

ORIGINAL

In the
Supreme Court of Ohio

State ex rel. OHIO CIVIL SERVICE	:	Case No. 2014-0319
EMPLOYEES ASSOCIATION, et al.,	:	
	:	On Appeal from the
Appellees/Cross-Appellants,	:	Franklin County
	:	Court of Appeals,
v.	:	Tenth Appellate District
	:	
STATE OF OHIO, et al.,	:	Court of Appeals
	:	Case No.12AP001064
Appellants/Cross-Appellees.	:	

STATE APPELLANTS' MEMORANDUM IN RESPONSE
TO APPELLEES' CROSS-APPEAL

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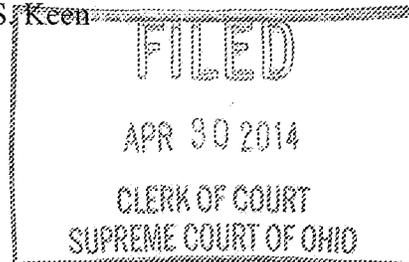
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INTRODUCTION

Plaintiffs—the Ohio Civil Service Employees Association, several of its members, and ProgressOhio.org—raise two propositions of law in their cross-appeal, both of which have been rejected by every judge to consider them and neither of which implicates a substantial constitutional question or a question of public or great general interest. The Court should thus deny jurisdiction over Plaintiffs’ cross-appeal.

Joinder of Property. Plaintiffs’ first proposition of law—that the State’s sale of a prison to Corrections Corporation of America (“CCA”) resulted in an impermissible joint-ownership arrangement in violation of Article VIII, Section 4 of the Ohio Constitution—fails under well-established law. Article VIII, Section 4 forbids the State from “becom[ing] a joint owner . . . in any company or association.” Here, however, the State sold Lake Erie Correctional Facility *outright* to CCA. Thus, what belongs to the State and what belongs to the private party remain “separate and distinct,” not “intermingl[ed].” *State ex rel. Campbell v. Cincinnati St. Ry. Co.*, 97 Ohio St. 283, 306 (1918). And, to the extent Plaintiffs argue the State has impermissibly extended “credit” to CCA under Article VIII, Section 4, by paying CCA for the use of its facility, that claim does not appear in their complaint. Regardless, no case has ever held that the Constitution “prescribe[s] the mode of the [State’s] compensation” to a private entity for the use of a facility. *Grendell v. Ohio EPA*, 146 Ohio App. 3d 1, 12 (9th Dist. 2001), quoting *Taylor v. Ross Cnty. Comm’rs*, 23 Ohio St. 22, 78 (1872). This case should not be the first.

Public Employees. Plaintiffs’ second proposition of law—that the lower courts had subject-matter jurisdiction to decide whether individuals working for private prison contractors qualify as “public employees” under R.C. Chapter 4117—also raises no novel legal question worth this Court’s attention. It is syllabus law that the State Employment Relations Board (“SERB”), not a court of common pleas, “has exclusive jurisdiction to decide matters committed

to it pursuant to R.C. Chapter 4117.” *Franklin Cnty. Law Enforcement Ass’n v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St. 3d 167, syl. ¶ 1 (1991). Thus, “[i]n numerous cases, courts have held that SERB has exclusive original jurisdiction over the issue of whether a particular entity is a ‘public employer’ or whether particular parties or groups are ‘public employees.’” *Carter v. Trotwood-Madison City Bd. of Educ.*, 181 Ohio App. 3d 764, 776 (2d Dist. 2009). Here, the complaint asserted the claim that the individuals working for the private prison contractors qualify as “public employees” under R.C. 4117.01(C) entitled to public-employee wages, benefits, and pensions. (Compl. ¶¶ 151-158.) But determining public-employee status under R.C. Chapter 4117 is exclusively within SERB’s jurisdiction, *see Carter*, 181 Ohio App. 3d at 776, so the lower courts rightly dismissed this claim for lack of jurisdiction.

STATEMENT OF THE CASE AND FACTS

Because the State Appellants have already described the relevant background in their jurisdictional memorandum, they will elaborate here only on the relevant procedural history.

A. The lower courts both rejected Plaintiffs’ claim that the State impermissibly joined its property with a private entity when it sold a prison to CCA.

The “Joinder of Property Rights” claim in Plaintiffs’ complaint alleged that the State’s contract for sale with CCA concerning the Lake Erie Correctional Facility “ma[d]e the State of Ohio a joint owner, created an ‘individual association’ and/or mixed its property rights with the rights” of the private owner, all in violation of “the prohibition in Section 4, Article VIII of the Ohio Constitution against joining public and private property rights.” (Compl. ¶ 148.) Likewise, this “Joinder of Property Rights” claim asserted that, “[f]or many of those same reasons,” the State’s contract for the private management of the North Central Correctional Institution (which it continued to own) also made “the State of Ohio a joint owner, created an ‘individual

association' and/or mixed its property rights" with those of the private prison manager in violation of the same constitutional provision. (*Id.* ¶ 149.)

The court of common pleas dismissed this part of Plaintiffs' complaint for failure to state a claim. After reviewing both the relevant constitutional provision and the statutes authorizing the prison sale and management contracts, the court concluded that the "State of Ohio simply does not become a joint owner." *State ex rel. Ohio Civ. Serv. Emps. Ass'n v. Ohio*, No. 12-CV-8716, at 20 (Ohio Ct. Com. Pl. Nov. 20, 2012) ("Com. Pl. Op.," Ex. 5 to State Jur. Mem.). It noted that "[r]egulatory oversight—which occurs in many facets of state government—is not the same as joint ownership." *Id.* And it concluded that the State had ample reason "to create and enforce rules relating to the operation of [its] prisons" and that these rules did not create any joint ownership in violation of the Ohio Constitution. *Id.*

The Tenth District affirmed, holding that "nothing in the plaintiffs' complaint demonstrates that the challenged provisions [of Ohio law] result in the sort of partnerships or unions that the Ohio Constitution forbids." *State ex rel. Ohio Civ. Serv. Emps. Ass'n v. Ohio*, No. 12AP-1064, 2013-Ohio-4505 ¶ 38 (10th Dist.) ("App. Op.," Ex. 4 to State Jur. Mem.). That is because the "state retains no ownership interest" in the facility it sold. *Id.*, citing, among others, *Grendell v. Ohio EPA*, 146 Ohio App. 3d 1, 11 (9th Dist. 2001). The Tenth District also addressed the annual ownership fees paid by the State to the private prison owner and found no constitutional violation because Article VIII, Section 4 does not forbid the State from employing private entities "as agents to perform public services" or "prescribe the mode of their compensation." *Id.* (citation omitted).

- B. The lower courts both rejected Plaintiffs' claim that they qualify as "public employees" under R.C. 4117.01(C) on the ground that SERB has exclusive jurisdiction over that claim.**

In their complaint, Plaintiffs asked for a declaratory judgment that the individual Plaintiffs working for the private prison contractors are "public employees" within the meaning of R.C. 4117.01(C). (Compl. ¶¶ 151-58.) Plaintiffs explained that, absent such a declaration, those particular Plaintiffs "will not be paid according to the wage scale applicable to state public employees in the applicable CBA [collective bargaining agreement]." (*Id.* ¶ 154.) The common pleas court determined that only SERB had jurisdiction to hear this kind of statutory claim, because "SERB has exclusive jurisdiction over employee rights, including whether or not the named individual plaintiffs are public employees" under R.C. Chapter 4117. Com. Pl. Op. at 7. The Tenth District affirmed this holding both because the relevant claim "depends on interpretation of the scope of 'public employer' as defined by R.C. Chapter 4117" and because "SERB has exclusive jurisdiction over such interpretation." App. Op. ¶ 49.

THE CROSS-APPEAL RAISES NEITHER A SUBSTANTIAL CONSTITUTIONAL QUESTION NOR A QUESTION OF PUBLIC AND GREAT GENERAL INTEREST

- A. Plaintiffs' joinder-of-property claim does not raise a substantial constitutional question because the prison sale adhered to longstanding case law interpreting Article VIII, Section 4.**

Plaintiffs' first proposition of law seeks to resurrect their claim that the State's sale of a prison to CCA made the State "a joint owner, created an 'individual association' and/or mixed its property rights" with CCA in violation of Article VIII, Section 4 of the Ohio Constitution. (Compl. ¶ 148.) But this claim does not present a substantial constitutional question.

First, the prison sale adhered to black-letter law dating back over a century that the State or a municipality may sell its property without running afoul of Article VIII, Section 4 or its counterpart for local governments in Article VIII, Section 6. *See, e.g., Grendell v. Ohio EPA,*

146 Ohio App. 3d 1, 12 (9th Dist. 2001) (noting that the “Ohio Supreme Court [has] held that a city may sell a railroad and receive a percentage of the future earnings as part of the sale price”); *State ex rel. Bruestle v. Rich*, 159 Ohio St. 13, 34 (1953) (upholding city’s ability to sell redeveloped homes); *City of Cincinnati v. Dexter*, 55 Ohio St. 93, 110 (1896) (noting that a railway sale did not violate Article VIII, Section 6). Indeed, Plaintiffs’ contrary suggestion would mean that the State or a municipality could not constitutionally sell public property—a far-reaching conclusion that would negatively affect the ability of governments to operate.

Second, Plaintiffs’ first proposition of law does not raise any of the serious separation-of-powers concerns identified in the State Appellants’ original appeal. For one thing, the Tenth District *rejected* Plaintiffs’ constitutional challenge under Article VIII, Section 4, so this portion of its decision comports with the cardinal principles of judicial deference to legislation identified in the State Appellants’ opening memorandum. *See State v. Cook*, 83 Ohio St. 3d 404, 409 (1998) (“An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.” (citation omitted)); *State v. Anderson*, 57 Ohio St. 3d 168, 171 (1991) (same). For another thing, unlike the Tenth District’s analysis concerning the one-subject rule, this part of its decision did not permit any potentially intrusive discovery into legislative intent. It thus did not contemplate improper “entanglement with the legislative process.” *In re Nowak*, 104 Ohio St. 3d 466, 2004-Ohio-6777 ¶ 72.

Third, Plaintiffs’ cross-appeal suggests that the prison sale might have violated the prohibition in Article VIII, Section 4 against the State’s lending “credit” to private entities. *See, e.g.,* Pls.’ Resp. 21. But Plaintiffs’ complaint lacks any allegations about an illegitimate extension of credit, alleging instead that the challenged sale resulted in an improper “joinder of

property rights.” (See Compl. ¶¶ 146-50 (claiming that the State has become a “joint owner, created an ‘individual association’ and/or mixed its property rights” with those of the private prison owner and managers)). Not surprisingly, therefore, neither the common pleas court nor the Tenth District addressed any specific “credit” based arguments. See App. Op. ¶¶ 33-40; Com. Pl. Op. at 20. This is thus a poor vehicle in which to decide the meaning or scope of the separate “credit” provision within Article VIII, Section 4, because the Court would not have the benefit of lower-court analysis. Cf. *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 489 n.5 (1986) (recognizing, as a prudential matter, that “it would be inappropriate for us to address [a] question without the benefit of a decision on the issue below”); see also *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St. 3d 78, 81 (1997) (per curiam).

B. Plaintiffs’ public-employee claim raises a repeatedly rejected argument, and thus is not one of any public or great general interest.

Plaintiffs’ second proposition of law likewise does not raise an issue worthy of this Court’s attention. First, the Court’s cases already provide the answer: SERB “has exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117.” *Franklin Cnty. Law Enforcement Ass’n v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St. 3d 167, syl. ¶ 1 (1991); see *Ohio Historical Soc’y v. State Empt. Relations Bd.*, 66 Ohio St. 3d 466, 469 (1993) (“The only substantive allegation in the Society’s complaint for declaratory judgment was that it is not a public employer. Resolution of this allegation depends entirely on the provisions of R.C. Chapter 4117, over which SERB has exclusive original jurisdiction.”). Here, Plaintiffs’ complaint relies on R.C. Chapter 4117 to support their request for a judgment declaring the individual Plaintiffs “public employees.” Since R.C. Chapter 4117 “establish[es] a comprehensive framework for the resolution of public-sector labor disputes,” *Franklin Cnty.*

Law Enforcement Ass'n, 59 Ohio St. 3d at 169, both lower courts correctly determined that SERB had exclusive jurisdiction over this claim.

Second, and perhaps unsurprisingly given the clear legal answer, this Court recently denied jurisdiction over a case resolving the same question. *See Carter v. Trotwood-Madison City Bd. of Educ.*, 181 Ohio App. 3d 764, 776 (2d Dist. 2009). In *Carter*, the relevant issue concerned whether retirees qualified as “public employees” under R.C. Chapter 4117. *See id.* at 775. The Second District noted that, “[i]n numerous cases, courts have held that SERB has exclusive original jurisdiction over the issue of whether a particular entity is a ‘public employer’ or whether particular parties or groups are ‘public employees.’” *Id.* at 776. It thus “conclude[d] that SERB has exclusive jurisdiction over the issue of whether [the plaintiffs], as retirees, are ‘public employees’ for purposes of R.C. 4117.01(C).” *Id.* The plaintiffs in that case filed a discretionary appeal in this Court, but the Court declined jurisdiction. *See Carter v. Trotwood-Madison City Bd. of Educ.*, 122 Ohio St. 3d 1504, 2009-Ohio-4233 (Ohio 2009). Plaintiffs here point to no change in law that would alter that result. This issue was not worthy of the Court’s time in 2009, and it is not worthy of the Court’s time today.

Third, given this clear rule, the Court’s review here likely would not serve to *clarify* the law; it would only serve to *confuse* the law—by creating the potential for uncertainty over what until now has been a bright-line rule. That uncertainty would be troubling given that the rule concerns subject-matter jurisdiction and so should be as clear as possible. *See Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (noting that courts “benefit from straightforward rules under which they can readily assure themselves of their power to hear a case”). If Plaintiffs had been serious about their claim under R.C. 4117.01(C), they should have attempted to file it with SERB and asked that administrative body to determine whether the individual Plaintiffs were “public

employees.” If SERB had returned an unfavorable decision, Plaintiffs could have appealed under R.C. 119.12. Instead, Plaintiffs persist in a litigation strategy that this Court’s precedent forecloses. Their fight to change black-letter law does not create a matter of public or great general interest warranting this Court’s grant of jurisdiction.

C. The propositions of law in Plaintiffs’ cross-appeal are not necessary or even helpful to decide the propositions of law in the State Appellants’ original appeal.

Finally, it should be noted that this is not one of those cases in which granting review over the cross-appeal’s propositions of law would assist the Court in resolving the propositions of law in the original appeal. The cross-appeal’s two propositions of law are *completely unrelated* to the State Appellants’ original propositions of law. One cross-appeal claim involves a provision of Ohio’s Constitution that is entirely distinct from the one-subject provision at issue in the State Appellants’ appeal; the other involves a question of statutory construction rather than constitutional law. The Court can have a full and complete adjudication of the State Appellants’ appeal regardless of whether it accepts jurisdiction of Plaintiffs’ cross-appeal.

ARGUMENT

State Cross-Appellees’ Proposition of Law I:

The State does not enter into an impermissible joint ownership of property in violation of Article VIII, Section 4 of the Ohio Constitution when it sells a piece of property to a private owner and relinquishes all of its claims to that property.

Article VIII, Section 4 of the Ohio Constitution states: “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 whatsoever.” Ohio Const. art. VIII § 4. Both lower courts properly found that the State’s prison sale to CCA under

R.C. 9.06 and Section 753.10 of the biennial budget bill did not result in the State becoming a “joint owner, or stockholder, in any company or association” with CCA.

Article VIII, Section 4 was passed in response to the State guaranteeing the debts of private entities engaged in the construction of railroads and canals in the early nineteenth century. “When many of the private interests failed, public debt soared and heavy taxation followed.” *Grendell*, 146 Ohio App. 3d at 7; see *C.I.V.I.C. Grp. v. City of Warren*, 88 Ohio St. 3d 37, 39-40 (2000). The provision sought to end the State’s ability to gamble public resources on the success of these private enterprises. *Grendell*, 146 Ohio App. 3d at 8.

Accordingly, Article VIII, Section 4 has never been interpreted to preclude all relationships between the State and corporations. To the contrary, forbidden joint ownership occurs only when the State is “the owner of part of a property which is owned and controlled in part by a corporation or an individual,” *Alter v. Cincinnati*, 56 Ohio St. 47, 64 (1897), or when the State and a corporation join their property rights “to produce the integral whole,” *State ex rel. Eichenberger v. Neff*, 42 Ohio App. 2d 69, 75 (10th Dist. 1974). Where, by contrast, “ownership of public property is kept ‘separate and distinct’ from privately owned property, the court has found no prohibited business partnership.” *Grendell*, 146 Ohio App. 3d at 10, quoting *State ex rel. Campbell v. Cincinnati St. Ry. Co.*, 97 Ohio St. 283, 306 (1918). Likewise, “[t]he 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.” *Grendell*, 146 Ohio App. 3d at 12, quoting *Taylor v. Ross Cnty. Comm’rs*, 23 Ohio St. 22, 78 (1872).

The prison sale at issue here falls on the constitutional side of the line. To begin with, the sale comports with the black-letter law permitting the State or local governments to sell public

property. *See Bruestle*, 159 Ohio St. at 34; *Dexter*, 55 Ohio St. at 110. The prison sale that occurred under R.C. 9.06 and Am. Sub. H.B. 153 § 753.10 in no way resulted in the joint ownership of assets by the State and CCA. Under the sale contract, the State agreed to relinquish *all* of its ownership rights in exchange for a lump-sum payment. Am. Sub. H.B. 153 § 753.10(B)(2)(a) (authorizing the State to enter with a private contractor “[a]n agreement for the sale to the contractor of the state’s right, title, and interest in the [prison] facility, the land situated thereon, and specified surrounding land”).

Nor does the State’s method of compensating CCA for the use of CCA’s prison run afoul of Article VIII, Section 4. Plaintiffs repeatedly note that the State has agreed to pay CCA an “Annual Ownership Fee” for the costs of maintaining the prison. *See, e.g.*, Pls.’ Resp. 1, 23-24. But that fee is not evidence of joint ownership of the prison. In fact, the fee is evidence of the *opposite*. Because the State no longer owns the prison, it pays the prison’s owner for the ability to use it. That fee does not include the cost of caring for inmates because the State pays that cost in the form of a per diem rate to the prison *manager*. But the per diem rate fails to compensate the *owner*. By separating the inmate per diem from the usage fee, the State ensures that it can change who manages the prison (if, for example, a particular manager proves ineffective) even though the owner of the prison remains the same. That kind of contract for the use of a facility is constitutional and does not create a prohibited joint venture. *Cf. Alter*, 56 Ohio St. at 64 (public entity “may lease from an individual or corporation any property of which it may need the use”); *State ex rel. McElroy v. Baron*, 169 Ohio St. 439, 444 (1959) (upholding lease arrangement). Simply stated, the Constitution does not “prescribe the mode of . . . compensation” that the State may pay corporations in exchange for their services—here, the use of a corporation’s prison. *Grendell*, 146 Ohio App. 3d at 12, quoting *Taylor*, 23 Ohio St. at 78.

Plaintiffs also point to the State's right of first refusal to repurchase the prison. *See* Pls.' Resp. 18. That guarantee simply permits the State to repurchase the prison and its land if the private owner chooses to sell it or defaults on its financial agreements. Am. Sub. H.B. 153 § 753.10(B)(2)(d); *see* R.C. 9.06(J)(4). The State is not obligated to repurchase the property, nor is it able to repurchase the property without one of the triggering events first occurring. *Id.*

Plaintiffs' contrary arguments lack merit. This case is nothing like the prior cases on which Plaintiffs have relied. In *Alter*, Cincinnati authorized the construction of waterworks enlargements that would be joined to the city's existing waterworks but owned by the private party that constructed them. 56 Ohio St. at 65-66. The Court held that such a scheme violated the constitutional prohibition on joint public-private ventures. *Id.* at 67. While it was constitutional for the city to "lease from an individual or corporation any property of which it may need the use," the city could not constitutionally "engage in an enterprise with an individual or corporation for the construction . . . of property which, as a completed whole, is to be owned and controlled in part by the city and in part by an individual corporation." 56 Ohio St. at 64.

The Tenth District invalidated a similar joint venture in *Neff*. There, Ohio University planned to develop a parcel of State-owned land by leasing the land to Kroger to build a grocery store. 42 Ohio App. 2d at 75. Under the plan, Kroger would own the shopping center on the State's land. *Id.* The Tenth District held that this leasing agreement violated Article VIII, Section 4, noting that Kroger could "encumber[]" the property with mortgages and, to the extent it defaulted, the University would have to "give recognition to the rights of the mortgagees." *Id.* In essence, therefore, the State had lent its credit to Kroger by this arrangement.

The sale of the prison at issue in this case, by contrast, is by quit claim deed conveying "all of the right, title and interest of the state," not simply the right to the prison itself. Am. Sub.

H.B. 153 § 753.10(C)(2); Governor's Deed, Ex. 2 of the Complaint. The budget bill also provides that the real property "shall be sold as an entire tract and not in parcels." Am. Sub. H.B. 153 § 753.10(C)(5). The prison sale thus does not join public and private property; it sells property entirely to a private owner. Where, as here, "the contract clearly outlines each party's separate role in the operation of a program and those roles are distinctive as to such matters as legal ownership of property, control over day-to-day operations, construction, maintenance, employee management, and establishment of fees," there is no joint control or community of interest. *Grendell*, 146 Ohio App. 3d at 11. The prison sale in this case simply does not implicate the constitutional prohibition on joint ownership between public and private parties.

Finally, the "credit" arguments that Plaintiffs raise under Article VIII, Section 4 fail because the State has not lent its credit to CCA. As noted, the credit clause of Article VIII, Section 4 is primarily concerned "about placing public tax dollars at risk to aid private enterprise." *Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 62 Ohio St. 3d 111, 114 (1991); see *Walker v. City of Cincinnati*, 21 Ohio St. 14, 53-54 (1871). Here, however, the State has not bet any money on CCA succeeding. In fact, if any entity is on the hook for unexpected future costs, it is the new prison *owner*, which bears the burden of paying for whatever costs the building might incur in the years to come. The State, by contrast, pays a *fixed fee* for its use of the facility, regardless of the cost actually incurred to maintain the prison. All of the risks are with the prison *owner*, not the *State*.

Nor is this case like *C.I.V.I.C. Group*, in which a city agreed to pay a private developer twenty percent of the cost of a private subdivision development. 88 Ohio St. 3d at 38. This Court held that the arrangement resulted in the city "taking action 'to raise money for' and 'loan its credit to, or in aid of' private corporations" in violation of the Ohio Constitution. *Id.* at 42.

The repayment scheme at issue was unconstitutional because it “place[d] taxpayers’ funds at risk,” since if “the project fails, the taxpayers are saddled with the debt.” *Id.* at 41. Nothing similar is happening here. Ohio’s taxpayers have received a lump-sum payment in exchange for the prison facility; the State Appellants have not risked tax dollars on the success of a private enterprise.

This court should affirm the determination of both lower courts that the Plaintiffs failed to state a claim for a violation of Article VIII, Section 4 of the Ohio Constitution. The lower courts correctly held that there was no unconstitutional joint-ownership arrangement.

State Cross-Appellees’ Proposition of Law II:

SERB has exclusive jurisdiction to determine whether an employee qualifies as a “public employee” within the meaning of R.C. 4117.01(C).

In *Franklin County Law Enforcement Association*, this Court noted that R.C. Chapter 4117 “was meant to regulate in a comprehensive manner the labor relations between public employees and employers.” 59 Ohio St. 3d at 171. Thus, *only* if a party asserts rights that are independent of R.C. Chapter 4117 may a court hear the complaint. *Id.* But “if a party asserts claims that arise from or depend on the collective bargaining rights created by R.C. Chapter 4117, the remedies provided in that chapter are exclusive.” *Id.* And “[u]ltimately the question of who is the ‘public employer’ must be determined under R.C. Chapter 4117.” *Id.* at 170.

The Court reaffirmed this ruling in *Ohio Historical Society*. There, it stated that “the Declaratory Judgments Act, R.C. Chapter 2721, was not intended to be used to circumvent [SERB’s] comprehensive agency processes.” 66 Ohio St. 3d at 469. The complaint in that case asked the common pleas court to determine through a declaratory judgment action whether the plaintiff was a “public employer” as that term is defined in R.C. Chapter 4117. *Id.* at 468. The

Court found that “resolution of this allegation depends entirely on the provisions of R.C. Chapter 4117, over which SERB has exclusive original jurisdiction.” *Id.* at 469.

As both lower courts held below, the same result was—and remains—correct in this case. SERB has exclusive jurisdiction to determine whether individuals employed by the private prison contractors qualify as “public employees” within the meaning of R.C. Chapter 4117, and so the courts lack jurisdiction to decide this issue. *See Carter*, 181 Ohio App. 3d at 776 (citing numerous cases where SERB considered whether employees were “public employees”).

If any doubt existed about whether the scope of a “public employer” under R.C. 4117.01(C) was a matter committed to SERB, Plaintiffs’ own complaint resolves it. This Court noted in *Franklin County Law Enforcement Association* that rights asserted independently from R.C. Chapter 4117 may be heard in common pleas court, but “claims that arise from or depend on the collective bargaining rights created by R.C. Chapter 4117” must be filed with SERB because “the remedies provided in [R.C. Chapter 4117] are exclusive.” 59 Ohio St. 3d syl. ¶ 2. Plaintiffs’ complaint reveals that their claim is *dependent* on R.C. Chapter 4117, not independent of that chapter as would be required to bring a claim in court. (Compl. ¶¶ 151-58.) The complaint *both* relies on the definition of “public employee” in R.C. 4117.01(C), *and* makes clear that Plaintiffs seek a remedy tied to the “applicable CBA,” which is the type of collective-bargaining claim that R.C. Chapter 4117 commits to SERB’s jurisdiction. (Compl. ¶ 154.)

Plaintiffs’ counterarguments lack merit. They initially contend that their complaint “asserted independent rights and they are in a capacity other than public employee, public employer or union asserting collective bargaining rights.” Pls.’ Resp. 26. But the relevant appellate decisions all illustrate that SERB’s exclusive jurisdiction encompasses preliminary questions under R.C. Chapter 4117 like the one Plaintiffs raise here—i.e., whether a certain

employer or employee qualifies as a “public” employer or employee under R.C. Chapter 4117. See *Ohio Historical Soc’y*, 66 Ohio St. 3d at 469; *Carter*, 181 Ohio App. 3d at 776.

Plaintiffs next argue that at least one individual Plaintiff and maybe others are not “public employees” under R.C. 4117.01(C), so the court of common pleas, rather than SERB, has subject-matter jurisdiction over this claim. Pls.’ Resp. 27. In other words, to manufacture jurisdiction over their claim that the individual Plaintiffs *are* public employees under R.C. 4117.01(C), Plaintiffs assert that the individual Plaintiffs are *not* public employees under R.C. 4117.01(C). But this concession that Plaintiffs are wrong *on the merits* of their underlying claim does not create jurisdiction. Whether Plaintiffs are right or wrong about their public-employee status, the underlying *question* concerning the meaning of “public employee” in R.C. 4117.01(C) is for SERB initially to determine, to be followed by appeal under R.C. 119.12.

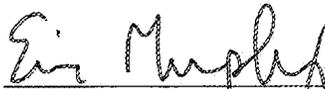
Finally, Plaintiffs put misplaced reliance on R.C. 9.06(K). Pls.’ Resp. 28. R.C. 9.06(K) states that “[a]ny action asserting that section 9.06 . . . or 753.10 of the act in which this amendment was adopted violates any provisions of the Ohio constitution . . . shall be brought in the court of common pleas of Franklin county.” It specifies the same venue for claims alleging constitutional violations or statutory violations by certain actors. Plaintiffs’ claim at issue here, however, asked the common pleas court to declare that they “satisfy the definition of a public employee in R.C. 4117.01(C) and are entitled to the wages, benefits and pensions for public employees.” (Compl. ¶ 157.) That claim raises no constitutional question and does not allege that any state actor violated state law. Rather, it rests on an interpretation of R.C. Chapter 4117, which is within SERB’s exclusive jurisdiction. The lower courts correctly held, then, that R.C. 9.06(K) does not override SERB’s jurisdiction over this claim arising under R.C. Chapter 4117.

CONCLUSION

For the foregoing reasons, the Court should deny jurisdiction over the cross-appeal.

Respectfully submitted,

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