June 30, 2016

The Honorable Joseph T. Deters
Hamilton County Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202-2151

SYLLABUS: 2016-021

Article XVIII, § 3 of the Ohio Constitution does not grant a city authority to adopt an ordinance that sets the minimum wage paid by employers within the city's boundaries at a rate that exceeds and conflicts with the statewide hourly minimum wage rate enacted by the General Assembly in R.C. 4111.02 pursuant to its authority under Article II, §§ 34 and 34a of the Ohio Constitution.

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OPINION NO. 2016-021

The Honorable Joseph T. Deters
Hamilton County Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202-2151

Dear Prosecutor Deters:

You have requested an opinion whether an employer may be required by a municipal ordinance to pay its employees an hourly minimum wage rate that is in excess of the statewide hourly minimum wage rate set by the General Assembly pursuant to R.C. 4111.02 and Article II, §§ 34 and 34a of the Ohio Constitution. You ask whether the home rule powers conferred upon a charter municipality by Article XVIII, §§ 3 and 7 of the Ohio Constitution permit the municipality to adopt an ordinance that increases the minimum wage rate within its boundaries.[1]

Your inquiry requires us to assess the nature and interplay of Article II, §§ 34 and 34a of the Ohio Constitution, R.C. 4111.02, and a municipality's home rule authority under Article

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[1] Article XVIII, § 3 of the Ohio Constitution provides "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Article XVIII, § 7 provides "[a]ny municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

You ask about a municipal corporation that has adopted a charter pursuant to Ohio Const. art. XVIII, § 7. Insofar as the adoption of an ordinance increasing the minimum wage rate is the adoption of a local police regulation, rather than an exercise of a power of procedural local self-government, the scope of a municipality's home rule authority to adopt such an ordinance is the same regardless of whether the municipality has adopted a charter. *See Northern Ohio Patrolmen's Benevolent Ass'n v. Parma*, 61 Ohio St. 2d 375, 382, 402 N.E.2d 519 (1980) ("non-chartered municipalities must only adhere to the state statutes in procedural matters of local self-government"); 1986 Op. Att'y Gen. No. 86-008, at 2-34 ("'[n]onchartered municipalities enjoy the same power as chartered municipalities, except that nonchartered municipalities are bound by state statute with regard to procedural and organizational, as opposed to substantive, matters of local self-government'" (quoting 1985 Op. Att'y Gen. No. 85-034, at 2-119 to 2-120)).

XVIII, § 3. We begin with an explanation of the authority to establish and increase a minimum wage rate under Ohio Const. art. II, §§ 34 and 34a. We will then determine whether a municipal corporation may exercise its home rule authority to adopt an ordinance that increases the minimum wage rate within the municipal corporation's boundaries to a rate that exceeds the statewide hourly minimum wage rate.

Application of Ohio Const. art. II, §§ 34 and 34a

Article II, § 34 was adopted by the Ohio electorate in 1912 and provides:

> Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.

The scope of a municipal corporation's authority to adopt ordinances relating to the matters addressed in Ohio Const. art. II, § 34 has been addressed in several decisions of the Ohio Supreme Court. In 1943, the Ohio Supreme Court was asked to determine whether a municipal ordinance limiting the hours during which a barber shop may be open was constitutional. *Cincinnati v. Correll*, 141 Ohio St. 535, 537, 49 N.E.2d 412 (1943). The court, addressing the meaning of "laws" in Ohio Const. art. II, § 34, concluded that "[t]he word 'laws' … does not embrace municipal ordinances, but defines the legislative power of the General Assembly only." *Id*. The court further held that "[t]he power to pass laws fixing and regulating the hours of labor is granted by the Constitution to the General Assembly only, and municipalities are without authority to accomplish such purpose by ordinance." *Id*. at 543; *see also Brewster v. Hill,* 128 Ohio St. 354, 357, 191 N.E. 366 (1934) ("[t]he term 'law' permeates the amendments of the Constitution adopted in 1912. It is often used in repeated phrases, such as, … '[l]aws may be passed fixing and regulating the hours of labor,' etc.; … and throughout the entire constitutional amendments then adopted we find frequent repetition of these phrases, disclosing that it was the unquestionable intention of the Constitution makers to apply the term 'laws' to legislative enactments only, and not to municipal ordinances").

Additional explanation of Ohio Const. art. II, § 34 was provided by the Ohio Supreme Court in *Fuldauer v. Cleveland,* 32 Ohio St. 2d 114, 290 N.E.2d 546 (1972). In that case, the court determined the constitutionality of a city charter provision that established a formula to determine the compensation paid to members of the city's fire and police departments. *Id.* at 115-16. The court reiterated the holding of *Cincinnati v. Correll*, 141 Ohio St. at 537, that "laws" in Ohio Const. art. II, § 34 "refers only to the power of the General Assembly to enact laws." *Fuldauer v. Cleveland,* 32 Ohio St. 2d at 123. The court held that Ohio Const. art. II, § 34 is not "self-executing, but must be augmented by the action of the General Assembly[.]" Because the General Assembly had not enacted a law regulating the compensation of members of a municipal corporation's police and fire departments, the court held that the municipal ordinance was constitutional under Ohio Const. art. II, § 34. *Fuldauer v. Cleveland,* 32 Ohio St. 2d at 123. The court stated "[i]n the absence of a conflict with the general law, Section 34,

Article II of the Ohio Constitution, has no application to a salary formula for policemen and firemen established by amendments to a municipal charter which are carried out annually by ordinance of council." *Fuldauer v. Cleveland,* 32 Ohio St. 2d at 122.

In *Lima v. State*, 122 Ohio St. 3d 155, 2009-Ohio-2597, 909 N.E.2d 616, at ¶ 15, the Ohio Supreme Court shifted its focus from the meaning of "laws" in Ohio Const. art. II, § 34 to the meaning of the amendment's phrase "no other provision of the constitution shall impair or limit this power." In *Lima*, the court was asked to determine whether R.C. 9.481(B)(1) or a conflicting municipal ordinance or charter provision was controlling. R.C. 9.481(B)(1) prohibited a political subdivision from requiring its employees to reside within its boundaries. The municipal ordinance and charter provision established a residency requirement for the municipal corporation's employees. *Lima v. State*, at ¶ 1. The court concluded that R.C. 9.481(B)(1) was enacted pursuant to Ohio Const. art. II, § 34's "'broad *grant* of authority to the General Assembly'" to enact laws "providing for the comfort, health, safety and general welfare of all employees." *Lima v. State*, at ¶ 10-11 (quoting *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St. 3d 55, 61, 717 N.E.2d 286 (1999)).

Thus, when the General Assembly enacts legislation pursuant to Ohio Const. art. II, § 34, a municipality may not invoke its home rule authority under Ohio Const. art. XVIII, § 3 to adopt a conflicting ordinance. *Lima v. State*, at ¶ 15-16. Specifically, the court held that the phrase "no other provision of the constitution" in Ohio Const. art. II, § 34 includes Ohio Const. art. XVIII, § 3, the home rule provision. *Lima v. State*, at ¶ 15. The court reasoned that a conflicting ordinance enacted under a municipality's home rule authority would impair or limit the authority of the General Assembly to enact laws pursuant to Ohio Const. art. II, § 34. *Lima v. State*, at ¶ 15; *accord Rocky River v. State Emp't Relations Bd.*, 43 Ohio St. 3d 1, 20, 539 N.E.2d 103 (1989) ("the home-rule provision, may not be interposed to impair, limit or negate [the Ohio Public Employees' Collective Bargaining Act, which was enacted pursuant to Ohio Const. art. II, § 34]"); *Dayton v. State*, 176 Ohio App. 3d 469, 2008-Ohio-2589, 892 N.E.2d 506, at ¶ 77 ("[t]he effect [of the latter half of Ohio Const. art. II, § 34] is to render the grant of legislative power contained in Section 34, Article II *plenary*; no limitations to that power external to the language therein may be imposed" (emphasis added)); *Fraternal Order of Police, Lodge 39 v. East Cleveland*, 64 Ohio App. 3d 421, 424, 581 N.E.2d 1131 (Cuyahoga County 1989) (the court refers to Ohio Const. art. II, § 34's statement that "no other provision of the constitution shall impair or limit this power" as "the *supremacy* clause of Section 34" that "operates to invalidate conflicting legislation" enacted pursuant to the home rule provision of Ohio Const. art. XVIII, § 3 (emphasis added)). Thus, the court concluded that a municipality's home rule powers "do not apply" when a statute has been enacted pursuant to Ohio Const. art. II, § 34. *Lima v. State*, at ¶ 16.

The General Assembly first exercised its power to establish a statewide hourly minimum wage rate applicable to employees generally under Ohio Const. art. II, § 34 when it enacted R.C.

4111.02 in 1973.[2] 1973 Ohio Laws, Part I, 1501, 1503 (Am. Sub. H.B. 201, eff. Jan. 1, 1974). At that time, R.C. 4111.02(A) provided, in pertinent part:

> Every employer shall pay each of his employees at a wage rate of not less than one dollar and sixty cents per hour, except that employers employing persons in counties of less than three hundred thousand population may pay employees an amount equal to one dollar forty cents per hour until January 1, 1975.

1973 Ohio Laws, Part I, 1503 and 1504.

In 2006, Ohio Const. art. II, § 34a was proposed by initiative petition and approved by Ohio voters. Article II, § 34a provides, in pertinent part:

> Except as provided in this section, every employer shall pay their employees a wage rate of not less than six dollars and eighty-five cents per hour beginning January 1, 2007. On the thirtieth day of each September, beginning in 2007, this state minimum wage rate shall be increased effective the first day of the following January by the rate of inflation for the twelve month period prior to that September according to the consumer price index or its successor index for all urban wage earners and clerical workers for all items as calculated by the federal government rounded to the nearest five cents.

Ohio Const. art. II, § 34a also defines "employer," "employee," "employ," "person," and "independent contractor" in accordance with the federal Fair Labor Standards Act, and specifies that "employer" includes the state and every political subdivision of the state. 2007 Op. Att'y Gen. No. 2007-033; 2007 Op. Att'y Gen. No. 2007-026. Article II, § 34a makes exceptions for the application of the statewide hourly minimum wage rate to certain employers and employees, imposes record keeping requirements on employers, authorizes civil actions for violations of the section or any law or regulation implementing the section, and provides a procedure for bringing

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[2] Legislation implementing § 34 was enacted in 1933. 1933 Ohio Laws 502 (H.B. 681, filed July 11, 1933) (codified as G.C. 154-45d to 154-45t). This original legislation, which charged the director of the department of industrial relations with establishing minimum fair wage rates for women and minors, was found to be constitutional under both the federal and state constitutions. *Walker v Chapman*, 17 F. Supp. 308 (S.D. Ohio 1936); *Strain v. Southerton*, 148 Ohio St. 153, 161, 74 N.E.2d 69 (1947) (wherein the court added that, "[w]ithout constitutional authorization, the General Assembly of Ohio could have enacted a minimum wage law in the exercise of the police power").

2007 Op. Att'y Gen. No. 2007-026, at 2-275 n.8.

an action and damage calculations. Ohio Const. art. II, § 34a also includes the following paragraph, which is particularly pertinent to your question:

> This section shall be liberally construed in favor of its purposes. *Laws* may be passed to implement its provisions and create additional remedies, *increase the minimum wage rate* and extend coverage of the section, but *in no manner restricting any provision of the section or the power of municipalities under Article XVIII of this constitution with respect to the same*. (Emphasis added.)[3]

As in Ohio Const. art. II, § 34, Ohio Const. art. II, § 34a uses the word "laws" when referring to, *inter alia*, increasing the minimum wage rate. When interpreting constitutional provisions, rules employed in statutory construction apply. *State v. Jackson*, 102 Ohio St. 3d 380, 2004-Ohio-3206, 811 N.E.2d 68, at ¶ 14 ("[g]enerally speaking, in construing the Constitution, we apply the same rules of construction that we apply in construing statutes"); *State v. Rodgers*, 166 Ohio App. 3d 218, 2006-Ohio-1528, 850 N.E.2d 90, at ¶ 11. It is a general axiom of statutory construction that once words have acquired a settled meaning, that same meaning will be applied to a subsequent statute on a similar or analogous subject. *See Brennaman v. R.M.I. Co.,* 70 Ohio St. 3d 460, 464, 639 N.E.2d 425 (1994). Thus, the minimum wage increase provision of Ohio Const. art. II, § 34a grants authority to the General Assembly to enact legislation that: (1) implements the provisions of Ohio Const. art. II, § 34a; (2) creates additional remedies; (3) increases the minimum wage rate; and (4) extends the coverage of Ohio Const. art. II, § 34a.

Pursuant to Ohio Const. art. II, § 34a, the General Assembly amended several sections of R.C. Chapter 4111 and enacted R.C. 4111.14. 2005-2006 Ohio Laws, Part V, 9576 (Am. Sub. H.B. 690, eff., in part, Apr. 4, 2007). As amended by Am. Sub. H.B. 690, R.C. 4111.02 provides, in pertinent part:

> Every employer, as defined in [Ohio Const. art. II, § 34a], shall pay each of the employer's employees at a wage rate of not less than the wage rate specified in [Ohio Const. art. II, § 34a].
>
> The director of commerce annually shall adjust the wage rate as specified in [Ohio Const. art. II, § 34a].

Even though Ohio Const. art. II, § 34a confers authority on the General Assembly to enact legislation that implements that provision, creates additional remedies, increases the minimum wage rate, and extends coverage of that provision, Ohio Const. art. II, § 34a also provides that the laws enacted by the General Assembly pursuant to Ohio Const. art. II, § 34a

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[3] This is the penultimate paragraph of Ohio Const. art. II, § 34a. For ease of understanding, we refer in this opinion to this paragraph as "the minimum wage increase provision."

may "in no manner [restrict] … the power of municipalities under Article XVIII of this constitution with respect to the same." No Ohio court has construed the phrase "in no manner [restrict] … the power of municipalities under [Ohio Const. art. XVIII]" in Ohio Const. art. II, § 34a. Consequently, our construction of the pertinent part of Ohio Const. art. II, § 34a is based upon the plain language of Ohio Const. art. II, § 34a and the canons of statutory construction.

Reconciling Conflicting Language in Ohio Const. art. II, §§ 34 and 34a

The plain language of Ohio Const. art. II, §§ 34 and 34a is different. The statement in Ohio Const. art. II, § 34 that "no other provision of the constitution shall impair or limit this power," and the case law interpreting that phrase, indicate that the provision is a direct restriction upon the power of municipalities to adopt ordinances. As explained in the case law interpreting Ohio Const. art. II, § 34, the provision expressly prohibits reliance upon home rule authority to adopt a municipal ordinance that conflicts with a statute enacted pursuant to Ohio Const. art. II, § 34. *Lima v. State*, at ¶ 15-16; *Fuldauer v. Cleveland,* 32 Ohio St. 2d at 122; *Cincinnati v. Correll*, 141 Ohio St. at 537.

In contrast, the plain language of Ohio Const. art. II, § 34a, *i.e.*, "in no manner [restrict] … the power of municipalities under [Ohio Const. art. XVIII]" reserves consideration of whether a municipality has authority under Ohio Const. art. XVIII to adopt an ordinance on the same subject as a statute enacted pursuant to Ohio Const. art. II, § 34a. We emphasize that the pertinent provision of Ohio Const. art. II, § 34a neither confers power upon a municipality to legislate in the areas identified in the provision nor defines the scope of a municipality's authority under Ohio Const. art. XVIII. Nevertheless, the language of Ohio Const. art. II, § 34a expressly indicates that the scope of home rule powers of a municipality under Ohio Const. art. XVIII, § 3 shall be considered when determining whether an ordinance that conflicts with a statute enacted pursuant to Ohio Const. art. II, § 34a may be adopted and enforced. If a statute enacted under Ohio Const. art. II, § 34a were deemed to prevail automatically over a conflicting ordinance, without any consideration of whether the municipality had authority to enact the ordinance pursuant to Ohio Const. art. XVIII, § 3, the statute would operate as a restriction upon the municipality's power under Ohio Const. art. XVIII. This result is contrary to the express language of Ohio Const. art. II, § 34a.

In light of the difference in the language of Ohio Const. art. II, §§ 34 and 34a, we conclude that the language in each appears to conflict. There are multiple ways to read the provisions of Ohio Const. art. II, §§ 34 and 34a so as to reconcile the apparent conflict. The first approach is to recognize that there are additional terms in Ohio Const. art. II, §§ 34 and 34a, which may mean that the two provisions are not meant to apply to the same situations. Ohio Const. art. II, § 34 authorizes the General Assembly to, *inter alia*, enact laws "*establishing* a minimum wage[.]" (Emphasis added.) The pertinent provision of Ohio Const. art. II, § 34a addresses the authority of the General Assembly to "*increase* the minimum wage rate[.]" (Emphasis added.) The common meanings of "establish" and "increase" are different. *See generally* R.C. 1.42 ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or

particular meaning, whether by legislative definition or otherwise, shall be construed accordingly").

"Establish" means "to institute (as a law) permanently by enactment" or "to bring into existence[.]" *Merriam-Webster's Collegiate Dictionary* 427 (11th ed. 2005). To "institute" is to "originate and get established[.]" *Id.* at 648. That something is instituted or brought into existence means that it did not exist before. In accordance with those meanings, the minimum wage rate was established when the General Assembly enacted the first statute instituting a minimum wage. "Increase," on the other hand, means "to become progressively greater[.]" *Id.* at 631. That something may become progressively greater means that it already exists. Accordingly, each time the minimum wage rate established by the General Assembly becomes progressively greater, the General Assembly increases the minimum wage rate. In light of the use of "increase" in Ohio Const. art. II, § 34a and its common meaning, the constitutionality of an ordinance that increases the minimum wage rate is evaluated by applying the terms of Ohio Const. art. II, § 34a.

In reaching this conclusion we do not assert that, prior to the adoption of Ohio Const. art. II, § 34a in 2006, the General Assembly did not have authority to periodically set the statewide hourly minimum wage at a higher rate. In the years prior to 2006, the applicable state law concerning the minimum wage rate was Ohio Const. art. II, § 34 and the related provisions of R.C. Chapter 4111. In the absence of Ohio Const. art. II, § 34a, the scope of the General Assembly's authority with respect to the statewide hourly minimum wage rate was defined by Ohio Const. art. II, § 34. Therefore, the determination whether the General Assembly's enactments in the minimum wage area were within its legislative authority required an analysis of the terms of Ohio Const. art. II, § 34. It was possible at that time, in the absence of Ohio Const. art. II, § 34a and its differing language, to construe the meaning of "establish" more broadly. For example, *Merriam-Webster's Collegiate Dictionary* also defines "establish," at 427, as "to put on a firm basis : set up[.]" Using that common meaning, the term "establish" in Ohio Const. art. II, § 34 could include setting the minimum wage rate for the first time and re-setting that wage rate at various times thereafter.

However, since Ohio Const. art. II, § 34a has been adopted, the language of that section shall be considered *in pari materia* with Ohio Const. art. II, § 34 when construing the authority now conferred upon the General Assembly with respect to the minimum wage rate. The uses of "establish" in Ohio Const. art. II, § 34 and "increase" in Ohio Const. art. II, § 34a are significant. *See* 2002 Op. Att'y Gen. No. 2002-033, at 2-217 (it is reasonable to presume that different meanings are intended when different words are used). In addition, terms shall be read in context and construed according to their common meanings. R.C. 1.42. When "establish" is read in the context of Ohio Const. art. II, § 34 and Ohio Const. art. II, § 34a, and in recognition of the use of the word "increase" in § 34a, it is appropriate to construe "establish" more narrowly. A more narrow construction of "establish" is that the term means "to institute" or "to bring into existence." That more narrow meaning of "establish" connotes bringing something into existence that did not exist before. Taking into account the different meaning of "increase"

and the context of the two provisions, we find that the terms "establish" and "increase" are not synonymous.

To reconcile and give effect to these two constitutional provisions, we adopt the more narrow meaning of "establish," *i.e.*, to institute or to bring into existence for the first time, when construing Ohio Const. art. II, § 34. Therefore, under this first approach to reconciling the pertinent language of Ohio Const. art. II, §§ 34 and 34a, when determining whether a municipal ordinance that increases the minimum wage rate in effect in its boundaries may be adopted and enforced, we must determine, in accordance with Ohio Const. art. II, § 34a, whether the municipal corporation has authority under Ohio Const. art. XVIII, § 3 to adopt and enforce the ordinance.

A second approach to reconciling the apparent conflict between the pertinent provisions of Ohio Const. art. II, §§ 34 and 34a is to follow the rule of construction set forth in R.C. 1.51, which states:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

This approach begins by presuming that Ohio Const. art. II, §§ 34 and 34a apply to the same situations. In light of the differing language in the pertinent parts of Ohio Const. art. II, §§ 34 ("no other provision of the constitution shall impair or limit this power") and 34a ("in no manner restricting … the power of municipalities under Article XVIII"), the two provisions appear to conflict when they are applied to the same situation. Following the dictates of R.C. 1.51, we first endeavor to construe Ohio Const. art. II, §§ 34 and 34a in such a manner as to give effect to both provisions. Ohio Const. art. II, § 34 is a general provision insofar as it provides general authority to the General Assembly to establish a minimum wage. Ohio Const. art. II, § 34a is a special provision insofar as it provides additional details regarding the implementation of a statewide hourly minimum wage rate. As discussed above, when the different meanings of "establish" and "increase" are taken into account, it is possible to reconcile the language of Ohio Const. art. II, §§ 34 and 34a. Reconciliation is accomplished by construing the meaning of "establish" so that the provisions of Ohio Const. art. II, § 34 apply when instituting a minimum wage for the first time and construing the meaning of "increase" so that the provisions of Ohio Const. art. II, § 34a apply when the statewide hourly minimum wage rate is incrementally made greater. At that point, we reach the same conclusion as we did above – Ohio Const. art. II, § 34 addresses the General Assembly's authority to "establish" a minimum wage and Ohio Const. art. II, § 34a addresses the authority of the General Assembly, and possibly a municipality, to "increase" the hourly minimum wage rate. When determining whether a municipal ordinance that increases the hourly minimum wage rate above the statewide hourly minimum wage rate may be adopted and enforced, Ohio Const. art. II, § 34a is used to determine the constitutionality of the municipal

ordinance, which requires a determination of whether the municipality's home rule powers authorize adoption of the ordinance.

Even if the conflict between the language in Ohio Const. art. II, §§ 34 and 34a were irreconcilable, the pertinent provision of Ohio Const. art. II, § 34a ("no manner restricting … the power of municipalities under Article XVIII"), as the special provision, would control to determine the constitutionality of a competing municipal ordinance. In that circumstance, Ohio Const. art. II, § 34a operates as an exception to Ohio Const. art. II, § 34. Thus, the constitutionality of the municipal ordinance shall be evaluated by considering whether the municipality may exercise its home rule powers to adopt and enforce an ordinance increasing the minimum wage rate in excess of the statewide hourly minimum wage rate.

A final approach to reconciling the language in Ohio Const. art. II, §§ 34 and 34a is to construe Ohio Const. art. II, § 34a as overruling, with respect to minimum wage only, the holdings of *Cincinnati v. Correll*, 141 Ohio St. at 537, *Fuldauer v. Cleveland*, 32 Ohio St. 2d at 122, and *Lima v. State,* at ¶ 15, which interpreted the language of Ohio Const. art. II, § 34 to preclude a municipality from exercising its home rule powers to adopt an ordinance that conflicts with a statute enacted pursuant to Ohio Const. art. II, § 34. Under this approach, the language of Ohio Const. art. II, § 34 declaring that "no other provision of the constitution shall impair or limit this power" is construed to no longer apply to minimum wage. Alternatively, Ohio Const. art. II, § 34 is construed, with respect to minimum wage, to not preclude consideration of a municipality's authority under Ohio Const. art. XVIII. Under this approach, with respect to minimum wage, language of Ohio Const. art. II, § 34a declaring that laws may be enacted "but in no manner restricting … the power of municipalities under Article XVIII" applies and the determination whether a municipal ordinance that increases the hourly minimum wage rate may be adopted and enforced by a municipality involves a consideration of the municipality's home rule powers under Ohio Const. art. XVIII, § 3.

Our discussion of the three approaches to reconciling the conflicting language in the provisions of Ohio Const. art. II, §§ 34 and 34a demonstrates that, regardless of the approach taken, the same analysis is used to determine whether a municipal ordinance increasing the minimum wage rate will prevail over Ohio Const. art. II, § 34a and R.C. 4111.02. That is, regardless of the approach taken to reconcile the conflicting provisions, a home rule analysis shall be undertaken to determine whether the municipal ordinance is constitutional. In accordance with the pertinent language of Ohio Const. art. II, § 34a ("in no manner restricting … the power of municipalities under Article XVIII"), a consideration whether the municipal ordinance is a proper exercise of the municipality's home rule powers under Ohio Const. art. XVIII, § 3 is necessary.

In our opinion, the first and second approaches, as we have applied them, are appropriate here. It is possible to reconcile Ohio Const. art. II, §§ 34 and 34a by reading "establish" and "increase" in accordance with the context in which they appear and their common meanings. While the third approach may be a valid argument to present to a court, we do not base our analysis of your inquiry upon it. The third approach requires reading Ohio Const. art. II, § 34 by

taking out language or adding language. Under that approach, Ohio Const. art. II, § 34 is read as if the phrase "establishing a minimum wage" has been deleted. Or, alternatively, the third approach reads Ohio Const. art. II, § 34 as if an exception for the minimum wage rate and the home rule amendment are added to the latter part of Ohio Const. art. II, § 34, so that the provision would conclude by declaring "no other provision of the constitution [except for the home rule amendment with respect to minimum wage] shall impair or limit this power." Under the first and second approaches, no language in the pertinent provisions is altered either by deletion or addition. All the words are construed in accordance with the context in which they are used and their ordinary meanings. And, both provisions, as they currently exist and apply, are given full effect.

An additional concern with respect to the third approach is that Ohio courts have decided cases regarding the application of Ohio Const. art. II, § 34 since the enactment of Ohio Const. art. II, § 34a. *See, e.g.*, *Lima v. State,* at ¶ 15; *Dayton v. State*, at ¶ 77. In those cases, the courts did not overrule or in any way limit the holdings that the term "laws," as used in Ohio Const. art. II, § 34, does not include municipal ordinances and the phrase "no other provision of the constitution shall impair or limit this power" includes the home rule amendment, Ohio Const. art. XVIII, § 3. One reason for not doing so may be that those cases did not involve the minimum wage. It was, therefore, unnecessary for the courts to expressly consider Ohio Const. art. II, § 34a. While we may surmise what a court would do if a case was presented that necessitated consideration of Ohio Const. art. II, §§ 34 and 34a in the context of minimum wage, there is no way for us to predict with a reasonable degree of certainty how the court would decide the question.[4] Until we have specific direction from Ohio courts that, with respect to minimum

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[4] 2005-2006 Ohio Laws, Part V, 9576, 9590 (Am. Sub. H.B. 690, eff., in part, Apr. 4, 2007) (section 6(C), uncodified) states that:

> The General Assembly enacts this act according to the proponents' campaign materials and pursuant to the authority vested in the General Assembly by the following constitutional provisions:
>
> (1) Section 34a of Article II, Ohio Constitution, which states that "laws may be passed to implement its provisions. . .."
>
> (2) *Section 34 of Article II, Ohio Constitution*, which states that "laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power," *which Section 34a of Article II, Ohio Constitution, made no attempt to amend, repeal, or otherwise modify*. (Emphasis added.)

Thus, Ohio Const. art. II, § 34a was not intended to amend or repeal Ohio Const. art. II, § 34. A court may take the statement in the uncodified language of Am. Sub. H.B. 690 into consideration and conclude that Ohio Const. art. II, § 34a does not overrule prior court holdings with respect to

wage, Ohio Const. art. II, § 34a has overruled or limited the courts' prior holdings, we believe it prudent in an Attorney General opinion to apply the plain language of Ohio Const. art. II, §§ 34 and 34a in the light of traditional rules of construction.

In sum, when determining whether a municipal ordinance that increases the minimum wage rate in excess of the statewide hourly minimum wage rate may be adopted and enforced, we consider, pursuant to Ohio Const. art. II, § 34a, whether the ordinance is a proper exercise of the municipality's home rule powers under Ohio Const. art. XVIII, § 3.

Authority under Ohio Const. art. XVIII, § 3 to Adopt an Ordinance Increasing the Minimum Wage Rate

Article XVIII, § 3 of the Ohio Constitution declares "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." The delegates to the 1912 Constitutional Convention intended this amendment to "empower municipalities to establish different forms of local self-government, to implement local ordinances not in conflict with general laws of the state, and to 'do those things *** which are not forbidden by the lawmaking power of the state.'" *Am. Fin. Servs. Ass'n v. Cleveland*, 112 Ohio St. 3d 170, 2006-Ohio-6043, 858 N.E.2d 776, at ¶ 26 (quoting 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio 1443 (1913)). The home rule amendment intended to "'leave the power of the state as broad … with reference to general affairs'" as it was prior to its adoption. *Am. Fin. Servs. Ass'n v. Cleveland*, at ¶ 26 (quoting 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio 1443 (1913)). Thus, "[a]lthough the constitutional provision … gave municipalities the exclusive power to govern themselves, as well as additional power to enact local health and safety measures not in conflict with general laws, '*exclusive state power* was retained in those areas where a municipality would in no way be affected or where state dominance seemed to be required.'" *Am. Fin. Servs. Ass'n v. Cleveland*, at ¶ 27 (quoting Vaubel, *Municipal Home Rule in Ohio* 1107-1108 (1978)). Further, the powers a municipal corporation may exercise pursuant to the home rule amendment "are subject to other 'restrictions or limitations contained in any other provision in the Constitution.'" *Dies Elec. Co. v. Akron*, 62 Ohio St. 2d 322, 325, 405 N.E.2d 1026 (1980) (quoting *State ex rel. Gordon v. Rhodes*, 156 Ohio St. 81, 88, 100 N.E.2d 225 (1951)).

Whether a Municipal Ordinance May Prevail over Ohio Const. art. II, § 34a and R.C. 4111.02

A three-part test is used to determine whether a state statute supersedes the application of a municipal ordinance. *Mendenhall v. Akron*, 117 Ohio St. 3d 33, 2008-Ohio-270, 881 N.E.2d

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minimum wage or create an exception to the application of the latter phrase in Ohio Const. art. II, § 34.

255, at ¶ 17. "A state statute takes precedence over a local ordinance when (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government, and (3) the statute is a general law." *Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 9. In *Mendenhall v. Akron* at ¶ 17, the Ohio Supreme Court clarified that "the *Canton* test should be reordered to question whether (1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute." The court explained the application of the test to a local ordinance as follows:

> "If an allegedly conflicting city ordinance relates solely to self-government, the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction." *Am. Fin. Servs. Ass'n v. Cleveland*, 112 Ohio St. 3d 170, 2006-Ohio-6043, 858 N.E.2d 776, at ¶ 23. If, on the other hand, the ordinance pertains to "local police, sanitary and other similar regulations," [Ohio Const. art. XVIII, § 3], the municipality has exceeded its home rule authority only if the ordinance is in conflict with a general state law. If that ordinance does not relate to local self-government, the second part of the test examines the state statute to determine whether it is a general law. If the statute is not a general law, the ordinance will not be invalidated. Only when the municipality has not exercised a power of self-government and when a general state law exists do we finally consider the third part of the test, whether the ordinance is in conflict with the general law.

Mendenhall v. Akron, at ¶ 18. Thus, the first step in the home rule analysis is to determine whether the local ordinance is an exercise of a power of local self-government or a police power. *Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St. 3d 96, 2008-Ohio-4605, 896 N.E.2d 967, at ¶ 24.

A "power of local self-government … relates solely to the government and administration of the internal affairs of the municipality[.]" *Beachwood v. Bd. of Elections of Cuyahoga Cnty.*, 167 Ohio St. 369, 148 N.E.2d 921 (1958) (syllabus, paragraph 1); *accord In re Complaint of City of Reynoldsburg*, 134 Ohio St. 3d 29, 2012-Ohio-5270, 979 N.E.2d 1229, at ¶ 25. Powers of local self-government "are essentially those powers of government which, '[i]n view of their nature and their field of operation, are local and municipal in character.'" *Dies Elec. Co. v. Akron*, 62 Ohio St. 2d at 326 (quoting *State ex rel. Toledo v. Lynch*, 88 Ohio St. 71, 97, 102 N.E. 670 (1913)). An ordinance addressing a matter that affects "only the municipality itself, with no extra-territorial effects" is an exercise of a power of local self-government. *Beachwood v. Bd. of Elections of Cuyahoga Cnty.*, 167 Ohio St. at 371. In contrast, an exercise of police power "'protect[s] the public health, safety, or morals, or the general welfare of the public.'" *Ohioans for Concealed Carry, Inc. v. Clyde* at ¶ 30 (quoting *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St. 3d 553, 556, 2008-Ohio-92, 880 N.E.2d 906, at ¶11); *accord In re Complaint of City of Reynoldsburg*, at ¶ 25.

Whether a matter is of statewide concern is part of determining whether the subject covered by a local ordinance is a matter of local self-government. *Am. Fin. Servs. Ass'n v. Cleveland*, at ¶ 29-30. The court has stated that whether the subject matter of an ordinance is a matter of statewide concern should be considered when deciding whether "'the ordinance is an exercise *** of local self-government,' *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 9, or whether 'a comprehensive statutory plan is, in certain circumstances, necessary to promote the safety and welfare of all the citizens of this state.' *Kettering v. State Emp. Relations Bd.* (1986), 26 Ohio St.3d 50, 55, 26 OBR 42, 496 N.E. 2d 983." *Id.* at ¶ 30.

> [T]he term "statewide concern" describes "the extent of state police power which was left unimpaired by the adoption of the Home Rule Amendment as well as *** those areas of authority which are outside the outer limits of 'local' power, i.e., those matters which are neither 'local self-government' nor 'local police and sanitary regulations.'"

Id. (quoting Vaubel, *Municipal Home Rule in Ohio,* at 1108). As explained by the Ohio Supreme Court:

> [a]lthough [Ohio Const. art. XVIII, § 3] as adopted gave municipalities the exclusive power to govern themselves, as well as additional power to enact local health and safety measures not in conflict with general laws, "*exclusive state power* was retained in those areas where a municipality would in no way be affected or where state dominance seemed to be required."

Am. Fin. Servs. Ass'n v. Cleveland, at ¶ 27 (quoting Vaubel, *Municipal Home Rule in Ohio*, at 1107-1108). In other words, "where matters of statewide concern are at issue, the state retains the power – despite the Home Rule Amendment – to address those matters." *Am. Fin. Servs. Ass'n v. Cleveland*, at ¶ 27; *see also In re Complaint of City of Reynoldsburg*, at ¶ 36; *State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88, 89-90, 431 N.E.2d 311 (1982) ("a municipality may not, in the regulation of local matters, infringe on matters of general and statewide concern"); 1996 Op. Att'y Gen. No. 96-043, at 2-163 ("[t]he statewide concern doctrine is premised on the notion that home rule powers relate solely to the internal affairs of a municipality and may not extend to matters of general and statewide concern. The local enactment may not have extra-territorial effect or be contrary to constitutional or legislative enactments that manifest a genuine concern for statewide uniformity"); 1994 Op. Att'y Gen. No. 94-095, at 2-470 ("[m]atters that are of 'general and statewide concern,' however, are not encompassed within the field of local self-government").

Insofar as a minimum wage rate protects the general welfare of the public, adoption of a municipal ordinance that increases the minimum wage rate is the exercise of local police power. *See Ohioans for Concealed Carry, Inc. v. Clyde*, at ¶ 30; *Strain v. Southerton*, 148 Ohio St. 153, 161, 74 N.E.2d 69 (1947) ("[w]ithout constitutional authorization, the General Assembly of Ohio could have enacted a minimum wage law in the exercise of the police power"). As an exercise of local police power, we conclude that a municipal minimum wage rate ordinance is

the adoption of a local police, sanitary, or other similar regulation for the purpose of Ohio Const. art. XVIII, § 3.

General Law Test

Having concluded that a municipal minimum wage rate ordinance is an exercise of local police power, rather than the exercise of a power of local self-government, the next step is to determine whether the state statute at issue is a general law. *Ohioans for Concealed Carry, Inc. v. Clyde*, at ¶ 25. The test for determining whether a statute is a general law consists of four parts. *Canton v. State*, at ¶ 21.

> [T]o constitute a general law …, a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.

Id.

Beginning with the first factor of the general law test, we consider whether Ohio Const. art. II, § 34a and R.C. 4111.02 are part of a statewide and comprehensive legislative enactment. When determining whether a statute is part of a comprehensive and statewide legislative enactment, it is improper to consider the statute in isolation. *Cleveland v. State*, 128 Ohio St. 3d 135, 2010-Ohio-6318, 942 N.E.2d 370, at ¶ 17. Rather, it is necessary to consider the statute in the context of other legislative enactments relating to the same subject. *See id.* Moreover, to be comprehensive, the enactment "need not regulate every aspect of disputed conduct.… Nor does 'comprehensive' mean 'exhaustive.'" *Id*. at ¶ 21.

Ohio Const. art. II, § 34a is an extension of the authority granted to the General Assembly in Ohio Const. art. II, § 34. In addition, R.C. 4111.02 is part of R.C. Chapter 4111, which governs many aspects of an employer's requirement to pay a fair minimum wage, including the statewide hourly minimum wage rate, R.C. 4111.02, payment of overtime, R.C. 4111.03, keeping records regarding employee pay, R.C. 4111.08, enforcement of the minimum wage laws, R.C. 4111.04; R.C. 4111.14, and a procedure for calculating damages, R.C. 4111.14(J). Further, the Director of Commerce is given authority to adopt rules to effect the purposes of R.C. 4111.01-.17. R.C. 4111.05-.07. Many aspects of the minimum wage laws are administered or enforced at the state government level. *See, e.g.*, R.C. 4111.14(C) ("the state may issue licenses to employers authorizing payment of a wage below that required by [Ohio Const. art. II, § 34a"); R.C. 4111.14(H) ("an employee … may file a complaint with the state for a violation of any provision of [Ohio Const. art. II, § 34a] or any law or regulation implementing its provisions"); R.C. 4111.14(I) ("the state may on its own initiative investigate an employer's compliance with [Ohio Const. art. II, § 34a] and any law or regulation implementing [Ohio Const. art. II, § 34a]"); R.C. 4111.14(K) ("an action for equitable and monetary relief may be brought against an employer by the attorney general"); R.C. 4111.14(N) ("[a]s used in [R.C.

4111.14], 'the state' means the director of commerce"). Therefore, Ohio Const. art. II, § 34a and R.C. 4111.02 satisfy the first prong of the general law test – they are part of a statewide and comprehensive legislative enactment.

Turning to the second prong of the general law test, we consider whether Ohio Const. art. II, § 34a and R.C. 4111.02 apply to all parts of the state alike and operate uniformly throughout the state. Ohio Const. art. II, § 34a and R.C. 4111.02 generally prohibit employers in the state from paying their employees less than the statewide hourly minimum wage rate. Although there are exceptions to the requirement to pay the statewide hourly minimum wage rate, R.C. 4111.14(D), those exceptions still apply to all parts of the state and operate uniformly throughout the state. "'The requirement of uniform operation throughout the state of laws of a general nature does not forbid different treatment of various classes or types of citizens, but does prohibit nonuniform classification if such be arbitrary, unreasonable or capricious.'" *Canton v. State*, at ¶ 30 (quoting *Garcia v. Siffrin Residential Ass'n*, 63 Ohio St. 2d 259, 272, 407 N.E.2d 1369 (1980)). Thus, we conclude that Ohio Const. art. II, § 34a and R.C. 4111.02 satisfy the second prong of the general law test by applying to all parts of the state alike and operating uniformly throughout the state.

We next consider the third prong of the general law test, whether the statute sets forth police, sanitary, or similar regulations, rather than purports only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations. This means that the statute itself must constitute a police, sanitary, or similar regulation. It must not solely authorize or prohibit a municipality from adopting a police, sanitary, or other similar regulation. As Ohio Const. art. II, § 34a and R.C. 4111.02 set a statewide hourly minimum wage rate, they set forth police, sanitary, or similar regulations. Although Ohio Const. art. II, § 34a indicates that a municipality's home rule powers shall be considered in determining whether a municipality may adopt an ordinance increasing the minimum wage rate, Ohio Const. art. II, § 34a is not merely a limitation on the authority of a municipality to set forth police, sanitary, or similar regulations. Therefore, we conclude that Ohio Const. art. II, § 34a and R.C. 4111.02 satisfy the third prong of the general law test as they set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations.

The final prong of the general law test requires a determination of whether the statute prescribes a rule of conduct upon citizens generally. We conclude that Ohio Const. art. II, § 34a and R.C. 4111.02 satisfy this prong as they require all employers covered by the terms of the provisions to pay their employees a wage that at least meets the minimum wage rate as established and increased by the General Assembly. Therefore, we conclude that Ohio Const. art. II, § 34a and R.C. 4111.02 constitute general laws.

It is important to recognize several practical considerations that support our conclusion that Ohio Const. art. II, § 34a and R.C. 4111.02 are general laws. An hourly minimum wage rate for all Ohio employers and their employees is a subject of particular statewide importance. The adoption and enforcement of differing minimum wage rates across the state may result in

deleterious fiscal and economic consequences at both the state and local levels for both employers and employees. The hourly minimum wage rate serves as a basis for many pay scales of thousands of employers that employ thousands of persons throughout the state of Ohio. *See* Paul K. Sonn, *Citywide Minimum Wage Laws: A New Policy Tool for Local Governments*, Economic Policy Brief 1, 2 (2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_36825.pdf. When the minimum wage rate is increased, it may produce a deterrent to increasing or maintaining hiring for those positions, or a need to raise wage rates for employees in successively higher positions. This ripple effect of increased wages may be too great an expense for a business to absorb without increasing the cost of its goods or reducing the number of its employees. Increasing the cost of goods or reducing the number of people employed may have a negative impact on both employees and consumers.

In addition, municipalities that increase the minimum wage rate that shall be paid within their boundaries create a hodgepodge of laws that may cause practical difficulties for local and statewide businesses. *Cf. Cleveland v. State*, at ¶ 35 ("absent a uniform law throughout the state, law abiding gun owners would face a confusing patchwork of licensing requirements, possession restrictions, and criminal penalties as they travel from one jurisdiction to another"); *Lorain v. Tomasic*, 59 Ohio St. 2d 1, 4, 391 N.E.2d 726 (1979) ("[t]o allow ordinances to be enacted throughout the state reducing maximum pay outs in any amount would destroy a uniform application of the newly enacted statutory scheme and create a potential for totally emasculating a duly licensed charitable organization's ability to conduct a lawful bingo operation. Such a construction of R.C. 2915.09(B)(5) would render its language virtually meaningless and nullify its effect"). Smaller local businesses may not be able to continue operating and larger, regional businesses may leave the municipality or state finding it too onerous to comply with the varied wage laws. If unemployment increases in one city, neighboring cities may find an influx of people migrating to those cities in search of work.

The potential consequences identified above bolster the conclusion that municipal minimum wage rates are not strictly a matter of local concern. Rather, variations in minimum wage rates among municipalities have effects that may extend beyond the boundaries of each municipality, thereby justifying a single uniform statewide hourly minimum wage rate that is determined at the state, rather than local, level.

Whether a Conflict Exists

Having concluded that a municipal ordinance increasing the hourly minimum wage rate that shall be paid within a city's boundaries constitutes a police regulation and that Ohio Const. art. II, § 34a and R.C. 4111.02 are general laws, the final consideration is whether the ordinance conflicts with state laws. If the ordinance conflicts, Ohio Const. art. II, § 34a and R.C. 4111.02 will prevail over the municipal ordinance. *See Ohioans for Concealed Carry, Inc. v. Clyde*, at ¶ 25.

An ordinance conflicts with a state statute if "the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E.

519 (1923) (syllabus, paragraph 2). Out of this core principle, different theories have emanated to determine whether an ordinance conflicts with state law. *Mendenhall v. Akron*, at ¶ 28. The first theory has been described as the "contrary directives" approach. *Id.* at ¶ 29. Under this approach, a municipal ordinance and state law conflict if the two are directly contradictive. *Id.* This approach relies upon the statement in *Struthers v. Sokol*, 108 Ohio St. at 268, that "[n]o real conflict can exist unless the ordinance *declares* something to be right which the state law *declares* to be wrong, or vice versa." *Mendenhall v. Akron*, at ¶ 29 (emphasis added).

The Ohio Supreme Court applied the "contrary directives" approach in *Cincinnati v. Baskin*, 112 Ohio St. 3d 279, 2006-Ohio-6422, 859 N.E.2d 514, at ¶ 19-25. In that case, the statute at issue prohibited a person from "knowingly possess[ing] any dangerous ordnance, including any semiautomatic firearm that is designed or modified to accommodate more than 31 cartridges." *Id.* at ¶ 14. The municipal ordinance prohibited "the possession of semiautomatic firearms, including any semiautomatic rifle with a capacity of more than ten rounds." *Id.* at ¶ 1 (footnote omitted). The court held that the statute and ordinance did not conflict. *Id.* at ¶ 25. After reciting the standard set forth in the second syllabus paragraph of *Struthers v. Sokol* (a conflict exists if "the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa"), the court noted that "[i]t is also well established that 'in order for such a conflict to arise, the state statute must *positively permit* what the ordinance prohibits, or vice versa, regardless of the extent of state regulation concerning the same subject.'" *Cincinnati v. Baskin*, at ¶ 20 (quoting *Cincinnati v. Hoffman*, 31 Ohio St. 2d 163, 169, 285 N.E.2d 714 (1972) (emphasis added)). When examining the pertinent statutes, the court rejected the court of appeals' interpretation of the statutes. *Cincinnati v. Baskin*, at ¶ 23. The court presumed that the court of appeals must have interpreted the statute "to not only prohibit the possession of any semiautomatic firearm that can fire more than 31 rounds without reloading, but to also imply a right to the possession of any semiautomatic firearm that can fire up to 31 rounds without reloading." *Id*. at ¶ 21. The court reasoned that the statutes prohibit only what is expressly stated, *i.e.*, the possession of firearms capable of firing more than 31 cartridges. *Id*. at ¶ 23. The court further reasoned that the statutes "do not, however, permit or authorize the possession of semiautomatic firearms that are capable of firing 31 or fewer cartridges without reloading." *Id.* Thus, the court concluded that the ordinance did not permit or prohibit something that the statute permitted or prohibited. *Id.* Accordingly, the statute and ordinance did not conflict. *Id.* In sum, the "contrary directives" approach reads a statute as prohibiting or permitting only that which it expressly prohibits or permits.

At other times courts have used a "conflict by implication" approach to determine whether a more nuanced statute and municipal ordinance conflict. *Mendenhall v. Akron*, at ¶ 31; *Am. Fin. Servs. Ass'n v. Cleveland*, at ¶ 41. "Conflict by implication" is not an entirely different test of conflict; it is "a subset of the *Struthers* analysis and recognizes that sometimes a municipal ordinance will indirectly prohibit what a state statute permits or vice versa." *Mendenhall v. Akron*, at ¶ 31. An early example of the Ohio Supreme Court applying "conflict by implication" is *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 86, 167 N.E. 158 (1929). In that case the court stated:

> When the law of the state provides that a rate of speed greater than a rate therein specified shall be unlawful, it is equivalent to stating that driving at a less rate of speed shall not be a violation of law; and therefore an ordinance of a municipality which attempts to make unlawful a rate of speed which the state by general law has stamped as lawful would be in conflict therewith.

Id.; *see also Lorain v. Tomasic*, 59 Ohio St. 2d at 2-3 (an ordinance that forbids a charitable organization from paying out more than $1,200 in prizes conflicts with a statute that prohibits a licensed charitable organization from paying out more than $3,500 because the statute permits a licensed organization to pay up to $3,500); *Neil House Hotel Co. v. Columbus*, 144 Ohio St. 248, 253, 58 N.E.2d 665 (1944) ("[w]hen the statutes and a valid regulation of the Board of Liquor Control say that the sale of intoxicants may not be made after a designated hour, it is equivalent to saying that sales up to that time are lawful, and an ordinance which attempts to restrict sales beyond an earlier hour is in conflict therewith and must yield"). Thus, under the "conflict by implication" approach, a statute is read to determine not only what it expressly permits or prohibits, but also to ascertain what it impliedly permits or prohibits.

Whether a court uses the "contrary directives" theory or the "conflict by implication" theory depends upon what the court believes is permitted or prohibited by the state law. In light of the purposes of the statewide hourly minimum wage rate and the potential adverse economic and fiscal consequences to employers and employees created by an uneven mix of local hourly minimum wage rates across the state, we believe it reasonable that a court would apply "conflict by implication" when determining whether an ordinance that increases the local minimum wage rate above the statewide hourly minimum wage rate conflicts with Ohio Const. art. II, § 34a and R.C. 4111.02.

Ohio Const. art. II, § 34a and R.C. 4111.02 prohibit the payment of an hourly wage rate less than the statewide hourly minimum wage rate. Ohio Const. art. II, § 34a and R.C. 4111.02 also permit an employer to pay an hourly wage rate that is higher than the statewide hourly minimum wage rate. An employer may pay an hourly wage rate that is higher than the statewide hourly minimum wage rate because R.C. 4111.02 expressly states that an employer "shall pay each of the employer's employees at a wage rate of *not less than* the wage rate specified in [Ohio Const. art. II, § 34a]." (Emphasis added.) In addition, an employer is subject to penalties only if the employer pays less than the wages that an employee is entitled to pursuant to R.C. 4111.01-.17. R.C. 4111.13(C). *See also* R.C. 4111.99(B) ("[w]hoever violates division (B) or (C) of section 4111.13 of the Revised Code is guilty of a misdemeanor of the third degree"). The imposition of a penalty only if an employer pays less than the statewide hourly minimum wage rate is an implied authorization for an employer to pay any amount of wages that is greater than the statewide hourly minimum wage rate. In other words, because an employer who pays a wage rate higher than the statewide minimum wage rate is not subject to penalty, it must be assumed that the state law permits an employer to pay such a wage rate. If an ordinance increasing the minimum wage rate goes into effect, the ordinance would make it illegal for an employer to pay a wage rate that is higher than the statewide hourly minimum wage rate, but lower than the municipality's minimum wage rate. An employer would then face penalties for not complying

with the municipality's minimum wage rate. Thus, the ordinance increasing the minimum wage rate will prohibit that which Ohio Const. art. II, § 34a and R.C. 4111.02 permit.

Often courts decide whether to use "conflict by implication" by examining the extent to which a state law demonstrates that the General Assembly intends to control a subject exclusively. *Mendenhall v. Akron*, at ¶ 32 ("[w]hen determining whether a conflict by implication exists, we examine whether the General Assembly indicated that the relevant state statute is to control a subject exclusively"); *Cincinnati v. Baskin*, at ¶ 23 ("there is nothing in the weapons-control measures in the criminal code that manifests an intent to prevent municipalities from regulating the possession of semiautomatic firearms that hold fewer than 32 rounds"); *Middleburg Heights v. Ohio Bd. of Bldg. Standards*, 65 Ohio St. 3d 510, 513, 605 N.E.2d 66 (1992) ("absent any specific statutes limiting local regulation, the OBBC [(Ohio Basic Building Code)] provides only minimum building requirements within Ohio. Accordingly, a municipality whose building department has been certified by the Ohio Board of Building Standards … to enforce state and local building codes within its territorial jurisdiction may adopt additional regulations not in conflict with state law"). A court, however, does not always look for evidence of legislative intent by the General Assembly before applying "conflict by implication." *See, e.g.*, *Lorain v. Tomasic*, 59 Ohio St. 2d at 3-4; *Neil House Hotel Co. v. Columbus*, 144 Ohio St. at 251-53.

Even were a court to examine Ohio Const. art. II, § 34a and R.C. Chapter 4111 for an indication from the General Assembly of an intent to exclusively occupy the field of the minimum wage rate before applying "conflict by implication," there is sufficient evidence in Ohio Const. art. II, § 34a and R.C. Chapter 4111, coupled with the practical and economic difficulties created by varying minimum wage rates, to conclude that the General Assembly has exclusive control of the minimum wage rate throughout the state of Ohio. First, Ohio Const. art. II, § 34a creates a formula and a schedule for increasing the minimum wage rate each year based upon the rate of inflation as indicated by the federal consumer price index. Second, R.C. 4111.14(A) explains the purpose of Ohio Const. art. II, § 34a as:

> (1) Ensur[ing] that Ohio employees, as defined in [R.C. 4111.14(B)(1)], are paid the wage rate required by [Ohio Const. art. II, § 34a];
>
> (2) Ensur[ing] that covered Ohio employers maintain certain records that are directly related to the enforcement of the wage rate requirements in [Ohio Const. art. II, § 34a];
>
> (3) Ensur[ing] that Ohio employees who are paid the wage rate required by [Ohio Const. art. II, § 34a] may enforce their right to receive that wage rate in the manner set forth in [Ohio Const. art. II, § 34a]; and
>
> (4) Protect[ing] the privacy of Ohio employees' pay and personal information specified in [Ohio Const. art. II, § 34a] by restricting an employee's access, and access by a person acting on behalf of that employee, to the employee's own pay and personal information.

The General Assembly's explanation of the purpose of Ohio Const. art. II, § 34a indicates that the statewide hourly minimum wage rate is to be uniform throughout the state. The importance of that uniformity is demonstrated when considering the potential negative fiscal and economic consequences to the state, municipalities, employers, and employees when varying minimum wage rates exist in the state.

Our conclusion that there are sufficient indicators in Ohio Const. art. II, § 34a and R.C. Chapter 4111 that the General Assembly intends to occupy the field of the hourly minimum wage rate is not altered by Ohio Const. art. II, § 34a's statement that the General Assembly may enact certain laws "but in no manner restricting … the power of municipalities under [Ohio Const. art. XVIII.]" As we discussed above, this statement does not confer power upon municipalities. It merely indicates that the laws the General Assembly enacts pursuant to Ohio Const. art. II, § 34a shall not restrict whatever power a municipality may or may not have under Ohio Const. art XVIII with respect to those laws.

In sum, we conclude that a municipal ordinance that increases the minimum wage rate above the state's rate is the adoption of a local police, sanitary, or other similar regulation that conflicts with Ohio Const. art. II, § 34a and R.C. 4111.02, which are general laws. Accordingly, adoption of a municipal ordinance that increases the hourly minimum wage rate above the statewide hourly minimum wage rate is not within the home rule powers conferred upon a municipal corporation by Ohio Const. art. XVIII, § 3.

Conclusion

Based upon the foregoing, it is my opinion, and you are hereby advised that Article XVIII, § 3 of the Ohio Constitution does not grant a city authority to adopt an ordinance that sets the minimum wage paid by employers within the city's boundaries at a rate that exceeds and conflicts with the statewide hourly minimum wage rate enacted by the General Assembly in R.C. 4111.02 pursuant to its authority under Article II, §§ 34 and 34a of the Ohio Constitution.

Very respectfully yours,

MICHEL DEWINE
Ohio Attorney General