In the Supreme Court of Ohio

DANIEL STOLZ,	:	Case No. 2017-1245
Plaintiff-Respondent,	:	On a Certified Question of State Law
	:	From the U.S. District Court,
vs.	:	Southern District of Ohio,
	:	Western Division
J & B STEEL ERECTORS, INC. et al.,	:	
	:	Case No. 1:14-cv-44
Defendants-Petitioners.	:	

BRIEF OF *AMICUS CURIAE* STATE OF OHIO IN SUPPORT OF PETITIONERS

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INTRODUCTION

This case presents a second certified question from the same federal litigation as an earlier one. *See Stolz v. J & B Steel Erectors, Inc.*, 146 Ohio St. 3d 281, 2016-Ohio-1567. In both cases, an injured worker wants to sidestep the grand bargain of worker's compensation (replacing tort remedies with administrative ones) so that he may recover both administrative benefits and a tort judgment. Whether raised as a statutory question (as before) or a constitutional challenge (as now), the bargain remains intact and directs that the worker's remedy is through the administrative system, not the tort system.

In an earlier decision, this Court held, over a dissent, that a workers' compensation law extends immunity to a subcontractor at a construction site for injuries to another subcontractor's employees that are allegedly caused by the first subcontractor's negligence. *Id.* ¶ 27. Judge Black now asks this Court to decide the validity of this workers' compensation law under various provisions of the Ohio Constitution. Yet if the Court's statutory interpretation had plunged the law into *serious* constitutional doubt, it would have been compelled by constitutional-avoidance principles to consider whether the dissent's reading—which would have raised no constitutional issue—was a plausible construction of the law (even if not the best one). That the majority interpreted the law as it did illustrates the weaknesses of today's constitutional claims.

Even more, the general constitutional challenges embraced in the certified question run up against the specific part of the Ohio Constitution that *authorizes* workers' compensation statutes trading common-law remedies for administrative ones. *See* Ohio Const. art. II, § 35. As explained when that section was added, it was designed to "write into the constitution of Ohio a constitutional provision making secure the workmen's compensation law passed by the last legislature" and to make it "possible to continue this beneficial measure without any further fear of a constitutional question being raised again on this matter." 2 Proceedings and Debates of the

Constitutional Convention of the State of Ohio 1346 (1912). The specific constitutional authority for the statute challenged here means that the general constitutional provisions have little relevance to the statute's validity. The certified question should be answered "no."

STATEMENT OF AMICUS INTEREST

The State has an interest here because an Ohio statute's constitutionality has been drawn into question. The State is also interested because the Bureau of Workers' Compensation is an arm of the State. The Bureau approves participation by those who manage the programs of which R.C. 4123.35(O) is a part, and the Bureau believes that the program benefits employees and employers by centralizing safety programs and compensation for large construction projects.

STATEMENT OF THE CASE AND OF FACTS

A. Stolz was injured in a construction-site accident and sued the general contractor and various subcontractors for negligence.

Respondent Daniel Stolz was employed by Jostin Construction, Inc. ("Jostin") as a concrete finisher on a construction project run by general contractor (and *amicus curiae* here) Messer Construction Company ("Messer"). *Stolz v. J & B Steel Erectors, Inc.*, 146 Ohio St. 3d 281, 2016-Ohio-1567 ¶ 4 ("*Stolz I*"). Jostin was a subcontractor on the project, along with Terracon Consultants, Inc. ("Terracon"), Pendleton Construction Group, L.L.C. ("Pendleton"), and Petitioners J & B Steel Erectors, Inc. ("J & B Steel"), TriVersity Construction Co., L.L.C. ("TriVersity"), and D.A.G. Construction Co., Inc. ("D.A.G."). *Id*. ¶ 5. (Terracon and Pendleton are not parties to this certified-question proceeding.)

Messer was the self-insuring employer for the project under R.C. 4123.35(O), meaning that it "was responsible for providing workers' compensation coverage for its own employees as well as the employees of enrolled subcontractors working on" the project. *Id*. ¶ 6. "In return for providing this coverage and satisfying other related statutory obligations," Messer "gain[ed]

protection against claims arising from" the workplace injuries or deaths "of any of its own employees as well as the employees of any" enrolled subcontractors. *Id.* ¶ 13. Jostin, J & B Steel, D.A.G., and TriVersity all became enrolled subcontractors as well. *Id.* ¶ 6. Subcontractors enrolled in the self-insurance program "do[] not pay workers' compensation premiums to the state for the payroll that [they] report[] for work performed at the construction site by covered employees," and instead "deduct their costs for workers' compensation premiums from their bids to the contractor." *Id.* ¶ 14.

Stolz was injured in a workplace accident on the project and filed a negligence lawsuit in federal court against Messer and several subcontractors. *Id.* ¶ 5. Messer, J & B Steel, D.A.G., and TriVersity moved for summary judgment on the grounds that, as participants in a self-insured construction project plan, they were immune from negligence claims under R.C. 4123.35 and R.C. 4123.74. *Id.* ¶ 7. The district court granted summary judgment to Messer but denied summary judgment to the subcontractors because it believed that enrolled subcontractors were immune only from claims by their own employees. *Id.*

After the summary-judgment decision, the district court certified the following question of state law to this Court: "Whether [R.C.] §§ 4123.35 and 4123.74 provide immunity to subcontractors enrolled in a Workers' Compensation self-insurance plan from tort claims made by employees of [other] enrolled subcontractors injured while working on the self-insured project." *Id.* ¶ 8 (alteration in original). This Court accepted the question and held that enrolled subcontractors are immune from such claims. *Id.* ¶ 2.

B. After this Court held that subcontractors enrolled in a self-insured construction project plan are immune from negligence claims of the employees of other enrolled subcontractors, Stolz amended his Complaint to challenge the constitutionality of R.C. 4123.35(O).

"[R]ecognizing that [his] claims regarding the interpretation of [R.C.] 4123.35(O) had been rejected by" this Court, Stolz amended his Complaint to allege that the statute violated the U.S. and Ohio Constitutions. *See* Order at 4, R.105, *Stolz v. J & B Steel Erectors, Inc.*, No. 1:14-cv-44 (S.D. Ohio Aug. 23, 2017). As to the Ohio constitutional claims, Stolz now alleges that R.C. 4123.35(O) violates Article II, Section 32 and Article IV, Section 1 (judicial power); Article IV, Section 5 (judicial rulemaking); Article I, Section 16 (right to a remedy); Article I, Section 5 (right to trial by jury); Article I, Section 2 (equal protection); and Article I, Section 16 (due process). *See* Second Am. Compl. ¶ 26, R.90, *Stolz*, No. 1:14-cv-44 (S.D. Ohio Nov. 4, 2016).

J & B Steel, D.A.G., and TriVersity moved the district court to certify another question of law to this Court—this time, concerning the validity of R.C. 4123.35(O) under the Ohio Constitution. *See* Am. Certification Order at 4, R.107, Stolz, No. 1:14-cv-44 (S.D. Ohio Sept. 15, 2017). The district court certified, and this Court accepted for review, the following question: "Whether [R.C.] 4123.35(O) is unconstitutional as applied to the tort claims of an enrolled subcontractor's employee who is injured while working on a self-insured construction project and whose injury is compensable under Ohio workers' compensation laws." *See 12/6/2017 Case Announcements*, 2017-Ohio-8842, at 6 (alteration in original).

ARGUMENT

***Amicus Curiae*'s Proposition of Law No. 1**

R.C. 4123.35(O) is constitutional.

Stolz raises a long list of constitutional challenges to a provision governing subcontractor liability on certain large construction projects. None has merit. Moreover, this Court's interpretation of the provision in an earlier round of this litigation is powerful evidence that the statute has no constitutional flaws. Under traditional principles of constitutional avoidance, this Court would not have interpreted the statute in the previous case in a way that *raised* rather than *avoided* constitutional questions.

A. R.C. 4123.35(O) does not invade separation-of-powers protections.

The General Assembly's statutory grant of subcontractor immunity in approved self-insured construction projects comports with the Ohio Constitution's provisions governing judicial power and judicial rulemaking. As to judicial power, Stolz challenges R.C. 4123.35(O) under Article II, Section 32 and Article IV, Section 1, which place the judicial power in the courts and bar the General Assembly from the "exercise [of] any judicial power" not "expressly conferred" to it. *See* Compl. ¶¶ 26(d)-(e); 28. As to judicial rulemaking, Stolz's challenge is under Article IV, Section 5(A) or Section 5(B), which govern this Court's superintendence powers and procedural rulemaking powers respectively. *See* Compl. ¶¶ 26(e)-(f). None of these challenges is persuasive.

1. The Ohio Constitution authorizes the judiciary to decide specific justiciable matters, govern the legal system, and prescribe procedural rules.

Judicial Power. The Ohio Constitution vests the "judicial power of the state" in the courts, Ohio Const. art. IV, § 1, and "[t]he legislative power of the state" in the General Assembly, *id*. art. II, § 1. *See Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St. 3d

280, 2010-Ohio-1029 ¶ 88. As a corollary, the General Assembly may not "exercise any judicial power not . . . expressly conferred" on it. Ohio Const. art. II, § 32.

The "judicial power" is outlined in Article IV. The General Assembly cannot exercise the original or appellate jurisdiction of this Court, art. IV, § 2(B); it cannot exercise the original or appellate jurisdiction of the courts of appeals, art. IV, § 3(B); and it cannot exercise the original jurisdiction "over all justiciable matters" of the court of common pleas, art. IV, § 4(B). This means, as this Court has explained, that the General Assembly may not decide specific justiciable cases, "decide the facts" in those cases, or determine whether those facts add up to liability and damages in a specific case. *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 ¶ 74. Nor, of course, can the General Assembly "review and affirm, modify, or reverse" specific judgments. *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424 ¶ 58.

But the General Assembly *does* possess "the power to continually refine Ohio's laws to meet the needs of our citizens," including *tort laws* that govern questions of liability. *Stetter*, 2010-Ohio-1029 ¶ 34. Importantly, this includes authority to '"alter, revise, modify, or abolish the common law' as the General Assembly deems necessary to further the common good." *Id.* ¶ 36 (citation omitted). This is true even though the common law is judicially created. The legislative branch is free to look to judicial decisions for guidance, but the legislative branch remains '"the ultimate arbiter of public policy.'" *Arbino*, 2007-Ohio-6948 ¶ 21 (citation omitted). Indeed, this Court routinely invites the General Assembly to respond to its decisions should that body disagree with the Court's statutory reading. *See, e.g.*, *State v. Pountney*, ___ Ohio St. 3d ___, 2018-Ohio-22 ¶¶ 3, 34. So the General Assembly can and does exercise broad legislative authority "to define the scope and contours" of tort law in Ohio. *Stetter*, 2010-Ohio-1029 ¶ 90.

Superintendence power. In addition to assigning courts the power to decide cases and controversies, the Ohio Constitution vests the Supreme Court with rulemaking powers. Article IV, Section 5(A)(1) provides that this Court "shall have general superintendence over all courts in the state." The rules of superintendence primarily deal with issues of court operations and case management. *See State v. Steffen*, 70 Ohio St. 3d 399, 408-10 (1994) (outlining the scope of the superintendence power). For instance, they deal with the selection and powers of a presiding or administrative judge, Sup. R. 3-4, court appointments, Sup. R. 8, caseload reporting, Sup. R. 35-39, and access to court records, Sup R. 44. The superintendence power is also the source of the Court's authority to govern the practice of law. *State ex rel. Buck v. Maloney*, 102 Ohio St. 3d 250, 2004-Ohio-2590 ¶¶ 7-8. The purpose of the rules of superintendence is administrative, not substantive. *Cf. State v. Singer*, 50 Ohio St. 2d 103, 110 (1977) ("The Rules of Superintendence are not designed to alter basic substantive rights . . .").

Procedural rulemaking power. Another part of Article IV empowers the Supreme Court to enact practice and procedure rules for litigants. Article IV, Section 5(B) provides: "The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. [The rules take effect] unless . . . the [G]eneral [A]ssembly . . . disapprov[es]." Ohio Const. art. IV, ¶ 5(B). Two relevant principles flow from this text. *First*, no constitutional problem arises if the statute is substantive. If the "legislature intend[s] the enactment to be substantive," there is "no intrusion on this court's exclusive authority over procedural matters." *State ex rel. Loyd v. Lovelady*, 108 Ohio St. 3d 86, 2006-Ohio-161 ¶ 13. Substantive "'means that body of law which creates, defines and regulates the rights of the parties.'" *State v. Slatter*, 66 Ohio St. 2d 452, 455 (1981) (citation omitted). Laws that change the state's "public policy" are usually substantive. *Id.* at

455 n.4. *Second*, no constitutional violation arises unless a statute actually *conflicts* with a procedural rule. A rule must "express[ly]" cover a situation to conflict with a statute. *Hiatt v. S. Health Facilities, Inc.*, 68 Ohio St. 3d 236, 238 (1994). Therefore, if "this [C]ourt" has not "promulgated a rule . . . specifically regarding" a topic, a statute addressing it provides the rule of decision. *State v. Boczar*, 113 Ohio St. 3d 148, 2007-Ohio-1251 ¶ 19.

2. R.C. 4123.35(O) is a legitimate exercise of the legislative power.

Judicial power. R.C. 4123.35(O) is not an exercise of the judicial power. R.C.4123.35(O) does not resolve one specific justiciable controversy; it creates a general rule of non-liability. It governs all self-insured construction projects that meet the requirements of the subsection and that the Bureau approves for self-insurance. R.C. 4123.35(O). True, the statute *governs* liability in specific cases like Stolz's, but many statutes do so. Just as the General Assembly may "regulat[e] the amount of damages available in certain circumstances," *Arbino*, 2007-Ohio-6948 ¶ 74, it can regulate the scope of liability in certain circumstances. Nor does the statute assign judicial authority to the Industrial Commission. Simply "ascertain[ing] facts as to the application of" workers' compensation claims "does not vest it with judicial power" within the meaning of the constitution. *See State ex rel. Yaple v. Creamer*, 85 Ohio St. 349, 401 (1912).

On the flip side, R.C. 4123.35(O) is a lawful exercise of the General Assembly's *legislative* power. The General Assembly had authority to pass the statute whether as both a tort law and a workers' compensation law because as it immunizes enrolled subcontractors and benefits employees. It ultimately determines statutory tort rights and the scope of the workers' compensation system. *See Stetter*, 2010-Ohio-1029 ¶ 90. If that were not enough, Article II, Section 35, authorizes the General Assembly to set "the terms and conditions" for payment of workers' compensation benefits, and correspondingly, the terms and conditions under which tort

liability will be extinguished. Legislative authority is at its apex when it exercises specifically granted powers.

Consistent with these boundaries between legislative and judicial power, the General Assembly routinely enacts laws defining civil liability. Just as the Court upheld the regulation of damages considered in *Arbino*, the Court must reject Stolz's argument about the regulation of liability here, because to do otherwise would render "numerous statutes" unconstitutional. *Arbino*, 2007-Ohio-6948 ¶ 74. If creating immunity for enrolled subcontractors "abrogate[s] judicial authority" here, *id.*, then the employer immunity governing the main provisions of workers' compensation would also be unconstitutional, R.C. 4123.74. That view would also invalidate immunities for potential tort defendants like Good Samaritans, volunteers, and landowners. *See respectively* R.C. 2305.23; 2305.37; 2305.40.

In a sense, this Court already disagreed with Stolz on this point. *Stolz I* rejected his argument about balancing the "social bargain of workers' compensation" because it was a "policy argument" best "directed to the General Assembly." *Stolz I*, 2016-Ohio-1567 ¶ 26. Stolz now repackages that argument in separation-of-powers terms, but the answer remains the same: policy questions belong in the General Assembly. *Arbino*, 2007-Ohio-6948 ¶ 21.

Superintendence power. Nor does R.C. 4123.35(O) invade any judicial power of superintendence. The statute dictates to courts a substantive rule governing civil liability. Indeed, it is precisely *because* it governs substantive rights and obligations that Stolz objects to this Court's reading of it in *Stolz I.* Second Am. Compl. ¶ 1 (noting that the statute "will control some aspects of Plaintiff's claims"). It does not dictate an *administrative* rule governing the traditional categories of superintendence, such as case management or the governance of the Ohio bar.

Procedural rulemaking. The General Assembly also did not violate this court's rulemaking authority when it enacted R.C. 4123.35(O). First, the statute is *substantive*. The General Assembly created a self-insurance option meant to provide compensation for actual injuries on actual construction sites, and provided corresponding tort immunity. That is enough to establish that the law does not "intru[de]" on the Court's procedural powers. *Loyd*, 2006-Ohio-161 ¶ 13. The statute also "creates [and] defines" legal obligations. *Slatter*, 66 Ohio St. 2d at 455. Approved employers and subcontractors have workers' compensation obligations and immunity from certain tort suits, and their employees have rights to benefits when injured. *Stolz I*, 2016-Ohio-1567 ¶¶ 13-14, 27. And of course the statute sets the state's "public policy," *Slatter*, 66 Ohio St. 2d at 455 n.4, which is the business of the General Assembly, not the courts, *see Stolz I*, 2016-Ohio-1567 ¶ 26.

Nor does R.C. 4123.35(O) directly *conflict* with any procedural rule this Court has written. This is an independent reason to deny Stolz's Article IV challenge. Stolz's complaint does not specify what civil rule allegedly creates a conflict. He may be referring to the rules governing trial by jury. Civ. R. 38-39, 47-48. If so, those rules do not "specifically" govern, *Boczar*, 2007-Ohio-1251 ¶ 19, in those situations where a party has no case as a matter of law. The civil rules provide for dismissal of such suits. *See* Civ. R. 12(B)-(C).

One last problem with Stolz's challenge: he sued in federal court. There, R.C. 4123.35(O) applies only *because* it is '"state substantive law.'" *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 409 (2010) (citation omitted) (plurality op.). Nor can there be a conflict with the Ohio Rules of Civil Procedure because the federal rules, not Ohio's, govern procedural aspects of his federal suit. *Id*.

B. R.C. 4123.35(O) does not violate the Ohio Constitution's Remedy Clause in Article I, Section 16.

The General Assembly's grant of subcontractor immunity also comports with the remedy language in Ohio's Constitution. *See* Second Am. Compl. ¶¶ 26(c), 27. The Constitution provides that "every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law." Ohio Const. art. I § 16. R.C. 4123.35(O) complies with this provision because, at minimum, it leaves Stolz with a meaningful remedy.

1. The Remedy Clause places few limits on the General Assembly's power to define causes of action.

For "an injury done" to a person, the Ohio Constitution requires a "remedy by due course of law." Ohio Const. art. I, § 16. "A plain reading" of the Remedy Clause "reveals that it does not provide for remedies without limitation or for any perceived injury." *Ruther v. Kaiser*, 134 Ohio St. 3d 408, 2012-Ohio-5686 ¶ 12. Instead, it is the General Assembly's province to determine what remedy (if any) is available for a wrong. The remedy language of Section 16 applies only to causes of action as defined by state law. *See Ruther*, 2012-Ohio-5686 ¶ 13; *see also Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546 ¶ 150. That is, the right-to-a-remedy clause "protects only those causes of action that the General Assembly identifies." *Antoon v. Cleveland Clinic Found.*, 148 Ohio St. 3d 483, 2016-Ohio-7432 ¶ 27 (citation omitted).

The remedy language in Section 16 does not interfere with the General Assembly's "authority to modify the rules of the common law." *Stetter*, 2010-Ohio-1029 ¶ 60. This power to alter the common law "'necessarily includes the power to modify any associated remedy.'" *Id.* (quoting *Arbino*, 2007-Ohio-6948 ¶ 132 (Cupp, J., concurring)). Moreover, no one "'vested right in rules of the common law,'" so the General Assembly may pass statutes to "'adapt it to new circumstances.'" *Id.* ¶ 52 (citation omitted). Ultimately, "the General Assembly has the

right to determine what causes of action the law will recognize and to alter the common law by abolishing the action, by defining the action, or by placing a time limit after which an injury is no longer a legal injury." *Ruther*, 2012-Ohio-5686 ¶ 14.

Indeed, as an original matter, it is doubtful that the remedy language restricts legislative action *at all*. As the Court emphasized in *Ruther*, the Remedy Clause focuses on the *process* for existing causes of action, not the *substance* of what causes of action are recognized. *See* 2012-Ohio-5686 ¶ 12 (highlighting the phrase "by *due course of law*"). The historical predecessors of the clause buttress this reading. The immediate predecessor to Ohio's remedy language was Tennessee's Constitution of 1796. *See* Steven H. Steinglass & Gino J. Scarselli, The Ohio Constitution 106 (2004). Tennessee interprets the remedy language of its constitution as a limit only on the power of the judiciary, not the legislature. *See* *Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978) (upholding medical-malpractice statute of limitations). "The provision of section 17 of article 1 of our State Constitution [containing the remedy language] is a mandate to the judiciary, and was not intended as a limitation of the legislative branch of the government." *Scott v. Nashville Bridge Co.*, 223 S.W. 844, 852 (Tenn. 1919). Ohio's 1802 borrowing from Tennessee suggests that the remedy language binds only Ohio's judiciary, not its legislature.

An early Ohio statute sheds further light on the meaning of this 1802 language. A statute passed only three years after the Constitution's ratification contemplated future legislation that would alter or even abolish common-law injuries. In 1805, the Third General Assembly passed a statute providing that "the common law of England" and "all statutes or acts of the British parliament" shall form the substantive law of Ohio "*until repealed by the general assembly of this state*." 3 Ohio Laws 248 (emphasis added). Just three years after Ohio adopted the remedy

language that is now Section 16, the General Assembly recognized its broad authority to define what injuries Ohio law recognizes, even by contradicting the received common law.

At bottom, the Remedy Clause does not prohibit the General Assembly from replacing a common-law remedy with an administrative one.

2. Through R.C. 4123.35(O), the General Assembly provided a "meaningful remedy" for an injured worker—a workers' compensation recovery from the self-insuring employer of the construction project.

Ohio's Constitution grants the General Assembly explicit authority to devise a workers' compensation system. *See* art. II, § 35. The state workers' compensation laws are "the result of a unique compromise." *Stetter*, 2010-Ohio-1029 ¶ 54 (citations omitted). "'[E]mployers and employees exchange their respective common-law rights and duties for a more certain and uniform set of statutory benefits and obligations.'" *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St. 3d 539, 2006-Ohio-3257 ¶ 18 (citation omitted).

When the General Assembly has exercised the power to modify the common law in the workers' compensation sphere, this Court has found that a "workers' compensation recovery is a meaningful remedy." *Stetter*, 2010-Ohio-1029 ¶¶ 59-60. In *Stetter*, an employee challenged Ohio's employer intentional-tort statute under the Remedy Clause, arguing that it impermissibly limited the employee's ability to bring an intentional-tort claim against his employer. *Id.* ¶¶ 44-45. In particular, the statute allowed an employee to bring an intentional-tort claim when there was "deliberate intent," but required an employee to accept a workers' compensation remedy for other injuries. *Id.* ¶ 59. The Court held that the employer intentional-tort statute did not violate the Remedy Clause. *Id.* ¶¶ 55-60.

Following Stetter's logic, the subcontractor-immunity provision of R.C. 4123.35(O) does not violate the Remedy Clause, either. The General Assembly has the authority to modify the available causes of action in this State, as well as the remedies available for injuries. *See Stetter*,

2010-Ohio-1029 ¶ 60. Using this authority, the General Assembly passed a statute that provides immunity from tort claims to contractors and subcontractors enrolled in a self-insured construction project. *See* R.C. 4123.35(O). An employee injured on the project must, therefore, seek workers' compensation benefits from the self-insuring employer. *Id.*; *see also Stolz I*, 2016-Ohio-1567 ¶ 21. That is a meaningful remedy. Two points bolster this conclusion.

First, Article II, Section 35 of the Ohio Constitution provides the basis for displacing common-law tort claims in favor of the workers' compensation system enacted by the General Assembly. A payment under workers' compensation is "in lieu of all other rights to compensation, or damages." Ohio Const. art. II, § 35. And an "employer who pays the premium or compensation provided by law . . . shall not be liable to respond in damages at common law or by statute." *Id.* This constitutional provision makes workers' compensation an exclusive remedy. *See Freese v. Consol. Rail Corp.*, 4 Ohio St. 3d 5, 7 (1983). Indeed, "[o]ne of the fundamental pillars supporting Section 35, Article II is the exclusivity of the no-fault compensation system." *Stetter*, 2010-Ohio-1029 ¶ 76. R.C. 4123.35(O) is just one manifestation of this exclusivity in that it grants immunity to enrolled contractors and subcontractors and requires the self-insuring employer to provide the workers' compensation benefits owed to an injured worker. *Id.*

Second, the exclusive remedy provided for in R.C. 4123.35(O) is a "meaningful remedy," *Id.* ¶ 42, because it "do[es] not wholly deny persons a remedy for their injuries," *see Arbino*, 2007-Ohio-6948 ¶ 47. In *Stolz I*, this Court held that R.C. 4123.35(O) employed a "legal fiction" through which "the contractor who is the 'self-insuring employer' is the legal employer, for workers' compensation purposes, of all employees of enrolled subcontractors who are engaged in work at the construction site." 2016-Ohio-1567 ¶ 18. The enrolled subcontractors thus

receive "immunity . . . from the claims of employees of other enrolled subcontractors." *Id.* ¶ 27. Rather than depriving an injured employee of any remedy whatsoever, R.C. 4123.35(O) simply channels that remedy to the self-insuring employer who functions as the project's employer through the legal fiction enacted by the General Assembly and approved by this Court. *Id.* When the self-insuring employer pays workers' compensation benefits to an injured employee, the employee has received a meaningful remedy.

Thus, R.C. 4123.35(O) does not violate the Remedy Clause because an injured worker retains a "meaningful remedy" to obtain compensation through the self-insuring employer of the construction project.

C. R.C. 4123.35(O) does not violate Article I, Section 5 of the Ohio Constitution.

The General Assembly's statutory grant of subcontractor immunity in self-insured construction projects also comports with the Ohio Constitution's jury-trial right. Stolz challenges the constitutionality of R.C. 4123.35(O) under Article I, Section 5 of the Ohio Constitution, which confirms "[t]he right of trial by jury." *See* Second Am. Compl. ¶¶ 26(a), 27. Because the General Assembly's right to modify the common law is not limited by Article I, Section 5, the statute does not violate this provision.

1. The Ohio Constitution confers a right to a jury trial only in those cases where the right existed prior to the adoption of Article I, Section 5.

The Ohio Constitution provides that "[t]he right of trial by jury shall be inviolate." Ohio Const. art. I, § 5. This right, though "inviolate," "is not absolute." *Arbino*, 2007-Ohio-6948 ¶ 32. The Court has long held that Ohio's jury-trial right applies only to certain causes of action. *Id.*; *Arrington*, 2006-Ohio-3257 ¶ 22; *Kneisley v. Lattimer-Stevens Co.*, 40 Ohio St. 3d 354, 356 (1988); *Belding v. State ex rel. Heifner*, 121 Ohio St. 393 syl. ¶ 1 (1929); *Brown v. Reed*, 56 Ohio St. 264, 270 (1897). The jury-trial right does not extend to "all controversies," but instead

applies only to those cases where the right existed "under the principles of the common law" as "it existed previously to the adoption of the Constitution." *Belding*, 121 Ohio St. at 396. For example, "the right applies to both negligence and intentional-tort actions," *Arbino*, 2007-Ohio-6948 ¶ 32, but not to statutory claims of more recent vintage, like those seeking participation in Ohio's worker's compensation fund, *Arrington*, 2006-Ohio-3257 syl. ¶ 1.

The Court has also carefully defined the effect of Ohio's jury-trial right. The right does not guarantee that a jury will resolve all aspects of a case, but more narrowly "protects a plaintiff's right to have a jury determine all issues of *fact*." *Arbino*, 2007-Ohio-6948 ¶ 34 (emphasis added); *see also Dunn v. Kanmacher*, 26 Ohio St. 497, 502-03 (1875). A challenge to a statute under Article I, Section 5 "can succeed only if the statute actually intrudes upon the jury's *fact-finding function*." *Arbino*, 2007-Ohio-6948 ¶ 90 (emphasis added).

Moreover, the jury-trial guarantee "does not act as 'a limit on the ability of the legislature to act within its constitutional boundaries.'" *Stetter*, 2010-Ohio-1029 ¶ 64 (citation omitted). Even where a common-law right to a jury exists, the General Assembly retains the power "'to alter, revise, modify, or abolish the common law as it may determine necessary or advisable for the common good.'" *Id*. (citation omitted). In circumstances where the legislature modifies a common-law cause of action, the jury retains its fact-finding function only to the extent that the cause of action remains "legally available." *Id*. ¶ 67.

2. The General Assembly acted within constitutional bounds when it marshaled certain workplace injury claims against subcontractors into Ohio's workers' compensation scheme.

Ohio's workers' compensation laws were designed to improve upon the common-law system that previously governed workplace injuries. *See Arrington*, 2006-Ohio-3257 ¶¶ 13-19. The Ohio Constitution specifically empowers the General Assembly to pass laws creating a system to provide "compensation to workmen and their dependents, for death, injuries or

occupational disease, occasioned in the course of such workmen's employment." Ohio Const. art. II, § 35. Such "compensation shall be in lieu of all other rights to compensation," and employers who abide by the system "shall not be liable to respond in damages at common law or by statute for" workplace injuries. *Id.* These laws were originally adopted as "a specific pragmatic response to the social dissatisfaction with the lack of compensation available to injured workers at common law." *Arrington*, 2006-Ohio-3257 ¶ 15. They "'represent[] a social bargain in which employers and employees exchange their respective common-law rights and duties for a more certain and uniform set of statutory benefits and obligations.'" *Id.* ¶ 18 (citation omitted). "The rights of employees and their dependents" under the workers' compensation laws "are not governed by common law, but are only such as may be conferred by the General Assembly." *Westenberger v. Indus. Comm'n*, 135 Ohio St. 211, 213 (1939); *see also Indus. Comm'n v. Kamrath*, 118 Ohio St. 1 syl. ¶ 1 (1928).

Granting tort-claim immunity to subcontractors enrolled in self-insured construction-project plans does not run afoul of Ohio's jury-trial right. This Court has rejected Article I, Section 5 challenges to statutory modifications of common-law causes of action on the ground that "the right to trial by jury does not prevent the General Assembly from altering a cause of action." *Stetter*, 2010-Ohio-1029 ¶¶ 61-68; *see also Arbino*, 2007-Ohio-6948 ¶ 134 (Cupp, J., concurring) (noting that the legislature "may alter or limit what damages the law makes available and legally recoverable"). It should reach the same conclusion here.

This Court has "never held that a worker seeking to participate in" Ohio's workers' compensation fund "is entitled to a trial by jury" under the Ohio Constitution. *Arrington*, 2006-Ohio-3257 ¶ 26. That is because workers' compensation rights "are solely those conferred by

the General Assembly." *Id*. They are not of the class of "civil cases in which the right existed before the adoption of" Article I, Section 5. *Id*. ¶ 22.

The fact that Stolz is attempting to *escape* the workers' compensation system to pursue a common-law negligence claim does not save his constitutional challenge. Although negligence actions fall within the Ohio Constitution's jury-trial guarantee, *see id*. ¶ 24, that does not mean that the negligence cause of action is untouchable. It is "'within the power of the legislature to alter, revise, modify, or abolish the common law as it may determine necessary or advisable for the common good.'" *Stetter*, 2010-Ohio-1029 ¶ 64 (citation omitted). The entire workers' compensation framework *depends* on this power; the system was, after all, "specifically designed to avoid the common law." *Arrington*, 2006-Ohio-3257 ¶ 24.

Stetter controls Stolz's jury-trial challenge. In *Stetter*, the General Assembly had enacted a statute that sought to "significantly curtail an employee's access to common-law damages for . . . a 'substantially certain' employer intentional tort." *Stetter*, 2010-Ohio-1029 ¶ 27. Like negligence claims, "employer intentional-tort claims typically retain a right to trial by jury." *Id*. ¶ 65. Even so, the Court rejected the argument that this statutory modification "'would deprive'" claimants "'of their right to trial by jury'" or that "'[a]ny deprivation of the right to bring a civil action amounts to an *ipso facto* deprivation' of that right." *See id*. ¶ 62 (citation omitted) (alteration in original). The legislature acted "under its authority to alter a common-law cause of action," and the jury-trial right did not stand in its way. *Id*. ¶¶ 64-65.

Like the workers' compensation scheme generally, the statutory provisions at issue in this case modify an employer's common-law negligence liability in exchange for more predictable coverage for workplace injuries. Specifically, the General Assembly determined that certain participants in self-insured construction projects should resolve workplace-injury claims through

the workers' compensation system, and consequently restricted access to negligence claims. *See Stolz*, 2016-Ohio-1567 ¶ 27. As in *Stetter*, Article I, Section 5 does not limit its power to make this determination.

D. R.C. 4123.35(O) does not violate the equal-protection component of Article I, Section 2 of the Ohio Constitution.

The General Assembly's statutory grant of subcontractor immunity in self-insured construction projects also comports with the Ohio Constitution's equal-protection guarantee. The generally applicable equal-protection provision does not strip the legislature of the power to adjust the common law as authorized in the specific provision authorizing workers' compensation laws. *See State v. Anderson*, 148 Ohio St. 3d 74, 2016-Ohio-5791 ¶ 3 (pl. op.) (analyzing question under specific part of constitution rather than "more general" clause).

1. Equal protection generally requires only rational basis for statutes.

Article I, Section 2 of the Ohio Constitution states that: "All political power is inherent in the people. Government is instituted for their equal protection and benefit." Under this provision, the State is "free to draw distinctions" between citizens as long as it does not treat similarly situated individuals differently. *Park Corp. v. Brook Park*, 102 Ohio St. 3d 166, 2004-Ohio-2237 ¶ 19. If the distinctions do not involve a fundamental right or a suspect classification, the Court will "uphold the classification if it is rationally related to a legitimate government interest." *State v. Ferguson*, ___ Ohio St. 3d ___, 2017-Ohio-7844 ¶ 31 (*citing Conley v. Shearer*, 64 Ohio St. 3d 284, 289 (1992)). Courts will "set aside legislative classifications only if they are 'based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them.'" *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St. 3d 307, 2016-Ohio-8118 ¶ 48 (citation omitted).

2. R.C. 4123.35(O) is rationally related to the goals of workers' compensation.

R.C. 4123.35(O) easily satisfies equal-protection guarantees. The statute does not implicate any fundamental rights. Nor does it implicate a suspect classification. R.C. 4123.35(O) therefore need only reflect a rational basis for equal protection purposes.

The Court's precedent shows that the statute meets that standard. The Court has already recognized that treating workers' compensation claimants differently from other civil plaintiffs "is especially reasonable given the differences between the workers' compensation system and the civil-justice system." *Ferguson*, 2017-Ohio-7844 ¶ 39. To the extent that Stolz might suggest that the relevant comparison is not between civil plaintiffs and all employees, but instead construction workers specifically, the Court has also observed that the General Assembly may permissibly include construction workers in Ohio's system and may permit their employers to self-insure. It has held that such decisions about the scope of self-insurance are policy questions that "must be directed to the General Assembly, rather than to this court." *Stolz I*, 2016-Ohio-1567 ¶ 26.

E. R.C. 4123.35(O) does not violate the due process component of Article I, Section 16 of the Ohio Constitution.

The conclusion that R.C. 4123.35(O) complies with equal-protection guarantees "gives away the ending" as to due process. *Ferguson*, 2017-Ohio-7844 ¶ 43. As under equal-protection, the due-process inquiry asks whether the law has a rational basis.

1. In most cases, the due-process guarantee requires only rational basis for a law.

Article I, Section 16 of the Ohio Constitution states that "every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law." It is unclear from Stolz's complaint whether he is raising a procedural due process claim or a substantive one. In either case, his challenge lacks merit.

"A procedural-due-process challenge concerns the adequacy of the procedures employed in a government action that deprives a person of life, liberty, or property." *Ferguson*, 2017-Ohio-7844 ¶ 42. "When the legislature passes a law of general application, there is no question about the adequacy of the procedures; the legislative process provides all the process that is due." *State v. Aalim*, 150 Ohio St. 3d 489, 2017-Ohio-2956 ¶ 41 (DeWine, J., concurring); *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003) (Scalia, J., concurring) ("a validly enacted statute suffices to provide all the process that is 'due'").

A substantive due process claim, by comparison, challenges a statute regardless of the associated process. *See Aalim*, 2017-Ohio-2956 ¶ 43 (DeWine, J., concurring). In the face of such a challenge, a statute must survive strict scrutiny if it involves a fundamental right. *Stetter*, 2010-Ohio-1029 ¶ 72. If it does not, then the statute need only satisfy rational basis review. *Id.* Under that more lenient standard, a court will uphold a statute "(1) if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and (2) if it is not unreasonable or arbitrary." *Arbino*, 2007-Ohio-6948 ¶ 49 (quotations omitted) *see also Stetter*, 2010-Ohio-1029 ¶ 70. Courts will '"grant substantial deference to the predictive judgment of the General Assembly'" when determining whether a statute is supported by a rational basis. *Arbino*, 2007-Ohio-6948 ¶ 58 (citation omitted).

2. Like countless other workers' compensation laws, R.C. 4123.35(O) has a rational basis.

Applying these principles, the Court has rejected several due process challenges to other aspects of Ohio's workers' compensation system. *See Stetter*, 2010-Ohio-1029 ¶¶ 69-78; *Groch*, 2008-Ohio-546 ¶¶ 155-75; *Kaiser v. Strall*, 5 Ohio St. 3d 91, 94 (1983). It has held that Ohio's workers' compensation laws do not implicate any fundamental rights. *See Stetter*, 2010-Ohio-1029 ¶ 72; *Groch*, 2008-Ohio-546 ¶¶ 82, 156; *Ferguson*, 2017-Ohio-7844 ¶ 31. And it has

further held that the State has a rational basis for structuring the workers' compensation system the way it has. The reasons for such a system are 'first, to maintain the balance of sacrifices between employer and employee in the substitution of no-fault liability for tort liability and, second, to minimize litigation, even litigation of undoubted merit." *Stetter*, 2010-Ohio-1029 ¶¶ 74-77. Finally, the Court has described due process challenges to the workers' compensation statutes as "particularly mystifying, given the fact that [their] very adoption would abrogate" Article II, Section 35 of the Ohio Constitution, which grants the state explicit authority to establish an exclusive workers' compensation fund. *See Kaiser*, 5 Ohio St. 3d at 94.

As this Court held in *Stolz I*, R.C. 4123.35(O) is simply one part of Ohio's larger workers' compensation system. 2016-Ohio-1567 ¶¶ 10-13. It extends the ability to qualify as a self-insuring employer to general contractors that oversee construction projects employing numerous sub-contractors. *See id.* at ¶¶ 12-13, 18-22. To the extent that R.C. 4123.35(O) limits an employee's ability to recover damages associated with a workplace injury or death through tort law, it does so only "to the same extent that recovery is limited by workers' compensation law." *Id.* at ¶ 22. The Court has already upheld restrictions on an injured worker's ability to sue a co-employee. *Kaiser*, 5 Ohio St. 3d at 94. The statute in this case does little more than define the scope of Ohio's workers' compensation system by extending fellow-servant immunity to employees of different subcontractors. The Court's prior decisions rejecting due process challenges to other aspects of that system therefore apply with equal force here and are more than enough to reject Stolz's due-process claim.

F. Under traditional constitutional-avoidance principles, this Court's prior decision in this same litigation suggests that the statute raises no serious constitutional question.

The Court's previous review of this litigation suggests that the constitutional challenges involved in this second round are not serious. Under constitutional-avoidance principles, courts

must "give a statute a constitutional construction, if one is reasonably available." *State v. Keenan*, 81 Ohio St. 3d 133, 150 (1998). That is so even if the construction that will avoid constitutional questions, "though plainly not the best reading, is at least a possible one." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2259 (2013). Indeed, the gravitational pull of "[m]odern avoidance" steers "statutes away from the constitutional danger zone" even if the non-avoidance construction "might well have been constitutionally valid." Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1960-61 (1997) (listing examples). So, any interpretation that choses a construction that *creates* constitutional questions, rather than *avoids* them through a different interpretation, is a powerful statement that those questions fall away, and the statute has no constitutional defects.

Applying these mandates, this Court has repeatedly avoided constitutional questions. *E.g.*, *Mahoning Educ. Ass'n of Developmental Disabilities v. State Emp. Relations Bd.*, 137 Ohio St. 3d 257, 2013-Ohio-4654 ¶¶ 13-15 (interpreting labor statute to avoid First Amendment issue); *State v. Talty*, 103 Ohio St. 3d 177, 2004-Ohio-4888, ¶¶ 12, 25 (construing probation conditions to avoid due-process question); *Norandex, Inc. v. Limbach*, 69 Ohio St. 3d 26, 28 (1994) (interpreting tax statute to partially avoid dormant-commerce-clause issues); *Winslow-Spacarb, Inc. v. Evatt*, 144 Ohio St. 471, 476 (1945) (reading tax law to avoid equal-protection questions). In short, "[i]t is always the duty of a court to construe a statute, if possible, in a manner to give it a constitutional operation." *Winslow-Spacarb*, 144 Ohio St. at 475.

In this case's previous iteration, however, the Court concluded that the General Assembly had foreclosed Stolz's tort claim even though Stolz made "policy argument[s]" that had "some merit." *Stolz I*, 2016-Ohio-1567 ¶ 26. A dissent disagreed that the statute could be read to block Stolz's suit. *Id*. at ¶ 37 (French, J., dissenting) ("[A] comprehensive reading" of the statute

shows that employees of one subcontractor may sue another subcontractor for negligence.). That dissent—even if not the best reading (as the majority of this Court has held)—at least raised a "possible" reading, *Inter Tribal*, 133 S. Ct. 2259, and so triggered the Court's "duty to liberally construe [the] statute[] 'to save [it] from constitutional infirmities,'" *Mahoning Educ.*, 2013-Ohio-4654 ¶ 13 (citation omitted).

If this Court in *Stolz I* had believed that the statute raised any serious constitutional question, it would have had to consider whether the dissent's reading was at least plausible. That it did not do so illustrates that no serious constitutional question is raised by this law. Instead, as the Court said in the first round, Stolz's arguments invoke "policy" considerations. 2016-Ohio-1567 ¶ 26. Those policy arguments are for the General Assembly, whether they are raised in the name of statutory *or* constitutional interpretation.

CONCLUSION

For the above reasons, the Court should answer the certified question "no."

Respectfully submitted,

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