ORIGINAL

IN THE SUPREME COURT OF OHIO

JOHN HAIGHT, et al.,	)	**SUPREME COURT CASE NO.: 14-1241**
	)	
Plaintiffs/Appellees,	)	**On appeal from the Montgomery County Court of Appeals, Second Appellate District**
	)	
vs.	)	
	)	
ROBERT MINCHAK, et al.,	)	**Court of Appeals Case No. 25983**
	)	
Defendants/Appellants.	)	**Trial Court Case No. 2012 CV 00946**
	)	
	)	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS, ROBERT MINCHAK AND JOAN MINCHAK

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EXPLANATION OF WHY A SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED, AND WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

On June 6, 2014, the Second District Court of Appeals substantially altered Ohio's existing minimum wage law by striking down Ohio's Minimum Wage Act, specifically, R.C. 4111.14(B)(1), a statue duly enacted by the Ohio General Assembly, as unconstitutional. The court of appeals, in reversing the trial court, held the statute invalid based on its conclusion that a "clear conflict" exists between the definition of an employee in R.C. 4111.14(B)(1), and the definition of an employee in Article II, Section 34a of the Ohio Constitution ("Section 34a"). In other words, the appellate court concluded that by approving the language of Section 34a, Ohio voters intended to abolish the concept of minimum wage exemptions contained in the federal Fair Labor Standards Act ("FLSA"). The impact of this constitutional question is substantial especially considering its broad-reaching effects, which raise issues of public or great general interest.

First, from a retrospective point of view, the court of appeals has granted minimum wage entitlement to entire classes of individuals, i.e., all classes of individuals, including outside salespeople, who have been historically exempt from minimum wage entitlement under the FLSA and Ohio law. Prior to the appellate court's decision in this case, Ohio employers had no obligation to pay these individuals minimum wage. Instead, employers have paid outside salespeople, as in this case, commissions. Now, the court of appeals' decision exposes these employers, who have been complying with Ohio law, to extremely costly collective action lawsuits brought by current and former employees for back wages. Law abiding Ohio businesses should not be forced to bear the financial burden of the court of appeals' decision to strike down existing Ohio law.

Second, from a prospective point of view, employers throughout Ohio are now forced to decide for themselves whether they should comply with the Ohio statute or with the decision of

this particular court of appeals in Montgomery County. If this Court does not grant jurisdiction to hear this case, Ohio courts and litigants will be left asking: "What is the law?" Trial and appellate courts throughout the state will be free to essentially establish their own version of minimum wage law in Ohio.

Because this Court is the final authority on Ohio law, litigants, trial judges, and appellate judges in the other eleven appellate districts in this state require this Court's guidance in determining what the law of Ohio is in regard to minimum wage. In short, without this Court's input in this case, Ohio's minimum wage law will remain in a perilous state. This Court should grant jurisdiction to hear this case in order to answer definitively (1) whether R.C. 4111.14(B)(1) clearly conflicts with Section 34a beyond a reasonable doubt, such that the statute is unconstitutional; and, (2) if so, whether such a conclusion and corresponding ruling should apply only prospectively.

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

Plaintiffs-Appellees, John Haight and Christopher Pence (collectively "Plaintiffs") originally filed this action for alleged unpaid wages on February 6, 2012, against Defendants-Appellants, The Cheap Escape Company, d/b/a J.B. Dollar Stretcher Magazine ("Cheap Escape"), and its owners, Robert Minchak, and Joan Minchak (collectively "Defendants"). Until its bankruptcy, Cheap Escape published a coupon book for consumers. In their original complaint, Plaintiffs, who had been outside salesmen for Cheap Escape, brought claims for (1) the payment of minimum wage under Article 2, Section 34a of the Ohio Constitution ("§34a"); (2) a declaratory judgment regarding the definition of "employee" under §34a; (3) failure to tender pay by regular

payday in violation of R.C. 4113.15 (against Cheap Escape only); (4) breach of contract (against Cheap Escape only); and, (5) quantum meruit (against Cheap Escape only).

On February 13, 2013, Plaintiffs filed an amended complaint that included class action allegations. In the First Amended Complaint ("FAC"), Plaintiffs brought the same five claims that were included in their original complaint, but also added an additional claim for a declaratory judgment regarding the constitutionality of the written consent requirement in R.C. 4111.14(K)(2). Plaintiffs first sought to bring their claims as a Rule 23 opt-out class action under the Ohio Constitution, Article II, § 34a. They, alternatively, sought to proceed as an opt-in collective action only if the opt-out class action failed.

In response, Defendants filed a motion to stay the proceedings and to compel arbitration. The trial court denied the motion, refusing to stay the proceedings, and Defendants appealed to the Second District Court of Appeals in *John Haight, et al. v. Cheap Escape Company, et al.*, Case No. CA25345 ("*Haight I*"). In *Haight I*, Plaintiffs filed a motion to strike the appeal as frivolous. The motion to strike was denied by the appellate court on October 4, 2012. Ultimately, however, Defendants' request for arbitration was unsuccessful when, on January 25, 2013, the appellate court affirmed the trial court's decision allowing the case to proceed in the trial court.

Upon remand, Defendants filed their answer to the FAC on February 15, 2013. Subsequently, on February 19, 2013, Plaintiffs filed their motion for a declaratory judgment regarding the applicability and constitutionality of the definition of "employee" contained in R.C. 4111.14(B)(1). Defendants opposed that motion, and Plaintiffs filed a reply.

Due to Cheap Escape's bankruptcy, on July 19, 2013, Plaintiffs moved to amend their complaint again to (1) remove Cheap Escape as a defendant and the claims brought solely against Cheap Escape; (2) include an additional defendant, Mark Kosir, who Plaintiffs alleged was also

an "employer" under R.C. 4111.14; and (3) to assert additional claims against all defendants based upon allegations that they failed to maintain and/or destroyed employment records. The trial court granted Plaintiffs leave, and they filed the Second Amended Complaint ("SAC") on July 24, 2013. Defendants, Robert and Joan Minchak, timely filed their answer to the SAC on August 9, 2013.

Subsequently, on October 3, 2013, the trial court entered its Decision, Order and Entry of Plaintiffs' Motion for Declaratory Judgment Regarding the Applicability and Constitutionality of Ohio Revised Code Section 4111.14(B)(1), in which the trial concluded that R.C. 4111.14(B)(1) was constitutional and applicable to actions brought under Article II, Section 34a, of the Ohio Constitution. (*See* Trial Court's Decision attached as A1-A18).

Plaintiffs appealed the trial court's decision to the Second District Court of Appeals, which, on June 6, 2014, reversed the trial court's decision and remanded the case to the trial court in *John Haight, et al. v. Cheap Escape Co., et al*, 2d Dist. No. 25983, 2014-Ohio-2447 (*Haight II*). (*See* Appellate Court's Opinion and Judgment Entry attached as B1-B15). The majority opinion of the appellate court framed the issue as follows: "whether the General Assembly's actions, particularly its passage of R.C. 4111.14, imposed requirements or defined terms in a manner that conflicts with Section 34a and its express provision that laws passed for its implementation may extend, but not restrict, its coverage." (*Id.* at ¶ 4).

In concluding that R.C. 4111.14(B)(1) clearly conflicts with Section 34a, and is therefore unconstitutional, the majority stated that "by incorporating the exemptions to minimum wage and maximum hour requirements contained in 29 U.S.C. [§] 213 into the R.C. 4111.14(B)(1) definition of 'employee', the legislature impermissibly narrowed Section 34a's definition of an employee and its scope." *Id.* at ¶ 19.

In contrast, Judge Welbaum authored a dissenting opinion in which he was carefully mindful of the fundamental principle that a legislative enactment is presumed valid, and that it may only be invalidated if the challenger establishes that it is unconstitutional beyond a reasonable doubt. (*Id.* at ¶ 27). Judge Welbaum was not convinced beyond a reasonable doubt that R.C. 4111.14(B) unconstitutionally conflicted with Section 34a. (*Id.*) He concluded that "the overarching meaning of employees under the FLSA, including its exclusions and exemptions from eligibility, must be applied" under Section 34a. (*Id.* at ¶ 28). Judge Welbaum, therefore, stated that he would uphold the constitutionality of R.C. 4111.14(B) and affirm the trial court's decision. (*Id.* at ¶ 31).

It is from the court of appeals' opinion and judgment entry dated June 6, 2014, that Defendants, Robert and Joan Minchak, now appeal.

B. Statement of the Facts

The only facts relevant to this appeal are that Plaintiffs worked for Cheap Escape as outside sales representatives and were paid either commissions plus a draw, or commissions without a draw. Plaintiffs claim that Cheap Escape was required to pay them minimum wage, but did not do so. Defendants deny that they were required to pay Plaintiffs minimum wage because Plaintiffs were "outside salespeople", as that term is defined under the federal Fair Labor Standards Act and Ohio law. Plaintiffs admit that they were "outside salespeople", but claim that they were, nevertheless, entitled to minimum wage protection under Article II, Section 34a, of the Ohio Constitution.

ARGUMENT

Proposition of Law No. 1: The meaning of the term "employee" under R.C. 4111.14(B)(1) is constitutionally valid because it does not clearly conflict with or restrict the meaning of that same term under Article II, Section 34a of the Ohio Constitution.

A. Introduction

This Court has recognized that "the power to set aside laws passed by the General Assembly, over which the people exercise the veto power through referendum, is to be exercised with the greatest care." *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 146 128 N.E.2d 59 (1955), quoting *State ex rel. Turner v. United States Fid. & Guar. Co.*, 96 Ohio St. 250, 258, 117 N.E. 232 (1917). Indeed, "[t]he court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. *** The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." *Id.* at 147, quoting *State ex rel. Durbin v. Smith*, 102 Ohio St. 591, 601, 133 N.E. 457 (1921).

In short, "[a] party challenging the constitutionality of a statute bears the burden of proving that it is unconstitutional **beyond a reasonable doubt**." (Emphasis added.) *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 41, citing *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, ¶ 12.

B. R.C. 4111.14(B)(1)'s definition of "employee" is consistent with Article II, § 34a of the Ohio Constitution.

Article II, § 34a of the Ohio Constitution states:

> As used in this section: "employer," "employee," "employ," "person" and "independent contractor" have the same ***meanings*** as under the federal Fair Labor Standards Act or its successor law, except that *** "employee" shall not include an individual employed in or about the property of the employer or individual's residence on a casual basis. Only the exemptions set forth in this section shall apply to this section. [Emphasis added.]

In turn, R.C. 4111.14(B) provides:

> In accordance with Section 34a of Article II, Ohio Constitution, the terms "employer," "employee," "employ," "person," and "independent contractor" have the same ***meanings*** as in the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 203, as amended. In construing the ***meaning*** of these terms, due consideration and great weight shall be given to the United States department of labor's and federal courts' interpretations of those terms under the Fair Labor Standards Act and its regulations. As used in division (B) of this section:
>
> (1) "Employee" ***means*** individuals employed in Ohio, but does not ***mean*** individuals who are excluded from the definition of "employee" under 29 U.S.C. 203(e) or individuals who are exempted from the minimum wage requirements in 29 U.S.C. 213 and from the definition of "employee" in this chapter.

(Emphasis added.)

So, both § 34a and R.C. 4111.14(B)(1) define "employee" by using the same meaning as that of the FLSA. The FLSA defines an "employee" as "any individual employed by any employer." 29 U.S.C. § 203(e). From that broad definition, the FLSA carves out several categories of individuals from minimum wage entitlement who would otherwise fit that definition, including "outside salespeople." *See* 29 U.S.C. § 213(a)(1). These carve-outs are found both in the definition section and another section entitled "Exemptions." *See* 29 U.S.C. § 203(e) and 29 U.S.C. § 213. However, whether an individual is excluded or exempted from the minimum wage entitlement is irrelevant because the operational effect is the same – that individual is <u>not</u> entitled to minimum wage. There is no dispute that "outside salespeople" are <u>not</u> entitled to minimum wage under the FLSA. Because both § 34a and R.C. 4111.14(B) clearly state that the term "employee" has the same meaning as under the FLSA, "outside salespeople" are not subject to Ohio's minimum wage law either. The court of appeals ignored the obvious and created an entitlement where none exists. There is no conflict between § 34a and R.C. 4111.14(B)(1).

This conclusion is supported by several considerations. First, § 34a states that the term "employee" shall have the same *meaning*, not the same *definition*, as under the FLSA. Abstractly, a term's "meaning" is broader than its "definition." "Meaning" is defined as: "The sense of

anything, but esp. of words; that which is conveyed (or intended to be conveyed) by a written or oral statement or other communicative act." *Black's Law Dictionary* 1001 (8th Ed.2004). In contrast, "definition" is defined as: "The meaning of a term as *explicitly* stated in a drafted document such as a contract, a corporate bylaw, an ordinance, or a statute ***." (Emphasis added.) *Id.* at 455. In other words, a term's *definition* is just one particular and explicit piece of the term's broader *meaning*. *See Bilstad v. Wakalopulos*, 386 F.3d 1116, 1122 (Fed.Cir.2004) (finding that the ordinary *meaning* of the term "plurality" encompassed multiple *definitions* of the same term).

In this case, the *meaning* of the term "employee" under the FLSA is best understood to include both its *strict definition* and the *exceptions thereto*, as well as the *applicable exemptions*. When read in this manner, § 34a includes the FLSA's exemptions, while adding one of its own.[1] The statement that "[o]nly the exemptions set forth in this section shall apply to this section" should be read as prohibiting any exemptions other than those in the FLSA and § 34a. That is precisely what R.C. 4111.14(B)(1) makes clear: "'*Employee*' means individuals employed in Ohio, but does not mean individuals who are excluded from the definition of 'employee' under 29 U.S.C. 203(e) or individuals who are exempted from the minimum wage requirements in 29 U.S.C. 213 and from the definition of 'employee' in this chapter." (Emphasis added.) In this sense, the statute simply implements the constitutional language and its intent.

Second, the conclusion that there is no conflict between § 34a and R.C. 4111.14(B)(1) is also fortified by the fact that § 34a refers to the FLSA <u>as a whole</u>, not simply the definition section in 29 U.S.C. § 203(e). The drafters of § 34a could have simply stated that the term "employee" shall have the same meaning as under the FLSA's definition section, 29 U.S.C. § 203(e). However,

[1] Section 34a adds an exemption for employees of a solely family owned and operated business who are family members of an owner. The fact that this exemption was expressly stated in § 34a is unsurprising because this exemption is <u>not</u> included in the FLSA.

they specifically chose not do so and instead referenced the entire FLSA. Thus, when construing the meaning of "employee" under Ohio law, due consideration must be given to all sections of the FLSA, including the exemption section and not just the definition section.

Third, § 34a refers to exemptions in the plural: "Only the **exemptions** set forth in this section shall apply to this section." (Emphasis added.) However, the express language of § 34a contains only one true exemption from minimum wage entitlement - the exemption for employees of a solely family owned and operated business who are family members of an owner.[2] As a result, the only reasonable conclusion to draw is that the drafters of § 34a intended for the exemptions contained in the FLSA to be applied to § 34a as well. Indeed, as Judge Welbaum noted, a contrary conclusion would simply be illogical. *See Haight v. Cheap Escape Co.*, 2d Dist. No. 25859, 2014-Ohio-2447, ¶ 30 (Welbaum, J., dissenting). It would "make[] no sense" to conclude that the drafters of § 34a intended to create one new exemption and completely discard those found in the FLSA. *Id.*

In short, the appellate court's decision in this case fundamentally altered the state of minimum wage law in Ohio. Now, courts and litigants are left wondering what exactly Ohio's law is with respect to minimum wage. This Court should exercise its jurisdiction to hear this case and conclude that R.C. 4111.14(B)(1) neither contradicts nor restricts any provision of § 34a. R.C. 4111.14(B)(1) simply implements the language of the amendment as stated and intended. The statute, therefore, is not unconstitutional.

[2] Other provisions in § 34a referring to the minimum wage entitlement afforded to (1) individuals employed by employers making less than $250,000 per year; (2) minors; (3) tipped employees; and, (4) disabled employees are not exemptions because these provisions still grant the minimum wage entitlement to these individuals and impose the corresponding payment obligation on the employers. The wage requirement is just modified for these individuals.

<u>Proposition of Law No. 2:</u> If the statutory definition of "employee" under R.C. 4111.14(B)(1) is unconstitutional and invalid, that conclusion and ruling should apply prospectively only under the three-part test propounded in *DiCenzo v. A-Best Products Co.*

A. Introduction

Should this Court either (1) permit the appellate court's decision to stand by refusing to exercise jurisdiction over Proposition of Law No. 1; or, (2) grant jurisdiction and affirm the appellate court's decision, this Court should exercise its jurisdiction over Defendants' second proposition of law and determine that if the statutory definition of "employee" under R.C. 4111.14(B)(1) is unconstitutional and invalid, that conclusion and ruling should apply prospectively only under the three-part test propounded by this Court in *DiCenzo v. A-Best Prods. Co., Inc.*, 120 Ohio St.3d 149, 2008-Ohio-5327, 897 N.E.2d 132.

First, the appellate court's decision certainly created new law because it struck down existing law and granted minimum wage entitlement to new classes of individuals not previously entitled to it. Second, retroactive application of the decision would neither promote nor hinder the purpose behind the new rule. Ensuring that the minimum wage is paid according to § 34a would remain the purpose of a decision striking down R.C. 4111.14(B)(1) as unconstitutional, regardless of whether the decision is given retroactive or prospective effect. Third, retroactive application would impose an extremely inequitable result. Specifically, retroactive application would expose Ohio employers, like Defendants, to a propagation of collective action lawsuits under § 34a for payment of back wages, <u>despite the fact they have complied with Ohio law at all times</u>. Simple payment of back wages would not even be the extent of this exposure. These law-abiding employers could also be required to pay liquidated damages and attorney fees – all as a result of following Ohio law. In light of these considerations, any conclusion or ruling that the definition of employee under R.C. 4111.14(B)(1) is unconstitutional should be applied prospectively only.

B. *DiCenzo*'s three-part test for prospective only application.

In *DiCenzo*, this Court concluded that its previous decision in *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 364 N.E.2d 267 (1977), which imposed strict liability on nonmanufacturing sellers of defective products, applied prospectively only. *DiCenzo*, 2008-Ohio-5327, at ¶ 1. In so holding, this Court recognized that "the general rule is that an Ohio court decision applies retrospectively unless a party has contract rights or vested rights under the prior [law]." *Id.* at ¶ 25, citing *Peerless Elec. Co. v. Bowers*, 164 Ohio St. 209, 129 N.E.2d 476 (1955), at the syllabus. However, this Court also noted that it has the discretion to apply its decision only prospectively after weighing the following considerations:

(1) whether the decision establishes a new principle of law that was not foreshadowed in prior decisions;

(2) whether retroactive application of the decision promotes or hinders the purpose behind the rule defined in the decision; and,

(3) whether retroactive application of the decision causes an inequitable result.

Id., citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971).

Moreover, this Court also emphasized that under the so-called *Sunburst* Doctrine, "state courts have recognized and used prospective application of a decision as a means of avoiding injustice in cases dealing with questions having widespread ramifications for person not parties to the action." *Minster Famers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, 884 N.E.2d 1056, ¶ 30, quoting *Hoover v. Franklin Cty. Bd. of Commrs.*, 19 Ohio St.3d 1, 9, 482 N.E.2d 575 (1985) (Douglas, J., concurring).

C. Based upon the three-part test in *DiCenzo*, a conclusion or ruling that the statutory definition of "employee" under R.C. 4111.14(B)(1) is unconstitutional and invalid should be applied prospectively only.

i. Such a decision would establish a new principle of law that was not foreshadowed in prior decisions.

The issue presented in this case, whether the statutory definition of "employee" under R.C. 4111.14(B)(1) is constitutional, was a matter of first impression before the appellate court and would be a matter of first impression before this Court. There are no other cases which foreshadowed the issue presented in this case. In fact, quite the contrary is true. The Ohio Attorney General issued an opinion letter in 2007 which specifically states that R.C. 4111.14 is "consistent with, and further delineates, the analysis of who constitutes an 'employee' that is dictated by § 34a." Office of the Attorney General, State of Ohio, Opinion No. 2007-033, at p. 6, n.9.

Since the enactment of the FLSA in 1938, outside salespeople have been exempt from the minimum wage entitlement under federal law. Until June 6, 2014, outside salespeople were also exempt from the minimum wage entitlement under Ohio law. Thus, employers have been operating for over seventy-five years with the expectation that an individual employed as an outside salesperson (or in any other capacity that has been historically exempted under the FLSA) could be paid commissions and was not entitled to minimum wage. The court of appeals' decision in this case destroyed this predictability by eviscerating the FLSA exemptions under Ohio minimum wage law. The newly-created entitlement resulting from the appellate court's over-reaching is obviously a new principle of law that was not foreshadowed in prior decisions.

In such circumstances, the first factor of the *DiCenzo* test weighs in favor of prospective only application. *See Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, ¶ 44. In *Beaver Excavating*, this Court concluded that the allocation of revenues from the commercial-activity tax ("CAT") contained in R.C. 5751.20 violated Article XII, Section

5a of the Ohio Constitution. *Id.* at ¶ 38. However, this Court then applied the *DiCenzo* three-part test and concluded that its decision in that case should be applied prospectively only. *Id.* at ¶¶ 42-47. In so concluding, this Court determined that the first factor weighed in favor of prospective only application because the case presented an issue of first impression. *Id.* at ¶ 44. Since this case also presents an issue of first impression, the application of such a change in minimum wage law should be applied prospectively only. Otherwise, every employer in Ohio who paid outside salespeople commissions, in accordance with federal law and in accordance with what the law of Ohio has been for seventy-five years, could face minimum wage liability for the past three years.

ii. Retroactive application of such a decision would neither promote nor hinder the purpose behind the corresponding rule.

In *Beaver Excavating*, this Court stated that purpose of its decision striking down R.C. 5751.20 as unconstitutional was to ensure "the constitutional allocation of the CAT revenues ***." *Id.* at ¶ 45. As a result, this Court concluded that retroactive application of its decision would neither promote nor hinder the purpose behind its determination "that allocation and crediting of the CAT revenue must be made according [to] the provisions of Section 5a." *Id.*

The same holds true in this case. Regardless of whether the decision is given retroactive or prospective effect, ensuring that the minimum wage is paid according to the provision of § 34a would remain the purpose of a decision striking down R.C. 4111.14(B)(1) as unconstitutional. Thus, retroactive application of such a decision would neither promote nor hinder the purpose behind such a rule.

iii. Retroactive application of such a decision would cause an extremely inequitable result.

In examining the third factor of the *DiCenzo* test, this Court often looks to the fiscal effect of retroactive application. For instance, in *DiCenzo*, this Court stated:

> [N]onmanufacturing sellers of asbestos *** could not have foreseen that these products, distributed from the 1950s to the 1970s, could decades later result in [their] being liable for injuries caused by that product. Imposing such a potential financial burden on these nonmanufacturing suppliers years after the fact for an obligation that was not foreseeable at the time would result in a great inequity.

DiCenzo, 2008-Ohio-5327, at ¶ 47.

Moreover, in *Beaver Excavating*, this Court stated:

> The fiscal effect of reallocating other state revenue to replace money that has been expended for nonhighway purposes would have a significant, consequential, and negative impact on the state's fiscal footing, which has been under sustained stress for several years during the course of the economic recession. ***.
>
> Clearly, the considerable sum of money implicated in this litigation and its significant effect on state finances satisfy the foregoing standard with respect to causing an inequitable result.

Beaver Excavating, 2012-Ohio-5776, at ¶¶ 46-47.

Finally, in *Minster*, which was decided before *DiCenzo*, this Court invoked the so-called *Sunburst* Doctrine and concluded that its decision should apply prospectively only stating that it did not intend to "create shock waves" throughout the affected sectors of Ohio's economy, nor did it intend to "encourage propagation of pleadings regarding past practices." *Minter*, 2008-Ohio-1259, at ¶ 30.

These same considerations weigh heavily in favor of prospective only application in this case. As stated above, retrospective application would expose Ohio employers, like Defendants, to a propagation of collective action lawsuits under § 34a for payment of back wages for the past three years, <u>despite the fact they have complied with both Ohio law and federal law (FLSA) at all times</u>. To make matters worse, simple payment of back wages would not even be the extent of this exposure. These law-abiding employers could also be required to pay liquidated damages and attorney fees – all as a result of following Ohio law. Such injustice more than satisfies the standard with respect to creating an inequitable result.

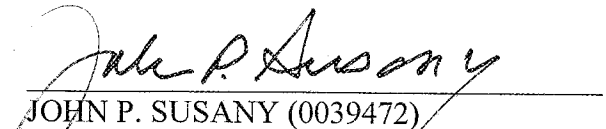
In conclusion, the three-part test propounded by this Court in *DiCenzo* weighs in favor of prospective only application. Therefore, should this Court either (1) permit the appellate court's decision to stand by refusing to exercise jurisdiction over Proposition of Law No. 1; or, (2) grant jurisdiction and affirm the appellate court's decision, this Court should exercise its jurisdiction over Defendants' second proposition of law and determine that if the statutory definition of "employee" under R.C. 4111.14(B)(1) is unconstitutional and invalid, that conclusion and ruling should apply prospectively only.

CONCLUSION

This case presents a constitutional issue of paramount importance and involves a matter of public or great general interest. For, without this Court's input in this case, Ohio's minimum wage law will remain in a perilous state. Courts and litigants will be left guessing as to the status of Ohio's minimum wage law. As the final authority on Ohio law, this Court's input is necessary in this case. Furthermore, retroactive application of a decision striking down R.C. 4111.14(B)(1) as unconstitutional would expose law-abiding Ohioans, like Defendants, to severe financial consequences simply for following Ohio law. This Court's input is necessary to prevent such a miscarriage of justice.

For these reasons, Defendants respectfully request that this Court grant jurisdiction to hear this case on both Proposition of Law No. 1 and No. 2. Alternatively, Defendants respectfully request that, should this Court refuse to exercise its discretion with respect to Proposition of Law No. 1, it should still exercise its discretion on Proposition of Law No. 2.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 18th th day of July, 2014, a copy of the foregoing was served upon the following by regular mail:

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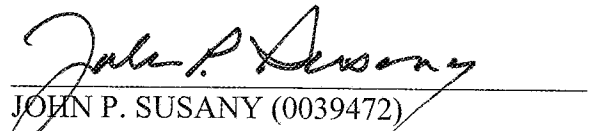

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Montgomery County Common Pleas Court
General Division

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

JOHN HAIGHT, et. al,	CASE NO. 2012 CV 00946
Plaintiffs,	JUDGE MARY KATHERINE HUFFMAN
-vs-	DECISION, ORDER AND ENTRY OF PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT REGARDING THE APPLICABILITY AND CONSTITUTIONALITY OF OHIO REVISED CODE SECTION 4111.14(B)(1)
CHEAP ESCAPE COMPANY, et. al,	
Defendants.	

This matter is before the court on Plaintiffs' Motion for Declaratory Judgment Regarding the Applicability and Constitutionality of Ohio Revised Code Section 4111.14(B)(1), filed on February 19, 2013. On March 4, 2013, State of Ohio filed its Memorandum of Amicus Curiae State of Ohio in Opposition to Plaintiffs' Motion for Declaratory Judgment Regarding the Applicability and Constitutionality of Ohio Revised Code Section 4111.14(B)(1). On March 5, 2013, Defendants filed their Opposition to Plaintiffs' Motion for Declaratory Judgment. Plaintiffs filed their Reply Memorandum in Support of Plaintiffs' Motion for Declaratory Judgment Regarding the Applicability and Constitutionality of Ohio Revised Code Section 4111.14(B)(1) on March 8, 2013. This matter is now ripe for decision.

I. PROCEDURAL HISTORY AND FACTS

Plaintiffs, John Haight and Chris Pence, on behalf of themselves and similarly situated individuals, bring this action against Defendants, The Cheap Escape Company d/b/a J.B. Dollar Stretcher Magazine, Robert Minchak, Joan Minchak, and Mark Kosir. Plaintiffs generally seek monetary, declaratory, and injunctive relief based on Defendants' alleged failure to compensate Plaintiffs and similarly situated individuals with minimum wages and to create and maintain employee records as required by the Ohio Constitution.

Cheap Escape published J.B. Dollar Stretcher Magazine and an "E-Coupon" website, and its services primarily consisted of selling advertising space in J.B. Dollar and on the E-Coupon website. Plaintiffs allegedly worked for Defendants, apparently as outside sales representatives, and solicited advertising business for J.B. Dollar by making sales phone calls, sending emails soliciting business, and meeting with customers. Plaintiffs alleged that, for five days per week, they were required to report to their designated office locations at 08:00 a.m. to start the work day and typically worked until approximately 06:00 p.m.

According to Plaintiffs, Defendants maintained a policy and pay schedule whereby sales representatives, including Plaintiffs, were paid either a combination of commissions with draw or commissions without draw. Starting sales representatives were allegedly entitled to receive a draw amount between $100.00 and $200.00 per week during weeks in which the sales representatives did not earn commissions. Sales representatives were required to pay back their draw before receiving any earned commissions, as draw was merely an advance on commissions, and the sales representatives ultimately received commissions less any previous draw amount received during the pay period. Defendants allegedly stopped paying or reduced the amount of draw paid to sales representatives who had been with the company for approximately five to six weeks or whom Defendants deemed to be underperforming. Once Defendants stopped paying the draw to sales

representatives, and if the sales representatives failed to earn commissions for the pay period, the sales representatives did not receive compensation for that pay period. Consequently, during those pay periods in which sales representatives failed to earn commissions, the sales representatives were consistently paid wages below the minimum wage mandated by Ohio Constitution Article II, Section 34a.

In general, Plaintiffs assert that they were "employees" as defined by Ohio Constitution Article II, Section 34a, and, thus, were entitled to minimum wages for hours worked. Plaintiffs seek to recover against Defendants under Article II, Section 34a, arguing that Defendants violated the Ohio Constitution by failing to pay Plaintiffs and other similarly situated individuals at least minimum wages for hours worked. Plaintiffs seek to proceed under a modified Civ.R. 23 opt-out class action on behalf of all similarly situated individuals, or, alternatively, if a Civ.R. 23 opt-out class action is not available in this matter under Ohio law, Plaintiffs seek to proceed under an opt-in collective action.

In their Complaint, filed on February 6, 2012, Plaintiffs assert that they were employed as sales representatives with Cheap Escape. During all relevant times, Plaintiffs assert that they were Defendants' "employees" within the meaning of that term as used in the federal Fair Labor Standards Act (FLSA) and in Ohio Constitution Article II, Section 34a and that Defendants were "employers" within the meaning of that term as used in the FLSA and in Section 34a. Plaintiffs allege, in summary, that all Defendants failed to pay minimum wages to Plaintiffs and similarly situated individuals, and now seek a declaratory judgment regarding the definition of "employee" under Ohio law.

At this juncture, Plaintiffs ask this court to enter a declaratory judgment that: (1) Ohio R.C. 4111.14(B)(1)'s inclusion of additional exemptions to the definition of "employee" is not compatible with Article II, Section 34a of the Ohio Constitution, and, as a result, is

unconstitutionally invalid; and (2) R.C. 4111.14(B)(1)'s additional exemptions to the definition of "employee" are not applicable to cases brought under Article II, Section 34a, as Section 34a is a self-executing constitutional provision not subject to the FLSA's or R.C. 4111.14's exemptions.

In support of their Motion for Declaratory Judgment, Plaintiffs assert that, in November 2006, Ohio voters approved Ohio Constitution Article II, Section 34a, which mandated that "every employer shall pay their employees a wage rate of not less than [minimum wage] beginning January 1, 2007." Plaintiffs argue that Section 34a explicitly forbids any law from "restricting any provision of the section." According to Plaintiffs, on January 2, 2007, Governor Taft signed House Bill 690 into law, thereby amending R.C. 4111.01-4111.10 and adding R.C. 4111.14. Plaintiffs assert that R.C. 4111.14(B)(1) effectively excludes outside salespeople from the definition of "employee" under Article II, Section 34a, thereby exempting outside sales representatives from minimum wage protection, and, thus, is unconstitutional. In the alternative, Plaintiffs seek to have the court find that Section 34a and R.C. 4111.14 exist independently of one another, arguing that Section 34a is a self-executing constitutional provision.

II. LAW AND ANALYSIS

Declaratory judgment actions are governed by Chapter 2721, Ohio Revised Code. R.C. 2721.02 refers to "rights, status, or other legal relations" as the subject of the court's declaratory powers. This right does not extend to anyone who is practically affected by the controversy involved, but only to those persons who are legally affected. Schriber Sheet Metal & Roofers, Inc. v. Shook (1940), 64 Ohio App. 276; Shoemaker v. City of Piqua (2000), 2000 Ohio App. LEXIS 4742. R.C. 2721.03 states in pertinent part, "any person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the

Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it."

Ohio Courts have consistently held that, in order for declaratory relief to be considered an appropriate remedy, the plaintiff must establish the following three essential elements: (1) that a real controversy exists between the parties; (2) the controversy is justiciable in nature; and (3) the particular situation is one in which speedy relief is necessary to preserve the rights of the parties. See Williams v. Akron (1978), 54 Ohio St. 2d 136, 144, 374 N.E.2d 1378; Herrick v. Kosydar (1975), 44 Ohio St. 2d 128, 130, 339 N.E.2d 626; Burger Brewing Co. v. Liquor Control Comm. (1973), 34 Ohio St. 2d 93, 296 N.E.2d 261; Buckeye Quality Care Centers v. Fletcher (1988), 48 Ohio App. 3d 150, 154, 548 N.E.2d 973. When determining if a "real controversy" exists, Ohio Courts have found that the controversy must be based upon legal rights and obligations. Superior *Dairy, Inc. v. Stark County Milk Producers' Ass'n.* (1950), 89 Ohio App. 26, 31.

"It is a generally accepted premise that courts must interpret the Constitution broadly in order to accomplish the manifest purpose of an amendment." State, ex rel. Swetland v. Kinney (1982), 69 Ohio St. 2d 567, citing State, ex rel. Turner v. Fassig (1916), 5 Ohio App. 479, 487. Courts attempt to reconcile constitutional conflicts, while considering the following:

> "In the interpretation of an amendment to the Constitution the object of the people in adopting it should be given effect; the polestar in the construction of the constitutional, as well as legislative, provisions is the intention of the makers and adopters thereof."

Id., quoting Castleberry v. Evatt (1946), 147 Ohio St. 30. Additionally, "[c]onstitutional provisions are intentionally cast in very general terms. This generality allows the legislature to promulgate more specific legislation to carry out the intricacies of the constitutional enactment." State, ex rel.

Swetland v. Kinney (1982), 69 Ohio St. 2d 567. "In making this determination our inquiry must include more than a mere analysis of the words found in the amendment at issue." Id. "The purpose of the amendment, and the reasons for, and this history of its adoption, are pertinent in determining the meaning of the language used, for when the language is obscure or of doubtful meaning the court may, with propriety, recur to the history of the time when it was passed, to the attending circumstances at the time of adoption, to the cause, occasion or necessity therefor, to the imperfections to be removed or the mischief sought to be avoided and the remedy intended to be afforded." Id., quoting Cleveland v. Bd of Tax Appeals (1950), 153 Ohio St. 97, 103. The court must (1) ascertain the motive behind the subject constitutional amendment, and (2) explore the intent of the voters of Ohio in approving the amendment. See id generally.

The interaction between the Constitution and legislation was reviewed by the court in State, ex rel. Jackman v. Court (1967), 9 Ohio St. 2d 159, 161-162, in which the court stated:

> "The legal duty imposed upon the judiciary was succinctly stated in paragraph one of the syllabus in State ex rel. Dickman, v. Defenbacher, Dir., 164 Ohio St. 142 (1955):
>
> > "'An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.'
> >
> > "That duty applies both to the General Assembly of Ohio and to the federal Congress. However, it should be noted that the federal Constitution is a grant of power to the Congress, while the state Constitution is primarily a limitation on legislative power of the General Assembly. It follows that the General Assembly may pass any law unless it is specifically prohibited by the state or federal Constitutions***. [Citations omitted.]
>
> "An excellent summary of these principles of law was made by the court in State, ex rel., v. Jones, Auditor, 51 Ohio St. 492, 503, 504 (1894):
>
> > "'In determining whether an act of the Legislature is or is not in conflict with the Constitution, it is a settled rule, that the presumption is in favor of the validity of the law. The legislative power of the state is vested in the General Assembly, and whatever limitation is placed upon the exercise of that plenary grant of power must be found in clear prohibition by the Constitution. The legislative power will generally be deemed ample to authorize the enactment of a law, unless the legislative

> discretion has been qualified or restricted by the Constitution in reference to the subject matter in question. If the constitutionality of the law is involved [sic] in doubt, that doubt must be resolved in favor of the legislative power. The power to legislate for all the requirements of civil government is the rule, while a restriction upon the exercise of that power in a particular case is the exception. (Emphasis added)."

The court in State, ex rel. Swetland v. Kinney (1982), 69 Ohio St. 2d 567, also explained this interaction by quoting State, ex rel. Dickman, v. Defenbacher (1955), 164 Ohio St. 142, 147, and Williams v. Scudder, 102 Ohio St., 305, respectively, stating:

> "A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality. This court has held enactments of the General Assembly to be constitutional unless such enactments are clearly unconstitutional beyond a reasonable doubt." (Emphasis added).
>
> ***
>
> "The legislative judgment in this behalf will not be nullified except when it clearly appears that there has been a gross abuse of such discretion in undoubted violation of some state of [sic] federal constitutional provision." (Emphasis added).

In 1938, the federal Fair Labor Standards Act (FLSA) was enacted to remedy "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" and required employers to pay employees engaged in commerce with a wage consistent with the minimum wage established by law. Ellington v. City of East Cleveland (2012), 689 F.3d 549, citing 29 U.S.C. 202(a). The Supreme Court has indicated that the FLSA is to be liberally construed, but, despite its expansive nature, the FLSA defines "employee" to exclude a number of working individuals from its provisions." Id. [citations omitted]. More specifically, *the FLSA broadly defines "employee" as "any individual employed by an employer" under 29 U.S.C. 203(e)(1), but then goes on to deli*neate exemptions to the minimum wage and maximum hour requirements under the law, specifically exempting from minimum wage protection any employee employed in the capacity of an outside salesman under 29 U.S.C. 213(a). (Emphasis added).

Broadly, both the FLSA and the Ohio Minimum Fair Wage Standards Act (OMFWSA) under Ohio Revised Code Chapter 4111 require employers to pay a minimum wage to certain categories of employees. Hurt v. Commerce Energy, Inc. (2013), 2013 U.S.Dist. LEXIS 116383. The Ohio Constitution was amended under Article II, Section 34a to ensure minimum wages for Ohio workers, stating, in relevant part, "that Ohio employers must pay their employees working in the State a specified minimum wage and provides that '[l]aws may be passed to implement [the section's] provisions and create additional remedies, increase the minimum wage rate and extend the coverage of that section.'" Ellington v. City of East Cleveland (2012), 689 F.3d 549. The OMFWSA was passed by the Ohio General Assembly to implement the provisions of Article II, Section 34a and to reaffirm the minimum wage rate established in the Ohio Constitution. Id [citations omitted]. Like the FLSA, Section 34a and the OMFWSA limit the scope of the minimum wage provision to individuals who qualify as "employees," expressly adopting the FLSA's meaning of "employee." Id.

More specifically, Ohio Constitution Article II, Section 34a establishes the state minimum wage for the State of Ohio, requiring every employer to pay its employees at a minimum wage rate as established by the legislature. As used in that section, "'*employer,' 'employee,' 'employ,' 'person' and 'independent contractor' have the same meanings as under the federal Fair Labor* Standards Act or its successor law, except that 'employer' shall also include the state and every political subdivision and 'employee' shall not include an individual employed in or about the property of the employer or individual's residence on a casual basis. Only the exemptions set forth in this section shall apply to this section." (Emphasis added) Ohio Const. Art. II, 34a. The same section provides provisions for bringing an action against an employer for failure to comply with the law, stating:

> "An action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person acting on behalf of an employee or all similarly situated employees in any court of competent jurisdiction, including the common pleas court of an employee's county of residence, for any violation of this section or any law or regulation implementing its provisions within three years of the violation or of when the violation ceased if it was of a continuing nature, or within one year after notification to the employee of final disposition by the state of a complaint for the same violation, whichever is later. There shall be no exhaustion requirement, no procedural, pleading or burden of proof requirements beyond those that apply generally to civil suits in order to maintain such action and no liability for costs or attorney's fees on an employee except upon a finding that such action was frivolous in accordance with the same standards that apply generally in civil suits. Where an employer is found by the state or a court to have violated any provision of this section, the employer shall within thirty days of the finding pay the employee back wages, damages, and the employee's costs and reasonable attorney's fees. Damages shall be calculated as an additional two times the amount of the back wages and in the case of a violation of an anti-retaliation provision an amount set by the state or court sufficient to compensate the employee and deter future violations, but not less than one hundred fifty dollars for each day that the violation continued. Payment under this paragraph shall not be stayed pending any appeal."

Id.

Ohio Constitution Article II, Section 34a also provides that "[l]aws may be passed to implement its provisions and create additional remedies, increase the minimum wage rate and extend the coverage of the section, but in no manner restricting any provision of the section or the power of municipalities under Article XVIII of this constitution with respect to the same." (Emphasis added) Id. Pursuant to this authorization contained in Section 34a, the General Assembly enacted R.C. 4111.14 to implement Section 34a. R.C. 4111.14(A). In implementing Section 34a, the General Assembly found that the purpose of Section 34a is (1) to ensure that Ohio employees, as defined in R.C. 4111.14(B)(1), are paid the wage rate required by Section 34a; (2) to ensure that covered Ohio employers maintain certain records that are directly related to the enforcement of the wage rate requirements under Section 34a; (3) to ensure that Ohio employees who are paid the wage rate required by Section 34a may enforce their right to receive that wage rate in the manner set forth in Section 34a; and (4) to protect the privacy of Ohio employees' pay and

personal information specified in Section 34a by restricting an employee's access, and access by a person acting on behalf of that employee, to the employee's own pay and personal information. Id. A review of the legislative history shows that the General Assembly, by enacting Article II, Section 34a of the Ohio Constitution, intended to implement the Ohio Fair Minimum Wage Amendment in the manner in which the proponents of the Amendment described it to Ohio voters during the campaigns for the General Election on November 7, 2006. The proponents of the Ohio Fair Minimum Wage Amendment issued campaign materials, one of which was entitled "Fact vs. Fiction: Minimum Wage Opponents Shamelessly Distort Facts to Deny Low-Wage Workers a Raise," published by Ohioans for a Fair Minimum Wage, that stated all of the following upon which Ohio voters relied to be honest and accurate:

> (1) The Amendment defines "employer," "employee," and "employ" as having the same meanings as under the federal Fair Labor Standards Act. Clear definitions for terms such as "employ" and "casual basis" will not necessitate litigation to clarify their meanings because those terms have been established by federal regulations, well settled case law, or both.
>
> (2) By referencing the federal minimum wage law directly, the Amendment ensures that the Ohio law tracks the federal minimum wage requirements with respect to individuals who volunteer their time.
>
> (3) The Amendment does not threaten employees' privacy because employees may seek access only to their own payroll records.
>
> (4) The Amendment allows an employer to take reasonable steps to verify that a person does in fact represent the employee.
>
> (5) Employment law experts explain that state authorities in Ohio will undoubtedly interpret the parallel language in the Amendment in the same manner as the federal Department of Labor, clarifying that employers need not keep irrelevant records for non-hourly employees.

The General Assembly enacted R.C. 4111.14 while considering the proponents' campaign materials and its authority under Section 34a of Article II, Ohio Constitution, which states that "laws may be passed to implement its provisions ..."

R.C. 4111.14(B) states, in part:

> *In accordance with Section 34a of Article II, Ohio Constitution, the terms "employer," and "employee," "employ," "person," and "independent contractor" have the same meanings as in the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 203, as amended. In* construing the meaning of these terms, due consideration and great weight shall be given to the *United States department of labor's and federal courts' interpretations of those terms* under the Fair Labor Standards Act and its regulations. As used in division (B) of this section:
>
> > (1) *"Employee" means individuals employed in Ohio, but does not mean* individuals who are excluded from the definition of "employee" under 29 U.S.C. 203(e) or individuals who are exempted from the minimum wage requirements in 29 *U.S.C. 213 and from the definition of "employee" in this chapter.* (Emphasis added).

R.C. 4111.14(K) further provides an action for equitable and monetary relief as in Section 34a, stating:

> In accordance with Section 34a of Article II, Ohio Constitution, an action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person acting on behalf of an employee or all similarly situated employees in any court of competent jurisdiction, including the court of common pleas of an employee's county of residence, for any violation of Section 34a of Article II, Ohio Constitution or any law or regulation implementing its provisions within three years of the violation or of when the violation ceased if it was of a continuing nature, or within one year after notification to the employee of final disposition by the state of a complaint for the same violation, whichever is later.

Plaintiffs ask this court to grant a declaratory judgment that (1) R.C. 4111.14(B)(1) is unconstitutional because the limiting definition of "employee" within R.C. 4111.14(B)(1) and the FLSA is not compatible with Article II, Section 34a of the Ohio Constitution; or (2) R.C. 4111.14(B)(1) is not applicable to cases brought under Article II, Section 34a because that provision of the Ohio Constitution is self-executing, providing Plaintiffs with a choice to bring action either under Section 34a or R.C. 4111.14.

In short, Plaintiffs allege that they were sales representatives for Cheap Escape and were entitled to minimum wage payments, which Defendants failed to pay. Defendants deny that they were required to pay Plaintiffs minimum wage because Plaintiffs as outside salespeople were

exempted from the minimum wage protection and were paid earned commissions. Plaintiffs admit that they are "outside salespeople" but assert that they are still "employees" for purposes of minimum wage protection under Section 34a. Plaintiffs argue that R.C. 4111.14's attempt to limit the definition of "employee" and prevent recovery of minimum wages for certain "employees" under Section 34a is an unconstitutional infringement on Plaintiffs' rights under the Constitution.

In this case, Plaintiffs first argue that the exemptions from the minimum wage requirements set forth in R.C. 4111.14 and also in the FLSA, including that for outside salespeople, do not apply under the Ohio Constitution. Yet, in Ellington v. City of E. Cleveland (2012), 2012 U.S. App. LEXIS 16265, the court held that the definition of employee under Ohio Constitution Article II, Section 34a and R.C. 4111.14(B) expressly adopted the FLSA definition. In that case, a city council deputy clerk was found to be subject to the FLSA legislative employee exclusion, and, thus, he necessarily was not an employee under Ohio law, thereby excluding him from the minimum wage protection. Ellington v. City of E. Cleveland (2012), 2012 U.S. App. LEXIS 16265. There, the court explained:

> Ellington's state-law claim fails because he is excluded from the wage and overtime protections afforded by the Ohio Constitution and the OMFWSA. Article II, section 34a of the Ohio Constitution states, in relevant part, that Ohio employers must pay their employees working in the State a specified minimum wage and provides that "[l]aws may be passed to implement [the section's] provisions and create additional remedies, increase the minimum wage rate and extend the coverage of the section." The OMFWSA is one such law the state legislature has passed to implement the provisions of § 34a. The OMFWSA reaffirms the minimum wage rate established in the Ohio Constitution, Ohio Rev. Code § 4111.02, and further guarantees employees overtime pay, Ohio Rev. Code § 4111.03. Like the FLSA, both § 34a and the OMFWSA limit the scope of the minimum wage and overtime provisions to individuals who qualify as "employees." They also both expressly adopt the FLSA's definition of "employee." Ohio Const. Art. II, § 34a ("As used in this section . . . "employee" . . . [has] the same meaning as under the federal Fair Labor Standards Act. . . ."); Ohio Rev. Code § 4111.14(B) ("In accordance with Section 34a of Article II, Ohio Constitution, the term . . . 'employee' . . . [has] the same meaning[] as in the 'Fair Labor Standards Act of 1938' . . . . As used in division (B) of this section . . . '[e]mployee" means individuals employed in Ohio, but does not mean individuals who are excluded from the definition of "employee" under 29 U.S.C. 203(e) . . . ." (emphasis added)). Accordingly, this court having already determined that Ellington was not an "employee" under the FLSA,

he also does not qualify as an employee subject to the benefits of § 34a and the OMFWSA. Ellington v. City of E. Cleveland (2012), 2012 U.S. App. LEXIS 16265.

Relevant to this case is the exemption of employees as outside salespeople under FLSA from the minimum wage protection. Plaintiffs argue that they are "employees" under Article II, Section 34a's definition, asserting that the plain language of the provision allows only for exemptions set forth in that section. Plaintiffs argue that the exemptions of certain employees, including outside salespeople as delineated under FLSA, are inapplicable to Plaintiffs in this case. Plaintiffs argue that the consequential narrower definition of "employee" under R.C. 4111.14(B) and (B)(1) is an unconstitutional limitation on the broad definition of "employee" found in Article II, Section 34a. Plaintiffs argue that, when a statute clearly conflicts with the plain language of the Constitution, the statute must be held unconstitutional. Plaintiffs also argue that the General Assembly exceeded its authority in passing laws regarding Section 34a's subject matter. Plaintiffs argue that, although "outside salespeople" are exempt from the minimum wage requirements under FLSA, "outside salespeople" still fall under the definition of "employee" for purposes of minimum wage recovery under Ohio Constitution Article II, Section 34a. Conversely, Defendants argue that (1) the General Assembly had the authority to pass laws implementing Section 34a's provisions under R.C. 4111.14 and (2) the meaning of "employee" under Section 34a and R.C. 4111.14 broadly incorporates the FLSA's definition of "employee," the exceptions thereto, and the applicable exemptions therein.

The first issue to be decided herein is whether the meaning of "employee" under R.C. 4111.14(B)(1) conflicts with the meaning of "employee" under Article II, Section 34a, thus rendering R.C. 4111.14(B)(1) unconstitutional. After considering the relevant facts, the court finds that R.C. 4111.14(B)(1) is instrumental in effectuating the intent of Article II, Section 34a, and the court fails to find that the meaning of "employee" found in R.C. 4111.14 or in the federal FLSA

conflicts or is inconsistent with the meaning of "employee" under Article II, Section 34a. First, although Article II, Section 34a stated that only exemptions set forth therein shall apply to that section, Section 34a also specifically granted the General Assembly with the authority to implement the constitutional provisions, including the authority that the General Assembly exercised in passing the OMWFSA under Revised Code Chapter 4111. Moreover, the plain language of Article II, Section 34a provides that "employee" shall have the same meaning as under FLSA, which includes not only the definition of "employee", but also includes the exceptions and exemptions detailed therein. (Emphasis added) Like the FLSA, both Section 34a and the OMWFSA under Revised Code Chapter 4111 limit the scope of the minimum wage provisions to individuals who qualify, and they also both expressly adopt the FLSA's meaning of "employee." Accordingly, the court fails to find that R.C. 4111.14(B)(1) contradicts or restricts the meaning of "employee' as described in Section 34a.

The court also fails to find that Article II, Section 34a contains anything that could be construed as a prohibition on the power of the General Assembly to legislate and implement R.C. 4111.14(B)(1), and, accordingly, the court finds that the General Assembly acted within its authority in promulgating the legislation. Finally, the court also finds that Plaintiffs have failed to show, beyond a reasonable doubt, that Article II, Section 34a of the Ohio Constitution and R.C. 4111.14(B)(1) are clearly incompatible or that there was a gross abuse of the General Assembly's discretion in undoubted violation of some state or federal constitutional provision. Therefore, the court finds that R.C. 4111.14(B)(1) does not conflict with Article II, Section 34a of the Ohio Constitution, and, thus, is constitutionally valid.

Alternatively, Plaintiffs also argue that, if the court determines that Section 34a and R.C. 4111.14 are two separate and parallel laws, Section 34a is self-executing, and, thus, no legislative

action is needed to implement and enforce Section 34a's provisions. Put differently, Plaintiffs argue that aggrieved workers could proceed under whichever law they choose.

"A constitutional provision is self-executing when it is complete in itself and becomes operative without the aid of supplemental or enabling legislation. A provision is not self-executing if its terms duly construed indicate that it is not to become operative without supplemental or enabling legislation." State ex rel. Russell v. Bliss (1951), 156 Ohio St. 147, quoting 16 Corpus Juris Secundum, 98, Section 48. A constitutional provision "must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action." Id. Put differently, "[a] clause in a constitution is self-executing if it contains more than a mere framework, and specifically provides for carrying into immediate effect the enjoyment of the rights established therein without legislative action." In re Protest Filed with Franklin County Bd. of Elections (1990), 49 Ohio St. 3d 102, citing see Yenter v. Baker (1952), 126 Colo. 232. "However, laws may be passed to facilitate its operation, as long as they do not restrict or limit the provision or the powers therein reserved." Id., citing see Daggett v. Hudson (1885), 43 Ohio St. 548. Put differently, although power authorized by a self-executing constitutional grant exists without the aid of legislation, the provisions may still be limited by relevant charter, statutory, or constitutional provisions. See State ex rel. Vickers v. Summit County Council (2002), 97 Ohio St. 3d 204, citing see State ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections (1991), 62 Ohio St.3d 17, 20.

Here, the court fails to find that Article II, Section 34a is self-executing. Section 34a was referred to the General Assembly for action as evidenced by its plain language therein, stating "laws may be passed to implement its provisions..." Moreover, the court fails to find that Plaintiffs have pointed to binding authority illustrating that Section 34a is a self-executing provision. Thus, the

court finds that R.C. 4111.14 was enacted to effectuate Article II, Section 34a of the Ohio Constitution, and, therefore, R.C. 4111.14(B)(1)'s additional exemptions to the definition of "employee" is applicable to actions brought under Ohio Constitution Article II, Section 34a by way of R.C. 4111.14.

III. CONCLUSION

For the foregoing reasons, the court hereby declares that:

(1) R.C. 4111.14(B)(1) is constitutionally valid; and

(2) R.C. 4111.14(B)(1)'s additional exemptions to the definition of "employee" is applicable to actions brought under Ohio Constitution Article II, Section 34a.

SO ORDERED:

JUDGE MARY KATHERINE HUFFMAN

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NO JUST CAUSE FOR DELAY FOR PURPOSES OF CIV.R. 54. PURSUANT TO APP.R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED.

JUDGE MARY KATHERINE HUFFMAN

To the Clerk of Courts:
Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.

JUDGE MARY KATHERINE HUFFMAN

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

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General Divison
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Type: Decision

Case Number: 2012 CV 00946

Case Title: JOHN HAIGHT vs CHEAP ESCAPE COMPANY

So Ordered

Mary K. Huffman

Electronically signed by mhuffman on 2[redacted]:06:01 page 18 of 18

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GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

JOHN HAIGHT, et al.	:	
Plaintiffs-Appellants	:	C.A. CASE NO. 25983
v.	:	T.C. NO. 12CV946
CHEAP ESCAPE COMPANY, et al.	:	**FINAL ENTRY**
Defendants-Appellees	:	
	:	

. . . . . .

Pursuant to the opinion of this court rendered on the 6th day of June, 2014, the judgment of the trial court is reversed, and the case is remanded to the trial court.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

JEFFREY E. FROELICH, Presiding Judge

MIKE FAIN, Judge

JEFFREY M. WELBAUM, Judge

[Cite as *Haight v. Cheap Escape Co.*, 2014-Ohio-2447.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

JOHN HAIGHT, et al.	:	
Plaintiffs-Appellants	:	C.A. CASE NO. 25983
v.	:	T.C. NO. 12CV946
CHEAP ESCAPE COMPANY, et al.	:	(Civil appeal from Common Pleas Court)
Defendants-Appellees	:	
	:	

. . . . . .

OPINION

Rendered on the 6th day of June, 2014.

. . . . . .

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. . . . . .

FROELICH, P.J.

{¶ 1} John Haight and Christopher Pence appeal from a judgment of the Montgomery County Court of Common Pleas, which found that they were not "employees" of Cheap Escape Company (d.b.a. JB Dollar Stretcher), as that term is defined in Ohio's minimum wage laws, when they were working at the company as salespersons. Defendants-Appellees Robert Minchak, Joan Minchak, and Mark Kosir were Cheap Escape's principals during the times relevant to this lawsuit.

Background

{¶ 2} The Ohio Fair Minimum Wage Amendment (State Issue 2) was approved by Ohio voters in November 2006, and was incorporated into the Ohio Constitution at Article II, Section 34a ("Section 34a"). It went into effect on December 8, 2006. A central provision of the amendment was that "every employer shall pay their (sic) *employees* a wage rate of not less than six dollars and eighty-five cents per hour beginning January 1, 2007," (emphasis added) with the amount to be adjusted annually thereafter pursuant to a formula tied to the consumer price index. The amendment did not require any action by the Ohio General Assembly to implement its protections, but it provided that "[l]aws may be passed to implement its provisions and to create additional remedies, increase the minimum wage rate and extend coverage of the section, but in no manner restricting any provision of the section * * *."

{¶ 3} Shortly after voter approval of Section 34a, the Ohio General Assembly

enacted R.C. 4111.14 and amended other portions of R.C. 4111.01 through R.C. 4111.10 (H.B. 690) "in implementation of Section 34a of Article II, Ohio Constitution."

{¶ 4} This appeal presents the question whether the General Assembly's actions, particularly its passage of R.C. 4111.14, imposed requirements or defined terms in a manner that conflicts with Section 34a and its express provision that laws passed for its implementation may extend, but not restrict, its coverage. If the statute clearly conflicts with the constitutional provision beyond a reasonable doubt, it cannot stand. *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 146, 128 N.E.2d 58 (1955).

Facts and Procedural History

{¶ 5} Haight and Pence are former salespersons of Cheap Escape, which published a coupon magazine and operated a website for electronic coupons; they sold advertising space in the magazine and website. There is some dispute as to how Cheap Escape's salespersons were paid, but all or a substantial part of their pay was through commissions. Haight and Pence allege that they were paid less than the minimum wage during the time that they worked for Cheap Escape, and this fact does not appear to be in dispute. The parties disagree about whether Ohio law required Cheap Escape to pay Haight and Pence the minimum wage.

{¶ 6} On February 6, 2012, Haight and Pence filed a complaint against Cheap Escape and the Minchaks seeking "monetary, declaratory, and injunctive relief."[1] The complaint identified the claims as follows: failure to pay minimum wages under Section 34a,

[1] Haight and Pence brought their minimum wage claim "on behalf of themselves and all similarly situated individuals," as permitted under Section 34a.

declaratory action regarding definition of "employee" under Ohio's minimum wage laws, failure to tender pay (earned commissions) by regular payday (R.C. 4113.15), breach of contract in failing to pay all earned commissions, and quantum meruit (unjust enrichment). Cheap Escape filed a counterclaim for unjust enrichment. Haight and Pence thereafter filed two amended complaints. In pertinent part, the amended complaints sought class action certification, omitted Cheap Escape as a defendant, added Mark Kosir as a defendant-employer, added additional claims against the Minchaks and Kosir under Section 34a and R.C. 4111.14 (which are not relevant to this appeal),[2] and dropped the claims against Cheap Escape for breach of contract and unjust enrichment. Cheap Escape and the Minchaks thereafter dismissed their counterclaim for unjust enrichment. We will hereafter refer to the Minchaks and Kosir, collectively, as the owners of Cheap Escape.

{¶ 7} On February 19, 2013, Haight and Pence filed a motion for a declaratory judgment on the constitutionality of the definition of "employee" contained in R.C. 4111.14(B)(1), arguing that the resolution of this legal question would "go a long way in resolving the lawsuit." On October 13, 2012, the trial court concluded that R.C. 4111.14(B)(1) did not unconstitutionally contradict or restrict the meaning of the term "employee," as set forth in Section 34a, and therefore that R.C. 4111.14(B)(1) was constitutionally valid. The court's judgment included a statement that it was a final appealable order and Civ.R. 54 certification that there was no just cause for delay.

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[2]These additional claims included a challenge to the constitutionality of the written consent requirement contained in R.C. 4111.14(K)(2), failure to maintain and provide employee records, retaliation, and spoilation of evidence.

{¶ 8} Haight and Pence appeal, raising two assignments of error, which we will address together.[3]

The trial court erred in declaring that R.C. § 4111.14(B)(1)'s "additional exemptions to the definition of 'employee'" apply to actions brought under Ohio Const. Art. II, Sec. 34a.

The trial court erred in declaring that R.C. § 4111.14(B)(1)'s definition of "employee" is constitutionally valid.

{¶ 9} The pivotal question posed by the assignments of error is whether the trial court erred in concluding that the definition of an "employee" set forth in R.C. 4111.14(B)(1) is not in conflict with the definition of an "employee" contained in Ohio Constitution, Article II, Section 34a, and that R.C. 4111.14(B)(1) permissibly implements Section 34a. This question turns on whether the definition of an "employee" in the statute is incompatible with the definition of that term in Section 34a. If the statute, or any part of it, conflicts with the constitutional provision, it is unconstitutional.

{¶ 10} "It is difficult to prove that a statute is unconstitutional. All statutes have a strong presumption of constitutionality. * * * Before a court may declare unconstitutional an enactment of the legislative branch, 'it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.'" *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 25, citing *Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59, paragraph one of the syllabus.

"A legislative act is presumed in law to be within the constitutional power of

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[3]The Ohio Employment Lawyers Association filed a brief of amicus curiae in support of Haight, Pence, and others similarly situated.

> the body making it, whether that body be a municipal or a state legislative body. * * * That presumption of validity of such legislative enactment cannot be overcome unless it appear that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution. * * * The question, whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." * * * [A] law should not be held unconstitutional on "slight implication" and "vague conjecture" but only where the court has a "clear and strong conviction" that the challenged law is incompatible with the Constitution. (Internal citations omitted.)

N. Olmsted v. N. Olmsted Land Holdings, Ltd., 137 Ohio App.3d 1, 7, 738 N.E.2d 1 (8th Dist.2000), citing *Defenbacher*.

{¶ 11} Section 34a defines "employee" and other terms as follows:

> As used in this section: "employer," "employee," "employ," "person" and "independent contractor" have the same meanings as under the federal Fair Labor Standards Act or its successor law, except that "employer" shall also include the state and every political subdivision and "employee" shall not include an individual employed in or about the property of the employer or individual's residence on a casual basis. Only the exemptions set forth in this section shall apply to this section.

The Fair Labor Standard Act, 29 U.S.C. 203, defines an "employee" as "any

individual employed by an employer"; the definition set forth in this section is subject to certain exceptions, also set forth in that section, related to employees of a "public agency," an agricultural employer's family members, and volunteers for a public agency. 29 U.S.C. 203(e).

{¶ 12} R.C. 4111.14, enacted less than two months after Section 34a, acknowledges that its purposes are "in implementation of Section 34a of Article II, Ohio Constitution," R.C. 4111.14(A), and to ensure that the wage rate required by Section 34a is paid to "Ohio employees, as defined in division (B)(1) of this section." R.C. 4111.14(A)(1). The statute also states that

> In accordance with Section 34a of Article II, Ohio Constitution, the terms "employer," "employee," "employ," "person," and "independent contractor" have the same meanings as in the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 203, as amended. In construing the meaning of these terms, due consideration and great weight shall be given to the United States department of labor's and federal courts' interpretations of those terms under the Fair Labor Standards Act and its regulations. * * *

R.C. 4111.14(B).

{¶ 13} Although R.C. 4111.14(B)(1) acknowledges that Section 34a defines "employee" as having the "same meaning" as under the federal Fair Labor Standards Act, it also includes its own definition of "Employee":

> "Employee" means individuals employed in Ohio, but does not mean individuals who are excluded from the definition of "employee" under 29

> U.S.C. 203(e) [the Fair Labor Standards Act] or individuals who are exempted from the minimum wage requirements in 29 U.S.C. 213 and from the definition of "employee" in this chapter.

R.C. 4111.14(B)(1).

{¶ 14} 29 U.S.C. 213 contains exemptions to the minimum wage and maximum hour requirements of the Fair Labor Standards Act. These exemptions include "any employee employed in a bona fide executive, administrative, or professional capacity * * *, *or in the capacity of outside salesman* * * *." 29 U.S.C. 213(a)(1). Other exemptions include, very generally, summer camp employees, immediate family members working in agriculture, criminal investigators, and employees of fishing operations and small publications.

{¶ 15} For purposes of this appeal, the parties seem to agree, and we will assume, that Haight's and Pence's positions with Cheap Escape fell within the definition of an "outside salesperson," which is exempt from minimum wage requirements under 29 U.S.C. 213. Thus, they would not have been entitled to the federal minimum wage under federal law.

{¶ 16} The question, then, is whether Haight and Pence were entitled under Ohio law to be paid the Ohio minimum wage. They claim that they were, because the definition of an employee under Section 34a is very broad and does not exclude employees who are exempt from the federal minimum wage law under 29 U.S.C. 213. Haight and Pence further argue that, in enacting R.C. 4111.14(B)(1), the legislature impermissibly narrowed the definition of an "employee" set forth in Section 34a. The owners of Cheap Escape contend

that the "*meaning*" of "employee" under the federal Fair Labor Standards Act, as that term is used in Section 34a, is broader than the "*definition*" of "employee" in Section 34a, and that the definition of employee contained in R.C. 4111.14(B)(1) does not clearly conflict with the constitutional provision.

{¶ 17} Section 34a's statement that "employee" and other terms have "the same meanings as under the federal Fair Labor Standards Act," coupled with its statement that "[o]nly the exemptions set forth in this section shall apply to this section," preclude interpreting Section 34a in the manner advocated by the owners of Cheap Escape. The exemptions from minimum wage requirements set forth in 29 U.S.C. 213 do not alter the definition of "employee" set forth in 29 U.S.C. 203. Rather, the exemptions provide that minimum wage (and maximum hour) requirements do not apply to certain categories of employees. In other words, the exemptions remove certain categories *of employees* from the minimum wage requirements set forth in other parts of the Fair Labor Standards Act, but they do not remove persons in those categories from the definition of an employee. Thus, the definition or "meaning" of an employee under the Fair Labor Standards Act is the broad definition contained in 29 U.S.C. 203(e) – "any individual employed by an employer" – rather than any narrower classification that applies for the provision of particular federal protections, such as wage and hour rules.

{¶ 18} This conclusion is bolstered by the statement in Section 34a that "[o]nly the exemptions set forth in this section shall apply to this section." This provision refutes the owner-employers' argument that the legislature was permitted to graft exemptions to minimum wage requirements set forth in 29 U.S.C. 213 of the Fair Labor Practices Act onto

the definition of an employee contained in 29 U.S.C. 203.

{¶ 19} Moreover, by incorporating the exemptions to minimum wage and maximum hour requirements contained in 29 U.S.C. 213 into the R.C. 4111.14(B)(1) definition of "employee," the legislature impermissibly narrowed Section 34a's definition of an employee and its scope. Section 34a states:

> This section shall be liberally construed in favor of its purposes. Laws may be passed to implement its provisions and create additional remedies, increase the minimum wage rate and extend the coverage of the section, but in no manner restricting any provision of the section or the power of municipalities under Article XVIII of this constitution with respect to the same.

Any deliberate or inadvertent narrowing of the definition of an employee covered by Section 34a violates its express intent that legislative provisions implementing Section 34a may in no manner restrict its applicability. To the extent that R.C. 4111.14(B)(1) narrowed the definition of an employee and, thus, the scope of Section 34a, such action must be viewed as an impermissible restriction or modification – rather than a permissible "implementation" – of the constitutional provision.

{¶ 20} Having found that there is a clear conflict between the definition of an employee in R.C. 4111.14(B)(1) and the definition of an employee in Section 34a, we must conclude that the legislative enactment is invalid.

{¶ 21} In finding that R.C. 4111.14(B)(1) does not conflict with Section 34a, the trial court relied on *Ellington v. East Cleveland*, 689 F.2d 549 (6th Cir.2012). *Ellington* held that the Deputy Clerk of the East Cleveland City Council fell within the "legislative

employee" exclusion from the definition of an employee under the federal Fair Labor Standards Act, R.C. 4111.14(B), and Section 34a. We note that the "legislative employee" exclusion upon which *Ellington* relies is contained in 29 U.S.C. 203, which *defines* an employee, rather than 29 U.S.C. 213, which sets forth *classifications of employees* who are exempt from the minimum wage requirements. Unlike a "legislative employee," who is excluded from the definition of an employee under 29 U.S.C. 203(e)(2)(C)(V), an "outside salesperson" is an employee who is exempt from the minimum wage requirement under 29 U.S.C. 213. *Ellington* does not address exempt employees, and the trial court does not discuss this distinction.

{¶ 22} In *Ellington,* the court found that the Deputy Clerk's claims under Section 34a and R.C 4111.14(B) failed because, on their face, "[I]ike the FLSA, both § 34a and [R.C. 4111.14(B)] limit the scope of the minimum wage and overtime provisions to individuals who qualify as 'employees.'" The court did not analyze Section 34a or R.C. 4111.14(B); it merely noted that Section 34a and R.C. 4111.14(B) rely on the Fair Labor Standards Act's definition of "employee." Having concluded that the Deputy Clerk was not an employee (because he fell within the legislative employee exception) under 29 U.S.C. 203, the court likewise concluded that the Clerk was not an employee under Ohio law. *Ellington* is not controlling in considering the effect of the exemptions contained in 29 U.S.C. 213 on the Ohio definition of an employee.

{¶ 23} The briefs engage in extensive argument parsing and attempting to distinguish between "exemption" and "exception" and between "meaning" and "definition." We appreciate these discussions. However, the Ohio Constitution (Section 34a) applies to

all "employees" as that term is used by the Fair Labor Standards Act, and the Fair Labor Standards Act defines "employee" as "any individual employed by an employer." Therefore, the Ohio Constitutional provisions cover any individual employed by an employer. The fact that the Fair Labor Standards Act goes on to exempt from *its* provisions employees who are employed by an employer as outside salespeople is not part of the definition and cannot reasonably be interpreted as such.

{¶ 24} We conclude that the legislature exceeded its authority to implement Section 34a when it defined "employee" differently, and more narrowly, than that term is defined in Section 34a or in the Fair Labor Standards Act.

{¶ 25} The assignments of error are sustained.

{¶ 26} The judgment of the trial court will be reversed, and the case will be remanded to the trial court.

. . . . . .

FAIN, J., concurs.

WELBAUM, J., dissenting:

{¶ 27} I very respectfully dissent. "In determining the constitutionality of an ordinance, we are mindful of the fundamental principle requiring courts to presume the constitutionality of lawfully enacted legislation. Further, the legislation being challenged will not be invalidated unless the challenger establishes that it is unconstitutional beyond a reasonable doubt." (Citations omitted.) *Arnold v. Cleveland*, 67 Ohio St.3d 35, 38-39, 616 N.E.2d 163 (1993). I am not convinced beyond a reasonable doubt that R.C. 4111.14(B) unconstitutionally conflicts with Article II, Section 34a of the Ohio Constitution.

{¶ 28} Article II, Section 34a and R.C. 4111.14(B) both state that the term "employee" has the same "meanings" as under the federal Fair Labor Standards Act (FLSA). I agree that 29 U.S.C. 203(e)(1) of the FLSA does provides a very broad definition of employee as "any individual employed by an employer." However, I also conclude that the overarching meaning of employees under the FLSA, including its exclusions and exemptions from eligibility, must be applied.

{¶ 29} Notably, Article II, Section 34a of the Ohio Constitution uses the plural term "meanings," which encompasses more than just a single definition. In addition, Section 34a does not confine itself only to the meaning of employee under 29 U.S.C. 203(e)(1). Instead, Section 34a states that "[a]s used in this section: 'employer,' 'employee,' 'employ,' 'person' and 'independent contractor' have the same meanings as under the federal Fair Labor Standards Act or its successor law * * *." This reference includes the entirety of the act, not just a specific section. Under 29 U.S.C. 213(a)(1) of the FLSA, outside sales employees are excluded from eligibility to receive minimum wages, and they are properly excluded from coverage under Section 34a and R.C. 4111.14(B) as well.

{¶ 30} My conclusion is also buttressed by the fact that Article II, Section 34a of the Ohio Constitution includes a specific exemption for "employees of a solely family owned and operated business who are family members of an owner." This exemption is not one that was included in the FLSA. Logically, the drafters of Ohio's constitutional amendment would have specifically mentioned the existing exemptions and exclusions in the FLSA if they believed that these categories were not already excluded from the meaning of "employees" for purposes of Section 34a. Exempting one specific category of employees from Ohio's coverage, while failing to exempt other previously-excluded categories, makes

no sense.

{¶ 31} The challengers have framed a debatable issue, but have not proved an invalidating conflict beyond a reasonable doubt. I am not convinced beyond a reasonable doubt that R.C. 4111.14(B) unconstitutionally conflicts with Article II, Section 34a of the Ohio Constitution. Therefore, I would uphold the constitutionality of R.C.4111.14(B) and affirm the judgment of the trial court.

{¶ 32} For the foregoing reasons, I very respectfully dissent.

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