

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

---

THIRD MERIT BRIEF OF APPELLANT/CROSS-APPELLEE  
MANAGEMENT & TRAINING CORPORATION

---

Adam Martin (0077722)  
Kevin W. Kita (0088029)  
Sutter O’Connell  
1301 East 9<sup>th</sup> Street  
Cleveland, OH 44114  
[amartin@sutter-law.com](mailto:amartin@sutter-law.com)  
[kkita@sutter-law.com](mailto:kkita@sutter-law.com)  
P: 216-928-2200  
F: 216-928-3636

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

Michael Dewine (0009181)  
Attorney General of Ohio  
Eric E. Murphy (0083284)  
State Solicitor and Counsel of Record  
30 East Broad St. 16<sup>th</sup> Floor  
Columbus, OH 43215  
[Eric.murphy@ohioattorneygeneral.gov](mailto:Eric.murphy@ohioattorneygeneral.gov)  
P: 614-466-8980  
F: 614-446-5087

*Attorneys for Defendants/Appellants/Cross-Appellees:  
State of Ohio, Governor John R. Kasich,*

James E. Melle (0009493)  
167 Rustic Place  
Columbus, OH 43214  
[jimmelle43@msn.com](mailto:jimmelle43@msn.com)  
P: 614-271-6180

*Attorney for Plaintiffs/Appellees/Cross-Appellants:  
Ohio Civil Service Employees Association,  
David Combs, Clair Crawford, Lori Leach Douce, Margo Hall, Shelia Herron, Daniel Karcher, Rebecca Sayers, Angela Schuster, Troy Tackett, Kathy Tinker, Lisa Zimmerman, and ProgressOhio.org*

Nicholas A. Iarocci (0001937)  
Ashtabula County Prosecuting Attorney  
25 West Jefferson Street  
Jefferson, OH 44047  
[TLSartini@ashtabulacounty.us](mailto:TLSartini@ashtabulacounty.us)  
P: 440-576-3662  
F: 440-576-3600

*Attorney for Plaintiffs/Appellees/Cross-Appellants:  
Dawn M. Cragon, Roger A. Corlett and Judith A. Barta*

RECEIVED  
DEC 19 2014  
CLERK OF COURT

FILED  
DEC 19 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

*Attorney General Mike DeWine, Secretary of State Jon Husted, Auditor of State David Yost, Ohio Department of Rehabilitation and Correction and Director, Gary C. Mohr, Ohio Department of Administrative Services and Director, Robert Blair, Treasurer Josh Mandel, and the Office of Budget and Management and Director Timothy S. Keen*

Charles R. Saxbe (0021952)  
James D. Abrams (0075968)  
Celia M. Kilgard (0085207)  
Taft, Stettinius & Hollister, LLP  
65 E. State St., Suite 1000  
Columbus, OH 43215-3413  
[Rsaxbe@taftlae.com](mailto:Rsaxbe@taftlae.com)  
[Jabrams@taftlaw.com](mailto:Jabrams@taftlaw.com)  
[Ckilgard@taftlaw.com](mailto:Ckilgard@taftlaw.com)  
P: 614-221-2838  
F: 614-221-2007

*Attorneys for Defendant/Cross-Appellees  
Corrections Corporation of America and CCA  
Western Properties, Inc.*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iv

REPLY ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW.....1

PROPOSITION OF LAW I: Amendments to Established Cost Saving Provisions in a Biennial Budget Bill Do Not Violate the Ohio Constitution’s One-Subject Rule ..... 1

PROPOSITION OF LAW II: Provisions in a Biennial Budget Bill That Authorize State Agencies to Raise Specific Types of Revenue Do Not Violate the Ohio Constitution’s One-Subject Rule Merely Because They Set the Terms By Which the Agencies May Do So. .... 1

PROPOSITION OF LAW III: A Court Should Not Permit An Evidentiary Hearing For a Provision-by-Provision Review of a Biennial Budget Bill That, On Its Face, Has a Common Purpose ..... 7

RESPONSE ARGUMENTS TO CROSS-APPELLANTS’ PROPOSITIONS OF LAW ..... 8

PROPOSITION OF LAW I: It is a Valid Act of the Legislative Body to Employ a Private Company Like CCA to Perform the Public Service of Managing and Operating a Private Prison that is Prohibited from Accepting Inmates Other Than Those Placed By the ODRC..... 8

PROPOSITION OF LAW II: It is Well Established That State Employment Relations Board (“SERB”) has Exclusive Jurisdiction to Determine Who is a “Public Employer” and “Public Employee” Pursuant to R.C. 4117 – the Statute that Created SERB and the Comprehensive Framework for Addressing Such Issues..... 15

CONCLUSION..... 19

CERTIFICATE OF SERVICE ..... 20

## TABLE OF AUTHORITIES

### Cases

<i>Alter v. Cincinnati</i> , 56 Ohio St. 47, 46 N.E. 69 (1897).....	12
<i>Baiardi v. Tucker</i> , Case No. 2011 CA 1838 (Second Judicial Circuit, Leon County 2011) .....	6
<i>Beagle v. Walden</i> , 78 Ohio St.3d 59, 676 N.E.2d 506 (1997) .....	2
<i>Carter v. Trotwood-Madison City Bd. of Educ.</i> , 181 Ohio App. 3d 764, 2009-Ohio-1769, 910 N.E.2d 1088, (2nd Dist. 2009).....	15, 16
<i>City of Cincinnati v. Dexter</i> , 55 Ohio St. 93, 44 N.E. 520 (1892).....	11
<i>City of Cleveland v. State</i> , 2013-Ohio-1186, 989 N.E.2d 1072 (8th Dist. 2013) .....	3
<i>City of Dublin v. State</i> , 118 Ohio Misc. 2d 18, 2002-Ohio-2431 .....	3
<i>City of Solon v. Martin</i> , 8th Dist. No. 89586, 2008-Ohio-808 .....	2
<i>C.I.V.I.C. Grp. v. Warren</i> , 88 Ohio St.3d 37, 40, 723 N.E.2d 106 (2000) .....	13
<i>ComTech Systems, Inc. v. Limbach</i> , 59 Ohio St.3d 96, 570 N.E.2d 1089, (1991) .....	2
<i>FCLEA v. Fraternal Order of Police</i> , 59 Ohio St.3d 167, 171, 572 N.E.2d 87 (1990).....	15-19
<i>Gallipolis Care, L.L.C. v. Ohio Dep't of Health (In re Holzer Consol. Health Sys.)</i> , Franklin App. No. 03AP-1020, 2004-Ohio-5533.....	3
<i>Grendell v. Ohio Env'tl. Prot. Agency</i> , 146 Ohio App.3d 1 (9 <sup>th</sup> Dist. 2001).....	10
<i>Gunn v. Bd. of Educ. of Euclid City School Dist.</i> , 51 Ohio App. 3d 41, 554 N.E.2d 130 (1988) .. .....	16
<i>Hines v. Bellefontaine</i> , 74 Ohio App. 393, 57 N.E.2d 164 (1943) .....	11
<i>In re Nowak</i> , 104 Ohio St.3d 466, 2005-Ohio-6777, 820 N.E.2d 335 .....	7
<i>Mitchell v. Lawson Milk Co.</i> , 40 Ohio St. 3d 190, 532 N.E.2d 753, (1988).....	18

<i>Ohio Historical Society v. State Employment Relations Bd.</i> , 66 Ohio St.3d 466, 613 N.E.2d 591 (1993).....	17
<i>People v. Cervantes</i> , 189 Ill.2d 80, 723 N.E.2d 265 (1999).....	6
<i>Riverside v. State</i> , 190 Ohio App.3d 765, 944 N.E.2d 281 (2010).....	3
<i>Simmons-Harris v. Goff</i> , 86 Ohio St.3d 1, 1999-Ohio-77, 711 N.E.2d 203, (1999) .....	4
<i>State ex rel. Bruestle v. Rich</i> , 159 Ohio St. 13, 110 N.E.2d 778, 790 (1953).....	11
<i>State ex rel. Cleveland Right to Life v. State Controlling Bd.</i> , 138 Ohio St. 3d 57, 2013-Ohio-5632, 3 N.E.3d 185 .....	3
<i>State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Employment Relations Bd.</i> , 22 Ohio St. 3d 1, 488 N.E.2d 181, (1986) .....	18
<i>State ex rel. LetOhioVote.org v. Brunner</i> , 123 Ohio St.3d 322, 2009-Ohio-4900 .....	4
<i>State ex rel. McElroy v. Baron</i> , 169 Ohio St. 439, 444 (1959).....	11
<i>State ex rel. OCSEA, Local 11 v. State Empl. Rels. Bd.</i> , 104 Ohio St.3d 122, 2004-Ohio-6363 ... .....	2
<i>State ex rel. Ohio Acad. of Trial Lawyers v. Sheward</i> , 86 Ohio St. 3d 451, 1999-Ohio-123, 715 N.E.2d 1062 .....	4
<i>State ex rel. Ohio AFL-CIO v. Voinovich</i> , 69 Ohio St. 3d 225, 631 N.E.2d 582 (1994).....	3
<i>State ex rel. Ohio Roundtable v. Taft</i> , Franklin App. No. 02AP-911, 2003-Ohio-3340 .....	2, 3
<i>State ex rel. Petroleum Underground Storage Tank Release Comp. Bd., v. Withrow</i> (1991), 62 Ohio St. 3d 111, 579 N.E.2d 705 .....	10
<i>State ex rel. Ryan v. City Council</i> (1984), 9 Ohio St. 3d 126, 459 N.E.2d 208.....	10
<i>Taylor v. Ross Cty. Commrs</i> , 23 Ohio St. 22, 78 (1872) .....	14
<i>State ex rel. Tomino v. Brown</i> , 47 Ohio St.3d 119, 549 N.E.2d 505 (1989).....	14

*Walker v. Cincinnati*, 21 Ohio St. 14 (1871) .....10

*York v. Ohio State Highway Patrol*, 60 Ohio St. 3d 143, 573 N.E.2d 1063 (1991) .....18

Constitutional Sections

Article VIII, Section 4.....9-12; 14-15

Article VIII, Section 6.....14

Statutes

O.R.C. 9.06 .....1, 2, 14, 15

O.R.C. 9.06(K).....18

O.R.C. 2721.01, *et seq.* .....16

O.R.C. 4117.01, (C)..... 15-18

O.R.C. 4117.02(O).....16

O.R.C. 4117.08 .....15

O.R.C. 4117.12(A).....16

O.R.C. 4117.22 .....17

Section 373.10 in H.B. 153 .....3

Section 753.10(C)(8) in H.B. 153.....3

Other References

2012 Ohio Am.Sub.H.B. 153.....1, 3, 7, 8, 11, 14

## **REPLY ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW**

Appellees/Cross-Appellants (Plaintiffs) present their response arguments in a single proposition of law. Several of these arguments are applicable to MTCs' Proposition of Law I and II and, thus, they will be addressed together.

### **PROPOSITION OF LAW I: Amendments to Established Cost Saving Provisions in a Biennial Budget Bill Do Not Violate the Ohio Constitution's One-Subject Rule.**

and

### **PROPOSITION OF LAW II: Provisions in a Biennial Budget Bill That Authorize State Agencies to Raise Specific Types of Revenue Do Not Violate the Ohio Constitution's One-Subject Rule Merely Because They Set the Terms By Which the Agencies May Do So.**

1. **Plaintiffs' Brief Concedes that Ohio's Prison Privatization Program has been Established, "Permanent Law" Since 1995, that it was Duly Created and Amended via a General Appropriations Bills, and that 2012 Ohio Am.Sub.H.B. 153 left "Untouched" the Provisions Governing MTC's O & M Contract with the State.**

Plaintiffs concede that Ohio's prison privatization program is an established cost-saving provision that has been controlling law since 1995. *Appellees' Br.* at 29 ("O&M Contract authorization and 5% cost savings were part of the **permanent law since 1995** and were untouched by H.B. 153") (emphasis added). In their silence, Plaintiffs concede that this program was duly created in a general appropriations bill with a stated subject nearly identical to the one in the case at bar. *See* 1995 H.B. 117. Further, Plaintiffs do not contest that Ohio's prison privatization program was appropriately amended five (5) times in subsequent appropriations bills. *See generally Appellees' Br.*; *see also* R.C. 9.06 (Legislative History). This is no accident. Once these facts are acknowledged, it is impossible to accept Plaintiffs' repetitious claim that the

disputed provisions are “leading edge” or that MTC’s arguments are “novel” or “expansive” of long established legal precedent.

The fact is MTC seeks nothing more than the application of *stare decisis*. The applicable analysis advocated in both the State and MTC’s Merit Briefs are the product of this Court’s interpretation of the Ohio Constitution time and time again. This Court has long established that appropriations bills may contain provisions that are not appropriations themselves, without violating the One-Subject Rule. *State ex rel. OCSEA, Local 11 v. State Empl. Rels. Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, at ¶30; *ComTech Systems, Inc. v. Limbach*, 59 Ohio St.3d 96, 99, 570 N.E.2d 1089 (1991). Non-appropriation provisions need only share a “sufficient common thread” with appropriations to merit inclusion. *Beagle v. Walden*, 78 Ohio St.3d 59, 62 676 N.E.2d 506 (1997); *City of Solon v. Martin*, 8th Dist. No. 89586, 2008-Ohio-808, at ¶23. This interpretation of the one-subject rule has been repeatedly applied by the lower courts in analogous cases. *See State ex rel. Ohio Roundtable v. Taft*, 10<sup>th</sup> Dist. App. No. 02AP-911, 2003-Ohio-3340; *Martin, supra*. Ohio has long recognized the connection between the appropriations the Ohio Department of Rehabilitation and Correction (ODRC) requires and its ability to save costs to the State through the privatization of its prisons. *See R.C. 9.06 (Legislative History)*.

There is nothing contradictory about the State and MTC highlighting the fact that “permanent law” mandates and continues to mandate cost-saving under O & M contracts in their Merit Briefs. The 5% savings requirement is, in part, what makes the nearly twenty year-old prison privatization program an established cost-saving provision, amendments to which, are directly connected to issues with Ohio’s budget and appropriations. The cost savings and revenue generation realized by the sale of LECF under Section 753.10 are self-evident in light of the undisputed facts of this case. The ODRC receives nearly \$1.6 billion in appropriations to

fund its institutional operations, services and property expenses. Section 373.10 in H.B. 153. The sale of LECF immediately removed a portion of these expenses from the ODRC's budget, while simultaneously raising \$72,770,260 for the payment of debt obligations. Section 753.10(C)(8), in H.B. 153.

What is contradictory, is the Plaintiffs' argument to invalidate MTC's contract with the State while simultaneously admitting it was established pursuant to "permanent law \* \* \* untouched by H.B. 153." Plaintiffs' argument that O & M contracts should be invalidated because they could, hypothetically, lead to a potential sale in the future fails for the reasons cited above, and further is not ripe for determination. First, MTC has not attempted to purchase North Coast Correctional Institute. Second, even if it did, Plaintiff could not prove any additional damages arising out of the change in ownership. Simply put, Plaintiffs' concessions confirm the Tenth District erred in its failure to affirm the trial court's dismissal of claims arising from MTC's contract.

**2. Plaintiffs' Argument Requires this Court to Abandon Precedent, Not to Follow it.**

Plaintiffs' argument relies on a novel application of semantics: that an "appropriations bill" is fundamentally different and more restrictive than a "budget bill." *See Appellees' Br.* at 18. This distinction, however, is legally and historically erroneous, and any suggestion that the Court apply Plaintiffs' unprecedentedly restrictive analysis is unfounded.

Even a cursory review of case law does not support Plaintiffs' assertion. The terms "appropriations" and "budget" are used interchangeably throughout Ohio one-subject rule case law, even those repeatedly cited by the opposition in support of their position. *See e.g. State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St.3d 225, 254, 631 N.E.2d 582 (1994); *City of Dublin v. State*, 118 Ohio Misc.2d 18, 38, 2002-Ohio-2431, at ¶49 (C.P.); *Taft*, 2003-Ohio-3340;

*Gallipolis Care, L.L.C. v. Ohio Dep't of Health (In re Holzer Consol. Health Sys.)*, 10th Dist. App. No. 03AP-1020, 2004-Ohio-5533, ¶40; *Riverside v. State*, 190 Ohio App.3d 765, 772 944 N.E.2d 281 (2010); *City of Cleveland v. State*, 989 N.E.2d 1072, 2013-Ohio-1186, ¶56; *State ex rel. Cleveland Right to Life v. State Controlling Bd.*, 138 Ohio St.3d 57, 2013-Ohio-5632, 3 N.E.3d 185.

Moreover, in the one-subject rule cases, involving appropriations bills, on which Plaintiffs' Brief relies, this Court has rejected the contention that the one-subject rule prohibits the inclusion of provisions that do not expressly make expenditures or incur obligations. *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 16, 1999-Ohio-77, 711 N.E.2d 203 ("Appropriations bills, of necessity, encompass many items, all bound by the thread of appropriations."); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 533, 1999-Ohio-123, 715 N.E.2d 1062 ("Multiple topics will not render a bill constitutionally infirm as long as the topics have a common purpose or relationship"). Rather, this Court has long given the term "subject" in the One-Subject Rule analysis a "broad and extensive meaning" to allow the General Assembly to include in one act all matters having a logical connection. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d at 539. Thus, the State and MTC ask this Court to recognize and follow established precedent, not to renounce it as Plaintiffs assert in their Brief. *Appellee Br.* at 19.

In reality, it is Plaintiffs' argument that requires the Court to abandon well-established one-subject rule analysis in favor of an unfounded application of analysis on a completely different legal topic. *Appellees' Br.* at 19 (citing *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322). This Court in *LetOhioVote* explicitly limited the scope of its holding: "[t]he narrow focus of this case \* \* \* is singularly centered on whether the citizens of Ohio have the

right of referendum.” *LetOhioVote*, 123 Ohio St. 3d at 323. This Court did not perform any one-subject rule analysis in *LetOhioVote*. In fact, the Court did not mention the term “one-subject” throughout the entire 18 page opinion. *See id.* Rather, the Court focused on whether the challenged provisions were, in and of themselves, “appropriations.” *Id.* If they were not appropriations, they were subject to referendum; if they were, they were exempt. *Id.* Because it is established that non-appropriation provisions can survive one-subject rule analysis of a budget bill, is the *LetOhioVote* analysis is not relevant.

**3. Plaintiffs’ Efforts to Distinguish Controlling Precedent and Their Reliance on Cases from Foreign Jurisdictions and Doomsday Prognostication is Flawed.**

**a. *ComTech* and *Riverside* are Analogous Cases that Demonstrate the Invalidity of Plaintiffs’ Proposition of Law.**

In light of the foregoing, Plaintiffs’ efforts to distinguish the case at bar from controlling Ohio case law is futile and unpersuasive. For example, Plaintiffs’ Brief argues this Court’s holding in *ComTech*, *supra*, is not controlling because the passage of new retail sales tax provisions via appropriations is materially different than the provisions in this case. *See Appellees’ Br.* at 28. The basis for this differentiation is allegedly that “retail sales and use transactions” had been taxable for decades prior to the passage of the bill at issue. *Id.* This rationale is hardly persuasive and actually quite confusing in light of Plaintiffs’ admission that prison-privatization has been “permanent law” in Ohio for nearly 20 years. *See Appellees’ Br.* at 29. Nor can one reconcile this Court’s decision in *ComTech* with Plaintiffs’ proposed legal test. In *ComTech*, this Court upheld the inclusion of a provision that was clearly not an “appropriation,” under the narrow *LetOhioVote* definition, in a general appropriation bill. *ComTech*, *supra* at 99. If Plaintiffs’ legal theory were controlling precedent, as opposed to an

unprecedentedly restrictive test that has yet to be applied by any Ohio Court prior to the Tenth District below, the *ComTech* Court could not have reached its conclusion.

Likewise, Plaintiffs' attempt to separate the present case from *Riverside, supra*, is fruitless. As a preliminary matter, Plaintiffs' assertion that "*Riverside* did not discuss *Simmons-Harris*" is simply false. *Appellees' Br.* at 29. The *Riverside* court directly discussed *Simmons-Harris, supra*, citing to its holding and discussing its rationale. *Riverside, supra* at 785-786. Yet, after a thorough analysis of controlling precedent, the court determined that a non-appropriation provision<sup>1</sup> was "sufficiently related to funding and budgeting to pass constitutional muster under the one-subject rule." *See id.* at 785-786; 789.

**b. This Court Should Not Abandon Ohio Law in Favor of Reasoning from Foreign Cases.**

Accordingly, Plaintiffs turn to foreign jurisdictions in an effort to muster support for their novel theory. They look to Florida and Illinois, citing *Baiardi v. Tucker*, Case No. 2011 CA 1838 (Second Judicial Circuit, Leon County 2011) and *People v. Cervantes*, 189 Ill.2d 80, 723 N.E.2d 265 (1999). Reliance on these cases is untenable. As a preliminary matter, the *Baiardi* court stated, unequivocally, that the sale of prisons was constitutional under Florida law and not at issue in the case:

At the outset the [c]ourt makes clear that the issue before it is not whether prisons in Florida may be privatized. **The answer to that question is yes**, and was already answered by the enactment of Section 944.105, Florida Statutes, which gives the Department of Corrections ("DOC") the authority to initiate and enter into contracts with private vendors for the operation and maintenance of correctional facilities and the supervision of inmates.

---

<sup>1</sup> The subject provision prohibited municipalities from taxing compensation paid to persons employed within the boundaries of certain air force bases unless that person was subject to taxation because of residence or domicile. *Riverside, supra* at 772. Because this provision does not make an expenditure or incur an obligation, it does not meet Appellees'/Cross-Appellants' proffered test for inclusion in an appropriations bill.

*Baiardi, supra* (emphasis added). *Id.* The *Cervantes* decision had nothing to do with prison-privatization or appropriations bills. Finally, and perhaps most obviously, the *Baiardi* and *Cervantes* courts were interpreting foreign statutes under precedent that has no authority over the case at bar. This Court should not abandon decades of Ohio precedent in favor of a non-binding trial court case interpreting Florida law. To do so would undermine the policy and rationale of *stare decisis*, the ability to rely on the established law of this State.

**c. Plaintiffs' Doomsday Prognostications Lack Any Factual Evidentiary Support.**

Plaintiffs' Brief uses emotional appeal and a well-known logical fallacy: the slippery-slope. The opposition claims that if the Court follows its precedent in *ComTech* and *Voinovich*, or the applicable appellate court holdings in *Taft* and *Riverside*, appropriations bills will suddenly become the instrument to strip Ohio citizens of their rights under the guise of affecting the budget. *Appellees' Br.* at 20-21. There is no factual basis to support such a position. Unlike the case at bar, the straw-man scenarios imagined by Plaintiffs do not involve amendments to an established cost saving program that has a direct impact on necessary State appropriations. Unlike Sec. 753.10 of H.B. 153, Plaintiffs' fictional prognostications do not directly generate revenue to pay down State bond obligations, nor save on future appropriations. And this Court has already stated that such non-analogous provisions will not survive one-subject rule scrutiny. *See e.g. State ex rel. OCSEA, supra.* Simply put, there is no reason to accept Plaintiffs' flawed logic.

**PROPOSITION OF LAW III: A Court Should Not Permit An Evidentiary Hearing For a Provision-by-Provision Review of a Biennial Budget Bill That, On Its Face, Has a Common Purpose.**

Plaintiffs do not contest that Ohio courts are required to limit their review to the narrowest grounds necessary to address Plaintiffs' Complaint. *See In re Nowak*, 104 Ohio St.3d

466, 2005-Ohio-6777, 820 N.E.2d 335, ¶72; *LetOhioVote*, 2009-Ohio-1750 at ¶37. Nor does the opposition contest that H.B. 153 has a subject. In fact, Plaintiffs spend several pages attempting to narrowly define the subject of the bill to “appropriations” as defined in *LetOhioVote*. *Appellees’ Br.* at 18-20. Thus, by logical deduction, even if this Court accepts Plaintiffs’ arguments, their challenge to H.B. 153 in it’s entirety must be dismissed.

Likewise, in their silence, Plaintiffs concede that, when reviewing a bill under one-subject analysis, courts are limited to a review of the “four corners” of the document and must address the issue only on the narrowest grounds necessary to resolve the controversy. *In Re Nowak*, *supra* at ¶ 72; *LetOhioVote*, *supra* at ¶37. Thus, there is no basis on which the Tenth District should have remanded the case for an evidentiary hearing. All of the evidence needed to make a legal determination on this case was provided to the trial court in the form of H.B. 153, and Plaintiffs’ Complaint which incorporated, by reference, the language of the contracts at issue.

For the reasons stated herein, MTC respectfully requests that this Court reverse the Court of Appeals decision regarding Plaintiffs’ One-Subject Rule claim and affirm the decision of the trial court dismissing Plaintiffs’ Complaint.

**RESPONSE ARGUMENTS TO CROSS-APPELLANTS' PROPOSITIONS OF LAW**

**PROPOSITION OF LAW I: It is a Valid Act of the Legislative Body to Employ a Private Company like CCA to Perform the Public Service of Managing and Operating a Private Prison that is Prohibited from Accepting Inmates Other than those Placed By The ODRC.**

As a preliminary matter, Plaintiffs' arguments regarding a violation of Section 4, Article VIII of the Ohio Constitution do not apply to MTC in any manner. Plaintiffs admit that MTC does not own the North Central Correctional Complex and does not receive an Annual Ownership Fee (AOF). The trial court's dismissal of Plaintiffs' claims arising from MTC's contract with the State should be affirmed.

**1. The Annual Ownership Fee is an Optional Payment Made in Exchange for Exclusive Use of a Privately Owned Facility.**

Plaintiffs ask this Court to make it unconstitutional for a private corporation to earn money in exchange for promising exclusive services to the State. There is absolutely no factual or legal basis for this request. Plaintiffs ignore, and their supplement omits, essential portions of the State's contract with CCA in an effort to manufacture a constitutional issue by calling the AOF a "subsidy" as defined under Michigan law. Specifically, Plaintiffs omit (1) that the State has an option, not an obligation, to pay an AOF; and (2) in exchange for the fee, CCA must guarantee the ODRC will have the exclusive ability to place inmates in Lake Erie Correctional Facility (LECF). These terms are explicitly stated on page 16 of the RFP that Plaintiffs selectively cite:

PER DIEM SAVINGS AND, IF APPLICABLE, ANNUAL OWNERSHIP FEE. \* \* \* the State **may** pay the Contractor an Annual Ownership Fee (AOF) for costs \* \* \* associated with the ownership(s) of the Lake Erie Correctional Complex \* \* \* and the use of any one or more of those complexes to house ODRC inmates subject to the Ohio General Assembly appropriating funds for such AOF. This AOF will result in an AOF portion of the Contract being executed and in effect for an initial

term expiring June 30, 2032. This AOF is **subject to re-negotiation \* \* \*** if the state terminates the O&M portion of the O&M, purchase, and, if applicable AOF Contract, the AOF will be re-negotiated, contingent upon such ownership. **If such use and such AOF are terminated, then the owner of the correctional complex may use the complex to house out-of-state inmates consistent with the requirements of ORC Section 9.07.**

*State's Req. for Proposal* (R. at 82, Appx. 3-4)(omitted from Plaintiff's supplement) (emphasis added). These facts are not trivial. They are critical to understanding why Plaintiffs' perpetual incantation that the "State receives nothing in return" is patently false, and why the Tenth District rejected these identical arguments below. Neither Article VIII precedent nor the policy behind the law forbids this type of agreement.

2. **Article VIII, Section 4 of the Ohio Constitution Permits the State to Sell Property to a Private Owner Where the State Relinquishes All of its Claims to the Property.**

Article VIII of the Ohio Constitution was adopted in 1851 in response to early investments the State made in private enterprise to encourage development, but had resulted in soaring debts when public funds were lost in risky business ventures. *Grendell v. Ohio Envtl. Prot. Agency*, 146 Ohio App.3d 1 at \*7 (9th Dist. 2001). The provision has been interpreted as an expression of concern with 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), citing *Walker v. Cincinnati*, 21 Ohio St. 14, 53-56 (1871); see also, *State ex rel. Ryan v. City Council*, 9 Ohio St. 3d 126, 129, 459 N.E.2d 208 (1984) ("It is this pledge of tax revenue which makes the notes or bonds issued by the respondents an unconstitutional act.")

It is well established, however, that Article VIII does not preclude all relationships or partnerships between government and private enterprise. See *Taylor v. Ross Cty. Commrs.*, 23

Ohio St. 22, 78 (1872), *see also Grendell, supra* at 12. This Court has long held that the State may hire private companies to perform a public service. *Id.* For example, in *City of Cincinnati v. Dexter*, 55 Ohio St. 93, 44 N.E. 520 (1892), this Court held that a city may sell a railroad and receive a percentage of the future earnings as part of the sale price without creating an unconstitutional alliance of public and private capital. Likewise, in *Hines v. Bellefontaine*, 74 Ohio App. 393, 57 N.E.2d 164 (3rd Dist. 1943), the court found it was constitutional for a city to enter an agreement to lease parking meters from a private entity and receive a portion of the revenue. Most recently, in *Grendell, supra*, the Ninth District held that legislation authorizing the State to contract with a private corporation to build and operate a vehicle emissions testing and inspection program did not violate Article VIII, Section 4, even if the State received a percentage of the company's earnings. *Id.* at 12. So long as the State and the private entity maintain separate and distinctive roles as to ownership of property and control over day-to-day operations, no joint venture in violation of Article VIII exists. *Id.* at 11. *See also State ex rel. McElroy v. Baron*, 169 Ohio St. 439, 444 (1959) (lease of State property to private company did not violate Article VIII where property remained under State control and lessee must conform to public purpose of lease).

In the present action, nothing in Plaintiffs' Complaint demonstrates that the challenged provisions resulted in the sort of partnerships or unions that would create unconstitutional joint ownership of the prison property. The prison sale complies with the State's right to sell public property. *See State ex rel. Bruestle v. Rich*, 159 Ohio St. 13, 34, 110 N.E.2d 778, 790 (1953). The State completely gave up its rights, title and interest in the subject, facility and the land in exchange for a lump sum payment. Section 753.10(B)(2)(a) of H.B. 153. Plaintiffs do not

address this point. Instead Plaintiffs focus solely on the existence of the AOF to argue a violation of Article VIII.

The State's optional payment of an AOF does not create unconstitutional joint ownership either. The fee serves as evidence that the State does not share ownership in the prison, and must pay the owner for the exclusive right to use it. This kind of agreement has been previously recognized as constitutional by this Court. *See Alter v. Cincinnati*, 56 Ohio St. 47, 59, 46 N.E. 69, 69 (1897); *see also McElroy, supra.* (upholding lease arrangement as constitutional). Accordingly, the Tenth District, was correct in that the statute requires the facilities to be privatized "as an entire tract by quit-claim deed" and the State does not possess "equal authority or right to direct and govern the movements and conduct" of CCA or vice versa. (R. at 106, ¶38).

**3. The State's Option to Pay an Annual Ownership Fee in Exchange for the Right for Exclusive Use Does Not Amount to a "Subsidy" or Extension of Credit in Violation of Article VIII of the Ohio Constitution.**

Nothing in the language of H.B. No. 153 as incorporated into Plaintiffs' Complaint creates a statutory obligation for the State to "subsidize" or otherwise lend "credit" to CCA or any other purchaser of a prison under Section 753.10 of H.B. 153. A brief consideration of the scenario presented in this case makes this abundantly clear.

CCA is a private entity that provides a service to the State of Ohio by operating and maintaining Lake Erie Correctional Institution (LECF). CCA is paid a per diem rate for each prisoner it houses. However, as even Plaintiffs acknowledge, CCA owns LECF and the surrounding property outright. Accordingly, absent the AOF provision, nothing prevents CCA from using its property to house prisoners from neighboring states. Like a hotel, airline, or restaurant, it is in CCA's best interest to keep LECF at maximum capacity in order to ensure its

revenues are sufficient to ultimately recoup its initial capital investment, pay its employees' salaries and benefits, pay operating costs, taxes, etc. The State of Ohio has an interest in ensuring that LECF remains available to the ODRC for housing Ohio's convicted criminals whenever the need should arise. That is where the AOF comes in. It is an optional payment from the State to CCA that promises some baseline revenue in exchange for CCA's promise that it will only house criminals placed by the ODRC. This is a *quid pro quo*; not a subsidy, or extension of credit. The State has not bet any money on CCA succeeding in its business. Neither the State nor the tax-payers bear the risk of loss associated with unexpected future costs or changes in the relative price of future maintenance. The State pays an annual fixed fee, at its discretion, regardless of how those future expenses change.

In light of the foregoing, Plaintiffs' reliance on *C.I.V.I.C. Grp. v. Warren*, 88 Ohio St.3d 37, 40, 723 N.E.2d 106 (2000) in support of their position is clearly misplaced. In *C.I.V.I.C. Group*, a city agreed to pay a private developer 20% of the cost of a private subdivision development. *Id.* at 38. The city also passed a reimbursement ordinance that required the private developers to pay back portions of the construction cost on a per-lot basis. *Id.* at 41. However, the ordinance did not give the city a lien to the private land that would transfer to the purchaser of the property, meaning if the developer became insolvent, bankrupt or otherwise unable to repay, the city would be left without a remedy to collect its outstanding debt. *Id.* Unlike *C.I.V.I.C. Group*, this case does not involve the selling of public bonds to pay for the development of private property or promissory notes that will put the public credit in issue without a possibility for repayment. *Id.* at 37. The arrangement is completely distinguishable and does not implicate the policy behind Article VIII.

The payment of the AOF is optional and is given in exchange for the exclusive ability to benefit from CCA's services. "[C]ontracting 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.'" citing *Taylor, supra*, at 78. The fact that this money defrays "CCA's ownership costs" which would otherwise be "defrayed" by housing out-of-state inmates is immaterial to Article VIII, Section 4 analysis. As is Plaintiffs' concern that CCA could ultimately make its investment in LECF a profitable venture by improving the land it purchased and providing services exclusively to the State of Ohio. This arrangement does not "invest" or "comingle" public funds in private enterprise nor does it serve to subsidize commerce or industry.

Finally, even assuming *arguendo* that the AOF could be considered a "subsidy" under Plaintiffs' suggested definition, the Court in *State ex rel. Tomino v. Brown*, 47 Ohio St.3d 119, 122, 549 N.E.2d 505 (1989) held that "Sections 4 and 6 of Article VIII have not been applied to programs undertaken for the public welfare." *Id.* at 121 (lending of city's credit through sale of subsidized public housing was for a "public welfare purpose, and not a business purpose" and thus not prohibited by Article VIII), *see also McElroy, supra* (leasing of land by Toledo Port Authority to private companies for the purpose "of meeting the public need and demand for enlarged shipping facilities" did not violate Article VIII). The State's contract with CCA, pursuant to R.C. 9.06 and Section 753.10 of H.B. 153, serves the public welfare by providing for the continued rehabilitation and correction of state offenders in a fiscally practicable manner within existing budget constraints. The General Assembly's policy determination of public purpose "will not be overruled by the courts except in instances where such determination is manifestly arbitrary and unreasonable." *McElroy, supra* at 444. Plaintiffs' arguments fall

severely short of meeting such a standard. Accordingly, the Tenth District properly upheld the trial court's dismissal of Plaintiffs' Article VIII, Section 4 claims.

**PROPOSITION OF LAW II: It is Well Established That State Employment Relations Board ("SERB") has Exclusive Jurisdiction to Determine Who is a "Public Employer" and "Public Employee" Pursuant to R.C. 4117 – the Statute that Created SERB and the Comprehensive Framework for Addressing Such Issues.**

In this case, Plaintiffs Complaint alleges that they are "public employees" as defined in R.C. 4117.01(C) and, thus, are entitled to "benefits and emoluments" of public employees in the applicable collective bargaining agreement (CBA). (R. at 60, Appx. 34-35). Plaintiffs further allege that the State (*i.e.* the ODRC), working with CCA and MTC, has unilaterally denied them their status as "public employees" and their benefits under the CBA. *Id.* Thus, Plaintiffs alternative claim relies on whether Plaintiffs are "public employees" as defined in R.C. Chapter 4117 and, if so, whether Plaintiffs have been denied their collective bargaining rights. Both of these issues fall squarely within the exclusive jurisdiction of the State Employees Relations Board (SERB). *See* R.C. 4117.08.

Neither issue presented is a matter of first impression or an unsettled area of law. More than twenty years ago this Court determined that Plaintiffs' claim is within the exclusive jurisdiction of the State Employees Relations Board (SERB). *FCLEA v. Fraternal Order of Police*, 59 Ohio St.3d 167, 171, 572 N.E.2d 87 (1990) (the question of who is the "public employer" [and, thus, a public employee] must be determined under R.C. 4117 and is within the exclusive jurisdiction of SERB). This Court and several lower appellate courts have followed this precedent numerous times. *See Carter v. Trotwood-Madison City Bd. of Educ.*, 181 Ohio App. 3d 764, 2009-Ohio-1769, 910 N.E.2d 1088, ¶58 (2nd Dist. 2009) (citing extensive precedent in support of SERB's exclusive jurisdiction over the issue of who is a "public

employee”). This Court’s holding in *FCLEA* finds further support in the statutory language of R.C. Chapter 4117. *See* R.C. 4117.02(O) (governing how SERB should handle substantial controversies with respect to SERB’s interpretation of R.C. 4117.01 *et seq.*); R.C. 4117.12(A) (providing that unfair labor practices are “remediable by [SERB]” but not providing for the filing of an original complaint in common pleas court).

Recently, the Second District in *Carter, supra*, considered a case that involved analogous issues of law. In *Carter*, two retired teachers appealed the trial court’s dismissal of their breach of contract claim for lack of jurisdiction. *Id.* at ¶1. The teachers argued the court, not SERB, had jurisdiction because they were no longer “public employees” as defined under R.C. 4117.01(C). *Id.* The court affirmed the trial court’s dismissal, stating that SERB, not the court, had jurisdiction to make this threshold determination. *Id.* at ¶60. In doing so, the court reviewed and cited Ohio’s extensive precedent regarding SERB’s exclusive original jurisdiction over this issue. *Id.* at ¶58. Moreover, the *Carter* court discussed the Eighth District’s decision in *Gunn v. Bd. of Educ. of Euclid City School Dist.*, 51 Ohio App. 3d 41, 554 N.E.2d 130 (8th Dist. 1988), in which the court held that a public employer’s unilateral modification of the terms or conditions of employment arguably constitutes a refusal to bargain collectively, bringing the claim within SERB’s jurisdiction. *Carter, supra* at ¶56.

In the present action, Plaintiffs allege the State, CCA and MTC have denied them their rights and benefits as “public employees” by refusing to recognize their status. (R. at 60, Appx. 35, ¶161). In short, they claim the State wrongfully and unilaterally modified the terms and working conditions Plaintiffs previously enjoyed under the applicable CBA. *See id.* Hence, the rights sought to be restored arise from and are dependent upon the rights created by R.C. 4117 and fall solely within the jurisdiction of SERB. *FCLEA*, 76 Ohio St.3d at 290. The fact that

Plaintiffs claim sounds in declaratory relief, based on an interpretation of R.C. 4117.01, is irrelevant. “The Declaratory Judgment Act, R.C. Chapter 2721, was not intended to be used to circumvent [SERB’s] comprehensive agency process.” *Ohio Historical Society v. State Employment Relations Bd.*, 66 Ohio St.3d 466, 469 613 N.E.2d 591 (1993).

Plaintiffs attempt to evade SERB by declaring themselves “former public employees” is both confusing and unavailing. First, as illustrated above, SERB has exclusive jurisdiction to determine Plaintiffs’ status as a threshold issue. Second, the declaratory judgment statute, R.C. Chapter 2721, empowers courts affirm **existing** rights, duties and obligations. R.C. 2721.01 (“courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed.”) It is a judicial recognition and declaration of fact, not a transformative decree. Thus, Plaintiffs cannot seek recognition that they are “public employees” under R.C. 4117 in an effort to obtain money and benefits, while simultaneously seek this Court’s recognition that they are “former public employees” in an effort to avoid SERB’s exclusive jurisdiction.

Plaintiffs’ argument that SERB lacks jurisdiction because Plaintiffs refused to “invoke its jurisdiction” by filing anything with SERB or cite to specific statutes in their Complaint is equally flawed. *See Appellees’ Br.* at 40. As a preliminary matter, the entire purpose and policy behind the SERB and R.C. Chapter 4117 as a comprehensive framework for dealing with public employer-employee relations would be defeated if its jurisdiction could avoided by merely ignoring its authority or engaging in the art of creative pleading. The Court need not even get that far, however, because Plaintiffs’ Complaint specifically invokes R.C. 4117.01(C) and 4117.22, requesting the Court to apply a liberal construction to recognize their rights as defined by the statute and the applicable CBA. Even if this language was omitted, it is well-established

that the Court will construe the language of a Complaint liberally to determine the implications of the drafter. *See Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756 (1988); *see also York v. Ohio State Highway Patrol*, 60 Ohio St. 3d 143, 573 N.E.2d 1063 (1991). Thus, Plaintiffs' request to be declared "public employees" and be granted privileges consistent with an applicable collective bargaining agreement must be read as invoking SERB's jurisdiction under R.C. 4117 regardless of Plaintiffs' contentions to the contrary.

Finally, Plaintiffs incorrectly look to R.C. 9.06(K), stating its venue provision supersedes SERB's exclusive jurisdiction. R.C. 9.06(K) states, in pertinent part, that any allegation that an action taken by the governor or the [ODRC], pursuant to 9.06 and 753.10, violates the constitution or the Revised Code shall be brought in the common pleas court of Franklin County. Here, Plaintiffs do not allege any constitutional violation, nor do they allege the governor or the ODRC violated state law. Rather, Plaintiffs' claim explicitly relies on an interpretation of R.C. 4117.01 *et seq.* and the applicable collective bargaining agreement. Each of these issues is within the exclusive jurisdiction of SERB pursuant to the protocol adopted therein. SERB's determination of these issues does not impact Plaintiffs' constitutional claims, nor do Plaintiff's constitutional claims rely on SERB's determination in this regard.

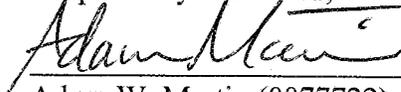
When the General assembly passed R.C. Chapter 4117, creating SERB, they intended it "to regulate **in a comprehensive manner** the labor relations between public employees and employers." *FCLEA, supra* (emphasis added). It was intended to correct an over-abundance of litigation that was clogging the court system and leading to repeated work stoppages all over the State. *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Employment Relations Bd.*, 22 Ohio St.3d 1, 5, 488 N.E.2d 181 (1986). Since its passage, this Court has held that all claims deriving from R.C. Chapter 4117 are within the exclusive jurisdiction of SERB

unless the complainant asserts rights that are “completely independent of R.C. Chapter 4117.”  
*FCLEA, supra* at 171. Plaintiffs’ claims assert rights that were created by and are dependent  
upon R.C. Chapter 4117 and an applicable CBA.

### CONCLUSION

For the reasons stated herein, MTC respectfully requests that this Court affirm the Tenth  
District Court of Appeals decision regarding Plaintiffs’ claim for a violation of Article VIII,  
Section 4 of the Ohio Constitution and request for alternative declaratory relief, and affirm the  
decision of the trial court dismissing Plaintiffs’ Complaint.

Respectfully submitted,



Adam W. Martin (0077722)

Kevin W. Kita (0088029)

Sutter O’Connell

1301 East 9<sup>th</sup> Street

Cleveland, OH 44114

(216) 928-4536 - direct

[amartin@sutter-law.com](mailto:amartin@sutter-law.com)

[kkita@sutter-law.com](mailto:kkita@sutter-law.com)

(216) 928-3636 – facsimile

*Attorneys for Defendant/Appellant/Cross-  
Appellee:*

*Management & Training Corporation*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing Third Merit Brief of Appellant/Cross-Appellee Management & Training Corporation was served via U.S. mail upon the following this 18th day of December, 2014:

Michael Dewine (0009181)  
Attorney General of Ohio

Eric E. Murphy (0083284)  
State Solicitor and Counsel of Record  
30 East Broad St. 16<sup>th</sup> Floor  
Columbus, OH 43215  
[Eric.murphy@ohioattorneygeneral.gov](mailto:Eric.murphy@ohioattorneygeneral.gov)  
P: 614-466-8980  
F: 614-446-5087

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

James E. Melle (0009493)  
167 Rustic Place  
Columbus, OH 43214-2030  
[Jimmelle43@msn.com](mailto:Jimmelle43@msn.com)  
P: 614-271-6180  
*Attorney for Plaintiff/Appellees/Cross-Appellants*

Nicholas A. Iarocci (0001937)  
Ashtabula County Prosecuting Attorney  
25 West Jefferson Street  
Jefferson, OH 44047  
[TLSartini@ashtabulacounty.us](mailto:TLSartini@ashtabulacounty.us)  
P: 440-576-3662  
F: 440-576-3600

*Attorney for Plaintiffs/Appellees/Cross-Appellants: Dawn M. Cragon, Roger A. Corlett and Judith A. Barta*

Charles R. Saxbe (0021952)  
James D. Abrams (0075968)  
Celia M. Kilgard (0085207)  
Taft, Stettinius & Hollister, LLP  
65 E. State St., Suite 1000  
Columbus, OH 43215-3413  
[Rsaxbe@taftlae.com](mailto:Rsaxbe@taftlae.com)  
[Jabrams@taftlaw.com](mailto:Jabrams@taftlaw.com)  
[Ckilgard@taftlaw.com](mailto:Ckilgard@taftlaw.com)  
P: 614-221-2838  
F: 614-221-2007

*Attorneys for Defendant/Cross-Appellant  
Corrections Corporation of America and CCA  
Western Properties, Inc.*

  
Adam W. Martin (0077722)  
Kevin W. Kita (0088029)