

IN THE SUPREME COURT OF OHIO

JOHN HAIGHT, et al.,)	Supreme Court Case No.: 2014-1241
)	
Plaintiffs/Appellees,)	On appeal from the Montgomery
)	County Court of Appeals, Second
vs.)	Appellate District
)	
ROBERT MINCHAK, et al.,)	Court of Appeals Case No. 25983
)	
Defendants/Appellants.)	Trial Court Case No. 2012 CV 00946
)	
)	

REPLY BRIEF OF DEFENDANTS-APPELLANTS, ROBERT MINCHAK AND JOAN
MINCHAK IN SUPPORT OF THEIR MERIT BRIEF

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INTRODUCTION

This Court confronts a simple but far-reaching decision. On one hand, the Court can keep Ohio's wage and hour laws consistent and find that R.C. § 4111.14(B)(1) is constitutional by simply looking to the "meaning" of employee as both pieces of legislation at issue require. This would be in complete conformity both with what the state of Ohio has publicized and with the federal Fair Labor Standards Act.¹ On the other hand, this Court can completely ignore its prior decisions about determining the constitutionality of statutes, change Ohio's longstanding adherence to the FLSA, and find that R.C. § 4111(B)(1) is unconstitutional.

The first finding – that R.C. § 4111.14(B)(1) is constitutional – would keep Ohio's minimum wage laws as they historically have been and currently are. However, the second option would break with current Ohio practice and federal law to usher in a period of utter uncertainty about one of the most fundamental questions in employment law – which employees are entitled to minimum wage – and create completely new categories of employees who suddenly are entitled to minimum wage, even though many are already receiving other forms of compensation, like commissions. This position is not supported in Ohio at all. Moreover, Appellees' central argument, that both "employee" and its general definition are unambiguous, is contrary to U.S. Supreme Court precedent.

STATEMENT OF FACTS

It is undisputed that Appellees are outside sales representatives. Appellees, like the majority of other Cheap Escape sales representatives, conducted their work outside the office, meeting with third parties in the hope of making sales. Sales representatives could work as much

¹ The Federal Fair Labor Standards Act will be referred to throughout this Reply as "FLSA".

– or as little – as they wanted. Their freedom came with certain limitations, however, because if sales representatives did not put in the work to make sales, they did not receive high commissions.²

Appellees’ version of Cheap Escape’s pay structure and the Appellees’ work schedule as set forth in their Brief is not supported by the record, and is simply not true. Appellees correctly state that Cheap Escape paid sales representatives on a commission basis. However, the record does not reflect Appellees worked forty hours a week, nor does it reflect business had been primarily conducted from one of Cheap Escape’s offices. Appellees simply invented these things for this appeal.

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. Article II, Section 34a and R.C. 4111.14(B)(1) exist together without conflict.

R.C. § 4111.14(B)(1) and Article II, Section 34a do not conflict, and are meant to work together to ensure certain employees (rather than almost every employee in Ohio) receive minimum wages. The language of each provision shows how easily the two work together. In pertinent part, Article II, Section 34a of the Ohio Constitution³ states:

The provisions of this section shall not apply to employees of a solely family owned and operated business who are family members of an owner.

² Appellees’ brief references Mr. Minchak’s alleged salary and possessions from twenty years ago, seemingly to gain sympathy from this Court. Even if this information were relevant or correct, what Appellees fail to mention is that the Cheap Escape went bankrupt. That is why it is not a part of this action. Years before it officially shut its doors, the Minchaks continued to pay their employees their earned wages while taking only small salaries. The Cheap Escape’s sales representatives agreed to their compensation structure, and many were able to earn a significant living by making sales and earning commissions.

³ Article II, Section 34a of the Ohio Constitution will be referred to throughout this Reply as “Article II, Section 34a”.

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.]

Similarly, R.C. 4111.14 provides:

(B) 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.)

Despite the similarity in the language, Appellees and the Second District find conflict in the provisions regarding which employees are entitled to minimum wages, and ask the Court to ignore any reasonable interpretation that show the provisions can work together.

When Appellees ask this Court to ignore any reasonable interpretations that show R.C. 4111.14 and Article II, Section 34a work together, they are asking this Court to completely disregard more than **one hundred forty years of state precedent** regarding constitutional construction and interpretation. *See* Appellees’ Brief, p. 15-16; *see also Gilpin v. Williams* (1874), 25 Ohio St. 283; *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575; *State ex rel Mack v. Guckenberger* (1942), 139 Ohio St. 273, 278. For these one hundred forty years, Ohio has always *required* that, in the review of legislation to determine whether it is constitutional, the courts must first attempt to harmonize the legislation with the constitution. *Gilpin v. Williams* (1874), 25 Ohio St. 283; *State ex rel Mack v.*

Guckenberger (1942), 139 Ohio St. 273. Unlike Appellees, the Minchaks are not requesting this Court to change the language of Article II, Section 34a or otherwise view one phrase of the provision in a vacuum. The Minchaks are simply asking the Court to view the constitutional provision's broad language in context, as required by both the United States Supreme Court and this Court. *See Yates v. United States*, 574 U.S. ____, 2015WL773330 (2015); *see also State ex rel. Mack v. Guckenberger* (1942), 139 Ohio St. 273, 278. Ohio law is clear:

The statute and constitutional provisions must be read together and so harmonized as to give effect to both when this can be done consistently. One of the tests of the constitutionality of a statute is whether it attempts to validate and legalize a course of conduct, the effect of which the Constitution forbids. If a legislative act does not override or interfere with the purpose and object of a constitutional limitation, it is not in conflict with the Constitution and therefore not invalid.

State ex rel. Mack v. Guckenberger (1942), 139 Ohio St. 273, 278. This has been the case in Ohio for more than seventy years. When read in context, Article II, Section 34a and R.C. 4111.14 are easily harmonized without overstepping the underlying purpose. If that is the case, according to Ohio's long-standing precedent, then R.C. 4111.14 is constitutional.

Appellees' position is utterly dismissive of the legislature and completely disregards the law.⁴ A statute has "a strong presumption of constitutionality." *State v. Bloomer* (2009), 122 Ohio St.3d 200, 2009-Ohio-2462, ¶ 41 (citing *State v. Carswell* (2007), 114 Ohio St.3d 210, 2007-Ohio-3723). Appellees have the burden to overcome this presumption by proving beyond a reasonable doubt that the statute and the constitutional provision are clearly incompatible and clearly irreconcilable. *State v. Carswell* (2007), 114 Ohio St.3d 210 (citations omitted). They make no

⁴ *See* Appellees' Brief, p. 31 ("Further, if the Court adopted the extraordinary measure of prospective application, the Court would ratify the legislature's unconstitutional act for a period of over eight years. Such a decision would send a message to the General Assembly that it is free to pass unconstitutional legislation, knowing that unconstitutional acts will be effective until someone finally expends the enormous sweat and treasure to obtain judicial review.").

effort to do so. Instead, Appellees place blame on the legislature, accusing it of intentionally enacting an unconstitutional statute. This is neither the law nor the standard. R.C. 4111.14 can be, and historically has been, harmonized with Article II, Section 34a. Appellees have not provided any evidence or argument to the contrary. That alone should lead to the conclusion that R.C. 4111.14 is, therefore, constitutional.

On the other hand, the Minchaks' position is supported by the law and complies with Ohio's current minimum wage practices. It is undisputed that the FLSA exempts certain categories of employees from receiving minimum wage. If one applies this common understanding to the reading of Article II, Section 34a, then R.C. 4111.14(B)(1)'s language makes sense and fully complies with the constitution. R.C. 4111.14 does not restrict Article II, Section 34a in any way; it merely clarifies its broad language. Therefore, the law requires R.C. 4111.14 to be upheld.

1. "Employee" cannot be defined in a vacuum.

Appellees would like this Court to believe Article II, Section 34a expressly and solely defines "employee" as "any individual employed by an employer." *See* Appellees' Brief, p. 15. It does not. In actuality, it states that "employee" has "the same meanings as under the federal Fair Labor Standards Act[.]" Appellees do not want this Court to look at the "meanings" of employee under the FLSA (even though both Article II, Section 34a and R.C. 4111.14 require exactly that). The drafters easily could have quoted the FLSA's **definition** of employee, as some other states did. They also could have cited to 29 U.S.C. § 203, the definitions section of the FLSA. Instead, they chose to incorporate the FLSA's *meanings* of the term for minimum wage purposes. The *meanings* include exemptions to the minimum wage requirements.

Appellees want this Court to look at a very limited definition of the word, and to define "employee" in a vacuum. However, the United States Supreme Court recently addressed the very

issue of whether, in constitutional construction, the reviewer can simply define a term's meaning in a vacuum rather than in the context of a broader enactment. See *Yates v. United States*, 574 U.S. ____, 2015WL773330 (2015). The Court expressly rejected that approach. Instead, it found that context matters.

In *Yates*, the U.S. Supreme Court addresses this point succinctly: “Ordinarily, a word’s usage accords with its dictionary definition. **In law as in life, however, the same words, placed in different contexts, sometimes mean different things.**” *Id.* at *6 (emphasis added). Moreover, whether a statute is clear or ambiguous requires the reviewer to look at “the specific context in which that language is used, and the broader context of the statute as a whole.” *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). This concept applies not only to statutory construction, but also to language in general. *Deal v. United States*, 508 U.S. 129, 132 (1993).

The U.S. Supreme Court pointed out:

We have several times affirmed that identical language may convey varying content when used in different statutes, **sometimes even in different provisions of the same statute.** See, e.g., *FAA v. Cooper*, 566 U.S. ____, ____, 132 S.Ct. 1441, 1448–1449, 182 L.Ed.2d 497 (2012), (“actual damages” has different meanings in different statutes); *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 313–314, 126 S.Ct. 941, 163 L.Ed.2d 797 (2006) (“located” has different meanings in different provisions of the National Bank Act); *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 595–597, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004) (“age” has different meanings in different provisions of the Age Discrimination in Employment Act of 1967); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213, 121 S.Ct. 1433, 149 L.Ed.2d 401 (2001) (“wages paid” has different meanings in different provisions of Title 26 U.S.C.); *Robinson*, 519 U.S., at 342–344, 117 S.Ct. 843 (“employee” has different meanings in different sections of Title VII of the Civil Rights Act of 1964); *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 807–808, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986) (“arising under” has different meanings in U.S. Const., Art. III, § 2, and 28 U.S.C. § 1331); *District of Columbia v. Carter*, 409 U.S. 418, 420–421, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973) (“State or Territory” has different meanings in 42 U.S.C. § 1982 and § 1983); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433–437, 52 S.Ct. 607, 76 L.Ed. 1204 (1932) (“trade or commerce” has different meanings in different sections of the Sherman Act).

Yates v. United States, 574 U.S. ____, 2015WL773330 at *6 (2015)(emphasis added).

The U.S. Supreme Court has already discredited the central premise of Appellees' argument. Appellees argue that both the term "employee" and Appellees' proposed definition ("an individual employed by an employer") are unambiguous.⁵ However, the U.S. Supreme Court determined "employee" – ironically defined by Title VII as "an individual employed by an employer" – was ambiguous.⁶ *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). The *Robinson* Court found that that definition lacked a temporal qualifier and, therefore, sometimes applied only to current employees and applicants, but other times included former employees. Yet, Appellees would like this Court to declare this same definition unambiguous. Simply put, the U.S. Supreme Court found that "employee" can – and does – mean one thing in certain instances, while meaning something else entirely in other situations, even though it is all within the same Act.

Despite the ambiguity of "employee" and its definition, the U.S. Supreme Court did not strike down Title VII. Instead, it used the provision's context to determine the *meaning* of "employee" while maintaining the broad definition for Title VII as a whole. The same can be said for the meaning of "employee" under Ohio law. Sometimes a provision will require a broad definition of "employee." Other times, that definition must be more narrow.

Appellees' entire position centers around the argument that "employee" is unambiguous, while attempting to define the word in a vacuum as "any individual employed by an employer." Their position is directly contrary to U.S. Supreme Court precedent. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *Yates v. United States*, 574 U.S. ____, 2015WL773330. To comply with

⁵ See Appellees' Brief, p. 7 ("Section 34a uses the FLSA's unambiguous meaning of "employee," which is "any individual employed by an employer.")

⁶ This is the identical definition that Appellees now urge Ohio to accept as unambiguous.

precedent, the reviewer must find the *meaning* of “employee” in context. The FLSA sets forth a general definition, while using the exceptions and exemptions to set forth the official *meaning* of “employee” for minimum wage. The drafters incorporated this *meaning* into both Article II, Section 34a and R.C. 4111.14(B) (1).

2. The Minchaks’ position coincides with Ohio’s current minimum wage laws.

Despite Appellees’ argument to the contrary, the Minchaks’ position will not change Ohio’s existing minimum wage laws or otherwise take away rights granted to employees. The General Assembly did not strip away constitutional rights Article II, Section 34a granted when it enacted R.C. 4111.14(B)(1). Instead, it clarified the constitutional language to remove any question about which employees are entitled to minimum wage in Ohio. This clarity was necessary. Although Appellees and their amici repeatedly allege Article II Section 34a is clear in its terms, they often refer to other provisions set forth in R.C. 4111 to provide additional insight. The language of R.C. 4111.14(B)(1) similarly provides insight and clarity to which employees are entitled to minimum wage in Ohio. It does not change the law.

Applying the Minchaks’ *meaning* of employee for minimum wage purposes also will not take away other protections from Ohio employees, and Appellees’ arguments to the contrary are nothing more than an attempt to distract the Court. Appellees and their amici imply that by following the language of Article II, Section 34a – thereby adhering to the FLSA minimum wage exemptions – those same categories of employees would not be entitled to anti-retaliation or equal pay protections. This argument defies logic. Article II, Section 34a’s *meaning* of employee would apply only to minimum wage issues. The drafters specifically limit any *meanings* to Article II, Section 34a – therefore, to Ohio’s minimum wage requirements. There is nothing in Article II, Section 34a or R.C. 4111.14 that references or affects Ohio’s other employment laws. The

applicable headings even limit the applicability to minimum wage. Therefore, other protections will continue to apply to “employees” as those sections define the term and without regard to how “employee” is defined for minimum wage. The meaning of “employee” at issue before this Court will be limited to minimum wage analysis and will have no impact on those sections.

Article II, Section 34a expressly applies the FLSA’s *meaning* of employee to Ohio’s minimum wage laws. It is undisputed that the FLSA exempts certain employees from minimum wage and overtime requirements. Undeniably, regardless of the FLSA’s general definition, several categories of employees – including outside salespeople – fall outside the FLSA’s *meaning* of employee when it comes to minimum wage. This *meaning* is different from the general definition set forth by the FLSA,⁷ but that does not change the fact that, although some employees meet the FLSA’s broad definition of employee, they nevertheless are not entitled to minimum wage.

Article II, Section 34a demands this same result when it incorporates the same *meaning* of employee as the FLSA. In fact, including the FLSA’s exemptions in Ohio’s meaning of “employee” is completely in line with Ohio’s existing minimum wage laws. Ohio’s Department of Commerce even issues a flier confirming outside salespeople are exempt from minimum wages.⁸ This adds to the Minchaks’ argument that Article II, Section 34a and R.C. 4111.14 are not in conflict.

The Appellants’ approach incorporates the FLSA’s *meaning* of employee and leaves Ohio’s minimum wage laws intact, as they historically have been, and in conformity with the FLSA. Appellees’ approach, on the other hand, would unnaturally divorce the FLSA’s exemptions from the FLSA’s *meaning* of “employee”. If the FLSA minimum wage exemptions were not

⁷ The broad definition is found in 29 U.S.C. § 203(e)(1).

⁸ The URL is http://www.com.ohio.gov/documents/dico_2014minimumwageposter.pdf.

included in Article II, Section 34a, the result would be that many categories of employees that previously never received such wages will suddenly be entitled to receive minimum wage. If that were the case, people that deliver newspapers will have to track and report their hours and receive an hourly minimum wage. Likewise, parents will need to keep track of their babysitter's hours and ensure minimum wages are paid. These types of employees are exempt under the FLSA but, following Appellees' argument, because Article II, Section 34a does not expressly exclude them, they must receive minimum wage compensation in Ohio.

Furthermore, in addition to setting forth hourly compensation requirements, Article II, Section 34a sets forth certain record keeping requirements for non-exempt employees, including the amount of hours an employee works each day. If an "employee" truly is defined as Appellees suggest, every person that works in Ohio would be obligated to report the exact number of hours he or she worked in a given day. While this is commonplace for employees traditionally entitled to minimum wages under the FLSA, it is not for exempt employees. High-ranking corporate executives certainly do not report their daily hours to their companies, and physicians do not report their total hours worked to hospitals. If all traditionally exempt employees had to report their hours, would employers then be obligated to pay employees minimum wage, as opposed to their standard salary, in weeks when their hours worked, multiplied by the minimum wage rate, would be greater than their weekly salary? This does not make sense, yet it is exactly what Appellees allege. Regardless of whether an employer *can* track employees' hours, Ohio historically has not done so for employees that are exempt under the FLSA. Therefore, adhering to the position that Ohio includes the FLSA's exemptions in its minimum wage laws follows current and historical practice, and the Second District's decision should be overturned.

B. The legislative history supports the Minchaks' position.

Both the motive behind its proposal as a constitutional amendment and the intent of the voters of Ohio in approving Article II, Section 34a further supports the Minchaks' interpretation. As this Court has previously stated: "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." See *State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567, 570 (quoting *Castleberry v. Evatt* (1946), 147 Ohio St. 30, paragraph one of the syllabus). In applying this rule, this Court recognized that a court's first task is to ascertain the motive behind the proposal of the constitutional amendment, and second, to explore the intent of the voters of Ohio in approving the issue. This Court also importantly noted that "[i]n making this determination, *our inquiry must include more than a mere analysis of the words found in the amendment at issue.*" *Id.* (Emphasis added.)

When construing the motive behind the proposal of a constitutional amendment, and exploring the intent of the voters of Ohio in approving the issue, Ohio courts should look 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."⁹ *Id.* at 570 (quoting *Cleveland v. Bd. of Tax Appeals* (1950), 153 Ohio St. 97, 103). This inquiry should involve an examination of the ballot language and the "Argument for the Proposed Amendment." *Id.* at 571.

⁹The constitutional amendment at issue in *Swetland*, which was proposed as Issue I on the ballot and ultimately resulted in the addition of Article XII, § 2a of the Ohio Constitution, "was proposed as an attempt to alleviate the unfair tax burden placed upon residential and agricultural real property owners" and was intended "to initiate a solution to the taxation dilemma of residential and agricultural real property owners." *Swetland*, 69 Ohio St.2d at 572. Ultimately, the Court concluded that the party challenging the constitutionality of the statute failed to carry its burden and concluded that the statute was valid. *Id.* at 576.

In this case, both the motive behind its proposal and the intent of the voters of Ohio in approving Article II, Section 34a supports the Minchaks' interpretation. The language of Article II, Section 34a was presented to the voters of Ohio as Issue 2 on November 7, 2006, with the substantive language of the provision appearing on the ballot. The arguments that were raised for and against Issue 2 reveal that its primary purposes were (1) to raise the minimum wage rate and tie it to the Consumer Price Index ("CPI"); and, (2) to impose record-keeping requirements on employers for those employees who receive minimum wage. The Ohio Secretary of State's website makes available the ballot language, the "Explanation and Argument in Support", and the "Explanation and Argument Against" Issue 2.¹⁰

Reviewing the arguments in support of and in opposition to what ultimately became Article II, Section 34a shows the intent was not to extend the FLSA to cover more categories of employees but instead to raise minimum wage rates. While one of the arguments in support notes that the amendment "would raise wages for over 700,000 Ohio workers," there is no mention of broadening the types and categories of employees entitled to receive minimum wage beyond those entitled to receive it under federal law. In fact, the plain language of the amendment contemplates that outside salespeople are not entitled to minimum wage when interpreting the FLSA as a whole. The "Explanation and Argument in Support" focuses on identifying potential benefits that come with raising the minimum wage rate. The "Explanation and Argument Against" focuses on the record-keeping requirements and the potential negative impact of raising the minimum wage rate.

¹⁰ See Exhibit A and Exhibit B, respectively, to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Declaratory Judgment. This information can also be found on the internet: <https://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2006ElectionsResults/06-1107Issue2.aspx>.

Yet, the issue of broadening the meaning of the term “employee” and wiping out almost all exemptions to minimum wage entitlement was never raised.

The history of the amendment’s enactment reveals that Ohio voters did not intend to wipe out exemptions and broaden the types and categories of employees entitled to receive minimum wage. Had the drafters intended to do so, both pro-employer and pro-employee groups likely would have raised arguments. It does not make sense that a constitutional provision that intended to expand the types of employees entitled to minimum wage would be voted on without a word on the new categories of employees who would suddenly get minimum wage in addition to commissions. This is especially true considering the debates that already surrounded the proposed language. Rather, it is more likely that the drafters intended to maintain Ohio’s existing wage and hour law in conformity with the FLSA’s exceptions and exemptions. Consequently, a conclusion that R.C. 4111.14(B)(1) does not conflict with the constitution is more in accord with the voters’ intent in approving the language of Article II, Section 34a than the contrary.

If Appellees prevail, minimum wage coverage would be extended to all people working in the state of Ohio, save a handful. This would drastically change minimum wage law in Ohio. How then, did this major change in the law that would affect “hundreds of thousands, if not millions, of employees”¹¹ get passed by Ohio’s voters without a peep from Ohio’s Council of Retail Merchants, Ohio’s Chamber of Commerce, the National Federation of Independent Businesses, Ohio’s Farm Bureau Federation, and Ohio’s Management Lawyers Association? Would voters have approved the issue if they believed they would have to pay minimum wage to and keep records of babysitters’ hours? It is highly improbable that the drafters would have buried such a

¹¹ See Brief of amici curiae Ohio Council of Retail Merchants, et al, p. 15. This is in addition to the workers that already were entitled to receive minimum wage compensation.

drastic change to wage and hour law within the very general language of Article II, Section 34a. More likely, the drafters intended to incorporate the FLSA's general definition together with its exceptions and exemptions (in other words, its *meaning* of employee as it relates to minimum wage), as shown by state issued documents and as argued by the Minchaks.¹² This is exactly how the Minchaks, through their company The Cheap Escape, d/b/a JB Dollar Stretcher, operated – following the law as it always had been and, as Ohio's Department of Commerce shows, it still is. Therefore, this Court should uphold existing minimum wage laws, and find that R.C. 4111.14 is constitutional.

C. Even if Article II, Section 34a were self-executing, that alone is not dispositive.

Whether or not Article II, Section 34a is self-executing ultimately does not matter. Even if this Court rules the provision is self-executing, R.C. 4111.14 can still exist to implement the constitutional provision.¹³

Appellees claim this issue, and whether R.C. 4111.14 applies to a case brought under Article II, Section 34a, is not properly before the court. This is not true. As with their Motion to Dismiss, Appellees seemingly confuse a “proposition of law” with an “assignment of error.” S. Ct. Prac. R. 16.02(B)(4) states that a proposition of law is intended to serve as a proposed “syllabus for the case if the appellant prevails.” This is different from an assignment of error, which requires an appellant to specify alleged errors a trial court made that justify reversing, modifying, or vacating an adverse judgment. *See* Assignment of Error, BLACK'S LAW DICTIONARY (9th ed. 2009). The Minchaks' jurisdictional brief detailed both arguments, and this Court accepted

¹² *See* http://www.com.ohio.gov/documents/dico_2014minimumwageposter.pdf.

¹³ Because “employee” has been held to be ambiguous by the U.S. Supreme Court, Article II, Section 34a cannot be self-executing.

jurisdiction in its entirety. As such, these arguments are properly before the Court and have not been waived.

R.C. 4111.14 is permitted to, and in fact, is necessary to implement Article II, Section 34a such that filing suit under one requires a review of the other. Article II, Section 34a specifically allows laws to be “passed to implement its provisions and create additional remedies”. Furthermore, non-conflicting statutes apply to self-executing constitutional provisions. *State ex rel. Vickers v. Summit Ct. Council* (2002), 97 Ohio St.3d 204 at ¶¶ 30-31. R.C. 4111.14(B)(1) both implements Article II, Section 34a and complies with its provisions. In fact, it specifically is titled “Implementing constitutional minimum wage authority.”

R.C. 4111.14 does not limit or conflict with Article II, Section 34a in any way – it implements and clarifies the constitutional language. This is directly on point with *Vickers*, which expressly allowed non-conflicting provisions to co-exist with a self-executing constitutional provision. Here, the dispute is over the *meaning* of employee for minimum wage purposes. Despite Appellees’ argument to the contrary, Article II, Section 34a does not establish a set definition for “employee”, nor does it cite to any particular definitional provision. Instead, it incorporated the general *meaning* of employee as set forth in the FLSA with respect to minimum wage.

R.C. 4111.14 removes any ambiguity from the meaning of “employee.” Simply put, Article II, Section 34a permitted the legislature to pass implementing legislation. The General Assembly chose to do so when it enacted R.C. 4111.14. Because the two provisions do not conflict, parties must comply with both provisions. Therefore, the statutory definition of “employee” under R.C. 4111.14 will still apply to actions brought under Article II, Section 34a, unless this Court concludes, after making every effort to harmonize the two provisions, that the

statutory definition irreconcilably conflicts with the constitutional provision. Because it does not, the provisions are compatible, and R.C. 4111.14 is constitutional.

Proposition of Law No. 2: If the statutory meaning 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.*

Should this Court conclude R.C. 4111.14(B)(1) is unconstitutional, this holding would open a Pandora’s Box of employment compensation issues in Ohio. As such, the Court should apply this holding prospectively only, as set forth in *DiCenzo v. A-Best Products Co.*, 120 Ohio St.3d 149, 2008-Ohio-5327. Any employer that followed state issued guidelines or otherwise adhered to R.C. 4111.14 – including the Minchaks – compensated employees in accordance with Ohio law. These employers should not be punished or otherwise subjected to class action litigation due to a sudden change in the law.

If this Court were to find R.C. 4111.14 unconstitutional, this decision would be directly contrary to the instructions given to employers by the Ohio Department of Commerce Division of Industrial Compliance. For example, the Minimum Wage fliers provided by the Department – and required to be posted in places of employment statewide – specifically exclude outside sales representatives from minimum wage requirements.¹⁴ In relevant part, this flier states: **“any individual employed as an outside salesman compensated by commissions** or in a bona fide executive, administrative, or professional capacity, or computer professionals” **is exempt from minimum wage.** *Id.* at No. 3. This supports the Minchaks’ argument that they properly compensated Appellees.

Prospective application would be necessary to prevent widespread injustice, should this court declare R.C. 4111.14 unconstitutional. *See Minster Farmers Coop. Exchange Co., Inc. v.*

¹⁴ The URL is http://www.com.ohio.gov/documents/dico_2014minimumwageposter.pdf.

Meyer (2008), 117 Ohio St.3d 459, 2008-Ohio-1259, ¶ 30 (quoting *Hoover v. Franklin Cty. Bd. of Commrs.* (1985), 19 Ohio St.3d 1, 9, (Douglas, J., concurring)). Never before have employers had to question whether or not outside salespeople were required to receive minimum wages. The direct language of Article II, Section 34a does not imply outside salespeople, or other traditionally exempt employees, were suddenly entitled to minimum wages. The legislative history also does not place employers on notice that all employees, save a handful expressly listed, would be entitled to minimum wages. Therefore, this concept is a matter of first impression of Ohio and retroactive application would be extremely inequitable, meeting the first and third requirements from *Vickers*.

This case also meets the second requirement from *Vickers*, further supporting prospective application. This Court declared in *Vickers* that courts should consider whether retroactive application would promote or hinder the purpose of the rule before allowing prospective application. Here, if R.C. 4111.14 were declared unconstitutional, the purpose of the rule would be to divorce Ohio from the FLSA and to provide minimum wage entitlement to outside salespeople, babysitters, summer camp counselors, etc. Employers would be obligated to adjust their compensation policies immediately to comply with the change. In addition, employers would be expected to have documents supporting the number of hours every employee worked dating back several years. This type of documentation was never required for traditionally exempt employees. Therefore, the result would be similar to a change in a statute of limitations -- it would be sudden, impossible to resolve retroactively, and would have an enormous impact on the courts. Allowing for prospective application will allow employees to receive compensation as this Court sets forth without subjecting employers to litigation for complying with previously valid laws.

Finally, despite Appellees' argument to the contrary, the Minchaks did not waive this argument by not presenting it to the lower courts. Appellees rely upon *State ex rel. Quarto Mining*

Co. v. Foreman, (1997) 79 Ohio St.3d 78, 1997-Ohio-71, to support their position. *Quarto Mining*, however, was a workers' compensation case that focused on an employer's failure to present a defense that existed throughout the duration of the case. There, the employer waited until it appealed to the Supreme Court to allege the injured worker's retirement prevented coverage. The facts indicate the employee had been retired well before the case advanced to the Supreme Court, yet the employer never raised the retirement as a defense at any of the lower levels.

First, the Minchaks were successful at the trial court level. Prospective application was not at issue until now. Furthermore, unlike in *Quarto Mining*, the Minchaks are not requesting prospective application as a defense. Instead, they are seeking prospective application as a proposition of law in the event a longstanding theory of law unexpectedly is declared unconstitutional. This request, therefore, is properly before the court and, if this Court cannot harmonize Article II, Section 34a with R.C. 4111.14, it should limit its effect by applying it only prospectively.

CONCLUSION

Because R.C. 4111.14(B)(1) and Article II, Section 34a can co-exist and be harmonized, R.C. 4111.14(B)(1) is constitutional. This is precisely what Ohio law requires. Appellees seek a deviation and break in precedent of how a Court analyzes legislation for constitutionality. In fact, what Appellees suggest is not valid or recognized as proper methodology at all. Appellees' central theme is that an "employee" is defined as "any individual employed by an employer." The United States Supreme Court stated it is not that simple. Instead, a Court must look at context to define a word, not in a vacuum. Appellees' position wants nothing to do with context, but that is exactly what the Minchaks request.

Ohio law requires this Court to begin its analysis with the presumption that R.C. 4111.14 is constitutional. In fact, the only way a Court can find a statute unconstitutional is if a party proves, beyond a reasonable doubt, that it cannot be harmonized with the constitution. Appellees have not, and cannot meet this burden. Instead, Appellees disregard the plain text of the constitution (that calls for the FLSA's meaning of employee), and devise their own definition for "employee" that is completely contrary to the provision's language. This flies in the face of well-established state and federal law.

Declaring R.C. 4111.14 constitutional, however, would adhere to Ohio's existing minimum wage laws. Ohio has regularly applied the FLSA's exemptions to its minimum wage laws. Therefore, it makes sense that the drafters included these exemptions when it adopted the FLSA's *meanings* of employee into Ohio's minimum wage laws. The FLSA has a general definition of "employee", but goes on to use the exemptions and exceptions to shape the *meaning* of the word. This is what Ohio's voters had in mind when they adopted Article II, Section 34a, and this is what the General Assembly had in mind when it drafted R.C. 4111.14.

Employers and employees alike have operated for decades by following the FLSA's exemptions, and using them to shape the *meaning* of "employee." This is how R.C. 4111.14 and Article II, Section 34a are, and historically have been, harmonized. Declaring R.C. 4111.14 unconstitutional would completely deviate from that understanding, and would open the floodgates of litigation.

For all of the foregoing reasons, this Court should overturn the Second District's decision and declare R.C. 4111.14(B)(1) constitutional. In the event it does not, however, this Court should apply the decision prospectively only.

Respectfully Submitted,

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