IN THE SUPREME COURT OF OHIO

HAIGHT, *et al.*,	:	**Supreme Court Case No. 2014-1241**
PLAINTIFFS/APPELLEES	:	
v.	:	
	:	**Appeal from the Montgomery County Court of Appeals, 2nd District**
CHEAP ESCAPE COMPANY, *et al.*,	:	**Appeal No. CA 25983**
DEFENDANTS/APPELLANTS.	:	**Trial No. 2012 CV 00946**

BRIEF OF *AMICUS CURIAE* THE OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF/APPELLEE JOHN HAIGHT AND OTHERS SIMILARLY SITUATED

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I. STATEMENT OF INTEREST

A. Description of the Amici

The Ohio Association for Justice ("OAJ") is Ohio's largest victims' rights advocacy association, comprised of approximately 1,500 attorneys dedicated to promoting the public good through efforts to secure a clean and safe environment, safe products, a safe workplace, and quality health care. OAJ is the only statewide association of attorneys whose mission is to preserve our Constitutional rights and protect access to the civil justice system for all Ohioans through advocacy in both the Courthouse and Statehouse. For the past sixty years, the OAJ has worked to strengthen the civil justice system so that deserving individuals receive justice and wrongdoers are held accountable. Our member lawyers practice in several specialty areas including wage and hour law.

B. Amici's Interest in the Outcome of This Case

The OAJ recognizes that this case carries important implications for a large number of workers in the State of Ohio who, if the appeals court ruling is overturned, may be relegated to working for sub-poverty wages. The OAJ thus welcomes this opportunity to provide the Court with an analysis of the interrelationship between the language of and history behind Article II, Section 34a of the Ohio Constitution ("Section 34a") and the Fair Labor Standards Act ("FLSA"). Further, the OAJ urges affirmation of the Second District Court of Appeals decision, which correctly applied Ohio's minimum wage law.

II. STATEMENT OF THE FACTS

At its essence, this case concerns Cheap Escape's failure to pay Appellees, advertising sales representatives, the required minimum wage as prescribed by Section 34a and Appellees'

request for a declaratory judgment to determine the constitutionality of R.C. 4111.14(B)(1) ("R.C. 4111"). In their motion for declaratory judgment, Appellees requested that the trial court determine that either R.C. 4111 was unconstitutional as a result of its conflict with Section 34a, or R.C. 4111 was constitutionally valid but only because it did not apply to the present action and Appellees could thus proceed exclusively under Section 34a. The OAJ defers to and adopts the Statement of Facts and Statement of the Case as set forth in the merit brief of the Plaintiffs/Appellees. (Appellees' Br. at 2-3).

III. ARGUMENTS IN OPPOSITION TO APPELLANTS' PROPOSITION OF LAW

A. Section 34a Adopts the Broad Definition of "employee" Found in the Fair Labor Standards Act at 29 U.S.C. 203(e) but Does Not Incorporate the Independent Exemptions Found Elsewhere in the FLSA. (Response to Proposition No. 1)

Ohio voters approved the Ohio Fair Minimum Wage Amendment ("the OFMW Amendment") on November 7, 2006.[1] The OFMW Amendment added Section 34a to Article II of the Ohio Constitution. Section 34a adopted certain definitions of the federal Fair Labor Standards Act 29 U.S.C. 201 *et seq.* ("FLSA"), but did not adopt the FLSA exemptions found in 29 U.S.C. 213. Under Section 34a the term "employee," for purpose of paying minimum wages in Ohio, has the same broad definition of "employee" in the FLSA, "except that [in Ohio]…'employee' shall not include an individual employed in or about the property of the employer or individual's residence on a casual basis."

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[1]The Amendment made several changes to Ohio minimum wage law, including "(1) an increase in the state minimum wage with guaranteed future increases; (2) an expansive definition of the term "employee"; (3) limitations on the exemptions to coverage by the Amendment; (4) new record-keeping requirements for Ohio employers; (5) guarantees that the right of an employee to enforce the protections of the Amendment not be abridged; (6) a self-executing text; and (7) an explicit restriction on any legislative action that might impair the protections provided in the Amendment." Jason R. Bristol, *Intended and Unintended Consequences: The 2006 Fair Minimum Wage Amendment of the Ohio Constitution*, 58 Clev. St. L. Rev. 367, 378 (2010).

The inclusion of the FLSA's broad definition of employee into Section 34a was both significant and deliberate. Section 34a states, in relevant part:

> As used in this section: "employer," "employee," "employ," "person" and "independent contractor" **have the same meanings as under the federal Fair Labor Standards Act**...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.) Ohio Constitution, Article II, Section 34a.

The history surrounding the enactment of the FLSA indicates that the FLSA's definition of employee was designed to be read broadly in order to effectuate its remedial purpose. The FLSA simply defines "employee" as "any individual employed by an employer," except for those individuals mentioned in paragraph (2),[2] (3),[3] and (4).[4] 29 U.S.C. 203(e). This definition has historically been recognized as "the broadest definition that has ever been included in any one act." *See United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting the Act's principal sponsor, Senator Hugo Black, 81 Cong. Rec. 7657 (1937)). The federal authors of the FLSA sought both to spread out hours amongst the eligible workforce and elevate wages of these very same employees.[5] The FLSA's definition of employee was designed to be a net of which the FLSA could cover as many employees as possible with its protections.

In 2006, Ohio voters specifically adopted the FLSA's broad definition of employee but deliberately **declined to** adopt the FLSA's exemptions. Pursuant to Section 34a, the term "employee" has the same meaning as the FLSA, "except that . . . [it] shall not include an individual employed in or about the property of the employer or individual's residence on a

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[2] 29 U.S.C. 203(e)(2)) (individuals employed by a public agency).
[3] 29 U.S.C. 203(e)(3 (certain agricultural workers).
[4] 29 U.S.C. 203(e)(4) (volunteers).
[5] *See, e.g.*, Deborah Malamud, *Engineering the Middle Classes: Class-Line Drawing in New Deal Hours Legislation*, 96 Mich. L. Rev. 2212, 2223 (1998).

casual basis." The text of Section 34a goes on further to explicitly state, "*Only the exemptions set forth in this section shall apply to this section.*" (Emphasis added.). By deliberately incorporating the FLSA's definition of employee into the text of Section 34a and simultaneously not including the FLSA's exemptions, the Ohio drafters of the Amendment demonstrated the intent to cover more employees with the Amendments' minimum wage protections than those of the FLSA.

Ohio's courts have recognized that the FLSA definition of "employee" encompasses "any individuals employed by an employer", both exempt and non-exempt, under this definition. As the Court of Appeals stated, "the exemptions from the minimum wage requirements set forth in 29 U.S.C. § 213 do not alter the definition of 'employee' set forth in 29 U.S.C. 203." *Haight v. Cheap Escape Co.*, _ Ohio St. 3d. _,2014-Ohio-2447, 11 N.E.3d. 1258, ¶ 17 (2nd Dist.). The same applies equally to the definition of employee found in Section 34a. Section 34a adopted the FLSA's broad definition, and then limited that provision by enumerating five specific exemptions:

(1) Employees under the age of 16;
(2) Employees of businesses with annual gross receipts of 250 thousand dollars or less;
(3) Tipped workers;
(4) Employees of solely family owned and operated businesses who are family members of an owner; and
(5) Employees with mental or physical disabilities.

The fact that Section 34a states that "[o]nly the exemptions set forth in this section shall apply to this section" means just that: no employees other than those enumerated within the Section 34a's text are to be excluded from the payment of minimum wages in Ohio. Ohio Constitution, Article II, Section 34a.

1. **By Identifying Certain Individuals as Exempt From Section 34a's Definition of "employee," the Language of Section 34a Necessarily Implies That the Ohio Drafters Did Not Intend to Exempt Those Individuals Not Enumerated From Section 34's Coverage**

Cheap Escape and amicus Ohio Management Lawyers' Association ("OMLA") incorrectly contend that Section 34a includes outside salespersons within those five enumerated exclusions from the definition of "employee." However, OMLA supports the contention that "jurists consistently applied the FLSA's exemptions to Ohio's minimum wage law" by referencing cases that concern Ohio's *overtime* law[6]—which unlike Section 34a—expressly includes the FLSA exemptions. *See Thomas v. Speedway Super America, LLC*, 506 F.3d 496, 501 (6th Cir. 2007) ("The Ohio [overtime] statute expressly incorporates the standards and principles found in the FLSA."; *Dillworth v. Case Farm's Processing, Inc.*, N.D. Ohio, No. 5:08-cv-1694, 2009 WL 2766991, *4 (Aug. 27, 2009) (analyzing a claim under Ohio's overtime statute, R.C. 4111.03); *Trocheck v. Pellin Emergency Medical Services, Inc,* 61 F. Supp. 2d 685, 699 (N.D. Ohio 1999) (the FLSA's "Motor Carrier Act exemption" applies equally to the claim brought under Ohio overtime law").

The established framework for interpreting statutory language and construction requires "first, a natural reading of the full text; second, the common-law meaning of the statutory terms; and finally, consideration of the statutory and legislative history for guidance." *Lockhart v. Napolitano,* 573 F.3d 251, 255 (6th Cir. 2009). Statutory interpretation always begins by examining the text, and statutory language is to be followed when clear. *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 2013-Ohio-4147, 998 N.E.2d 517, ¶ 24 (1st Dist.) citing *Symmes Twp. Bd.*

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[6] *See* R.C. 4111.03(A) ("An employer shall pay an employee for overtime . . .in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the 'Fair Labor Standards Act of 1938'").

of Trustees v. Smyth, 87 Ohio St.3d 549, 553, 721 N.E.2d 1057 (2000); *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 882 N.E.2d 400, 2008-Ohio-511, ¶ 19. ("[w]hen statutory language is plain and unambiguous and conveys a clear and definite meaning, we must rely on what the [drafters have] said. The court must give effect to the words used, making neither additions nor deletions from words chosen by the [drafters]").

Similarly, the legal maxim of *expressio unius est exclusio alterius* ("the inclusion of one thing implies the exclusion of all others"), commonly applied to matters of statutory interpretation, stresses that additions or exemptions to a statutory provision should not be inserted without explicit directive from the authors of the statute. *See, e.g., Bd. of Educ., Erie Cnty. Sch. Dist. v. Rhodes*, 17 Ohio App. 3d 35, 477 N.E.2d 1171 (10th Dist. 1984); *Rundquist v. Director of Revenue*, 62 S.W.3d 643, 646 (Mo. App. 2001). ("when a statute enumerates the persons affected, it is to be construed as excluding from its effect all those not expressly mentioned"). Adhering to these principles, the same applies to Section 34a: if the Ohio drafters had intended Section 34a to include the FLSA exemptions, they would have expressly done so. Accordingly, the express mention of (1) employees under the age of 16, (2) employees of businesses with annual gross receipts of 250 thousand dollars or less, (3) tipped workers, (4) employees of solely family owned and operated businesses who are family members of an owner, and (5) employees with mental or physical disabilities as exempted from the definition of "employee" operates to exclude any other additional exemptions. Ohio Const. Article II, Section 34a; *C.f. Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518, 130 Nev. Adv. Op. 52, (2014), *reh'g denied* (Sept. 24, 2014) (applying the canon of *expressio unius est exclusio alterius* canon to Nevada's Minimum Wage Amendment, which "expressly and broadly defines employee, exempting only certain groups...[and] necessarily implies that all employees not exempted by

the Amendment, including taxicab drivers, must be paid the minimum wage set out in the Amendment"). Therefore, the only individuals exempted by Section 34a, as the language of the provision clearly indicates, are the five enumerated categories of individuals therein. Given this language, the term "employee" under Section 34a necessarily includes outside salespersons.

2. Comparison of Ohio Minimum Wage Law Exemptions Included in Section 34a With Those Present Prior to Section 34a's Enactment Indicate That Section 34a's Limitation of its Exclusions to the Five (5) Categories of Employees Specified Therein Was Both Intentional and Deliberate

The Amendment was presented to Ohio voters for consideration in 2006 as Issue 2. The Ohio electorate had the opportunity to review and consider the Amendment and was asked to vote on the addition of Section 34a to the Ohio Constitution. As the OMLA points out in its amicus brief, Issue 2's "Argument and Explanation" section included language that informed the voters that the proponents of the Amendment intended Section 34a "to raise wages for over 700,000 Ohio Workers" and that the "value of the federal minimum wage has reached a 50-year low."[7] Additionally, under Ohio's prior minimum wage law, "employee" meant any individual employed by an employer, but excluded nine (9) categories of individuals from the definition of "employee," which was reduced to five through the amendment.[8] By adopting the FLSA's broad

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[7] OMLA Br., 5 (citing Appendix A).

[8] Prior to the enactment of H.B. 690, R.C. 4111.01 excluded:

(1) Any individual employed by the United States;
(2) Any individual employed as a baby-sitter in the employer's home, or a live-in companion to a sick, convalescing, or elderly person whose principal duties do not include housekeeping;
(3) Any individual engaged in the delivery of newspapers to the consumer;
(4) Any individual employed as an outside salesperson compensated by commissions or in a bona fide executive, administrative, or professional capacity as such terms are defined by the Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C.A. 201, as amended;

definition of "employee" and limiting its exclusions to the five (5) enumerated categories of individuals, the proponents of Section 34a sought to provide greater protections for Ohio workers than those contained in either Ohio's previously existing minimum wage law or the federal FLSA.[9]

i. Ohio's Prior Minimum Wage Law

The FLSA exempts twenty-three (23) categories of employees from the minimum wage. *See* 29 U.S.C. 213. Thus, prior to Section 34a's adoption, Ohio minimum wage law provided a more expansive minimum wage protection than what was afforded by the FLSA. When Section 34a was drafted and put before Ohio voters, it expanded the scope of Ohio's minimum wage protections by reducing the categories of individuals excepted from the definition of employee from nine to five.

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(5) Any employee employed in agriculture if the employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred worker-days of agricultural labor, or if the employee is the parent, spouse, child, or other member of the employer's immediate family;
(6) Any individual who works or provides personal services of a charitable nature in a hospital or health institution for which compensation is not sought or contemplated;
(7) A member of a police or fire protection agency or student employed on a part-time or seasonal basis by a political subdivision of this state;
(8) Any individual in the employ of a camp or recreational area for children under eighteen years of age and owned and operated by a nonprofit organization or group of organizations described in Section 501(c) of the "Internal Revenue Code of 1954," and exempt from income tax under Section 501(a) of that code;
(9) Any individual employed directly by the house of representatives or directly by the senate.

[9] Section 34a included: 1) an increase in the minimum wage to a rate of not less than $6.85 per hour beginning January 1, 2007, and guaranteed future yearly increases of the minimum wage rate based on inflation 2) an definition of "employee," with two exemptions; and 3) new record-keeping requirements; 4) a prohibition on any laws passed restriction its provisions.

If the Court is to accept Appellant's argument as correct, then the Court would have to find that the drafters of Section 34a intended the implementing statute to constrict minimum wage coverage in Ohio because R. C. 4111.14(B)(1) adopts the exemptions enumerated in 29 U.S.C. 213, which was precisely the opposite of what both the drafters and the voters intended to accomplish. The Appellees maintain that Appellant's proposition cannot be reconciled with the plain text of Section 34a and the will of the Ohio voters.

ii. Ohio's Overtime Law

As opposed to Section 34a, Ohio's overtime provision expressly states that it is subject to the FLSA exemptions "in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the 'Fair Labor Standards Act of 1938.'" R.C. 4111.03(A). This starkly contrasts the language of both Ohio's prior minimum wage law and Section 34a.

From the outset, Ohio had not previously applied the full range of FLSA exemptions to its minimum wage provision (R.C. 4111.01) before Section 34a was added. As previously discussed, R.C. 4111.01 excluded nine types of individuals from the definition of "employee," some of which are listed under the FLSA's exemptions. When Section 34a was enacted, it adopted the FLSA's definition of "employee," but provided its own exemptions rather than incorporating the FLSA's exemptions. Ohio's overtime law provision, which was in effect prior to the enactment of Section 34a, serves as an example supporting the conclusion that had the drafters of Section 34a wished to do so, they could have incorporated the a more extensive set of exemptions into the Amendment, just as the framers of the previously enacted R.C. 4111.01 had done. Instead, they chose to specifically list separate and unique exemptions to the minimum wage requirements.

The specific choice of words used to incorporate the FLSA is also worth noting. R.C. 4111.03(A) states that the overtime pay shall be applied "*in the manner in and methods provided in and subject to* the exemptions of section 7 and section 13." In contrast, Section 34a uses the broad language of "same *meanings* as the FLSA." By comparing the two provisions, it is hard to see how Appellants can argue that Section 34a's broad language actually equates to the language in R.C. 4111.03(A) which specifically includes the FLSA exemptions.

3. Section 34a's Elimination of Previous Exemptions Creates Consistency in Interpretation

At the time Section 34a was being drafted, the FLSA's definition of employee had 23 exemptions and the pre-2006 Ohio minimum wage law had nine exceptions to the definition of "employee." The campaign materials issued by the proponents of Section 34a stated that one goal in enacting Section 34a was to provide clarity to the language of Ohio's minimum wage laws, so as to avoid unnecessary litigation.[10] Accordingly, the Ohio drafters of Section 34a sought to further this goal of eliminating excessive litigation by simplifying the scope of Ohio's minimum wage protection—choosing not to adopt the FLSA's twenty-three exemptions and eliminating four (4) previously existing Ohio exemptions. As a result, the Ohio drafters expanded the coverage of Ohio's minimum wage laws by limiting the minimum wage exclusions to a finite enumeration of those exemptions listed in Section 34a's definition of "employee."

Appellants' contention that the drafters of Section 34a intended to exclude outside salespersons from its minimum wage protections without enumerating them among the exclusions therein calls for an absurd reading of the plain text of the amendment. Construing

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[10] OHIOANS FOR A FAIR MINIMUM WAGE, *Fact vs. Fiction: Minimum Wage Opponents Shamelessly Distort Facts to Deny Low-Wage Workers a Raise* (emphasizing the importance in clear definition, so as to not "necessitate litigation to clarify their meanings because those terms have been established by federal regulations, well settled case law, or both").

Section 34a in this way invites conflicting interpretations and thereby opens the door to excessive litigation concerning the question of which, if any, Ohio workers enjoy minimum wage protections. Appellants ask this Court to read into a list naming five categories of individuals excluded from the definition of employee, the separate and additional category of outside salespersons. Following Appellants' rationale, any employer who choses not to pay their employees minimum wages can do so by claiming that the drafters of Section 34a intended to include their employees, despite those employees not falling within one of the five enumerated exemptions. Such an irrational and untenable position will certainly result in a flood of litigation which will seek to test the boundaries of the Court's willingness to add to a list of five without creating a sixth enumerated exemption.

4. Constitutional Initiatives Merit Considerable Deference

Amendments by initiative retain a "powerful place in political life."[11] "The people's right to the use of the initiative and referendum is one of the most essential safeguards to representative government." *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St. 3d 315, 2010-Ohio-1845, 928 N.E.2d 410, ¶ 55.[12] Such deference is both rational and appropriate in consideration of the fact that initiatives, as opposed to legislation enacted by a representative body, better reflect the will of the people.[13] In interpreting the intent of a statute enacted by

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[11] Scott Kafler & David Russcol, *The Eye of a Constitutional Storm: Pre-Election Review by the State Judiciary of Initiative Amendments to State Constitutions*, 2012 Mich. St. L. Rev. 1279, 1285 (2012) (*citing* Economist, *What Do You Know? How Voters Decide*, (April 23, 2011) http://www.economist.com/node/18563612 (accessed Feb. 20, 2015).

[12] *Compare id.* at 420 ("duty to liberally construe the citizens' right of initiative in favor of their exercise of this important right") with *Legislature of Cal. v. Deukmejan*, 669 P.2d 17, 4 Cal.3d 658 (Cal. 1983) (courts accord ballot initiatives "great deference and express reluctance to overturn them").

[13] *See* Nicholas R. Theodore, *We the People: A Needed Reform of State Initiative and Referendum Procedures*, 78 Mo. L. Rev. 1401, 1413 (2013) (initiatives are a "more democratic

initiative, courts rely heavily on the text of the initiative in question, as the language of a law provides the best evidence of the lawmakers' intentions."[14] As discussed *supra*, Section 34a's drafters' deliberate selection of clear language defining "employee" for the purposes of Ohio minimum wage protections embodied the inclusive spirit and intent behind the initiative. Accordingly, the Court should grant deference to this intent.

Judges further rely on and apply "voter intent" when interpreting initiatives.[15] Voter intent may be derived from a variety of materials—not solely from the text of the initiative—including the information the voter saw or heard before making his or her decision, the initiative's statement of purpose, material used in the pro and con advertising campaigns, and the official voter information pamphlet.[16] Before voting on the addition of Section 34a, Ohio voters reviewed the Amendment "Argument and Explanation," which expressed the popular intent behind Issue 2—including expanding the minimum wage to over 700,000 Ohio workers. Narrowing the coverage of Section 34a would cut against the voters' intent to expand minimum wage to Ohio workers. *See* Tsedeye Gebreselassie, Policy Matters Ohio and The National

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means of enacting legislation than representative democracy through the use of elected officials"); John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or A Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. Rev. 227, 229 (1998) (court generally view initiatives as "important and positive components of American government and democracy").

[14] Michael D. Gilbert , *Interpreting Initiatives*, 97 Minn. L. Rev. 1621 (2013); Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 Colum. J.L. & Soc. Probs. 237, 264 (1999) ("Ultimately, courts should not be left wondering what the voters thought they were voting for or whether they understood what a 'yes' vote meant-that should be clear on the face of the initiative.").

[15] *Gilbert*, 97 Minn. L. Rev. at 1625-26 ("In the vast majority of those cases, courts declared that their task is to locate the controlling popular intent behind the provision at issue."); Cathy R. Silak, *The People Act, the Courts React: A Proposed Model for Interpreting Initiatives in Idaho*, 33 Idaho L. Rev. 1, 4, 62 (1996) ("the interpretive process should place a paramount emphasis on discerning the voters' intent behind the initiative and should not employ facile and superficial traditional norms to undermine that voter intent").

[16] *Silak*, at 37-38, 60 (Courts will look to extraneous material to ascertain legislative purpose).

Employment Law Project, *Senate Bill Would Reduce Ohio Minimum Wage Coverage, Violating the Ohio Constitution*, (June 6, 2011) http://www.raisetheminimumwage.com/media-center/entry/senate-bill-would-reduce-ohio-minimum-wage-coverage-violating-the-ohio-cons/ (accessed Feb. 23, 2015) ("It's not the legislature's intent that matters here—it's the voters'."). The Court should recognize this intent behind the initiative.

5. Appellees' Interpretation of the OFMWA as Including Outside Salespersons Within the Amendment's Minimum Wage Requirements is Consistent With the Intent Exhibited in Similar Legislation Enacted by Neighboring States During the Same Time Period

Section 34a, rather than signifying an isolated act divorced from any greater trend of legislative reformation, exhibited a populist initiative which belonged to a greater trend of wage and hour law expansion. State wage and hour laws generally fit one of two patterns: certain states add on to the federal law and have enacted even higher minimum standards; others have adopted so-called "safety net" laws that generally apply only to workers not covered by the FLSA. The "safety net" states apply a broad exemption (or in the definitional portion of the state law, an exclusion) for employees covered by the FLSA.[17]

Simply put, Ohio was not alone in expanding the coverage of its minimum wage laws. A review of similar changes to other states' codes and regulations demonstrates that at the time Section 34a was enacted, other states were enacting similar minimum wage statutes that eliminated most of the FLSA exemptions from those states' minimum wage laws. Where certain states—such as, Colorado, Michigan, Missouri and Montana—did *not* eliminate the outside salespersons exemption from their minimum wage laws, they did so explicitly. *See, e.g.,* Mich.

[17] Employers' Guide to the Fair Labor Stds. Act, 110 *Relationship of the Federal FLSA to State Wage and Hour Requirements*, 2010 WL 304378.

Comp. Laws Ann. 408.420(b) ("This act does not apply to an employee who is exempt from the minimum wage requirements of the Fair Labor Standards Act of 1938, 29 USC 201 to 219.").

a. Arizona

Arizona voters approved Proposition 202 in November of 2006, which increased the minimum wage to $6.75 an hour to be adjusted each year for changes in the cost of living. Arizona Secretary of State, *2006 Ballot Propositions & Judicial Performance Review* (Sept. 2006), http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop202.htm (accessed Feb. 20, 2015). Similar to Ohio, Arizona did not incorporate the FLSA exemptions into the minimum wage statute. Proposition 202 defined "employee" as "any person who is or was employed by an employer but does not include any person who is employed by a parent or sibling, or who is employed performing babysitting services in the employer's home on a casual basis." Ariz. Rev. Stat. Ann. 23-362(A).

b. Colorado

In 2006, Colorado voters approved the Colorado Minimum Wage Increase Initiative, which increased the minimum wage to $6.85 (the same amount as that required in Section 34a). *See* Colorado State Legislative Council, *Ballot History* (2006), http://www.leg.state.co.us/lcs/ballothistory.nsf/835d2ada8de735e787256ffe0074333d/459d92dc248c6dcd872571e9005c9291?OpenDocument (accessed Feb. 20, 2015). The Amendment "explicitly limited the minimum wage increase to "employees who receive the state or federal minimum wage." Colorado Constitution, Article XVIII, Section 15. Colorado's definition of "employee" differs from the FLSA and contains its own exemptions. *See* 7 CCR 1103-1(1), (2), and (5).

c. Michigan

In 2006, the Michigan legislature amended its minimum wage law and increased the state minimum wage. *See Arrington v. Michigan Bell Tel. Co.*, 746 F. Supp. 2d 854, 857 (E.D. Mich. 2010). Michigan's minimum wage law does not apply to employees who are exempt from the FLSA's minimum wage requirements. *See* Mich. Comp. Laws Ann. 408.420(b). Michigan law explicitly states that the FLSA exemptions apply. "This act does not apply to an employee who is exempt from the minimum wage requirements of the fair labor standards act of 1938, 29 USC 201 to 219." Mich. Comp. Laws Ann. 408.420 (West)

d. Missouri

Missouri voters approved the Missouri Minimum Wage Act, which appeared in the November 7, 2006 ballot as an initiated state statute. *See* BallotPedia, *Missouri 2006 ballot measures*, http://ballotpedia.org/Missouri_2006_ballot_measures (accessed Feb. 20, 2015). Although the Amendment increased the minimum wage to $6.50 per hour or the federal minimum wage, if higher, it did not change Missouri's minimum wage coverage with respect to outside salespeople. Similar to Ohio, Missouri defines "employee" as "any individual employed by an employer," but specifically excludes outside salespeople from that definition. *See* Mo. Ann. Stat. 290.500(3)(k).

e. Montana

In 2006, Montana voters approved an initiative to amend a section of its code, which increased Montana's minimum wage and tied future raises to inflation. *See* Mont. Code Ann. 39-3-409. Montana kept its exemption for outside salespeople. As with every other state that kept an exclusion or exemption for those employees, Montana law does it explicitly. *See* Mont. Code Ann. 39-3-409(1)(j).

f. Nevada

Similar to Ohio, Nevada's 2006 constitutional amendment raised the minimum wage and ties it to inflation. Nevada Constitution Article XV, Section 16(A). Under Nevada law, "employee" is defined as "any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period of not longer than (90) days." *Id.* at (C). Aside from the exceptions, the definition is the same as that found in Section 34a and the FLSA.

Also similar to that of Ohio, Nevada's prior, statutory minimum wage law contained a number of exemptions to its minimum wage requirements. Like Section 34a, Nevada's 2006 Amendment included fewer exemptions from coverage, indicating the intent to expand coverage from that of the prior statute Nev. Rev. Stat. Ann. 608.250. *See Thomas v. Nevada Yellow Cab Corp*, 327 P.3d 518, 130 Nev. Adv. Op. 52 (2014), *reh'g denied* (Sept. 24, 2014) (holding that the additional exemptions contained in the old statute were implicitly repealed as a result of the broader coverage in the constitutional amendment).

B. The Definition of "employee" Under R.C. 4111.14(B)(1) is Unconstitutional Because it Directly Conflicts with and Restricts the Meaning of that Same Term as Defined by Article II, Section 34a of the Ohio Constitution. (Response to Proposition of Law No. 1)

As discussed *supra*, Ohio voters approved the amendment to add Section 34a on November 7, 2006. On January 2, 2007, the Ohio General Assembly passed H.B. 690 to amend Ohio's prior minimum wage laws.[18] R.C. 4111.14 was enacted to implement the mandates of

[18] The Ohio Revised Code Sections that were affected by H.B. 690 include newly enacted Section 4111.14 and amended Sections 4111.01-4111.04 and 4111.08-4111,10. County Commissioners Association of Ohio, County Advisory Bulletin 2007-04 *Ohio's New Minimum*

Section 34a and states that "...Ohio employees, as defined in division (B)(1) of this section, are paid the wage rate required by Section 34a..." R.C. 4111.14(A)(1).

R.C. 4111.14(B)(1) defines "employee" as:

> [I]ndividuals 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.

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

To the contrary, Section 34a states, in relevant part:

> As used in this section: "employer," "employee," "employ," "person" and "independent contractor" have the same meanings as under the federal Fair Labor Standards Act ...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.

Ohio Constitution, Article II, Section 34a.

The critical passage in Section 34a is "[o]nly the exemptions set forth in this section shall apply to this section." The drafters of Section 34a specifically intended the five enumerated exemptions listed in Section 34a to apply to Section 34a and only those five exemptions. However, R.C. 4111.14(B)(1) in implementing Section 34a incorporates the exemptions found in Section 213 of the FLSA in contravention of Section 34a's express directive.

To declare a statute unconstitutional, the Court must find that it appears "beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Arbino,* 880 N.E.2d at 429. Section 34a permits laws to be passed to implement its provisions, but prohibits any restriction of the provisions therein. Ohio Constitution, Article II, Section 34a. The exemptions enumerated in Section 213 of the FLSA and embedded in the implementing

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Wage Law (November 2007), available at http://www.ccao.org/userfiles/CAB%20200704.pdf (accessed Feb. 20, 2015).

statute at R.C. 4111.14(B)(1) directly conflict with express rejection of those exemptions by Section 34a. The Ohio General Assembly, when adding Section 4111.14 to the Ohio Revised Code, exceeded its authority when implementing Section 34a. Although the Bill Summary explains that H.B. 690 "amends the conflicting provisions to comply with Section 34a," it impermissibly narrowed Section 34a's broad minimum wage protections. Legislative Service Commission, *Am. Sub. H.B. 690 Final Analysis*, http://www.lsc.ohio.gov/analyses126/06-hb690-126.pdf (accessed Feb. 20, 2015). The General Assembly, in enacting R.C. 4111.14 utilized Section 34a's definition of "employee," but exceeded its constitutional authority by including exemptions enumerated in Section 213 of the FLSA. Therefore, R.C. 4111.14(B)(1) is unconstitutional as currently written.

C. The Recordkeeping Requirements Imposed by Section 34a Would Not Substantially Burden Employers. (Response to Proposition of Law No. 1)

Section 34a requires employers to maintain "a record of the name, address, occupation, pay rate, hours worked for each day worked and each amount paid an employee for a period of not less than three years following the last date the employee was employed." Ohio Constitution, Article II, Section 34a. The recordkeeping provisions set forth in R.C. 4111.14, however, conflict with the requirements established by Section 34a. Subsequent to the provisions of R.C. 4114, an employer's recordkeeping responsibilities differ depending on whether an employee is exempt or non-exempt. Furthermore, R.C. 4111.14 does not require employers to keep track of hours worked for each day for exempt employees such as outside salespersons or executive, administrative, or professional employees as defined by the FLSA. R.C. 4111.14(G)(1).

OMLA argues that, should this Court declare R.C. 4111.14 unconstitutional, employers would suffer "numerous, onerous, and far reaching" consequences from maintaining records for *all employees* as required by Section 34a. (OMLA Br., 16). Yet, employers already keep many of

those records for exempt employees—including employees' names, addresses, and pay rates for tax purposes, and job titles in employees' personnel files. For example, employers must keep records to calculate employee benefits/vacation accrual, and to comply with Employee Retirement Income Security Act ("ERISA"). Section 209 of ERISA requires employers to maintain records sufficient to determine the benefits to which its employees might become entitled. Records relevant to benefits determination include age and service records that are used to determine waiting periods, eligibility, vesting, breaks in service, *payroll records*, marital status records, and participant account records.[19] Maintaining records for the hours worked by exempt employees may impose an additional requirement upon employers, but in no manner would result in a "substantial burden" on employers as OMLA contends.

1. Advances in Technology Facilitate and Permit the Expansion of Employer Recordkeeping

The OMLA incorrectly suggests that complying with the recordkeeping requirements will impair flexibility and result in a rigid documented workplace.[20] The historical exclusion of outside salespersons from the FLSA's minimum wage provisions was originally predicated upon the fact that much of outside salespersons' work was unsupervised and thus immune to adequate recording or documentation. *Jewel Tea Co. v. Williams*, 118 F.2d 202, 208 (10th Cir. 1941) (reasoning that an employer would have "no way of knowing the number of hours [an outside salesperson] works per day."). With the advances in technology available today, however, maintaining records required by Section 34a is certainly manageable for employers. Automated

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[19] *See* Verrill Dana LLP, *Retention of Records for Employee Benefit Plans: How Long Is Long Enough* (Sept. 27, 2012)http://www.employeebenefitsupdate.com/benefits-law-update/2012/9/27/retention-of-records-for-employee-benefit-plans-how-long-is.html (accessed Feb. 20, 2015).

[20] OMLA Br. at 17; *Haight v. Cheap Escape*, 2014-Ohio-2447 11 N.E.3d. 1258 (2nd Dist.).

timekeeping systems and other new developments in software and data collection permit employers to devise systems for tracking hours worked with fewer calculation errors. These advances have facilitated working arrangements which permit 30 million individuals nationwide to work from home on a regular basis without constraining employers in their recordkeeping obligations.[21] Finally, Ohio law recognizes and permits flexibility by refusing to mandate one particular form or method for maintaining records. R.C. 4111.14(F)(3) ("One or more documents, databases, or other paper or electronic forms of recordkeeping maintained by an employer are acceptable.").

2. Recordkeeping Benefits Both Employees and Employers

The recording and retention of records furthers the interest of both employees and employers. Courts have recognized a strong public policy interest in the recording and retention of records related to employment. *See, e.g., Craig v. Bridges Bros. Trucking LLC*, S.D.Ohio No. 2:12-CV-954, 2013 WL 4010316, at *4 (Aug. 6, 2013) (*quoting White v. Sears, Roebuck & Co.* 163 Ohio App.3d 416, 2005-Ohio-5086, 837 N.E.2d 1275 (10th Dist.2005) ("[W]e conclude that both Ohio and federal law manifest a clear public policy requiring employers to maintain accurate employee time records")). Recordkeeping provisions enhance transparency and disclosure of worker classification, thus protecting employees from being misclassified as exempt. Typically, if one employee in a group is misclassified, his or her companions may be misclassified as well. Employers can avoid this risk and reduce classification related litigation by

[21] *See* Forbes, *One In Five Americans Work From Home, Numbers Seen Rising Over 60%* (Feb. 18, 2013) http://www.forbes.com/sites/kenrapoza/2013/02/18/one-in-five-americans-work-from-home-numbers-seen-rising-over-60/ (accessed Feb. 20, 2015).According to statistics from the American Community Survey, telecommuting has risen nearly 80% since 2005. Global Workplace Analytics, http://www.globalworkplaceanalytics.com/wp-content/uploads/2009/02/Table2.jpg (accessed Feb. 20, 2015).

maintaining relevant records related to all employees' employment. Furthermore, recordkeeping requirements serve as a bulwark against unscrupulous employers who may seek to hide the true characteristics and details of their employees' employment.

D. The Court Should Apply the Requirement Upon Employers to Pay Outside Salespersons the Constitutionally Mandated Ohio Minimum Wage Retrospectively. (Response to Proposition of Law No. 2)

Appellants contend that if the Court finds R.C. 4111.14 (B)(1) unconstitutional, the Court should apply the ruling in a limited prospective fashion. Generally, an Ohio court decision interpreting statutory or constitutional language will apply retrospectively unless a party has contract rights or vested rights under the prior decision. *DiCenzo v. A-Best Prods. Co.*, 120 Ohio St. 3d 149, 2008-Ohio-5327, 897 N.E.2d 132, ¶14. Courts have normally applied this principle when overruling a former decision but not ordinarily when interpreting a statute. *Day v. Hissa*, 97 Ohio App. 3d 286, 287, 646 N.E.2d 565, 566 (1994). Nevertheless, the Court has the discretion under "exceptional circumstances" to apply its decision only prospectively after considering the following three factors: (1) whether the new principle of law that was not foreshadowed in prior decisions; (2) whether retroactive application promotes or retards the purpose behind the rule; and (3) whether retroactive application would cause an inequitable result. *DiCenzo* at ¶ 52-53. The exceptions will not apply "where the party cannot demonstrate reliance upon the prior case law." *Williams v. Jones*, 4th Dist., Franklin No. 04CA-6, 2004-Ohio-5512, ¶14.

The present case implicates no vested rights of the Appellants, and none of the factors for prospective application weigh in Appellants' favor. Section 34a has been in effect since 2007; accordingly, this case does not present a new rule of law, rather the issue before this Court involves interpreting a constitutional provision in force for at least seven years. *See Wright v. Proctor-Donald*, 5th Dist., Franklin No. 12CA-00154, 2013-Ohio-1973, ¶ 20 (recognizing that

since its decision did not establish a new principle of law, this Court held that retroactive application should apply.); *Berlin Twp. Bd. of Trustees v. Delaware Cty. Bd. of Commrs.*, 194 Ohio App. 3d 109,2011-Ohio-2020, 954 N.E.2d 1264, ¶ 34 (distinguishing between announcing a new principle of law and merely interpreting a statute).

Retroactive application of the Court's ruling will certainly promote the vision behind Section 34a. Should the Court conclude that R.C. 4111.14(B)(1) is unconstitutional, the decision must be applied retrospectively to accord deference to the citizens who voted to extend minimum wage protection to employees not enumerated as exempt from the minimum wage protections of Ohio. Retroactive application would "eradicate a conflict" between a section of the Ohio Constitution and its implementing statute, rather than declare a prior decision to be bad law. *See Day v. Hissa*, 97 Ohio App. 3d 286, 288, 646 N.E.2d 565, 566 (8th Dist. 1994)

Finally, retroactive application will not produce substantially inequitable results for those who incorrectly relied upon the flawed enabling statute instead of the clearly written section of the Ohio Constitution. Although Appellants contend that retroactive application will expose employers to a "propagation of collective action lawsuits under 34a," this belief is unfounded.[22] OMLA argues that employers have relied on "decades of jurisprudence" in regards to the established classifications exempt from the minimum wage by Ohio law.[23] However, as previously discussed, the cases to which OMLA cites discuss Ohio's **overtime** law, rather than minimum wage law.[24] The only minimum wage case cited by the Appellants simply deals with

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[22] Mem. in Support of Jurisdiction of Appellants, 10; *Haight v. Cheap Escape*, 2014-Ohio-1241.
[23] *See* OMLA Br., 10, n.5; *Haight v. Cheap Escape*, _ Ohio St. 3d._, 2014-Ohio-2447
[24] See OMLA Br. at 9-10, n.5. *citing, Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 501 (6th Cir. 2007); *Dillworth v. Case Farm's Processing, Inc.* N.D.Ohio No. 5:08-cv-1694, 2009 WL 2766991, *4 (Aug. 27, 2009), *order vacated in part on reconsideration*, No. 5:08-cv-1694, 2010 WL 776933 (Mar. 8, 2010); *Trocheck v. Pellin Emergency Medical Services, Inc.*, 61 F. Supp. 2d 685, 699-700 (N.D.Ohio 1999).

whether Section 34a provides an independent cause of action was *Murray v. Mary Glynn Homes, Inc.*, N.D. Ohio No. 1:11-cv-532, 2013 WL 4054595 *15 (Aug. 12, 2013). The court in *Murray* never actually reached that issue.

Rather, the case before this Court is a case of first impression in which the Court has the opportunity to eradicate a conflict between a Section 34a of the Ohio Constitution and its implementing statute, R.C. 4111.14. In fact, the argument which OMLA presents could be construed in favor of either Appellants or Appellees because in any given case, an adverse ruling on a matter of law could result in an unfavorable outcome to either of the interested parties involved. A party mistakenly relying upon either definition as authoritative bears the risk that their reliance may result in significant injury. However, reliance on an incorrect provision or interpretation of law should not preclude the proper and correct application of law and the resulting consequences to those afforded its protections.

In sum, no exception to the general rule of retroactive application applies to this case. Accordingly, the Court must apply the plain language of Section 34a retroactively to permit the inclusion of outside salesperson within the Section 34a's minimum wage coverage as the voters in Ohio intended.

IV. CONCLUSION

In ratifying Section 34a, the Ohio voters sought to incorporate into the Ohio Constitution new and more expansive minimum wage protections that would cover a greater portion of Ohio's working people. These intentions are evidenced by the plain language of Section 34a, as well as the surrounding context of the constitutional initiative and similar conduct of other states. The OAJ thus hereby urges the Court to both recognize and validate the will and intention of Ohio's

electorate by properly including outside salespersons within Ohio's minimum wage requirements and overturning R.C. 4111.14 as unconstitutional.

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