 R.C. 6119.011(K) defines “waste water” as “any storm water and
any water containing sewage or industrial waste or other pollutants or
contaminants derived from the prior use of the water.” Despite its plain language,
the parties’ interpretations of this definition are radically different.

¶ 11 Appellees argue, and the court of appeals concluded, that “[t]he
term waste water necessarily means water containing waste.” 2013-Ohio-4186,
999 N.E.2d 181, ¶ 44. Appellees contend that the participial phrase “containing
sewage or industrial waste or other pollutants or contaminants derived from the
prior use of the water” modifies the noun “any storm water” as well as the noun
“any water,” which would mean that stormwater is only “waste water” when it is
combined with sewage or pollutants.

¶ 12 The definition provided in the statute is uncomplicated. See
is customary to give words their plain ordinary meaning unless the legislative
body has clearly expressed a contrary intention”). In our view, the statute plainly
indicates that “waste water” comes in two forms. One is “any storm water.” The
other is “any water containing sewage or industrial waste or other pollutants or
contaminants derived from the prior use of the water.” There is no other plausible
reading of the definition.

¶ 13 The definition sought by appellees renders the words “any storm
water and” meaningless. But the words “any storm water and” are in the statute,
and it is well known that our duty is to “give effect to the words used, not to
delete words used or to insert words not used.” Columbus-Suburban Coach
also State ex rel. Carmean v. Hardin Cty. Bd. of Edn., 170 Ohio St. 415, 422, 165
N.E.2d 918 (1960) (“It is axiomatic in statutory construction that words are not inserted into an act without some purpose”).

¶ 14 We conclude that the term “any storm water” was not included in the statute to be mere surplusage. The Sewer District has the authority to collect, treat, and dispose of “waste water.” We hold that R.C. 6119.011(K) identifies two types of “waste water,” one of which is “any storm water.” Accordingly, we conclude that the regional stormwater-management program falls within the statutory authority of the Sewer District.

¶ 15 The charter creating the Sewer District states, “The purpose of the District shall be the establishment of a total waste water control system for the collection, treatment and disposal of waste water within and without the District * * *.” In re Establishment of Cleveland Regional Sewer Dist., Cuyahoga C.P. No. SD 69411 (June 15, 1972), Exhibit A, ¶ 4. This authority includes “overall control of all waste water collection systems in the area.” Id. Given the statutory definition of “waste water,” as discussed above, it is clear that the charter governing the Sewer District authorizes it to implement a regional stormwater-management program. Moreover, the charter also states, “The District will plan, finance, construct, operate and control waste water treatment and disposal facilities, major interceptor sewers, all sewer regulator systems and devices, weirs, retaining basins, storm water handling facilities, and all other water pollution control facilities of the District.” Id. at ¶ 5(c). This charter provision specifically authorizes the Sewer District to build and operate stormwater-handling facilities.

II. The Sewer District is authorized by statute and by its charter to assess fees to implement the regional stormwater-management program

¶ 16 Having determined that the Sewer District is authorized to implement a regional stormwater-management program, we must now determine whether the district has the authority to charge fees to pay for that program. R.C.
6119.09 provides that “[a] regional water and sewer district may charge, alter, and collect rentals or other charges * * * for the use or services of any water resource project or any benefit conferred thereby.” R.C. 6119.011(G) defines a “water resource project” as

any waste water facility or water management facility acquired, constructed, or operated by or leased to a regional water and sewer district or to be acquired, constructed, or operated by or leased to a regional water and sewer district under this chapter * * *.

{¶ 17} “Waste water facilities” means

facilities for the purpose of treating, neutralizing, disposing of, stabilizing, cooling, segregating, or holding waste water, including, without limiting the generality of the foregoing, * * * facilities for the temporary or permanent impoundment of waste water, both surface and underground, and storm and sanitary sewers and other systems, whether on the surface or underground, designed to transport waste water * * *.

R.C. 6119.011(L).

{¶ 18} “Water management facilities” means

facilities for the purpose of the development, use, and protection of water resources, including, without limiting the generality of the foregoing, facilities for water supply, facilities for stream flow improvement, dams, reservoirs, and other impoundments, * * *
stream monitoring systems, facilities for the stabilization of stream and river banks, and facilities for the treatment of streams and rivers * * *

R.C. 6119.011(M).

{¶ 19} Appellees argue that the Sewer District cannot charge the fees permitted for a water-resource project because the Sewer District does not own or operate the various parts of the current stormwater-management system. See R.C. 6119.011(G). But the statutory definition of “water resource project” includes a facility that is “to be acquired, constructed, or operated” by the Sewer District. Id. The Sewer District may therefore charge fees for this purpose under R.C. 6119.09.

{¶ 20} It is impossible to say at this time that the Sewer District will not use the fees to acquire, construct, or operate a facility that will be part of the regional stormwater-management system that it is authorized to implement. It might not, and if it does not, appellees will be within their rights to challenge the Sewer District’s collection of fees that did not go toward the use for which they were statutorily authorized. But today is not that day.

{¶ 21} As stated above, the Sewer District’s charter instructs it to, among other things, “finance * * * waste water treatment and disposal facilities [and] storm water handling facilities * * *.” In re Establishment of Cleveland Regional Sewer Dist., Cuyahoga C.P. No. SD 69411, Exhibit A, ¶ 5(c)(1). The charter provides that “[a]ny projects not financed through the Ohio Water Development Authority would be financed in such a manner as may be deemed appropriate by the Board of Trustees.” Id. at ¶ 5(e)(3). We conclude that this broad language encompasses the assessing of fees to pay for a stormwater-management system and that the fees are therefore authorized by the charter.
Because we conclude that the Sewer District has authority to implement a regional stormwater-management program and to charge fees for that program, we reverse the judgment of the court of appeals.

Judgment reversed.

O’CONNOR, C.J., and LANZINGER and O’NEILL, JJ., concur.

FRENCH, J., concurs in part and dissents in part.

O’DONNELL and KENNEDY, JJ., dissent.

FRENCH, J., concurring in part and dissenting in part.

I agree with the majority that appellant, the Northeast Ohio Regional Sewer District (the “Sewer District”), has authority under both R.C. Chapter 6119 and its charter to implement a regional stormwater-management program, but I respectfully disagree with the majority’s conclusion that the Sewer District has statutory authority to finance that program by presently assessing the stormwater fees that are set out in Title V of its Code of Regulations, which implements the stormwater-management program. Accordingly, I concur in part and dissent in part.

Both the majority opinion and Justice Kennedy’s dissent recognize that the Sewer District’s statutory authority over stormwater hinges, in part, upon the meaning of the term “waste water” in R.C. 6119.01(B) and, specifically, upon whether that term includes uncontaminated stormwater. I agree with the majority opinion that R.C. 6119.011(K) is unambiguous. It defines “waste water” as encompassing two types of water: (1) “any storm water” and (2) “any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water.” Under R.C. 6119.01(B), the Sewer District has

authority to collect, treat, and dispose of stormwater, whether or not it contains sewage, industrial waste or other pollutants.

¶ 25 Other provisions in R.C. Chapter 6119 reinforce the Sewer District’s statutory authority over stormwater. A regional water and sewer district’s broad authority includes the authority to acquire, construct, improve, maintain, repair, and operate water-resource projects, including waste-water facilities and water-management facilities. R.C. 6119.011(G) and (S); R.C. 6119.06(G). Both “waste water facilities” and “water management facilities” encompass facilities dealing with stormwater. R.C. 6119.011(L) and (M). Additionally, R.C. 6119.19 states that “the board of trustees of a regional water and sewer district may provide a system of sanitary and/or storm water sewerage, herein referred to only as sewerage, for any part of the area included within the district.” (Emphasis added.) Based upon these provisions and the statutory definition of “waste water,” which encompasses stormwater, I agree with the majority’s conclusion that the Sewer District has the authority to manage stormwater.

¶ 26 I likewise agree with the majority that the Sewer District’s charter authorizes it to implement a regional stormwater-management program. The charter tracks the language of R.C. 6119.01(B) and states the Sewer District’s purpose as “the establishment of a total wastewater control system for the collection, treatment and disposal of wastewater within and without the District.” In re Establishment of Cleveland Regional Sewer Dist., Cuyahoga C.P. No. SD 69411 (May 25, 1979), Exhibit A, ¶4. In light of the inclusion of stormwater within the preexisting statutory definition of “waste water,” the charter authorizes

storm water runoff, or any combination thereof * * *”); Wis.Adm.Code SPS 381.01(276) (“‘Wastewater’ means clear water, storm water, domestic wastewater, industrial wastewater, sewage or any combination of these”).
the Sewer District to establish a stormwater-management system, consistent with R.C. Chapter 6119.

{¶ 27} Water pollution, stemming from “[t]he increase in the amount of wastewater in the Metropolitan Cleveland area resulting from the increase in population and the expansion of industry in the many political subdivisions outside of the City of Cleveland,” was a driving force behind the creation of the Sewer District. Id. at ¶ 3. The charter authorizes the Sewer District to “plan, finance, construct, operate and control wastewater treatment and disposal facilities, major interceptor sewers, all sewer regulator systems and devices, weirs, retaining basins, storm water handling facilities, and all other water pollution control facilities of the District.” Id. at ¶ 5(c)(1). But the charter also expressly authorizes the Sewer District to undertake stormwater-control measures. Paragraph 5(m), which governs the Sewer District’s authority with respect to “Local Sewerage Collection Facilities and Systems,” states that “[t]he District shall have authority pursuant to Chapter 6119 of the Ohio Revised Code to plan, finance, construct, maintain, operate, and regulate local sewerage collection facilities and systems within the District, including both storm and sanitary sewer systems.” (Emphasis added.) And paragraph 5(m)(3) specifically directs the Sewer District to “develop a detailed integrated capital improvement plan for regional management of wastewater collection and storm drainage designed to identify a capital improvement program for the solution of all intercommunity drainage problems (both storm and sanitary) in the District.”

{¶ 28} Appellees, political subdivisions and property owners within the Sewer District, argue that Title V of the Sewer District’s Code of Regulations, which sets out the regional stormwater-management program, conflicts with the charter’s provision that local communities retain authority and responsibility for maintaining and operating their local sewerage collection systems absent a written agreement placing that responsibility on the Sewer District. But Title V does not
provide for the Sewer District’s ownership of or responsibility for sewerage collection facilities and systems owned or operated by the member communities, and the Sewer District asserts that it does not intend to interfere with the member communities’ local systems.

¶ 29 Title V distinguishes between local stormwater systems and the regional stormwater system. “Regional Stormwater System” means “[t]he entire system of watercourses, stormwater conveyance structures, and Stormwater Control Measures in the District’s service area that are owned and/or operated by the District or over which the District has right of use for the management of stormwater, including both naturally occurring and constructed facilities.” Northeast Ohio Regional Sewer Dist. Code of Regs., Section 5.0218. “Local Stormwater System,” on the other hand, includes watercourses, stormwater-conveyance structures or stormwater-control measures “owned and/or operated by a private entity or a unit of local government other than the District” and “not designated as part of the Regional Stormwater System.” Id., Section 5.0212. So, the regional stormwater system does not include watercourses, conveyance structures or stormwater-control measures owned or operated by the local communities absent agreement between the local communities and the Sewer District. By limiting the reach of the regional stormwater system, Title V does not conflict with the Sewer District’s charter, and I agree with the majority that the charter authorizes the Sewer District to build and operate a regional stormwater-management system.

¶ 30 Despite my agreement with the majority’s determination that the Sewer District has authority to manage uncontaminated stormwater, I disagree with the majority’s conclusion that R.C. 6119.09 authorizes the stormwater fees set out in Title V. Appellees argue that the Sewer District cannot impose its stormwater fees for two reasons: (1) because R.C. Chapter 6119 does not authorize the fees and (2) because the fees amount to an unlawful tax.
In her dissent, Justice Kennedy adopts appellees’ second argument—that the charges amount to an unlawful tax. But I agree with the Sewer District’s assertion that that issue is not properly before us. The Sewer District asked this court to adopt a proposition of law stating that stormwater-management charges based upon the amount of impervious surface a parcel contains—like the stormwater fees here—do not constitute an illegal tax. This court, however, declined jurisdiction over that proposition of law. *Northeast Ohio Regional Sewer Dist. v. Bath Twp.*, 138 Ohio St.3d 1413, 2014-Ohio-566, 3 N.E.3d 1216. Having declined jurisdiction over that proposition of law, the question whether the stormwater fees are an unlawful tax is not before the court.

In my view, it is appellees’ other argument—regarding statutory authority—that is persuasive. The majority reasons that because a “water resource project” includes a facility to be acquired, constructed or operated, the Sewer District may charge fees for that purpose under R.C. 6119.09. I respectfully disagree.

R.C. 6119.09 authorizes a regional water and sewer district to

“charge, alter, and collect rentals or other charges * * * for the use or services of any water resource project or any benefit conferred thereby and contract * * * with one or more persons, one or more political subdivisions, or any combination thereof, desiring the use or services thereof, and fix the terms, conditions, rentals, or other charges * * * for such use or services.”

(Emphasis added.) See also R.C. 6119.06(W). The Sewer District contends that its stormwater fees represent charges for the use, services or benefits of a water-resource project.
Although R.C. 6119.011(G) defines “water resource project” to include a project “to be acquired, constructed, or operated by or leased to a regional water and sewer district,” the district may charge only “for the use or services of” or “any benefit conferred” by a water-resource project. R.C. 6119.09. R.C. 6119.09 contemplates uses or services that may be contracted for. The question, therefore, resolves to whether a water-resource project that will be acquired, constructed or operated in the future affords uses, services or benefits in the present, so as to authorize charges under R.C. 6119.09—a question the majority does not address.

The Eighth District concluded that the Sewer District “improperly employed R.C. 6119.09 to generate revenues for the costs of its” regional stormwater-management program because the stormwater fees are “unrelated to any use or services afforded to a property owner by a ‘water resource project.’ ” 2013-Ohio-4186, 999 N.E.2d 181, ¶ 53, 56. Appellees likewise contend that the Sewer District may not impose stormwater fees for a water-resource project that the Sewer District has not yet acquired, constructed or operated, because until it has done so, there is no use, service or benefit for which to charge.

The Sewer District directs this court to the trial court’s factual findings regarding the uses and services the regional stormwater-management program provides. The trial court found that property owners within the Sewer District passively “use the unmanaged Regional Stormwater System as rainfall creates runoff from each parcel.” The trial court also found that the Sewer District provides the “service of effective transportation of stormwater,” resulting in decreased flooding and erosion. Finally, the court stated that the regional stormwater-management system will provide benefits, including improvements in water quality and wildlife habitats and the reduction of future stormwater-management costs. But those findings depend upon the Sewer District acquiring, constructing, and operating a water-resource project. Whether property owners
would benefit in the future from the system the Sewer District intends to create and operate sidesteps the relevant issue: whether the Sewer District currently offers uses or services relating to the stormwater-management system for which it may charge.

{¶ 37} Nothing in R.C. 6119.09 suggests that the Sewer District may presently impose a fee for uses or services it will be able to provide only in the future. The statute requires current usage, service or benefits to justify the collection of stormwater fees. Until the Sewer District acquires, constructs or begins to operate a water-resource project relating to regional stormwater management, it has no use, service or benefit to provide in exchange for the stormwater fees it seeks to extract from property owners.

{¶ 38} Even so, the Sewer District is not without recourse. A regional water and sewer district may levy and collect taxes and special assessments and may issue revenue bonds. R.C. 6119.06(I) and (J); R.C. 6119.12; R.C. 6119.18; R.C. 6119.42. It may receive and accept grants from federal and state agencies for or in aid of the construction of water-resource projects. R.C. 6119.06(U). And it may enter into cooperative agreements with one or more political subdivisions to fund the acquisition or construction of a water-resource project. R.C. 6119.09.

{¶ 39} Because I conclude that R.C. 6119.09 does not authorize the Sewer District to impose stormwater fees for the use and service of a water-resource project to be acquired, constructed or operated by the Sewer District in the future, I dissent from the majority’s determination that the Sewer District is presently authorized to impose the stormwater fees set out in Title V of its Code of Regulations. In all other respects, I concur.
KENNEDY, J., dissenting.

¶ 40 Respectfully, I dissent. I would hold that the Northeast Ohio Regional Sewer District (the “Sewer District”) lacks authority to manage stormwater as proposed in the Sewer District’s Stormwater Management Code (“SMC”) or to charge a fee to manage stormwater.

R.C. Chapter 6119

¶ 41 R.C. Chapter 6119 addresses the creation and authority of regional sewer districts. As creatures of statute, sewer districts “have no more authority than that conferred upon them by the statute, or what is clearly implied therefrom.” See Hall v. Lakeview Local School Dist. Bd. of Edn., 63 Ohio St.3d 380, 383, 588 N.E.2d 785 (1992). “Implied powers are those that are incidental or ancillary to an expressly granted power; the express grant of power must be clear, and any doubt as to the extent of the grant must be resolved against it.” In re Guardianship of Spangler, 126 Ohio St.3d 339, 2010-Ohio-2471, 933 N.E.2d 1067, ¶ 17.

¶ 42 The Sewer District is authorized “[t]o provide for the collection, treatment, and disposal of waste water within and without the district” pursuant to R.C. 6119.01. “ ‘Waste water’ means any storm water and any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water.” R.C. 6119.011(K). I agree with appellees and the court of appeals that “waste water” necessarily means water containing waste.

¶ 43 The majority holds that R.C. 6119.011(K) authorizes the District to manage two types of water—stormwater and water that is polluted or contaminated. I disagree. In my view, the definition of “waste water” is water that “contain[s] sewage or industrial waste or other pollutants or contaminants.” R.C. 6119.011(K). This conclusion is supported by the purpose of the Sewer District, which is “to provide for collection, treatment, and disposal of waste water.” (Emphasis added.) R.C. 6119.01. Therefore, because the Sewer District...
is only authorized to treat water that contains waste, it has no authority to treat stormwater runoff, which the SMC defines as stormwater “that flows into ditches, water courses, storm sewers, or other concentrated flow patterns during and following precipitation, including rain runoff, snowmelt runoff, and surface runoff.”

_The SMC_

_{¶ 44} The SMC proposes a comprehensive, broad-ranging plan to manage stormwater that is beyond the Sewer District’s authority under R.C. Chapter 6119. The Sewer District found that flooding and streambank erosion are “significant threats” within the District. Consequently, the Sewer District determined that a “Regional Stormwater Management Program is necessary” to address these threats and their impacts on northeast Ohio’s water resources. The regional stormwater-management program would include “[c]omprehensive management of the Regional Stormwater System,” “construction and implementation of necessary Stormwater Control Measures to address current, and minimize new flooding and erosion issues affecting the Regional Stormwater System,” as well as “inspection, operation, maintenance, and monitoring activities,” including but not limited to clearing debris from blocked culverts, bridge abutments, and repair of streambank erosion. The “Regional Stormwater System” is extensive and includes

[t]he entire system of watercourses, stormwater conveyance structures, and Stormwater Control Measures in the District’s service area that are owned and/or operated by the District or over which the District has right of use for the management of stormwater, including both naturally occurring and constructed facilities. The Regional Stormwater System shall generally include those watercourses, stormwater
conveyance structures, and Stormwater Control Measures receiving drainage from three hundred (300) acres of land or more.

¶ 45 The SMC further states that it “is applicable to activities and persons on all parcels within the Sewer District’s service area.” The District will charge every parcel of land within the District a stormwater fee to fund the aforementioned stormwater-control measures.

¶ 46 Nowhere in R.C. Chapter 6119 is flooding or erosion control discussed. In large part, the SMC seeks to manage “pure” stormwater, i.e., water resulting from precipitation that is not mixed with pollutants or contaminants and that never enters the sanitary sewer system. Management of this water is beyond the scope of the Sewer District’s authority, which is to collect, treat, and dispose of waste water, which is water that contains waste, i.e., pollutants or contaminants. Therefore, I would hold that the Sewer District has no statutory authority to implement the SMC.

Stormwater “Fees”

¶ 47 Initially, I will address the concurring and dissenting opinion’s assertion that the issue of whether a stormwater fee is a lawful tax is not properly before the court.

¶ 48 Even though the reasons are not typically memorialized, this court may reject one or more propositions of law or an entire discretionary appeal for any number of reasons. See Williamson v. Rubich, 171 Ohio St. 253, 253-254, 168 N.E.2d 876 (1960), citing Ohio Constitution, Article IV, Section 6 (whether questions presented to this court for appellate review “are in fact ones of public or great general interest rests within the discretion of the court”). However, I can find no authority that a rejected proposition of law creates a bar or waiver upon a party’s argument when set forth in a legitimate response to an opposing party’s
proposition of law that has been accepted by the court. Nor can I find any authority that would preclude the court from considering and relying upon such an argument.

¶ 49 The Sewer District raised three propositions of law in its discretionary appeal to this court. We accepted the Sewer District’s first two propositions for review on their merits, 138 Ohio St.3d 1413, 2014-Ohio-566, 3 N.E.3d 1216, but declined to review the third proposition, which stated, “Stormwater management programs, paid for through charges for stormwater management services, do not violate the Ohio or United States Constitutions. Further, such charges, when based upon the amount of impervious surface on a property, do not constitute an illegal tax.”

¶ 50 One of the two propositions that we accepted stated, “A district formed pursuant to R.C. Chapter 6119 is authorized to manage stormwater which is not combined with sewage, and to impose a charge for that purpose. Such a charge is one ‘for the use or service of a water resource project or any benefit conferred thereby.’” (Emphasis added.)

¶ 51 In response to that proposition, appellee city of Beachwood argued in its merit brief in part that “[t]he Stormwater Fee is actually an unauthorized tax that the Sewer District is using to avoid other required R.C. Chapter 6119 revenue-generating procedures.” Beachwood’s argument is an apt challenge to the Sewer District’s assertion that the proposed charge for stormwater management is authorized. To prevent Beachwood from making such an argument based on our initial declination to consider this issue would infringe upon Beachwood’s ability to make arguments of its own choosing and to fully respond to the Sewer District’s propositions of law that we accepted in this appeal. And unlike issues raised for the first time in a reply brief, where the opposing party has no ability to respond, Beachwood raised the unlawful tax argument in its merit brief, affording the Sewer District an opportunity to refute

¶ 52 Obviously, this court may reject any argument presented by a party, but this court’s refusal to review a proposition of law should not bar an opposing party from later using the same or a similar issue raised in that proposition in a legitimate, responsive argument to an opposing party’s proposition of law that is being considered by the court, nor should it prevent this court from relying upon such an argument. Under the facts of this case, I would hold that the court is justified in considering Beachwood’s responsive argument that the Sewer District’s proposed fee is really an unlawful tax, even though the court declined to accept the Sewer District’s proposition of law on that issue for review. Having addressed this threshold issue, I will proceed to address the merits of whether the stormwater fee is an unlawful tax.

¶ 53 A sewer district may “charge, alter, and collect rentals or other charges, including penalties for late payment, for the use or services of any water resource project or any benefit conferred thereby.” R.C. 6119.09; see also R.C. 6119.06(W)(1). A “water resource project” is defined under R.C. 6119.011(G) as “any waste water facility or water management facility acquired, constructed, or operated by or leased to a regional water and sewer district or to be acquired, constructed, or operated by or leased to a regional water and sewer district under this chapter * * *.”

¶ 54 In this case, the Sewer District, through the SMC, seeks to impose a “stormwater fee” on parcels of land in the District to pay for the management of stormwater. The fee, which is “based upon a calculation of the amount of Impervious Surface on a parcel[,] shall be imposed on every parcel within the District’s service area.”
In my view, this fee is actually a tax, which does not appear to have been lawfully imposed. See R.C. 6119.18; see also Sanborn v. Hamilton Cty. Budget Comm., 142 Ohio St.3d 20, 2014-Ohio-5218, 27 N.E.3d 498, ¶ 5-7, citing Ohio Constitution, Article XII, Section 2.

“It is not possible to come up with a single test that will correctly distinguish a tax from a fee in all situations * * *.” State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow, 62 Ohio St.3d 111, 117, 579 N.E.2d 705 (1991). Therefore, “[d]etermining whether an assessment is a fee or a tax must be done on a case-by-case basis dependent upon the facts and circumstances surrounding each assessment.” Id. at 115.

Some factors that may indicate that an assessment is a fee include: (1) the assessment is “imposed in furtherance of regulatory measures,” (2) the assessment is not placed in the general fund, but is used only to fund the regulatory purpose, (3) the assessment is “‘imposed by a government in return for a service it provides,’ ” and (4) the assessment is discontinued when the unobligated balance in the fund reaches a certain level. Drees Co. v. Hamilton Twp., 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E.2d 916, ¶ 16-20, citing and quoting Withrow at 111, 113, 116-117.

In Natl. Cable Television Assn., Inc. v. United States, 415 U.S. 336, 340-341, 94 S.Ct. 1146, 39 L.Ed.2d 370, the court commented:

Taxation is a legislative function [where the legislature] may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those
services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.

(Emphasis added.)

¶ 59 An example of a fee charged for a service is found in Wyatt v. Trimble Twp. Waste Water Treatment Dist., 4th Dist. Athens No. 1521, 1992 WL 329386 (Nov. 3, 1992). In Wyatt, the Trimble Township Waste Water Treatment District charged a homeowner for the installation of a plug at the point where each premises was to be connected to an existing sanitary sewer system for the purpose of waste-water treatment. The court found that the fee was in return for a benefit conferred, i.e., treatment of the homeowner’s waste water. Id. at *3.

¶ 60 In Bolt v. Lansing, 459 Mich. 152, 587 N.W.2d 264 (1998), the Supreme Court of Michigan addressed whether a stormwater service charge imposed by the city of Lansing on its residents for the purpose of stormwater control was a fee or a tax.

¶ 61 In Bolt, Lansing decided to separate its combined sanitary and storm sewers. To finance this project, Lansing decided to impose a stormwater service charge. Similar to the instant case, the fee was based on the amount of impervious surface that a parcel contained. The court stated:

A proper fee must reflect the bestowal of a corresponding benefit on the person paying the charge, which benefit is not generally shared by other members of society. Nat’l Cable Television Ass’n v. United States & Federal Communications Comm, 415 U.S. 336, 340-342, 94 S.Ct. 1146,
39 L.Ed.2d 370 (1974). Where the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component, sewerage may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax.

_Id._ at 164-165.

_{¶ 62}_ But the court held that “the lack of correspondence between the [stormwater service] charges and the benefit conferred demonstrates that the city has failed to differentiate any particularized benefits to property owners from the general benefits conferred on the public.” _Id._ at 166. The court continued:

This conclusion is buttressed by the fact that the acknowledged goal of the ordinance is to address environmental concerns regarding water quality. Improved water quality in the Grand and Red Cedar Rivers and the avoidance of federal penalties for discharge violations are goals that benefit everyone in the city, not only property owners.

_Id._

_{¶ 63}_ Pursuant to my interpretation of “waste water” above, I do not believe that the Sewer District has authority to manage stormwater; consequently, the assessment fails to support a regulatory purpose, which is a factor that can support a finding that it is indeed a fee and not a tax. _See Drees Co._, 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E.2d 916, at ¶ 16-20. However, even
assuming that the Sewer District has statutory authority to manage stormwater as proposed in the SMC, the purported fee fails to meet other indicia of a true fee.

¶ 64 In the instant case, the Sewer District found that the SWC is necessary (1) to prevent flooding to public and private property, (2) to prevent “[s]treambank erosion[, which] is a significant threat to public and private property, water quality, wildlife, and aquatic and terrestrial habitats,” and (3) to prevent “damage[ to] the water resources of Northeast Ohio, [which] impair[s] the ability of these waters to sustain ecological and aquatic systems.”

¶ 65 Despite the district’s claims that the SMC will benefit private property, I would hold that alleviating these problems results in a benefit that is conferred on the general public rather than on individual property owners. See Natl. Cable Television Assn., Inc., 415 U.S. at 340-342, 94 S.Ct. 1146, 39 L.Ed.2d 370; Bolt, 459 Mich. at 164-165, 587 N.W.2d 264.

¶ 66 Further, as evidenced by this lawsuit, at minimum there are numerous municipalities (e.g., Beachwood, Bedford Heights, Brecksville, Independence, Lyndhurst, and Strongsville) and other entities (e.g., Highlands Business Park, L.L.C., Lakepoint Office Park, L.L.C., Park East Office Park, L.L.C., and the Ohio Counsel of Retail Merchants) that oppose the SMC. Voluntary acceptance of a service is another indicator that an assessment is a fee and not a tax. Natl. Cable Television Assn. at 340.

¶ 67 For all the aforementioned reasons, I would hold that the Sewer District’s stormwater fee is not a fee, but an unlawful tax.

Conclusion

¶ 68 Because I would hold that R.C. Chapter 6119 does not authorize the type of stormwater regulation that the SMC seeks to impose and that the stormwater fee is actually an unlawful tax, I would affirm the judgment of the court of appeals and hold that the Sewer District does not have the authority to implement the SMC. Accordingly, I respectfully dissent.
O’DONNELL, J., concurs in the foregoing opinion.

Thacker Martinsek, L.P.A., and Mark I. Wallach; Calfee, Halter & Griswold, L.L.P., James F. Lang, Matthew J. Kucharson, and Molly A. Drake; and Marlene Sundheimer, Northeast Ohio Regional Sewer District Director of Law, for appellant.


Matty, Henrikson & Greve, L.L.C., David J. Matty, Shana A. Samson, and Justin Whelan, for appellee city of Brecksville.

Barbara A. Langhenry, Director of Law, Harold A. Madorsky, and Kate E. Ryan, urging reversal for amicus curiae city of Cleveland.

McMahon DeGulis, L.L.P., Andrea M. Salimbene, Gregory J. DeGulis, and Erica M. Spitzig, urging reversal for amici curiae National Association of
Clean Water Agencies and Association of Ohio Metropolitan Wastewater Agencies.

Jones Day, Yvette McGee Brown, and Chad Readler, urging reversal for amici curiae village of Cuyahoga Heights, village of Moreland Hills, and Orange Village.

Scott Claussen, urging reversal for amicus curiae city of Brooklyn.
Neal M. Jamison, urging reversal for amicus curiae city of Brook Park.
Jerome Dowling, urging reversal for amicus curiae village of Brooklyn Heights.
Thomas P. O’Donnell, urging reversal for amicus curiae village of Highland Hills.
Peter H. Hull, urging reversal for amicus curiae city of Middleburg Heights.
Dale F. Pelsozy, urging reversal for amicus curiae Olmsted Township.
Michael Pokorny, urging reversal for amicus curiae city of Parma Heights.
Timothy G. Dobeck, urging reversal for amicus curiae city of Parma.
Richard A. Pignatiello, urging reversal for amicus curiae city of Seven Hills.
William M. Ondrey Gruber, urging reversal for amicus curiae city of Shaker Heights.
David Lambros, urging reversal for amicus curiae village of Valley View.
Michael P. Lograsso, urging reversal for amicus curiae city of South Euclid.

Rosalina M. Fini; and Thompson Hine, L.L.P., Michael L. Hardy, Karen E. Rubin, and Devin A. Barry, urging reversal for amicus curiae Cleveland Metropolitan Park District.

Albers & Albers, Eric Luckage, and John Albers, urging reversal for amici curiae Coalition of Ohio Regional Districts, Deerfield Regional Storm Water District, and ABC Water and Storm Water District.

Michael DeWine, Attorney General, Eric E. Murphy, State Solicitor, Michael J. Hendershot, Chief Deputy Solicitor, Jeffrey Jarosch, Deputy Solicitor, and Aaron S. Farmer, Assistant Attorney General, urging reversal for amicus curiae state of Ohio.

Penny L. Sisson, pro se, urging affirmance for amicus curiae Penny L. Sisson.

Eugene P. Holmes, pro se, urging affirmance for amicus curiae Eugene P. Holmes.

Michael J. Jogan, pro se, urging affirmance for amicus curiae Michael J. Jogan.

Maurice A. Thompson, urging affirmance for amici curiae 1851 Center for Constitutional Law and Ohio Real Estate Investors Association.
Bill Drafting, Including Common Problems to Avoid

Jim Kelly
Legislative Service Commission

Jim Kelly has served on state legislative staffs for 31 years, including 29 years with the Legislative Service Commission. Mr. Kelly served as the first administrator of LSC’s Administrative Rules Unit, coordinating with the Legislative Information Systems to establish the online Register of Ohio and the state electronic rule-filing system, through which all state agencies, colleges, and universities file administrative rules. He currently serves as Deputy Director for Research and Drafting Services. He holds a Master of Arts in sociology from Loyola University Chicago.
Excerpt from "Preface,"
*Guidelines for Drafting and Editing Legislation,*
by Bryan A. Garner

Legislative drafting is a peculiar genre of writing. It’s a subset of expository prose that (1) imposes duties and liabilities, grants entitlements, supplies remedies, and confers statuses—all with the authority of government; (2) deals almost exclusively with events that have not yet occurred but that are thought to be foreseeable; (3) is predictably subject to hostile, bad-faith misreadings by those wishing not to be bound by its dictates; and (4) constitutes the primary work of legislators, who officially exercise their law-making functions exclusively through the provisions they pass.

* * *

[D]rafters should approach their work with an unusual degree of linguistic and syntactic rigor. Their sentences have an effect not usual for most compositions: they govern civil society as we know it. They prescribe the conditions under which a citizen may be deprived of liberty and sometimes life itself, the situations in which taxes may be assessed and property confiscated, and the other facets of the intricate network of rules by which our polity operates.

Although nobody—nobody—can aspire to comprehend all the statutory law that governs his or her life, legislative drafters do well to espouse the fiction that anybody should be able to read and understand enacted statutes. People ought to be able to consult the law and feel enlightened, not baffled. That’s the goal. It’s not always achievable. But if drafters will keep the ordinary reader always in mind, the statutes won’t be any more complex than they absolutely must be.

*Guidelines for Drafting and Editing Legislation*
Bryan A. Garner, in conjunction with the Uniform Law Commission
2015, RosePen Books, Dallas, Texas
Sec. 101. Introduction

A statute is a formal written statement of the law enacted by the General Assembly under the constitutional provisions that prescribe its legislative authority. In essence, a statute is a communication of the law established by the General Assembly.

* * *

Sec. 102. General check lists for bill drafting

By way of general introduction, your task as a drafter is to help a legislator do legislatively what the legislator wants to do in fact. You begin with substantive ideas, which are often rather imperfectly thought out, and end up with exact words. You face the problem of finding out what the particular problem is – and of helping the legislator bring about the result he or she wants.

In doing this, you need skills of conceptualization and verbalization – that is, skill at analyzing the problem that led the legislator to request a bill draft, and skill at writing a statute that will deal effectively and smoothly with the problem.

This section consists of two check lists. Check List A outlines the conceptualization of a legislative proposal. Check List B, which to some degree overlaps with Check List A, outlines the verbalization of a legislative proposal.

Check List A

Conceptualizing a bill

1. ____ Get the facts. In terms of the "five W's" – "who," "what," "when," "where," and "why" – with what factual problem does the proposed bill or amendment attempt to deal?

2. ____ Assess the proposal. In terms of the "four W's" – "who," "what," "when," and "where" – exactly what legislative solution is being proposed? Is the proposal adequate to deal with the factual problem? If not, how might it be improved? Does the proposal raise any practical problems of feasibility that might complicate or frustrate its implementation? If so, what can be done about them?

3. ____ Assess the proposal's relationship to existing law. Does the proposal overlap or conflict with other, existing statutes? If so, should they be repealed or amended? If they should be amended, have the necessary amendments been conceptualized? If they should be repealed, have the necessary repeals
been noted? Does the proposal raise any issues under either the Ohio or United States Constitution? If so, can those issues be eliminated or minimized? Is the proposal in reaction to, or affected by, case law? Administrative rules? Administrative adjudications? If so, has their content and effect upon the proposal been considered? Has the proposal’s effect upon them been considered?

4. **Purpose clause.** Is a purpose clause constitutionally required? Even if not constitutionally required, would a purpose clause be useful?

5. **Administrative procedure.** Does the proposal simply require the statement of a rule of law? Is it self-executing? Or does it require administrative implementation? If it requires administrative implementation, what administrative processes are needed? Rule-making? Adjudication? Judicial review? If rule-making and adjudication are to be included, are standards necessary? If so, what are the appropriate standards?

6. **Funding.** Does the proposal require an appropriation of money in order for it to be implemented? If so, how much? And subject to what conditions? Or should funding be left to an appropriations measure? Or should the implementing authority draw money from its current appropriations?


8. **Timing of implementation.** Are the constitutionally prescribed effective dates acceptable given the nature of the proposal? Is an emergency clause needed? If so, what are the reasons for urgency? Does implementation of the proposal need to be delayed or phased in over a period of time?

9. **Savings clause.** Would the proposal affect pending matters? If so, how should they be disposed of? Does the general savings clause (R.C. 1.58) provide an adequate disposition? Or is a special savings clause needed?

10. **Severability.** Is the general severability clause (R.C. 1.50) applicable? If not, does the proposal need a severability clause?
11. **Sunset clause.** Should the proposal expire after a period of time unless the legislature intervenes and reenacts it? If so, what should be the period of time?

**Check List B**

**Verbalizing a bill**

1. **Select an optimal organization.** Is the bill organized so that it indicates the logical relationships between the substantive concepts it embodies? So that it directs attention to the relative position of each concept in the hierarchy of concepts embodied in the bill? Of the several ways of organizing the bill – by category, time, magnitude, location, or by alphabet (as in definition sections) – which way or combination of ways best serves these purposes? Does the bill chart a direct path to its conclusion? If the bill includes several sections of law, is each section confined to a single proposition of law?

2. **Strive for accuracy.** Does the language of the bill put into words the concepts of law that were embodied in the fully conceptualized proposal? Does the language accomplish the purpose of the fully conceptualized proposal? In the same manner as the fully conceptualized proposal? Does the language do more than necessary? Less than necessary? Does the language create new problems without providing solutions to them?

3. **Strive for clarity.** Does the bill or amendment achieve the proper degree of certainty of meaning? Will the several audiences of the bill or amendment be able to readily understand what its language requires, authorizes, or provides? Is the bill or amendment free of ambiguity? Redundancy? Circumlocution? Does the bill or amendment use words in their normal senses? Are words specially defined because they are used in a way that might lead to misinterpretation if their definition is left to common usage?

4. **Make the bill or amendment consistent (the Golden Rule of Drafting).** Are words used consistently throughout the bill? Are defined terms used throughout the bill with exactly their defined meanings? If any words in the bill have been used in current statutes, is their use in the bill consistent with their use in the statute? Are cross-references correct? If there is a stated purpose, is it implemented by, and inferable from, the operative provisions?

5. **Proofread.** Have you carefully proofread the bill? Does it accurately reproduce your draft? Is the bill free of mechanical errors? Is the bill drafted in compliance with the Rules of Code Revision?

6. **Have someone else review your draft.** Has the bill been reviewed by someone other than the drafter? Have any suggestions and comments been
carefully, thoroughly, and open-mindedly considered? If meritorious, have the suggestions and comments been acted upon?

Sec. 105. Constitutional provisions pertinent to bill drafting

The following are those provisions of the Ohio Constitution that are directly applicable to bill drafting. Explanatory material of particular relevance will be presented immediately after these constitutional excerpts.

Sec. 1c, Art. II

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

Sec. 1d, Art. II

Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health, and safety, shall go into immediate effect. Such emergency laws upon a yea and nay vote must receive the vote of two-thirds of all the members elected to each branch of the general assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a yea and nay vote, upon a separate roll call thereon. The laws mentioned in this section shall not be subject to the referendum.

Sec. 15(B), Art. II

The style of the laws of this State shall be, "Be it enacted by the General Assembly of the State of Ohio."

Sec. 15(D), Art. II

No bill shall contain more than one subject which shall be clearly expressed in its title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.
Sec. 22, Art. II

No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied.

Sec. 26, Art. II

All laws, of a general nature, shall have a uniform operation throughout the State; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except, as otherwise provided in this constitution.

Sec. 5, Art. XII

No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years.

Sec. 501. General notes on style

An "audience" can be defined as a person or group of persons who can take or refrain from taking some sort of action. A comedian, a musician, or an actor, for instance, may inspire an audience to laugh, to dance, or to cheer. A statute, equally a form of communication, has its own audience as well: it addresses people who need to be apprised that they are expected to take or refrain from taking legal actions that the statute commands, authorizes, regulates, or forbids.

Of course, the exact composition of a statute's audience will depend upon its subject matter. As a general proposition, however, a statute may have up to six audiences: (1) its drafter, as alter-ego critic and revisor; (2) the drafter's colleagues who review, edit, type, proofread, analyze, amend, and redraft the statute; (3) legislators, lobbyists, and other interested persons who request, introduce, present, defend, oppose, consider, debate, amend, redraft, vote upon, and approve or veto the statute; (4) the persons, if any, who administer the statute; (5) the persons who are affected by or may take advantage of the statute; and (6) lawyers, judges, juries, and others who advise, interpret, and apply the statute to concrete sets of facts.
The language and arrangement used in drafting a statute therefore ought to be such that the statute will readily communicate, to each of its several audiences, the action or inaction it commands, authorizes, regulates, or prohibits. A statute, in other words, should be understandable "on its face" as a matter of grammar and language – and should give fair notice of what it commands, authorizes, regulates, or prohibits to persons of reasonable intelligence who are the subjects of its application.

In this regard, perhaps the best thing to keep in mind is that a statute is an instruction. It is a recipe for commanding, authorizing, regulating, or prohibiting action. And as for the writing of effective instructions, whether recipes or statutes, the secret is to write as if your audience does not have any of your knowledge of the subject and is hearing the explanation for the first time.
Sec. 2305.2310. (A) A volunteer who is an architect, contractor, engineer, surveyor, or tradesperson shall not be liable in damages in a civil action for any injury, loss to person or property, or wrongful death related to the volunteer's acts, errors, or omissions in the performance of any professional services or construction services for any structure, building, piping, or other engineered system, either publicly or privately owned.

(B)(1) The immunity provided in this section shall only apply to professional services or construction services provided during a declared emergency and to professional services or construction services provided not more than ninety days after the end of the period of the declared emergency.

(2) If the governor, under the governor's emergency executive powers, extends the period of declared emergency, the immunity provided under this section shall apply to services provided not more than ninety days after the end of the extended period of emergency.

(C) Nothing in this section shall provide immunity for wanton, willful, or intentional misconduct.

(D) As used in this section:

(1) "Architect" means an individual who is certified as an architect under Chapter 4703. of the Revised Code.

(2) "Building inspection official" means any appointed or elected federal, state, or local official with overall executive responsibility for coordinating building inspections in the jurisdiction in which a declared emergency has occurred.

(3) "Construction services" includes any construction, improvement, renovation, repair, or maintenance performed by a contractor or tradesperson. "Construction services" does not include services provided by an individual who is not qualified to provide such services.

(4) "Contractor" has the same meaning as in section 4740.01 of the Revised Code.

(5) "Engineer" means an individual registered as a professional engineer under Chapter 4733. of the Revised Code.
(6) "Law enforcement official" means an appointed or elected federal, state, or local official responsible for coordinating law enforcement in the jurisdiction in which a declared emergency has occurred.

(7) "Professional services" means architectural, engineering, or surveying services provided by an architect, engineer, or surveyor, respectively. "Professional services" does not include services provided by an individual who is not qualified to provide such services.

(8) "Public official" means any elected federal, state, or local official with overall executive responsibility in the jurisdiction in which a declared emergency has occurred.

(9) "Public safety official" means any appointed or elected official with overall executive responsibility to coordinate public safety in the jurisdiction in which a declared emergency has occurred.

(10) "Surveyor" means an individual who is registered as a professional surveyor under Chapter 4733. of the Revised Code.

(11) " Tradesperson" has the same meaning as in section 4740.01 of the Revised Code.

(12) "Volunteer" means an individual to whom all of the following applies:

(a) The individual is acting at the request of, or with the approval of, a national, state, or local public official, law enforcement official, public safety official, or building inspection official acting in an official capacity;

(b) The individual provides professional services or construction services in relation to a declared national, state, or local emergency caused by a major earthquake, hurricane, tornado, fire, explosion, collapse, or other catastrophic event;

(c) The individual provides those services voluntarily, without compensation, and without a written contract in relation to the emergency.
Sec. 2305.2310. (A) An architect, contractor, engineer, surveyor, or tradesperson shall not be liable in damages in a civil action for any injury, loss to person or property, or wrongful death related to the individual's acts, errors, or omissions in performing any professional services or construction services for any structure, building, piping, or other engineered system, either publicly or privately owned, when all of the following circumstances apply:

(1) The individual provides the services in relation to a declared national, state, or local emergency caused by a major earthquake, hurricane, tornado, fire, explosion, collapse, or other catastrophic event.

(2) The individual provides the services voluntarily, without compensation, and without a written contract.

(3) The individual provides the services during the period of declared emergency, not more than ninety days after the period ends, or, if the governor extends the declared emergency under the governor's emergency executive powers, not more than ninety days after the extended period ends.

(4) The individual is acting at the request of, or with the approval of, a national, state, or local public official, law enforcement official, public safety official, or building inspection official acting in an official capacity.

(B) Nothing in this section shall provide immunity for wanton, willful, or intentional misconduct.

(C) As used in this section:

* * *
R.C. 4769.01(B) AND 4769.02 – EXAMPLE OF "STUFFED" DEFINITION

CURRENT LAW

Sec. 4769.01. As used in this chapter:

* * *

(B) "Balance billing" means charging or collecting from a medicare beneficiary an amount in excess of the medicare reimbursement rate for medicare-covered services or supplies provided to a medicare beneficiary, except when medicare is the secondary insurer. When medicare is the secondary insurer, the health care practitioner may pursue full reimbursement under the terms and conditions of the primary coverage and, if applicable, the charge allowed under the terms and conditions of the appropriate provider contract, from the primary insurer, but the medicare beneficiary cannot be balance billed above the medicare reimbursement rate for a medicare-covered service or supply. "Balance billing" does not include charging or collecting deductibles or coinsurance required by the program.

* * *

Sec. 4769.02. No health care practitioner, and no person that employs any health care practitioner, shall balance bill for any supplies or service provided to a medicare beneficiary.
Sec. 4769.01. As used in this chapter:

* * *

(B) "Balance billing" means charging or collecting from a medicare beneficiary an amount exceeding the medicare reimbursement rate for medicare-covered services or supplies provided to a medicare beneficiary. "Balance billing" does not include charging or collecting deductibles or coinsurance required by the program.

* * *

Sec. 4769.02. No health care practitioner, and no person that employs any health care practitioner, shall balance bill for any supplies or service provided to a medicare beneficiary.

When medicare is the secondary insurer, a health care practitioner may pursue full reimbursement under the terms and conditions of the primary coverage and, if applicable, the charge allowed under the terms and conditions of the appropriate provider contract, from the primary insurer, but the medicare beneficiary cannot be balance billed above the medicare reimbursement rate for a medicare-covered service or supply.
Unconstitutional Laws- How to Move On

Michael O'Neill
Legislative Service Commission

Michael J. O'Neill is a division chief at the Legislative Service Commission and oversees the Insurance, Commerce, Housing, and Financial Institutions group. He has also overseen LSC staff dealing with the topics of Labor, Elections, and Child Welfare. In addition to these duties, Mr. O'Neill has assisted LSC regarding staff training, recruiting, public records, and legal review. Prior to his employment with LSC, Mr. O'Neill worked for the U.S. Department of Labor Office of Administrative Law Judges, working primarily in Black Lung Law. Mr. O'Neill received his J.D. from the University of Cincinnati College of Law, and degrees in History and Economics from Xavier University.
What do you mean the bill wasn’t properly enacted?  
Where do we go from here?

Some constitutional requirements for enacting bills
- Both houses must concur in the same version
- Presiding officers must attest that the procedural requirements have been met
- Entire section being amended must be laid out
- Prior version must be repealed
- Only one subject

For practitioners, the question is - where do I find the law that is in effect?
LEXIS and Westlaw - they also will give explanatory notes
For the Legislature, the question is – what is the drafting base?

Short answer - the General Assembly’s drafting base is the enacted statutes (regardless of the court case). So the disconnect makes things really confusing -
- Bills amend laws to effect a change
- But drafting base may not reflect the Law that you are trying to change
- If so, need to bring the Revised Code into alignment with the Law as part of making the change in the new bill

Why doesn’t LSC just update the drafting base automatically?

- Separation of powers
  - Court’s decision only means that the enactment can’t be enforced
  - A court can’t enact or repeal laws
  - Only an enactment by the General Assembly can bring the enacted statutes (the drafting base) in line with the Law

Sometimes it gets more complicated

BUT - what is the law in effect, and the proper drafting base, if the statute was further amended before the court issues its decision? Does the intervening act fix the procedural problem?
First – some more background
- Existing law appears normal
- New text is underlined
- Text to be eliminated is struck through
- There are two types of repeals
  - Existing repeals are used when amending a section and make it clear that the prior version is gone (existing section… is hereby repealed)
  - Outright repeals are used to eliminate a section in its entirety (section … is hereby repealed)

Intervening amendment - question partially answered
- HB 350 of the 121st General Assembly
- Affected over 100 sections of the Revised Code
- Ohio Supreme Court struck the bill down in its entirety for violating the One Subject Rule (Sheward)

HB 350
- *Sheward* was decided nearly 3 years after HB 350 was passed
- Many HB 350 sections had been amended again
- Did the subsequent amendment to the section cure the One Subject Rule problem?
Partial answer - Stevens v. Ackman

- At the crux of Stevens was RC 2744.02(C), which was enacted in HB 350
- A later bill, HB 215, amended RC 2744.02(B)
- HB 215 included the entire HB 350 version of R.C. 2744.02, including RC 2744.02(C)

Stevens v. Ackman, cont.

- The defendant argued that the General Assembly “enacted” an entirely new RC 2744.02, including a new division (C)
  - Because HB 350 was a nullity, RC 2744.02(C) was never truly enacted until HB 215
  - HB 215 repealed the version of RC 2744.02 believed to be in effect at the time

The Court disagreed

Goal of statutory construction is to give effect to the intent of the General Assembly, which may be -
  - Inferred from the statute’s wording
  - Revealed in the act’s procedural passage
General Assembly intent

For HB 215 to successfully enact or reenact RC 2744.02(C), the General Assembly needed to intend HB 215 to do so. Did it?

No. Sheward hadn’t even been filed yet. No reason to think that HB 350’s enactment of division (C) would later be found to be unsuccessful.

General Assembly intent

Evidence of intent to amend division (B), but there was no evidence of an intent to act with regard to division (C).

Division (C) was required to appear in the bill, but it appeared as existing law – it wasn’t underlined.

Bill format

Sec. 2744.02. … (B)(2) Except as otherwise provided in sections 3314.07 and 3746.24 …

(C) An order that … is a final order.
Revised Code statutory construction

RC 1.54: A statute that is amended is intended to be a continuation of the prior statute and not a new enactment, so far as it is the same as the prior statute.

- The General Assembly did not intend to do anything to division (C) in HB 215
- Division (C) continued forward as purportedly enacted in HB 350
- Division (C) remained invalid

General Assembly response – a clean up bill

- SB 108 of the 124th General Assembly effectively undid HB 350. It
  - Repealed HB 350 and revived the law as it existed before HB 350
  - Continued subsequent amendments made to HB 350 sections
  - Clarified the status of the law

But

What if the subsequent amendment is revising the unconstitutional language – the amendment makes no sense without it?
And what if the General Assembly knew of a court challenge?
**HB 694 in 2006**

- The clerk created the act using the wrong version of the bill
- Presiding officers signed this wrong version
- After the session’s term ended, the error was discovered
- Act promptly challenged

**Subsequent amendment of HB 694 provisions**

- HB 119 substantively amended one of the sections that HB 694 enacted and both of the sections that HB 694 amended

**HB 694 enacted division (J)(3)**

- No agency or department of this state or any political subdivision shall enter into any contract for the purchase of goods costing more than $500 or services costing more than $500, and no political subdivision shall enter into any contract for the purchase of goods with a cost aggregating more than $10,000 in a calendar year or services with a cost aggregating more than $10,000 in a calendar year, with a corporation or business trust …
Fate of HB 694

- In U.A.W., Local 1112 v. Brunner, the 10th District Court of Appeals held that HB 694 was not properly enacted
  - No one disputed the innocence of the error
  - But less innocent circumstances could subvert the will of the General Assembly
  - In some instances form is substance

Did HB 119 save any HB 694 provisions?

- No. The Court noted
  - The entire section had to be included in the bill
  - There is a standard format to indicate changes
  - In HB 119, the text in question appeared as existing law

State argued that HB 119 acted as an implied validation of HB 694's constitutional shortcomings

- Court rejected this argument - implied validation deals with substantive, not procedural, infirmities
Court instead applied Stevens v. Ackman
- HB 119’s title explicitly stated that the sections enacted by HB 694 were amended, not enacted
- The HB 694 language was not underlined – it appeared as existing law
- What was underlined referred to something that was not law, but that reference did not show an intent to reenact that law

HB 119 could not amend or reenact by partial reference the HB 694 language
- Decision was not appealed

So, what do you do to fix things?
- Option 1 - If the entire bill failed and you want to clarify the law - repeal the failed bill and “revive” the old law
  - The old law then appears in the bill as existing law
  - Intervening amendments not related to the failed bill should appear as existing law too
  - Check to make sure this is done
Then, if you want to bring the failed bill back (or parts of it), show intent:
- For failed outright repeals, repeal the section again
- For sections with failed amendments, amend it normally
- For failed enactments, enact the provision again, using underlined text

Don’t forget intervening amendments related to the failed provision
- Warning - it might get complicated if there are intervening amendments (see the uncodified law in 149 Ohio Laws S. 108)
- Consider an emergency clause
- Include an uncodified provision stating what you are doing. LSC has models

Tackle only part of the bill
- Have LSC generate a new version of the individual section you are interested in without the amendments that failed
- For outright repeals that failed, need to re-repeal them
- Best to include uncodified law explaining what is happening
Option 3

- Do nothing regarding the failed amendment
  - Possible if the failed amendment is not related to your bill’s changes

Caveats

- A redo of the failed bill is prospective, not retroactive. You are not saving the old bill. There will be a time gap.
- There will be interest in trying to retroactively save the old bill. Be wary - trying to save it might defeat your fix.
- Don’t be ironic – avoid doing the fix in a procedurally unconstitutional manner, like violating the One Subject Rule

I’ll be available afterwards if anyone has questions