

IN THE SUPREME COURT OF OHIO

JOHN HAIGHT, et al.	:	Supreme Court Case No. 2014-1241
	:	
Plaintiffs/Appellees	:	
v.	:	
	:	Appeal from the Montgomery County
	:	Court of Appeals, 2nd District
	:	
CHEAP ESCAPE COMPANY, et al.	:	Appeal No. CA 25983
	:	
	:	
	:	
Defendants/Appellants.	:	Trial No. 2012 CV 00946

**Brief of Amicus Curiae The Ohio Employment Lawyers' Association
In Support of Plaintiffs/Appellees**

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I. Statement of Interest of Amicus Curiae

The Ohio Employment Lawyers' Association (OELA) is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment, civil rights and wage disputes. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to protecting the rights of American workers. NELA and OELA regularly support precedent-setting litigation affecting broad classes of workers. OELA advocates for employee rights and workplace justice, while promoting the highest standards of professionalism, ethics and judicial integrity.

As an organization focused on protecting employees' rights, OELA has an abiding interest in ensuring the most basic employee right, to be paid at least the legally required minimum wage. Ohio voters set Ohio's minimum wage in Ohio's Constitution by initiative petition in 2006. OELA takes great interest in legislation and judicial decisions that impermissibly restrict this right. Appellants in this case seek such impermissible restrictions. The meaning they want to give to "employees" in Section 34a would strip outside salespeople and other classes of employees of their right to a constitutional minimum wage, of their right to obtain records of the hours they worked and the amounts earned, and from Section 34a's anti-retaliation protections. OELA thus asks to participate as amicus in this case to cast light on these issues and to call attention to the impact this case may have on the employees it affects.

II. Introduction and Summary of Argument

If Article II, Section 34a of Ohio's Constitution ("Section 34a") needs O.R.C. § 4111.14 to go into effect, then O.R.C. § 4111.14(B)(1)'s definition of "employee" is unconstitutional. It violates Section 34a's prohibition against any law restricting any provision of Section 34a. Section 34a defines "employee" to cover outside salespeople and most other FLSA exempt employees, but R.C. § 4111.14(B)(1) excludes them. By excluding outside salespeople and these other classes of employees from Section 34a's coverage, R.C. § 4111.14(B)(1) unconstitutionally restricts Section 34a.

But Section 34a does not need § 4111.14 to go into effect. Section 34a operates independently of any implementing legislation. Because it has sufficient rules to grant its rights and enforce its obligations, it "did not require any action by the Ohio General Assembly to implement" *Haight v. Cheap Escape Co.* (2d. Dist.), 2014-Ohio-2447, ¶ 2, 11 N.E.3d 1258. As a self-executing constitutional provision, Section 34a is independent of ORC § 4111.14. Therefore, the only question the Court needs to answer is the meaning of Section 34a's coverage term, "employee."

Section 34a's plain language says that an "employee" under Section 34a has "the same meaning as under the Fair Labor Standards Act" The FLSA definition of "employee," in 29 U.S.C. § 203(e), includes outside salespersons and therefore covers the Plaintiffs. Importantly, the FLSA exemptions in 29 U.S.C. § 213 do not alter § 203(e)'s meaning of "employee." Section 213 exempts outside salespeople from the FLSA's right to a minimum wage, but not from the FLSA's right to equal pay, its anti-retaliation protections, or most of its record-keeping requirements. The exemptions therefore do not alter the meaning of "employee," since exempt employees remain FLSA employees entitled to other FLSA rights and protections.

Notably, the definition of “employee” in Ohio’s prior minimum wage law, former Section 4111.01 (the Ohio Fair Minimum Wage Standards Act), contained versions of some, but not all, of the exempt categories in Section 213 of the FLSA. So does Section 34a, which incorporates a few of the FLSA exemptions referenced in Ohio’s prior minimum wage law, but discards the rest. This is an obvious indicator that the plain language of Section 34a means exactly what it says: it is borrowing the FLSA’s definition of employee, but not its exemptions, and it contains only the exemptions explicitly included in the amendment. The Appellants and their amici ignore this evident conclusion and actually argue that the drafters of Section 34a sought to incorporate *all* of the FLSA’s exemptions, thereby intentionally *narrowing* the coverage of Ohio’s minimum wage law from where it stood prior to the amendment. Such an argument defies not just the text of the amendment and the principles of statutory interpretation, but basic common sense.

As a fallback position, the Appellants and their amici try to justify the General Assembly’s conflicting definition of “employee” by relying on a prior constitutional provision, Article II, Section 34, which authorizes legislation to establish a minimum wage and other workplace rights. Section 34 explicitly supersedes any legislation or constitutional provision that would deprive the General Assembly of the right to establish a minimum wage. The Appellants argue that this provision somehow justified the General Assembly’s decision to disregard the definition of “employee” the voters adopted in Section 34a. This argument ignores the fact that Section 34a is self-executing, meaning the actions of the General Assembly are entirely beside the point. As important, Section 34 did not and could not prevent a *subsequent* constitutional amendment from setting a limit on the General Assembly’s power to control the minimum wage. There is no such thing as a “super-amendment” to the Ohio Constitution that bars further

amendments in a particular area. Creating such a class of super-amendments would lead to absurd and even dangerous results, including immunizing some constitutional provisions from being amended at all.

Finally, the Appellants argue, for the first time in this case, that if this Court honors the plain language of Section 34a, it should do so only prospectively. They base this argument not on any prior case law interpreting Section 34a otherwise, but because of the mixed signals sent by the General Assembly and others as to the amendment's definition of "employee." This Court has noted its reluctance to limit its rulings to prospective application, especially when it involves a statutory or constitutional mandate. Here, the exceptional circumstances the Court requires for such a limitation are definitely not present. The history of Section 34a, including publications at the time and the opponents' own official arguments, demonstrates that the conflict between Section 34a's definition of "employee" and the General Assembly's subsequent enactment was widely known and discussed, and employers relying on R.C. 4111.14's narrower definition of "employee" knew they did so at their own risk. It would be profoundly unjust to reward those employers who disregarded a prominent and plainly worded constitutional amendment while punishing employers who complied with the law and denying Ohio's lowest-paid workers the benefits of Section 34a's provisions.

III. Statement of the Facts

OELA adopts the statement of the facts contained in the merit brief of Plaintiffs-Appellees John Haight and Chris Pence. In addition, OELA calls special attention to the employees whose rights hang in the balance of this decision. They are not just outside salespeople like Mssrs. Haight and Pence, but other categories of workers, including seasonal and small farm workers, employees of recreational parks, certain newspaper employees, and

others—many of whom were covered by the prior version of Ohio’s minimum wage law, but would be excluded from all of § 34a’s protections if the Appellants’ interpretation were adopted.

Section 34a also covers employees who regularly earn more than the minimum wage for economic or regulatory reasons. Reversing the Second District Court of Appeals decision would deprive these employees of the records they need to ensure that they earn at least the minimum wage, and would make them fair game for retaliation if they ever tried to find out.

IV. Argument

A. The History of Article II, Section 34a

In 1912, the electors of Ohio adopted the initiative and referendum amendment to the Ohio constitution. Oh. Const. Article II, § 1. *See State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St. 3d 315, 2010-Ohio-1845, 928 N.E.2d 410, ¶ 54. It declares that “the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided.” Oh. Const. Article II, §1. Initiative and referendum rights are of paramount importance. *State ex rel. Ohio Gen. Assembly v. Brunner* (2007), 115 Ohio St.3d 103, 2007-Ohio-4460, 873 N.E.2d 1232, ¶ 8. They provide “a means for direct political participation” and “give citizens a voice on questions of public policy.” *Eastlake v. Forest City Ents., Inc.* (1976), 426 U.S. 668, 673, quoting *James v. Valtierra* (1971), 402 U.S. 137, 141.

Ohio Constitution Article II, § 34, was one of the first initiatives adopted by the electors of Ohio. It allowed the General Assembly to establish a minimum wage. *Strain v. Southerton*, 148 Ohio St. 153, 156 (Ohio 1947). When Ohio’s minimum wage fell below that set by the federal Fair Labor Standards Act, and the value of the FLSA minimum wage fell to a 50-year low, Ohio voters expanded and supplemented the minimum wage rights created by the General

Assembly. Specifically, on November 7, 2006, voters passed ballot initiative Issue 2, which created Article II, Section 34a of the Ohio Constitution. Effective January 1, 2007, it provided the right to a higher minimum wage for “employees,” indexed to inflation, and created an effective mechanism to enforce its minimum wage rights.

Section 34a prohibited passage of any law that in any manner “restricted any provision” of Section 34a, and declared that it was to be “liberally construed in favor of its purposes,” a critically important instruction that ensures the voters’ exercise of their constitutional right is given its full and rightful meaning.

B. Section 34a is a Self-Executing Constitutional Provision

Section 34a is a remarkably detailed and complete law. As one commentator noted and the Second District Court of Appeals found, Section 34a “was written to be self-executing, such that no action was required by the Ohio General Assembly to implement the protections provided by the Amendment.” *Intended and Unintended Consequences: The 2006 Fair Minimum Wage Amendment of the Ohio Constitution*, 58 Clev. St. L. Rev. 367, 368; *Haight*, 2014-Ohio-2447 at ¶ 2 (Section 34a “did not require any action by the Ohio General Assembly to implement its protections . . .”). This ensured that Ohio workers “would receive the protections they voted for without relying on legislative action.” *Id.* Legislative action, while not required, was permitted to “implement its provisions and create additional remedies, increase the minimum wage rate and extend the coverage of the Section.” However, Section 34a expressly prohibited any law from “restricting any provision of (this) Section . . .” Article II, § 34a, Ohio Constitution.

Where, as in Section 34a, the constitutional language supplies a sufficient rule by which the right it grants may be enjoyed and protected, and the duty it imposes to be enforced, the constitutional provision is self-executing. *State ex rel. Russell v. Bliss* (1951), 156 Ohio St. 147,

150-151; see also *In re Protest Filed by Citizens for Merit Selection of Judges, Inc.* (1990), 551 N.E.2d 150, 152 (a clause 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 *Bliss*, the Ohio Supreme Court held that Constitution Article V, § 2a, which governs how names of candidates appear on ballots, was self-executing. *Id.*¹ The *Bliss* court first noted that modern constitutional provisions are presumed to be self-executing:

During the last fifty years, state constitutions have been generally drafted upon a different principle and have often become, in effect, extensive codes of laws intended to operate directly upon the people in a manner similar to that of statutory enactments. Accordingly, the presumption now is that all provisions of the constitution are self-executing.

Id. In addition to a presumption favoring self-execution, the *Bliss* court held that a constitutional provision is self-executing when:

it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative enactment. Therefore, if a constitutional provision either directly or by implication imposes a duty upon an officer, no legislation is necessary to require the performance of such duty. Another way of stating this general, governing principle is that a constitutional provision is self-executing if there is nothing to be done by the legislature to put it in operation.

¹ Section 2a said then that “[t]he names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a party primary or in a nonpartisan election, the name or designation of each candidate’s party, if any, shall be printed under or after each candidate’s name in lighter and smaller type face than that in which the candidate’s name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.” Section 2a has since been amended.

Id. Against this test, the *Bliss* court found Article V, § 2a self-executing because it “set out how the names of candidates shall be rotated on the ballots with such clarity that the form of the ballot is clearly prescribed, making unnecessary any repetitive or enabling legislation.” *See also In re Protest Filed with Franklin County Bd. of Elections* (1990), 49 Ohio St. 3d 102, 104 (citing *Hockett v. State Liquor Licensing Bd.* (1915), 91 Ohio St. 176) (holding that “Section 1g, Article II of the Ohio Constitution, by its own language, 1 is a self-executing provision” even though it allowed that “laws may be passed to facilitate its operation, as long as they do not restrict or limit the provision or the powers therein reserved.”); *Link v. Public Utilities Com.* (1921), 102 Ohio St. 336, 338 (Article XVIII, § 5 self-executing); *Perrysburg v. Ridgeway* (1923), 108 Ohio St. 245 (Article XVIII, § 3, which provides that municipal corporations possess “* * * all powers of local self government and (may) adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws,” is self-executing).

C. Article II, Section 34a Creates an Independent Private Right of Action

Like the self-executing rule for ordering names on ballots in *Bliss*, Article II, Section 34a supplies sufficient rules for determining its coverage and enforcement of the rights it created. It requires that, “[e]xcept as provided in this section, every employer shall pay their employees a wage rate of not less than six dollars and eighty-five cents.” Article II, § 34a, Ohio Constitution. In addition, Section 34a precisely defines “employee” and “employer,” and it contains specific exemptions while prohibiting others. Section 34a specified a starting date (January 1, 2007), and adjusted the amount of the minimum wage annually “effective the first day of the following January by the rate of inflation” pursuant to a formula tied to the “consumer price index or its successor index . . . rounded to the nearest five cents.” *Id.* (emphasis added).

For enforcement, Section 34a allows that “[a]n 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 . . . for any violation of this Section” Employees can bring their Section 34a private right in civil court, where “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.” If a court finds an employer violated any provision of the Section, it requires the employer to pay all back wages, damages, costs, and attorney’s fees within thirty days. “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.” *Id.*

Section 34a thus “directly . . . imposes a duty upon an officer.” *Bliss, supra*, (here, Ohio employers). “[N]o legislation is necessary to require the performance of such duty.” *Bliss, supra*. Put another way, Section 34a “is self-executing (since) there is nothing to be done by the legislature to put it in operation.” *Id.*; 58 Clev. St. L. Rev. 367, 368. Consequently, every court to consider the question, with one exception, has held that Section 34a self-executes. The exception was the trial court in this case, which the Second District Court of Appeals overturned. *Frisby v. Keith D. Weiner & Associates Co., LPA* (N.D. Ohio 2009), 669 F. Supp. 2d 863, 869 (the court found an “express grant of a private cause of action” in Section 34a); *Craig v. Bridges Bros. Trucking LLC* (S.D. Ohio Aug. 6, 2013), 2013 U.S. Dist. LEXIS 110662 7 (Section 34a “expressly provides the right for an employee to bring an action for violation”); *Clark v. Shop24*

Global, LLC (S.D. Ohio Jan. 7, 2014), 2014 U.S. Dist. LEXIS 1464, 12-13; *Haight v. Cheap Escape Co.* (2d. Dist.), 2014-Ohio-2447, 11 N.E.3d 1258 (Section 34a “did not require any action by the Ohio General Assembly to implement its protections”); *Castillo v. Morales, Inc.* (S.D. Ohio Sep. 4, 2014), 302 F.R.D. 480.

In *Craig*, the federal court for the Southern District of Ohio found that Section 34a contained an “express grant of a private cause of action.” There, a bookkeeper alleged that her employer failed to keep the records that Section 34a required, and that she was terminated in retaliation for refusing to fabricate or falsify records when audited. The *Craig* court recognized that the provision was self-executing since it allows “action for equitable and monetary relief (to) be brought against an employer by . . . an employee . . . for any violation of this Section.” *Craig v. Bridges Bros. Trucking LLC*, 2013 U.S. Dist. LEXIS 110662 at 7.

Following *Craig*, two more federal courts considered the question and found that Section 34a self-executes. In *Clark v. Shop24 Global, LLC* (S.D. Ohio Jan. 7, 2014), 2014 U.S. Dist. LEXIS 1464, 12-13, the court found that “an employer’s failure to maintain accurate records is in itself a violation of Section 34a.” The *Clark* court reasoned that:

Section 34a mandates that employers maintain certain records and it also mandates that employers provide such records to employees upon request. Nothing in the language of Section 34a indicates that the two are dependent upon one another. As Judge Sargus held in *Craig*, an employer’s failure to maintain accurate records is in itself a violation of Section 34a. (citation omitted). The Plaintiff is correct in his assertion that the mere failure to keep the required records is a violation of Section 34a.

Id. Similarly, the *Castillo v. Morales* court held that:

Section 34a creates a precise framework, describing who is entitled to minimum wages, when its terms take effect, how to enforce the rights it establishes, setting forth a cause of action, damages, and a limitations period. The fact that the General Assembly is empowered to pass legislation to “implement its provisions and create additional remedies, increase the minimum wage rate and extend coverage of the section” hardly renders § 34a non-self-executing.

302 F.R.D. at 489. Significantly, the *Castillo* court had the benefit of the Second District’s ruling in this case to guide it. The *Castillo* court agreed “with the logic of the Second District Court of Appeals . . . that the provision is, as a matter of constitutional interpretation, self-executing.” *Id.* The *Castillo* court also considered, and rejected, the argument, made by Appellant Cheap Escape Company (“Cheap Escape”) here, that Section 34a depends on the General Assembly for implementation. That “argument defies both common sense and the text of § 34a by implying that Ohio voters enacted this constitutional amendment and specified its terms, definitions, exceptions, causes of action, limitations period, and available damages, including a clause mandating that the provision ‘be liberally construed in favor of its purposes,’ and yet in fact only set forth the ‘authority for the General Assembly to pass whatever legislation is necessary to enforce Section 34a.’ ”

D. Section 34a’s Self-Executing Private Right Covers Outside Salespeople

Since Section 34a is self-executing, the only question for this Court is whether the Second District Court of Appeals correctly interpreted it to cover “employees,” as defined by 29 U.S.C. § 203(e). With this, the Appellants’ amici agree. (Brief of *amici curiae* Ohio Council of Retail Merchants (OCRM) *et al.*, at 11) (“the important question is who is an employee for the purposes of Section 34a”). When interpreting a constitutional provision, this Court must liberally construe its terms to ensure they each have the meanings given to them by Ohio’s voters. *See, e.g., Miami County v. City of Dayton* (1915), 92 Ohio St. 215, 223, (“In construing a Constitution we apply the same general rules that we do in statutes, save and except that the terms of a Constitution must of necessity be of a more general and ominous character, and therefore, in order that the grants of power under the Constitution shall be workable, such grants should be favorably and liberally construed so as to effect the public welfare sought by the

constitutional grant.”). This is especially appropriate where, as here, the constitutional provision itself requires liberal construction in favor of its purposes. Art. II, § 34a Ohio Constitution.

This Court must therefore look first to the language of Section 34a. If its meaning of “employee” is clear, the inquiry ends there. If not, the Court can look to Section 34a’s purpose. *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, ¶ 14. The Court must give effect to the words used, and not delete words used or insert words not used. *Columbus–Suburban Coach Lines v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127 . Finally, the Court must construe “[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise,” according to such meaning. R.C. § 1.42.

Section 34a’s plain language defines “employee” (along with “employer” and other terms) to “have the same meanings as under the federal Fair Labor Standards Act (FLSA),” with one exception that does not exclude outside salespeople. The FLSA, in turn, defines “employee” as “any individual employed by an employer,” with exceptions that also do not exclude outside salespeople. 29 U.S.C. §203(e)(1). The FLSA’s plain meaning of “employee” therefore has the meaning that 29 U.S.C. § 203(e) gives it, and that meaning covers outside salespeople. *Chao v. First Nat’l Lending Corp.*, 516 F. Supp. 2d 895, 898 (N.D. Ohio 2006) (loan officer whom bank claimed was exempt as an outside salesperson was an “employee” under the FLSA). Since the meaning of “employee” is clear, the Court’s inquiry ends here.

E. FLSA Section 213 Exemptions do not Alter the FLSA or Section 34a Meaning of Employee

Although the meaning of Section 34a’s coverage term is clear, Cheap Escape and its amici want this Court to disregard the words the sponsors used and consider instead their intent—with this intent defined not by the amendment’s plain language, but instead solely by selected excerpts from the sponsor’s campaign literature. Those, Cheap Escape and its amici

claim, show that the sponsors intended for Section 34a to cover fewer Ohio employees and provide fewer rights than either the FLSA or the Ohio Fair Minimum Wage Standards Act (“OFMWSA”) then in effect, by interpreting the meaning of a Section 34a employee with reference to the FLSA exemptions in 29 U.S.C. § 213.

The language of Section 34a does not permit this. It does not exempt § 213 employees from enjoying any of the rights it created. To the contrary, Section 34a purposefully states that “[o]nly the exemptions set forth in this section shall apply to this section.” Section 34a likewise does not exclude § 213 employees from its coverage. If the sponsors wanted to exclude § 213 employees from Section 34a’s coverage, they could have done so. As an example, they could have used the pre-existing language from Ohio’s overtime statute, of which they were surely aware, and which explicitly stated that overtime would be paid to Ohio workers “in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the ‘Fair Labor Standards Act of 1938.’ ” R.C. 4111.03(A). Or they could have adopted more of the specifically enumerated exemptions listed in the prior OFMWSA (which quoted or paraphrased some of the exemptions in § 213, but omitted others). See 2006 Am. Sub. H.B. 690, Sec. 1 (amending prior R.C. 4111.01). Instead, Section 34a does not mention § 213 at all, incorporates some, but not others, of its exemptions, and some, but not others, of the exemptions in the OFMWSA, and explicitly bars all exemptions not contained in the amendment.

What Section 34a certainly would not have done to incorporate the coverage exemptions in Section 213 is reference the definition of “employee” in the FLSA without mentioning its exemptions. The FLSA’s coverage exemptions do not restrict or change the meaning of terms the statute defines. The FLSA regulates “employees.” Its exemptions do not redefine some

employees as non-employees; instead, they remove certain rights from those employees, while leaving them with others. As the Second District noted:

The exemptions from the 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 person in those categories from the definition of an employee.

Haight, 2014-Ohio-2447 (emphasis in the original).

Section 213 itself demonstrates that exempt employees remain employees. For instance, it states, “[t]he provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection)” shall not apply to the employees identified in § 213(a) and (b). Subsection (d) of § 206 is the Equal Pay Act. 29 U.S.C. § 206(d). It prohibits pay discrimination on the basis of sex for substantially equal work. *Id.* The FLSA’s Equal Pay Act refers to “employees” *five times*. *Id.* (“No employer having **employees** subject to any provisions of this section shall discriminate, within any establishment in which such **employees** are employed, between **employees** on the basis of sex by paying wages to **employees** in such establishment at a rate less than the rate at which he pays wages to **employees** of the opposite sex in such establishment for equal work”) (emphasis added). Although § 213 (a)(1) takes away outside salespeople’s right to the FLSA’s minimum wage, it does not take away their right, as employees, to be free from pay discrimination on the basis of sex.

Outside salespeople also remain “employees” under the FLSA’s anti-retaliation provision:

Section 215(a)(3) prohibits retaliation “against any *employee*” because the employee sued the employer to enforce the (FLSA’s) substantive rights. An “employee” does not, in the (FLSA), exist in a vacuum; rather it is defined in relationship to an employer. Section 203(e)(1) provides that an employee is “any

individual employed by an employer.” Thus, by using the term “employee” in the anti-retaliation provision, Congress was referring to the employer-employee relationship, the regulation of which underlies the (FLSA) as a whole, and was therefore providing protection to those in an employment relationship with their employer.

Dellinger v. Sci. Applications Int’l Corp. (4th Cir. 2011), 649 F.3d 226, 228-229. Since a § 213(a) employee remains an employee for the FLSA’s equal pay and anti-retaliation protections (and, as discussed below, many of its record-keeping requirements), the § 213 exemptions do not add to or alter the meaning of the term “employee.” Although exempt from the federal minimum wage, Msrs. Haight and Pence remain “employees” covered by the FLSA’s equal pay and anti-retaliation provisions. Finally, as discussed more below, the FLSA creates record-keeping rights for exempt employees. 29 CFR § 516.

If this Court removed FLSA exempt employees from Section 34a’s coverage, it would send Section 34a veering away from the track intended by its sponsors. Section 34a would cover fewer people than both the FLSA and the OFMWSA, and would provide fewer rights. While the FLSA covers outside salespeople and other § 213 exempt employees and protects them from retaliatory termination, Section 34a would not. Removing FLSA exempt employees from Section 34a’s coverage would also erect substantial hurdles for plaintiffs, and split the burden of proof between the parties in a combined FLSA and Section 34a action. *Fox v. Lovas*, 2012 U.S. Dist. LEXIS 27908, 7 (W.D. Ky. Mar. 1, 2012). The *Fox* court reached this conclusion in a case involving the Kentucky Wage and Hour Act (“KWAHA”), which defines employees to exclude outside salespeople in a way similar to what Cheap Escape wants the Court to do in this case. *See* KRS § 337.010(2)(a)(2) (“Employee’ . . . shall not include '[a]ny individual employed in a bona fide executive, administrative, supervisory, or professional capacity, or in the capacity of outside

salesman"). The *Fox* court noted that this "erects substantial hurdles" for plaintiffs and puts them "at a double disadvantage" in their efforts to recover unpaid wages due to them:

Whereas the FLSA includes bona fide administrative employees in the definition of "employee" and then exempts them from the overtime pay provision, the same provision in the KWHHA never covers such individuals because they are not "employees." As a result, "while the employer bears the burden of proving an employee is exempted from the overtime provision in the FLSA, an individual seeking overtime wages under the KWHHA bears the burden of proving that she is an "employee."

Id. This structural difference between the FLSA and Cheap Escape's reading of Section 34a thus creates a split in "the burden of proof between the parties under the federal and state acts." *Id.* That is precisely the opposite of what the sponsors intended. They explained that Section 34a "provides enforcement measures, *similar to the federal minimum wage law*, so Ohioans can protect themselves against unscrupulous employers." See Ohio Ballot Board, *Ohio Issues Report*, "State Issues Ballot Information for the November 7, 2006 General Election." (Attached as Appendix A to Brief of Amici Curiae OCRM et al. (emphasis added)).

The sponsors made Section 34a's meaning of "employee" clear with the words they used. Those words cover outside salespeople. Since Section 34a's failure even to mention FLSA exemptions defeats Cheap Escape's proposed meaning of employee, and because the sponsors could not have intended Section 34a to cover fewer employees, and provide fewer rights, than either the FLSA or the prior version of the OFMWSA, this Court must affirm the Second District's holding that Section 34a covers outside salespeople.

F. Campaign Literature Does not Evince a Sponsor Intent to Exclude § 213 Employees

Section 34a adopted the FLSA's meaning of "employee." It did not mention § 213, much less incorporate its exemptions as exclusions from Section 34a's coverage. Deprived of any language referring to § 213, Appellants' amici grasp at excerpts from sponsor campaign

literature referenced in H.B. 690. Notably, the literature itself (and therefore, any explanatory context the full literature could provide) is nowhere in the record, it is not quoted directly or in its entirety in either the briefs or H.B. 690, and it does not appear to be available online. This is an incredibly thin and unreliable reed upon which to hang the shocking assertion that the drafters of Section 34a intended to adopt a definition of “employee” that *narrowed* the existing coverage of Ohio’s minimum wage law. And it is substantially less reliable than, for instance, the carefully vetted language of the official statements that were presented for and against the proposed amendment, including the opponents’ own assertion that the amendment would impose record-keeping requirements related to non-hourly employees. (Brief of OCRM, Appendix A).

Even assuming the General Assembly’s summary of this single piece of campaign literature were a reliable indicator of the drafters’ intent, it would not support the Appellants’ proposed interpretation. The literature is simply supposed to have sent the message that borrowing the definition of “employee” and other words from the FLSA would allow Ohio to rely on federal precedents interpreting those terms. This advantage to using parallel definitions would be true whether or not the amendment also incorporated the FLSA’s exemptions.

The only other message the Appellants’ amici cite was that “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.” (Brief of OCRM, et al., at pp. 7-8). Appellants’ amici argue that this was a signal that employers would not need to keep records of any kind for FLSA-exempt employees. This cannot be true.

First, the amici ignore the word “irrelevant,” and instead pretend the proponents promised that no records would need to be kept for FLSA-exempt employees. Second, they ignore the fact

that even under federal law, employers must keep all sorts of records for FLSA-exempt employees. In fact, the FLSA itself requires employers to “maintain and preserve” certain records for “each employee in a bona fide executive, administrative, or professional capacity . . . or in outside sales.” 29 CFR § 516.3. Those records must contain “all the information and data required by §516.2(a) except paragraphs (a) (6) through (10) and, in addition, the basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee’s total remuneration for employment including fringe benefits and prerequisites”). *Id.*²

In short, if this campaign flyer had been intended to state that non-hourly employees would be exempt from any record-keeping requirements, it would not have linked these requirements to federal law, which *does not* exempt salaried or commission-only employees from most such requirements. It would have simply said that none of the amendment’s requirements would apply to these workers. It did not say that because this was not true.

V. The Non-Impairment Clause of Article II, Section 34 Does Not Affect Actions Filed Pursuant to Section 34a for Two Separate Reasons: 1) Section 34a Superseded Section 34 Providing Specific Constitutional Protections Related to Minimum Wages for Ohio Employees While Leaving the Legislature Free to Adopt more Expansive or Protective Statutes; and 2) Section 34’s Non-Impairment Clause is not Implicated Because 34A (Which is Self-Executing) and Section 4111.14 are Independent of Each Other.

The Amici for Appellant, ignoring common sense and established rules of statutory and constitutional construction, ask this court to recognize a new, heretofore unheard of species of “super” amendment to the Ohio Constitution. The provisions of such super constitutional

² This is yet another example of the principle that the meaning of “employee” under the FLSA includes minimum wage exempt employees. Like the FLSA’s retaliation provision, these record-keeping regulations apply even to employees who are exempt from the minimum wage under § 213. This is fundamentally inconsistent with the notion that the meaning of “employee” in the FLSA does not include exempt employees.

amendments cannot be changed or modified, even by subsequent constitutional amendments to the same constitutional section concerning the same subject area – EVER.

Here, appellants’ amici claim that Article II, Section 34 (which authorized the legislature to approve employee protective laws such as minimum wage statutes) is such a super provision because it contains language stating, “...no other provision of the constitution shall impair or limit this power.” Appellants’ amici contend that Article II, Section 34a, overwhelmingly adopted by Ohio citizens through an initiative to provide standards and procedures governing new constitutional minimum wage requirements, can be legislatively ignored or modified by the General Assembly as it pleases because of this language.

The implications of amici’s unsupported new proposed principle of constitutional jurisprudence are astounding. If adopted by this court, it would mean that such language in a previously adopted constitutional amendment would bar any subsequent effort to modify the earlier provision whether by initiative or otherwise. The ability to amend a variety of constitutional provisions would be eliminated.

The amici’s attempt to immunize provisions of the Ohio Constitution from amendment is contrary to precedent, constitutional jurisprudence and practice and common sense. The well-established rule that subsequent legislative amendments supersede contrary existing legislative provisions is equally applicable to constitutional amendments. *State v. Ward*, 2006-Ohio-1407, ¶18, 166 Ohio App. 3d 188, 849 N.E.2d 1076 (2nd Dist.), *rev’d on other grounds sub nom. In re Ohio Domestic-Violence Statute Cases*, 2007-Ohio-4552. After all, the very notion of an amendment is to supersede and modify the existing statute or constitutional provision being addressed. This is also consistent with the clear meaning and intention of the non-impairment clause in section 34 which was to prevent application of other existing provisions in the Ohio

constitution from being used to limit legislative efforts to adopt protective workplace laws, as was happening during the time period of its adoption. Such non-impairment clauses cannot be used for the purpose of prohibiting or nullifying properly adopted subsequent amendments to the very provision containing them.

Of course, this case does not actually present the question of whether Section 34a violates the non-impairment clause in section 34. Since 34a is self-executing and independent of the current version of section 4111.14 adopted by the legislature, both are in effect and available to employees. In this action, the pending claim is based solely on the Ohio constitutional minimum wage provision. No claim is made under the statute and neither the statute nor 34a are limited by each other.

VI. If Section 34a does not Self-Execute, then ORC § 34a unconstitutionally restricts Section 34a’s coverage of Ohio Employees.

If Section 34a’s detailed rights and rules do not self-execute, then R.C. Section 4111.14(B)(1)’s exclusion of outside salespeople and other FLSA exempt employees unconstitutionally restricts Section 34a’s coverage provision. The plain language of Section 34a removes certain individuals from its definition of “employee,” and they do not include outside salespeople. In contrast, R.C. § 4111.14(B)(1) states that “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.*” (Emphasis added). Section 4111.14(B)(1) thus excludes an entire, additional set of employees from Section 34a’s coverage, being those exempted from the federal minimum wage requirement. Since R.C. 4111.14(B)(1) excludes a set of employees from Section 34a that Section 34a covers, it unconstitutionally restricts Section 34a’s provisions.

Finally, reversing the Second District would make a mockery of Ohio's constitutional initiative and petition process. If the General Assembly can strip constitutional rights from entire classes of workers merely by passing a law, it could eviscerate any constitutional provision it wanted, at any time, for any reason. Overturning the Second District's decision would give the General Assembly free reign to exclude even more employees from Section 34a's coverage. Section 34a's own language, and bedrock constitutional principles, do not permit this.

Section 34a did not incorporate the FLSA's exemptions. Section 4111.14 did. Its exclusion of FLSA exempt employees from Section 34a's coverage is unconstitutionally restrictive. Cheap Escape and its amici are simply wrong. Section 34a does not remove FLSA exempt employees from its coverage. The clear and unequivocal meaning of Section 34a allows only one conclusion, that Section 4111.14, if necessary to effectuate Section 34a's terms, unconstitutionally restricts them.

VII. Limiting a Decision Affirming that Section 34a Covers Outside Salespeople to Prospective Application Would Be Unjustified and Would Reward Scofflaw Employers While Punishing Low-Income Families and Employers Who Complied with the Law.

Section 34a, by its terms, was to take full effect on January 1, 2007. For the first time in this case, the Appellants argue that, assuming this Court follows the plain language of the amendment and affirms the Second District's holding, it should excuse Cheap Escape and all other Ohio employers from any responsibility for complying with Section 34a's requirements prior to this Court's ruling. Such prospective application would be an unprecedented departure from this Court's jurisprudence and the rule of law in general, and it would overrule the explicit intent of the Ohio voters who overwhelmingly approved Section 34a.

Prospective application of a rule of law is justified only in exceptional circumstances. It is not intended to delay the application of a duly enacted statute or constitutional provision until

this Court has the opportunity to resolve a disputed question of statutory interpretation; instead, it is reserved for those rare circumstances when this Court or the lower courts have previously adopted one position on a disputed question and then unexpectedly reverse course, creating inequitable results. See *Berlin Twp. Bd. of Trustees v. Delaware Cty. Bd. of Commrs.*, 194 Ohio App. 3d 109, 2011-Ohio-2020, 954 N.E.2d 1264, ¶ 34 (distinguishing between these two circumstances and applying statutory interpretation retroactively).

The principle that must follow from the plain language of Section 34a cannot be considered new, surprising, or a reversal of course in any sense. The group opposing Section 34a, Ohioans to Protect Personal Privacy, adopted an Explanation and Argument Against the amendment that warned Ohio voters that the amendment they overwhelmingly approved would give “employees or any person acting on behalf of an employee the right to demand salary records for all employees (not just hourly workers).” (Amicus Brief of OCRM, et al., Appendix A). This meant the opponents of the amendment believed at the time it was passed that the term “employee” as defined in Section 34a would cover non-hourly workers. The Ohio Manufacturers’ Association took the same position prior to the amendment’s approval, stating that the records referenced in Section 34a “must be kept for virtually all employees – not just hourly employees but also employees in executive, administrative, professional or sales positions.” Ohio Manufacturers’ Association, 2006, “Employment Records May Become Public Information.” [<https://www.ohiomfg.com/communities/human-resources/employment-records-may-become-public-information/>]. Now, the very same opponents³ assert to this Court that the

³ Ohioans to Protect Personal Privacy was organized and funded by many of Appellants’ amici (see, e.g., <http://www.followthemoney.org/entity-details?eid=10239499>), and its official statement opposing the amendment was signed by representatives of the Ohio Chamber of

definition was never intended to cover non-hourly workers. Their recent change of heart cannot obscure the fact of the matter: businesses in Ohio and their advocates were on notice that Section 34a expanded the class of individuals who would be eligible for the minimum wage and its attendant record-keeping requirements. They vehemently opposed the amendment on that very basis, but the voters resoundingly disagreed.

Beyond their self-serving, and demonstrably false, claim of surprise, the Appellants and their amici rely upon informal guidance to the contrary from the Ohio Department of Commerce, which published a summary of Ohio's minimum wage requirements on an annual basis. (Amicus Brief of OCRM, et al., Appendix B). But a closer look at this guidance reveals that—even if it were somehow sufficient to overrule a duly enacted constitutional amendment—it does not even support the Appellants' interpretation of Section 34a. Instead, the Department of Commerce provides a list of exemptions that goes beyond the exemptions listed in Section 34a, but leaves out a substantial number of the FLSA Section 213 exemptions the Appellants claim are incorporated in Section 34a by implication. It appears closest to the list of exclusions from the definition of employee in Ohio's overtime law, R.C. 4111.03, and the pre-Section 34a Ohio minimum wage law. No one examining this guidance document in conjunction with Section 34a, the FLSA, and R.C. 4111.14 could reasonably rely upon it as a way to determine whether an employee was eligible for Ohio's minimum wage.

At most, the Department of Commerce document, in conjunction with the widely publicized statements by Appellants' amici opposing Issue 2, would put employers on notice that the law had changed, warranting caution, that consulting an employment attorney would be wise,

Commerce, the Ohio chapter of the National Federation of Independent Businesses, and the Ohio Council of Retail Merchants, all of whom are amici curiae for the Appellants here.

and that any decision to disregard Section 34a would be at their own peril. Employment attorneys, meanwhile, were amply warned of the conflicting definitions in Section 34a and R.C. 4111.14(B)(1) and the risk to employers who simply disregarded the clear coverage mandate of Section 34a. For instance, the Ohio State Bar Association published a notice in a 2007 edition of *Ohio Lawyer* advising employers to:

proceed with caution before exempting employees from the minimum wage based on the exemptions created by H. B. 690, the implementing legislation. Those exemptions may be subject to challenge as unconstitutional. Exemptions that may be challenged include:

- Agricultural workers;
- Police or fire protection employees;
- Newspaper delivery employees;
- Seasonal amusement or recreational employees, including summer camp counselors; and
- Outside salespeople.

The OSBA Labor and Employment Law Section recommends that employers obtain the advice of employment law counsel before relying on these exemptions.

Ohio Lawyer, March/April 2007, pg. 10 (emphasis added).

If employers were somehow confused or uncertain of their obligations despite such warnings, the solution was not to pay their FLSA-exempt workers less than Ohio's minimum wage (or, as was the case for some of Cheap Escape's employees, nothing at all) and hope these employees never realized they might be covered. Instead, their recourse was either to err on the side of compliance with the law or else to seek a declaratory judgment establishing their right to pay a lower wage. Many employers, guided by common sense and the advice of their duly warned employment counsel, no doubt followed the wiser path of complying with the plain language of the Constitution. A decision of this Court limiting the Second District's holding to prospective application would punish employers who respected the law, while rewarding their scofflaw competitors.

Prospective application here would be an invitation to mischief on a number of levels. Judicial review of any new statute or constitutional amendment takes some time, and this Court's procedure is to take up only those cases that are of particular importance—often only after a conflict develops among the lower appellate courts. The rule of prospective application the Appellants propose would mean that no law could truly take effect until years after the fact.

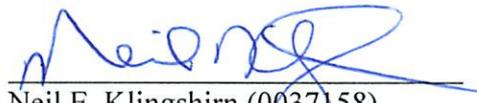
This would be particularly true where, as here, the voters purposefully bypass the legislature and directly approve a constitutional amendment, only for the General Assembly to adopt legislation purporting to alter the effect of that amendment. The Appellants seem to argue that they should not be held accountable for underpaying (or failing to pay) their employees because they were relying on the definition of “employee” passed by the General Assembly. In other words, even though the General Assembly, by passing House Bill 690 following the adoption of Section 34a, had no authority to overrule or contradict Section 34a, it did have the power to create a conflict that only this Court could conclusively resolve, thereby effecting a substantial delay in the amendment's effective date. Of course, such a rule of “when in doubt, apply the law prospectively” would bear no relation to this Court's longstanding presumption against prospective application of its decisions, and it would grant the legislature unprecedented power to interfere with duly enacted constitutional amendments.

If this Court was to credit such arguments, it would not only be departing from its own established presumptions, it would be working a tremendous injustice in the most practical terms. Employers who have been well aware of an unresolved legal question for seven years (personally, through their employment counsel, or through their advocacy organizations) would be granted blanket amnesty for a pattern of underpayments to their lowest-paid employees. Meanwhile, despite the clearly stated intent of Ohio's voters to provide something closer to a

living wage for all Ohio workers, a broad class of the lowest-paid employees in Ohio would be denied the relief secured through a hard fought electoral victory. This is not just a question of the competing “equities” considered in determining whether to apply a decision prospectively. It is a question of whether Ohio’s employees, and the voters who support their rights, can ever be assured that a victory at the ballot box will translate into a victory in the workplace.

For all of the above-stated reasons, this Court should affirm the decision of the Second District Court of Appeals.

Respectfully Submitted,



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