

ORIGINAL

In the
Supreme Court of Ohio

State ex. rel. OHIO CIVIL SERVICE : CASE NO. 14-0319
 EMPLOYEES ASSOCIATION, *et. al.*, :
 :
 Plaintiffs-Appellees/ : On appeal from the Franklin County Court of
 Cross-Appellants, : Appeals, Tenth Appellate District
 :
 v. : Court of Appeals Case No. 12 AP 1064
 :
 STATE OF OHIO, *et. al.*, :
 :
 Defendants-Appellants/ :
 Cross-Appellees. :

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MEMORANDUM OF AMICI CURIAE, OHIO ASSOCIATION OF PUBLIC SCHOOL
 EMPLOYEES (OAPSE)/AFSCME LOCAL 4, AFL-CIO, FRATERNAL ORDER OF POLICE
 OF OHIO, INCORPORATED, AND AMERICAN FEDERATION OF STATE, COUNTY,
 MUNICIPAL EMPLOYEES OHIO COUNCIL 8, IN SUPPORT OF PLAINTIFFS-
 APPELLEES/CROSS-APPELLANTS COMBINED MEMORANDUM IN RESPONSE TO
 DEFENDANTS-APPELLANTS/CROSS-APPELLEES' MEMORANDUM AND IN SUPPORT
 OF JURISDICTION OF THE CROSS-APPEAL

MICHAEL DEWINE (0009181)
 Attorney General of Ohio
 ERIC MURPHY (0083284)
 State Solicitor
 RICHARD COGLIANESE (0066830)
 WILLIAM L. COLE (0067778)
 ERIN BUTCHER-LYDEN (0087278)
 Assistant Attorneys General
 MEGAN M. DILLHOFF (0090227)
 Deputy Solicitor
 30 East Broad St, 17th Floor
 Columbus, Ohio 43215
 614-466-8980; 614-466-5087 fax
Eric.murphy@ohioattorneygeneral.gov
Richard.coglianese@ohioattorneygeneral.gov
Erin.butcher-lyden@ohioattorneygeneral.gov
William.cole@ohioattorneygeneral.gov
Megan.dillhoff@ohioattorneygeneral.gov

JAMES E. MELLE (0009493)
 167 Rustic Place
 Columbus, Ohio 43214-2030
 614-271-6180; 419-332-1488 fax
Jimmelle43@msn.com
 Attorney for Plaintiffs-Appellees/Cross-
 Appellants: Ohio Civil Service Employees
 Association, David Combs, Clair Crawford,
 Lori Leach Douce, Margo Hall, Sheila Herron,
 Daniel Karcher, Rebecca Sayers, Angela
 Schuster, Troy Tackett, Kathy Tinker, Lisa
 Zimmerman and ProgressOhio.org
 Robert J. Walter (0009491)
 Thomas I. Blackburn (0010796)
 Diem N. Kaelber (0087155)
 Buckley King LPA
 One Columbus

Attorneys for Defendants-Appellants/Cross-Appellees: State of Ohio, Governor John R. Kasich, Attorney General Mike DeWine, Secretary of State Jon Husted, Auditor of State David Yost, Ohio Department of Rehabilitation and Correction, and Director Gary C. Mohr, Ohio Department of Administrative Services and Director Robert Blair, Treasurer Josh Mandel, Office of Budget and Management and Director Timothy S. Keen

CHARLES R. SAXBE (0021952)

JAMES D. ABRAMS (0075968)

CELIA M. KILGARD (0085207)

Taft, Stettinius & Hollister LLP

65 E. State St., Suite 1000

Columbus, Ohio 43215-3413

614-221-2838; 614-221-2007 fax

rsaxbe@taftlaw.com

jabrams@taftlaw.com

ckilgard@taftlaw.com

Attorneys for Appellees: Corrections

Corporation of America and CCA Western Properties, Inc.

10 W. Broad Street, Suite 1300

Columbus, Ohio 43215

(614) 461-5600; (614) 361-5630 fax

Walter@buckleyking.com

Blackburn@buckleyking.com

Kaelber@buckleyking.com

Attorneys for Amici Curiae Ohio Association of Public School Employees (OAPSE)/AFSCME Local 4, AFL-CIO, Fraternal Order of Police of Ohio, Incorporated, and American Federation of State, County, Municipal Employees Ohio Council 8

NICHOLAS A. IAROCCI (0042729)

Ashtabula County Prosecuting Attorney

25 West Jefferson Street

Jefferson, Ohio 44047

440-576-3662; 440-576-3600 fax

naiarocci@ashtabulacounty.us

Attorney for Appellees: Dawn M. Cragon,

Roger A. Corlett and Judith A. Barta

ADAM W. MARTIN (0077722)

KEVIN W. KITNA (0088029)

Sutter O'Connell

3600 Erieview Tower

1301 East 9th Street

Cleveland, Ohio 44114

216-928-2200; 216-928-3636 fax

amartin@sutter-law.com

Attorneys for Defendant-Appellant/Cross-Appellee Management & Training Corporation

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I. STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

The Amended Complaint of Plaintiffs-Appellees/Cross-Appellants (“Plaintiffs/Cross-Appellants”) alleged that 2011 Am. Sub. H.B. No. 153 (“HB 153”) as it related to section 753.10, section 812.20, and R.C. 9.06 violated three provisions of the Ohio Constitution: (1) The one-subject rule in Article II, Section 15(D); (2) the state credit/joint venture rule in Article VIII, Section 4, both on its face and as applied; and (3) the right to referendum in Article II, Section 1(C) because it stated that R.C. 9.06 and section 753.10 as enacted were effective immediately and not subject to referendum. Plaintiffs/Cross-Appellants additionally alleged that HB 153 in its entirety and Senate Bill No. 312 in its entirety were unconstitutional because they violated the one-subject rule. Also, the individual Plaintiffs/Cross-Appellants sought declarations that they were “public employees” as defined in R.C. 4117.01(C).

The State Defendants-Appellants filed a motion to dismiss arguing that: (1) The trial court lacked jurisdiction under Civ.R. 12(B)(1); (2) Plaintiffs/Cross-Appellants lacked standing to bring the Amended Complaint; and (3) the Amended Complaint failed to state a claim upon which relief could be granted under Civ.R. 12(B)(6). The trial court granted State Defendants-Appellants’ motion to dismiss, finding: (1) the court had jurisdiction over the constitutional challenges to HB 153; (2) Plaintiffs/Cross-Appellants had standing to pursue their constitutional claims; and (3) Plaintiffs/Cross-Appellants failed to state a claim that HB 153 violated the Ohio Constitution. (The court failed to rule on the individual employee rights, including whether the individual Plaintiffs/Cross Appellants were public employees under R.C. 4117.01(C).)

Plaintiffs/Cross-Appellants appealed the Decision of the trial court assigning essentially three errors: (1) The trial court erred in dismissing Plaintiffs/Cross-Appellants’ Amended Complaint because it stated a claim that R.C. 9.06 as amended and section 753.10 as enacted in HB

153 violated the one-subject rule, Section 4, Article VIII and Section 15(D), Article II of the Ohio Constitution; and (2) the trial court erred in failing to take evidence before ruling on Plaintiffs/Cross-Appellants' "as-applied" constitutional challenges and in failing to rule that the individual Plaintiffs/Cross-Appellants were public employees as defined in R.C. 4117.01(C).

The Appellate Court held that "[b]ecause plaintiffs' complaint sufficiently states a claim that the challenged legislation violates the one-subject rule of the Ohio Constitution, we conclude the trial court erred in granting defendants' motion to dismiss. Plaintiffs' first assignment of error is sustained in part and overruled in part and plaintiffs' second assignment of error is overruled." (Page 17 of the Decision of the Appellate Court ("Appellate Court Decision").)

In regard to Plaintiffs/Cross-Appellants' first assignment of error, the Appellate Court (citing *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 16-17 (1999)) stating that "no rational reason for the combination of the prison privatization provisions and the budget-related appropriations exist in the record; suggesting that the combination was for tactical reasons"; stating that "given that such provisions amount to approximately 20 of over 3,000 pages in H.B. No. 153, they are 'in essence little more than a rider attached to an appropriations bill'"; and noting that Plaintiffs/Cross-Appellants' "amended complaint . . . claimed the entire bill [HB 153] was unconstitutional (Appellate Court Decision, p. 9), held that:

[b]ecause plaintiffs alleged a set of facts that if proved would entitle them to relief, the trial court erred in granting defendants' motion to dismiss the complaint for failing to state a claim upon which relief can be granted. *Hoover* at 6-7 [*Hoover v. Franklin Cty. Bd. of Comrs.*, 19 Ohio St.3d 1, 6-7 (1985)]. Therefore, the trial court must continue proceedings consistent with this decision, including holding an evidentiary hearing to determine whether the bill in question had only one subject pursuant to Ohio Constitution, Article II, Section 15(D). *Id.* If, after holding an evidentiary hearing, the trial court finds any provisions constitute a manifestly gross or fraudulent violation of the one-subject rule, such that the provisions bear no common purpose or relationship with the budget-related items and give rise to an inference of logrolling, the court must sever the offending provisions. *State ex rel. Hinkle v. Granting Cty. Bd. Of Elections*, 62 Ohio St.3d 145, 149 (1991) (concluding severance to be the appropriate remedy where possible to cure the defect and save those sections relating to a single subject). *See also Ohio Civ. Serv.*

Emps. Assn. at ¶ 36 [*State ex rel. Ohio Civ. Serv. Emps. Assn., AFSCME Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6303 (2004)]. [Appellate Court Decision, p. 10.]

B. Statement of Facts

Amici Curiae adopt the Statement of Facts of Plaintiffs/Cross-Appellants, which Statement of Facts is set forth in Plaintiffs-Appellees/Cross-Appellants Combined Memorandum in Response to Defendants-Appellants/Cross-Appellees' Memorandum and in Support of Jurisdiction for Its Cross-Appeal.

II. THIS CASE, IN REGARD TO THE APPEAL OF THE STATE DEFENDANTS-APPELLANTS AND DEFENDANT-APPELLANT MANAGEMENT & TRAINING CORPORATION, DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND DOES NOT INVOLVE A QUESTION OF GREAT GENERAL INTEREST; THIS CASE, IN REGARD TO THE CROSS-APPEAL OF THE PLAINTIFFS/CROSS-APPELLANTS INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST.

A. This case, in regard to the appeal of the State Defendants-Appellants and Defendant-Appellant Management & Training Corporation, does not involve a substantial constitutional question and is not of great general interest.

The State Defendants-Appellants argue that the appeal of the Appellate Court's Decision on the one-subject rule is "important" as shown by the many one-subject cases the Ohio Supreme Court has accepted on appeal in the last 10 or 12 years. However, the issue is whether the Decision on the one-subject rule in this case involves a "substantial" constitutional question and not an "important" constitutional question. Moreover, the State Defendants-Appellants ignore the procedural structure of this case, *i.e.* this case was decided on a motion to dismiss and there is no indication that the trial court did any type of analysis other than in regard to the two prison privatization provisions of HB 153 to determine if HB 153 violated the one-subject rule. In examining an act or bill for compliance with the one-subject rule, a court must conduct a "thorough and in-depth review" of the entire act. *Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 497, 715 N.E.2d 1062, 1099 (1999). All the Appellate Court's Decision effectively did was

send this issue back to the trial court in order for it to perform an in-depth analysis on those provisions which were not addressed by the trial court.

The State Defendants-Appellants also argue that:

by remanding this case for an “evidentiary hearing to determine whether the bill in question had only one subject” *Id.* ¶ 24, the Tenth District’s blanket order raises serious separation-of-power concerns. It could lead to allow Plaintiffs to take discovery concerning the *intent* of legislators who passed the bill, thereby requiring excessive entanglement between the judicial and legislative branches. The Court has cautioned that if the courts were allowed “to look beyond the four corners of a bill and inquire into the doings of the legislators,” the result would be “entanglement with the legislative process that far exceeds any legitimate judicial function.” *In re: Nowak* (2004), 104 Ohio St.3d 466, 472, 820 N.E.2d 335, 2004-Ohio-6777 ¶ 72. Such a line of discovery would also be unworkable.

However, the Appellate Court placed limits on the trial court’s examination of the provisions in HB 153 by stating that the trial court, in conducting its evidentiary hearings, must conduct its examination “consistent with this decision . . .” (Appellate Court Decision, p. 10), which Decision specifically stated that if “after holding an evidentiary hearing, the trial court finds any provisions constitute a manifestly gross or fraudulent violation of the one-subject rule, such that the provisions bear no common purpose or relationship with the budget-related items and give rise to an inference of logrolling, the court must sever the offending provisions.” (Appellate Court Decision, p. 10.) The Appellate Court [Citing *Nowak* at ¶ 59] further noted that it is the “[d]isunity of subject matter, not the mere aggregation of topics, ... [which] ... causes a bill to violate the one-subject rule. ”. Thus, the trial court will be examining the words of the provisions and not delving into the intent of the legislators.

B. This case, in regard to the appeal of the Plaintiffs/Cross-Appellants does involve a substantial constitutional question and a question of public or great general interest.

HB 153 is an Appropriations Bill in which Bill the General Assembly amended R.C. 9.06 and enacted new section 753.10, the two statutes which are the sole authority for prison privatization in Ohio. Acting pursuant to those two statutes, the State Defendants-Appellants sold a

state-owned prison in Ashtabula County named Lake Erie Correctional Facility (“LECF”), together with 119 acres, to Defendant-Appellant Corrections Corporation of America (“CCA”) for \$72,770,260. As part of the transaction, the State Defendants-Appellants promised to subsidize CCA’s ownership costs by paying to CCA from General Revenue Funds what it called an “Annual Ownership Fee.” This Annual Ownership Fee is not part of the cost of housing, feeding, clothing, providing programs and services etc. to the prisoners. Those separate payments are identified in the contract between the state and CCA as “Per Diem Fee” payments. Annual Ownership Fees are paid to CCA for the “wear and tear” of the prison which the state no longer owns. The amount of this Annual Ownership Fee is \$3,800,000/year and it is to be paid by the state to CCA each year for 21 years. Total Annual Ownership Fee payments are \$79,800,000, an amount greater than the sale price of the prison. CCA and the State Defendants-Appellants admit the annual payments. Further explanation can be found at <http://www.drc.ohio.gov/Public/privatizationfaqs.pdf>.

Plaintiffs/Cross-Appellants’ complaint alleged, in part, that these Annual Ownership Fee payments are a subsidy which violated Section 4, Article VIII of the Ohio Constitution which prohibits the state from lending credit to or in aid of any corporation and/or that the subsidy payments resulted in an unconstitutional joinder of CCA and the state’s property rights. Counsel for Amici Curiae, as was the case with counsel for Plaintiffs/Cross-Appellants, has found no cases in Ohio or elsewhere discussing an Annual Ownership Fee or a state subsidizing the ownership costs of the purchaser of a state-sold prison. This is a first. The case should have been allowed to proceed beyond a motion to dismiss. A full record should have been developed on such an important constitutional and economic issue.

Pursuant to R.C. 9.06, the State Defendants-Appellants privatized another state-owned prison complex known as North Central Correctional Institution (“NCCI”) and the nearby North Central Correctional Institution Camp (“NCCIC”), together known as the “North Central

Correctional Complex” (the “Marion Complex”) situated in Marion County, together with approximately 258 acres. The State Defendants-Appellants executed what they called an “Operation, Management and Maintenance Contract” (“O&M Contract”) with Defendant-Appellant Management & Training Corporation (“MTC”). In this form of privatization MTC operates and manages the Marion Complex with employees it hires while the State continues to own and retain ultimate jurisdiction and control over the entire prison operation.

Despite their employment by MTC, a private-sector employer who is operating and managing a privatized prison pursuant to a business contract which is not governed by the Ohio Collective Bargaining Law, the complaint alleged that the employees were nevertheless public employees. R.C. 4117.01(C) defines a public employee as “including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction...” That statutory language is precisely the fact in this case. There is no dispute that such a contract exists between the state and both CCA and MTC.

The Appellate Court ruled that the State Employment Relations Board (“SERB”) had exclusive jurisdiction to decide whether the individual Plaintiffs/Cross-Appellants are public employees because it involved an interpretation of R.C. 4117.01(C). However, no statute vests jurisdiction in SERB over a private-employer-contractor who operates a prison pursuant to a business contract which privatized the prison where the employees are hired as private-sector employees. The only condition for public employee status under R.C. 4117.01(C) is whether there is a contract between Defendant Ohio Department of Rehabilitation and Correction (“ODRC”) and MTC and CCA. That is a question well-within the jurisdiction of the common pleas court as are the remedies requested: declaratory, injunctive and mandamus relief.

Additionally, R.C. 9.06 (K), newly enacted in HB 153, says that any “action” (i) challenging the constitutionality of either R.C. 9.06 or section 753.10 or (ii) any action taken

pursuant to those statutes alleged to be unconstitutional must be filed in the Franklin County Common Pleas Court.

This Court should deny the Defendants-Appellants Discretionary Appeals because the Court of Appeals remanded the case and no proceedings have yet occurred there. However, this Court should accept for review Plaintiffs/Cross-Appellants' cross-appeal and reverse the Court of Appeals on the above-stated issues.

III. PROPOSITION OF LAW I:

Am. Sub. HB 153 Is Unconstitutional, and therefore Void, Because It Violates the One-Subject Rule of Article II, Section 15(d) of the Ohio Constitution.

Article II, Section 15(d) of the Ohio Constitution provides that: "No bill shall contain more than one subject, which shall be clearly expressed in its title."

The Ohio Supreme Court, in its Decision in *In re: Nowak* (2004), 104 Ohio St.3d 366, 471, 820 N.E.2d 335, 340, 2004-Ohio-6777, citing from *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 495, 715 N.E.2d 1062, 1098 (1999), stated that:

"The one-subject rule was added to our Constitution in 1851. It was one of the proposals resulting from the efforts of the Second Constitutional Convention, of 1850-1851. See Kulewicz, *The History of the One-Subject Rule of the Ohio Constitution* (1997), 45 *Cleve.St.L.Rev.* 591, 591-593. The genesis of support for this rule had its roots in the same concerns over the General Assembly's dominance of state government that formed the most significant theme of the Constitution of 1851. These concerns ... resulted in the placement of concrete limits on the power of the General Assembly to proceed however it saw fit in the enactment of legislation. The one-subject rule is one product of the drafters' desire to place checks on the legislative branch's ability to exploit its position as the overwhelmingly pre-eminent branch of state government prior to 1851.

The rule derives in part from the prevailing antipathy toward the manner and means by which the General Assembly exercised its pre-1851 power to enact special laws. By virtue of this power, the General Assembly "became heavily involved in the subsidization of private companies and the granting of special privileges in corporate charters. The General Assembly passed a number of Acts * * * designed to loan credit or give financial aid to private canal, bridge, turnpike, and railroad companies. * * * The public began to bemoan the taxes imposed on them for the benefit of private companies" *Id.* Ohio St.3d at 464, 715 N.E.2d 1062. Concurrently, special charters or bills of incorporation were often assured passage

through a system of logrolling, *i.e.*, the practice of combining and thereby obtaining passage for several distinct legislative proposals that would probably have failed to gain majority support if presented and voted on separately. *Id.* at 495-496, 715 N.E.2d 1062. In limiting each bill to a single subject, the one-subject rule strikes at the heart of logrolling by essentially vitiating its product.

As explained in *State ex rel. Dix v. Celeste*, 11 Ohio St.3d 141, 142-143, 464 N.E.2d 153, 155 (1984):

Ohio is one of among forty-one states whose Constitution contains a one-subject provision. The primary and universally recognized purpose of such provision is to prevent logrolling – “* * * the practice of several minorities combining their several proposals and different provisions of a single bill and thus consolidating their votes so that a majority is obtained for the omnibus bill where perhaps no single proposal of each minority could have obtained majority approval separately.” . . . In *Pim v. Nicholson* (1856), 6 Ohio St. 176, this Court likewise recognized that the one-subject rule was directed at logrolling. [Footnotes omitted.]

The one-subject provision attacks logrolling by disallowing unnatural combinations of provisions in acts, *i.e.*, those dealing with more than one subject, on the theory that the best explanation for the unnatural combination is a tactical one-logrolling. By limiting each bill to a single subject, the bill will have unity and thus the purpose of the provision will be satisfied.

The one-subject provision also has the related benefit of operating to prevent “riders” from being attached to bills that are” * * * so certain of adoption that the rider will secure adoption not on its own merits, but on the measure to which it is attached. [Footnotes omitted.]

The Ohio Supreme Court in defining its role in the enforcement of the one-subject provision of Section 15(D), Article II of the Ohio Constitution, “has been emphatic about its reluctance to interfere or become entangled with the legislative process” and has “endeavored to ‘accor[d] appropriate respect to the General Assembly, a coordinate branch of state government’”; *Ohio Academy of Trial Lawyers, supra*, at 496, 715 N.E.2d 1099; *Dix, supra*, at 144, 464 N.E.2d 157, and has recognized “the necessity of giving the General Assembly great latitude in enacting comprehensive legislation by not construing the one-subject provision so as to unnecessarily restrict the scope and operation of laws, or to multiply their number excessively, or to prevent legislation from embracing in one act all matters properly connected with one general subject.”

But, “[w]hile the Supreme Court has consistently expressed its reluctance to interfere with the legislative process, it will not, however, abdicate its duty to enforce the Ohio Constitution.” *Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 496, 715 N.E.2d 1062, 1099 (1999); *Dix, supra*, at 144, 464 N.E.2d 157.

The one-subject rule is not directed at plurality but at disunity in subject matter. *Ohio Academy of Trial Lawyers, supra*, at 496, 715 N.E.2d 1099; *Dix, supra*, at 144, 464 N.E.2d 157. Thus, the mere fact that a bill embraces more than one topic is not fatal so long as a common purpose or relationship exists between topics. *Hoover v. Franklin Cty. Bd. of Commrs.*, 19 Ohio St.3d 1, 6, 482 N.E.2d 575, 586 (1985). But, when there is an absence of common purpose or relationship between specific topics in an act and when there are no discernible practical, rational or legitimate reasons for combining the provisions in one act, or when there is a blatant disunity between topics and no rational reason for their combination can be discerned, there is a strong suggestion and it may be inferred that the provisions were combined as, and the bill is, the result of tactical reasons, *i.e.*, logrolling. *Ohio Academy of Trial Lawyers, supra*, at 496-497, 715 N.E.2d 1100; *Dix, supra*, at 145, 464 N.E.2d 157. *See also Beagle v. Walden*, 78 Ohio St.3d 59, 62, 676 N.E.2d 506, 507 (1997); *State ex rel. Hinkle v. Financial Cty. Bd. of Elections*, 62 Ohio St.3d 145, 148-149, 580 N.E.2d 767, 770 (1991); and *Hoover, supra*, at 6, 482 N.E.2d 580.

Because the one-subject rule attacks logrolling by disallowing unnatural combinations of provisions in acts, *i.e.*, those dealing with more than one subject on the theory that the best explanation for that unnatural combination is a tactical one – logrolling (*Dix, supra*, at 143, 464 N.E.2d 153; *Nowak, supra*, at 480-481, 820 N.E.2d 347), the one-subject provision does not require evidence of fraud or logrolling beyond the unnatural combinations themselves. Instead, “an analysis of any particular enactment is dependent upon a particular language and subject matter of the proposal,” rather than upon extrinsic evidence of logrolling and, thus, “an act which contains

such unrelated provisions must necessarily be held to be invalid in order to effectuate the purposes of the rule.” *Dix, supra*, at 145, 464 N.E.2d 153; *Nowak, supra*, at 481, 820 N.E.2d 347. Otherwise, the court is “left with the anomalous proposition that a bill containing more than one subject does not violate a constitutional provision that prohibits a bill from containing more than one subject.” *Nowak, supra*, at 481, 820 N.E.2d 347.

“While an examination of any two provisions contained in [an act or bill] carefully selected and compared in isolation could support a finding that ‘a common purpose or relationship exists among the sections, representing a potential plurality but not disunity of topics,’ an examination of the bill or act in its entirety [could belie] such a conclusion.” Thus, a court, in examining an act or bill for compliance with the one-subject rule, must conduct a “thorough and in-depth review” of the entire act. *Ohio Academy of Trial Lawyers, supra*, at 497, 715 N.E.2d 1099.

The Ohio Supreme Court has accepted “the proposition that, in order to accord appropriate deference to the General Assembly in its law-making function, a subject for purposes of the one-subject rule is to be liberally construed as a classification of significant scope and generality”; however, this principle does not extend to give the General Assembly such latitude as to include in one act blatantly unrelated matters, and [the Ohio Supreme Court is] not obliged to accept that any ingenious comprehensive form of expression constitutes a legitimate subject for purposes of the one-subject rule.” *Ohio Academy of Trial Lawyers, supra*, at 498, 715 N.E.2d 1100. This principle is particularly relevant when the subject matter is inherently controversial and of significant constitutional importance. *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 16, 711 N.E.2d 203, 216 (1999).

HB 153 is an “appropriations” bill; whereas, Section 753.10 and R.C. 9.06 are clearly not appropriations and should not be in an appropriations bill. R.C. 9.06 deals with the sale of prisons after an O&M Contract is made. Section 753.10(C), (D), (E), (F) and (G) are not appropriations either. They merely authorize the sale of specified state-owned prisons and direct where the

proceeds must be deposited.

HB 153 amended 318 chapters, repealed 130 sections, amended 1,407 sections, enacted 255 new sections and amended 13 other bills. HB 153 has a 6 or 7-page title (depending on the font size and page set when printed) which, after identifying section numbers and bill numbers for 6 or 7 pages, provides that it was enacted “to make operating appropriations for the biennium beginning July 1, 2011, and ending June 30, 2013; **and to provide authorizations and conditions for the operation of programs, including reforms for the efficient and effective operation of state and local government**”. (Emphasis added.)

Nowak, supra, requires a thorough and in-depth review of each provision in HB 153 in order to determine whether it violated the one-subject rule. In this case, a thorough and in-depth review, in fact even a less than thorough in-depth review, of HB 153 reveals that it violates the one-subject rule and must be held to be invalid in order to effectuate the purposes of the one-subject rule. As a few examples of the disunity and non-appropriation provisions in HB 153,¹ HB 153 combines the elimination of a prior felony conviction as a bar to the issuance or renewal of a barber’s license with the creation of a new liquor control permit for nonprofit corporations operating a park on property leased from either a municipal corporation or, in some instances, a nonprofit corporation; combines the requirement that the Director of the Ohio Casino Control Commission establish a problem gambling hotline with the requirement that school districts implement merit-based pay regulations; combines the modification of Rules of Evidence in civil cases to change the requirements for the expert testimony of a coroner or deputy coroner with the prohibition of a state institution of higher

¹ Amici Curiae listed for more examples of disunity and non-appropriation provisions (in HB 153) in its Brief Of Amici Curiae Ohio Association Of Public School Employees (OAPSE)/AFSCME Local 4, AFL-CIO, Fraternal Order Of Police Of Ohio, Incorporated, And American Federation Of State, County, Municipal Employees Ohio Council 8 In Support Of Appellants, filed in the Appellate Court; and a review of HB 153 reveals even more provisions which have no common purpose or relationship and which are not appropriations.

education from denying, based on religious affiliation, a religious student group any benefit conferred upon any other student group; combines the prohibition of non-therapeutic abortions in specific places, such as: public hospitals and clinics, state hospitals, state medical colleges, health districts, and joint hospitals, with the authorization to the State of Ohio to transfer to JobsOhio by absolute conveyance, the entire statewide spirituous liquor distribution system, including all of the capital or other assets of the spirituous liquor distribution and merchandising operations of the Division of Liquor Control, for a price payable by JobsOhio to the State; combines the elimination of all collective bargaining rights to turnpike employees with the requirement that the Chancellor of the Board of Regents develop a plan for charter universities; combines the revision of requirements and processes for obtaining a certificate for practice of a limited branch of medicine with a new limitation for a liability for violations under the Public Records Law; and combines the establishment of new limits to unemployment compensation in regard to seasonal employment with revisions to childcare provider laws.

In *Ohio Academy of Trial Lawyers*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999), the Ohio Supreme Court examined Am. Sub. H.B. No. 350 (hereinafter referred to as “HB 350”) which embraced a multitude of topics affecting some 18 different titles, 38 different chapters and over 100 different sections of the Revised Code, as well as procedural and evidentiary rules. The Court, stating that the issue before it was “whether the various topics share a common purpose or relationship, *i.e.*, whether they unite to form a single subject for purposes of’ the one-subject rule, compared a number of subjects, such as the combination of a provision requiring the wearing of seatbelts with employment discrimination claims; the combination of class actions arising from the sale of securities with limitations on agency liability and actions against a hospital; the combination of recall notification with qualified immunity for athletic coaches; and the combination of actions by a roller skater with supporting affidavits in a medical claim, and

concluded that such provisions were “so blatantly unrelated that, if allowed to stand as a single subject, this court would be forever left with no basis upon which to invalidate any bill, no matter how flawed.” *Ohio Academy of Trial Lawyers, supra*, 86 Ohio St.3d at 498; 715 N.E.2d at 1100. The Court, while acknowledging that there were some provisions contained within HB 350 which had a common purpose or relationship, nevertheless invalidated HB 350 in its entirety. The Court stated that “to find otherwise would be no less than an abdicat[ion] [of our] duty to enforce the Ohio Constitution.” *Ohio Academy of Trial Lawyers, supra*, at 498; 715 N.E.2d 1100.

In *Simmons-Harris*, 86 Ohio St.3d at 1, 711 N.E.2d 203 (the lead of which case the trial court said it would follow, but which case the trial court found was not controlling), the Court was addressing the issue of whether Am. Sub. H.B. No. 117 (hereinafter referred to as “HB 117”) violated the one-subject rule. HB 117 contained three hundred eighty-three amendments in twenty-five different titles of the Revised Code, ten amendments to renumber, and eighty-one new sections in sixteen different titles. *Simmons-Harris, supra*, at 15, 711 N.E.2d 215. The Court compared several provisions of HB 117 noting that the first provision concerns the residency of certain elected officials; the second provision enabled certain government entities to contract for the private operation of correctional facilities; the third provision declared some files of the Joint Legislative Ethics Committee to be confidential; the fourth provision required candidates for elected offices to file financial statements with the Ethics Commission; the fifth provision created a Joint Legislative Committee on Federal Funds; and the sixth provision required certain state agencies to submit proposals to the created Joint Legislative Committee. The Court noted that none of these subjects had anything to do with the School Voucher Program which the plaintiffs had challenged as violating the one-subject rule. The Court concluded that there was considerable disunity in subject matter between the School Voucher Program and the vast majority of the provisions of HB 117 and ruled that the creation of a substantive program (the School Voucher Program) in a general appropriations bill violated the one-subject rule. While the

Court noted that, even though many provisions of HB 117 appeared unrelated, it restricted its analysis to the School Voucher Program, the only part of HB 117 whose constitutionality was challenged in the case. *Simmons-Harris, supra*, at 16, 711 N.E.2d 215.

HB 153 contains just as much, or even more, disunity and changes far more R.C. Chapters and sections than did the bills at issue in *Ohio Academy of Trial Lawyers* and *Simmons-Harris*.

HB 153 also violates the one-subject rule of the Ohio Constitution because of its title. In this regard, as noted, Article II, Section 15(d) of the Ohio Constitution provided that: “No bill shall contain more than one subject, **which shall be clearly expressed in its title.**” (Emphasis added.) The title of HB 153, except for the last three or four lines thereof, lists statutory code section after statutory code section after statutory code section, as well as a few house and senate bills which are amended by HB 153. The last three or four lines provide that HB 153 was enacted “to make operating appropriations for the biennium beginning July 1, 2011, and ending June 30, 2013; and **to provide authorization and conditions for the operation of programs, including reforms for the efficient and effective operation of state and local government.**” (Emphasis added.) Despite the fact that the HB 153 title lists for nearly 7 pages, statutory code section after statutory code section after statutory code section, it does not list R.C. 753.10. Additionally, there is no language in the title which would even indicate that HB 153 authorizes the privatization of prisons through the lease or sale thereof. Thus, the subject of prison privatization is not clearly expressed in the title of HB 153.

Another problem with HB 153 is it essentially does not identify any subject to which it pertains. As noted by the Ohio Supreme Court in *Ohio Academy of Trial Lawyers, supra*, at 499, 1101 “[as] the topics embracing a single act become more diverse, and as their connection to each other becomes more attenuated, so the statement of subject necessary to comprehend them broadens and expands. There comes a point past which a denominated subject becomes so strained in its effort

to cohere diverse matter as to lose its legitimacy as such. It becomes a ruse by which to connect blatantly unrelated topics. At the further end of this spectrum lies the single enactment which endeavors to legislate on all matters under the heading of ‘law’”. *Ohio Academy of Trial Lawyers, supra*, at 3099, 1101. The court, in *Ohio Academy of Trial Lawyers*, further stated that HB 350 “[a]dvances a notion that ‘tort and other civil actions’ [the subject described in the title of HB 350] is a single subject ... If we accept this notion, the General Assembly could conceivably revamp all Ohio law in two strokes of the legislative pen -- riding once on civil law and again on criminal law. The thought of it is staggering.” *Ohio Academy of Trial Lawyers, supra*, at 499, 1101.

The title of HB 153 is even more egregious than the title of HB 350 as addressed in the *Ohio Academy of Trial Lawyers* case. The General Assembly under the HB 153 title “[t]o provide authorization and conditions for the operation of programs, including reforms for the efficient and effective operation of state and local government” can conceivably revamp all Ohio law in one stroke of the legislative pen which thought is even more staggering than the ability to revamp all Ohio law in two strokes of the legislative pen as was the case in the *Ohio Academy of Trial Lawyers* case.

If it is determined that a bill violates the one-subject rule, the entire bill must be invalidated as it is the bill which violates the one-subject rule and, therefore, it is the bill which must be held to be unconstitutional. *See In re: Nowak, supra*, 104 Ohio St.3d at 481, 820 N.E.2d 347, holding that “an act which contains such unrelated provisions must necessarily be held to be invalid in order to effectuate the purposes of the rule.” In *Nowak*, the petitioner argued that the court should adopt a two-part test for determining whether an act should be invalidated for violation of the one-subject rule. The first part of the test was for the court “to determine whether there was an absence of common purpose or relationship between the specific topics of an act” and the second part of the test was that “if the act is found to contain unrelated provisions, the court would then inquire as to whether the disunity was actually the result of logrolling.” *Nowak, supra*, 104 Ohio St.3d at 480, 820 N.E.2d 347. The court

noted that “[u]nder the second prong of petitioner’s test, this disunity in subject matter would not be fatal to the validity of any act that does not ‘contain highly charged political issues,’ involved ‘high profile legislation,’ or embody ‘any provisions that would have a great deal of political opposition.’ The theory is that such innocuous legislation is unlikely to provoke the tactics of logrolling. Thus, disunity of subject matter would be excused where the challenged enactment is not particularly controversial. We emphatically reject this approach.” *Nowak, supra*, 104 Ohio St.3d at 480, 820 N.E.2d 347. The Court noted that “[t]he one-subject provision attacks logrolling by disallowing unnatural combinations of provisions in acts, i.e., those dealing with more than one subject on the theory that the best explanation for the unnatural combination is a tactical one – logrolling ... in other words, the one-subject provision does not require evidence of fraud or logrolling beyond the unnatural combinations themselves. Instead, ‘an analysis of any particular enactment is dependent upon the particular language and subject matter of the proposal,’ rather than upon the intrinsic evidence of logrolling, and thus ‘an act which contains such unrelated provisions must necessarily be held to be invalid in order to effectuate the purposes of the rule.’ ... Otherwise, we are left with the anomalous proportion that a bill containing more than one subject does not violate a constitutional provision that prohibits a bill from containing more than one subject.’ *Nowak, supra*, 104 Ohio St.3d at 481, 820 N.E.2d 347. Nowak further noted that the “petitioner’s proposed test invites the evil it claims to avoid. It purports to be steeped in concerns of legislative autonomy and judicial noninterference, yet directs [the court] to look beyond the four corners of a bill and inquire into the doings of legislators. By its own terms, this test requires that we perform the inherently legislative function of gauging the extent to which particular proposals are likely to generate political controversy or invoke political opposition, which is a kind of entanglement with the legislative process that far exceeds any legitimate judicial function.” The court further noted that the same argument was recently rejected in *State ex rel. Ohio Civ. Serv. Employees Assn.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, ¶ 35.

As noted, every court that has addressed the one-subject rule has concluded that the primary and universally recognized purpose of the rule is to prevent logrolling – the practice of several minorities combining their several proposals in different provisions of a single bill, thus consolidating their votes so that a majority is obtained for the omnibus bill when perhaps no single proposal of each minority could have obtained majority support separately. There is simply no way to determine whether R.C. 9.06 and section 753.10 would have obtained majority approval if not included in HB 153 which contained a multitude of different subjects and provisions (including a multitude of high profile and highly charged political provisions). To make such a determination, the Court would have to put itself in the place of the General Assembly, even worse, it would have to put itself in the place of each individual legislator, and decide which legislators would have voted for the passage of R.C. 9.06 and section 753.10 if they were stand-alone provisions. Perhaps one or more legislators only voted for HB 153 because it was an appropriations bill or because it contained some other provision important to such legislators such as the provisions addressing abortion issues, the sale of the prison system, the sale of the Turnpike, etc. Certainly, in view of recent history involving S.B. No. 5, many legislators may not have voted for passage of a provision or provisions which eliminated public employee positions (as does R.C. 906 and section 753.10) unless such bill or provisions were buried in a massive appropriations bill containing a multitude of unrelated subjects. HB 153 clearly violates the one-subject rule and is therefore unconstitutional and is thus invalid and void.

IV. PROPOSITION OF LAW II:

R.C. 9.06 and Section 753.10 Violate Section 4, Article VIII of the Ohio Constitution, Both on Their Face and as Applied.

Pursuant to amended R.C. 9.06 and enacted new section 753.10 in HB 153, the two statutes which are the sole authority for prison privatization in Ohio, the State Defendants-Appellants sold LECF, together with 119 acres, to CCA for \$72,770,260. As part of the transaction, the State Defendants-Appellants promised to subsidize CCA's ownership costs by paying to CCA from

General Revenue Funds an Annual Ownership Fee. This Annual Ownership Fee is not part of the cost of housing, feeding, clothing, providing programs and services etc. to the prisoners; rather separate payments for such latter costs are identified in the contract between the State and CCA as Per Diem Fee payments. Annual Ownership Fees are paid to CCA for the “wear and tear” of the prison which the State no longer owns. The amount of this Annual Ownership Fee is \$3,800,000/year and it is to be paid by the State to CCA each year for 21 years. Total Annual Ownership Fee payments are \$79,800,000, an amount greater than the sale price of the prison. CCA and the State Defendants-Appellants admit these payments. Further explanation can be found at <http://www.drc.ohio.gov/Public/privatizationfaqs.pdf>.

Additional facts concerning CCA’s purchase of the prison and the entanglement of the State’s interest with that of CCA include the obligation imposed by R.C. 753.10(B)(2)(d) that CCA, and all successors in title, grant to the State an irrevocable right to repurchase the prison and transferred land. If the State does not exercise its right of first refusal, the contractor has the right to sell the prison and all acreage to anyone. R.C. 753.10(B)(2)(d)(i) and (ii) and R.C. 9.06(J)(4)(a). The contractor may charge the State any amount the contractor chooses upon repurchase. R.C. 753.10(B)(2)(d)(i) originally restricted the repurchase price to that which was paid; but the language was vetoed by the Governor. (HB 153 p. 3221).

Additionally, R.C. 753.10(C)(4)(a) and (b) allowed the State to place restrictions in the Governor’s Deed regarding the resale, use and development of the property surrounding the prison. If developed, and the State desires to exercise its right to get LECF back, the State could be forced to pay CCA for the cost of the prison and, because of the vetoed language in R.C. 753.10(B)(2)(d)(i), CCA has the ability to make the State pay for all of its development costs.

Section 4, Article VIII of the Ohio Constitution provides that:

The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association or corporation whatever; nor shall the state ever

hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever.

Plaintiffs/Cross-Appellants, in their Amended Complaint, claim that section 753.10 (the statute pursuant to which LECF was sold) and R.C. 9.06 (the statute which dictates requirements which must be contained in all O&M Contracts with the state) were unconstitutional under Section 4, Article VIII of the Ohio Constitution on their face and as applied. While the trial court does not expressly say so, it is clear that it did not rule on Plaintiffs/Cross-Appellants' claims that R.C. 9.06 and section 753.10 were unconstitutional as applied. This is because the trial court took no evidence and created no record.

When evaluating a statute challenged as unconstitutional on its face, the constitutional question is to be considered without regard to extrinsic facts (*Belden v. Union Central Life Ins.*, 143 Ohio St. 329, 55 N.E.2d 629 (1944), ¶5 syllabus; *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988)) whereas, when a statute is challenged on the basis that it is unconstitutional in its application, extrinsic facts are required and the court must have a record of the extrinsic facts. *Belden*, ¶4, 6 syllabus; *Cleveland Gear Co.*, *supra*, at 232, 520 N.E.2d 189. The court cannot rule on an "as-applied" constitutional claim where the court does not have any true evidence before it. *State v. Beckley*, 5 Ohio St.3d 4, 6, 448 N.E.2d 1147 (1983). The circumstances must be part of the record. *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 802 N.E.2d 632, 2004-Ohio-357 ¶17; *Wymyslo v. Bartec, Inc.*, 132 Ohio St.3d 167, 970 N.E.2d 898, 2012-Ohio-2187, ¶22. When the constitutionality of a statute is challenged "as-applied" to a specific set of facts, a record is required. *Semenchuk v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-19, 2010-Ohio-5551, 2010 WL 4632551, ¶30; *State v. Rexroad*, 7th Dist. No. 05 CO 36 and 05 CO 52, 2005-Ohio-6790, 2005 WL 3489726, ¶30-31.

Extrinsic evidence and a record are needed in determining an "as-applied" constitutional challenge of a statute because Ohio is a notice pleading State. Ohio law does not require plaintiffs to

plead operative facts with particularity. *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶ 29. Nor is the pleader required to allege every fact the pleader intends to prove. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 605 N.E.2d 378 (1992). Plaintiffs are not required to prove their case at the pleading stage because very often the evidence necessary can only be obtained through discovery. *Bunguard v. Ohio Dept. of Job and Family Servs.*, 10th Dist. No. 07AP-447, 2007-Ohio-6280, 2007 WL 4171105, ¶ 17.

Plaintiffs/Cross-Appellants served discovery requests in order to attempt to obtain evidence necessary to prove their case; however, the State Defendants-Appellants filed a motion for protective order and failed to respond to the said discovery requests. Even if Plaintiffs/Cross-Appellants had been able to obtain, prior to the time they filed their Amended Complaint, all the information they sought in discovery, because they were not required to allege every fact they intended to prove in this case, the trial court, without a record, even if it is assumed all the facts alleged in the Amended Complaint were true, would not have before it all the facts Plaintiffs/Cross-Appellants intended to prove in regard to the “as-applied” constitutional challenge to R.C. 9.06 and section 753.10 and, therefore, the trial court could not make a determination as to such challenge. This, alone, is grounds for reversal of the trial court’s decision (and the Appellate Court Decision affirming the trial court’s decision) to dismiss Plaintiffs/Cross-Appellants’ Amended Complaint. The trial court should have deferred to the summary judgment procedure as the court did in *Grendell v. Ohio Environmental Protection Agency*, 146 Ohio App.3d 1, 4, 764 N.E.2d 1067 (2001).

The trial court, while concluding that R.C. 9.06 and section 753.10 were constitutional under Section 4, Article VIII, gave absolutely no analysis as to how it reached its conclusion other than stating that “[t]hose cases cited by Defendants in their Memorandum in Opposition at 11 are persuasive on this issue.” However, none of the cases cited by Defendants/Cross-Appellants in their “Memorandum in Opposition” filed in the trial court dealt with such convoluted transactions as are

involved in this case which convoluted transactions permit the State to enter into what it calls a sale of property or a management contract while at the same time controlling every aspect of the company managing, pursuant to the management contract, State property, with the State controlling whether or not it will retain the right to ultimately obtain ownership of property it claims to have sold.

The Appellate Court acknowledges that Plaintiffs/Cross-Appellants claim that R.C. 906 and section 753.10 violate both the Section 4, Article VII prohibition on joint ventures and prohibition against extending the State's credit to a private enterprise. However, it is unclear whether the Appellate Court addresses the claimed violation of the prohibition against extending the State's credit to a private enterprise. The Appellate Court (citing *Grendell* at 12, quoting *Taylor v. Ross Cty. Commrs.*, 23 Ohio St.22, 78 (1872)) does state that "payment of the annual ownership fee by the state to the prison operators does not violate Article VIII, Section 4 because the Ohio Constitution " 'does not forbid the employment of corporations, or individuals, associate or otherwise, as agents to perform public services; nor does it prescribe the mode of their compensation.' " (Appellate Court Decision, p. 14.) However, the cited language in *Taylor* regarded the purchase of services whereas the Annual Ownership Fee payments are not for services; rather, they are annual payments (totaling \$79,800,000) paid by the State to CCA for CCA's ownership costs of the property sold to CCA. The costs of CCA's public service are paid by the "Per Diem Fee" of \$44.25 per inmate (section 753.10(C)(1) and (10)). *Grendell*, at p. 12, citing *Taylor, supra*, pointed out the very difference which the Court of Appeals missed and Plaintiffs/Cross-Appellants rely on. *Taylor* said at p. 78, that contracting with a corporation to perform a service "is a different thing from investing public money in the enterprises of others, or from aiding them with money or credit."

The Appellate Court, in affirming the trial court's decision that R.C. 9.06 and section 753.10 were constitutional under Section 4, Article VIII, cited *Cincinnati v. Dexter*, 55 Ohio St. 93

(1986) which held that “[a] sale made in good faith and for fair market value under the circumstances [involved in *Dexter*], cannot properly be characterized as a loan of the credit of the municipality, directly or indirectly, to or in aid of the purchaser.” Fair market value is a factual determination and there is certainly a question (which is raised by Plaintiffs/Cross-Appellants throughout their pleadings, motions and memoranda) as to whether, under the convoluted transactions involved in this case, LECF was sold for fair market value. This, alone, is also grounds for reversal of the trial court’s decision that R.C. 9.06 and section 753.10 were constitutional under Section 4, Article VII.

In *C.I.V.I.C. Group v. City of Warren*, 88 Ohio St.3d 37, 723 N.E.2d 106 (2000), the Court noted the following:

The history behind the adoption of this section is relevant to our determination today. In the early days of statehood, Ohio’s fertile soil and abundance of water provided many opportunities, yet Ohioans lacked the efficient means to get their products to market. Thus, Ohio’s prosperity depended on the construction of a transportation network. David M. Gold, *Public Aid to Private Enterprise under the Ohio Constitution: Sections 4, 6, and 13 of Article VIII in Historical Perspective* (1985), 16 U.Tol.L.Rev. 405, 407-408. As explained in the editorial comment to Section 4, Article VIII (the provision prohibiting state activities):

“Since the state’s own resources were limited (at least at first), the legislature relied heavily on private enterprise to build and operate roads, bridges, ferries, canals and railroads. Most of the canal system was financed directly by the state, resulting in debts of \$16 million. In the 1830’s the state and local governments shifted to a policy of financing turnpike, canal and railroad companies by lending credit or purchasing stock. Insofar as an effective transportation network sprang into being in a remarkably short time, these practices had the desired result. But, they also had undesirable results: they put the state’s money and credit at risk in business schemes that often were risky at best, and the demonstrated willingness of the legislature and local bodies to use them was an open invitation for private interests to dip into the public till. Many of these companies failed, the public debt burgeoned as a consequence, and by 1850 the burden was more than the taxpayers could tolerate. This section was adopted to put a halt to these practices.” 2 Baldwin’s Ohio Revised Code Annotated (1993) 202.

Cases interpreting and applying Section 6, Article VIII of the Ohio Constitution also assist in interpreting and applying Section 4, Article VIII, because the prohibitions are “nearly identical.” *State*

ex rel. Eichenberger v. Neff, 42 Ohio App.2d 69, 74, 330 N.E.2d 454 (10th Dist. 1974). The purpose of the two Sections is to prevent private interests from tapping into public funds at taxpayer expense and prohibit the union of public and private capital or credit in any enterprise whatsoever. It does not matter that the public may benefit from the transaction. *C.I.V.I.C. Group, supra*, at 37 & 40, 723 N.E.2d 106.

Also, pertinent to applying Section 4, Article VIII of the Ohio Constitution is Article II, Section 15(d) of the Ohio Constitution, the purpose of which is to prevent the General Assembly from becoming “heavily involved in the subsidization of private companies and granting special privileges . . . designed to loan credit or give financial aid to private companies . . .” *Ohio Academy of Trial Lawyers, supra*, at 495, 715 N.E.2d. 198.

In this case, the State claims to have sold LECF for \$72,770,260. However, the State, as part of the claimed sale, obligates itself to make, for 21 years, Annual Ownership Fee payments of \$3,800,000 for financial support to CCA for CCA’s ownership costs such as wear and tear on the actual physical prison structure, to subsidize CCA’s cost to purchase new or replace old equipment used in the prison and to subsidize any other cost CCA has which is associated with owning LECF. These Annual Ownership Fee payments, which total \$79,800,000 (more than CCA paid to the State to purchase LECF) are in addition to the Per Diem Fee payments the State makes to house and feed the inmates. CCA will end up owning LECF without even paying anything for it.²

Additionally, the State virtually guarantees CCA a profit on the backs of public employees. The Per Diem Fee is \$79,561 (based on a charge of \$44.25 per inmate for 1,798 inmates) which amounts to an annual payment of \$29,039,765. The Per Diem Fee is based on the requirement of R.C. 9.06(A)(4) that CCA operate LECF at a cost which is 5% less than the costs incurred by the State to operate LECF.

² Because MTC did not purchase the Marion Complex, no Annual Ownership Fee is involved in that transaction. However, the Marion Complex could still be sold and an Annual Ownership Fee subsidy could also be included in that deal. R.C. 753.10(B)(1)(2).

How does CCA meet the 5% cost reduction requirement? State employee participation in the Ohio Public Employees Retirement System (“OPERS”) is compulsory. R.C. 145.03(A). State employers contribute 14% to OPERS for each employee. When the prison is privatized, the employees, under HB 153, become private-sector employees. Participation in social security is compulsory even for those working under the contract described in R.C. 4117.01(C), and it cannot be waived. 26 U.S.C. § 3121(a). Private-sector employers pay FICA (social security). These FICA contributions are 6.2% per employee. By forcing employees out of OPERS and into social security, the employer saves 7.8% on pension costs alone.

Adding to the harm suffered by employees working at privatized prisons, Congress amended the Social Security Act in the 1980s by enacting the Windfall Elimination Provision (WEP) which is also referred to as the Government Pension Offset (“GPO”). 42 U.S.C. § 415(a)(7) decrees that individuals who participate in both OPERS and social security but do not accumulate 30 years of contributions in social security will have the GPO offset applied to decrease a percentage of their future social security benefit. 42 U.S.C. § 415(a)(7)(B)(ii)(1-5). Thus, an employee with 15 years of state service who lost his or her state job and was hired by MTC and waived continued OPERS participation cannot work 30 years under social security because he or she will not live long enough. Thus, they will be harmed again by the future loss of social security benefits when they retire. Amici Curiae strongly object to forcing public employees out of OPERS and into social security resulting in future loss to such employees, especially, when such losses are imposed on public employees in order to virtually guarantee the owner of a privatized prison an operating profit.

It is a fair and real inference from the allegations in the Amended Complaint that in the year 2032 (21 years from the date of this claimed sale) should CCA sell the prison facility and undeveloped surrounding acreage back to the State, the economics would look like this. The State would pay to repurchase the prison for no less than \$72,770,260, the amount it received from CCA

when it purchased LECF in 2011. CCA would have received from the State a total of \$152,570,260 (which amount does not include the total amount of Per Diem Fees from which CCA derives its profit for operating LECF) on an investment of only \$72,770,260. CCA will walk away with \$79,800,000 which is the amount of the financial support the State gave to CCA during the period of the O&M Contract. As well, CCA will have made a profit on its Per Diem Fees from the State. If the State never re-purchases the LECF property, CCA owns the property and because it has been subsidized by the State through the Annual Ownership Fee, CCA has paid nothing for the property. The State has financed the entire purchase price through the Annual Ownership Fee payments. And, as the owner, CCA can sell the property to anyone and pocket those funds as well.

CCA, as the owner of LECF and the surrounding 119 acres, also has the right to develop the property surrounding the prison in any manner it sees fit. If developed, and the State desires to exercise its right to purchase LECF, CCA, because of the right-of-first refusal language in R.C. 753.10(B)(2)(d)(i) and (ii) and the vetoed language in R.C. 753.10(B)(2)(d)(i), has the ability to make the State pay for some or all of its development and improvement costs on the 119 acres surrounding LECF. If the State declines to pay for the developed and improved property, then CCA may sell all of it to anyone. Then the State will be required to build another prison at substantial cost without recouping anything from CCA and the burden will fall upon another governor and General Assembly in the future.

If the transfer of LECF by the State to CCA for \$72,770,260 were actually a sale, the State would transfer the deed to LECF to CCA and CCA would pay the State \$72,770,260 and that would be the end of the transaction. If CCA did not have on hand cash in the amount of \$72,770,260, it would have to borrow such funds. In borrowing such funds, CCA would have to show any potential lender that CCA could repay the borrowed funds. A potential lender would look to the credit worthiness of CCA in deciding whether CCA would be able to repay the borrowed funds. However,

in this case, the State has basically guaranteed CCA's ability to repay the borrowed funds by obligating itself to pay to CCA Annual Ownership Fee payments in the amount of \$79,800,000. Effectively, the State has given its credit to CCA, and to CCA's potential lenders, to aid CCA's purchase of the property. What lender would not extend credit to a private corporation if the State obligated itself to pay the borrower the amount of funds borrowed from the lender.

Section 4, Article III, Section 6, Article III and Article II, Section 15(d) were enacted to prevent the State's entanglement with private entities where the credit of the State is used or lent to such private entities and when the State and private entities have essentially entered into a joint venture resulting in costs to the taxpayer. Here, the State has entered into exactly the type of entanglement these Constitutional Sections were enacted to prevent.

V. **PROPOSITION OF LAW III:**

Individuals working in the state-owned prisons that have been privatized pursuant to HB 153, are public employees as defined in R.C. 4117.01(C) and the trial court had jurisdiction to make this determination.

The trial, properly holding that it had jurisdiction over the underlying matter, initially stated that R.C. 9.06(K) did not vest the court with jurisdiction over the entire case but only vested the court with jurisdiction over the constitutional claims raised in the case. However, the trial court ultimately correctly rejected the Defendants-Appellants' argument that SERB had jurisdiction over Plaintiffs/Cross-Appellants' claim requesting that those working in the privatized prisons be declared public employees as that term is defined in R.C. 4117.02(C) because that administrative remedy was "futile" and "useless." But, despite reaching this latter conclusion, the trial court failed to make a determination and/or declaration that the individuals now working in the state-owned prisons, including but not limited to, NCCI and NCCIC, that have been privatized are public employees as defined in R.C. 4117.01(C).

R.C. 4117.01(C) defines a public employee as:

[A]ny person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer.

As stated by the Appellate Court, “R.C. Chapter 4117 established a comprehensive framework for the resolution of public-sector labor disputes by creating a series of new rights and setting forth specific procedures and remedies for the vindication of those rights. *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St. 3d 167, 169 (1991).” (Appellate Court Decision, P. 15.) However, as noted in *Franklin Cty. Law Enforcement Assn., supra*, in paragraph one of the syllabus, SERB “has exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117.” In this regard, nowhere in R.C. Chapter 4117 is SERB given the jurisdiction to determine who is and who is not a public employee; rather, as noted by the Appellate Court, the jurisdiction given to SERB is to vindicate the rights given to public employees in R.C. Chapter 4117. As SERB is not given such jurisdiction, such jurisdiction vests in the courts.

The “right to control” test is determinative of whether employees are public employees. *Hamilton v. State Emp. Relations Bd.*, 70 Ohio St. 3d 210, 213, 638 N.E.2d 522 (1994)³; *Gillum v. Indus. Comm.*, 141 Ohio St. 373, 48 N.E.2d 234 (1943). “The principal test applied to determine the character of the arrangement is that if the employer reserves the right to control the manner or means of doing the work, the relation created is that of master and servant . . .” *Id.*

In this case, the record contains extensive evidence indicating the State Defendants-Appellants retain control over the entire operation of the Marion Complex after the state-owned

³ In *Hamilton*, while SERB made an initial determination that the employees of the union seeking recognition were public employees, no one challenged SERB’s jurisdiction to do so. Additionally, it was the Court which made the ultimate decision, using common law principles of the right to control, that the employees in the union were public employees.

prisons were privatized. Although the State Defendants-Appellants offered for sale NCCI and NCCIC, they did not actually sell these state-owned prisons. They combined them into one package and privatized these two prisons through the O&M Contract between the State Defendants-Appellants, a public employer, and MTC, a private employer. As a consequence, MTC operates and manages the two prisons while the State Defendants-Appellants continue to own, control and retain jurisdiction over the operations of the Marion Complex by virtue of the O&M Contract.

Pursuant to R.C. 9.06, all O&M Contracts must contain certain requirements. Under R.C. 9.06, MTC is obligated to comply with all rules promulgated by Defendant-Appellant ODRC which apply to state-run prisons. ODRC specifically dictates the policy on “use of force” which must be followed by all prison employees; the conditions under which corrections officers may carry and use firearms in the course of their employment; terms which contractors’ employees must comply with when inmates escape from the prisons; parameters in which contractors’ employees may discipline inmates; the staffing pattern at the prisons; services provided and goods produced at the prisons; prison funds; etc. R.C. 9.06(B)(3), (B)(7), (B)(12), (B)(13), (B)(18), (B)(19), (E) and (F). Certain other functions are reserved for Defendant-Appellant ODRC including awarding or revoking earned credits; approving good time; approving the type of work an inmate may perform; setting wages for inmates; reclassification of inmates; the placement of inmates in restrictive custody; approval of inmate work releases; etc. R.C. 9.06(C)(1)-(6). Under R.C. 9.06(B)(17), the State may even terminate the O&M Contract at its discretion. For these reasons, the individual Plaintiffs/Cross-Appellants currently working at the privatized prisons are public employees because the State, and its agents and employees, retain extensive and ultimate jurisdiction and control over major aspects of the employees of the Marion Complex.

For similar reasons, the individual Plaintiffs/Cross-Appellants working at the privatized prisons, including the Marion Complex, are public employees because the State Defendants-Appellants

are, under the common law, the employer of such Plaintiffs/Cross-Appellants. Courts have recognized that a defendant entity that does not directly employ a plaintiff may still be the plaintiff's employer if the defendant entity is so interrelated to another company employer and has control over that company's employees such that the defendant entity and the other company are acting as a "joint employer" and considered a "single employer" or "integrated enterprise" of the plaintiff employee. *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990 (6th Cir.1997); *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360 (6th Cir.1982); *Carrier Corp. v. NLRB*, 768 F.2d 778 (6th Cir.1985). This is known as the "single employer" or "integrated enterprise" doctrine. *Id.*

Under the "single employer" or "integrated enterprise" doctrine, two companies or entities may be considered so interrelated that they are considered a single employer. *Id.* The determination as to whether two companies or entities are a single employer is based on four factors: 1) interrelation of operations; 2) common management; 3) centralized control of labor relations and personnel; and/or 4) common ownership and financial control. *York*, 684 F.2d at 362. None of these factors is conclusive. *Id.*

As discussed above, the State Defendants-Appellants and the private company, MTC, clearly share in the operations and control of the privatized prisons now known as the Marion Complex. Therefore, the State Defendants-Appellants and MTC should be treated as an integrated enterprise. And, the individual Plaintiffs/Cross-Appellants currently working at the privatized prisons should be declared public employees as they are employees of the State. At the very least, these issues cannot be decided in a ruling on a motion to dismiss; rather, the trial court should have accepted evidence, made a factual determination as to whether the individual Plaintiffs/Cross-Appellants now working in the state-owned prisons that have been privatized are public employees as defined in R.C. 4117.01(C).

VI. CONCLUSION

HB 153 is unconstitutional, and therefore void, because it violates the one-subject rule of Article II, Section 15(d) of the Ohio Constitution. If it is determined that HB 153 does not violate the one-subject rule and is constitutional, R.C. 9.06 and section 753.10 (which statutory provisions cannot be severed out of HB 153 when determining whether HB 153 is constitutional) are unconstitutional both on their face and as applied. If it is determined that R.C. 9.06 and section 753.10 are constitutional, all employees of any prison privatized pursuant to HB 153 are public employees.

Respectfully submitted,



Robert J. Walter (0009491)
Thomas I. Blackburn (0010796)
Diem N. Kaelber (0087155)
Buckley King LPA
One Columbus
10 W. Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 461-5600
(614) 361-5630 (*facsimile*)
Walter@buckleyking.com
Blackburn@buckleyking.com
Kaelber@buckleyking.com

Attorneys for Amici Curiae Ohio Association of Public School Employees (OAPSE)/AFSCME Local 4, AFL-CIO, Fraternal Order of Police of Ohio, Incorporated, and American Federation of State, County, Municipal Employees Ohio Council 8

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing MEMORANDUM OF AMICI CURIAE, OHIO ASSOCIATION OF PUBLIC SCHOOL EMPLOYEES (OAPSE)/AFSCME LOCAL 4, AFL-CIO, FRATERNAL ORDER OF POLICE OF OHIO, INCORPORATED, AND AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES OHIO COUNCIL 8, IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS COMBINED MEMORANDUM IN RESPONSE TO DEFENDANTS-APPELLANTS/CROSS-APPELLEES' MEMORANDUM AND IN SUPPORT OF JURISDICTION OF THE CROSS-APPEAL, was duly served via U.S. First Class mail, postage prepaid, upon the following parties this 7th day of April, 2014:

MICHAEL DEWINE, ESQ.
Attorney General of Ohio
ERIC MURPHY, ESQ.
State Solicitor
RICHARD COGLIANESE, ESQ.
WILLIAM L. COLE, ESQ.
ERIN BUTCHER-LYDEN, ESQ.
Assistant Attorneys General
MEGAN M. DILLFOFF, ESQ.
Deputy Solicitor
30 East Broad St, 17th Floor
Columbus, Ohio 43215
Attorneys for Defendants-Appellants/Cross-Appellees: State of Ohio, Governor John R. Kasich, Attorney General Mike DeWine, Secretary of State Jon Husted, Auditor of State David Yost, Ohio Department of Rehabilitation and Correction, and Director Gary C. Mohr, Ohio Department of Administrative Services and Director Robert Blair, Treasurer Josh Mandel, Office of Budget and Management and Director Timothy S. Keen

CHARLES R. SAXBE, ESQ.
JAMES D. ABRAMS, ESQ.
CELIA M. KILGARD, ESQ.
Taft, Stettinius & Hollister LLP
65 E. State St., Suite 1000

JAMES E. MELLE, ESQ.
167 Rustic Place
Columbus, Ohio 43214-2030
Attorney for Plaintiffs-Appellees/Cross-Appellants: Ohio Civil Service Employees Association, David Combs, Clair Crawford, Lori Leach Douce, Margo Hall, Sheila Herron, Daniel Karcher, Rebecca Sayers, Angela Schuster, Troy Tackett, Kathy Tinker, Lisa Zimmerman and ProgressOhio.org

Robert J. Walter, ESQ.
Thomas I. Blackburn, ESQ.
Diem N. Kaelber, ESQ.
Buckley King LPA
One Columbus
10 W. Broad Street, Suite 1300
Columbus, Ohio 43215
Attorneys for Amici Curiae Ohio Association of Public School Employees (OAPSE)/AFSCME Local 4, AFL-CIO, Fraternal Order of Police of Ohio, Incorporated, and American Federation of State, County, Municipal Employees Ohio Council 8

NICHOLAS A. IAROCCI, ESQ.
Ashtabula County Prosecuting Attorney
25 West Jefferson Street

Columbus, Ohio 43215-3413
Attorneys for Appellees: Corrections
Corporation of America and CCA Western
Properties, Inc.

Jefferson, Ohio 44047
Attorney for Appellees: Dawn M. Cragon,
Roger A. Corlett and Judith A. Barta

ADAM W. MARTIN, ESQ.
KEVIN W. KITNA, ESQ.
Sutter O'Connell
3600 Erieview Tower
1301 East 9th Street
Cleveland, Ohio 44114
Attorneys for Defendant-Appellant/Cross-
Appellee Management & Training Corporation



THOMAS I. BLACKBURN (0010796)

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