ORIGINAL

IN THE
SUPREME COURT OF OHIO

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

REPLY BRIEF OF AMICI CURIAE, OHIO ASSOCIATION OF PUBLIC SCHOOL EMPLOYEES (OAPSE)/AFSCME LOCAL 4, AFL-CIO, FRATERNAL ORDER OF POLICE OF OHIO, INCORPORATED, AND AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES OHIO COUNCIL 8, IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

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I. AMICI CURIAE'S (IN SUPPORT OF PLAINTIFFS-APPELLEES /CROSS APPELLANTS) PROPOSITION OF LAW II:

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

HB 153 is an Appropriations Bill in which Bill the General Assembly amended R.C. 9.06 and enacted new Section 753.10, the two statutes which are the sole authority for prison privatization in Ohio. Acting pursuant to those two statutes, the State sold a State-owned prison in Ashtabula County named Lake Erie Correctional Facility ("LECF"), together with 119 acres, to Defendant-Appellant Corrections Corporation of America ("CCA") for $72,770,260. As part of the transaction, the State Defendants-Appellants promised to subsidize CCA's ownership costs by paying to CCA from the State's General Revenue Funds what it called an "Annual Ownership Fee." This Annual Ownership Fee is not part of the cost of housing, feeding, clothing, providing programs and services etc. to the prisoners. Rather, the separate payments for the cost of housing, feeding, clothing, providing programs and services, etc. are identified in the Operating and Management Contract (the "CCA O&M Contract") between the State and CCA as "Per Diem Fee" payments

The per diem fee payments for housing Ohio inmates under the CCA O&M Contract is based on CCA housing 1,798 Ohio inmates for a Per Diem Fee of $24.25 per inmate per day for an annual payment of $29,039,765. R.C. 9.06(A)(1); Section 753.10(C)(2), (6) and (9) (see State Appx. 67-68, 80-81), (Supp. 1-6). Annual Ownership Fees are paid to CCA for the "wear and tear" of the prison which the State no longer owns. The amount of the Annual Ownership Fee is $3,800,000 per year and it is to be paid by the State to CCA each year for 21 years. Total Annual Ownership Fee payments are $79,800,000, an amount greater than the sale price of the prison and the land around it. CCA and the State Defendants-Appellants admit the annual payments. Further

explanation can be found at http://www.drc.ohio.gov/Public/privatizationfaqs.pdf.[1]

Additional facts concerning CCA's purchase of the LECF and the transferred land, and the entanglement of the State's interest with that of CCA include the obligation imposed by Section 753.10 (B)(2)(d) that CCA, and all successors in title, grant to the State an irrevocable right to repurchase the prison and transferred land. If the State does not exercise its right of first refusal, CCA, or its successor, has the right to sell LECF and all acreage to anyone. Section 753.10(B)(2)(d)(i) and (ii) and R.C. 9.06(J)(4)(a). CCA, or its successor, may charge the State any amount CCA, or it successor, chooses upon repurchase. 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. (HB 153, p. 3221).

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

Plaintiffs/Cross-Appellants' Amended Complaint alleged, in part, that these Annual Ownership Fee payments are a subsidy which violated Section 4, Article VIII of the Ohio Constitution which prohibits the State from lending credit to or in aid of any corporation and/or

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[1] Also, the State and Defendant-Appellant Management & Training Corporation ("MTC"), pursuant to amended R.C. 9.06 and newly enacted Section 753.10, entered into an Operating and Management Contract ("MTC O&M Contract") pursuant to which MTC operates a State-owned prison complex known as North Central Correctional Institution ("NCCI") and the nearby North Central Correctional Institution Camp ("NCCIC"), together known as the North Central Correctional Complex (the "Marion Complex") situated in Marion County, together with approximately 258 acres. However, NCCI and NCCIC were not sold to MTC or any private entity.

that the subsidy payments resulted in an unconstitutional joinder of CCA and the state's property rights. Amici Curiae, as was the case with Plaintiffs/Cross-Appellants, have found no cases in Ohio or elsewhere discussing an Annual Ownership Fee, discussing a state subsidizing the ownership costs of the purchaser of a state-sold prison, or discussing a series of convoluted contracts such as those between the State and CCA.

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

> The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever.

Plaintiffs/Cross-Appellants, in their Amended Complaint, claim that Section 753.10 (the statute pursuant to which LECF and the transferred land was sold) and R.C. 9.06 (the statute which dictates requirements which must be contained in all O&M Contracts with the State) were unconstitutional under Section 4, Article VIII of the Ohio Constitution on its face and as applied. While the trial court does not expressly say so, and while none of the Defendants-Appellants address the issue, it is clear that the trial court did not rule on Plaintiffs/Cross-Appellants' claims that R.C. 9.06 and Section 753.10 were unconstitutional as applied. This is because the trial court took no evidence and created no record.

When evaluating a statute challenged as unconstitutional on its face, the constitutional question is to be considered without regard to extrinsic facts (*Belden v. Union Central Life Ins.*, 143 Ohio St. 329, 55 N.E.2d 629 (1944), ¶5 syllabus; *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988)) whereas, when a statute is challenged on the basis that it is unconstitutional in its application, extrinsic facts are required and the court must have a record of the extrinsic facts. *Belden*, ¶4, 6 syllabus; *Cleveland Gear Co., supra*, at 232, 520 N.E.2d 189. The court cannot rule on an "as-applied" constitutional claim where the court does not have any

true evidence before it. *State v. Beckley*, 5 Ohio St.3d 4, 6, 448 N.E.2d 1147 (1983). The circumstances must be part of the record. *Yajnik v. Akron Dept. of Health, House. Div.*, 101 Ohio St.3d 106, 802 N.E.2d 632, 2004-Ohio-357 ¶17; *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 970 N.E.2d 898, 2012-Ohio-2187, ¶22. When the constitutionality of a statute is challenged "as-applied" to a specific set of facts, a record is required. *Semenchuk v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-19, 2010-Ohio-5551, 2010 WL 4632551, ¶30; *State v. Rexroad*, 7th Dist. No. 05 CO 36 and 05 CO 52, 2005-Ohio-6790, 2005 WL 3489726, ¶30-31.

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

Plaintiffs/Cross-Appellants served discovery requests in order to attempt to obtain evidence necessary to prove their case; however, the State Defendants-Appellants filed a motion for protective order and failed to respond to the said discovery requests. Even if Plaintiffs/Cross-Appellants had been able to obtain, prior to the time they filed their Amended Complaint, all the information they sought in discovery, because they were not required to allege every fact they intended to prove in this case, the trial court, without a record, even if it is assumed all the facts alleged in the Amended Complaint were true, would not have before it all the facts Plaintiffs/Cross-Appellants intended to prove in regard to the "as-applied" constitutional challenge to R.C. 9.06 and Sec. 753.10 and, therefore, the trial court could not make a determination as to such challenge. This, alone, is grounds

for reversal of the trial court's decision (and the Appellate Court Decision affirming the trial court's decision) to dismiss Plaintiffs/Cross-Appellants' Amended Complaint. The trial court should have deferred to the summary judgment procedure as the court did in *Grendell v. Ohio Environmental Protection Agency*, 146 Ohio App.3d 1, 4, 764 N.E.2d 1067 (2001).

The trial court, while concluding that R.C. 9.06 and Section 753.10 were constitutional under Section 4, Article VIII, gave absolutely no analysis as to how it reached its conclusion other than stating that "[t]hose cases cited by Defendants in their Memorandum in Opposition at 11 are persuasive on this issue." However, none of the cases cited by Defendants/Cross-Appellants in their "Memorandum in Opposition" filed in the trial court or in their Briefs filed in the Appellate Court or filed in this Court dealt with such convoluted transactions as are involved in this case which convoluted transactions permit the State to enter into what it calls a sale of property or a management contract while at the same time controlling every aspect of the company managing, pursuant to the management contract, State property, with the State controlling whether or not it will retain the right to ultimately obtain ownership of property it claims to have sold.

While the State Defendants-Appellants argue, in the Third Brief of State Defendants-Appellants (herein the "State's Third Brief") that Plaintiffs/Cross-Appellants did not initially raise the claim that R.C. 9.06 and Section 753.10 violated the Section 4, Article VIII prohibition against extending the State's credit to a private enterprise, the Appellate Court acknowledges that Plaintiffs/Cross-Appellants claim that R.C. 906 and Section 753.10 violate both the Section 4, Article VIII prohibition on joint ventures and the Section 4, Article VIII prohibition against extending the State's credit to a private enterprise.

The Appellate Court (citing *Grendell* at 12, quoting *Taylor v. Ross Cty. Commrs.*, 23 Ohio St.22, 78 (1872)) states that "payment of the annual ownership fee by the state to the prison operators does not violate Article VIII, Sec. 4 because the Ohio Constitution does not forbid the

employment of corporations, or individuals, associate or otherwise, as agents to perform public services; nor does it prescribe the mode of their compensation' ". (Appellate Court Decision, p. 14.) However, the cited language in *Taylor* regarded the purchase of services whereas the Annual Ownership Fee payments are not for services; rather, they are annual payments (totaling $79,800,000) paid by the State to CCA for CCA's ownership costs of the property sold to CCA. The costs of CCA's public service are paid by the "Per Diem Fee" of $44.25 per inmate (Section 753.10(C)(1) and (10)). *Grendell*, at p. 12, citing *Taylor, supra,* pointed out the very difference which the Appellate Court missed and Plaintiffs/Cross-Appellants rely on. *Taylor* said at p. 78, that contracting with a corporation to perform a service "is a different thing from investing public money in the enterprises of others, or from aiding them with money or credit."

The Appellate Court, in affirming the trial court's decision that R.C. 9.06 and Section 753.10 were constitutional under Section 4, Article VIII, cited *Cincinnati v. Dexter*, 55 Ohio St. 93 (1986) which held that **"[a] sale** made in good faith and **for fair market value** under the circumstances [involved in *Dexter*], cannot properly be characterized as a loan of the credit of the municipality, directly or indirectly, to or in aid of the purchaser." (Emphasis added.) However, fair market value is a factual determination and there is certainly a question (which is raised by Plaintiffs/Cross-Appellants throughout their pleadings, motions, memoranda and briefs) as to whether, under the convoluted transactions involved in this case, LECF and the transferred land was sold for fair market value. This, alone, is also grounds for reversal of the trial court's decision dismissing the Amended Complaint on the basis that R.C. 9.06 and Section 753.10 were constitutional under Section 4, Article VIII. Plaintiffs/Cross-Appellants should have been permitted to present evidence on this issue.

The cases cited by the Appellate Court, as well as all the cases cited by the State Defendants-Appellants, involved simple transactions between the state or other governmental

entities and the private entity, such where a state or municipality sold (without retaining any interest in the property, such as a right to repurchase and without retaining any control over how the property could be developed) property to a private entity; where a state or municipality leased from a private entity property, which property had not been sold by the state or municipality to the private entity; or where a state or municipality agreed to purchase services from a private entity, which private entity had not purchased any property from the state or municipality. As set forth, Section 4, Article VIII, in part, provides that "The credit of the state shall not, **in any manner**, be given or loaned to, or in aid of, any individual, association or corporation whatever....: (Emphasis added.) To determine whether the State is lending its credit to CCA, the Court must evaluate all the transactions between the State and CCA together, not in isolation. The Appellate Court and the State Defendants-Appellants do not cite any cases addressing transactions as convoluted as the transactions between the State and CCA.

Perhaps the biggest problem with the arguments of the State Defendants-Appellants is that they ignore the phrase "**in any manner**". The State Defendants-Appellants make this clear at the very start of their arguments (p. 21 of the State's Third Brief) by stating that "Section 4's first clause prohibits the State from 'giv[ing] or loan[ing]' the State's 'credit' to a private entity", specifically omitting the phrase "in any manner". This omission is repeated throughout the State's Third Brief.

The State Defendants-Appellants, also throughout the State's Third Brief, argue that the State in this case basically entered into three separate contracts: 1) a contract for the sale to a private party of property owned by the State; 2) a lease agreement whereby the State leased private property from a private entity for the housing of prisoners of the State; and 3) a contract with a private entity for management and operating services of the leased facilities. The State Defendants-Appellants then argue that Section 4, Article VIII does not prohibit the sale to a private entity by

the State of property owned by the State, does not prohibit the State from leasing property from a private entity and does not prohibit the State from entering into a contract with a private entity for the provision of services by the private entity. The State Defendants-Appellants then conclude that because, in isolation, both of the contracts and the claimed lease between the State and CCA are not prohibited by Section 4, Article VIII, they do not become impermissible when combined together. Again, the State Defendants-Appellants overlook the phrase "in any manner" contained in Section 4, Article VIII and do not address the these related transactions together constitute the lending of the State's credit to CCA.

The State Defendants-Appellants, in the State's Third Brief (p. 24), citing a law review article, also argue that Section 4, Article VIII became part of the Ohio Constitution to prevent public authorities from giving their borrowing power to private railroads and canal companies by guarantying the private bonds of those companies or by providing such companies with "public bonds", the two common methods of providing public assistance, and thus Section 4, Article VIII does not preclude the transactions involved in this case because the State did not guarantee any private bonds of CCA and did not provide CCA with any public bonds. However, Article 4, Section VIII prohibits the lending of the State's credit "in any manner"; there is no language in Section 4, Article VIII providing that it only prohibits the lending of the State's credit in cases where the State guarantees private bonds or provides private companies with public bonds.

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

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

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

In other words, Section 4, Article VIII was adopted to prohibit the lending, in any manner, of the State's credit to private entities.

In addition to *Grendell, supra; Taylor, supra; and C.I.V.I.C. Group, supra,* cases interpreting and applying Section 6, Article VIII of the Ohio Constitution also assist in interpreting and applying Section 4, Article VIII, because the prohibitions are "nearly identical." *State ex rel. Eichenberger v. Neff,* 42 Ohio App.2d 69, 74, 330 N.E.2d 454 (10th Dist. 1974). The purpose of the two Sections is to prevent private interests from tapping into public funds at taxpayer expense and prohibit the union of public and private capital or credit **in any enterprise** whatsoever. It does not matter that the public may benefit from the transaction. *C.I.V.I.C. Group, supra,* at 37 & 40, 723 N.E.2d 106.

Also, pertinent to applying Section 4, Article VIII of the Ohio Constitution is Section 15(d), Article II of the Ohio Constitution, the purpose of which is to prevent the General Assembly from becoming "heavily involved in the subsidization of private companies and granting special privileges . . . designed to loan credit or give financial aid to private companies . . ." *State ex rel. Ohio Academy of Trial Lawyers,* 86 Ohio St.3d 451, 495, 715 N.E.2d 1062, 1098 (1999).

The State Defendants-Appellants, addressing the joint owner prohibition in Section 4, Article VIII, argue (p. 28, State's Third Brief) that the State cannot be a joint owner of LECF

because the State "through the sale [of LECF and the transferred property]... *divested* its ownership interest – e.g. its 'right, title and interest'-of the prison.....Its deed 'conveys a grantor's *complete* interest or claim in certain real property.'" However, the State did not convey all of its interest in LECF and the transferred property.

Ownership is defined in Black's Law Dictionary as "The bundle of rights allowing one to use, manage, and enjoy property..." As held in Marsh v. Alabama, 326 U.S. 501, 506, 66 S. Ct. 276, 278 (1946), cited in the definition of "ownership" in Black's Law Dictionary, "Ownership does not always mean absolute dominion." The State in the Governor's Deed transferring LECF and the transferred property retained numerous interests in LECF, including the obligation imposed by Section 753.10(B)(2)(d) that CCA, and all successors in title, grant to the State an irrevocable right to repurchase the prison and transferred land. Additionally, R.C. 753.10(C)(4)(a) and (b) allowed the State to place restrictions in the Governor's Deed regarding the resale, use and development of the property surrounding LECF thus enabling the State to protect the value of its right to repurchase by controlling what will be developed on the property in the event the State chooses to exercise its right to repurchase. The State, through such restrictions, retains a valuable interest in LECF.

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

paying anything for it.[2]

Additionally, the State virtually guarantees CCA a profit on the backs of public employees. The Per Diem Fee is $79,561 (based on a charge of $44.25 per inmate for 1,798 inmates) which amounts to an annual payment of $29,039,765. The Per Diem Fee is based on the requirement of R.C. 9.06(A)(4) that CCA operate LECF at a cost which is 5% less than the costs incurred by the State to operate LECF.[3]

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

Adding to the harm suffered by employees working at privatized prisons, Congress amended the Social Security Act in the 1980s by enacting the Windfall Elimination Provision (WEP) which is also referred to as the Government Pension Offset ("GPO"). 42 U.S.C. § 415(a)(7) decrees that individuals who participate in both OPERS and social security but do not accumulate 30 years of contributions in social security will have the GPO offset applied to decrease a percentage of their future social security benefit. 42 U.S.C. § 415(a)(7)(B)(ii)(1-5). Thus, an employee with 15 years of

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

[3] However, there are exceptions to a 5% requirement which could allow CCA to operate LECF at less than 5% of the costs incurred by the State to operate LECF.

state service who lost his or her state job and was hired by MTC and waived continued OPERS participation cannot work 30 years under social security because he or she will not live long enough. Thus, they will be harmed again by the future loss of social security benefits when they retire. Amici Curiae strongly object to forcing public employees out of OPERS and into social security resulting in future loss to such employees, especially, when such losses are imposed on public employees in order to virtually guarantee the owner of a privatized prison an operating profit.

It is a fair and real inference from the allegations in the Amended Complaint that in the year 2032 (21 years from the date of this claimed sale) should CCA sell the prison facility and undeveloped surrounding acreage back to the State, the economics would look like this. The State would pay to repurchase the prison for no less than $72,770,260, the amount it received from CCA when it purchased LECF in 2011. CCA would have received from the State a total of $152,570,260 (which amount does not include the total amount of Per Diem Fees from which CCA derives its profit for operating LECF) on an investment of only $72,770,260. CCA will walk away with $79,800,000 which is the amount of the financial support the State gave to CCA during the period of the CCA O&M Contract. As well, CCA will have made a profit on its Per Diem Fees from the State. If the State never re-purchases the LECF property, CCA owns the property and because it has been subsidized by the State through the Annual Ownership Fee, CCA has paid nothing for the property. The State has financed the entire purchase price through the Annual Ownership Fee payments. And, as the owner, CCA, can sell the property to anyone and pocket those funds as well.

CCA, as the owner of LECF and the surrounding 119 acres, also has the right to develop the property surrounding the prison in any manner it sees fit. If developed, and the State desires to exercise its right to purchase LECF, CCA, because of the right-of-first refusal language in R.C. 753.10 (B)(2)(d)(i) and (ii) the vetoed language in Section 753.10(B)(2)(d)(i), has the ability to make the State pay for some or all of its development and improvement costs on the 119 acres surrounding

LECF. If the State declines to pay for the developed and improved property, then CCA may sell all of it to anyone. Then the State will be required to build another prison at substantial cost without recouping anything from CCA and the burden will fall upon another governor and General Assembly in the future.

If the transfer of LECF by the State to CCA for $72,770,260 were actually a sale, the State would transfer, without receiving any interest in the property, LECF to CCA and CCA would pay the State $72,770,260 and that would be the end of the transaction. If CCA did not have on hand cash in the amount of $72,770,260, it would have to borrow such funds. In borrowing such funds, CCA would have to show any potential lender that CCA could repay the borrowed funds. A potential lender would look to the credit worthiness of CCA in deciding whether CCA would be able to repay the borrowed funds. However, in this case, the State has basically guaranteed CCA's ability to repay the borrowed funds by obligating itself to pay to CCA Annual Ownership Fee payments in the amount of $79,800,000. Effectively, the State has given its credit to CCA, and to CCA's potential lenders, to aid CCA's purchase of the property.[4] What lender would not extend credit to a private corporation if the State obligated itself to pay the borrower the amount of funds borrowed from the lender.

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

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[4] Plaintiffs/Cross-Appellants, prior to the dismissal of their Amended Complaint, should have been given an opportunity to conduct discovery on all aspects of the transactions involved in this case. *Belden, supra; Beckley, supra; Semenchuk, supra; Beretta U.S.A., supra; Guernsey Cty. Bd. of Commrs., supra; Bunguard, supra.*

II. AMICI CURIAE'S (IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS) PROPOSITION OF LAW II:

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

The trial court, properly holding that it had jurisdiction over the underlying matter, initially stated that R.C. 9.06(K) did not vest the court with jurisdiction over the entire case but only vested the court with jurisdiction over the constitutional claims raised in the case. However, the trial court, because it determined that the administrative remedy was "futile" and "useless", ultimately correctly rejected the Defendants-Appellants' argument that the Ohio State Employment Relations Board ("SERB") had jurisdiction over Plaintiffs/Cross-Appellants' claim requesting that those working in the prisons privatized pursuant to R.C. 9.06 and Section 753.10 be declared public employees as that term is defined in R.C. 4117.02(C). But, despite reaching this latter conclusion, the trial court failed to make a determination and/or declaration that the individuals now working in the state-owned prisons, including but not limited to, LECF, NCCI and NCCIC, which have been privatized pursuant to R.C. 9.06 and Section 753.10, are public employees as defined in R.C. 4117.01(C).

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

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

As stated by the Appellate Court, "R.C. Chapter 4117 established a comprehensive framework for the resolution of public-sector labor disputes by creating a series of new rights and setting forth specific procedures and remedies for the vindication of those rights. *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d 167,

169 (1991)." (Appellate Court Decision, P. 15.) However, as noted in *Franklin Cty. Law Enforcement Assn.*, *supra*, in paragraph one of the syllabus, SERB "has exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117." In this regard, nowhere in R.C. Chapter 4117 is SERB given the jurisdiction to determine who is and who is not a public employee; rather, as noted by the Appellate Court, the jurisdiction given to SERB is to vindicate the rights given to public employees in R.C. Chapter 4117. As SERB is not given jurisdiction to determine who is and who is not a public employee, such jurisdiction vests in the courts. As this Court held in *Chesapeake Exploration, L.L.C. v. Oil & Gas Commission*, 135 Ohio St.3d 204 (Ohio 2013) 985 N.E.2d 480, "...where jurisdiction is dependent upon a statutory grant, this court is without the authority to create jurisdiction when the statutory language does not."

Additionally, R.C. 9.06(K) says that any claim challenging any action taken by the Governor, the Department of Administrative Services ("DAS") or the Ohio Department of Rehabilitation and Correction ("ODRC") pursuant to R.C. 9.06 or Section 753.10 "which violates any provision of the Revised Code shall be brought in the Court of Common Pleas of Franklin county." Plaintiffs/Cross-Appellants, in their Amended Complaint, allege that Defendants-Appellants DAS and ODRC violated the Revised Code by failing to accord public employee status and rights to employees of the prisons privatized pursuant to R.C. 9.06 and Section 753.10. Thus, the claims of Plaintiffs/Cross-Appellants are required to be filed in the Franklin County Common Pleas Court.

The "right to control" test is determinative of whether employees are public employees. *Hamilton v. State Emp. Relations Bd.*, 70 Ohio St.3d 210, 213, 638 N.E.2d 522 (1994)[5]; *Gillum v.*

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

Indus. Comm., 141 Ohio St. 373, 48 N.E.2d 234 (1943). "The principal test applied to determine the character of the arrangement is that if the employer reserves the right to control the manner or means of doing the work, the relation created is that of master and servant . . .." *Id.*

In this case, the record contains extensive evidence indicating the State Defendants-Appellants retain control over the entire operation of both LECF and the Marion Complex after the state-owed prisons were privatized. Although the State Defendants-Appellants offered for sale NCCI and NCCIC, they did not actually sell these state-owned prisons. They combined them into one package and privatized these two prisons through the MTC O&M Contract between the State Defendants-Appellants, a public employer, and MTC, a private employer. As a consequence, MTC operates and manages the two prisons while the State Defendants-Appellants continue to own, control and retain jurisdiction over the operations of the Marion Complex by virtue of the MTC O&M Contract, and even though the State sold LECF to CCA, the State Defendants-Appellants continue to control and retain jurisdiction over the operations of LECF by virtue of the CCA O&M Contract.

Pursuant to R.C. 9.06, all O&M Contracts must contain certain requirements. Under R.C. 9.06, MTC and CCA are obligated to comply with all rules promulgated by Defendant-Appellant ODRC which apply to state-run prisons. ODRC specifically dictates the policy on "use of force" which must be followed by all prison employees; the conditions under which corrections officers may carry and use firearms in the course of their employment; terms which contractors' employees must comply with when inmates escape from the prisons; parameters in which contractors' employees may discipline inmates; the staffing pattern at the prisons; services provided and goods produced at the prisons; prison funds; etc. R.C. 9.06(B)(3), (B)(7), (B)(12), (B)(13), (B)(18), (B)(19) (E) and (F). Certain other functions are reserved for Defendant-Appellant ODRC including awarding or revoking earned credits; approving good time; approving the type of work

an inmate may perform; setting wages for inmates; reclassification of inmates; the placement of inmates in restrictive custody; approval of inmate work releases; etc. R.C. 9.06(C)(1)-(6). Under R.C. 9.06(B)(17), the State may even terminate the O&M Contracts at its discretion. For these reasons, the individual Plaintiffs/Cross-Appellants currently working at the privatized prisons are public employees because the State, and its agents and employees, retain extensive and ultimate jurisdiction and control over major aspects of the employees of LECF and the Marion Complex.

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

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

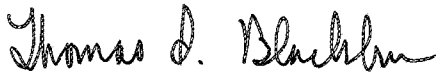
As discussed above, the State Defendants-Appellants and the private companies, CCA and MTC, clearly share in the operations and control of the privatized prisons. Therefore, the State

Defendants-Appellants and CCA and MTC should be treated as integrated enterprises. And, the individual Plaintiffs/Cross-Appellants currently working at the privatized prisons should be declared public employees as they are employees of the State. At the very least, these issues cannot be decided in a ruling on a motion to dismiss; rather, the trial court should have accepted evidence and then made a factual determination as to whether the individual Plaintiffs/Cross-Appellants now working in the state-owned prisons that have been privatized are public employees as defined in R.C. 4117.01(C).

III. CONCLUSION

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

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing REPLY BRIEF OF AMICI CURIAE, OHIO ASSOCIATION OF PUBLIC SCHOOL EMPLOYEES (OAPSE)/AFSCME LOCAL 4, AFL-CIO, FRATERNAL ORDER OF POLICE OF OHIO, INCORPORATED, AND AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES OHIO COUNCIL 8, IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS, was duly served via U.S. First Class mail, postage prepaid, upon the following parties this 12th day of January, 2015:

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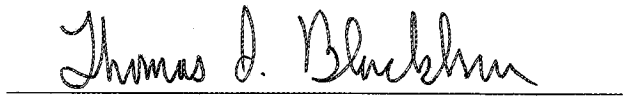

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