ORIGINAL

IN THE SUPREME COURT OF OHIO

John Haight, et al.,	:	
	:	Supreme Court Case No. 2014-1241
Plaintiffs/Appellees,	:	
	:	Appeal from the Montgomery County
v.	:	Court of Appeals, 2nd District
	:	
The Cheap Escape Company, et al.,	:	Appeal No. CA 25983
	:	
Defendants/Appellants.	:	Trial No. 2012 CV 00946

REPLY BRIEF OF AMICUS CURIAE OHIO COUNCIL OF RETAIL MERCHANTS, OHIO CHAMBER OF COMMERCE, OHIO CHAPTER OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, OHIO FARM BUREAU FEDERATION, AND OHIO MANAGEMENT LAWYERS ASSOCIATION

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

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 2

I. The history of Section 34a clearly demonstrates no intent to alter the coverage of the minimum wage and related recordkeeping requirements 2

A. Simple math supports the Appellants' position 2

B. Proponents campaign literature establishes no intent to require irrelevant recordkeeping 3

II. Appellees' position creates greater complexity in Ohio wage hour law 4

III. Interpreting Section 34a is simple 5

A. Section 34a references the FLSA, not a particular section of it 5

B. Section 34a's reference to "exemptions" demonstrates the intent to include exemptions traditionally recognized in Ohio and federal law 6

IV. Whether Section 34a is self-executing is not the real issue; what exemptions are included is the real issue 8

V. Adopting Appellees' position will open the floodgates for class action litigation, including over technical recordkeeping violations 9

A. Class action litigation against employers who have done nothing wrong will result 9

B. Employers have properly relied on appropriate sources for guidance on their minimum wage obligations 10

VI. The harm to Ohio from affirming the Second District's decision cannot be ignored or minimized 11

A. The Second District's opinion will lead to a devastating and radical restructuring of the status quo 11

B. Appellee's approach is unworkable and impractical 12

C. Technological fixes are speculative and do not address the unwarranted burden imposed on employers 13

CONCLUSION 14

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Cases

Burry v. Nat'l Trailer Convoy, Inc., 338 F.2d 422 (6th Cir. 1964) 9

Fegley v. Higgins, 19 F.3d 1126 (6th Cir.1994) 9

Haight v. Cheap Escape Co., 2014-Ohio-2447, 11 N.E.3d 1258 (2d Dist) 2, 7

Keeton v. Time Warner Cable, Inc., S.D. Ohio No. 2:09-CV-1085, 2011 U.S. Dist. LEXIS 71472 (July 1, 2011) 9

Renfro v. Ind. Mich. Power Co., 497 F.3d 573 (6th Cir.2007) 12

State v. Williams, 88 Ohio St.3d 513, 728 N.E.2d 342 (2000) 9

Yates v. U.S., No. 13-7451, 574 U.S. _____, slip op. at 9 (2015) 7

Statutes

2006 Am.Sub.H.B. No. 690, Section 6 ..... 4, 9

29 C.F.R. § 531.59 8

29 C.F.R. Ch. V 7

29 U.S.C. § 203 8

29 U.S.C. § 213 ..... 4, 7, 8

Ariz. Rev. Stat. Ann. 23-362 6

R.C. 4111.01 4

R.C. 4111.14 ..... 6, 8, 10, 11

R.C. 4111.14(B)(1) 2

Other Authorities

Bryan Schwartz, Plaintiff Magazine, *Wage-and-Hour Class Actions: The Sky Is Falling (Or Is It?)* (Sep. 2012), http://plaintiffmagazine.com/Sept12/Schwartz_Wage-and-hour-class-actions_The-sky-is-falling-or-is-it.pdf (accessed Mar. 13, 2015) 13

Klingshirn, *Ohio's New Minimum Wage: Higher Wages, More Records, and Much Confusion*, Ohio Lawyer (March-April 2007) 9-10 11

The Ohio Ballot Board, *Ohio Issues Report*, "States Issues Ballot Information for the November 7, 2006 General Election." 3

Vogelzang, *The Tidal Wave of Wage and Hour Class Actions*, San Francisco Daily Journal (Apr. 23, 2010) 13

Constitutional Provisions

Article II, Section 34, of the Ohio Constitution 6

Article II, Section 34a, of the Ohio Constitution ..... passim

Nevada Constitution, Section 16, Article 15 6

INTRODUCTION

The Court of Appeals has adopted an interpretation of Article II, Section 34a of the Ohio Constitution that radically expands burdensome recordkeeping obligations on Ohio employers. This result is not required by Section 34a, is not consistent with the purpose for the passage of Section 34a, and is not good for Ohio. Ohioans approved Section 34a to increase the minimum wage for 700,000 low income citizens. There is simply no suggestion in the Amendment itself, its official supporting statement, or in the proponents' campaign literature, that Ohio voters intended to extend minimum wage protections, and the related recordkeeping burdens, to a vast swath of employees who have **never** been entitled to minimum wage and did not require protection.

Appellees and their amici support the lower court's decision by attempting to **create conflict where none exists**. Section 34a refers to the "Fair Labor Standards Act" ("FLSA") and to "exemption**s**." It doesn't single out a particular section of the FLSA and a simple textual review of Section 34a makes clear that "exemptions" **must** refer to those found in the FLSA, as well as to the **only one** that is found in the text of the Amendment. The use of these terms makes clear that Section 34a incorporates exemptions like the outside sales exemption and the "white collar" exemptions found in the FLSA, and historically in Ohio law.

Accepting Appellees' argument **creates unnecessary complexity in Ohio law**. It imposes burdensome recordkeeping requirements on employers, the impracticality of which is demonstrated by Appellees' own assertion that all employers and employees in

Ohio "record their hours worked" like attorneys record their time.[1] Appellees' Br. 26. Moreover, the tone of the briefs from Appellees and their amici demonstrate that a **wave of class action litigation awaits Ohio employers** if this Court opens the floodgates.

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.

I. The history of Section 34a clearly demonstrates no intent to alter the coverage of the minimum wage and related recordkeeping requirements.

A. *Simple math supports the Appellants' position.*

The proponents' statement in support of the Amendment indicated that it was intended to benefit "700,000" "low wage" Ohioans. **The Second District's decision, however, eliminates essentially all exemptions to minimum wage in Ohio**, **which** according to the undisputed Census Bureau data amici[2] cited, **would have a sweeping effect on potentially millions** of Ohioans. *See* Ohio Council of Retail Merchants' ("OCRM") Br. 15-16. There is no way to read the opinion otherwise. The Court of Appeals flat out found that no exemptions from the FLSA were included in Section 34a. *Haight v. Cheap Escape Co.*, 2014-Ohio-2447, 11 N.E.3d 1258, ¶ 17-18 (2d Dist).

Even more significantly, those impacted are clearly not "low wage." Employees currently exempt, but who would lose their exemption under the lower court's decision,

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[1] Of course, attorneys do not record their time in order to be paid by their employer (for those who are so employed), but rather to bill their clients. It is also a chore that most attorneys intensely dislike.

[2] Amici represented in this brief include the Ohio Council of Retail Merchants, Ohio Chamber of Commerce, Ohio Chapter of the National Federation of Independent Business, Ohio Farm Bureau Federation, and Ohio Management Lawyers Association.

include doctors, attorneys, business executives, and judges, to name just a few. This is just the tip of an iceberg of employees who would have to begin keeping detailed records of their hours worked. Nowhere do Appellees or their amici dispute this point. Employers in Ohio would then have to regularly compare the earnings of these individuals each workweek to the minimum wage in order to ascertain if their earnings were high enough. Even if the salary was set at a level that was so high that minimum wage would surely be paid, employers and these employees would **still** have to engage in the meaningless and unnecessary task of recording hours worked. *See* Ohio Constitution, Article II, Section 34a. Clearly, Section 34a's purpose was to increase the minimum wage, not to expand or alter coverage of employees who – for decades – had been exempt from the minimum wage. *See* The Ohio Ballot Board, *Ohio Issues Report*, "States Issues Ballot Information for the November 7, 2006 General Election."

B. *Proponents campaign literature establishes no intent to require irrelevant recordkeeping.*

The campaign literature distributed by the proponents of the Amendment promised that employers would not need to keep "irrelevant" records. *See* OCRM Br. 7-8. Only the OELA responded to this argument. *See* Ohio Employment Lawyers' Association's ("OELA") Br. 20-21. Its confusing, straw man argument should be rejected. Amici do not ignore the word "irrelevant." It is the key word. Nor do amici maintain that "no" records must be maintained. Amici do not quibble with basic records like the employee's name, address, sex, Social Security number, etc. These records are required under federal law, as the OELA points out. *See id.* at 22.

The records that create the burden are those that would track the hours worked for employees who are "non-hourly," to use the term the proponents used. *See* 2006

Am.Sub.H.B. No. 690, Section 6. Records of hours worked for those employees are truly "irrelevant" because they do not relate to how the employee is compensated. Nor are those records necessary to ensure minimum wage compliance because the employees would not be eligible to receive the minimum wage. Moreover, basic recordkeeping requirements do not explain what Section 34a means when it refers to the FLSA and to exemptions from the minimum wage obligation. Section 34a clearly intended to include all FLSA exemptions.

II. Appellees' position creates greater complexity in Ohio wage hour law.

A mainstay of Appellees' and their amici's[3] position is their observation regarding the differing coverage of the FLSA, Ohio's overtime pay law, and Section 34a. *See* Ohio Association for Justice's ("OAJ") Br. 13-16; 29 U.S.C. § 213; R.C. 4111.01; Ohio Constitution, Article II, Section 34a. Focusing on the word "employee" in these three separate enactments, and comparing it to the minimum wage law that was in effect prior to Section 34a's enactment, they count up the numbers of exemptions under each. They conclude that there are differing numbers of exemptions, then make an inference that somehow Section 34a must not include the FLSA exemptions. *See* Appellees' Br. 11-13.

This numbers game ignores the rationale behind the hours tracking requirement. The state overtime law, which Appellees and the OAJ admit also references the FLSA, exempts from its coverage the employees at issue in this case, and many others. Thus, there is no need to track the hours worked of those employees under that statute. Similarly, Appellees concede that the FLSA exempts an even

[3] The OAJ primarily advances this argument in support of Appellees. *See* OAJ Br. 13-16.

broader collection of employees from minimum wage **and** overtime pay requirements. Included in these exemptions are outside salespersons, so there is no need to track their hours worked under the FLSA either.

Yet under the Appellees' interpretation, Section 34a would create an even more narrow category of employees who would be exempt from its minimum wage obligation. In other words, **if the decision below is allowed to stand, employers will have comply with not just a federal and state standard, but three different standards**: (1) a federal standard, which requires no tracking of hours worked for a group of employees for overtime **and** minimum wage purposes; (2) a state overtime standard, which requires no tracking of hours worked for an employee group for overtime pay purposes; but (3) a state minimum wage constitutional standard, which will require tracking of all hours worked for minimum wage purposes of a different employee group.

So, under state law as the lower court determined it to be, even though employees are exempt and do not have to track and be paid overtime for hours worked over 40 in a week, their employers would still have to track employees' hours to ensure compliance with minimum wage. Section 34a's reference to the FLSA could not have intended this result. Rather, Section 34a surely intended to harmonize these varying requirements, while still giving an hourly pay raise to 700,000 low-wage, hard-working Ohioans.

III. Interpreting Section 34a is simple.

A. *Section 34a references the FLSA, not a particular section of it.*

Appellees and their amici point out repeatedly that Section 34a does not reference Section 213 of the FLSA. That section contains the exemptions to the minimum wage obligation under federal law. They ignore, however, that **Section 34a**

also does not explicitly reference the definition section of the FLSA, Section 203, the one on which Appellees rely to expand minimum wage coverage.[4] **Indeed, there is no language in Section 34a that limits the reference to the FLSA to any particular subsection of the FLSA**. Whether other states used or did not use the same language as Ohio is irrelevant. The Court must interpret the actions of Ohio voters, not what voters did in states thousands of miles away from the nearest Ohioan who would be injured by making the Second District's decision law of the state.[5]

Because Section 34a spells out no limitation in citing to the FLSA, there can be no conflict between R.C. 4111.14 and Section 34a. The former is constitutional. The latter includes exemptions found in the FLSA.

B. *Section 34a's reference to "exemptions" demonstrates the intent to include exemptions traditionally recognized in Ohio and federal law.*

1. *"Exemption," in the wage/hour context, is a term of art.*

When used in the wage/hour context, the term "exemption" is a term of art. It has grown up in decades of jurisprudence, and is found in the FLSA's text, case law, and regulations. *See* 29 U.S.C. § 213; *see generally* 29 C.F.R. Ch. V. Under the FLSA,

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[4] The entirety of the Appellees' position depends on making this logical leap. They entice the Court into making it by reference to arguments regarding what the word "meanings" means. Amici here join with and support the argument on those terms made in Appellants' merits brief. While that is an important issue, amici here believes that what was intended when the FLSA was referenced is the critical question.

[5] Indeed, even if the evidence is considered, it does not support Appellees. For example, the Nevada law does not reference the FLSA at all. *See* Nevada Constitution, Article 15, Section 16. Thus, Ohioans must have intended something different from Nevadans when Ohioans voted for an amendment that did reference the FLSA. The Arizona law references the FLSA once, but does so with specificity that is lacking in Section 34a. *See* Ariz. Rev. Stat. Ann. 23-362. This suggests that the Ohio reference is broader in scope. Finally, there is no indication that the legislatures in those other states had a constitutional provision like Ohio's Article II, Section 34 that gave the General Assembly here independent authority to enact R.C. 4111.14.

an "exemption" functions as a complete avoidance of **any** minimum wage obligation. *See* 29 U.S.C. § 213. Appellees' assertion to the contrary, Appellees' Br. 12, is incorrect. Interpretation of any term doesn't turn solely on a common dictionary definition, but must instead be determined by reference to the specific context in which the language is used and the broader context of the enactment as a whole. *See Yates v. U.S.*, No. 13-7451, 574 U.S. _____, slip op. at 9 (2015). Thus, when interpreting the word "exemptions" in Section 34a, the term must be understood in its wage/hour context, not any common dictionary meaning.

The Second District at least recognized this, when it distinguished between an exemption and an exclusion. This "tortured definition," as Appellee calls it, is not one invented by amici here. It comes directly from the lower court. *See Haight*, 2014-Ohio-2447, 11 N.E.3d 1258, at ¶¶ 16-18. Even the OELA agrees, albeit *sub silentio*, with the definition. *See* OELA Br. 6, 24.

2. *Applying this term of art, Section 34a allows for the recognition of exemptions traditionally found in Ohio law.*

Applying the appropriate definition of the term, there is only one exemption in the text of Section 34a. That applies to **employees** of family-owned businesses who are family members of the owners. The sub-minimum wage provisions, which Appellees and their amici attempt to turn into "exemptions," are simply not "exemptions" as that term has been applied in the wage/hour context. Those employees must still be paid a minimum wage, albeit one that is lower than what other employees who are entitled to full minimum wage are paid. Appellees' version is **inconsistent** with the meaning of that term as used in the FLSA. *Compare* Appellees' Br. 12 *with* 29 U.S.C. § 213. **If the**

employee is exempt, the employee is not entitled to any minimum wage – subminimum or otherwise.

For confirmation, one need look no further than tipped employees. This is one of the provisions in Section 34a that Appellees maintain is an "exemption." But it receives no such treatment under the FLSA. Indeed, under the FLSA tipped employees do not appear in the list of minimum wage exemptions in Section 213. *See* 29 U.S.C. § 213. Rather, the term appears in various definitional sections and is further expanded upon in the DOL's regulations. *See, e.g.,* 29 U.S.C. § 203; 29 C.F.R. § 531.59. Appellees' interpretation twists the commonly accepted meaning and treatment of the term "exemption" and should be rejected.

IV. Whether Section 34a is self-executing is not the real issue; what exemptions are included is the real issue.

Whether the Amendment is self-executing is a red herring. *See* OCRM Br. 21-22. The real issue is what exemptions were incorporated into Section 34a given its reference to the "Fair Labor Standards Act" and to the word "exemption**s**." Because Section 34a is not self-executing,[6] Appellants position should be sustained on this additional ground. That is, if Section 34a requires R.C. 4111.14 for implementation, then obviously Appellees have no cause of action because the statute clearly makes outside salespersons exempt. On that point, there is no dispute.

In the many pages of argument on this self-executing issue, however, an important point has been lost. **Section 34a refers to the term "independent contractor" and states that it shall have the meaning found in the FLSA.** Ohio

[6] Amici here join in the Appellants' argument on that issue, to the extent the Court determines to address it.

Constitution, Article II, Section 34a. **In fact, however, the term "independent contractor" is not defined in the FLSA.** Section 203, on which Appellees and the lower court so heavily rely, contains no such definition. *See* 29 U.S.C. § 203. Rather, the case law under the FLSA has defined the term. *See, e.g. Fegley v. Higgins*, 19 F.3d 1126, 1132, fn. 6 (6th Cir.1994); *Burry v. Nat'l Trailer Convoy, Inc.*, 338 F.2d 422, 424 (6th Cir. 1964); *Keeton v. Time Warner Cable, Inc.*, S.D. Ohio No. 2:09-CV-1085, 2011 U.S. Dist. LEXIS 71472 at *7-8 (July 1, 2011).

Two significant conclusions flow from the way Section 34a refers to "independent contractor." First, Section 34a cannot be "self-executing" when a key term going to the extent of its coverage is left undefined. *See State v. Williams*, 88 Ohio St.3d 513, 521, 728 N.E.2d 342 (2000). The General Assembly was required to act to clarify the Amendment. **Second, it supports the argument in Section III.A, *supra*, that the reference to the FLSA in Section 34a cannot possibly be intended to refer only to Section 203.** If that were the case, then a term purportedly defined in the Amendment would in fact have no definition. It explains why proponents assured voters that the Amendment would be interpreted consistent with the FLSA's "regulations, settled case law, or both." 2006 Am.Sub.H.B. No. 690, Section 6. Clearly, then, Section 34a included the entire FLSA, which must necessarily incorporate the exemptions found therein.

V. Adopting Appellees' position will open the floodgates for class action litigation, including over technical recordkeeping violations.

A. *Class action litigation against employers who have done nothing wrong will result.*

Section 34a provides for class actions. Ohio Constitution, Article II, Section 34a. Appellees sought early in this very lawsuit to convert their claim to a class action

complaint. The briefing in this case reveals that this weapon will be wielded if the Court permits it. For example, the OELA refers to "scofflaw" employers. Appellee's merits brief accuses Appellants of "breaking the law" and accuse Cheap Escape, now apparently bankrupt, Appellees' Br. 3, of making "substantial profits" as a result of a "business model" allegedly noncompliant with wage/hour law. *Id.* at 30. It also accuses Ohio employers generally of engaging in "eight years of depriving Ohioans" of the benefits they perceive Section 34a to have granted. *Id.* at 2. Appellees even reference litigation over the number of hours employees work and the "right" of employees to have information about their hours worked even if they earn more than the minimum wage. *Id.* at 9-10. The Court need look no further to find a promise of future class action litigation over technical recordkeeping violations.

The image one gets is of a plaintiff's bar ready to bring lawsuits against employers who have done nothing wrong. Indeed, if Appellees here are outside salespersons,[7] then they were properly classified as exempt from minimum wage payments. So where is the "scofflaw" employer? Only by stretching Section 34a to apply to situations to which it was never intended to apply, can one conclude that the Appellant here, or any employer in Ohio for that matter, was somehow violating the law.

B. *Employers have properly relied on appropriate sources for guidance on their minimum wage obligations.*

The OELA makes the startling argument that employers should **not** have relied on the language of R.C. 4111.14 itself, the Department of Commerce's pronouncements, or the long-established federal precedents. Instead, the OELA

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[7] That factual issue was not presented to the lower courts, nor is it present or necessary to the decision here.

asserts, employers should have taken heed of an article in the Ohio Lawyer. OELA Br. 28. Clearly, this argument should be rejected. Advocacy pieces in a lawyers' magazine that employers, employees, and even some practitioners may never have seen do not trump the statute, the pronouncements of the agency charged with enforcing the minimum wage obligations in Section 34a, or the text of Section 34a itself.

Although the Court would not know it from the incomplete citation in the OELA's brief, counsel for the OELA authored the publication the OELA now relies upon. In fact, the article appears to accept the exemptions versus exceptions paradigm advanced by amici here. Klingshirn, *Ohio's New Minimum Wage: Higher Wages, More Records, and Much Confusion*, Ohio Lawyer (March-April 2007) 9-10. Moreover, the "notice" contained in that article does not reference the white collar exemptions, thus suggesting (under the OELA's own logic) that reliance on those exemptions remained proper. *Id.* at 10. Finally, it is interesting to note that the author of the article believed that R.C. 4111.14 "may be" unconstitutional, but now as counsel in litigation claims that it is unconstitutional.

VI. The harm to Ohio from affirming the Second District's decision cannot be ignored or minimized.

A. *The Second District's opinion will lead to a devastating and radical restructuring of the status quo.*

Appellees and their amici essentially concede, but wish the Court to minimize, the vast implications for wage/hour law in Ohio if the decision below is affirmed. They want nothing less than the complete elimination of exemptions long relied upon by employers, and understood and accepted by employees, from minimum wage and the related burden of tracking hours worked. Employers will now have to track hours worked and calculate whether the minimum wage has been satisfied every week for

potentially millions of employees. The ruling will also throw open the courthouse doors for class actions alleging technical, recordkeeping violations of the statute on behalf of employees who are paid a salary, and thus not reasonably within the description of "low wage."

B. *Appellee's approach is unworkable and impractical.*

Try as they might, Appellees and their amici cannot demonstrate that tracking hours for all of the individuals who would now be subject to recordkeeping obligations is even feasible. The nature of the work that exempt Ohioans perform means that there is a good reason why employers and those employees should not be required to track those hours of work. The very essence of the white collar exemptions, for example, is that they apply to employees whose work is not easily monitored or tracked. *See, e.g., Renfro v. Ind. Mich. Power Co.*, 497 F.3d 573, 577 (6th Cir.2007). For example, outside sales employees, as their name implies, work away from the employer's place of business, without direct or immediate supervision, and potentially at odd hours of the day, as may be necessary to meet the needs of customers. Employees in these jobs, and many others, do not work "nine to five," as Appellees suggest in their brief. Appellees' Br. 26. Rather, these employees "work," as that term is understood in the wage/hour context, at many different points during the day (and sometimes night).

It also underscores a point made in amici's opening brief. **Adopting Appellee's interpretation will harm employees.** OCRM Br. 19. Employees will have more rules and restrictions governing them, including those who are used to working without those restrictions. **For salaried employees, this is particularly punitive.** They will have to spend more time monitoring their hours worked, yet their salaries will in all likelihood

remain fixed. And to what end? Employees who can now work flexible hours will have to adhere to rigid recordkeeping.

C. *Technological fixes are speculative and do not address the unwarranted burden imposed on employers.*

Finally, technology does not address the problem. Purchasing (and then maintaining and upgrading) software is expensive and particularly burdensome on small employers and farmers. Moreover, its availability is speculative. Is an employer relying upon an agricultural exemption expected to purchase smartphones with an hours tracking application for each of its field laborers? Must every outside salesperson now receive a laptop or tablet computer to track every call made or every customer visited? And purchasing the technology is only the beginning of the additional cost. There is the cost of training employees on the proper and consistent use of the technology, storing the records, and setting up the different time tracking regimens for the FLSA, the state overtime statute, and Section 34a, as described Section II, above.

The OAJ asserts that employers should want to undertake all of this expense because tracking hours worked somehow avoids classification-related litigation. *See* OAJ Br. 16. It doesn't, as anyone familiar with California wage/hour class actions can attest.[8] What is more troubling, however, is that the OAJ encourages the Court to focus on the wrong issue. **Only by limiting the distinctions between federal and state law about which employees are exempt can employers avoid being surprised and trapped by classification-related litigation.**

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[8] *See* Bryan Schwartz, Plaintiff Magazine, *Wage-and-Hour Class Actions: The Sky Is Falling (Or Is It?)* (Sep. 2012), http://plaintiffmagazine.com/Sept12/Schwartz_Wage-and-hour-class-actions_The-sky-is-falling-or-is-it.pdf (accessed Mar. 13, 2015); *see also* Vogelzang, *The Tidal Wave of Wage and Hour Class Actions*, San Francisco Daily Journal (Apr. 23, 2010).

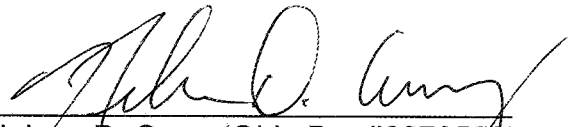
There is simply no way to soften the effect on Ohio employers of the Second District's opinion. The "solutions" are neither workable nor practical. All of them impose financial and other burdens on Ohio employers that employers in surrounding states do not have to shoulder.

CONCLUSION

Appellees' interpretation of Section 34a creates conflict where none need exist. The reference to the "FLSA" in Section 34a is not inherently limited to any particular section of that statute. Moreover, the language, appropriately read in the wage/hour context, clearly intends to incorporate more than just the single exemption found in Section 34a's text. While Section 34a was clearly intended to benefit employees in Ohio, it was only intended to benefit "low wage" Ohioans. There is no suggestion that well-established exemptions from the minimum wage that existed in Ohio and federal law for decades would vanish with the adoption of the initiative. The Chamber, the

Council, the OFBF, the NFIB-Ohio, and the OMLA, all urge this Court to hold in favor of Appellants.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Amicus Curiae was served by regular U.S. Mail, postage prepaid, upon the following counsel, this 16th day of March, 2015:

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