

ORIGINAL

IN THE SUPREME COURT OF OHIO

JOHN DOE,

Petitioner,

v.

MARY RONAN,

and

CINCINNATI PUBLIC SCHOOLS,

and

OHIO DEPARTMENT OF EDUCATION,

Respondents.

On Certified Questions of Law from the
United States District Court Southern
District of Ohio

Supreme Court of Ohio
Case No. 09-2104

District Court
Case No. 1:09cv243

REPLY BRIEF OF PETITIONER JOHN DOE

Christopher R. McDowell (0072218) (COUNSEL OF RECORD)
Kimberly Beck (0080616)
Sarah Sparks Herron (0083803)
DINSMORE & SHOHL LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
Phone: (513) 977-8200
Fax: (513) 977-8141
christopher.mcdowell@dinslaw.com

COUNSEL FOR PETITIONER JOHN DOE

Mark J. Stepaniak (0007758) (COUNSEL OF RECORD)
Daniel J. Hoying (0079689)
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957
(513) 381-2838
(513) 381-0205 (fax)
stepaniak@taftlaw.com

COUNSEL FOR RESPONDENTS MARY RONAN & CINCINNATI PUBLIC SCHOOLS

RECEIVED
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SUPREME COURT OF OHIO

Amy Nash Golian (0039306)
Todd R. Marti (0019280)
Benjamin Mizer (83089) (COUNSEL OF RECORD)
David Lieberman (pro hac vice)
Mia Meucci (83822)
OFFICE OF THE OHIO ATTORNEY GENERAL
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 644-7250
(614) 644-7634 (fax)
benjamin.mizer@ohioattorneygeneral.gov

COUNSEL FOR RESPONDENT OHIO DEPARTMENT OF EDUCATION

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INTRODUCTION

The implications of this decision will affect the livelihood of numerous Ohioans. Ohioans, like Petitioner John Doe (“Petitioner” or “Doe”), who have been faithful and respected employees of Ohio schools, have lost their jobs because of the unconstitutional mandates of the 2007 version of 3319.391 and Ohio Administrative Code 3301-20-01 (“Statutory Scheme”). This Statutory Scheme, according to Respondents Mary Ronan and Cincinnati Public Schools (collectively, “CPS”) and the Ohio Department of Education (“ODE,” all respondents together referred to as “Respondents”), required the termination of anyone who was *ever* convicted of a crime on a certain enumerated list of offenses, regardless of the employee’s interaction with students or the employee’s work history, or if the conviction was expunged and the employee was found to be fully rehabilitated.

Respondents’ arguments focus on deference to the Legislature, but in so doing, fail to acknowledge one of the principle purposes of this Court—to protect the Constitution and the citizens of Ohio when the Legislature oversteps its bounds. Petitioner, after twelve years of “acceptable” and “accomplished” service to CPS, was fired, just two years before his planned retirement. Based on the Statutory Scheme, CPS has asserted that it was required to fire Doe because he was convicted of drug trafficking in 1976, despite the fact that the conviction was expunged and Doe otherwise had no criminal record. Doe filed suit, seeking a judicial determination that, in creating this Statutory Scheme, the Legislature overstepped its bounds. Just four months after Doe’s termination, the Legislature amended the Statutory Scheme so that employees in Doe’s position would be permitted to retain their jobs if they could demonstrate that they were rehabilitated. Doe, however, was never given the opportunity to present evidence of his rehabilitation under the Statutory Scheme, and was terminated.

This Court has agreed to answer two Certified Questions with regard to the Statutory Scheme: Does the Statutory Scheme violate the Retroactivity Clause and/or the Contract Clause of Section 28, Article II of the Ohio Constitution? Petitioner has established that this Court should answer these questions in the affirmative. In this Reply, Doe briefly reinforces why this is so and fully disposes of the arguments raised by Respondents in their merit briefs.

ARGUMENT

The Statutory Scheme is unconstitutional because it violates the Retroactivity Clause and the Contracts Clause of Section 28, Article II of the Ohio Constitution. Moreover, ODE cannot take shelter under Section 34, Article II because the Statutory Scheme was not enacted to regulate hours of employment, establish a minimum wage, or provide for the comfort, health, safety, and welfare of all employees. Rather, the Statutory Scheme was enacted “to preserve a safe and healthy learning environment for Ohio schoolchildren.” (ODE Brief pg. 23.) And, as applied to Doe, the Statutory Scheme does not even accomplish that; it only succeeds in terminating an otherwise highly qualified and successful school employee.

I. PROPOSITION OF LAW I: OHIO REVISED CODE 3319.391 AND OHIO ADMINISTRATIVE CODE 3301-20-01 VIOLATE THE RETROACTIVITY CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION.

The Statutory Scheme is a retroactive law that not only impaired, but eliminated Doe's vested, substantive right to continued public employment. As such, the law is unconstitutional.

A. The Statutory Scheme Is Expressly Retroactive.

CPS argues that “[t]he statute applies prospectively only: the only conduct prohibited (i.e., employing an individual after receiving a disqualifying criminal background check) occurs after the effective date of the statute.” (CPS Brief pg. 6-7.) CPS confuses the date a statute takes effect and whether or not a statute operates retroactively.

Without a doubt, the Statutory Scheme is retroactive. The term “retroactive” refers to a law that affects “acts or facts occurring, or rights accruing, before it came into force.” *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, at fn.1. The Statutory Scheme applies to individuals who seek employment at a school district after the effective date *and* to individuals who were employed at the time the statute became effective. R.C. 3319.391(A). The Statutory Scheme affects current school employees, and more specifically, their right to continuing employment. The right to continued employment accrued before the General Assembly enacted R.C. 3319.391, that statute affects this right, and therefore, the Statutory Scheme operates retroactively.

B. The Statutory Scheme Impairs A Public School Employee’s Substantive Right To Continued Employment.

Doe has a substantive right to continued employment. As admitted by ODE, classified civil servants in Ohio have a protected property interest in continued employment by virtue of state law. (See ODE Brief pg. 16-17.) See *Ohio Assn. of Pub. School Employees v. Lakewood City Schools*, 68 Ohio St.3d 175, 176, 1994-Ohio-354, 624 N.E.2d 1043 (school custodian has a substantive right to or expectation of continued employment). That is, Doe was not an ‘at-will’ employee; he could only be fired ‘for cause.’ This is made plain in the first part of R.C.

124.34(A), cited by ODE:

The tenure of every officer or employee in the classified service of the * * * city school districts * * * shall be during good behavior and efficient service. No officer or employee shall be * * * removed * * * except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonest, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer’s or employee’s appointing authority, violation of this chapter of the rules of the services commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office * * *.

In other words, Doe had an ongoing, vested interest in continued employment.

The remainder of R.C. 124.34(A), however, permits a public employer to take several kinds of negative action—including firing—against employees who are convicted of a felony. (ODE Brief pg. 17.) The language of that statute demonstrates, however, that it only applies to felonies committed *while the person is an employee*: “A person convicted of a felony immediately forfeits the person’s status as a classified employee in any public employment on and after the date of the conviction for the felony.” R.C. 124.34(A). Doe could not, as ODE argues, have forfeited his status as a classified employee when he committed a felony in 1976 simply because he was not a classified employee at that time. ODE’s reading of R.C. 124.34 is strained at best. Surely, ODE would not argue that any civil servant could be fined, suspended or removed from a position for any other misconduct listed in the statute that occurred before an individual became a classified civil servant.

A plain reading of R.C. 124.34 or R.C. 3319.081 indicates that *after* an employee is hired as a civil servant, that employee cannot be terminated except ‘for cause.’ The first sentence of the statute makes this clear by stating that “[t]he tenure of every * * * employee in the classified service * * * shall be during good behavior and efficient service.” R.C. 124.34(A). The statute then lists certain offenses for which a civil servant can be disciplined. The General Assembly intended a civil servant to lose protected status if he is convicted of a felony *during his tenure* in office.

As a twenty-eight year old, Doe was convicted of Unlawful Sale of Narcotic Drugs. (Supp. at 4, 20.) *After* serving his sentence, Doe obtained his bachelor’s degree and state certifications, had his conviction expunged, applied for a job and CPS and was hired. (Id. at 4, 5, 20, 21, 32.) Then, after he worked at CPS for twelve years, receiving positive job evaluations and a promotion, Doe was fired pursuant to the Statutory Scheme. (Id. at 2, 3, 18, 19.) Whether pursuant to R.C. 3319.081

or R.C. 124.34,¹ Doe had a substantive right to continued employment at CPS. He could only be terminated for misfeasance, malfeasance, or nonfeasance that occurred during his tenure as a civil servant. Yet, Doe was terminated pursuant to the unconstitutionally retroactive Statutory Scheme for a crime he committed thirty years prior to the Statutory Scheme's enactment.

Notably both ODE and CPS assert the General Assembly has the power to mandate background checks for school employees. Doe does not disagree. The General Assembly has the power (pursuant to its general power to provide for the general welfare and public interest) to require these background checks. The General Assembly only ran afoul of the Constitution by requiring that schools *terminate* current employees if a background check uncovered certain convictions that *pre-dated the employment relationship*. Such a law is unconstitutionally retroactive within the civil servant context because of the substantive right to continued employment.

In sum, the General Assembly intended the Statutory Scheme to be applied retroactively, and the Statutory Scheme retroactively impairs Doe's substantive right to continued employment. ODE's argument that a convicted felon can never have a substantive right to continued employment as a civil servant is belied by the plain language of the civil servant statute. Moreover, the General Assembly's ability to mandate these type of background checks would not be limited by a holding that the Statutory Scheme is unconstitutional. The General Assembly may require these background checks prospectively, but cannot require terminations based on convictions that pre-date the employment relationship. In short, the Statutory Scheme is unconstitutionally retroactive.

¹ Both R.C. 3319.081 and R.C. 124.34 provide a continuing right to employment for public school employees. Under either scheme, Doe had a "protected property interest in continued employment by virtue of state law." (ODE Brief pg. 17.)

II. PROPOSITION OF LAW II: OHIO REVISED CODE 3319.391 AND OHIO ADMINISTRATIVE CODE 3301-20-01 VIOLATE THE CONTRACTS CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION.

As explained more fully in Petitioner’s Merit Brief, the Statutory Scheme violates the Contracts Clause of the Ohio Constitution. Although the Ohio Legislature has the power to enact laws, that power is not absolute. It is instead limited by Ohio’s Constitution and this Court is charged with the responsibility to declare a law unconstitutional, where, as here, the Legislature has over-stepped its bounds. *State ex rel. Jackman v. Court of Common Pleas* (1967), 9 Ohio St. 2d 159, 162, 38 O.O.2d 404, 224 N.E.2d 906. Indeed, ODE concedes the limitations imposed on the Legislature by the Contracts Clause: “A law that impairs ‘contracts made prior to its enactment[] [is] unconstitutional.’” (ODE Brief pg. 21.) Despite this concession, Respondents have attempted to argue that the Statutory Scheme is constitutional. Yet, Respondents have failed to dispel Doe’s argument that the Statutory Scheme violates the Contracts Clause because it (1) substantially impaired Doe’s employment contract and (2) fails the applicable scrutiny.

A. The Statutory Scheme Substantially Impaired Doe’s Contract With CPS.

Petitioner established that the Statutory Scheme operated to affect his termination, in violation of this long-time employee’s employment contract. This destruction of Doe’s employment contract, “operated as a substantial impairment of a contractual relationship,” as described in *State ex rel. Horvath v. State Teachers Retirement Bd.*, 83 Ohio St. 3d 67, 76, 1998-Ohio-424, 697 N.E.2d 644.

Both Respondents’ briefs take great lengths to argue that Doe did not have a statutory contract with CPS pursuant to 3319.081 because the provisions of Chapter 124 apply to CPS and those statutory provisions are mutually exclusive. This argument misses the mark. As explained in Doe’s Merit Brief, Doe either has a contract pursuant to 3319.081 or, in the alternative, he has

a statutory contract pursuant to Chapter 124. Either way, Doe had a contract with CPS on the day the Statutory Scheme was enacted. Indeed, ODE alludes to the Chapter 124 contract when it cited a portion of R.C. 124.34(A). See R.C. 124.34(A) (discussing the “tenure of every officer or employee in the classified service”); accord *DeMarco v. Cuyahoga Cty. Dept. of Human Services* (N.D. Ohio 1998), 12 F.Supp.2d 715, 721 (discussing the contract right of a tenured job, pursuant to R.C. 124.34 (A)).

ODE’s argument that CPS was not obligated to perform under the Chapter 124 contract because Doe was a felon, lacks merit. As discussed in Part I(B), the dictates of R.C. 124.34 do not contemplate a felony conviction that occurred 33 years in the past. Accordingly, Doe and CPS had a contract pursuant to Chapter 124, which was substantially impaired.

B. The Statutory Scheme Was Not Reasonable And Necessary To Serve An Important Government Interest.

As fully set forth in the Merit Brief, the Statutory Scheme violates the Contracts Clause of the Ohio Constitution because it is not reasonable and necessary to serve the interest of protecting school children. Indeed, the Statutory Scheme in this case, like the legislative action in *Middletown v. Ferguson*, (1986), 25 Ohio St.3d 71, 495 N.E.2d 38 and *City of London v. Proctor* (May 24, 2001), 10th Dist. No. 01AP-34, 2001 Ohio App. LEXIS 2310 is a draconian means to accomplish the purported purpose. Neither of the Respondents focus much attention on this pivotal issue of the case—the reasonableness and necessity of the Statutory Scheme.

Respondents cannot with a clear conscience argue the necessity of the Statutory Scheme in light of the fact that it was changed shortly after being enacted. *Under the revised statutory scheme, Doe is not barred from employment* (though he has not been reinstated by CPS). Ohio Adm.Code 3301-20-03(A)(6)(e) (2009). This begs the question, how could the Statutory Scheme be reasonable and necessary to protect school children, if it was significantly altered just

months after it was enacted? No doubt, this troubling question explains why Respondents have glossed over this aspect of the case in their briefs.

Indeed, the Statutory Scheme as applied to Doe and others like him, does not further the purported interest of preserving ‘a safe and healthy learning environment.’ The record reflects that Doe served as a Due Process Hearings Officer, which means he worked in an office, away from students. (Supp. at 2, 18.) He only saw students during hearings when the student’s parents were present. Even ODE explicitly admits that Doe had no direct contact with students. (Id.; see, also, ODE Brief pg. 9.) A Statutory Scheme that destroys Doe’s employment contract on the basis of one 33-year-old expunged conviction is not reasonable and necessary to protect the safety of students. Doe was a young man when he was convicted in 1976. (Supp. at 4, 20.) By the time the Statutory Scheme came into effect, Doe was in his mid-60’s — close to retirement, and had an established track record of good employment with CPS for 12 years. (See id. at 2, 18.) There is no evidence that Doe ever harmed or threatened a child.

In lieu of discussing these arguments head-on, ODE quotes from *Util. Serv. Partners v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038 (“*USP*”) without explaining why that case is relevant in this situation. A review of *USP* reveals that it is not. In *USP*, this Court determined that the Public Utilities Commission could constitutionally order a natural gas company to maintain natural gas lines going into homes. Id. at ¶10. Prior to the PUC-order, each homeowner was responsible to maintain its own line, and some homeowners had purchased a warranty from the USP, in which USP agreed to pay for repairs to the line. Id. at ¶4. After several inadequately repaired lines caused homes to explode, this Court held that the PUC-order “is based upon reasonable conditions and is of a character appropriate to the public purpose.” Id. at ¶45. ODE has taken that quote out of context and somehow extrapolated *USP*

to stand for the proposition that “the background check law ‘is based upon reasonable conditions and is of a character appropriate to the public purpose.’” (ODE Brief pg. 23.) However, ODE failed to explain how *USP* is relevant to the facts or law in this case.

CPS’s reliance on *Doe v. Petro* is similarly misplaced. The contracts at issue in *Petro* are fundamentally different because they are contracts between private parties, whereas a government entity is a party to the contract in this case. *Doe v. Petro* (S.D. Ohio, May 3, 2005), Case No. 1:05-CV-125, 2005 U.S. Dist. LEXIS 35537, at *9. The *Petro* court assumed that the statutory scheme was necessary and reasonable to further the interests of protecting school children: “Because [this contract] would be between private parties, the Court should defer to the legislature’s conclusion that this is a necessary and reasonable impairment to impose on the parties’ contract rights.” *Id.* This Court does not defer to the Legislature when one of the parties to the contract is a government entity. *Middletown v. Ferguson*, 25 Ohio St.3d at 71.

Once subjected to scrutiny, the drastic means in this case are apparent and clearly not reasonable and necessary to further the purported interest. Accordingly, the Statutory Scheme does not pass constitutional scrutiny, and therefore, this Court must declare the Statutory Scheme unconstitutional, as a violation of the Contracts Clause.

III. COUNTER-PROPOSITION OF LAW: OHIO REVISED CODE 3319.391 AND OHIO ADMINISTRATIVE CODE 3301-20-01 ARE NOT CONSTITUTIONAL PURSUANT TO SECTION 34, ARTICLE II OF THE OHIO CONSTITUTION.

ODE attempts to salvage the constitutionality of the Statutory Scheme by resorting to a section of the Constitution that is not limited by the Retroactivity Clause or the Contracts Clause. This argument should not prevail. First, this issue is not properly before the Court. Second, neither the plain language of Section 34, Article II nor the case law interpreting that language support enactment of the Statutory Scheme. Third and finally, this Court should not adopt

ODE's reasoning because such a holding would permit the General Assembly to require hiring or firing of employees with the only limitation that it be in "the public interest."

A. Whether R.C. 3319.391 Is Constitutional Pursuant To Section 34, Article II Of The Ohio Constitution Is Not An Issue Properly Before The Court.

This issue is not properly before the Court. Supreme Court Practice Rule 18 states,

The Supreme Court may answer a question of law certified to it by a court of the United States. This rule may be invoked when the certifying court, in a proceeding before it, issues a certification order finding there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court.

S.Ct.Prac.R. XVIII(1). At Petitioner's request, the District Court certified two questions, both of which this Court accepted. Neither Petitioner nor Respondents requested that this Court address the constitutionality of the Statutory Scheme pursuant to Section 34, Article II. Furthermore, the District Court did not certify this issue as a determining question of law. Accordingly, this issue is not properly before the Court.

While this Court "does not exercise jurisdiction by answering" a certified question, *Scott v. Bank One Trust Co., N.A.* (1991), 62 Ohio St.3d 39, 42, 577 N.E.2d 1077, the Court has refused to address issues outside the scope of the certified question(s). See e.g., *State v. Sowers*, 81 Ohio St.3d 260, 263, 1998-Ohio-632, 690 N.E.2d 881, fn.3 (Moyer, C.J., concurring) (refusing to address attorney-client relationship issues or the general duties a law firm has to a client because these issues were "beyond the scope of the question of state law certified by the Sixth Circuit Court of Appeals."). The Court should decline to address ODE's never before raised argument that the Statutory Scheme was enacted pursuant to Section 34, Article II of the Ohio Constitution. The issue is not properly before the Court and it goes well beyond the scope of the certified questions. However, if the Court entertain this new question, it should still find the Statutory Scheme unconstitutional.

B. The Constitutionality Of The Statutory Scheme Is Not Saved By Section 34, Article II.

Contrary to ODE's argument, Section 34, Article II does not authorize the legislation at issue. Rather, the plain language of the Section, the history of its adoption, and case law interpreting it do not support ODE's position.

- i. The plain language of Section 34, Article II does not authorize enactment of the Statutory Scheme.*

Section 34, Article II states:

Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.

The plain language of the Section delineates the bounds of the General Assembly's power: the General Assembly may pass laws that (1) regulate the hours of labor, (2) establish a minimum wage, and (3) provide for the comfort, health, safety, and welfare of all employees. Where the language of a "constitutional provision is clear and unambiguous, it is the duty of courts to enforce the provision as written." *City of Rocky River v. State Emp. Rel. Bd.* (1989), 43 Ohio St.3d 1, 15, 539 N.E.2d 103 ("*Rocky River IV*"), citing *Bernardini v. Bd. of Edn.* (1979), 58 Ohio St.2d 1, 12 O.O.3d 1, 387 N.E.2d 1222. The Statutory Scheme does not regulate the hours of labor, establish a minimum wage, or provide for the welfare of all employees. Instead, it requires employees to undergo background checks *and* requires a school to fire an employee, if certain convictions are discovered. See generally, R.C. 3319.391.

ODE does not argue that the Statutory Scheme regulates the hours of labor, establishes a minimum wage, or provides for the comfort, health, safety, and welfare of all employees. Rather, ODE quite unambiguously asserts that the General Assembly enacted R.C. 3319.391 to protect children: "The General Assembly reasonably concluded that the 'public health, safety and

welfare' of *students* necessitated an expansion of the background check law * * *." (ODE Brief pg. 23 (emphasis added); see, also, CPS Brief pg. 10.) Moreover, this Statutory Scheme is logically not designed to protect employees. If it were, why limit it's breadth to only school employees? Why would this background check law not apply to all public employees? Since the Statutory Scheme clearly does not fall within the plain language of the Section 34, Article II, it was enacted pursuant to the Legislature's general power to legislate for the general welfare, and, accordingly, the Statutory Scheme is subject to normal constitutional analysis, including analysis under the Retroactivity Clause and Contracts Clause.

ii. *The history of Section 34, Article II does not authorize enactment of the Statutory Scheme.*

Though the language of Section 34 is clear, the astounding scope of powers ODE argues for in its Merit Brief warrants deeper consideration of this powerful constitutional provision. The history of Section 34, Article II clearly shows that the drafters of the section did not intend to give the General Assembly a limitless power to regulate all matters even tangentially related to employment. Rather, the amendment "empowered the General Assembly to regulate the employment relationship without running afoul of the now-obsolete judicial doctrine of 'economic substantive due process.'" *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 639, 576 N.E.2d 722 (Brown, Herbert, J., concurring), citing 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio (1913) 1331, 1334-1335.

"[T]he polestar in the construction of constitutional * * * provisions is the intention of [their] makers and adopters." *Castleberry v. Evatt* (1946), 147 Ohio St. 30, 33, 33 O.O. 197, 67 N.E.2d 861. The most thorough, accurate, and cogent analysis of the 1912 constitutional convention debates regarding Section 34 is found in Justice Wright's *Rocky River IV* dissent. *Rocky River IV*, 43 Ohio St.3d at 26-33 (Wright, J., dissenting). Those debates clearly show that

the delegates, in voting to submit Section 34 to the people of Ohio for their acceptance or rejection, wanted to do their utmost *to protect employees* from the worst abuses of the industrial economy. Topics such as extremely long hours, poor pay, dangerous conditions, and other labor issues dominated the conversation. See, generally, 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio (1912) 1328-1338. In creating a power that would enable the Legislature to directly attack these evils, the constitutional convention delegates were also keenly aware of a growing jurisprudential trend to invalidate labor-protection legislation using an economic substantive due process theory. 2 Proceedings and Debates at 1335 (comments of Mr. Dwyer: “Take that bake-shop case in New York [*Lochner*] * * *.”).

The *Lochner* era, named after the infamous U.S. Supreme Court case, was an overbroad interpretation of the freedom of contract. *Lochner v. New York* (1905), 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937. In Ohio, this era began in the 1890’s with cases like *Palmer v. Tingle* (1896), 55 Ohio St. 423, 45 N.E. 313. There, the Court struck down a law creating mechanics’ liens and reasoned that “[l]iberty to acquire property by contract can be restrained by the general assembly only so far as such restraint is for the common welfare and equal protection and benefit of the people * * *. The judgment of the general assembly in such cases is not conclusive.” *Id.* at paragraph two of the syllabus. Using this activist interpretation of the inalienable right to acquire property by contract, Ohio courts struck down or threatened to strike down numerous pro-employee laws. See, e.g., *State ex rel. Yapple v. Creamer* (1912), 85 Ohio St. 349, 399-400, 97 N.E. 602 (workers’ compensation system); *City of Cleveland v. Clements Bros. Constr. Co.* (1902), 67 Ohio St. 197, 65 N.E. 885 (work-hour limits on public projects).

The labor movement, frustrated that protective legislation was being routinely invalidated, worked hard to ensure that these issues were considered in the 1912 Constitutional

Convention. Pierce, “Organized Labor and the Law in Ohio” (2004), 2 History of Ohio Law 883, 897-98 (Benedict & Winkler eds.). And, one of the labor movements top priorities was the employee protection amendment that would become Section 34, Article II. Id. The citizens of Ohio approved nearly every pro-labor proposal, including Section 34. Id. at 899.

The delegates at the 1912 Convention and the Ohioans that voted for Section 34 would be shocked to see the state requiring mandatory retroactive terminations under the amendment they intended as protection for workers. They intended to empower the General Assembly to protect workers from the *Lochner*-era jurisprudence that had prevented important employment reforms such as a minimum wage and health and safety laws that protected employees who were increasingly subjected to dangerous working conditions in a new, industrial America. Clearly, the history of Section 34, Article II does not support ODE's argument that the General Assembly enacted the Statutory Scheme pursuant to this provision.

iii. The case law interpreting Section 34, Article II does not authorize enactment of the Statutory Scheme.

This Court's Section 34, Article II jurisprudence does not support ODE's position. Early case law involving legislation promulgated under Section 34, Article II was closely related to employment. In 1947, this Court held that the Ohio Minimum Wage Act was constitutional pursuant to Section 34, Article II. *Stain v. Southerton* (1947), 148 Ohio St. 153, 160-61, 74 N.E.2d, 69. The Court noted:

[I]f this court were now to strike down this salutary legislation it would be doing a real disservice to the women and minor employees of this state and would be placing itself in opposition to present-day concepts as to the measures necessary and proper to insure the welfare and well-being of those employed in business and industry generally.

Id. at 162-63. And in *Akron & B.B.R. Co. v. Pub. Util. Comm.* (1947), 148 Ohio St. 282, 74 N.E.2d 256, the Court held that a regulation requiring that all trains have a caboose (for train

employees to sleep on) was constitutional. Train employment was dangerous and the regulation was “designed to afford some relief from that hazard and exposure.” *Id.* at 259; see, also, *State v. Kidd* (1958), 167 Ohio St. 521, 527, 150 N.E.2d 413 (upholding Sunday closing law pursuant to Section 34, Article II). In all of these cases, the statutes promulgated pursuant to the Section 34, Article II power are closely related to the words of the constitutional provision. The Ohio Minimum Wage Act is a law establishing a minimum wage; the caboose requirement was for the health, safety, and welfare of train employees; and the Sunday closing law also provided for the welfare of employees as such laws were “derived from long experience and the custom of all nations, that periods of rest from ordinary pursuits are requisite to the well-being, morally and physically, of a people.” *Kidd*, 167 Ohio St. at 524.

The Court’s more recent jurisprudence is also linked to the plain language of the Section. In *City of Lima v. State*, 122 Ohio St.3d 155, 2009-Ohio-2597, 909 N.E.2d 616, the Court reviewed its recent Section 34, Article II jurisprudence and found that a state statute prohibiting political subdivisions from enacting residency requirements for their employees was constitutional. The Court concluded that the statute “provides for the comfort and general welfare of employees.” *Id.* at 13. In *Rocky River IV*, the Court upheld the constitutionality of a statute that mandated binding arbitration between a city and its safety forces in the event of a collective-bargaining impasse. In *Am. Assn. of Univ. Professors, Ctr. State Univ. Chapter v. Ctr. State Univ.*, 87 Ohio St.3d 55, 1999-Ohio-248, 717 N.E.2d 286 (“*AAUP*”), the Court upheld a statute that increased teaching-hour requirements for faculty at state universities. And in *State, ex rel. Bd. of Trustees of Pension Fund v. Bd. of Trustees of Relief Fund* (1967), 12 Ohio St.2d 105, 41 O.O.2d 410, 233 N.E.2d 135 the Court upheld a statute requiring local police pension funds to surrender their assets to a state-controlled fund.

In all of these cases, the challenged statute can be linked directly to the words of Section 34, Article II. The residency statute in *Lima* “provide[s] for the comfort, health, safety, and welfare” of civil servants by restricting cities and townships from mandating where the civil servants live. The arbitration statute upheld in *Rocky River IV* also provides for the welfare of employees by ensuring that a resolution is reached in case of collective-bargaining impasses. The increased teaching hour requirement is a regulation of the “hours of labor,” and the pension fund relates to the comfort and welfare of employees by providing a statewide pension fund for the benefit of police and fire station employees.

But the statute at issue here, R.C. 3319.391, is not related to the hours of labor, a minimum wage, or the comfort, health, safety, and welfare *of employees*.² Rather, the statute relates to the comfort, health, safety, and welfare *of schoolchildren*, and only seeks to regulate employment to that end. Pursuant to this Court's jurisprudence, the Statutory Scheme was not enacted pursuant to the General Assembly's power to “fix[] and regulat[e] the hours of labor, establish[] a minimum wage, and provid[e] for the comfort, health, safety and general welfare of all employees.” Rather, the Legislature enacted the Statutory Scheme pursuant to its general power to legislate for the general welfare or public interest. This power *is* limited by the remainder of the Constitution, and, as discussed in Parts I and II, the Statutory Scheme violates the Retroactivity Clause and the Contracts Clause of Section 28, Article II.

C. The Court Should Not Adopt ODE's Reasoning Because This Would Give The General Assembly Nearly Limitless Power To Legislate.

Admittedly, this Court has held that Section 34, Article II is a “broad grant of authority to the General Assembly, not [] a limitation on its power.” *Lima* at ¶11. However, Section 34,

² The legislative history of R.C. 3319.391 does not address the idea of promoting comfort, health, safety and welfare of employees.

Article II *must* have some limitation or the remainder of the Ohio Constitution would be rendered meaningless. Section 34 specifically states that “no other provision of the Constitution shall impair or limit” its power. As aptly stated by Justice Lanzinger, “If there are no limits on the subject matter the Legislature may address under the rubric of ‘general welfare of all employees,’ then [the General Assembly] has limitless power to enact any and all laws that arguably affect employees in the state.” *Lima*, at ¶38 (Lanzinger, J. dissenting).

A holding that the General Assembly enacted the Statutory Scheme pursuant to Section 34, Article II would give the General Assembly the limitless power that concerned Justice Lanzinger. ODE’s argument that the Statutory Scheme is insulated from constitutional attack by Section 34, Article II is troubling. ODE argues that “requiring all current school employees to complete background checks is, in every sense, a regulation of the employment sector in furtherance of the public interest—namely, the safety and security of students in the schoolhouse.” (ODE Brief pg. 14.) Thus, according to ODE, the General Assembly is authorized to regulate employment—including mandatory terminations—if the regulation is in the public interest. Notably, this Court will not second-guess a policy decision of the Legislature. See, e.g., *Rankin v. Cuyahoga Cty. Dept. of Children and Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521, at ¶34. Therefore, pursuant to ODE’s understanding of Section 34, the General Assembly could mandate that private businesses hire additional workers if that action is in the public interest. Or, the General Assembly could mandate that every train have a dining car for passengers merely because the passengers interact with railroad employees. These examples may seem ludicrous but they show that ODE’s limitation, is no limitation at all.

Section 34, Article II is a strong power, unlimited by the remainder of the Constitution. For example, a limitless reading of Section 34 would say that legislation touching on some

employment issue would trump the right of property, the right to a jury trial, and the freedom of speech and of the press. Such a limitless reading would allow any employment-related legislation to bypass the General Assembly's three-reading requirement, the governor's veto power, and the right of initiative and referendum. The General Assembly would then know that, so long as it made any sort of pretextual link to employment, it could be guaranteed the power to ignore all other constitutional requirements and limits.

ODE twists this Court's jurisprudence to argue that it "validates the General Assembly[']s authority to enact" R.C. 3319.391. (ODE Brief pg. 14.) ODE states that the *AAUP* Court "highlighted examples of valid Section 34 enactments that burdened employees" including two criminal background check statutes (R.C. 2151.86 (childcare providers) and R.C. 3301.32 (head start employees)). (ODE Brief pg. 13.) A closer look at *AAUP* shows that this argument is hollow. The plaintiff in *AAUP* sought to use Section 34, Article II to declare a law unconstitutional. *AAUP* at 60. The plaintiff argued that "laws burdening employees are unconstitutional as violative of Section 34." *Id.* The Court rejected the plaintiff's reasoning and then listed numerous statutes, including R.C. 2151.86 and R.C. 3301.32, that would be impermissible pursuant to the plaintiff's reasoning. *Id.* at 61. Contrary to ODE's characterization, the Court did not indicate that these statutes were enacted pursuant to Section 34, but rather used these statutes to show that Section 34 did not prohibit their enactment. *Id.*

ODE's mischaracterization of *AAUP* shows the overall error in ODE's reasoning. The statutes that ODE points to as proper enactments pursuant to Section 34, Article II are simply "legislative decisions to regulate the employment sector in the public interest." *Id.* Such decisions are not insulated from Constitutional attack by Section 34, Article II. Instead, they are like any other legislation enacted in the public interest—subject to the normal Constitutional

constraints. Laws, however, that regulate the hours of labor, establish a minimum wage, or provide for the health, safety, and welfare of employees are enacted pursuant to Section 34, Article II and bear that Section's protection from further constitutional scrutiny. Here, the Statutory Scheme is a general law enacted for the public interest that relates to employment. It is *not* a law that regulates the hours of labor, establishes a minimum wage, or provides for the health, safety, or welfare of employees.

ODE's brief shows that the purpose of the law was to protect children. (See ODE Brief pgs. 4, 14, 23.) In fact, ODE clearly states that the General Assembly "reasonably concluded that the 'public health, safety and welfare' *of students* necessitated an expansion of the background check * * *." (ODE Brief pg. 23 (emphasis added); see, also, CPS Brief pg. 10 ("R.C. 3319.391 and Ohio Adm.Code 3301-20-01 (2007) were clearly designed to protect Ohio public school children * * *").) Further, it begs credulity to argue that requiring schools to fire good employees such as Doe is for the "health, safety and general welfare of all employees."

In sum, in an effort to save the Statutory Scheme from constitutional attack, ODE has attempted to shelter it behind a powerful constitutional provision. However, that provision is limited to specific legislation, namely laws that regulate the hours of labor, establish a minimum wage, or provide for the health, safety, and welfare of employees. Section 34, Article II was added to the Constitution to protect employees from perceived abuses, and the promulgators of Section 34, Article II sought to insulate it from *Lochner*-era jurisprudence. Since its passage, the General Assembly has used Section 34, Article II to enact a minimum wage, protect railroad employees from dangerous conditions, mandate teaching hours at public universities, and prohibit political subdivisions from requiring their employees to live within city or township limits. These laws all relate to the plain language of the Section. But, the Statutory Scheme

clearly *is not* a law promulgated pursuant to Section 34, Article II. Rather, the General Assembly enacted the Statutory Scheme pursuant to its general power to legislate for the public interest—the public interest being protection of school children. To hold otherwise would give the General Assembly a nearly limitless power, including the power to require terminating or hiring employees. Such a power is beyond the scope of Section 34, Article II, and, accordingly, the Statutory Scheme was not enacted pursuant to Section 34, Article II.

CONCLUSION

By operation of R.C. 124.34, Doe had an ongoing vested interest in his continued employment and a statutory contract with CPS until it was taken away by the 2007 amendments to R.C. 3319.391 and Ohio Admin.Code 3301-20-01. Those amendments operated retroactively, mandating Doe's termination based solely on a single, nonviolent offense that occurred more than twenty years before he was hired. The substantial interference with the contract was not reasonable and necessary to effect the purported purpose, and therefore, fails constitutional scrutiny. The history of Section 34 and this Court's precedent demonstrate that Section 34 was never meant to and should not be allowed to shield this blatant violation of Section 28. This Court should hold, therefore, that these amendments violated Section 28, Article II of the Ohio Constitution as applied to Doe.

Respectfully submitted,

Christopher McDowell by K Beck
Christopher R. McDowell (0072218)

Counsel for Petitioner John Doe

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Reply Brief of Petitioner John Doe" was served upon the following via ordinary U.S. mail postage pre-paid this 26th day of May, 2010:

Mark J. Stepaniak & Daniel J. Hoying
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957
COUNSEL FOR RESPONDENTS
MARY RONAN & CINCINNATI PUBLIC SCHOOLS

Amy Nash Golian, Todd R. Marti, Benjamin Mizer
David Lieberman, and Mia Meucci
OFFICE OF THE OHIO ATTORNEY GENERAL
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
COUNSEL FOR RESPONDENT
OHIO DEPARTMENT OF EDUCATION

Christopher McDowell by K Beck
Christopher R. McDowell (0072218) 

**Counsel for Petitioner
John Doe**