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## ARGUMENT

**Proposition of Law: The Ohio legislature has not expressed a public policy in favor of community schools over public schools with regard to a public school district's disposal of real property; to the extent any public policy has been established, it is expressly stated in R.C. 3313.41(G), and does not permit a court of law to unilaterally abridge a public school district's statutory authority to negotiate arm's-length contract terms, including deed restrictions in a contract to sell real property to private citizens**

This Court is called upon to determine whether or not the State of Ohio has expressed a public policy such that a freely negotiated deed restriction between a public school district and an individual during a sale at public auction may be voided, despite the lack of any statutory prohibition on such restrictions. Although the parties disagree about some of the factual allegations improperly raised in Conners' brief,<sup>1</sup> none of those facts are material to this case and the parties are actually in agreement about much of the analysis and law the Court must use to make its determination.<sup>2</sup>

The parties agree that the contract between them was freely-negotiated at arms' length.<sup>3</sup> The parties also agree that Ohio contract law includes the proposition that "a contract may not transgress public policy."<sup>4</sup> Generally, the public policy exception allows a court to determine as a matter of law "whether a public policy (1) exists; and (2) voids a contract term."<sup>5</sup>

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<sup>1</sup> Conners' 11-page "Fact" section contains at least 10 references to affidavits, statements, and documents that are not a part of the record on appeal. Similar factual allegations and reliance on affidavits not in the record are found throughout the Appellee brief. This case is an appeal from a motion for judgment on the pleadings, and so the Court's consideration of facts should be limited to those found in the pleadings. In any event, Conners himself concedes that many of these facts are irrelevant and no more than puffery. See Merit Brief of Appellees Roger and Deborah Conners at p. 19.

<sup>2</sup> The parties agree that determination does not require the Court to analyze whether or not the property was suitable for use as classroom space. The question of whether or not a public school district may negotiate a deed restriction to be placed on property sold at public auction remains an issue regardless of whether or not the property was suitable for use as classroom space. This is because, pursuant to R.C. 3313.41, the public auction process occurred after the determination of suitability or the first offer period had expired. It is quite possible that CPS will again be selling properties at public auction if no charter school accepts a future first offer. In that scenario, the question of the deed restriction is still pertinent.

<sup>3</sup> Conners' Merit Brief at p. 19.

<sup>4</sup> *Id.*, at 19.

<sup>5</sup> *Id.*, at 18.

Where the parties diverge is in the method and manner by which the Court is supposed to make its determination regarding the existence of public policy. First, Conners suggests that a court has *carte blanche* authority to create public policy.<sup>6</sup> But Ohio and Supreme Court precedent demonstrates that any public policy enforced by a court must be rooted in law or legal precedent expressed by the legislature.

Second, Conners cites to a few specific statutory benefits granted to charter schools as the basis for the broader purported public policy. But the deed restriction negotiated by CPS does not hinder the benefits of those statutes in any way. This is especially true because the sale of public school property at issue in this case was made to private citizens who only later decided to make it a charter school and declare that they would not abide by the deed restriction.

Finally, Conners' suggestion that the public policy doctrine is routinely invoked by courts is belied by Ohio precedent that clearly indicates the public policy doctrine is to be the exception to the general rule of freedom to contract. It should be used only when a contract term violates public policy expressed by the General Assembly.<sup>7</sup> That is not this case.

**I. Public Policy Is Expressed by the General Assembly, not Created by the Judiciary.**

The primary difficulty in any case invoking the public policy doctrine is determining what constitutes public policy.<sup>8</sup> In order to ensure consistent enforcement of true public policy, both Ohio courts and the U.S. Supreme Court recognize that a public policy should only be enforced when the policy is firmly rooted in existing law or legal precedent.<sup>9</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 19.

<sup>8</sup> *Allman v. Simmers*, 5<sup>th</sup> Dist. No. 1999AP030014, 1999 WL 1072200 (Nov. 16, 1999) (“At best, public policy is an uncertain and indefinite term.”).

<sup>9</sup> See *United Paperworkers International Union v. MISCO*, 484 U.S. 29, 108 S.Ct. 364 (1987); *J.F. v. D.B.*, 116 Ohio St.3d 363, 2007-Ohio-6750, 879 N.E.2d 740; *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 613 N.E.2d 183 (1993).

This Court has specifically accepted that Ohio's educational policy falls within the purview of the General Assembly and that Ohio courts should not tinker with that policy when there is no constitutional violation.<sup>10</sup> This is especially so when, as even *Connors* is forced to acknowledge, the General Assembly is actively engaging in the creation and modification of the state's policy regarding charter schools.<sup>11</sup> The public policy of Ohio regarding charter schools is not to provide them with unlimited access, resources, and advantages, but instead to provide limited competition and alternatives for public school districts within the bounds of strict statutory guidelines.<sup>12</sup> No public policy exists outside of these strict statutory guidelines.

The Court of Appeals has attempted to create a new expansion of that public policy rather than enforcing the existing public policy rooted in the statutes enacted by the General Assembly. *Connors* and the lower courts have variously termed this new judicially-created "public policy" as eliminating "barriers to entry" for charter schools<sup>13</sup> or a "policy in favor of transferring taxpayer-owned school buildings to charter schools for their use as schools."<sup>14</sup> At one point, *Connors* even suggests that anything impairing the ability of a charter school to open might be void as against public policy for inhibiting the purposes of the Ohio Community Schools Act.<sup>15</sup>

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<sup>10</sup> *Ohio Congress of Parents and Teachers v. State Board of Ed.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 87 N.E.2d 1148 (2006), at ¶ 73 ("These policy decisions are within the purview of [the General Assembly's] legislative responsibilities, and that legislation is entitled to deference."); *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, 937 N.E.2d 547.

<sup>11</sup> *Connors*' Merit Brief at 32. Although *Connors* tries to read a more expansive policy into this most recent revision to the statutes governing disposal of real property, the only change it really makes is eliminating the potential ambiguity caused by the qualifying phrase "suitable for use as classroom space". As this revision was made well after the filing of this lawsuit, the General Assembly could presumably have addressed the deed restriction as well had it so desired.

<sup>12</sup> *State ex rel Congress v. State Board of Education*, 111 Ohio St.3d 568, 2006-Ohio-5512; 857 N.E.2d 1148 at ¶ 30 ("Community schools were designed to give parents a choice and give educators 'the opportunity to establish **limited** experimental educational programs.'"), citing 1997 Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043.

<sup>13</sup> *Connors*' Merit Brief at 36.

<sup>14</sup> *Id.* at 17.

<sup>15</sup> *Id.* at 37.

Connors' viewpoint is unsupported by any Ohio legal precedent, and would produce absurd results.<sup>16</sup>

Connors asks this Court to alter the long-standing application of Ohio's public policy doctrine as follows: (1) recognize a limited number of very specific statutory benefits the General Assembly has granted to charter schools; (2) assume, without any other legal support, that those specific benefits exhibit a far broader intention to grant charter schools additional benefits that the General Assembly has declined to specify;<sup>17</sup> and (3) usurp the General Assembly's legislative and policy-making role by creating a new statement of public policy to provide those additional benefits. Connors' entire argument hinges on the assumption that the limited, specific statutory grants of privilege to charter schools stands for a much broader authority than that actually given by the General Assembly. But as we have already seen, courts may only enforce public policy when it is firmly rooted in existing law or legal precedent.<sup>18</sup> That is not the case here.

**II. A Public School District's Negotiation of a Deed Restriction to be Placed on Property Sold to an Individual at Public Auction Does Not Conflict With Any Legislative Provision or Intent.**

None of the statutes cited by Connors as indicative of the General Assembly's purported broad policy in favor of charter schools have anything to do with a school district's sale of real property at public auction. Rather, those statutes primarily concern a public school district's obligation to provide charter schools with a first offer of real property before the property is offered at public auction.

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<sup>16</sup> Following this logic, a City's zoning restrictions could be deemed inapplicable to charter schools, not to mention a vendor's market-rate offer to sell equipment or supplies to a cash-poor start-up charter school.

<sup>17</sup> In support of this assumption, Connors is only able to point to cases from other jurisdictions, with different state constitutions and legislative frameworks.

<sup>18</sup> See *United Paperworkers International Union v. MISCO*, 484 U.S. 29, 108 S.Ct. 364 (1987); *J.F. v. D.B.*, 116 Ohio St.3d 363, 2007-Ohio-6750, 879 N.E.2d 740; *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 613 N.E.2d 183 (1993).

The Ohio Revised Code sets forth a very specific statutory process by which school districts are to dispose of real property, and this process contains within it very specific grants of privileges to charter schools. With a few word choice changes to more accurately reflect the statutory language, Connors' summary of the property disposal process is accurate, as it relates to charter schools:

[T]hese statutes reflect a state policy and legislative will to (1) *require* boards of education to **[offer] [unused]** school buildings to community schools<sup>19</sup> so that community schools can use them as classroom space; (2) suppress the price that boards of education may charge community schools for public school buildings; (3) hold community schools' window of opportunity to purchase (essentially a 'right of first refusal') open for a lengthy period (60 days); (4) financially assist community schools with the acquisition of school buildings.<sup>20</sup>

CPS has never disputed that the statutory scheme reflects a policy that charter schools should be given a preliminary opportunity to purchase suitable unused school buildings from public schools before that property is otherwise offered for sale to the public at large. After all, that is what the plain language of the statutes says.

After the first offer phase has expired, however, CPS no longer owes any statutory obligation to charter schools with respect to the sale of real property. In order to dispose of remaining real property after the first offer phase, CPS is required to sell that property to the general public at public auction.<sup>21</sup> The school district may outright sell, at a private sale, property that is not purchased at public auction.<sup>22</sup> Neither of these processes contains any provision that provides any privilege or benefit to charter schools. Neither of these processes prohibit deed

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<sup>19</sup> This is a benefit only offered to existing charter schools. In this case, Connors purchased the property in his own capacity, not as a charter school operator. He would not have been entitled to the first offer benefits afforded to charter schools in any event.

<sup>20</sup> Connors' Merit Brief at 33.

<sup>21</sup> R.C. 3313.41(A).

<sup>22</sup> R.C. 3313.41(B).

restrictions in the sale contract. And yet, the broad policy proposed by Connors would directly impact both of these processes in a manner not contemplated by the statutory language.<sup>23</sup>

The General Assembly has already expressed its policy intent with regard to a public school district's disposal of real property: charter schools are to be given a first opportunity to purchase such real property. If a charter school neglects to take advantage of the first offer, CPS may then sell the real property in accordance with the statutes governing such sales and negotiate a sales contract as it is permitted by R.C. 3313.17. Any more expansive reading of R.C. 3313.41 and 3313.411 distorts the clear statutory language that already expresses the intent of the General Assembly.

### **III. The Void as Against Public Policy is a Narrow Exception to the General Rule of Freedom to Contract.**

According to Ohio precedent, courts should be cautious only to apply the doctrine of void as against public policy when a contract provision either: (1) rises to the level of a broad, overwhelming public policy concern (often through the application of constitutional language); or (2) directly contradicts a statute. If a contract term does not completely and directly defeat the purpose of a statutory or Constitutional provision, it is not void as against public policy.

The United States Supreme Court stated that “our decision [to void the contract] turned on our examination of whether the [contract] created any explicit conflict with other ‘laws and legal precedents’ rather than an assessment of ‘general considerations of supposed public

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<sup>23</sup> If the public policy is as Connors suggests, to transfer “taxpayer-owned school buildings to charter schools for their use as schools” then something as simple as a contract of sale with a third party at either auction or private sale could be construed as violating that policy. Presumably, a charter school could ask a court to void that sale voided on the basis that the unused school building should be transferred into the hands of a charter-school, not a third party purchaser.

interest.”<sup>24</sup> This Court has stated that parties are bound to their contract where the General Assembly has not clearly articulated a broad, overwhelming public policy interest.<sup>25</sup>

CPS’s ability to negotiate a deed restriction for property sold at public auction certainly does not violate any constitutional or statutory right or other broad overwhelming policy interest articulated by the General Assembly. As seen above, the applicable law or legal precedent only entitles charter schools to a first offer of real property that is being disposed of by public school districts. That first offer, therefore, is the extent of the public policy in favor of charter schools expressed by the statutes. The broader “public policy exception” stated by the Court of Appeals to void deed restrictions in the sale of public school property to private citizens who later decide to start a charter school does not derive from these statutes. Rather, it is the creation of an expansive new public policy.

#### **IV. CONCLUSION**

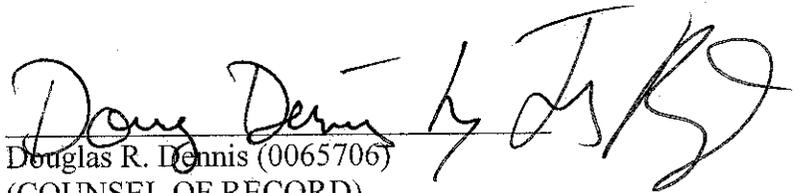
The Court should decline to follow *Connors* in his leap of logic, relying on assumptions regarding the intent of the General Assembly. The statutes speak for themselves. Nowhere in these statutes does it even hint that public school districts are prohibited from exercising their statutory right to contract through negotiation of a deed restriction when property is sold at public auction. Accordingly, this Court should abide by the statutory language governing a public school district’s disposal of property, reverse the decision of the Court of Appeals and trial court, and remand for an entry enforcing the deed restriction that was lawfully negotiated and entered between CPS and *Connors*.

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<sup>24</sup> *United Paperworkers International Union v. MISCO*, 484 U.S. 29, 108 S.Ct. 364 (1987).

<sup>25</sup> *J.F. v. D.B.*, 116 Ohio St.3d 363, 2007-Ohio-6750, 879 N.E.2d 740.

Respectfully submitted,



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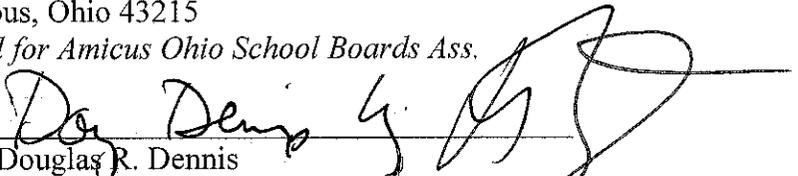
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Merit Brief of Appellant Board of Education of the City School District of the City of Cincinnati was served by ordinary U.S. mail, postage prepaid, on December 8, 2011 on the counsel listed below:

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