

In the  
Supreme Court of Ohio

State ex. rel. Ohio Civil Service	:	
Employees Association et. al.,	:	Supreme Court Case No. 2014-0319
	:	
Plaintiffs-Appellees/Cross-Appellants	:	
	:	On Appeal from the Franklin County
v.	:	Court of Appeals, Tenth Appellate District
	:	
State of Ohio et. al.,	:	
	:	Court of Appeals Case No.
Defendants-Appellants/Cross-Appellees	:	12 AP 1064
	:	

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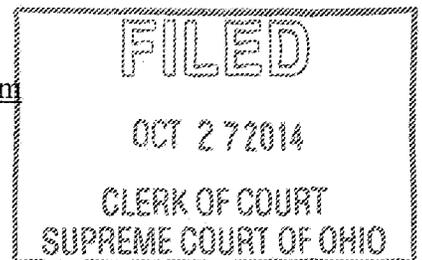
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I. **STATEMENT OF THE CASE AND FACTS**

A. **Authority To Privatize Prisons, Contracts And Annual Ownership Fee**

The 129<sup>th</sup> General Assembly enacted Am. Sub. H. B. No. 153 (“H.B.153”) an Appropriations Bill effective for the biennium July 1, 2011 through June 30, 2013. Among its many provisions, it amended R.C. 9.06, primarily by adding §(J), and enacted new uncodified §753.10. These two statutes were the sole authority for the State Appellants/Cross-Appellees, (“State”) to sell five state-owned prisons. Offered for sale were: Lake Erie Correctional Facility in Ashtabula County (“Lake Erie”); Grafton Correctional Institution and North Coast Correctional Treatment Facility in Lorain County; and, offered as a package, North Central Correctional Institution and North Central Correctional Institution Camp in Marion County (“North Central”).

Lake Erie together with the entire 119 surrounding acres was sold for \$72,770,260 and conveyed by Governor’s Deed signed on December 19, 2011 to Appellee Corrections Corporation of America which named Appellee CCA Western Properties, Inc. as the grantee of the property. (“CCA”). In a separate contract called an Operations and Management Contract (“O & M Contract”), the State contracted with CCA to house 1,798 Ohio inmates for a Per Diem Fee of \$44.25/inmate/day or an annual payment of \$29,039,765. R.C. 9.06(A)(1); §753.10(C)(2), (6) and (9) (St. Appx.67-68, 80-81). (Supp. 1-6).

As part of the transaction, the State additionally promised to subsidize CCA’s ownership costs by paying to CCA what it called an “Annual Ownership Fee.” (“AOF”). This AOF is not part of the O & M Contract payments which are called “Per Diem” payments. (Supp. 2). An AOF is paid by the State from General Revenue Funds to CCA for “wear and tear” of the Lake Erie Prison which the State no longer owns. The amount of this AOF is \$3,800,000/year and will

be paid to CCA each year for 21 years until 2032. Total AOF payments during that period will be \$79,800,000, an amount greater than the sale price of the prison. CCA and the State admit the annual payments. (Supp. 25-30). Further explanation can be found at <http://www.drc.ohio.gov/public/privatizationfaqs.pdf>.

As a result of privatizing Lake Erie, Plaintiffs, Appellees/Cross-Appellants Tinker and Zimmerman lost their jobs. Because they were not hired by CCA or offered suitable employment with the Department of Rehabilitation and Correction (“ODRC”), they suffered a loss of wages and were no longer eligible to participate in the Ohio Public Employees Retirement System (“OPERS”). Tinker was forced to move out of state. (Cpt.18, ¶115-123).

No contractor made a proposal to purchase North Central. Appellant/Cross-Appellee Management & Training Corporation (“MTC”) did, however, bid for and receive an O & M Contract. In this form of prison privatization MTC operates and manages the prison for a fee while the State continues to own and retain ultimate control over the entire prison operation. R.C. 9.06(A)(1),(J)(1),§753.10(F)(9),(G)(9). (State Appx. 74-75, 85-86). The statutory authority to sell the remaining four prisons expired on June 30, 2013. §753.10(D)(10),(E)(10),(F)(10),(G10) (St. Appx.81-86). However R.C. 9.06(J), §753.10(B)(1),(2), §753.10 (F)(1),(9), (G)(1),(9) and the contractual promise in the State’s Request For Proposals (RFP), permit the State to sell and convey the North Central property to MTC at any future date provided the State’s O & M Contract with MTC remains in effect. (St. Appx.78-79, 84-86). Thus, the State errs in saying that prison sales were limited to 2012-13. (p.7). As a result of this prison privatization by O & M Contract, nine individual Plaintiffs lost their jobs at North Central.

**B. Impact On North Central Plaintiffs And OCSEA**

While at North Central, Plaintiff Combs had a second job as a sports referee earning more

than \$6,600 annually. Because of the layoff and his new work location with mid-week days off, he had to cease working weekends as a referee. Plaintiff Crawford's daughter has a medical condition which at times requires assistance round the clock which was manageable when she was a state employee at North Central. After layoff, she applied for employment with MTC but was not hired despite her experience as a Corrections Officer. During her job interview, MTC asked if she used Family Medical Leave for her daughter's condition and she said she did occasionally. She was then told she lacked the qualifications to be hired for the same job she held at North Central. (Cpt. ¶9,14,75-82). The State's promise that employees were to receive a hiring preference by MTC was hollow. Like Combs and all the other Plaintiffs save one, she incurred increased travel expenses because her new work location was in a different county. Further, all bargaining unit transferees lost their institutional seniority and started at the bottom of the seniority list at their new prisons.

Plaintiff Tackett was a supervisor at North Central. Supervisors do not have collective bargaining rights because they are excluded from the definition of a public employee. R.C. 4117.01(C)(10). Thus, he was not covered by a Collective Bargaining Agreement ("CBA") or O.R.C. Chapter 4117. When his job was abolished, ODRC transferred him to the Ohio Reformatory for Women ("ORW") and demoted him. He lost annual salary of more than \$13,000 and will suffer a diminished OPERS pension. Because of the layoff and new work location with mid-week days off, Plaintiff Karcher is in jeopardy of losing his captain rank and position in the Leesburg Township Volunteer Fire Department. Plaintiff Schuster was displaced from her job and transferred to ORW. The daily commute was too expensive and forced her to move from LaRue to Marysville, Ohio. Schuster has also treated with a physician for emotional distress. While at North Central, Plaintiff Douce, a Guidance Counselor, was a member of the

Ohio Education Association. She had job security under its CBA with the State, including grievance rights with binding arbitration. She participated in the State Teachers Retirement System (“STRS”). After layoff, she was hired by CCA as an “at will” employee but discharged after seven weeks. Lacking comparable bargaining rights, she had no contractual recourse to contest her termination. Further, as an MTC employee, she lost continued participation in STRS. (Cpt. ¶69-87,114).

Plaintiffs Hall, Herron and Sayers intended to accumulate 30 years of service credit in OPERS which qualifies them for full retirement benefits. At the time of job loss Herron had over 23 years and Sayers over 13 years of service credit. Hall had less. If hired by MTC, they were eligible to continue participation in OPERS under the “carryover” language in R.C. 145.01(A)(2). However, as MTC employees, they would have been obligated by law to also participate in the Social Security System which is compulsory and cannot be waived. 26 U.S.C. § 3121(a). (Cpt. ¶88-100,105-109).

The Social Security Act contains a Windfall Elimination Provision also referred to as the Government Pension Offset (“GPO”). 42 U.S.C. § 415(a)(7) decrees that individuals who participate in both a state retirement system like OPERS and social security but who do not accumulate 30 years of contributions in social security will have the GPO offset applied to decrease their future social security benefit. 42 U.S.C. § 415(a)(7)(B)(ii)(1-5). If hired by MTC, these Plaintiffs, after working several years in the public-sector, could not work for an additional 30 years to achieve full social security benefits and avoid the GPO offset. Because participation in OPERS can be waived, R.C.145.034, and they could not afford to pay 16.2% of their salary into two separate pension systems, OPERS (10%) and social security (6.2%), economic necessity required waiver of their continued OPERS participation and a loss of full OPERS benefits. In a

word, if they were employed by MTC they would never achieve full retirement benefits in either OPERS or Social Security. However, if they were public employees as defined in R.C. 4117.01(C), they would be excluded from the Social Security System (42 U.S.C. § 410(a)(7)) and could under R.C. 145.01(A)(2) achieve full retirement benefits in OPERS because R.C. 4117.01(C) provides that:

‘Public employee’ means ... 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....

Rather than sacrifice the loss of their full state pensions and suffer the GPO offset while in retirement, these Plaintiffs found other state employment allowing them to continue participation in OPERS. Herron transferred to ORW but her new mid-week days off prevented her from attending Sunday church services. Sayers transferred to Toledo Correctional Institution and rented there during work days to avoid the lengthy daily commute from Edison to Toledo, Ohio. Hall could not sell her home in Marion and commutes daily to ORW in Marysville. (Cpt. ¶8-17, 68-114).

Plaintiff Ohio Civil Service Employees Association (“OCSEA”) is a labor organization which through its CBA with the State represented bargaining unit employees at North Central before privatization occurred. Because North Central was privatized and MTC is a private-sector employer, its labor relations are regulated by the National Labor Relations Act (“NLRA”). 29 U.S.C. § 151-169. Whereas under O.R.C. Chapter 4117 both “rank and file” workers and Corrections Officers may be represented by OCSEA, in the private-sector 29 U.S.C. §159(b)(3) prohibits OCSEA from representing both groups. If the North Central employees were public employees as defined in R.C. 4117.01(C), OCSEA could continue as their bargaining representative. OCSEA was damaged by the loss of its contract right to represent North Central

employees, the loss of union members and dues payments and the loss of bargaining unit members and fair share fees resulting in an economic loss of \$145,000 at the time suit was filed which loss is continuing.

**C. Statutory Restrictions On The Use Of Prison Sale Proceeds**

The General Assembly in H.B. 153 enacted R.C. 5120.092 and linked it to §753.10. A permanent law, R.C. 5120.092 established the “Adult and Juvenile Correctional Facilities Bond Retirement Fund.” (“Bond Retirement Fund”). As then existing, it provided in part:

There is hereby created in the state treasury the adult and juvenile correctional facilities bond retirement fund. The fund shall receive proceeds derived from the sale of state adult or juvenile correctional facilities. ... To accomplish the redemption or defeasance, the director of budget and management ... may direct that moneys in the fund be transferred to the appropriate trustees under the applicable bond trust agreements. Upon receipt of both (i) one or more opinions of a nationally recognized bond counsel ... stating that the ... bonds have been redeemed or defeased and that the transfer of such moneys will not adversely affect the exclusion from gross income of the interest payable on such bonds, and (ii) a certification by both the director of administrative services and the director of rehabilitation and correction stating either that all sales of state adult and juvenile correctional facilities contemplated by Sections 753.10 and 753.30 ... have been completed or that no further sales of any such facilities will be undertaken the director of budget and management may direct that any moneys remaining in the fund after the redemption or defeasance ... shall be transferred to the general revenue fund. (Emphasis Added).

Almost congruent with R.C. 5120.092 are §753.10C)(8), (D)(8), (E)(8), (F)(8) and (G)(8). (State Appx. 81-86). They require that all prison sale proceeds must be deposited in the Bond Retirement Fund and restricts their use. Section (8) is identical for all five prisons. It reads:

The proceeds of the conveyance of the real estate shall be deposited into the state treasury to the credit of the Adult and Juvenile Correctional Facilities Bond Retirement Fund and shall be used to redeem or defease bonds in accordance with section 5120.092 of the Revised Code, and any remaining moneys after such redemption or defeasance shall be transferred in accordance with that section to the General Revenue Fund. (Emphasis Added).

The State never claimed that the conditions in R.C. 5120.092 (the bond counsel letter and

the two directors' certifications) and §753.10 were satisfied. Indeed, the State could not because as long as MTC's O & M Contract continues with the State, MTC had a continuing right to purchase the North Central facilities and surrounding land. Additionally, the Lake Erie prison sale proceeds remained in the Bond Retirement Fund at the time Plaintiffs filed their complaint. (Supp. 7). Thus, with the State's inability to comply with the restrictions to free-up the Lake Erie prison sale proceeds, the State's narrative that the proceeds created a stream of revenue ultimately flowing to the General Revenue Fund is contrary to the facts and contrary to law.

After Plaintiffs presented this argument to the trial court, the 129<sup>th</sup> General Assembly effective June 29, 2012 enacted Sub. S. B. No. 312 (Appx. 6-8) and amended R.C. 5120.092 by eliminating the directors' certifications but retaining the prohibition on transfers from the Bond Retirement Fund until bond counsel submitted the letter which was never produced. This amendment admits that the restrictions in R.C. 5120.092 negate the stream of revenue argument. Moreover, S. B. 312 did not change §753.10 which for the duration of the biennium also required that the prison sale proceeds could only redeem or defease previously issued bonds but only after receipt of the bond counsel letter which was never produced. In any event, the constitutionality of H.B. 153 is not affected by the later enactment of S. B. 312. See, Standard of Review, *infra*. Factually, because no other prisons were sold, no stream of revenue was produced.

#### **D. Prison Re-Purchase Right And Annual Ownership Fee Payments**

When a prison is sold and operated pursuant to an O & M Contract, the contract must contain, and the contractor must comply, with all of the requirements in R.C. 9.06. §753.10 (B)(1) and (2). Section 753.10(B)(2)(d) requires that the contractor, and all successors in title, must 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 may sell the prison and all acreage

to anyone. Section 753.10(B)(2)(d)(i) and (ii) and R.C. 9.06(J)(4)(a). The contractor may charge the state any amount it chooses upon resale. Section 753.10(B)(2)(d)(i) originally restricted the repurchase price to that which was paid; but the language was vetoed by the Governor. R.C. 753.10(B)(2)(d); (Appx.9).

Section 753.10(C)(4)(a) and (b)<sup>1</sup> allowed the State to place restrictions in the deed regarding the resale, use and development of the property surrounding the prison. The deed's sole restriction for Lake Erie is that "The grantee shall not use, develop or sell the Property such that it will interfere with the quiet enjoyment of the neighboring State-owned land." A review of the Governor's Deed shows that the State sold all 119 acres. (Supp. 3-6). There are no neighboring State-owned lands. CCA may do as it pleases with the 119 acres surrounding the prison. CCA or its successor could develop the land without legal concern that a prison existed next door. If developed, and the State desires to exercise its right to re-purchase, the State could be forced to pay CCA for the cost of the prison and land and, because of the vetoed language in § 753.10(B)(2)(d)(i), the State must pay for all of CCA's development costs.

If the AOF payments are continued until the year 2032 (18 years from now) as the contract provides and the State does repurchase the property, CCA would amass from the State a sum greater than it invested in the transaction. For example, on an investment of \$72,770,260 CCA will amass \$79,800,000, which is the amount the State will have paid CCA through the AOF payments, plus the State will additionally pay to re-purchase the prison. Or, if the State never re-purchases Lake Erie, CCA will have received \$79,800,000 in AOF payments and retain ownership of Lake Erie and the 119 surrounding acres. Benefitting from the AOF payments, CCA will have paid, in effect, nothing for the prison and acreage and have the unfettered right to

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<sup>1</sup> For North Central it is the same. See, § 753.10 (F)(4)(a) and (b);and, (G)(4)(a) and (b).

sell it for a price it is free to negotiate. The State will have financed the entire purchase price through the AOF payments.

When the State sells a prison, R.C. 753.10(B)(2)(e) provides that the O & M Contract must contain a provision that if the contract is later terminated, ODRC can resume operation and management of the entire prison despite the fact that ODRC does not own the prison. In a word, R.C. 753.10(B)(2)(e) authorizes the State to operate and manage a privately-owned prison.

**E. H. B. 153 Contains Substantive Programs Unrelated To Appropriations**

H.B. 153 created at least these three major substantive programs which were controversial, leading-edge matters unrelated to appropriations or to each other and enacted several other non-appropriation items. For the first time in Ohio history, R.C. 9.06 and §753.10 authorize the sale of five state-owned prisons. For the first time since it was opened in 1955, newly enacted R.C. 126.60 through R.C. 126.605, subject to further approval by the General Assembly, authorized the sale or lease of the 241 mile Ohio Turnpike. (Appx. 10-14). For the first time in Ohio history, R.C. 4313.01 and R.C. 4313.02 authorize the transfer of the State-regulated liquor distribution system and the State's merchandising operations including all of its capital and assets (money is an asset) for a period of 25 years to JobsOhio ("JobsOhio liquor transaction"). JobsOhio is a private entity created by the State and in which the State invested money or to whom it lent credit. It is not subject to the laws applicable to other state agencies. Nor, are its records public. It is unaccountable to the public. (Id. 15-19).

The JobsOhio liquor transaction does not produce a stream of revenue for the State's budget. Just the opposite. R.C. 4313.01 and R.C. 4313.02 are a drain on state revenue. They enable JobsOhio to receive the major portion of this income. "JobsOhio was given the right to purchase the state's liquor distribution and merchandising operations and to operate from

revenues of the liquor enterprise.” *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, ¶2. Similarly, selling or leasing the Ohio Turnpike does not produce a stream of income to “balance the budget.” Turnpike revenue has never been a part of the General Revenue Fund. Revenue is restricted by permanent law to turnpike projects. R.C. 5537.11, R.C. 5537.14. Moreover, had the turnpike been sold, the proceeds were to be deposited in the highway services fund and could not be used to balance the budget. R.C. 126.03. (Appx. 13-14). What's more, privatizing five prisons is unrelated to the JobsOhio liquor transaction. Owning and operating a prison has nothing in common with selling liquor. Privatizing five prisons housing prisoners is likewise unrelated to selling/leasing the Ohio Turnpike which facilitates interstate commerce.

Not one word of these three monumental and historic changes is discernible from the Title of H. B. 153. Not only does Ohio Constitution, Article II, Section 15(D) provide that “no bill shall contain more than one subject,” it also requires that the subject of the bill “shall be clearly expressed in its title.”

#### **F. Additional Evidence Of A Gross And Fraudulent Violation**

Section 753.10 was not mentioned in the Title of H. B. 153. Nor is there any language in the 17 page title mentioning that the bill enacted new legislation authorizing the sale of five state-owned prisons or even mentions the “subject” of prison privatization. Nowhere is this “one subject ... clearly expressed in its title.” (St. Appx.55-66); (Supp. 8-24).

To counter this omission, the State references some obscure media accounts mentioning that the prisons may be offered for sale.<sup>2</sup> (p. 28). However, a rider isn't judged by newspaper publicity. It is a matter which cannot stand on its own merits and is included in another bill sure

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<sup>2</sup>They are not in the record. See, *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500, (1978), ¶1syllabus; *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 162, 656 N.E.2d 1288 (1995). See also, Evid. R. 801(C).

to pass and becomes law because it was a rider on another bill which the majority favored. *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 16, 711 N.E.2d 203 (1999). The amount of legislative attention is irrelevant. *Ohio Civ. Serv. Emps. Assn., AFSCME, Local 11, AFL-CIO v. State Employment Relations Board*, 104 Ohio St.3d 122, 818 N.E.2d 688 (“*OCSEA I*”), ¶35. Besides, such publication does not mean that the public expected the General Assembly to violate Section 15(D). Just the opposite, the public had a right to expect that it would respect and comply with the Ohio Constitution. Indeed, the omission of §753.10 from the title of the bill would lead any reasonable person to believe that the prison privatization provisions were not in the bill at all.

Second, the title to H.B. 153 says “to provide authorization and conditions for the operation of programs, including reforms for the efficient and effective operation of state and local government.” That generalized language does not satisfy the mandatory “clearly expressed subject” language in Section 15(D). *In re Nowak*, 104 Ohio St.3d 466, 820 N.E.2d 335 (2004), ¶54. Nor does that generalized language give an indication to legislators or the public that prisons were being authorized for sale for the first time in Ohio history. “By limiting each bill to one subject, the issues presented can be better grasped and more intelligently discussed. ... This principle is particularly relevant when the subject matter is inherently controversial and of significant constitutional importance.” *Simmons-Harris*, at 16.

Third, in this 3,262 page Appropriations Bill, the challenged language amending R.C. 9.06 appears on pages 30-32. Section 753.10 is buried on pages 3,220-3,228. (St. Appx.78-86). They are separated by 3,188 pages dealing with numerous other economic and non-economic matters. In evaluating an Article II, Section 15(D) challenge to new controversial, substantive legislation enacted in a lengthy Appropriations Bill, this submersion of language overwhelmed in a massive Appropriations Bill is a factor which must be considered. *OCSEA I*, at 131, *Nowak* at

¶59, *Simmons-Harris* at 15-16, *supra*. Indeed, H. B. 153 is so enormous that the Legislative Services Commission Analysis consists of 720 pages and its Table of Contents is 27 pages long.

Fourth, Section 812.20 in H.B. 153 made R.C. 9.06 and R.C. 753.10 effective immediately with the right of referendum purportedly legislatively barred. (Appx. 22-23). Both the trial court and the Court of Appeals said that those statutes were not appropriations and could be the subject of a referendum effort. (St. Appx.21,50). Because appropriations are effective immediately, that legislative characterization was an artificial effort by insiders in a legislative leadership role to protect those laws from any challenge. When one considers that §753.10 was omitted from the Title of H.B. 153 where it should have been mentioned and included under Section 812.20 where it clearly did not belong, it is obvious that the legislative leaders were acting intentionally to protect an unpopular and controversial subject wrongfully included in H. B. 153 by logrolling. Recently, this Court rejected a somewhat similar tactic used by the same 129<sup>th</sup> General Assembly in *State ex. rel. Ohioans for Fair Districts v. Husted*, 130 Ohio St.3d 240, 2011-Ohio-5333.

**G. R.C. 9.06(K)**

H. B. 153 enacted R.C. 9.06(K) which provides in part:

Any action asserting that section 9.06 of the Revised Code or section 753.10 of the act in which this amendment was adopted violates any provision of the Ohio constitution and any claim asserting that any action taken by the governor or the department of administrative services or the department of rehabilitation and correction pursuant to section 9.06 of the Revised Code or section 753.10 ... violates any provision of the Ohio constitution or any provision of the Revised Code shall be brought in the court of common pleas of Franklin county. (Emphasis Added). (St. Appx.76).

Previous to filing this case, with one exception, different Plaintiffs sued for a temporary restraining order (“TRO”) to prevent the State from executing any contracts for or selling any of the five prisons. The TRO was denied. *State ex. rel. ProgressOhio v. State*, Case No. 11 CVH

08-10647. (Supp. 33-48). Those Plaintiffs voluntarily dismissed without prejudice. Civ. R. 41(A)(1)(a). This case was ruled as a re-filed case. (St. Appx.28).

Alleging violations of Ohio Constitution, Article II, Section 15(D) and Article VIII, Section 4 Plaintiffs requested the Court to find and declare that all prison privatization laws and transactions were unconstitutional and void, order that the purchase price of \$72,770,260 be returned to CCA and Lake Erie and the surrounding 119 acres be returned to the State. All employees who suffered a job loss as a result of prison privatization asked to be reinstated to their positions as public employees with full back pay and benefits and that they be reimbursed for all losses incurred. OCSEA requested payment for its monetary and losses and reinstatement of its collective bargaining rights. Plaintiffs also asked for the severance of the prison privatization provisions and/or that H.B. 153 in its entirety be declared unconstitutional.

Plaintiffs also alleged that the State did not regard the MTC employees working at North Central as public employees, did not pay them according to the State's wage scale or accord them State benefits and pensions. All MTC employees were alleged to be public employees under R.C. 4117.01(C). In the absence of a favorable constitutional ruling, the Court was asked to find that they were public employees under R.C. 4117.01(C). (Cpt. ¶5-7, 68, 160-166, ¶M).

#### **H. Rulings By The Common Pleas And Appellate Courts**

Contrary to the allegations in ¶160-166 of the complaint, the trial court said that "there is no allegation that Chapter 4117 itself has in any way actually been violated." (St. Appx.33). Those paragraphs plainly stated that the employees were not being treated as public employees as R.C. 4117.01(C) provided. Citing *Franklin County Law Enforcement Assn v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d 167, 572 N.E.2d 87 (1991) ("FCLEA"), the trial court rejected Plaintiffs argument that R.C. 9.06(K) vested jurisdiction over the entire case

ruling that only the Ohio constitutional claims were properly before it. SERB had exclusive jurisdiction over the R.C. 4117.01(C) claim to decide whether the individual Plaintiffs are public employees. (St. Appx.31, 33-34). The Court of Appeals agreed and also denied reconsideration on this issue. (Id. 8, 26-27).

The trial court found that R.C. 9.06 and §753.10 “are not in violation of the Single Subject Rule.” Relying upon *State ex rel. Ohio Roundtable v. Taft*, 2003 WL 21470307 and *ComTech Systems, Inc. v. Limbach*, 59 Ohio St.3d 96, 570 N.E.2d 1089 (1991) to uphold R.C. 9.06 and R.C. 753.10 and reject Plaintiffs’ claim that their inclusion in H.B. 153 violated Article II, Section 15(D), the trial court said “the purpose of the privatization bill<sup>3</sup> is to generate a stream of revenue to, in this instance, help balance the budget. This is certainly a connected subject to an appropriations bill. At the very least, it is not a ‘manifestly gross or fraudulent’ violation of the Single Subject requirement.” (Id. 46).

In reaching that conclusion, the Court observed that the complaint listed “many subjects which are quite diverse” and certainly “appeared unrelated” to an Appropriations Bill. (Id. 44-46). In its earlier *ProgressOhio* Decision, upon which it relied for its ruling in this case, the Court twice noted that numerous provisions in H. B. 153 appear unrelated and “appear to be at odds with the Single Subject Rule.” (Supp. 38-40). But, it did not address the issue. (St. Appx. 45).

A unanimous Court of Appeals saw it differently. It first noted that a motion to dismiss tests the sufficiency of the complaint and that the constitutionality of a bill depends primarily if not exclusively on a case-by-case, semantic and contextual analysis. It recognized that the purpose of H.B. 153 was to make appropriations for the biennium. However, it “encompasses a

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<sup>3</sup> This is a misnomer.

variety of topics, some of which potentially having little or no connection with appropriations.” (St. Appx.14-15).

Citing *LetOhioVote.Org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, ¶28-29, the Court of Appeals said: “The challenged prison privatization provisions of H.B. 153 ‘are not themselves appropriations for state expenses because they do not set aside a sum of money for a public purpose’ and neither R.C. 9.06 nor section 753.10 as amended by H.B. 153 ‘makes expenditures and incurs obligations.’” (St. Appx. 16, 21). Then, citing ¶34 of *OCSEA I*, the Court said of the challenged prison privatization provisions:

Here, the subject of the various provisions in section 753.10 does not concern the acquisition of a revenue stream, but, instead, the contractual requirements for prison privatization. Because the record lacks guidance regarding the way in which the challenged provisions ‘will clarify or alter the appropriation of state funds,’ there appears to be no common purpose or relationship between the budget-related items in H.B. 153 and the prison privatization provisions. (St. Appx.18).

The Court correctly found that R.C. 9.06 and §753.10 were very analogous to and paralleled the leading-edge, new, substantive Ohio School Voucher Program found unconstitutional in *Simmons-Harris, supra*. It acknowledged that appropriations bills “tie disparate topics together.” However, under *Simmons-Harris*, “a general appropriations bill cannot constitutionally establish a substantive program related to the subject of appropriations only insofar as it impacts the budget.” (St. Appx.19). After finding that the complaint sufficiently stated a claim that H.B. 153 in its entirety was unconstitutional (Id. 20), the Court of Appeals also ruled “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.). Then, citing *State ex rel. Hinkle v. Franklin County Bd. Of Elections*, 62 Ohio St.3d 145,149, 580 N.E.2d 767 (1991), the Court concluded by

saying: “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.” The Article II, Section 15(D) claim was remanded for further proceedings. (Id.20,27).

The trial court rejected Plaintiffs’ claim that the AOF obligation was a subsidy prohibited by Ohio Constitution, Article VIII, Section 4. The trial court wrote that it “cannot conclude that the legislation at issue is in violation of this prohibition. The State of Ohio simply does not become a joint owner.” (St. Appx. 47). It forgot to decide Plaintiffs “as applied” challenge to the contractual subsidy and the operational entanglements forming the basis of this claim. Plaintiffs alleged that the entire circumstances involved in the sale and operation of Lake Erie and the actions of the Defendants were to be considered in resolving this issue. (Cpt. ¶156).

There are two prohibitions in Section 4. One prohibits the lending of credit, the other joint ventures. The complaint alleged both. The Court of Appeals did not fully consider the “credit” argument. It ruled that “accepting all of the allegations in the complaint as true and making all reasonable inferences in favor of plaintiffs, no set of facts in plaintiffs complaint, if proven, would entitle them to relief” that Section 4 was violated 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.” (St. Appx.24). The AOF is not a service. Reconsideration of this issue was also denied. (Id.6-9).

### **I. Standard Of Review**

Where, as here, the trial court grants a motion to dismiss, the standard of review on appeal for questions of law is *de novo*. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 814

N.E.2d 44 (2004), ¶5. Dismissal is appropriate only where it appears beyond doubt from the complaint that Plaintiffs can prove no set of facts entitling them to recovery. *O'Brien v. University Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975) syllabus. Ohio law does not require Plaintiffs to plead operative facts with particularity. *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 768 N.E.2d 1136 (2002), ¶ 29. Nor is the pleader required to allege every fact he intends to prove. *State ex. rel. Hanson v. Guernsey County Board of Commissioners*, 65 Ohio St.3d 545, 549, 605 N.E.2d 378 (1992). As long as there is a set of facts, consistent with the Plaintiffs' complaint, which would allow the Plaintiffs to recover, the court may not grant a defendant's motion to dismiss. *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144-45, 573 N.E.2d 1063 (1991). *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562-63, 127 S. Ct. 1955 (2007) citing *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7<sup>th</sup> Cir.1994) expressly allows reference by the Plaintiffs to facts despite their absence from the complaint. Calling it "an accepted pleading standard," the Court said "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. See *Sanjuan*, at 251 (once a claim for relief has been stated, a plaintiff 'receives the benefit of imagination, so long as the hypotheses are consistent with the complaint')...."

Challenges to legislation based upon Ohio Constitution, Article II, Section 15(D) are evaluated on their face and resort to extrinsic evidence is unnecessary. *ComTech, supra*, at 101; *Global Knowledge Training, L.L.C. v. Levin*, 127 Ohio St. 3d 34, 936 N.E.2d 463 (2010), ¶17; *In re Nowak*, *supra*, ¶71. But, where a statute is challenged as unconstitutional in its application, the court must have a record. The burden rests upon the party making the attack to present clear and convincing evidence of a presently existing state of facts which makes the act unconstitutional

and void when applied and the proponent of the statute must also have an opportunity to offer testimony supporting its view. *Belden v. Union Central Life Ins.*, 143 Ohio St. 329, 55 N.E.2d 629 (1944), ¶4, 6 of syllabus; *Cleveland Gear Co. v. Limbach*, 34 Ohio St.3d 229, 232, 520 N.E.2d 188 (1988). This determination requires consideration of facts outside the complaint; but, such consideration is not permitted when ruling on a motion to dismiss. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 72 Ohio St.3d 94, 96, 647 N.E.2d 788 (1995); *State v. Beckley*, 5 Ohio St. 3d 4, 6, 448 N.E.2d 1147 (1983). Because the trial court granted a motion to dismiss, no record was, but should have been, made

## II. LAW AND ARGUMENT

### APPELLEES PROPOSITION OF LAW NO. 1

#### The Amendment Of R.C. 9.06 And The Enactment Of Section 753.10 In Am. Sub. H. B. No. 153 By The 129<sup>th</sup> General Assembly Violated Ohio Constitution, Article II, Section 15(D) Because They Are Not Appropriations

##### 1. Am. Sub. H. B. No. 153 Is An Appropriations Bill

The State refers to H.B. 153 as a “budget bill.” This term is intended to misdirect this Court’s focus away from the true nature of an Appropriations Bill which is to make appropriations. Viewed as a budget bill, the State seeks to expand the items which may be included in an Appropriations Bill by arguing that all matters “rationally connected to and which affect the state budget” are permissible. This would include non-appropriation items, major new programs whether controversial or not and revenue-raising items. This “budget bill” theme is not a terminology dispute. It is a wolf in sheep’s clothing. If the notion is approved, then Section 15(D) will be meaningless, because, whether it is called an Appropriations Bill or a Budget Bill, everything is in some way rationally connected to “the budget” as the State defines it.

The expression “budget bill” is not a term used in the Ohio Constitution. The constitutional word is “appropriations.” See, Ohio Constitution, Article II, Section 1d

(“appropriations for the current expenses of the state government and state institutions”); Section 16 (“a bill making appropriations of money”); Section 22 (“No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years”); Ohio Constitution, Article VI, Section 6 (“all moneys that may be, by the general assembly, appropriated”); Ohio Constitution, Article VIII, Section 2h (“moneys ... are hereby appropriated”); Section 10 (“all appropriations of moneys”). Indeed, the General Assembly has not labeled H.B. 153 as a “budget bill.” Its Title says: “to make operating appropriations for the biennium.” (St. Appx. 65).

To accept the State’s budget bill theory, this Court would be obliged to renounce the definition of “appropriations” recently used and approved in *LetOhioVote.Org*, at ¶28. An appropriation, this Court said, is an authorization granted by the General Assembly to make expenditures and to incur obligations for specific purposes. That definition is consistent with the general rule that words in the Ohio Constitution are to be given their usual, normal and customary meaning. *State ex rel. Taft v. Franklin County Court of Common Pleas*, 81 Ohio St.3d 480, 481, 692 N.E.2d 560 (1998). What’s more, where provisions of the constitution address the same subject matter, they must be read *in pari materia* and harmonized if possible. *Toledo Edison Co. v. Bryan*, 90 Ohio St.3d 288, 292, 737 N.E.2d 529 (2000).

This Court has already rejected most of the argument the State makes here. In *LetOhioVote.Org*, at ¶31-34, it was argued that laws in an Appropriations Bill which are “inextricably linked to appropriations” but do not themselves appropriate funds, are appropriations. This Court disagreed and said they are not appropriations. In *OCSEA I*, ¶33, this Court rejected an argument that all matters in an Appropriations Bill form a single subject because they are all bound by appropriations. This “stretches the one-subject concept to the point

of breaking. ... Such a notion, however, renders the one-subject rule meaningless in the context of appropriations bills because virtually any statute arguably impacts the state budget, even if only tenuously. We flatly rejected this proposition in *Simmons-Harris*.” And, *Simmons-Harris*, at 17, the case most analogous to these facts, concluded that creation of a controversial substantive program in an Appropriations Bill violates the one-subject rule because there was no rational reason for the combination thus producing blatant disunity between the new substantive program and most other items contained in the bill.

The State’s notion that all matters which affect the state budget and anything rationally connected to the budget is so broad that almost nothing would be excluded from an Appropriations Bill. As this Court said in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 499, 715 N.E.2d 1062 (1999) “If we accept this notion, the General Assembly could conceivably revamp all Ohio law in two strokes of the legislative pen—writing once on civil law and again on criminal law. The thought of it is staggering.”

This Court should be wary of the State’s novel argument. The suggested premise has unforeseen consequences. For example, the 129<sup>th</sup> General Assembly also enacted Am. Sub. S. B. No. 5 (“S.B. 5”) which attempted to strip collective bargaining rights from all of Ohio public employees. Although S. B. 5 was voided by referendum, should the Court adopt the State’s radical suggestion that non-appropriation substantive items, including controversial ones, are permissible, then in a future Appropriations Bill the State can easily justify including some or all of the voter-rejected S. B. 5 amendments as riders. After all, R.C. 4117.08 gives labor organizations in the public sector the right to bargain with the State and all municipalities over all matters pertaining to wages, hours, or terms and other conditions of employment. These rights are rationally and directly connected to and affect all “budgets” state and local.

By like reasoning, it is not out of the question to say that the General Assembly could also enact a “Right to Work” law in an Appropriations Bill. Under the NLRA, 29 U.S.C. § 164(b), a “Right to Work” law, which is left to the states, could arguably be justified because it would have an impact on recruiting new businesses to Ohio and thus impact state tax revenues. Arguably, it could be said that a “Right to Work” law also impacts wages paid to private-sector employees (whether increased or decreased) and affects state tax receipts. Even if the State disavows these scenarios in their reply brief, under the State’s “budget bill” definition, if approved by this Court, nothing would prevent a future General Assembly from enacting such provisions as riders in an Appropriations Bill.

The wide-ranging standard advocated by the State creates opportunity for other abuses. Ohio Constitution, Article II, Section 16 describes the Governor’s veto power. For non-appropriation bills the Governor must sign or veto the entire bill. For Appropriations Bills, the Governor “may disapprove any item.” If this Court were to expand the One-Subject Rule as requested by the State, then substantive non-appropriation provisions in an Appropriations Bill which is adopted in one form by the General Assembly can be line-item-vetoed by the Governor thereby undoing the legislative process of compromise and concessions. The Governor, by line item veto, can delete all of the compromises and concessions and re-write the program as if he alone were the General Assembly. The expanded definition of a “budget bill” requested by the State should be rejected.

2. **This Court’s Current One-Subject Case Law Properly Balances The Need For Deference To The General Assembly And Enforcement Of Article II, Section 15(D)**

Existing case law has created a body of law which fairly accommodates deference to the General Assembly’s legislative efforts and the faithful observance of Section 15(D). The State gives the impression that that the only way to balance the State’s budget is to expand the

meaning of the One-Subject Rule to allow budget related items (revenues and expenses) including controversial non-appropriations substantive programs in the Appropriations Bill. It feigns a dilemma that doesn't exist. (p.21). New revenue raising programs, if needed, can be enacted in a separate bill moving through the legislative process at the same time as the Appropriations Bill just as Section 15(D) requires. If the legislative votes are there to raise new revenue in the manner proposed, the bill will pass. The straightforward answer is more compliance with the Ohio Constitution, not less.

What the State really seeks in this case is a broadening of the One-Subject Rule to approve not only the prison privatization statutes but the Turnpike sale/lease statutes, the JobsOhio liquor transfer statutes and all of the other non-appropriation items which the Court of Appeals said are to be reviewed for violation of the One-Subject Rule. (St. Appx.20). Because it cannot defend under current case law the disunity in H.B. 153, the State asks this Court to adopt an unrestricted standard which allows any item "rationally connected to the budget" to be appended to an Appropriations Bill. This is unfettered logrolling. The State wants to establish permanent laws through a bill whose primary purpose is to make appropriations for the two year biennium. The State's suggestion contravenes the primary and universally recognized purpose of constitutional provisions like Section 15(D) which is to prevent logrolling. *State ex rel. Dix v. Celeste*, 11 Ohio St.3d 141, 142-43, 464 N.E.2d 153 (1984).

It is also unnecessary to depart from existing precedent or reject the historical body of One-Subject law. For example, the State requests "heightened one-subject deference." (p.13). This Court has explained its role in One-Subject litigation as "limited." To avoid interfering with the legislative process, this Court affords 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. *OCSEA I, supra*, ¶27. See also, *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶48.

The State's suggested expansion would require overruling *Simmons-Harris*, the case most closely aligned with this case. In *Simmons-Harris*, at 16, this Court recognized that appropriations bills are different from other Acts of the General Assembly saying appropriations bills, of necessity, encompass many items, all bound by the thread of appropriations. See also, *OCSEA I*, ¶30. Continuing, *Simmons-Harris*, at 16 says that the danger of riders is particularly evident when a bill as important and likely of passage as an Appropriations Bill is at issue. The general appropriation bill presents a special temptation for the attachment of riders. See also, *City of Dublin v. State*, 118 Ohio Misc.2d 18, 2002-Ohio-2431, ¶22.

There was a "blatant disunity between" the Voucher Program and most other items contained in that bill. This Court was not given a "rational reason for their combination" and "conclude[d] that creation of a substantive program in a general appropriations bill violates the one-subject rule." *Simmons-Harris*, at 17. The Court also "modif[ied] *Dix* to the extent necessary to ensure that it is not read to support the position that a substantive program created in an appropriations bill is immune from a one-subject-rule challenge as long as funds are also appropriated for that program." *Id.* Both the trial court and the Court of Appeals recognized that a substantive program cannot be established in an Appropriations Bill. (St. Appx.19); (Supp. 37). The Court of Appeals concluded that the prison privatization provisions are much more aligned with the program voided by *Simmons-Harris, supra*, than the cases cited by the State or the reasoning of the trial court.

Adoption of the State's argument would also require overruling *OCSEA I*. The State calls

the challenged statute in *OCSEA I* merely a tenuous connection to the budget. But the rule it advocates for here would allow the General Assembly to include that item and all like matters in an Appropriations Bill because they rationally affect the State's revenues and expenses. Applying the State's suggested definition, exclusion of employees from collective bargaining rights rationally and directly affects the budget because of the wages, hours, benefits and working condition negotiating rights in R.C. 4117.08. This is not tenuous-it is as direct as it gets. As this Court said in *OCSEA I*, the State's argument stretches the One-Subject Rule to its breaking point. ¶33.

Although giving great latitude, this Court's review of legislation is not so deferential as to effectively negate the one-subject provision. Despite its reluctance to interfere with the legislative process, it will not abdicate the duty to enforce the Ohio Constitution. *OCSEA I* at ¶29 citing *Simmons-Harris* says "[t]he one-subject rule is part of our Constitution and must be enforced." See also, *In re Nowak, supra*, ¶52. "However, where there is a blatant disunity between topics and no rational reason for their combination can be discerned... [t]his is the very practice which Section 15(D) was designed to prevent." *Hoover v. Board of County Com'rs, Franklin County*, 19 Ohio St.3d 1, 6, 482 N.E.2d 575 (1985). *LetOhioVote.org, supra*, ¶55 says it best: "We are not unmindful of the effect our decision may have on the state budget, nor of the commendable efforts of the members of the executive and legislative branches of state government to fulfill their constitutional duties to balance the budget in Ohio; however, our own constitutional duty is to ensure compliance with the requirements of the Ohio Constitution irrespective of their effect on the state's current financial conditions."

*Simmons-Harris* and *OCSEA I* are controlling here and the Court of Appeals was correct to rely upon them. *Simmons-Harris*, at p.16, explained the One Subject Rule is most significant

and “particularly relevant when the subject matter is inherently controversial and of significant constitutional importance.” The Court of Appeals correctly concluded that the challenged provisions were significant, substantive, controversial and of significant constitutional importance. (St. Appx.19). That is why it said: “[G]iven that such provisions amount to approximately twenty of over three thousand pages in H.B. No. 153, they are ‘in essence little more than a rider attached to an appropriations bill.’” (Id.).

The State admits that R.C. 9.06 and §753.10 are not appropriations. (p. 31). Nor does it argue that the JobsOhio statutes and Ohio Turnpike statutes are appropriations. It is precisely because R.C. 9.06, §753.10 (prisons), R.C. 126.60, R.C. 126.601, R.C. 126.603, R.C. 126.604, R.C. 126.605 (Turnpike), R.C. 4313.01 and R.C. 4313.02 (JobsOhio) are constitutionally vulnerable that the State so strongly advocates for a new broad rule, one that cannot be squared with any current case law. If this Court accepts the State’s argument that any new, leading-edge, controversial, substantive program if rationally connected to the budget by affecting revenues or expenses is acceptable in an Appropriations Bill, then not only would those statutes be approved, but the S. B. No. 5 amendments, Right to Work laws and other permanent laws like them will also be pre-approved for inclusion in future Appropriations Bills.

Under current case law their inclusion in an Appropriations Bill is a clear violation of Section 15(D) because none of those statutes are appropriations. All are monumental first-time changes in the historical makeup of state government. They are easily found as leading edge substantive programs. And, the presence of three such leading-edge discordant subjects of this magnitude in H. B. 153 alone proves that Section 15(D) which says “No bill shall contain more than one subject” is violated. What the State advocates is really a “no holds barred” One-Subject Rule making Section 15(D) meaningless, a position already rejected by this Court more than a

generation ago. *OCSEA I, supra*, ¶76 citing *Simmons-Harris, In re Nowak, supra*, ¶52. When Ohio voters read the language in Section 15(D) and adopted the constitutional amendment, it was plain enough for them- one subject in one bill. This Court should respect their vote and reject a judicial re-writing of Section 15(D)'s plain language.

3. **The Numerous Unrelated Noneconomic Items In Am. Sub. H. B. No. 153 Are A Perfect Example Of The Mischief Resulting From Redefining An Appropriations Bill As The State Advocates**

A look into the future is here. H.B. 153 is a step on the stairs showing precisely what will happen in the future if the State's suggestion is adopted. Logrolling will flourish in Ohio. Controversial provisions which cannot gain a majority in an honest debate on the legislative floor will be buried in a 3,500 page Appropriations Bill and passed. The items shown below (others shown in (Supp. 31-32) would be includable in an Appropriations Bill using the State's justification that everything "rationally connected to and which affects the state budget" is permissible. This would include non-appropriation items, major new programs whether controversial or not and revenue-raising items. Referring to the complaint, the Court of Appeals noted examples of statutes alleged to be violative of the One-Subject Rule but made no ruling on any. It found that a claim was stated and remanded the case to determine whether any of them violate the One-Subject Rule. (St. Appx.19-20). This was a proper ruling under *Hoover, at 6-7*.

The following is but a sample:

- Modifies the rules of evidence in civil cases to change the requirements for the expert testimony of a coroner or deputy coroner. R.C. 2335.061, 2335.05, 2335.06.
- Prohibits nontherapeutic abortions in public hospitals and clinics, state universities, state medical colleges, health districts and joint hospitals. R.C. 5101.57(A)(3) and (B).
- Enacts a prohibition on the use of political subdivision funds for the purpose of procuring insurance policies which provide nontherapeutic abortions. R.C. 124.85 and R.C. 9.04.
- In connection with the sale or lease of the Turnpike eliminates all collective bargaining rights for Turnpike employees. R.C. 126.602(F).
- Requires the Chancellor of the Board of Regents to develop a plan for charter universities R.C. 3345.81

- Requires school districts to implement merit-based pay regulations. R.C. 3319.111 and R.C. 3319.112.

A unanimous Eighth District Court of Appeals also found a One Subject violation concerning a different statute enacted in H.B. 153. See, *City of Cleveland v. State*, 2013-Ohio-1186, 989 N.E.2d 1072, ¶44-54. It was “deeply concerned with the broad scope of the state’s argument” which parallels its argument here. It rejected this argument: “Under the State’s logic, every subject matter statewide that conceivably can be connected to a dollar of not merely state funding but also municipal spending could be substantively regulated in a single appropriations bill.” The Court agreed with the words in *Sheward, supra*, at 499, “the thought of it is staggering.” At ¶51.

There is a more appropriate place for the State to voice this radical departure from the literal wording of Section 15(D) and case precedent. The 129<sup>th</sup> General Assembly enacted R.C. 103.61 creating the Ohio Constitutional Modernization Commission. Its function is to make recommended changes to the Ohio Constitution and issue a report every two years until 2021. The Commission is the appropriate place to voice the State’s radical changes and the opportunity currently exists to seek such change there. This Court should not judicially rewrite Section 15(D). If the State’s argument has merit and is placed on the ballot, the voters will accept it.

4. **In Privatizing Florida’s State-Owned Prisons In An Appropriations Bill The Court Found It Violated Its One-Subject Rule**

The Circuit Court in Florida, in *Baiardi v. Tucker*, Case No. 2011 CA 1838 (Second Judicial Circuit, Leon County, Florida, 2011), appeal dismissed *Bondi v. Tucker*, 93 So.3d 1106 (2012), rejected as unconstitutional a very similar approach to O & M Contract prison privatization used by the Florida Legislature. (Supp. 49-54). That Legislature in an Appropriations Bill required the Florida Department of Correction to privatize 29 prisons by O &

M Contract. Its Constitution in Article III, Section 6 states “Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.” The Court found that the Title of the Bill did not indicate that the Bill was changing the established process or standards for privatizing prisons. If such substantive changes to general law were desired, the court said that the Legislature “must do so by general law, rather than ‘using the hidden recesses of the General Appropriations Act.’” It also ruled that the changes were not “rationally related to the appropriations for DOC generally” and that “such indirect enactment of law is contrary to our principles of representative government.” For more explanation see, *Crews v. Florida Public Employers Council 79, AFSCME*, 113 So.3d 1063, 1066 (2013) and *Bondi v. Tucker* at 1109-10.

The Illinois Supreme Court in *People v. Cervantes*, 189 Ill.2d 80, 723 N.E.2d 265, 273 (1999) likewise applied that state’s Single Subject Rule and found unconstitutional a rider which allowed its youth detention facilities to be owned, operated and managed by private contractors. Although not an Appropriations Bill, the court found no natural and logical connection between neighborhood safety (the main bill which was a Licensing Act) and the privatization of juvenile detention facilities and neighborhood safety.

##### **5. Further Rebuttal**

As did the trial court, the State cites *ComTech Sys., Inc., supra*, (p. 24) as an example of a rational connection to the budget allowing revenue raising by enactment of a new tax in an Appropriations Bill. Actually, the challenged provision only amended the definition of a retail sale and, unlike §753.10, it was expressly mentioned in the title of the bill. At 97. It did not enact a new tax. At 99. Unlike the new programs enacted in H.B. 153, retail sales and use transactions were taxable for 50 years before that case. R.C. 5739.01(B)(3)(e) and (Y). *ComTech*

is distinguishable because it did not involve the creation of a new substantive, controversial, leading edge program like those in H.B. 153 and disapproved by *Simmons-Harris*. Further, *ComTech* preceded *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St.3d 225, 631 N.E.2d 582 (1994), *Sheward*, *Simmons-Harris*, *Nowak*, and *OCSEA I* all of which have better explained and clarified the One-Subject Rule. *ComTech* has not been cited as a controlling authority by this Court since it was decided 23 years ago.

Citation to *Riverside v. State*, 190 Ohio App.3d 765, 944 N.E.2d 281 (2010) fares no better. In that case, the City argued only that the statute restricting cities from taxing certain income was “too tenuous to withstand one-subject scrutiny.” ¶41. *Riverside* did not discuss *Simmons-Harris* and its application to controversial substantive programs in an Appropriations Bill. Because the issues here are vastly different, the case is not a persuasive precedent. In any event, *Riverside* was decided prior to *LetOhioVote.Org*’s definition of an appropriation. Best demonstrating the differences between *Riverside* on the one hand and *Simmons-Harris* and this case on the other is S. B. 5. The 129<sup>th</sup> General Assembly knows when a separate bill is required having enacted S. B. 5 in a separate bill at the same time it enacted H.B. 153. Both were effective 7/1/2011. If the State’s definition were accepted, S. B. 5 could have been included in H.B. 153.

The State’s argument is also contradictory. On the one hand it says that as a condition to privatizing by O & M Contract there must be a demonstrated 5% cost savings and this is proper in an Appropriations Bill because it is rationally related to the state budget by saving money. On the other hand, it says that the 5% requirement has been in the law since 1995. (p. 27-28,33). The O & M Contract authorization and 5% cost savings were part of the permanent law since 1995 and were untouched by H.B. 153. See, R.C. 9.06(A)(4). (St. Appx. 68). What changed was the authorization to sell 5 prisons in §753.10 and the addition of §(J) to R.C. 9.06 which authorized

the prison sales after an O & M Contract was extant. These prison sale authorizations are the new programs prohibited by *Simmons-Harris*. This is not mundane. It is leading edge and highly controversial. The actions taken by the State were very harmful as shown above. Therefore, the amendment to §9.06(J) did not save the State 5%. Nor did the enactment of §753.10 provide additional revenue for the biennium because of the restrictions in R.C. 5120.092 and §753.10 as explained previously.

Moreover, the 5% savings is a “low blow” to the individuals working in the State’s Correctional System. State employees are not participants in the Social Security System. The State as employer contributes 14% to OPERS for each state employee. When a prison is privatized, the employees are alleged to be private-sector employees. Private-sector employers contribute 6.2% per employee to the Social Security System (FICA).<sup>4</sup> By forcing employees out of OPERS and into social security, the employer saves 7.8% on pension costs alone. Even if the employer has a 3% match to its pension plan (a high amount), it still saves 4.8% without doing a thing different than the State did when it owned and operated the prisons. The State may argue that the employees could stay in OPERS even after the layoffs. This is true-but unrealistic. As explained above, they can’t afford to pay 16.2% of their wages to two pension systems. It is doubtful that the 121<sup>st</sup> General Assembly was aware of this when it enacted the 5% cost savings requirement. As an aside, in the *Baiardi* case, the Florida legislature required a 7% cost savings. That played no part in the constitutional analysis of the Court. Negligible, if any, operational money is saved from the 5% Ohio requirement. That is the reality.

The State criticizes the appellate court’s ruling which remanded the case to determine whether H.B. 153 had only one subject and to sever any provisions the trial court finds

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<sup>4</sup> The employee also contributes 6.2% to Social Security. But, the retirement benefits are lower.

“constitute a manifestly gross or fraudulent violation of the one-subject rule.” The Court relied upon *Hinkle, supra*, 148-49 for that authority. The State mentions that the complaint did not ask for severance of the other items mentioned therein. But, in ¶135-136 the complaint cited Section 806.10 from H.B. 153 allowing severance and in ¶168E asked for severance of the prison privatization provisions. Civ. R. 54 (C) allows any relief which is appropriate and the rule is cited in the WHEREFORE Clause ¶5. See also, *State ex rel. Hottle v. Board of County Com'rs of Highland County*, 52 Ohio St.2d 117, 122, 370 N.E.2d 462 (1977). Thus, the Court of Appeals was correct to remand and determine whether there was a Single Subject in H.B. 153, whether provisions should be severed or whether the entire bill may be declared void. *Sheward, supra*; *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 880 N.E.2d 420 (2007), ¶79, *Akron Metropolitan Housing Authority v. State of Ohio*, 2008-Ohio-2836, 2008 WL 2390802, are authorities for this ruling.

In the final analysis the doctrine of *stare decisis* imposes an obligation on this Court to follow its precedents. *Stare decisis* engenders in the populace respect for the judiciary. Like cases will be decided alike regardless of the status of the party standing before the Court. The rule of law advocated by the State has been rejected by this Court in *LetOhioVote.Org*, *Simmons-Harris*, *Hoover*, *OCSEA I*, and *Hinkle* and should not be rejected here.

R.C. 9.06 and §753.10 violate the One-Subject Rule in Article II, Section 15(D), *Simmons-Harris* and *OCSEA I* and must be severed from H.B. 153 by this Court. The Turnpike statutes (R.C. 126.60, R.C. 126.601, R.C. 126.603, R.C. 126.604, R.C. 126.605) and the JobsOhio statutes (R.C. 4313.01 and R.C. 4313.02) also violate the One-Subject Rule, *Simmons-Harris* and *OCSEA I* and should be severed by this Court from H.B. 153. The Court’s remand for a hearing on the remaining issues should be affirmed.

## CROSS-APPELLANTS PROPOSITION OF LAW NO. 1

### Where A State-Owned Prison Is Sold And In Addition To Paying The Purchaser To Operate The Prison The State Agrees To Pay The Purchaser \$3,800,000 Per Year To Subsidize The Purchaser's Cost Of Owning The Prison A Claim For Violation Of Ohio Constitution, Article VIII, Section 4 Is Stated Upon Which Relief May Be Granted

Research has not disclosed any cases, in Ohio or elsewhere, involving the payment by the State of an Annual Ownership Fee (“AOF”) to the purchaser of a state-owned and sold prison or other similar facility. Ohio Constitution, Article VIII, Section 4 provides “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.”

Because the trial court granted a motion to dismiss, all of the allegations in the complaint must be taken as true. But, there is more. Exhibit 1 to the complaint is a document authored by at least two Defendants, DAS and ODRC. The Exhibit proves that the complaint’s allegations concerning the AOF claim are based in fact. (Supp. 1-2, 25-30). In its Court of Appeals Brief, CCA admitted it gets a \$3,800,000 annual payment from the State. (Id. 29-30). This amount is labeled by Defendants in the Request for Proposal (RFP) as an Annual Ownership Fee. (Id. 1-2, 25-30). Portions of the RFP which was incorporated into the CCA sales contract were filed with the Court of Appeals as an Appendix to CCA’s Brief. They confirm that the AOF is paid for “purchase price recovery, renovation and fixed equipment associated with the ownership(s) of the Lake Erie Correctional Complex.” (Id. 25, ¶4.10). Thus, the State admits it is paying for CCA’s ownership costs and CCA also admits it. Yet the State does not own the prison. Moreover, CCA’s Appendix showed that the State intends to pay, and CCA to receive, AOF payments for 21 years until the year 2032 (¶4.10). The State has promised to pay CCA more in

AOF payments ( $\$3,800,000/\text{yr} \times 21\text{years} = \$79,800,000$ ) than CCA paid for the prison (\$72,770,260).

There are no restrictions on CCA's use of the AOF payments. CCA can use the AOF payments to recover the full price it paid for Lake Erie. ("purchase price recovery"). In that event, CCA acquired the Lake Erie prison for nothing. CCA can use the AOF funds to pay for improvements on the 119 acres surrounding the prison which are currently unimproved. If CCA improves that acreage and the State elects to re-purchase the entire property, CCA can charge the State for the prison and the improvements made thereon. The AOF payments can be used by CCA to purchase a prison in another State or to help pay dividends to its shareholders.

No statute required the AOF payment. The AOF is not a lease payment. Nothing is being leased. The State sold the prison to CCA. The AOF is not a payment to purchase an asset. The prison was sold for the fixed amount of \$72,770,260. The State had no obligation to pay additional funds to CCA. Nor is the AOF payment purchasing a service. The operation and management of the prison is contained in the O & M Contract which contains a set fee for that service. The AOF payments are to defray CCA's ownership costs, an expense the State obligated itself to pay in violation of Article VIII, Section 4.

A subsidy has been defined as direct financial aid furnished by a government, as to a private commercial enterprise, an individual, or another government or any grant or contribution of money. *State Defender Union Employees v. Legal Aid & Defender Ass'n of Detroit*, 230 Mich. App. 426, 432, 584 N.W.2d 359 (1998). A subsidy is a grant of money made by government in aid of the promoters of any enterprise, work, or improvement in which the government desires to participate, or which is considered a proper subject for government aid, because such purpose is likely to be of benefit to the public. It is monetary assistance granted by a government to a

person or a private commercial enterprise. *Satellite Broadcasting & Communications Ass'n of America v. F.C.C.*, 146 F.Supp.2d 803, 829 (E.D.Va. 2001).

Cases involving Ohio Constitution, Article VIII, Section 6 are appropriate authorities for Article VIII, Section 4 issues because the prohibitions are “nearly identical.” *State ex rel. Eichenberger v. Neff*, 42 Ohio App.2d 69, 74, 330 N.E.2d 454 (1974). *State ex rel. Tomino v. Brown*, 47 Ohio St.3d 119, 122, 549 N.E.2d 545 (1989) says “Historically, Sections 4 and 6 of Article VIII have not been applied to programs undertaken for public welfare. Rather, these sections have been uniformly held to prohibit governmental involvement only in ventures that subsidize commerce or industry.” The AOF payments satisfy this definition of a subsidy. Privatizing a prison by transferring the operation and management of it to a for-profit corporation satisfies the definition of commerce and industry. See, *State, ex rel. Lake Cty. Bd. of Commrs., v. Zupancic*, 62 Ohio St.3d 297, 301-02, 581 N.E.2d 1086 (1991).

These AOF payments are taxpayer monies given to CCA to subsidize its ownership costs and for which the State receives nothing in return. In the words of *Taylor*, the State is aiding CCA with this money. In the words of *Tomino*, the State is subsidizing a venture for 21 years. “Running throughout Article VIII of the Ohio Constitution is a concern about placing public tax dollars at risk to aid private enterprise.” *State, ex rel. Petroleum Underground Storage Tank Release Comp. Bd., v. Withrow*, 62 Ohio St.3d 111, 114, 579 N.E.2d 705 (1991). Under these circumstances, it is a violation of Article VIII, Section 4 for the State to pay CCA this AOF subsidy. In addition to being a subsidy, it has all the characteristics of a gift of public funds.

*In C.I.V.I.C. Group v. Warren* , 88 Ohio St. 3d 37, 723 N.E.2d 106 (2000) three ordinances were enacted. One authorized bidding for the construction of streets, sewer and water lines with the developer responsible for 80% of the cost. A second ordinance authorized the

issuance of bonds with the proceeds used to pay for development of private property and tax revenue pledged to pay off the bonds but with no liens attached to the land. The third approved a reimbursement agreement whereby the developer would reimburse the City, out of the proceeds from the sale of houses constructed on the land, 80% of its costs over a 15 year period. The City would pay 20% of the construction costs and 100% of other sales costs and in return, the City would end up owning the streets, sewer and water lines.

This Court said that it does not matter that the public may directly or indirectly benefit from the enterprise. At 40. Citing *Taylor v. Ross Cty. Commrs*, 23 Ohio St. 22, (1872), this Court approved this statement: “It may be that, without the aid of this law, projects may fail, which could, under it, have been prosecuted to successful and useful results. But this consideration can have no influence in a judicial tribunal invested with the high trust of seeing, in the administration of justice, that the constitution suffers no detriment, from whatever quarter or in whatever shape the threatened invasion comes.”

*C.I.V.I.C.* found that the financing arrangements violated Ohio Constitution, Article VIII, Section 6 and held that the actions by the City raised money for and loaned its credit to or in aid of private corporations. Critical to the decision was the fact that the City did not own the land and taxpayer monies were used (and pledged) to pay for improvements which were the responsibility of the landowner. The case is close to these facts. The State does not own Lake Erie. Nevertheless, it is paying CCA for “purchase price recovery, renovation and fixed equipment associated with the ownership(s) of the Lake Erie Correctional Complex.” (Supp. 25, ¶ 4.10). Just as the City did not own the land in *C.I.V.I.C.*, the State doesn’t own the Lake Erie prison or surrounding acreage. Costs associated with the ownership of the prison are the

responsibility of the owner, CCA. This is an unlawful subsidy and the debt is for 21 years during which taxpayer monies are at risk.

Although acknowledging that Plaintiffs argued both the venture and credit prohibitions in Article VIII, Section 4 and both on its face and as applied, the Court of Appeals only addressed the venture portion of Section 4. (St. Appx.12, 23). It erred in both respects. The State and the Court below mistakenly relied upon *Grendell v. Ohio Environmental Protection Agency*, 146 Ohio App.3d 1, 4, 764 N.E.2d 1067 (2001) as authority to pay the AOF. (Id.24). The *Grendell* Plaintiffs challenged the statute authorizing the State's Echeck program on its face and its implementation and operation. Under the statutes, the EPA implemented and supervised the Echeck program through private contractors and set the fees to be charged for the vehicle inspections. The contractor was responsible for leasing the building and doing the vehicle inspections, collecting the fees and remitting and sharing a portion of the fees to EPA allowing it to run the program at essentially no cost to the EPA. No tax money was given to the contractor. That Court rejected Plaintiffs claim that this arrangement violated created a joint venture or violated Section 4.

*Grendell* is inapposite for several reasons. First, unlike this case, no State asset was sold or conveyed by EPA to the contractors who were required to lease the land and buildings from third parties and absorb all of the "initial capital investment costs of the program." At 8. Second, unlike this case, no tax money was paid to the contractors. The contractor paid a portion of the fees collected from the public to the EPA. Here ODRC pays the AOF subsidy from tax money to CCA. *Grendell* is the opposite of these facts. Third, *Grendell*, at p. 12, citing *Taylor, supra*, pointed out the very difference which the Court of Appeals missed and Plaintiffs 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.”

*Grendell* acknowledged that aiding a business enterprise with money or credit is prohibited by Section 4. At a minimum, the facts here state a claim that the State is aiding CCA with money or credit by paying an AOF subsidy under these circumstances.

The State defended against this claim by saying that it is permitted to pay the purchaser of a state prison a subsidy in order to offset some business costs. It cited cases which involved substantively different facts such as lottery agents and liquor sales agents who are paid a commission. In those examples there was no sale to a private party of a state-owned asset which was bought by tax dollars followed by a conveyance of all of the State’s right, title and interest in real estate. Moreover, those contractors delivered a service to the State. Here, the AOF payments subsidize CCA;s ownership costs and the State receives nothing in return for them.

This is the first time in Ohio’s history that the State has sold a prison. This highly unusual type of financial arrangement should not have been given a stamp of approval by the Court of Appeals on a motion to dismiss especially where, as here, no Defendant or Court has cited a single authority on point approving this scheme and discovery has not begun or even approached a cutoff date. Apparently, this is a case of first impression in the entire country. The lower Court’s affirmance is currently a precedent approving these AOF subsidies for all types of asset sales in the future not only in Ohio but as persuasive authority elsewhere. The case should have at least proceeded to the summary judgment phase of the case as was the case in *Grendell*.

Cumulatively, the AOF payments will exceed the price paid by CCA for Lake Erie. It cannot be said as a matter of law that this financial scheme where the State spends more money in AOF payments for which it receives nothing in return and where CCA will end up owning this prison and acreage at no cost is a valid constitutional transaction on its face. Moreover, if the

State re-purchases the prison and acreage, CCA will be selling the State a prison for which CCA paid nothing and the State will pay twice for the same asset (when constructed and now re-purchased). These pleading facts more than satisfied the requirements to state a claim under Ohio Constitution, Article VIII, Section 4.

**CROSS-APPELLANTS PROPOSITION OF LAW NO. 2**

**The Franklin County Court Of Common Pleas Possessed Jurisdiction To Determine Whether The Employees Working For The Private Contractor Pursuant To A Contract With The State Are Public Employees As Defined In R.C. 4117.01(C)**

If the two privatized situations were not voided on constitutional grounds and the employees reinstated with back pay and OCSEA's rights resumed, Plaintiffs' complaint requested that the employees working at North Central for MTC and at Lake Erie for CCA, be declared public employees under R.C. 4117.01(C). Citing *FCLEA*, the Court of Appeals ruled "Finally, because resolution of plaintiffs alternative claim depends on interpretation of the scope of 'public employer' as defined by R.C. Chapter 4117, the trial court did not err in finding that SERB had exclusive jurisdiction over such interpretation and dismissing plaintiffs complaint as to their alternative claim." (St. Appx.26). The Court of Appeals read *FCLEA* much too broadly and out of context and erred in ruling that R.C. 9.06(K) was not controlling.

It is undisputed that ODRC is a public employer and that CCA and MTC are private employers. It is undisputed that MTC and CCA both had O & M Contracts which resulted from actions taken under R.C. 9.06 and/or §753.10. It is undisputed that Defendants refused to acknowledge public employee status, pay, benefits and working conditions for employees working at both locations. (Cpt. ¶160-166, 168M, 172H-J,174-76).

Defendants refusal contravened the plain wording of R.C. 4117.01(C) which says that a public employee means "any person working pursuant to a contract between a public employer

and a private employer....” Regarding jurisdiction, R.C. 9.06(K) says that any claim challenging any action taken by the Governor, DAS or ODRC pursuant to R.C. 9.06 or §753.10 which “violates any provision of the Revised Code shall be brought in the court of common pleas of Franklin county.” DAS, where the Office of Collective Bargaining is located (R.C. 4117.10(D), and ODRC, the former employer, violated R.C. 4117.01(C) by failing to accord public employee status and rights to the MTC and CCA employees. R.C. 9.06(K) is a substantive right and supersedes the *FCLEA* ruling upon which the two lower Courts erroneously relied. *Proctor v. Kardassilaris*, 115 Ohio St. 3d 71, 75, 873 N.E.2d 872 (2007). Additionally, a specific statute enacted later in time prevails over any other earlier general statute. R.C. 1.51; R.C. 1.52(B); *Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, ¶26-33. A National Labor Relations Board (“NLRB”) determination is not required before making this type of claim. *Hamilton v. State Emp. Relations Bd.*, 70 Ohio St.3d 210, 213, 638 N.E.2d 522 (1994).

All of this created a sufficient basis under R.C. 9.06(K) to vest the trial court with jurisdiction over this claim. Thus, the Court, not SERB, had jurisdiction over this claim and it was error to dismiss it.

Irrespective of R.C. 9.06(K), the Court erred in relying upon *FCLEA* to find that SERB had exclusive jurisdiction over this claim because *FCLEA* does not apply to these facts. Most Courts misunderstand that SERB does not have an all-encompassing statute vesting jurisdiction in it over all matters which involve a public employer or public employee. No party identified a statute which vests SERB with jurisdiction over this claim. Nor did either lower Court. “[W]here jurisdiction is dependent upon a statutory grant, this Court is without the authority to create jurisdiction when the statutory language does not. That power resides in the General Assembly.” *Walco Truck Equip. Co. v. City of Tallmadge Bd. of Zoning Appeals*, 40 Ohio St. 3d 41, 43, 531

N.E.2d 685 (1988). In construing a statute, the Court must be careful not to add or insert words which were not included by the General Assembly. *State ex rel. Carna v. Teays Valley Local Sch. Dist. Bd. of Edn.*, 131 Ohio St. 3d 478, 967 N.E.2d 193 (2012), ¶18. The lower courts failed to heed those rules and added to SERB's jurisdiction where none exists.

*FCLEA* in paragraph one of the syllabus states that SERB "has exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117." This matter is not committed to it. There are two ways that SERB may exercise jurisdiction. The first occurs when a specific statute enables SERB to exercise jurisdiction and a party utilizes that statutory authority. These statutes are: R.C. 4117.05, SERB certifies exclusive bargaining representatives and approves requests for voluntary recognition; R.C. 4117.06(A) and R.C. 4117.07 SERB determines appropriateness of, or clarifies, a bargaining unit, petition for representation election or decertification; R.C. 4117.11 and R.C. 4117.12 SERB decides unfair labor practices and awards ULP remedies and R.C. 4117.19 requiring reports from and regulates the bylaws of labor organizations. No party to this case filed anything with SERB pursuant to those statutes or invoked its express statutory jurisdiction. Nor, are those statutes cited in Plaintiffs' complaint.

Second, a claim is within SERB's jurisdiction where a court complaint contains language which may fairly be construed as conduct or activity which is equivalent to one of SERB's express jurisdictional statutes. *FCLEA, supra*, 171; *E. Cleveland v. E. Cleveland Firefighters Local 500, I.A.F.F.*, 70 Ohio St. 3d 125, 127-28, 637 N.E.2d 878 (1994). In this circumstance the Court must analyze the complaint and find that the conduct or activity alleged therein is equivalent to one of SERB's express jurisdictional statutes. Neither Court has made such a finding in this case nor would the undisputed facts support it.

*FCLEA* recognizes that SERB does not have jurisdiction over every situation. (*State ex*

*rel. Rootstown Local Sch. Dist. Bd. of Educ. v. Portage Cnty. Court of Common Pleas*, 78 Ohio St. 3d 489, 678 N.E.2d 1365 (1997) is an example). This case is another example. *FCLEA* says at p. 171 and ¶2 of the syllabus:

That Chapter [4117] was meant to regulate in a comprehensive manner the labor relations between public employees and employers. Necessarily, then, it was not meant to give SERB exclusive jurisdiction over claims that a party might have in a capacity other than as a public employee, employer, or union asserting collective bargaining rights. Thus, as a matter of jurisdiction, if a party asserts rights that are independent of R.C. Chapter 4117, then the party's complaint may properly be heard in common pleas court. (Emphasis Added).

Unlike *FCLEA*, this complaint's allegations do not state an equivalent statutory basis for jurisdiction in SERB. Plaintiffs' complaint asserted independent rights and they are in a capacity other than public employee, public employer or union asserting collective bargaining rights.

MTC and CCA are not, by definition, public employers. See, R.C. 4117.01(B); *Ohio Historical Society v. SERB*, 66 Ohio St.3d 466, 479, 613 N.E.2d 591 (1993). Thus, SERB lacks jurisdiction over them. ODRC is a former public employer and many of the employees working at Lake Erie and North Central are former public employees. With that status, SERB lacks jurisdiction over them. The O & M Contracts are not labor agreements and SERB cannot adjudicate contract rights under them. Judicial power is vested in the courts and SERB is in no sense a Court. Ohio Constitution Article IV, Section 1. Compare, *Incorporated Village of New Bremen v. Public Utilities Commission*, 103 Ohio St. 23, 31, 132 N.E. 162 (1921). See also, 73 C.J.S. *Pub Administrative Law and Procedure* §135. Thus, SERB does not have jurisdiction over the contracts.

No CBA between OCSEA and MTC (and CCA) currently exists. Further, federal law prohibits OCSEA from representing both "rank and file" workers and guards (29 U.S.C. §159(b)(3)) and National Labor Relations Act issues are outside SERB's jurisdiction. Thus,

OCSEA no longer is the bargaining representative for the employees at North Central or Lake Erie. All Defendants assert that the employees hired by MTC and CCA are private sector employees. *Professional Assn. v. SERB*, 2004-Ohio-5839, 2004 WL 2474422, ¶13 holds that: “persons who are not public employees are not subject to the provisions of R.C. Chapter 4117.” In the words of *FCLEA*, Plaintiffs do not currently possess the status to assert collective bargaining rights under O.R. Chapter 4117. Thus, there is a total lack of jurisdiction in SERB, both of the subject matter and parties.

Additionally, one Plaintiff, Tackett, was a supervisor when privatization caused his job loss. Supervisors are not public employees. R.C. 4117.01(C)(10). Therefore, separately, Tackett lacked any rights under a CBA or O.R.C. Chapter 4117. Thus, under no circumstances could SERB entertain his R.C. 4117.01(C) claim. The Franklin County Common Pleas Court, without question, had jurisdiction over Tackett’s claim under R.C. 4117.01(C) regardless of how this Court rules on this issue regarding the other Plaintiffs’ arguments.

There are several Policy reasons why public employee status under R.C. 4117.01(C) is a significant issue. First, R.C. 145.01(A)(2) allows the MTC and CCA employees to continue in OPERS without also being forced to participate in the non-waivable, compulsory Social Security System. Public employees are excluded from mandatory participation in social security. Declared public employee status under R.C. 4117.01(C) would help alleviate the harm to the laid off employees working in the privatized prisons because they cannot afford to pay for both retirement systems. Further, R.C. 145.01(A)(2) and R.C. 4117.01(C) are complementary, both are intended to ameliorate harm to the employees when privatization occurs.

Second, it is in the best interest of the State of Ohio to have labor relations in Ohio prisons regulated by SERB instead of the NLRB. SERB has built up the public-sector labor

relations expertise whereas the NLRB's expertise is in the private sector. Although for the reasons stated above they are currently regulated by the NLRB, if public employee status is recognized by this court, SERB will possess jurisdiction over all the employees and their labor organizations. Third, as a result of privatizing, the MTC and CCA employees no longer have immunity from suit as they did under R.C. 2743.01 et. seq. See, R.C. 9.06(B)(15). They were stripped from their "immunity from suit." The contractors must, however, carry insurance. Nevertheless, there is a difference. Immunity from suit means the employees will not be named parties to the suit or involved in the litigation in the Ohio Court of Claims. Insurance does not afford those protections. It, if in sufficient amount, only pays the judgment.

Fourth, the State may cancel both of the O & M Contracts when it considers it "appropriate." R.C. 9.06(B)(17). The employees' wages, pensions, and family life are thus disrupted at the stroke of the State's pen. They are not chattels. This Court should consider this situation from their point of view especially when the so-called 5% savings requirement is such a charade. If the State resumes management and control (and ownership of Lake Erie) the employees will end up back in OPERS. But, in the interim, they will have lost years of service credit in OPERS and their participation in Social Security will gain them little or almost no retirement benefit. They will be harmed again.

Fifth, in *State of Tennessee v. Gilliam*, 2010 WL 2670822, \*2, the Court held "The providing of prisons is a responsibility that the State cannot delegate to a private entity. While the State can contract with a private entity such as CCA to operate a prison consistent with the provisions of the Private Prison Contracting Act of 1986, the ultimate responsibility to provide for its prisoners belongs to the State of Tennessee." Additionally, the Ohio Attorney General has ruled that despite the sale of Lake Erie to CCA, it remains to this day a "state institution." "With

the transfer of ownership, LECF [Lake Erie] is no longer state property. Nonetheless, LECF still constitutes a state institution.” Citing R.C. 9.06(J)(1), the Attorney General ruled that the sold prison “shall be considered for purposes of the Revised Code as being under the control of, or under the jurisdiction of, the department of rehabilitation and correction.” (Supp. 55-56).

For all of these reasons, the Franklin County Common Pleas Court had jurisdiction over the R.C. 4117.01(C) claim and it was error to dismiss it.

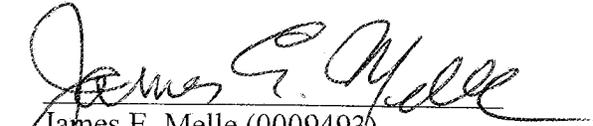
### III. **CONCLUSION**

For the foregoing reasons, the judgment of the Court of Appeals reversing dismissal of the claim in Plaintiffs’ complaint based upon Ohio Constitution, Article II, Section 15(D) should be affirmed with a finding and declaration from the Court that R.C. 9.06, §753.10 (prisons), R.C. 126.60, R.C. 126.601, R.C. 126.603, R.C. 126.604, R.C. 126.605 (Turnpike), and R.C. 4313.01 and R.C. 4313.02 (JobsOhio) are unconstitutional in violation of Ohio Constitution, Article II, Section 15(D) and affirm the remand of the remainder of this claim to the Franklin County Common Pleas Court with instructions to allow Plaintiffs and Defendants to make a complete record and, where appropriate, to sever all provisions which offend the One-Subject Rule.

The judgment of the Court of Appeals affirming dismissal of the claim in Plaintiffs’ complaint based upon Ohio Constitution, Article VIII, Section 4 should be reversed because the complaint stated a claim upon which relief may be granted.

The judgment of the Court of Appeals dismissing Plaintiffs claim that the Franklin County Common Pleas Court, and not the State Employment Relations Board, possessed jurisdiction to determine whether the employees working for Management & Training Corporation at North Central and the employees working for Corrections Corporation of America at Lake Erie are public employees as defined in R.C. 4117.01(C) should be reversed.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing Merit Brief of Appellees/Cross-Appellants was served via ordinary mail upon the following persons

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