

IN THE SUPREME COURT OF OHIO

Vernon L. Tribett, et al.,	:	
	:	
Plaintiffs-Appellees,	:	Sup. Ct. Case No. 2014-1966
	:	
v.	:	On Appeal from the Belmont County
	:	Court of Appeals, Seventh Appellate
Barbara Shepherd, et al.,	:	District, Case No. 13 BE 22
	:	
Defendants-Appellants.	:	

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INTRODUCTION

A. Putting this case in context.

Time out. Before turning the Court’s attention to the two unique propositions of law in this case, it is essential to take a step back and put this case in context.

First, there are at least 15 cases currently pending before the Court involving the Ohio Dormant Minerals Act, 5301.56 (the “DMA”). This case represents the seventh and last of those cases to be fully briefed and heard. Although this case is the most comprehensive, the briefing was narrowed in scope to focus on two unique propositions of law not already before the Court. When making its decision, however, this Court cannot ignore the other five (5) propositions of law in this case, including the threshold question of whether the 1989 version of the DMA was “self-executing” during the 17 years it remained in effect.

Second, in examining whether the 1989 version of the DMA was self-executing, this Court must start by answering a single question—Was the 1989 version of the DMA ambiguous? The answer is a resounding “yes.” Under Ohio law, ambiguous means capable of more than one reasonable interpretation. *Clark v. Scarpelli*, 91 Ohio St.3d 271, 274, 744 N.E.2d 719 (2001). Practitioners in every DMA case, the General Assembly, the Ohio State Bar Association, trial courts, and appellate judges (even in the same appellate district) have advanced different, but reasonable, interpretations of the 1989 version of the DMA.

Third, and based upon the inherent ambiguity in the 1989 version of the DMA, this Court must look beyond the text in order to ascertain the General Assembly’s intent. And it is here, that the constitutional questions at issue in this case become relevant. Specifically, R.C. 1.49(E) explains that this Court, “in determining the intention of the legislature, may consider among other matters. . . . [t]he consequences of a particular construction.” The natural consequence of interpreting the 1989 version of the DMA to be self-executing is the constitutional challenge set

forth by the Shepherds—namely that such an interpretation violates Article II, Section 28 of the Ohio Constitution (prohibiting retroactive legislation) and certain due process guarantees in the Ohio Constitution associated with the fundamental right of private property ownership.

Fourth, when properly labeled as an ambiguous statute¹—an analysis of the ambiguous text and statutory factors in R.C. 1.49 lead to the inescapable conclusion that the 1989 version of the DMA was not intended to be “self-executing.” The constitutional concerns represent one factor in that analysis, albeit one weighing heavily against a self-executing interpretation.

Fifth, if any only if this Court concludes that the 1989 version of the DMA is self-executing, and decides the other propositions of law in this case (and others), will this Court be forced to determine: (i) whether the the self-executing interpretation of the 1989 version of the DMA violates the Ohio Constitution; and, (ii) the applicability of the statute of limitations in R.C. 2305.04 to claims raised under the 1989 version of the DMA. These issues will be moot if the Court determines that the statute was not self-executing, thereby confirming the Shepherds’ ownership of the severed mineral interest at issue in this case.

Finally, to the extent the Court is forced to decide the two unique propositions of law in this case, the proper legal conclusions bar Appellees’ (and most surface owners’) claims under the 1989 version of the DMA.

B. The doctrine of adverse possession is irrelevant to this case.

Amicus curiae, the State of Ohio, takes the unusual and unpersuasive tact of attempting to analogize the doctrine of adverse possession to the 1989 version of the DMA. For example, on page 2 of its amicus brief, the State of Ohio claims that the 1989 version of the DMA is a

¹ For a more detailed discussion of this issue, the Shepherds point this Court to the Merit Brief (pp. 7-22) and Reply Brief (pp. 1-16) of Appellants in *Walker v. Shondrick-Nau*, Sup. Ct. Ohio No. 2014-0803, as well as the Merit Brief (pp. 7-22) and Reply Brief (pp. 1-16) of Appellees in *Eisenbarth v. Reusser*, Sup. Ct. Ohio No. 2014-1767.

“mineral-specific version of adverse possession,” and actually a “close legal relative” of the adverse possession doctrine. And, the State of Ohio then claims on page 6 of its amicus brief (albeit inaccurately and without even tacit support) that the General Assembly adopted the 1989 version of the DMA “[i]n part because the traditional adverse possession doctrine does not apply to severed mineral interests.” Such statements, however, are wrong as a matter of law.

First, the common law doctrine of adverse possession played no part in the enactment of either version of the DMA. Nothing in the legislative history, text of the statute, or briefing before any Ohio court states or even suggests as much.

Second, and perhaps more importantly, the doctrine of adverse possession *does* apply to severed mineral interests in Ohio, and has for more than 110 years. The State of Ohio simply ignores this fact despite citing to the very case in which this Court said as much. *See Gill v. Fletcher*, 74 Ohio St. 295, 305, 78 N.E. 433 (1906). *See also Williams & Meyers, Oil and Gas Law*, 4th ed. § 224.4 (“Adverse possession of severed minerals”). The only limitation placed on the use of the common law doctrine in *Gill v. Fletcher* is that it “cannot be accomplished by secret trespass,” which in the severed mineral interest context means: (i) possession of the surface is not enough; (ii) “mere nonuser” is not enough; and (iii) “title can be defeated only by acts which actually take the mineral out of his possession,” namely actual production of oil and gas from a well. *Gill*, 74 Ohio St. at 305. As a result, the DMA cannot be a mineral-specific version of the doctrine of adverse possession.

Finally, the State of Ohio conveniently glosses over the fact that use of the doctrine of adverse possession is disfavored in Ohio. *See Grace v. Koch*, 81 Ohio St.3d 577, 580–81, 692 N.E.2d 1009 (1998). *See also Houck v. Bd. of Park Comm’rs*, 116 Ohio St.3d 148, 2007-Ohio-5586, 876 N.E.2d 1210, ¶ 29. Indeed, this guiding principle is nearly identical to this Court’s

precedent (which the Shepherds have repeatedly cited as support for the conclusion that the ambiguous 1989 version of the DMA, a forfeiture statute, should not be self-executing) that: (i) courts should “favor individual property rights when interpreting forfeiture statutes,” *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St.3d 532, 534, 605 N.E.2d 368 (1992); (ii) “Forfeitures . . . are not favored in law or equity and statutory provisions therefor must be strictly construed,” *State ex rel. Lukens v. Indus. Comm. of Ohio*, 143 Ohio St. 609, 611, 56 N.E.2d 216 (1944); and (iii) “Whenever possible, such statutes must be construed to avoid a forfeiture of property,” *State v. Lilliock*, 70 Ohio St.2d 23, 26, 434 N.E.2d 723 (1982), *superseded on other grounds*. As a result, the State of Ohio’s analogy actually lends credence to the arguments of severed mineral interest owners.

Making matters worse, the State of Ohio illogically concludes on page 1 of its amicus brief that the 1989 version of the DMA is constitutional because “there is no legitimate debate that adverse possession passes constitutional muster under both federal and state law.” The constitutionality of a common law doctrine, however, has no bearing on the constitutionality of a dormant mineral statute. Further, the doctrine of adverse possession is premised on one party proving “by clear and convincing evidence, exclusive possession and open, notorious, continuous, and adverse use for a period of twenty-one years.” *Grace v. Koch*, 81 Ohio St.3d 577, syllabus. In essence, one party actively possesses and makes productive use of property (e.g., a surface owner who drills a well into a severed mineral interest), while the other party (the record owner of the severed mineral interest) takes no action to enforce its rights. To the contrary, the self-executing interpretation of the 1989 version of the DMA (i) does not require notice in the form of possession or use (open, notorious, adverse or otherwise) by the surface owner; and (ii) allows the surface owner to recover such severed mineral interest without any

action or productive use of the minerals. As a result, any potential concerns associated with the doctrine of adverse possession are cured through the direct notice provided by actual possession, and open, notorious and adverse use—elements that simply do not exist under a self-executing interpretation of the 1989 version of the DMA.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. III: Interpreting the 1989 version of the DMA as “self-executing” violates the Ohio Constitution.

Contrary to the arguments of Appellees, their supporting amici, and most surface owners, the 1989 version of the DMA was not self-executing. As such, the Shepherds strongly support the arguments set forth by the severed mineral interests owners in *Walker v. Shondrick-Nau*, Sup. Ct. Ohio No. 2014-0803, *Corban v. Chesapeake Exploration, L.L.C.*, Sup. Ct. Ohio No. 2014-0804, and *Eisenbarth v. Reusser*, Sup. Ct. Ohio No. 2014-1767. To the extent this Court finds the 1989 version of the DMA to be self-executing (a conclusion the Shepherds strongly disagree with), this Court must recognize that such an interpretation violates the Ohio Constitution.

A. Construing the 1989 version of the DMA as “self-executing” violates Article II, Section 28 of the Ohio Constitution.

Appellees and their supporting amici spend dozens of pages of their respective briefs arguing that the self-executing interpretation of the 1989 version of the DMA is constitutional under Article II, Section 28 of the Ohio Constitution. At the end of the day, however, Appellees and their supporting amici actually raise only two arguments: (i) the 1989 version of the DMA was not retroactive, and only operated prospectively (Appellees’ Merit Brief at 12-13; State of Ohio’s Amicus Brief at 2 and 13; and, Jeffco Resources’ Amicus Brief at 5-8); and, (ii) even if the 1989 version of the DMA operated retroactively, it was remedial (not substantive) and therefore is constitutional (Appellees’ Merit Brief at 13-14; State of Ohio’s Amicus Brief at 15-18; and, Jeffco Resources’ Amicus Brief at 8-9). Interestingly, the Shepherds’ response to these

arguments results in two alternative conclusions, both of which result in the same outcome—namely, that the 1989 version of the DMA does not result in the abandonment of severed mineral interests, including those at issue in this case.

1. Adoption of a truly prospective application of the 1989 version of the DMA bars Appellees’ claims as a matter of law.

In reviewing the case law cited by Appellees and their supporting amici, it became clear that they did not truly understand the argument being presented. As defined in Black’s Law Dictionary, a “prospective” statute is one that is “[e]ffective or operative in the future.” (10th Ed. 2014) at 1417. For example, in *Kiser v. Coleman*, this Court concluded that the “retroactive application of [two statutes] to land installment contracts which were in existence at the time of the enactment of these statutes is violative of Section 28, Article I of the Ohio Constitution[.]” 28 Ohio St.3d 259, 263, 503 N.E.2d 753 (1986). *See also Longbottom v. Mercy Hosp. Clermont*, 137 Ohio St.3d 103, 2013-Ohio-4068, 998 N.E.2d 419, ¶ 22. Even more pertinent, Justice Brennan noted in the dissenting opinion in *Texaco v. Short* that:

Every mineral interest in land carved from the fee after the effective date of the statute was carved subject to the [Indiana Dormant Mineral Act’s] limitations. In *prospective* application the statute simply provides that any instrument purporting to transfer a mineral interest carries with it the implicit condition that unless the transferee uses the land within the meaning of the statute, his interest will revert to the transferor.” (Court’s emphasis.)

454 U.S. 516, 542, 102 S.Ct. 781, 70 L.Ed.2d 738 (1981).

In this case, the Shepherds would have no objection if the Court reaches the conclusion that the 1989 version of the DMA only operated prospectively in nature. But, this means that the 1989 version of the DMA could only apply to severed mineral interests created after its effective date (March 22, 1989). In that case, the Shepherds would remain the lawful owners of the severed mineral rights because such rights were created prior to March 22, 1989.

2. In the alternative, if the 1989 version of the DMA is determined to operate retroactively, it violates Article II, Section 28 of the Ohio Constitution.

a. The 1989 version of the DMA operates retroactively.

As Appellees and their supporting amici recognize, the “test for unconstitutional retroactivity requires the court first to determine whether the General Assembly expressly intended the statute to apply retroactively.” *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 721 N.E.2d 28 (2000). “If there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.” *Kiser*, 28 Ohio St.3d at 262.

Here, and contrary to the arguments of Appellees and their supporting amici, the General Assembly intended the 1989 version of the DMA to apply retroactively. Nowhere does the statute specifically limit its application to mineral interests created after the effective date of the statute. Instead, it applied to “[a]ny mineral interest held by any person, other than the owner of the surface of the lands subject to the interest.” (emphasis added) R.C. 5301.56(B)(1) (eff. March 22, 1989). As this Court recently explained, “[w]e have long held that the use of the term ‘any’ in a phrase encompasses ‘every’ and ‘all’ examples of the subject described.” *Chesapeake v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶ 34. As a result, the 1989 version of the DMA applied both prospectively (to severed mineral interests created after March 22, 1989) and retroactively (to such interests created prior to March 22, 1989).

b. Even if the 1989 version of the DMA operates prospectively, it still violates Article II, Section 28 of the Ohio Constitution.

As predicted, Appellees and their supporting amici contend that the 1989 version of the DMA operated prospectively, and either gloss over (Jeffco Resources) or completely ignore (State of Ohio and Appellees) this Court’s holdings that “a statute that applies prospectively may nonetheless implicate the Retroactivity Clause.” *Longbottom*, 137 Ohio St.3d at 109. In fact, as

this Court recently recognized, “the constitutional limitation against retroactive laws ‘include[s] a prohibition against laws which commenced on the date of enactment and which operated in futuro, but which, in doing so, divested rights, particularly property rights, which had been vested anterior to the time of enactment of the laws.’” *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, 941 N.E.2d 745, ¶ 14.

The only brief to even attempt to address this principle was the amicus brief of Jeffco Resources, which simply quotes a different portion of the *Tobacco* decision to support its conclusion that the “1989 DMA applied only prospectively, after a three year grace period.” Jeffco Resources’ Amicus Brief at 8. This argument, however, entirely misses the point. When this Court’s precedent from *Tobacco* and *Longbottom* is actually applied, the only conclusion is that the 1989 version of the DMA operated retroactively. Specifically, the statute: (i) “commenced on the date of enactment” (March 22, 1989); (ii) arguably (if Appellees and their supporting amici are to be believed) “operated in futuro” thereafter because of the three-year grace period; and (iii) “in doing so,” it “divested rights, particularly property rights [such as the Shepherds’ mineral rights], which had been vested anterior to the time of enactment of the laws [March 22, 1989].” *See Tobacco Use Prevention*, 2010-Ohio-6207 at ¶ 14. As such, the 1989 version of the DMA operated retroactively.

c. The 1989 version of the DMA was substantive, not remedial.

Once a statute is deemed retroactive, as the 1989 version of the DMA is here, it is undisputed that the second part of this Court’s retroactivity test requires the Court to determine “whether the statute is [1] substantive, rendering it unconstitutionally retroactive” or merely [2] “remedial and curative” and therefore comporting with the Ohio Constitution, even if it applies retroactively. *Bielat*, 87 Ohio St.3d 350, 353. A statute is substantive—and unconstitutionally retroactive—where it “impairs vested rights, affects an accrued substantive right, or imposes new

or additional burdens, duties, obligations, or liabilities to a past transaction.” *Bd. of Educ. of the Cincinnati Sch. Dist. v. Hamilton Cnty. Bd. of Revision*, 91 Ohio St.3d 308, 316, 2001-Ohio-46, 744 N.E.2d 751 (2000). In other words, “a statute that retroactively creates a new right is unconstitutionally retroactive if, and only if, it also impairs a vested right or creates some new obligation or burden as well.” *Id.* (citing *Bielat*, paragraph two of the syllabus).

Appellees and their supporting amici, however, claim that the 1989 version of the DMA was remedial because it is “curative” (Appellees’ Merit Brief at 14), “affects only the remedy provided” (Jeffco Resources’ Amicus Brief at 8), and does “little more than create a set of procedures designed to guide courts in the application of existing rights” (State of Ohio’s Amicus Brief at 15). Such arguments, however, miss the mark. In reality, the 1989 version of the DMA is undoubtedly *substantive* because it “impairs vested rights . . . or imposes new or additional burdens, duties, obligations, or liabilities to a past transaction.” *Hamilton Cnty. Bd. of Revision*, 91 Ohio St.3d at 316. In fact, the 1989 version of the DMA did both.

First, the statute impairs the vested property rights of severed mineral interest owners (like the Shepherds) by taking those property rights away and giving them to someone else. Borrowing a line from a case cited on page 17 of the State of Ohio’s amicus brief, if the 1989 version of the DMA is held to be self-executing, its enactment “obliterated” (or extinguished) the pre-existing, vested property rights of the Shepherds and hundreds of other severed mineral interest owners without any sort of process or procedure. *See Longbottom*, 137 Ohio St.3d at 109 (noting that the “Retroactivity Clause bars statutes that extinguish preexisting legal rights”).

Second, the 1989 version of the DMA imposed a new burden, duty and obligation on the severed mineral interest owner which did not previously exist. Prior to the enactment of the DMA, the severed mineral interest owner had no obligation under the common law to take action

or preserve a severed mineral interest. See *Kiser v. Board of County Comm'rs*, 85 Ohio St. 129, 131, 97 N.E. 52 (1911) (“mere non-user is not ordinarily sufficient to establish the fact of abandonment”); *Texaco v. Short*, 454 U.S. 516, 544, 102 S.Ct. 781, 70 L.Ed.2d 738 (1981) (Brennan, J., dissenting) (recognizing that, in the context of Indiana’s dormant mineral statute, “[u]ntil their interests were extinguished by ‘operation of law’ [the mineral owners] simply had no occasion to pursue any legal action. Moreover, that mineral interest owners may have failed to exploit their interest for 20 years. . . during which period there was no statutory obligation to use the interest in any manner, does not suggest abandonment”).

Upon enactment of the 1989 version of the DMA, severed mineral interest owners went from having to do nothing, to having to take action to protect their constitutionally protected property rights, or they would be lost. There can be no debate that this new statute created a new burden, duty and obligation for severed mineral interest owners.

For these reasons, the Appellee’s interpretation of the 1989 version of the DMA violates the prohibition against retroactive laws in Article II, Section 28 of the Ohio Constitution.

B. Construing the 1989 version of the DMA as “self-executing” also violates the due process protections inherent in the Ohio Constitution.

In addition to being unconstitutionally retroactive, the 1989 version of the DMA violates the due process protections in the Ohio Constitution. As a precursory matter, and in light of arguments raised in the briefs of Appellees and their supporting amici, it bears repeating that the Shepherds are not, and have not, challenged the constitutionality of the 1989 version of the DMA as an unlawful exercise of the state’s takings power. Although the Shepherds do rely on both Article I, Section 19 of the Ohio Constitution and this Court’s decision in *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 38 (2006), it is not for the purpose of challenging the 1989 version of the DMA under a takings theory.

Instead, the Shepherds reference *Norwood* because it represents this Court’s most thorough explanation of the fundamental nature of private property rights under the Ohio Constitution. *See Norwood*, 110 Ohio St.3d at ¶ 37 (observing that property rights are so fundamentally important that “the founders of our state expressly incorporated individual property rights into the Ohio Constitution in terms that reinforced the sacrosanct nature of the individual’s ‘inalienable’ property rights, Section 1, Article I, which are to be held forever ‘inviolable.’ Section 19, Article I”). Relatedly, the Shepherds reference the first sentence in Article I, Section 19 of the Ohio Constitution because it sets forth the limited circumstances in which the Ohio Constitution’s deference to private property rights can be invaded.

It is through this lens—that private property ownership is one of the most *fundamental rights* protected under the Ohio Constitution—that the Shepherds’ argument should be viewed. And, as properly viewed through this lens, the 1989 version of the DMA violates the due process protections in the Ohio Constitution.

1. The Shepherds’ arguments under Article I, Sections 1 and 19 of the Ohio Constitution have not been waived.

As it did in another DMA case pending before this Court (*see Walker v. Shondrick-Nau*), amicus curiae, the State of Ohio, raises a waiver argument regarding the due process portion of the Shepherds’ third proposition of law. This argument, however, is unpersuasive.

First and foremost, the nature of the due process argument in this case is unique. Rather than a direct challenge to the validity of an existing statute, it arises in the unusual context of interpreting an ambiguous and superseded statute—specifically, as one component of the analysis under R.C. 1.49(E). In this case, that ambiguity analysis necessarily requires this Court to examine the constitutional shortcomings of the self-executing interpretation of the 1989

version of the DMA. As a result, the due process concerns raised by the Shepherds can and should be considered by this Court regardless of whether they were raised below.

Further, there is no dispute that the Shepherds have challenged the constitutionality of the 1989 version of the DMA at every phase of this proceeding. Even the State of Ohio does not dispute this fact. State of Ohio's Amicus Brief at 3. Instead, the State of Ohio argues on page 3 of its amicus brief that the Shepherds waived their right to assert the due process arguments based on the following language in their Reply Brief before the lower appellate court:

To date, the Shepherds have not challenged the constitutionality of the 1989 version of the DMA under the due process provisions of the United States Constitution—the primary issue in the United States Supreme Court's decision in *Texaco v. Short*. Thus, the Tribetts' argument to that effect is misplaced. Instead, the Shepherds have asserted, and reassert now, that the 1989 version of the DMA is unconstitutional under Article II, Section 28 of the Ohio Constitution. This state constitutional issue is the only one germane to this appeal.

Rather than waiving an argument, this statement draws an accurate distinction between the federal constitutional issues examined in *Texaco* (and not at issue in this case) and the state constitutional challenges raised by the Shepherds (which are properly before this Court).

Finally, even if the Shepherds are deemed to have failed to properly raise their due process arguments before the lower appellate court, this Court retains the discretion to review and rule upon the issue. The reasons are twofold. First, “[e]ven where waiver is clear, [a reviewing court may] consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it,” *In re M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), syllabus. This is certainly such a case, especially in light of the fact that this Court accepted the entirety of Proposition of Law No. III (including the due process question) as being of “public or great general interest.” Sup. Ct. R. Prac. 7.02(C)(2). Second, a successful waiver claim would simply preclude the Shepherds from raising the due

process arguments in this case. This result, however, does nothing to the numerous other DMA-related cases pending before various Ohio courts which also involve the due process issue. As a result, acceptance of the State of Ohio's waiver argument will simply kick the proverbial can down the road, and require this Court to decide the due process question in another case.

2. Case law interpreting the due process protections under the United States Constitution are not controlling.

The United States Supreme Court's decision in *Texaco v. Short* did not analyze any state constitutional claims. Instead, the *Texaco* Court upheld the constitutionality of Indiana's dormant mineral statute under the United States Constitution, specifically, under the due process, equal protection, and takings clauses. Here, the Shepherds have not, and do not, challenge the constitutionality of the 1989 version of the DMA under the United States Constitution. Instead, the Shepherds have consistently asserted that the 1989 version of the DMA is unconstitutional solely under the Ohio Constitution. On these points, all parties seem to agree.

Yet, Appellee and at least one supporting amici continue to label *Texaco* as "controlling. See Appellees' Merit Brief at 6-8; Stanleys' Amicus Brief at 6-10. It is well established, however, that "this court is not bound by federal court interpretations of the federal Constitution in interpreting our own Constitution." *Humphrey v. Lane*, 89 Ohio St.3d 62, 68, 728 N.E.2d 1039 (1999). In fact, as this Court noted more than two decades ago:

The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

Arnold v. City of Cleveland, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), paragraph 1 of syllabus.

While the 1989 version of the DMA Act may meet the due process “floor” as established in *Texaco*, because of Ohio’s unique history and the fact that “the founders of our state expressly incorporated individual property rights into the Ohio Constitution in terms that reinforced the sacrosanct nature of the individual’s ‘inalienable’ property rights, which are to be held forever ‘inviolable,’” *Norwood*, 110 Ohio St.3d at ¶ 37, the Ohio Constitution offers greater protection to individual property rights than the federal constitution. This Court long ago recognized just that:

Section 1, Article I, with its guaranty of inalienable rights. . . and Section 19, Article I, guaranteeing the inviolability of private property, have run parallel with the protections of the Fourteenth Amendment to the United States Constitution. . . . As was pointed out in the Steele case, page 126, “The guaranties of Sections 1, 2 and 19 of the Bill of Rights in the Constitution of Ohio are similar to those contained in the amendment to the federal Constitution referred to [the 14th Amendment].” If in the midst of current trends toward regimentation of persons and property, this long history of parallelism seems threatened by a narrowing federal interpretation of federal guaranties, it is well to remember that Ohio is a sovereign state and that the fundamental guaranties of the Ohio Bill of Rights have undiminished vitality. Decision here may be and is bottomed on those guaranties.

Direct Plumbing Supply Co. v. City of Dayton, 138 Ohio St. 540, 545, 38 N.E.2d 70 (1941).

Due to the “sacrosanct nature of the individual’s ‘inalienable’ property rights” under the Ohio Constitution, the “bundle of venerable rights associated with property . . . must be trod upon lightly, no matter how great the weight of other forces.” *Norwood*, 110 Ohio St.3d at ¶ 38. Accordingly, the question before this Court is not whether the 1989 version of the DMA is valid under *Texaco* and the federal constitution, but whether it violates the Ohio Constitution’s special guarantees regarding private property rights. As set forth below, the answer is “yes.”

a. The 1989 version of the DMA violates the void-for-vagueness doctrine.

Amici are correct that Article I, Section 16 of the Ohio Constitution includes certain due process protections. But, amici fail to point out that Article I, Section 16 is not the exclusive source for such due process protections in the Ohio Constitution. In fact, this Court recognizes that the due process “guaranties of Sections 1. . . and 19 of the Bill of Rights in the Constitution

of Ohio are similar to those contained in the amendment to the federal Constitution referred to [the 14th Amendment].” *Direct Plumbing Supply Co.*, 138 Ohio St. 540 at 545. Embedded within these due process protections is the void-for-vagueness doctrine. “When a statute is challenged under the due-process doctrine prohibiting vagueness, the court must determine whether the enactment (1) provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement.” *Norwood*, 110 Ohio St.3d at ¶ 84.

The first step in the vagueness analysis requires a court to determine the appropriate standard of review. “Though the degree of review is not described with specificity, regulations that are directed to economic matters and impose only civil penalties are subject to a ‘less strict vagueness test,’ but if the enactment ‘threatens to inhibit the exercise of constitutionally protected rights,’ a more stringent vagueness test is to be applied.” *Id.* at ¶ 85. It is here that Amicus Curiae Jeffco Resources completely ignores the most relevant portion of this Court’s decision in *Norwood*. Although recognizing that the more stringent standard of review applies to statutes which “substantially implicate constitutional provisions” (Jeffco Resources’ Amicus Brief at 17-18), they completely ignore the *Norwood* Court’s recognition that the heightened standard of review applies to a statute impacting a “fundamental constitutional right.” *Norwood*, 110 Ohio St.3d at ¶ 88. And, “Ohio has always considered the right of property to be a fundamental right.” *Id.* at ¶ 38.

This is also true in the severed mineral interest world. “Unlike other individual rights within the bundle of rights that make up a complete property estate, mineral rights are recognized by Ohio law as separate property rights.” *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 11, 780 N.E.2d 998 (2002). As this Court long ago explained, “there may be a complete severance of

the ownership of the surface of land from the ownership of the different strata of mineral which may underlie the surface.” *Moore v. Indian Camp Coal Co.*, 75 Ohio St. 493, 499, 80 N.E. 6 (1907). As a result, the heightened standard of review applies.

The next issue under the vagueness analysis is whether the 1989 version of the DMA “affords a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law. *Norwood*, 110 Ohio St.3d at ¶ 86; *see also Columbus v. Thompson*, 25 Ohio St.2d 26, 30, 266 N.E.2d 571 (1971) (noting that “a statute which . . . requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”). Here, persons of “common intelligence,” including surface owners, mineral owners, lawyers, respected jurists, the General Assembly and academics have been left guessing as to how the 1989 version of the DMA operated. This is highlighted by the fact that a person of ordinary intelligence (e.g., a severed mineral interest owner or counsel) would be unable to determine whether he/she needed to take any action whatsoever (because the statute was not self-executing); and, if so, what the relevant 20-year time period was for determining abandonment.

Furthermore, the 1989 Act fails the second prong of the analysis as it is not “specific enough to prevent official arbitrariness or discrimination in its enforcement.” *Norwood*, 110 Ohio St.3d at ¶ 84. As Judge DeGenaro noted in her concurring opinion in *Farnsworth*, the vagueness of the 1989 Act left it open to “potentially arbitrary operation.” *Farnsworth v. Burkhardt*, 2014-Ohio-4184, 21 N.E.3d 577, ¶ 82 (7th Dist.) (DeGenaro, P.J., concurring in judgment only). While amici suggest that the need for judicial interpretation does not render a statute unconstitutionally vague, this argument is unpersuasive. This is not an example of needing to “clarify specific language,” *In re Application of Columbus S. Power Co.*, 134 Ohio

St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276, ¶ 20; rather, it is an example of courts and commentators struggling to determine the core function of a statute establishing an arbitrary mechanism by which a fundamental right is obliterated and extinguished.

b. The self-executing interpretation of the 1989 version of the DMA violates the first sentence of Article I, Section 19 of the Ohio Constitution.

The first sentence of Article I, Section 19 of the Ohio Constitution proclaims that “[p]rivate property shall ever be held inviolate, but subservient to the public welfare.” As this Court long ago recognized:

These words, which contain a fundamental tenet of our political heritage, express the delicate balance between the rights of the governed and the power of a free government. Each element of this balance is modified and restricted by the presence of the other, yet neither can be extinguished. No government could long continue to function if all property rights were unqualifiedly inviolate. But, on the other hand, the constitutional guaranty of the right of private property would be hollow if all legislation enacted in the name of the public welfare were *per se* valid. To be truly in the public welfare within the meaning of Section 19, and thus superior to private property rights, any legislation must be reasonable, not arbitrary, and must confer upon the public a benefit commensurate with its burdens upon private property.

Direct Plumbing Supply Co., 138 Ohio St. 540 at 546. A self-executing interpretation of the 1989 version of the DMA is none of these things.

As set forth above, the 1989 version of the DMA was ambiguous (*supra* at Introduction, Section A of this Reply Brief), vague and arbitrary (*supra* at Proposition of Law No. III, Section B.2.a of this Reply Brief), and contrary to both the common law (*supra* at Proposition of Law No. III, Section A.2.c of this Reply Brief) and longstanding principles of statutory interpretation (*supra* at Introduction, Section B of this Reply Brief). Further, the benefit to the public of enforcing a superseded statute at the expense of fundamental and constitutionally-protected private property rights is non-existent. This is especially true in light of the fact that: (i) the self-executing interpretation of the 1989 version of the DMA runs contrary to the express statutory

purpose in R.C. 5301.55 of "simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title;" (ii) there will not be a merging of the surface and mineral estates in this case because the Appellees sold the surface of the property on March 9, 2014 and purported to reserve the oil and gas mineral interests; and (iii) the 2006 version of the DMA still exists as a reasonable tool, replete with due process protections, for surface owners to reclaim severed mineral interests, albeit through a process Appellees used unsuccessfully in this case.

Proposition of Law No. VII: A claim brought under the 1989 version of the DMA must have been filed within 21 years of March 22, 1989 (or, at the very latest, March 22, 1992), or such claim is barred by the statute of limitations in R.C. 2305.04.

1. There is no dispute that a claim under the 1989 version of the DMA is an “action to recover title to or possession of real estate.”

The State of Ohio inaccurately argues on page 29 of its amici brief that the statute of limitations in R.C. 2305.04 does not apply “because the surface owners are not attempting to recover property.” That is not, however, what the statute says. To the contrary, the statute bars an action to recover “*title to . . . real property.*” And, that is precisely what the Appellees’ are seeking to do through a self-executing interpretation of the 1989 version of the DMA.

As noted in the Shepherds’ Merit Brief, and undisputed by the State of Ohio, Black’s Law Dictionary defines the word “recover” as meaning: “To obtain (relief) by judgment or other legal process . . . To obtain (a judgment) in one’s favor . . . To obtain damages or other relief; to success in a lawsuit or other legal proceeding.” (10th Ed. 2014). Thus, the statute of limitations in R.C. 2305.04 applies to “an action to [obtain relief by judgment or other legal process regarding] the title to or possession of real property.” And, there can be no dispute that Appellees’ action is one to “obtain relief by judgment or other legal process” by way of an order

that they are the owners of the severed mineral interests by virtue of the 1989 version of the DMA. As a result, this action falls precisely within the definition of “recover.”

2. The Shepherds stand by their argument that a cause of action accrued under the 1989 version of the DMA on either March 22, 1989 or March 22, 1992.

Appellees inaccurately (and without legal support) claim that their cause of action under the 1989 version of the DMA “accrued on October 28, 2011, when three of the Appellants. . . filed an Affidavit of Claim to Preserve Mineral Interest.” Appellees’ Merit Brief at 15. The fact that several of the Shepherds filed preservation affidavits in 2011 (during Appellees’ unsuccessful attempt to utilize the 2006 and current version of the DMA) is irrelevant to the analysis under R.C. 2305.04.

On March 22, 1989, the Appellees’ predecessors-in-title gained a statutory right, and were put on notice, that a cause of action had accrued under the statute. Yet, neither the Appellees nor their predecessors-in-interest took any action until the filing of this action in 2012. To the contrary, since March 22, 1989, the Shepherds have maintained uninterrupted possession of the severed mineral estate, as evidenced by the undisputed fact that they alone have held the record title. At no point during the 17 years during which the 1989 version of the DMA remained in effect did any surface owner bring an action to recover title to those mineral rights. Because Appellee’s “action to recover the title to” the mineral rights was not “brought within twenty-one years after the cause of action accrued,” it is barred under R.C. 2305.04.

Appellees and their supporting amici, however, argue that a cause of action under the 1989 version of the DMA could not have accrued until March 22, 1992. “It is fundamental that where rights are created by statutes,” such as the 1989 version of the DMA, such rights accrue “when all the statutory conditions have been met.” *State ex rel. Frye v. Bachrach*, 175 Ohio St. 419, 423, 195 N.E.2d 803 (1964). To the extent the Appellees are correct, the statutory

conditions were met on March 22, 1992 after the end of the three-year grace period. *See* R.C. 5301.56(B)(2) (eff. 1989) (stating that a “mineral interest shall not be deemed abandoned under division (B)(1) of this section because none of the circumstances described in that division apply until three years from the effective date of this section”). Although such a holding admittedly would not benefit the Shepherds in this case, such a decision would significantly limit the scope of DMA cases subject to review by Ohio appellate courts, and resolve numerous pending DMA cases filed after March 22, 2013. *See e.g., The Weekender v. Gregor*, 5th Dist. Ct. of App. Case No. 15-CA-05 (appeal of judgment in favor of severed mineral interest owner on grounds which included statute of limitations, and stayed pending decision by Ohio Supreme Court).

CONCLUSION

For the reasons set forth above, and those set forth in the Shepherds’ Merit Brief, the Court should reverse the decision of the Seventh District Court of Appeals and adopt each of the Shepherds’ propositions of law.

Respectfully submitted,

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