

ORIGINAL

IN THE SUPREME COURT OF OHIO  
Case No. 2009-2104

|                     |   |   |
|---------------------|---|---|
| JOHN DOE,           | ) | Upon Certification of State Law Questions     |
|                     | ) |   |
| Petitioner,         | ) | from the United States District Court for the |
|                     | ) | Southern District of Ohio, Western Division   |
| v.                  | ) |   |
|                     | ) | Case No. 1:09-cv-243                          |
| MARY RONAN, et al., | ) |   |
|                     | ) |   |
| Respondents.        | ) |   |

**BRIEF OF AMICI CURIAE**  
**OHIO EMPLOYMENT LAWYERS ASSOCIATION**  
**THE LEGAL AID SOCIETY OF CLEVELAND**  
**TOWARDS EMPLOYMENT, INC.**  
**IN SUPPORT OF PETITIONER JOHN DOE**

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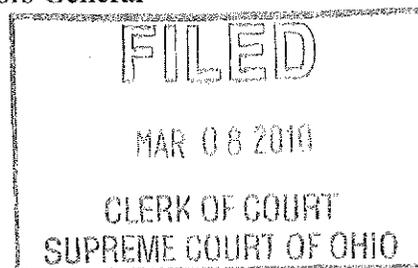
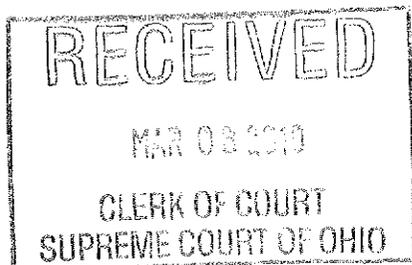
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## STATEMENT OF INTEREST OF *AMICI CURIAE*

### I. OHIO EMPLOYMENT LAWYERS ASSOCIATION

The Ohio Employment Lawyer's Association (OELA) is the statewide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment, and civil rights matters. OELA is the only statewide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. OELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness, while promoting the highest standards of professionalism and ethics.

As an organization focused on protecting the rights and interests who are subjected to adverse or unfair treatment in the workplace, OELA has an abiding interest in ensuring the integrity of the statutory schemes that relate to the workplace. The aim of OELA's amicus participation is to cast light not only on the legal issues presented in a given case, but also on the practical effect and impact that a case may have on Ohio's workers.

OELA is interested in this case because of the significant impact that R.C. 3391.391 and Ohio Adm. Code § 3301-20-01 have on the employment relationships of non-licensed public school personnel such as John Doe and others similarly situated. Because employment relationships are contractual in nature, there is a certain freedom of contract attendant to these relationships. State and federal legislatures legitimately regulate employment relationships when statutory enactments serve to equalize an inherent imbalance of power between an employer and employee, or to redress certain wrongful conduct in the workplace, such as discrimination.

Where, however, a legislative mandate extinguishes a contractual employment relationship that was otherwise legitimately bargained for between the parties – and for a reason judged to be valid by the General Assembly, and not necessarily by the employer itself – such legislative action impermissibly impedes contractual relationships in a manner that is repugnant to the Contract Clause of the Ohio Constitution.

## **II. LEGAL AID SOCIETY OF CLEVELAND**

The Legal Aid Society of Cleveland (“LASC”) is a nonprofit corporation formed in 1905 for the purpose of providing free legal assistance to low-income people. LASC receives funds from the federal Legal Services Corporation, the Ohio Legal Assistance Foundation, and various foundations and donors. LASC represents low-income individuals with civil legal problems in Ashtabula, Cuyahoga, Geauga, Lake, and Lorain Counties. LASC’s mission is “to secure justice and resolve fundamental problems for those who are low income and vulnerable by providing high-quality legal services and working for systemic solutions.”

The issues in this case concern LASC for several reasons. LASC’s employment practice represents individuals with unemployment-compensation claims, wage-and-hour claims, and in cases where the goal is to remove certain barriers to employment. Criminal convictions are significant barriers to employment. In 2009, LASC assisted 161 low-income clients with their expungement cases. However, because certain convictions cannot be expunged, these kinds of convictions will remain a barrier to employment.

The staff of LASC works every day to confront poverty and the problems associated with it. All of LASC’s clients are low-income individuals, most earning at or below 125 percent of

the federal poverty guidelines.<sup>1</sup> The main avenue by which one can escape poverty is to secure a job that pays a living wage and provides benefits. School systems provide exactly these kinds of stable jobs and benefits. Unfortunately, because many of LASC's clients have convictions, they are automatically excluded from such employment, even if they have been rehabilitated and are now productive members of society – and even if they have been working in a school district for several years.

LASC has seen two clients who were terminated as a result of the statutory scheme at issue in this case. Both were long-term employees of their school districts who had minimal contact with school children. One was a janitor with the Cleveland Metropolitan School District for almost ten years, and the other was a cafeteria worker for almost thirteen years with the Euclid School District. If R.C. 3319.391 and Ohio Adm. Code § 3301-20-01 are found to be constitutional, LASC expects to see more affected clients struggling with joblessness, evictions, foreclosures, and all other legal problems associated with poverty.

### **III. TOWARDS EMPLOYMENT, INC.**

Towards Employment is a broker of second chances. Since 1976, Towards Employment has assisted over 100,000 disadvantaged adults to transition off of welfare; out of prison or off of the streets; and into employment. In 2004, Towards Employment developed a specialized program, NETworks 4 Success, specifically to address the issues facing ex-offenders who are seeking or sustaining employment. Sixty percent of the funding for the NETworks 4 Success program is provided by the Cuyahoga County government.

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<sup>1</sup> The 2009 poverty guidelines have been extended until at least March 1, 2010. In 2009, a family of one individual earning \$10,830 per year is at 125% of the Federal Poverty Guidelines. A family of four persons earning \$22,050 is at 125% of the Federal Poverty Guidelines. Extension of the 2009 Poverty Guidelines at Least Until March 1, 2010, 75 Fed. Reg. 3734 (Jan. 22, 2010).

Because of its experience, few better understand the challenges facing ex-felons than Towards Employment. The tangible barriers these individuals face include denied access to public housing, types of public assistance, drivers' licenses, and education loans. However, there are many other intangible factors that impede the success of a job search for ex-offenders. There is the stigma attached to having a criminal record that affects both prospective employers and the confidence level of the individuals as they move through the employment process. Moreover, for many facing reentry, the precise interpersonal skills they were forced to develop in order to endure life in prison are antithetical to the skills necessary to be a successful employee.

Towards Employment has designed a program specifically to address each of these barriers. Structured to mirror a workplace, clients attend an intense four-week, full-time program. During this time, they are taught how to write a résumé and interview with confidence. They are given computer training, career planning, individual case management, and access to GED classes. The program includes presentations about substance abuse, child support requirements, employment discrimination, and financial literacy. Towards Employment also provides legal services to help remove legal barriers to employment, such as suspended drivers licenses, child support arrearages, or expungements.

Additionally, Towards Employment has partnered with several employers in the community who have come to trust the quality of employees who graduate from the NETWORKS 4 Success program. Towards Employment maintains a relationship with both the employer and employee, and provides follow-up guidance to ensure that each placement is successful. The result is one of the most successful ex-offender employment programs in the country. Since 2004, Towards Employment has placed over 900 ex-offenders in full-time permanent jobs.

Given its mission statement, “to empower individuals to achieve and maintain self sufficiency through employment,” and its specific work with individuals with felony convictions, Towards Employment has a vested interest in the outcome of this case. Towards Employment has several clients, like John Doe in this case, who are haunted by old convictions, despite subsequent rehabilitation and years of successful employment. R.C. 3319.391 and Ohio Adm. Code § 3301-20-01 operate to undermine what Towards Employment tells its clients every day: that they can rehabilitate and change their lives; that they are more than their criminal convictions; and, if they work hard, they should be judged on their overall merits for the job, and not on their past mistakes.

#### **STATEMENT OF THE CASE AND FACTS**

The Amici adopt the Statement of the Case and the Statement of Facts contained in the merit brief of Petitioner John Doe.

## ARGUMENT

**CERTIFIED QUESTION: DO R.C. 3319.391 AND OHIO ADM. CODE 3301-20-01 VIOLATE THE CONTRACT CLAUSE OF ARTICLE II, SECTION 28 OF THE OHIO CONSTITUTION?**

**APPLYING R.C. 3301.391 AND OHIO ADM. CODE 3301-20-01 RETROSPECTIVELY TO TERMINATE EXISTING EMPLOYMENT CONTRACTS BETWEEN CERTAIN NON-LICENSED PUBLIC-SCHOOL EMPLOYEES AND PUBLIC SCHOOL DISTRICTS VIOLATES THE CONTRACT CLAUSE OF THE OHIO CONSTITUTION BY SUBSTANTIALLY IMPAIRING THESE CONTRACTUAL RELATIONSHIPS IN A MANNER THAT REACHES FAR BEYOND ANY APPROPRIATE MEANS OF EFFECTUATING THE LEGITIMATE PURPOSE OF PROTECTING THE SAFETY OF SCHOOLCHILDREN.**

The Ohio Constitution protects the freedom of parties in this State to enter into contracts without undue interference from the Legislature:

The general assembly shall have no power to pass . . . laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intentions of parties . . . by curing omissions, defects, and errors, in instruments . . . , arising out of their want of conformity with the laws of this state.

OHIO CONST. art. II, § 28. The federal Constitution likewise recognizes the sanctity of contracts, limiting States' power accordingly: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." U.S. CONST. art. I, § 10, cl. 1.

This Court has recognized that the "freedom to contract and the attendant benefits and responsibilities of the parties to a contract are integral to the liberty of the citizenry." *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 218, 2003-Ohio-5849. In *Galatis*, this Court noted that the purpose of the federal prohibition against laws impairing contracts is to "protect the integrity of contracts," and the rights of parties to contract with each other. *See id.* at 218-19 (citing *Piqua Branch of State Bank of Ohio v. Knoop* (1853), 57 U.S. (16 How.) 369).

In *Kiser v. Coleman*, this Court invalidated a statutory scheme involving forfeitures for land contracts, finding that the legislation, enacted in 1969, impaired land contracts entered into

before that time. *See generally* (1986), 28 Ohio St. 3d 259. In *Kiser*, prior to the enactment of R.C. Chapter 5313, a seller of land could validly contract with the purchaser for the right to a forfeiture without legal proceedings. *See id.* at 261. In 1969, however, the General Assembly enacted statutory provisions that limited the rights of sellers to declare a forfeiture, absent particular circumstances. *See id.*

Because the later-enacted legislation invalidated the right to forfeiture under the land contract between the parties to the case, this Court found that the provisions of R.C. Chapter 5313 violated the Ohio Constitution, when applied retrospectively to land contracts that predated the legislation. *Id.* at 263 (applying both the retroactivity and contracts provisions of Article II, Section 28 of the Ohio Constitution). According to this Court, “any change in the law which impairs the rights of either party, or amounts to a denial or obstruction of the rights accruing by contract, is repugnant to the Constitution.” *Id.* (internal citation omitted); *accord King v. Safeco Ins. Co.* (1990), 66 Ohio App. 3d 157, 161 (“The state prohibition against the impairment of contractual obligations, which is expressly imposed on the General Assembly, is clearly directed against the retrospective application of legislation that operates to impair the obligation of contracts.”).

This Court has also recognized that the protections of the Contract Clause of the Ohio Constitution are co-extensive with those of the Contract Clause contained in the federal Constitution. *Galatis*, 100 Ohio St. 3d at 219. The United States Supreme Court has recognized that “[i]t long has been established that the Contract Clause limits the power of the States to . . . regulate [contracts] between private parties.” *E.g., U.S. Trust Co. of New York v. New Jersey* (1977), 431 U.S. 1, 17.

This seemingly strict prohibition of the Contract Clause has, however, been tempered by the recognition of a State's "sovereign right . . . to protect the lives, health, morals, comfort, and general welfare of the people." *E.g.*, *Allied Structural Steel Co. v. Spannaus* (1978), 438 U.S. 234, 241 (stating that the State's "police power" may trump the Contract Clause in certain cases). Nonetheless, the *Spannaus* Court recognized the necessity of imposing some limits on the impairment of contractual relationships, even where the State is exercising its police power:

If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.

*Id.* at 242 (emphasis sic); *see also Home Bldg. & Loan Assoc. v. Blaisdell* (1934), 290 U.S. 398, 439 ("Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power.").

The legislation at issue in this case was enacted by the 127th General Assembly, effective November 14, 2007. *See generally* Sub. H.B. 190, 127th Gen. Assem. (Ohio 2007) ("the Act"). Among other provisions, the Act created a new background-check requirement for employees of school districts who are not licensed by the Ohio Department of Education ("ODE"), and whose job duties do not entail the care, custody, or control of children. *See id.* at § 1 (enacting, *inter alia*, R.C. 3319.391); *see also* LEGISLATIVE SERV. COMM'N, FINAL BILL ANALYSIS, Sub. H.B. 190, 127th Gen. Assem., at 10, at <http://www.lsc.state.oh.us/analyses127/07-hb190-127.pdf>.<sup>2</sup>

Although the Act states that it is an emergency measure, "necessary for the immediate preservation of the public peace, health, and safety," the reason for the necessity relates to tuition fees for all-day kindergarten. *See* Sub. H.B. 190, 127th Gen. Assem. at § 11. Thus, the

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<sup>2</sup> The 128th General Assembly further amended R.C. § 3319.391 by way of Am. Sub. H.B. 1, § 101.01, effective January 1, 2010. However, the amendments contained in this House Bill do not change the statutory provisions at issue in this case.

emergent nature of the Act relates in no way to the background-check requirement for non-licensed school employees. *See id.*

Not only does the Act require initial and periodic criminal records checks for non-licensed school employees hired *after the effective date of the bill*, but it also requires schools to request criminal records checks for *all existing* non-licensed employees by a date specified by the ODE, and then every five years thereafter. *See* OHIO REV. CODE ANN. § 3319.391(A) (Anderson 2007) (emphasis added) (expressly distinguishing between persons hired on or after November 14, 2007, and those hired prior to November 14, 2007); *see also* LEGISLATIVE SERVICE COMMISSION, FISCAL NOTES & LOCAL IMPACT STATEMENT, Sub. H.B. 190, 127th Gen. Assem., at 3-4, at <http://www.lbo.state.oh.us/fiscal/fiscalnotes/127ga/pdfs/HB0190EN.pdf>.<sup>3</sup>

If a current employee's records check reveals that he or she has been convicted of, or pleaded guilty to, an offense listed in R.C. 3319.39(B)(1), he or she "*shall be released from employment*," unless he or she meets "the rehabilitation standards" adopted by the ODE pursuant to R.C. 3319.39(E). OHIO REV. CODE ANN. § 3319.391(C) (Anderson 2007) (emphasis added). R.C. 3319.39(E) authorizes the ODE to promulgate rules specifying circumstances under which a school district may hire a person who has been convicted of one of the enumerated offenses, provided that the individual meets the "rehabilitative" standards set by the ODE. *See id.* § 3319.39(E).

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<sup>3</sup> The Ohio Department of Education specified that the background checks were to be done by September 5, 2008. *See* Ohio Dep't of Educ., *Fact Sheet and Frequently Asked Questions Regarding Background Check Requirements*, at <http://www.ode.state.oh.us/GD/DocumentManagement/DocumentDownload.aspx?DocumentID=43559>.

At the time this case arose, the applicable ODE regulation related to licensed school employees. *See generally* OHIO ADM. CODE § 3301-01-20 (Anderson 2007).<sup>4</sup> Nonetheless, this provision was applied to the non-licensed current employees who were suddenly subjected to criminal records checks under the newly-enacted R.C. 3319.391. Under Section 3301-01-20, a school district may continue to employ non-licensed persons convicted of certain crimes, as long as the crime at issue is not listed as a “non-rehabilitative offense,” and certain “rehabilitation criteria” apply. *See id.* at (E). “Non-rehabilitative offenses” include specifically enumerated violent offenses, theft offenses, drug offenses, and sexually-oriented offenses. *See id.* at (A)(9)-(12). Thus, if a current, non-licensed employee’s records check revealed that he or she had been convicted of, or pleaded guilty to, one of these offenses – no matter when – he or she would be subject to immediate discharge from employment.

**A. Applying R.C 3319.391 and Ohio Adm. Code 3301-20-01 to terminate existing employment contracts between non-licensed employees with criminal convictions, and the public school districts that chose to hire them, substantially impairs contractual relationships by nullifying the contracts and precluding any remedy for breach.**

To determine whether a particular legislative enactment violates the Contract Clause, the threshold inquiry is “whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.” *E.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983), 459 U.S. 400, 411. The severity of the impairment generally increases the level of scrutiny to which the legislation will be subjected. *Id.* In *Home Building & Loan Association v.*

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<sup>4</sup> In August of 2009, the ODE revised § 3301-20-01, thus the citations in this section are from the 2007 version of the regulation. The cited provisions remain in the 2009 version, but, in some cases, in different places. In addition, in August of 2009, the ODE promulgated Ohio Adm. Code § 3301-20-03, which relates specifically to non-licensed employees, and specifies the conditions under which such individuals who have criminal convictions may be employed. By virtue of the timing of the adoption of this new regulation, it applies only to new applicants, not current, non-licensed employees.

*Blaisdell*, the Court stated that “[t]he obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them.” (1934), 290 U.S. 398, 431. The Supreme Court has also recognized that “substantial impairment” must be measured in light of the Framers’ great interest in the sanctity of private contracts:

Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. ***Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.***

*Allied Structural Steel Co. v. Spannaus* (1978), 438 U.S. 234, 245 (emphasis added) (finding severe impairment of employment contracts under a Minnesota law relating to the vesting of pension benefits).

In keeping with the federal analysis of the Contracts Clause, this Court, in *City of Middletown v. Ferguson*, recognized a constitutional claim where the State “uses its *legislative authority* to impair a contract.” (1986), 25 Ohio St. 3d 71, 76 (emphasis sic) (distinguishing between mere refusal to perform a contract and actual impairment of a contract). This Court found that the “contravening legislation” at issue in the case “sought to prevent the parties” to an existing contract “from meeting their obligations by ***repealing the contract.***” *Id.* at 76-77 (emphasis added). Thus, there could be no remedy for breach of a contract that was essentially nullified by legislative action. *Id.* at 77. This Court cited to a Seventh Circuit case to explain how the absence of a remedy for breach amounts to a substantial impairment:

If a state or its subdivision passes a law and through enforcement of it prevents another party from fulfilling its obligation under the contract because the use of the ordinance precludes a damage remedy, the non-breaching party cannot be made whole. ***Instead, the law has impaired the obligation of the contract.***

*Id.* (citing *E&E Hauling, Inc. v. Forest Preserve Dist. of DuPage County* (7th Cir. 1980), 613 F.2d 675, 678) (emphasis added).

In this case, Plaintiff John Doe was hired by the Cincinnati Public Schools (“CPS”) in 1976 as a Safe and Drug-free School Specialist. He was promoted to a Due Process Hearing Specialist in 2002. Doe had a contract of employment with the CPS for the 2008-2009 school year, to work for CPS as a Due Process Hearing Specialist. In 1976, 20 years before CPS hired him and *32 years before entering into the 2008-2009 contract*, Doe was convicted of the sale of narcotics. Because of the operation of the newly-enacted R.C. 3319.391, Doe was subjected to a criminal records check in September 2008, which revealed his decades-old conviction.

Based on the 2007 statute, and the regulatory scheme contained in Ohio Adm. Code 3301-20-01, on January 26, 2009, CPS informed Doe that his contract of employment was being terminated, in the middle of the parties’ performance of their contract. *But for the General Assembly’s legislative action at issue in this case, there would be no question that CPS breached its contract with Doe by terminating him in the middle of the school year, and no question that CPS would have been liable to Doe for the damages arising from that breach.*

Thus, in Doe’s case, and in those of other non-licensed school employees like him, the Ohio General Assembly essentially repealed employment contracts, thereby nullifying them. Doe’s employment contract, as well as those of similarly situated public-school employees across the State of Ohio, was substantially impaired because it was rendered invalid; its obligations became meaningless to the parties; and there could be no remedy for breach, all as a result of legislative fiat.

Outright abrogation of a contractual relationship agreed upon, and relied upon, by private parties is an impairment of the utmost severity, which requires this Court to scrutinize the legislative and regulatory scheme here with an eye towards ensuring that the General Assembly’s action, as applied to current public-school employees, was appropriately tailored to its purpose.

**B. Applying R.C. 3319.391 and Ohio Adm. Code retrospectively to nullify existing contractual relationships between public school districts and non-licensed employees with certain criminal convictions is not appropriately tailored to serve its purpose because the statutory and regulatory scheme sweeps far too broadly and unreasonably, resulting in the General Assembly substituting its judgment for that of parties to a private contract.**

If there is a “substantial impairment” of a contractual relationship, the next inquiry is whether there is a “significant and legitimate public purpose” behind the regulation, “such as the remedying of a *broad and general* social or economic problem.” *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983), 459 U.S. 400, 411-12 (emphasis added). The Court recognized that requiring the State to show a legitimate public purpose behind a particular piece of legislation “guarantees that the State is exercising its police power, rather than providing a benefit to special interests.” *Id.* at 410; 412.

Even if the State shows a legitimate public purpose, it must also show that legislative adjustment of the rights and responsibilities of contracting parties is “based upon reasonable conditions” and is “appropriate to the public purpose justifying” the adoption of the legislation. *Id.* at 412-13 (internal citations omitted). Factors significant to the analysis are whether the legislative act: (1.) was an emergency measure; (2.) is designed to protect a basic societal interest, rather than particular individuals; (3.) is tailored appropriately to its purpose; (4.) imposes reasonable conditions; and (5.) is limited to the duration of the emergency. *Energy Reserves Group*, 459 U.S. at 410, n. 11 (citing *Blaisdell*, 290 U.S. at 444-47).

In *Allied Structural Steel Co. v. Spannaus*, the Supreme Court invalidated a Minnesota law that retroactively changed pension obligations for companies that closed their offices in the State. *See generally* (1978), 438 U.S. 234. Because the statute at issue increased the companies’ pension obligations, it severely impaired contractual relationships with their employees, and was subject to close scrutiny by the Court. *Id.* at 247-49. The Court ultimately held that the

Minnesota statute unconstitutionally impaired contractual obligations, and was not reasonably tailored to meet its purpose. *See id.* at 250-51.

The *Spannaus* Court criticized the statutory scheme because “there [was] not even any provision for gradual applicability or grace periods.” *Id.* at 247. In addition, the Court found nothing in the record to indicate that “this severe disruption of contractual expectations was necessary to meet *an important general social problem.*” *Id.* (emphasis added). Moreover, this narrowly focused statute was “not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions [recognized in *Blaisdell*].” *Id.* at 249.

In this case, it appears that the purpose of R.C. 3319.391 and Ohio Adm. Code 3301-20-01 is to protect the safety of Ohio’s public schoolchildren. While there can be no question that the safety of Ohio’s school children is of paramount importance, a legislative and regulatory mandate that terminates the existing employment contracts of current non-licensed employees of public school districts – many of whom do not come into contact with children – must nonetheless be appropriately tailored to serve this legitimate purpose.

- i. R.C. 3319.391 and Ohio Adm. Code § 3301-20-01 are not narrowly tailored to serve the purpose of addressing a broad, societal problem relating to crimes against schoolchildren; impose unreasonable conditions by indiscriminately erecting barriers to employment; and do not represent a legitimate exercise of the State’s police power to address an emergency situation.*

Imposing collateral penalties on individuals convicted of crimes has serious implications, both in terms of fairness to the individuals affected, and in terms of the burdens placed on the community. Symposium on the Collateral Sanctions in Theory & Practice, *ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons: Black Letter with Commentary*, U. TOL. L. REV. 441, 443 (2005). These collateral penalties are most difficult to justify when they apply automatically across the board to whole categories of

convicted persons. *Id.*

The most problematic limitations imposed by these sorts of penalties include those that erect barriers to employment, housing, and otherwise generally available public benefits and services. *Id.* If collateral sanctions, including barriers to certain types of employment, are promulgated and administered indiscriminately, they will frustrate the chance of successful re-entry into the community, and thereby increase the risk of recidivism. *Id.* For example, denying all drug offenders access to the means to rehabilitate themselves and support their families imposes a cost upon the community with no evident corresponding benefit. *Id.* at 453.

Other states have recognized the important link between gainful employment and rehabilitation. For example, in August 2009, Minnesota passed a law requiring public employers to wait until an applicant has qualified for an interview before inquiring about the applicant's criminal background. MINN. STAT. ANN. § 364.021 (West 2009). Deferring the question of criminal history until a later point in the hiring process prevents employers from relying on stereotypes and prejudices before preliminarily assessing a job applicant's ability to do the job. More importantly, Minnesota's "Ban the Box" law – referring to the "check box" on job applications relating to criminal convictions – is based on the Minnesota Legislature's determination that barriers to employment are counterproductive:

The legislature declares that it is the policy of the state of Minnesota to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the resumption of the responsibilities of citizenship. ***The opportunity to secure employment or to pursue, practice, or engage in a meaningful and profitable trade, occupation, vocation, profession, or business is essential to rehabilitation and the resumption of the responsibilities of citizenship.***

*Id.* § 364.01 (emphasis added).

The importance of rehabilitation and re-entry has likewise been recognized by the State of Ohio, including in the Mission Statement for the Ohio Department of Rehabilitation and

Corrections:

Through rehabilitative and restorative programming, we seek to instill in offenders an improved sense of responsibility and the capacity to become law-abiding members of society.

Ohio Dep't of Rehab. & Corrections, *Our Mission*, at <http://www.drc.ohio.gov>.<sup>5</sup> In fact, on the federal level, in his 2004 State of the Union address, President George W. Bush recognized the importance of access to housing and employment as a means of reducing recidivism:

This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work or a home, or help, they are much more likely to commit more crimes and return to prison.

President George W. Bush, State of the Union Address (Jan. 20, 2004) (transcript available at <http://www.whitehouse.gov/news/releases/2004/01/20020120-7.html>).

President Bush acted on this principle by signing into law the Second Chance Act of 2007 on April 9, 2008, which, *inter alia*, allows for federal grants for re-entry and rehabilitation programs. *See generally* Second Chance Act of 2007: Community Safety through Recidivism Prevention, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified at scattered sections of 42 U.S.C.). The Purposes and Findings underlying the Second Chances Act cite the lack of employment as a factor contributing to recidivism:

(a) The purposes of the Act are –

(1) to break the cycle of criminal recidivism, increase public safety, and help States, local units of government, and Indian Tribes, better address the growing population of criminal offenders who return to their communities and commit new crimes;

(6) to provide offenders in prisons, jails or juvenile facilities with educational, literacy, vocational, and ***job placement services to facilitate re-entry into the community.***

(18) The National Institute of Justice has found that 1 year after release, up to 60 percent of former inmates are not employed.

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<sup>5</sup> In addition, the fact that Cuyahoga County provides 60% of the funding for *amicus curiae* Towards Employment, Inc., suggests that the rehabilitation and re-entry are likewise important to county government.

***(19) Transitional jobs programs have proven to help people with criminal records to successfully return to the workplace and to the community, and therefore can reduce recidivism.***

*Id.* § 3 (codified at 42 U.S.C. § 17501 (2008)) (emphasis added).

Using a past felony conviction to conclude that an employee poses a safety risk to certain groups of citizens is not only simplistic, but also ignores the realities of rehabilitation. Criminologists have identified several factors used to predict desistance, such as employment at an adequate income, the age of the ex-offender, family connections, adult friends, and ownership of a home. John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 18 (2001). Employment has been shown to reduce recidivism because workers are more likely to experience close and frequent contact with conventional others and because the informal social controls of the workplace encourage conformity. Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment and Recidivism*, 67 AM. SOC. REV. 529, 530 (2000) (citing ROBERT SAMPSON & JOHN LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE (1993), for the proposition that employment is an important indicator of the likelihood of recidivism, especially among adult ex-offenders).

In addition, many studies have concluded that the most important factor in determining an ex-offender's risk level is the passage of time since the date of the offense. For example, research indicates that individuals who stay arrest-free for seven years pose very little risk for future crime, and that this risk is similar to that of non-offenders. Shawn Bushway & Gary Sweeten, *Abolish Lifetime Bans for Ex-Felons*, 6 CRIMINOLOGY & PUB. POL'Y 697, 697 (2007).

In this case, there is no evidence that the purpose of R.C. 3319.391 is to cure a broad and general societal problem relating to crimes against public schoolchildren committed by public-

school employees like John Doe. Instead, the statutory and regulatory scheme operates to punish non-licensed public school employees for decades-old convictions of certain crimes by divesting them of all rights and benefits attendant to the employment relationship, the most important of which is a stable income. This so no matter when the conviction occurred, or how successfully the individual has re-integrated into society in the years since the conviction. Erecting a categorical and non-negotiable barrier to existing, gainful employment for such a broad class of individuals simply casts too wide a net to respond appropriately to the goal of ensuring the safety of public schoolchildren.

The impermissible width of the General Assembly's net in this case is illustrated by the fact that nothing in the legislative and regulatory scheme for these particular employees even takes into consideration whether the employee in question actually works in the presence of schoolchildren. For example, a non-licensed employee with a "non-rehabilitative" criminal conviction may not even work in an area near the children, or even during hours when the children are present. Despite the fact that such an individual poses absolutely no risk to the safety of schoolchildren, R.C. 3391.391 and Ohio Adm. Code § 3301-20-01 mandate that, based on the conviction alone – and not the individual's actual job duties – his or her employment contract must be terminated immediately.

The direct correlation between gainful employment and successful rehabilitation and re-entry are well-documented, and support the competing public policy goals of rehabilitating offenders and transitioning them back into a law-abiding life – which further ensures public safety. Yet the General Assembly ignored these principles when it enacted R.C. 3319.391 and, in so doing, may actually increase the risk of recidivism for these individuals, which would ultimately jeopardize public safety more than allowing them to maintain their employment in the

public schools. This not only runs counter to the goal of protecting the safety of Ohio's schoolchildren, but also is patently unfair to the public school employees whose employment contracts were terminated as a result of the 2007 legislative mandate.

The legislative and regulatory scheme in this case also fails to pass constitutional muster because there is no evidence that it relates to an emergency situation that the Ohio General Assembly needed to address by flexing its police power muscles. Rather, the plain language of House Bill 190 states that the "emergency" reason for the legislation related to tuition fees for all-day kindergarten; it says nothing about the "emergency" need for immediate background-checks for existing employees, much less the need for immediate termination in a broad class of cases. In short, nothing in House Bill 190 cites that crimes against public schoolchildren, committed by employees like Doe with long-past convictions, were the impetus for this measure.

In essence, the operation of the statutory and regulatory scheme created by R.C. 3319.391 and Ohio Adm. Code 3301-20-01, like the legislation invalidated in *Spannaus*, is an inappropriate means to effectuate the laudable goal of safety in the public schools. As in *Spannaus*, the legislative and regulatory scheme here contains no grace period and no gradual applicability; rather, as soon as the background checks were completed, employees with certain convictions were to be immediately terminated. Because R.C. 3319.391's legislative mandates relating to current employees sweep too broadly; impose unreasonable conditions; and are not the result of an emergent situation, terminating these employees' existing employment contracts violates the Contract Clause of Article II, Section 28 of the Ohio Constitution.

- ii. ***Substituting legislative judgment for that of parties to existing private employment contracts reaches so far beyond the necessities of protecting the safety of public schoolchildren that the statutory and regulatory scheme embodied in R.C. 3319.391 and Ohio Adm. Code § 3301-20-01 cannot be either reasonable, or appropriately tailored to serve its purpose.***

Employment relationships are complex, ambiguous, and, ultimately, personal. *E.I. DuPont de Nemours & Co. v. Pressman* (Del. Supr. 1996), 679 A.2d 436, 444. In fact, as the *Pressman* Court recognized, employment agreements are intrinsically different from commercial contracts primarily because they “create an ongoing personal relationship between employee and employer . . . .” *Id.* (internal citation omitted).

This Court has likewise recognized the personal, and yet contractual, nature of the employment relationship, especially where that relationship is premised on an oral, at-will agreement:

A fundamental policy in favor of the employment-at-will doctrine is the principle that parties to a ***contractual relationship should have complete freedom to fashion whatever relationship they so desire.***

*Phung v. Waste Mgmt, Inc.* (1986), 23 Ohio St. 3d 100, 102, *overruled on other grounds by Kulch v. Structural Fibers, Inc.*, 78 Ohio St. 3d 134, 1997-Ohio-219 (emphasis added); *see also Lake Land Empl. Group of Akron v. Columber*, 101 Ohio St. 3d 242, 247, 2004-Ohio-786 (“At-will employment is contractual in nature.”).

In *Columber*, this Court recognized that the parties to an at-will employment agreement may “propose to change the terms of their employment relationship at any time.” *Id.* In fact, this Court has refused to abolish the employment-at-will doctrine because doing so would “place Ohio’s courts in the untenable position of having to second-guess the business judgments of employers.” *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St. 3d 100, 103; *Babcock & Wilcox Co. v. Ohio Civil Rights Comm’n* (1987), 31 Ohio St. 3d 222, 228 (Douglas, J., dissenting).

The United States Supreme Court has likewise recognized that the freedom to contract extends to employment relationships. *E.g., Morehead v. People of State of New York* ex rel. *Tipaldo* (1936), 298 U.S. 587, 610, *overruled on other grounds, Olsen v. State of Neb.* ex rel. *Western Ref. & Bond Ass'n* (1941), 313 U.S. 236. The Court recognized the role of both parties to an employment agreement: “In making contracts of employment, generally speaking, the parties have equal rights to obtain from each other the best terms they can by private bargaining.” *Id.* (addressing a due process challenge to a statute fixing wages for women).

However, while “freedom of contract is the general rule and restraint the exception,” the Supreme Court has validated statutes that “prescribe the character, methods, and time of payment of wages,” as well as those “fixing hours of labor.” *Id.* at 611; *see also West Coast Hotel Co. v. Parrish* (1937), 300 U.S. 379, 392-93 (“This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable.”). As the *Parrish* Court recognized, it is sometimes necessary for a legislature to regulate contractual employment relationships to a certain degree to ensure that the scales of bargaining power tip relatively evenly. *Parrish*, 300 U.S. at 399.

This principle is illustrated with equal force in the labor context; one of the primary purposes underlying the National Labor Relations Act is to address unequal bargaining power between employees and employers. 29 U.S.C. § 151 (2008). However, as the United States Supreme Court has recognized, the regulation of labor-management relations is carefully crafted: “what Congress left unregulated is as important as the regulations that it imposed.” *New York Tel. Co. v. New York State Dep’t of Labor* (1979), 440 U.S. 519, 52. While Congress imposed limited regulations to “establish a fair balance of bargaining power,” it also left room for labor

and management to remain “essentially free to bargain for an agreement to govern their relationship.” *Id.*; *see also, e.g., American Ship Bldg. Co. v. NLRB* (1965), 380 U.S. 300, 316-17.

The Ohio General Assembly has likewise regulated the employment relationship in ways that balance the bargaining power between employer and employee, or that seek to redress societal wrongs that may occur in the workplace, while leaving the parties largely free to establish and maintain private contractual relationships. For example, R.C. Chapter 4117 codifies collective bargaining for public employees, and therefore carefully balances the relationship between public-sector employers and employees. *See generally* OHIO REV. CODE ANN. Ch. 4117 (Anderson 2009); *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Employee Relations Bd.* (1986), 22 Ohio St. 3d 1, 4-5 (discussing the history and purpose of the enactment of Chapter 4117).

Similarly, the Ohio General Assembly sought to regulate contractual employment relationships when it enacted Chapter 4112, which proscribes various forms of workplace discrimination. *See generally* OHIO REV. CODE ANN. Ch. 4112 (Anderson 2009); *see also, e.g., Helmick v. Cincinnati Word Processing, Inc.* (1985), 45 Ohio St. 3d 131, 133 (“... there appears to be little question that R.C. Chapter 4112 is comprehensive legislation designed to provide a wide variety of remedies for employment discrimination . . . .”). This Court has repeatedly recognized that R.C. Chapter 4112 embodies Ohio’s strong public policy condemning workplace discrimination. *E.g., Genaro v. Central Transport, Inc.*, 84 Ohio St. 3d 293, 296-97, 1999-Ohio-353; *Dworning v. City of Euclid*, 119 Ohio St. 3d 83, 88, 2008-Ohio-3318 (“R.C. Chapter 4112 is remedial legislation designed to prevent and eliminate discrimination.”). Thus, while Chapter

4112 regulates a private and contractual employment relationship, it does so for the express purpose of eliminating what the General Assembly found to be a broad societal problem.

In contrast to Chapters 4117 and 4112, R.C. 3319.391 does not seek to equalize bargaining power in a contractual relationship in which the parties are otherwise free to bargain the terms. Nor does it seek to eradicate a broad societal problem, such as workplace discrimination. Instead, when it enacted R.C. 3319.391, the General Assembly meddled in existing contractual relationships, and substituted its own judgment for that of the public school districts as parties to private contractual employment relationships.

If a public school district chooses to maintain a contractual employment relationship with a non-licensed individual, and to continue to maintain that contractual relationship over a number of years – even with knowledge of a past conviction – it should be free to exercise that kind of discretion and judgment. The public school district, not the General Assembly, is in the best position to make business judgments about its contractual employment relationships with current personnel, and whether a past criminal conviction is relevant to its hiring needs.

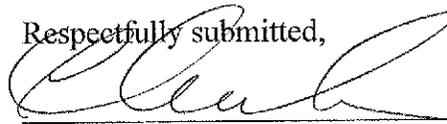
There is no question that the Ohio General Assembly has broad power, and arguably, a duty to ensure the safety of public schoolchildren. However, it must wield that power, and carry out this duty, in a manner that is consistent with the mandates of the Contract Clause of the Ohio Constitution. In this case, applying R.C. 3319.391 and Ohio Adm. Code § 3301-20-01 retrospectively interferes in existing contractual relationships in a manner that is repugnant to the freedom of private parties to contract, and is inconsistent with the purposes of legislative regulation of private employment relationships. Accordingly, the legislative and regulatory scheme at issue in this case reaches too far beyond the ostensible purpose of protecting the safety of public schoolchildren to be appropriately tailored to serve an otherwise legitimate goal.

Under the principles embodied in the constitutional protection of the sanctity of contracts in Ohio, this legislative and regulatory scheme cannot pass constitutional muster under the Contract Clause of Article II, Section 28 of the Ohio Constitution.

### CONCLUSION

For all of the foregoing reasons, the Ohio Employment Lawyers Association, The Legal Aid Society of Cleveland, and Towards Employment, Inc., as *amici curiae* in support of Petitioner John Doe urge this Court to answer the certified question relating to the Contract Clause embodied in Article II, Section 28 of the Ohio Constitution, in the affirmative.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 5<sup>th</sup> day of March, 2010, a copy of the foregoing was served upon the following by regular U.S. mail, postage pre-paid:

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