

**IN THE SUPREME COURT OF OHIO**

JACQUELINE STOWERS, *et al.*,  
Plaintiff-Appellants,

v.

OHIO DEPARTMENT  
OF AGRICULTURE

and

LORAIN COUNTY  
GENERAL HEALTH DISTRICT

Defendant-Appellees.

ON APPEAL FROM LORAIN  
COUNTY COURT OF APPEALS,  
NINTH APPELLATE DISTRICT

**11-1240**

COURT OF APPEALS  
CASE NO. 10CA009782

TRIAL COURT  
CASE NO. 08CV159968

**MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFF-APPELLANTS  
JACQUELINE STOWERS, JOHN STOWERS, AND MANNA STOREHOUSE, LLC**

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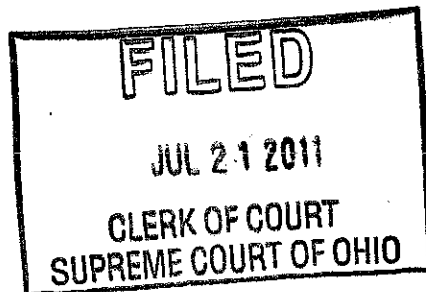
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## EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case involves issues of public and great general interest, and raises several pressing and substantial constitutional questions. The first issue here, the proper standard of review to be applied when scrutinizing regulatory infringement on property and occupational rights, affects many Ohioans, and raises a substantial constitutional question touched upon, but yet to be squarely addressed by this Court. The second issue here, the extent of state authority to prohibit operation of an utterly harmless and purely private food buying club without prior government permission affects many Ohioans, both directly and indirectly, and has garnered great interest from the public. Ultimately, this matter implicates the preeminent dispute over constitutional liberties and the role of government: freedom of the individual as against governmental command and control.

First, prohibition on the private transportation and storage of food amongst and for members of a private buying club affects many Ohioans. A movement toward locally-grown, organic, and “sustainable” agriculture has spawned hundreds, if not thousands, of small private cooperatives and buying clubs in Ohio. According to the Farm to Consumer Legal Defense Fund and Weston A. Price Foundation, over 200 buying clubs tantamount to Manna Storehouse serve over 40,000 Ohioans, and each number continues to grow. Whether retail food establishment (“RFE”) regulations can permissibly be applied to such organizations is critical: here, the power to regulate is the power to destroy - - buying club activities are typically conducted in a manner wholly incompatible with RFE requirements. Meanwhile, the absence of licensure subjects operators and members to the perpetual risk of forceful execution of criminal search warrants on private homes and repeated misdemeanor convictions and jail time and potentially hundreds of thousands of dollars in fines.<sup>1</sup>

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<sup>1</sup> See R.C. 3717.99 (“Whoever violates section 3717.21 or 3717.41 of the Revised Code is guilty of a misdemeanor of the third degree on a first offense; for a second offense or subsequent offense, such person is guilty of a misdemeanor of the second degree. *Each day the violation continues is a separate offense.*”)

Thus, the outcome of this case will have a significant effect on how a growing number of Ohioans procure food. Accordingly, it is no surprise that this case has received intense media scrutiny both statewide and nationwide, since the day Manna Storehouse was raided.<sup>2</sup>

More broadly, the rights at stake in this case are relevant to every Ohioan. First, the degree to which Ohio Courts scrutinize prohibitions that limit property and business rights is likely to be outcome-determinative in cases involving those rights: As Justice Stevens once noted, rational basis review “is tantamount to no review at all.”<sup>3</sup> And “[a] key consequence of applying strict scrutiny is that the burden of proof shifts from the plaintiffs to the defendants.”<sup>4</sup> Thus, a more exacting level of scrutiny lends Ohioans a greater degree of freedom in using their property to pursue gainful business.

Similarly, state prohibition of the innocuous activity at issue in this case carries with it the specter of a virtually unlimited police power, as against fixed, explicitly-guaranteed constitutional rights. If the state may preempt Ohioans from transporting and storing food in a purely private capacity, and from cooperating with friends and neighbors to acquire food supplies from local farmers, in the absence of arms-length transactions or evidence of past or impending negative externalities, then it may render nearly any basic human activity, taken for granted for generations, subject to government permission. Thus this matter touches upon the very contours of the police power, and state regulatory authority, as against property rights.

These issues pave the way for a series of related substantial constitutional questions, which are also questions that have yet to be directly addressed by this Court. Chief among these, in light of the Appellate

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<sup>2</sup> *Manna Storehouse asks court to rule sheriff's search illegal*, Cleveland Plain Dealer, December 18, 2008; *Judge Rules LaGrange Food Co-Op Must Receive a State License*, Elyria Chronicle-Telegram February 11, 2010; *Online Network to Cover Manna Co-op Trial*, Elyria Chronicle-Telegram, October 3, 2010; *Court Rules Against Food Co-Op*, Elyria Chronicle-Telegram, June 8, 2011; *Manna Storehouse labeled retail store*, Lorain Morning Journal, June 7, 2011; *LaGrange's organic food co-op loses licensing fight*, Lorain Morning Journal, February 12, 2011; *Boose intervenes on behalf of food co-op*, Lorain Morning Journal, Mar. 24, 2009; *Duo suing over armed raid: Experience 'traumatic' for Manna Storehouse owners*, Lorain Morning Journal, December 18, 2010. This case was also featured on national and local radio talk shows, and even in a documentary (“Farmageddon”). A “youtube” video, *The Stowers Family Tells their Story*, featuring the story of this case has been viewed 136,000 times (See <http://www.youtube.com/watch?v=FdLxMKuxyr4>).

<sup>3</sup> *FCC v. Beach Communications, Inc.* (1993), 508 U.S. 307, at 323 (Stevens, J., concurring).

<sup>4</sup> *League of United Latin American Citizens v. Bredesen* (6<sup>th</sup> Cir, 2007), 500 F.3d 523.

Court's application of rational basis review to the Stowers' property rights, is whether application of regulations that burden property rights are to be scrutinized with a heightened standard of scrutiny. At the federal level, "[g]overnment actions that burden the exercise of ... fundamental rights or liberty interests are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling government interest,"<sup>5</sup> while "[g]overnment actions that do not affect fundamental rights or liberty interests will be upheld if they are rationally related to a legitimate state interest."<sup>6</sup> This distinction is meant to provide "heightened protection against government interference with certain fundamental rights and liberty interests."<sup>7</sup>

This Court was no doubt aware of this federal nomenclature when it recently "reaffirmed" that (1) "Ohio has always considered the right of property to be a fundamental right," (2) "there can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces;"<sup>8</sup> and (3) these "venerable rights associated with property" are not confined to the mere ownership of property - - "[t]he rights related to property, i.e., to acquire, *use, enjoy*, and dispose of property, are *among the most revered in our law* and traditions."<sup>9</sup> Thus, "the free use of property is guaranteed by Section 19, Article I of the Ohio Constitution."<sup>10</sup> Although these declarations of fundamental rights have simmered over the past two decades, this Court has yet to squarely express their necessary implication: Ohio Courts must provide "heightened protection against government interference" when government actions affect property rights - - akin to "strict scrutiny."

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<sup>5</sup> *Taylor Acquisitions, L.L.C. v. City of Taylor* (6<sup>th</sup> Cir. 2009), 313 Fed.Appx. 826; *Seal v. Morgan*, 229 F.3d 567, 574 (6<sup>th</sup> Cir.2000).

<sup>6</sup> *Seal, supra.*, at 575.

<sup>7</sup> *Seal, supra.*, at 574.

<sup>8</sup> *Norwood v. Horney* (2006), 110 Ohio St.3d 353,361-62, 853 N.E.2d 1115, 1129 (internal citations omitted).

<sup>9</sup> *Id.*

<sup>10</sup> *State v. Cline*, 125 N.E.2d 222, 69 Ohio Law Abs. 305.

Couched within this issue is, critically, whether the right to engage in business and earn a living, characterized as “the most precious liberty that a man possesses,”<sup>11</sup> remains a property right in Ohio, and thus also a fundamental right: *In City of Cincinnati v. Correll*, this Court observed “the business of barbering is a lawful business, and that the right to carry on such business is a property right constitutionally protected against unwarranted and arbitrary interference by legislative bodies.”<sup>12</sup> More recently, this Court has acknowledged, “the right to do business” as a right “equally sacred” to “free speech,”<sup>13</sup> and a “right to pursue a lawful occupation free from government interference.”<sup>14</sup>

Despite express acknowledgment of this right in *Correll*, *Williams*, and *Eastwood Mall*, this Court has never elaborated, much less squarely addressed its contours. This vacuum is now more pronounced than ever before with (1) this Court having reaffirmed the fundamental nature of property rights; (2) unemployment continuing to hover near ten percent in Ohio; and (3) licensing laws have meteorically risen - - 50 years ago, only about five percent of the workforce was required to be licensed, as opposed to over 30 percent today, and increasingly, “irrational occupational licensing laws – which restrict entry into jobs that don’t require a great deal of education or capital to enter – affect each of us in our daily lives.”<sup>15</sup> These phenomena coalesce to heighten the need for this Court to breathe life into the aforementioned precedent, rather than permitting Ohio’s lower courts to, as the Appellate Court did in this case through rational basis review, reduce it to mere truism.<sup>16</sup> Moreover, rational basis review of government actions impinging rights that this Court has deemed “fundamental” is incompatible with the Ohio Constitution’s purpose, text, and interpretive precedent.

Finally, then, this case requires delineation of the disjunctive relationship between the above constitutional protection of property rights, and the *outermost boundary* of the state’s police power. While

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<sup>11</sup> *Barsky v. Board of Regents*, 347 U.S. 442, 472 (Douglas, J. dissenting).

<sup>12</sup> *City of Cincinnati v. Correll*, *supra*, at 540.

<sup>13</sup> *Eastwood Mall v. Slanco* (1994), 68 Ohio St.3d 221, citing *Crosby v. Rath* (1940), 136 Ohio St. 352, 355-356, 16 O.O. 496, 497, 25 N.E.2d 934, 935.

<sup>14</sup> *State v. Williams* (2000), 88 Ohio St.3d 7, citing *Time, Inc. v. Hill* (1967), 385 U.S. 374, 413, 87 S.Ct. 534, 555, 17 L.Ed.2d 456, 481 (Fortas, J., dissenting).

<sup>15</sup> Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* Upjohn Institute Press

<sup>16</sup> See *Stowers v. Ohio Dept. of Agriculture*, 2011-Ohio-2710, pp. 9, 10.

the state maintains leeway in regulating pursuant to its police powers, this leeway is far from unlimited. To the contrary, the police power \* \* \* is based upon *public necessity*. *There must be essential public need for the exercise of the power in order to justify its use.*<sup>17</sup>

This unprecedented expansion of a doctrine rooted in public necessity and nuisance theory to the Stowers' purely private food-buying club defies reason, and conflicts with Ohio Courts' duty to be "extremely zealous in preventing the constitutional rights of citizens being frittered away by regulations passed by virtue of the police power."<sup>18</sup> After all, "the constitutional guaranty of the right of private property would be hollow if all legislation enacted in the name of the public welfare were *per se* valid."<sup>19</sup>

Thus, this issue runs the core of this state's constitutional jurisprudence: to allow the police power to subsume explicitly-recognized constitutional rights implicitly adopts a "living, breathing" constitution, that his capable of amendment through every unelected agency regulatory interpretation, rather than through the only allowable channel of permissible constitutional amendment. These paradigmatic public issues and unanswered constitutional questions warrant review.

### STATEMENT OF THE CASE

This is an appeal from the June 6, 2011 Decision and Journal Entry of the Court of Appeals for the Ninth District Court of Ohio, upholding the Lorain County Court of Common Pleas' February 10, 2010 Order and Entry granting Appellees' Motion(s) for Summary Judgment, and denying Appellants' Motion for Summary Judgment. That Decision holds that "Manna Storehouse is a retail food establishment," "is subject to the licensing requirements of R.C. 3717.21," and "regulation of Manna as a retail food establishment does have some rational relationship to public health and safety."<sup>20</sup>

After a December, 2008 raid on their home by Appellees and others, for the putative criminal offense of not acquiring a retail food establishment license for their private buying club activities, Appellants (hereinafter "Manna") filed this action, seeking a declaration that, as applied, requiring

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<sup>17</sup> *State ex. rel. Killeen Realty Co. v. City of East Cleveland* (1959), 169 Ohio St. 375, 160 N.E.2d 1.

<sup>18</sup> *City of Cincinnati v. Correll* (1943), 141 Ohio St. 535, 539, 49 N.E.2d 412, 414.

<sup>19</sup> *Id.*, at 546.

<sup>20</sup> See *Stowers v. Ohio Dept. of Agriculture*, 2011-Ohio-2710, pp. 8, 11.

government permission to engage in the specified private-membership buying club activities exceeds the state police power, and infringes on, *inter alia*, “fundamental” property and business rights.<sup>21</sup> This action is not a referendum on each of Manna’s activities over the past ten years; rather it is an action to designate its private buying club activities is immune from requiring government permission.

A host of procedural irregularities having delayed matters,<sup>22</sup> the Trial Court requested the parties to file cross-motions for summary judgment, and on February 10, 2010, issued an Opinion and Judgment Entry dismissing Manna’s Complaint, and granting the Motions for Summary Judgment of ODA and LCGHD. Thereafter, in reaching its decision in favor of application of the regulation to private buying clubs, the Appellate Court, importantly, employed rational basis review, abstained from proper as-applied analysis, or use of the “avoidance canon,” and deemed Manna Storehouse “public” through abandoning the federal definition of “consumer” promulgated by the Food and Drug Administration and adopted by Ohio in the Uniform Food Safety Code. Further, the Court declared that property rights are not “fundamental rights” in Ohio.

### **STATEMENT OF THE FACTS**

Appellants John and Jacqueline Stowers and their family maintain a small, private-membership organic food cooperative-buying club, Manna Storehouse, operated out of their home in rural southern Lorain County.<sup>23</sup> Essentially, John and Jackie visit local food producers to determine whether their production, processing, storage and manufacturing processes are consistent with the philosophy of Manna

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<sup>21</sup> See Plaintiffs’ First Amended Complaint, Paragraphs 85, 96-104, 108 (contesting the imposition of licensure to “amongst other things, (1) buy food directly from local farmers; (2) distribute locally-grown food to neighbors; (3) grow and consumer one’s own food; (4) grow and distribute one’s own food; and (5) pool resources to purchase in food in bulk.”)

<sup>22</sup> ODA and LCGHD removed the case to federal court on February 23, 2009; Manna moved to remand, and the case was remanded to Lorain County on July 15, 2009. The Trial Court consolidated the Motion for Preliminary Injunction hearing with the Trial on the Merits, setting both for October 8, 2009, but later cancelled the trial. Contemporaneously, the Trial Court granted Manna’s Motion for Partial Summary Judgment on its Writ of Replevin, and ordered the return of Manna’s seized food. In the absence of briefings or a hearing, the Trial Court denied Manna’s Motion for Preliminary Injunction on October 19, 2009. At a hearing upon Manna’s Motion for Reconsideration, the Trial Court invited the parties to file Cross-Motions for Summary Judgment on the Merits.

<sup>23</sup> All Facts specified herein can be located in Appellants’ affidavits, attached to their December 17, 2009 Combined Motion for Partial Summary Judgment and Brief in Response to Defendants’ Motion for Summary Judgment.

Storehouse, i.e., sustainable agriculture that promotes the health of humans, the environment and animals. If a producer is acceptable to John and Jackie, then Manna Storehouse members begin to acquire food from that producer.

Operated out of a breezeway connected to the families' home, the only outward reference to its existence is a small sign next to the storehouse door, indicating Manna Storehouse is "*a PRIVATE, not Public, Business,*" and that Manna storehouse is open to members by appointment only. Although Manna Storehouse maintains a password-protected website to facilitate members' food ordering, it limits distribution to these members, abstaining from advertising to the public (to promote membership or food distribution). To become a member of Manna Storehouse, one must (1) fill out an application; (2) review and approve of Manna Storehouse facilities, i.e. where the food is stored until pickup; (3) sit with Jackie Stowers for an interview that may be as long as several hours; and (4) pay an annual \$10 membership fee. The membership application and interview inquire into issues beyond business interests, such as viewpoints about agriculture and the person's personal and family life. During the membership application process, freezers, refrigerators, other storage methods are displayed to, discussed with, and approved by the members, and members are informed and commit to the understanding that Manna is not licensed.

Manna's mode of operations is typical of what can be characterized as a "buying club" or "cooperative." The members directly control what food comes to, and is stored at, Manna Storehouse: (1) orders are due by Monday nights; (2) members place their orders for items; and if a sufficient amount of a particular item has been ordered; (3) the items are stored at Manna until they are pickup up on Monday or Tuesday of the next week; (4) members pay John or Jackie for the items at the time they pick up (often with a check made out to the supplier), and John or Jackie sends this money to the appropriate supplier.<sup>24</sup> For instance, members may wish to acquire beef from a grass-fed cow. Rather than one family having to pay for the entire cow, pay the farmer to slaughter the entire cow, and then store the entire cow in its personal freezer, the split method allows member families to purchase just a portion of that cow - - a cow that would

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<sup>24</sup> The Appellate Court misfired on this point, neglecting to note that funds go to suppliers, rather than the Stowers.

not otherwise be slaughtered on those particular terms. As such, the Appellate Court was compelled to acknowledge “[m]uch of this knowledge [required of Retail Food Establishments] is relevant to activities that undisputedly do not do.”<sup>25</sup> After all, John and Jackie simply (1) pick up and transports food from local farmers; and (2) store the food for no more than 48 hours until Manna members pick it up, and leave funds for the producer. Prices paid by members reflect the prices set by the particular supplier of the food.

After over seven years of operation without incident, the Ohio Department of Agriculture (“ODA”) and Lorain County General Health District announced an intention to require Manna Storehouse to train for, acquire, and maintain a retail food establishment license if it wished to continue its buying club and cooperative activities. Arising out of this intention, ODA dispatched an agent to perform covert surveillance on Manna, misleading the family in an attempt to become a member of the cooperative. Ostensibly, ODA led an armed, forced-entry raid into the families’ home, confiscating personal food, computers, and cellular phones in the process (it is a third degree misdemeanor, punishable by considerable fines and imprisonment, to operate a “retail food establishment” without a license).

All that has been discovered since is that Manna conducts the above processes in a safe manner, because doing so is not complex: John and Jackie ensure that food items that must be refrigerated or frozen are kept at the proper temperature while (1) they are being transported (less than four hours) to Manna; and (2) they are being stored at Manna (for 24 to 48 hours). These precautions have proven to be more than sufficient to ensure the health and safety of the food during the limited time that it is in Manna’s possession: there are no reported cases of Manna Storehouse food making people ill, or otherwise being unsafe. Manna Storehouse is clean and safe enough that all of its members approve of it. Additionally, the food is already butchered by a government licensed butcher, and processed by a government-licensed processor; or acquired from an otherwise “approved” source, such as United Natural Foods (an organic food distributor), or a small farmer who could himself sell the food.

The Appellate Court acknowledged that Manna operates from the home, and that Manna’s low-profit business model necessitates that it operate from the home: “John and Jacqueline Stowers do not

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<sup>25</sup> *Stowers*, supra, p. 12.

receive these profits as monetary payments. Rather, the profits essentially feed the family of fourteen. The Stowers family does not shop at grocery stores, but rather eats whatever is left of the food purchased through Manna after the members have picked up their ordered products.<sup>26</sup>

### ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1: In Ohio, government impositions on property rights require heightened scrutiny.**

Pursuant to the text and context of the Ohio Constitution, and this Court's precedent, Ohio courts must review government actions infringing on property rights with exacting scrutiny, rather than rational basis review. Accordingly, the Appellate Court erred in applying rational basis review to the regulation and ostensible preclusion of Appellants' property rights.

First, state courts are free to construe their state constitutions so as to provide different, and broader, protections of individual liberties than those offered by the federal Constitution.<sup>27</sup> Accordingly, Ohio courts are free to interpret the Ohio Constitution without adherence or deference to federal court decisions-- the United States Constitution provides a floor, not a ceiling, for individual rights enjoyed by state citizens.<sup>28</sup> This Court has not hesitated to recognize this capacity, holding "[W]e believe that the Ohio Constitution is a document of independent force,"<sup>29</sup> and "[w]e are, of course, free to determine that the Ohio Constitution confers greater rights on its citizens than those provided by the federal Constitution, and we have not hesitated to do so in cases warranting an expansion."<sup>30</sup> The Ohio Supreme Court's 1941 ruling in *Direct Plumbing Supply v. City of Dayton*, directly in the wake of *Nebbia v. New York* and *United States v. Carolene Products*, stresses the importance using the Ohio Bill of Rights as an independent basis for protecting individual rights where federal protections are insufficient: "If in the midst of current trends toward regimentation of persons and property, [the] long history of parallelism seems threatened by a

<sup>26</sup> *Stowers*, supra., at p. 3.

<sup>27</sup> *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163.

<sup>28</sup> *PruneYard Shopping Ctr. v. Robbins* (1980), 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741; *State v. Brown* (1992), 63 Ohio St.3d 349, 588 N.E.2d 113.

<sup>29</sup> *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163 (recognizing an obligation "not to disturb the clear protections provided by the drafters of [the Ohio] Constitution," and interpreting Section 4, Article I of the Ohio Constitution, as more protective of the right to bear arms than the Second Amendment.

<sup>30</sup> *State v. Gardner* (2008) 118 Ohio St.3d 420, 889 N.E.2d 995.

narrowing federal interpretation of federal guaranties, it is well to remember that Ohio is a sovereign state and that the fundamental guaranties of the Ohio Bill of Rights have undiminished vitality. Decision here may be and is bottomed on those guaranties.”<sup>31</sup> Consequently, this Court is in no manner bound by federal standards.

To the contrary, this Court takes its cue from unique private property protections in Ohio’s Bill of Rights, placed at the forefront of the state’s constitution in 1851, so as to emphasize them:<sup>32</sup>

Section 1, Article 1: “All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.”

Section 19, Article I: “Private property shall ever be held inviolate, but subservient to the public welfare.”

Pursuant to the force of these two state-specific provisions, this Court recently reaffirmed “Ohio has always considered the right of property to be a fundamental right,” and emphatically stated “there can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces.”<sup>33</sup>

In Ohio, these “venerable rights associated with property” include “[t]he rights related to property, i.e., to *acquire, use, enjoy, and dispose of property*.”<sup>34</sup> And this is as it must be: merely protecting *ownership* of property becomes a hollow and illusory right when regulations of that same property are permitted to eat away at the owner’s capacity to use and enjoy the property. For this very reason, “the free use of property is guaranteed by Section 19, Article I of the Ohio Constitution,”<sup>35</sup> and “any substantial

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<sup>31</sup> *Direct Plumbing Supply v. City of Dayton* (1941), 138 Ohio St. 540, 38 N.E.2d 70, 137 A.L.R. 1058, 21 O.O. 422, citing *Wilson v. City of Zanesville*, supra; *Steele, Hopkins & Meredith Co. v. Miller*, 92 Ohio St. 115, 110 N.E. 648, at p. 651.

<sup>32</sup> *Moore v. Middletown* (2010), 2010-Ohio-2962 (Ringland, concurring and dissenting), citing Fischel, *The Offer/Ask Disparity and Just Compensation for Takings: A Constitutional Choice Perspective*, 15 *International Rev.L. & Econ.* 187, 197; 2 *Liberty U.L.Rev.* at 264.

<sup>33</sup> *Norwood v. Horney* (2006), 110 Ohio St.3d 353,361-62, 853 N.E.2d 1115, 1129 (internal citations omitted).

<sup>34</sup> *Id.*

<sup>35</sup> *State v. Cline*, 125 N.E.2d 222, 69 Ohio Law Abs. 305.

interference with the elemental rights growing out of ownership of private property is considered a taking.”<sup>36</sup>

Transitively, one gainful use, the right to engage in business is amongst these fundamental property rights: *In City of Cincinnati v. Correll*, this Court struck down a restriction on barber shop hours, observing “the business of barbering is a lawful business, and that the right to carry on such business is a property right constitutionally protected against unwarranted and arbitrary interference by legislative bodies.”<sup>37</sup> And this point of law is not a strange relic from the past: this Court has recently acknowledged that, “the right to do business” is a right “equally sacred” to “free speech.”<sup>38</sup> Just a decade ago, in *State v. Williams*, this Court noted that Section 1, Article I can and should be applied so as to guarantee not only a right of privacy, but also a “right to pursue a lawful occupation free from government interference.”<sup>39</sup> Thus, the right to use one’s property to carry on a business is a vital variation of a property rights, and consequently, a “fundamental right.”

This designation demands a standard of scrutiny for the right to use property more akin to “strict scrutiny,” and clearly the converse of “rational basis review.” This Court was no doubt aware of federal nomenclature on standards of scrutiny - - well prior to *Norwood*, federal courts have conspicuously distinguished “fundamental” and “non-fundamental” rights, and applied starkly contrasting standards of scrutiny - - when it declared property rights to be “fundamental rights.” In the context of this nomenclature, scrutiny of government actions limiting Ohioans’ property rights must be reviewed with scrutiny akin to “strict scrutiny.”

Essentially, “[g]overnment actions that burden the exercise of ... fundamental rights or liberty interests are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling government interest.”<sup>40</sup> On the other hand, “[g]overnment actions that do not affect

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<sup>36</sup> *Smith v. Erie RR. Co.* (1938), 134 Ohio St. 135, 142, 16 N.E.2d 310.

<sup>37</sup> *City of Cincinnati v. Correll*, supra, at 540.

<sup>38</sup> *Eastwood Mall v. Slanco* (1994), 68 Ohio St.3d 221, citing *Crosby v. Rath* (1940), 136 Ohio St. 352, 355-356, 16 O.O. 496, 497, 25 N.E.2d 934, 935.

<sup>39</sup> *Williams*, supra.

<sup>40</sup> *Taylor Acquisitions, L.L.C. v. City of Taylor* (6<sup>th</sup> Cir. 2009), 313 Fed.Appx. 826.

fundamental rights or liberty interests ... will be upheld if ... they are rationally related to a legitimate state interest.”<sup>41</sup> This distinction is meant to provide “heightened protection against government interference with certain fundamental rights and liberty interests.”<sup>42</sup>

Since *Nebbia v. New York*, federal courts have conducted rational-basis review of statutes that do not implicate a plaintiff's fundamental rights.<sup>43</sup> However, the rational basis test is insufficiently protective to guard Ohioans property rights, given the emphasis this Court has afforded those rights: the question in “rational basis” cases, whether the statute at issue is “rationally related to legitimate government interests,”<sup>44</sup> “is highly deferential; courts hold statutes unconstitutional under this standard of review only in rare or exceptional circumstances,”<sup>45</sup> and the party challenging a legislative enactment subject to rational basis review must “negative every conceivable basis which might support it.”<sup>46</sup> Courts are “satisfied with the government's ‘rational speculation’ linking the regulation to a legitimate purpose, even ‘unsupported by evidence or empirical data.’”<sup>47</sup> Consequently, it comes as no surprise that only a handful of provisions have been invalidated for failing rational basis review.<sup>48</sup>

Consequently, given this Court's designation of property rights as “fundamental,” rational basis review of property rights is inadequate in Ohio, and instead impositions on property rights may be upheld “only when they are narrowly tailored to a compelling government interest,” or through an equivalently-protective independent state standards of scrutiny.

Thus, the overly-permissive rational basis test is the wrong test to utilize when determining whether an imposition on property rights is in harmony with the liberties guaranteed in the Ohio Constitution. Yet this is exactly what the Appellate Court did, explicitly rejected the notion that property rights are

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<sup>41</sup> *Seal v. Morgan* (6th Cir.2000), 229 F.3d 567, at 575.

<sup>42</sup> *Seal*, supra., at 574.

<sup>43</sup> *LensCrafters, Inc. v. Robinson*, 403 F.3d 798, 806 (6th Cir.2005).

<sup>44</sup> *Glucksberg*, 521 U.S. at 728, 117 S.Ct. 2258.

<sup>45</sup> *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 501 (6th Cir.2007)

<sup>46</sup> See, e.g., *Lehmhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88, 60 S.Ct. 406, 84 L.Ed. 590 (1940)).

<sup>47</sup> (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313; 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)).

<sup>48</sup> See *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522 (6th Cir.1998).

fundamental rights in Ohio, wrongly elevating *Nebbia v. New York*<sup>49</sup> over *Norwood, Correll, Eastwood Mall, and Williams*, asserting “we will assume, arguendo, that Appellants’ property rights are limited by the licensing requirement \* \* \* We note that Appellants have not suggested that the statute infringes upon the exercise of any fundamental rights and hence they do not suggest that anything other than rational basis review applies.”<sup>50</sup> (Appellants did in fact argue for a heightened standard of review). Having elected to employ the rational basis test, Appellants’ resulting loss of their property rights was inevitable, with the Court cursorily reasoning only that (1) “Appellants do not contest that food safety is substantially related to the public health and safety;” (2) “we will be satisfied with the government’s ‘rational speculation’ linking the regulation to a legitimate purpose, even unsupported by evidence or empirical data \* \* \* as long as some rational basis can be articulated to support the decision;” (3) “Appellants have not provided evidence indicating that illness could not be carried by the food that Manna supplies;” (4) “it would not be clearly erroneous for the legislature to conclude that regulation of the activity would further the public health;” and (5) “regulation of Manna as a retail food establishment does have some rational relationship to public health and safety.”<sup>51</sup> Ohio courts must apply a heightened standard, akin to strict scrutiny, when reviewing government impositions on Ohioans’ property rights, and in abdication of this, the Appellate Court erred in a manner that was not harmless.

**Proposition of Law No. 2: Application of Retail Food Establishment Licensing Laws to Private Buying Clubs and Cooperatives akin to Manna Storehouse exceeds the police power and unduly violates its property rights.**

Contrary to the Appellate Court’s analysis, which focuses on a facial argument not made, RFE regulations may not be permissibly applied to Manna because they impose an undue burden, without evidence of necessary or *substantial* advancement of the *public* health.

Pursuant to R.C. 3717.21, “no person \* \* \* shall operate a retail food establishment without a license [and] no person shall fail to comply with any other requirement of this chapter \* \* \*.” Importantly, R.C. 3717.29(B) permits the board of health to “suspend or revoke a retail food establishment license on

<sup>49</sup> *Nebbia v. New York* (1934), 291 U.S. 502, 527-528

<sup>50</sup> *Stowers, supra*, at p. 9, 10.

<sup>51</sup> *Id.*, at pp. 10, 11.

determining that the license holder is in violation of any requirement of this chapter or the rules adopted under it \* \* \*.” Application of retail food establishment laws would place Manna in constant imperilment of being arbitrarily closed by state action.

First, Manna would be subject to OAC 3717-1-06.1(S), which prohibits a retail food establishment from operating in or adjacent to a private home. Manna is currently a home-based business,<sup>52</sup> and like many small private buying clubs, operates in such a way that provides food for the family of fourteen, but no monetary profit, thus foreclosing the rental or purchase of commercial space. Consequently, application of the retail food establishment designation, licensure, and regulatory regime to Manna would destroy it, depriving Manna of its fundamental right to use property so as to operate a private buying club.

Next, as a “license holder,” OAC 3717-1-02.4(B) would apply to Manna, and require that, on-the-spot, “during inspections,” that John and Jackie “demonstrate knowledge” essentially necessary to run a commercial restaurant, including the “hazards involved in the consumption of raw or undercooked meat, poultry, eggs, and fish;” “the required food temperatures and times for safe cooking of time/temperature controlled for safety food including eggs, fish, meat, and poultry;” “the required temperatures and times for the safe refrigerated storage, hot holding, cooling, and reheating of time/temperature controlled for safety food;” and the “relationship between the prevention of foodborne illness and the management and control of the following: \* \* \* Hand contact with ready-to-eat foods,” - - all of this even though Manna does not serve or cook food, or distribute ready-to-eat foods.<sup>53</sup>

Meanwhile, there is no *need* of the “general public” at stake, since Manna only engages with private members. In Ohio, the police power is not unlimited: it is based upon *public necessity*. *There must be essential public need for the exercise of the power in order to justify its use.*<sup>54</sup> Thus, the Court observed that the regulation of business is only within the police power when “*the relation to the public interest and*

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<sup>52</sup> December 16, 2009 Affidavits of Jacqueline and Kathryn Stowers.

<sup>53</sup> December 16, 2009 Affidavits of Jacqueline and Kathryn Stowers

<sup>54</sup> *State ex. rel. Killeen Realty Co. v. City of East Cleveland* (1959), 169 Ohio St. 375, 160 N.E.2d 1.

*the common good is substantial* and the terms of the law or ordinance are reasonable and not arbitrary in character.”<sup>55</sup>

First, All evidence demonstrates that there has never been a complaint about the health or safety of food acquired through Manna.<sup>56</sup> Manna does not produce or prepare food, but instead only engages in the nonthreatening activities of transporting and temporarily storing food for its members.<sup>57</sup> Second, if Manna Storehouse is “public,” then everything from family dinners to church potlucks are public, and subject to state regulation. Black’s Law Dictionary defines “public” as “1. Relating or belonging to an entire community, state, or nation. 2. Open or available for all to use, share, or enjoy. 3. (Of a company) having shares that are available on an open market.”<sup>58</sup> This is consistent with constitutional understanding: “[t]o be subject to regulation by the police power, *the business regulated must be clothed with a public interest,*<sup>59</sup> and \* \* \* If \* \* \* the common callings are clothed with a public interest by a mere legislative declaration, \* \* \* this will be running the public interest argument into the ground \* \* \*.”<sup>60</sup> Manna is *not* available for all to use, share, or enjoy: only private members who have undergone an interview, paid a membership fee, and reviewed the facilities may cooperate with Manna to acquire agricultural products.<sup>61</sup> Thus, if the police power is found to empower the legislature to reach, regulate, control, and eviscerate this basic, private activity, then the power knows no limits, and Ohioans constitutional rights have no efficacy.

## CONCLUSION

For the foregoing reasons, Appellant’s respectfully request that this Court accept jurisdiction, and adjudicate each of these important matters.

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<sup>55</sup> *Olds v. Klotz* (1936), 131 Ohio St. 447, 451, 3 N.E.2d 371, 373.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Decision, p. 4.

<sup>59</sup> *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.

<sup>60</sup> *Wolff Packing Company v. Court of Industrial Relations*, 262 U. S. 522, 43 S. Ct. 630, 633, 67 L. Ed. 1103, 27 A. L. R. 1280.

<sup>61</sup> See Statement of Facts; separately the Ohio Administrative Code provides that non-public entities are not “retail,” and thus not subject to licensure. The Appellate Court could have invoked the avoidance canon.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel  
for appellees on July 21, 2011.



Maurice A. Thompson (0078548)

[Cite as *Stowers v. Ohio Dept. of Agriculture*, 2011-Ohio-2710.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF LORAIN        )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

JACQUELINE STOWERS, et al.

C.A. No.     10CA009782

Appellants

v.

OHIO DEPARTMENT OF  
AGRICULTURE, et al.

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE No.    08CV159968

Appellees

DECISION AND JOURNAL ENTRY

Dated: June 6, 2011

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BELFANCE, Presiding Judge.

{¶1} John Stowers, Jacqueline Stowers, and Manna Storehouse, LLC (“Manna”), appeal from the judgment of the Lorain County Court of Common Pleas granting summary judgment in favor of the Ohio Department of Agriculture (“ODA”) and the Lorain County General Health District (“LCGHD”). For reasons stated herein, we affirm.

I.

{¶2} John Stowers and Jacqueline Stowers are the sole owners of Manna, a limited liability company registered to do business in the state of Ohio. Manna is a family-run enterprise that sells food and other products to its members. John and Jacqueline Stowers, their seven children, and their daughter-in-law, Kathryn Stowers, perform work for Manna. These

{¶3} Manna has approximately one hundred members. In order to become a member, one must pay a ten dollar initial fee, fill out an application, and complete an interview with Jacqueline Stowers. Members may order products through Manna, either by mail, email, or phone. The products are primarily food products, although Jacqueline Stowers testified that members may also order some cleaning or personal hygiene products. The food products available to Manna members include raw chicken, turkey, beef, and eggs. The meat is typically frozen.

{¶4} After receiving orders from members, Manna obtains the ordered products from various suppliers. Testimony from Jacqueline and Kathryn Stowers indicated that the primary supplier from which Manna obtains products is United Natural Foods, which delivers the products to Manna from Indiana. When ordering from other suppliers, however, the Stowers will transport the products back to the Manna rooms themselves in their own unrefrigerated personal vehicles. The products are stored in refrigerators in the Manna rooms, which contain refrigerators and shelving, until members take the products from Manna.

{¶5} Manna has regular hours posted on the outside of the building and on its website, indicating when members may come to pick up their ordered products. Members pay Manna when they pick up their products, although the pricing is determined at the time of the order. Manna's pricelist is posted on its website.

{¶6} The Manna pricelist represents a mark up from the price at which Manna obtains products from suppliers. The typical mark up is fifteen to twenty-five percent. Beef is marked up by twenty cents per pound. Manna pays sales tax on the amounts that it collects from

{¶7} John and Jacqueline Stowers do not receive these profits as monetary payments. Rather, the profits essentially feed the family of fourteen. The Stowers family does not shop at grocery stores, but rather eats whatever is left of the food purchased through Manna after the members have picked up their ordered products. Although the Stowers are occasionally required to pay money to Manna in order to have enough food, they generally do not do this. Rather, the mark up enables them to purchase enough extra food from suppliers that they do not have to pay out of pocket for food.

{¶8} A search warrant was executed on the Manna rooms and the rest of the Stowers' home in December 2008. Manna's food products and other items were seized as part of an ODA and LCGHD investigation of Manna as an unlicensed retail food establishment. Chapter 3717 of the Ohio Revised Code authorizes regulation of retail food establishments and R.C. 3717.21 requires all retail food establishments to be licensed. Appellants did not have a retail food establishment license.

{¶9} Appellants then brought an action in the Lorain County Common Pleas Court seeking, inter alia, a declaration that R.C. 3717.21 and related provisions were unconstitutional as applied to Manna, a return of all seized property, an injunction against further enforcement of the licensing requirement against Manna, injunctions against further certain searches and seizures described in the complaint, and attorney fees.

{¶10} All other claims in this case have been voluntarily dismissed. The trial court entered a judgment ordering that property seized in the execution of the search warrant be returned to Appellants and later granted summary judgment to ODA and LCGHD on other

intended to voluntarily dismiss. Those claims have now been dismissed and Appellants appeal the trial court's order granting summary judgment against them on their remaining claims for declaratory judgment, injunction against enforcement, and attorney fees. Appellants present two assignments of error.

## II.

### ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED IN CONCLUDING THAT APPELLANTS’ ACTIVITIES REQUIRE LICENSURE AS A ‘RETAIL FOOD ESTABLISHMENT.’”

{¶11} Appellants argue, in their first assignment of error, that Manna does not constitute a retail food establishment required to be licensed under R.C. 3717.21. We disagree.

{¶12} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶13} Pursuant to Civ.R. 56(C), summary judgment is appropriate when:

“(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

To succeed on a summary judgment motion, the movant “bears the initial burden of

movant satisfies this burden, the non-moving party “ ‘must set forth specific facts showing that there is a genuine issue for trial.’ ” Id. at 293, quoting Civ.R. 56(E).

{¶14} R.C. 3717.21 provides that, except for certain exclusions and exemptions not applicable in this case, “no person or government entity shall operate a retail food establishment without a license.” A “[r]etail food establishment” is defined as “a premises or part of a premises where food is stored, processed, prepared, manufactured, or otherwise held or handled for retail sale.” R.C. 3717.01(C). “ ‘Retail,’ ” furthermore, means “the sale of food to a person who is the ultimate consumer.” R.C. 3717.01(C)(1). Appellants also emphasize that “[f]or purposes of Chapter 3717-1 [The State of Ohio Uniform Food Safety Code] of the Administrative Code, \* \* \* “consumer” means a person *who is a member of the public*, takes possession of food, is not functioning in the capacity of an operator of a food service operation, retail food establishment or food processing plant, and does not offer the food for resale.” (Emphasis added.) Ohio Adm. Code 3717-1-01(B)(21).

{¶15} Appellants argue that because they do not sell food to the public, Manna is not a retail food establishment and consequently not subject to the licensure requirement of R.C. 3717.21. Although the Court appropriately views the evidence in a light most favorable to Appellants, we disagree with the legal conclusions Appellants draw from that evidence. Appellants attempt to distinguish Manna’s activities from “selling,” but the evidence in this case indicates that Manna does sell food products. Members order their products before Manna purchases them, but Manna nonetheless gives those products to members in exchange for money. Furthermore, Manna makes a profit well in excess of the cost of transporting and storing the

{¶16} Although Appellants assert that their activities are different than traditional retailing, these differences are not relevant to the statute and do not distinguish their activities from selling. Manna does not purchase products if members have not ordered enough to make a bulk purchase. Members must place their orders before Manna will purchase products, but there is no exemption in the statute for an establishment that does not maintain a product inventory. Although not dispositive, it is also significant that Manna pays sales tax on the taxable products it orders for members. See, generally, R.C. 5739.01(B) (defining “sale” and “selling” for purposes of sales tax).

{¶17} When words are not defined in a statute, they shall be given their ordinary meaning and construed according to common usage. See R.C. 1.42; *Moore Personnel Servs., Inc. v. Zaino*, 98 Ohio St.3d 337, 2003-Ohio-1089, ¶15. In the common usage, a sale is the exchange of goods for tender. The statute does not require the state to investigate an establishment’s method of obtaining and ordering products, collecting payment, or structuring profit in order to determine whether that establishment must be licensed. It is only necessary to determine that the establishment is selling food to consumers.

{¶18} Manna sets prices for its products in amounts sufficient to guarantee a profit and thereby generate income for the Stowers family. Manna members obtain food products from Manna in exchange for money and only money. Manna’s business model does not alter the fact that these exchanges are sales.

{¶19} Appellants also assert Manna sells only to members, not the “public,” and therefore does not sell to “[c]onsumer[s],” as defined in Ohio Adm. Code 3717-1-01(B)(21).

1. Appellants have not made any argument or provided any legal authority in support of this assumption.

{¶20} Chapter 3717 of the Ohio Administrative Code, the Uniform Food Safety Code, is promulgated pursuant to authorization granted in R.C. 3717.05. That provision does not authorize the drafters of the Uniform Food Safety Code to define statutory terms contained in R.C. Chapter 3717 of the Ohio Revised Code. R.C. 3717.05. Although the word consumer has been defined for purposes of the Ohio Administrative Code, that definition is not applicable to R.C. Chapter 3717. We therefore conclude that “consumer” is not statutorily defined for purposes of R.C. 3717.01. Because it is not defined, we construe “consumer” according to its ordinary meaning. See R.C. 1.42; *Moore Personnel Servs. Inc.*, supra.

{¶21} The ordinary meaning of the word “consumer” is “one that consumes” or “one that utilizes economic goods[.]” Merriam-Webster’s Collegiate Dictionary (11 Ed. 2005) 268. In this sense, the “ultimate consumer[.]” as described in the statute, is most reasonably understood as the end user of a consumable good, in this case, food. Whether such an individual is a member of the “public,” however defined, is irrelevant because to be a consumer, a person need only consume a product.

{¶22} Appellants have not contested the fact that when members order food through Manna, it is consumed primarily by those members and their families. Appellants have made no suggestion that Manna members are not typically the end users of the products, including food, that they purchase from Manna. They are therefore “consumers,” within the ordinary meaning and common usage of that word. Viewing the evidence in the light most favorable to the

is the ultimate consumer. Manna is therefore a retail food establishment subject to the licensing requirement of R.C. 3717.21

{¶23} We therefore conclude that the trial court did not err in finding that the statute requires Manna to be licensed as a retail food establishment and in granting summary judgment to Appellees on their declaratory judgment claim. Appellants' first assignment of error is overruled.

#### ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED IN FINDING THAT R.C. 3717 IS CONSTITUTIONAL AS APPLIED TO APPELLANTS.”

{¶24} In their second assignment of error, Appellants argue that R.C. 3717 is unconstitutional as applied to them because its application violates their due process and equal protection rights as guaranteed by the Ohio Constitution. We disagree.

{¶25} The due process and equal protection rights guaranteed by the Ohio Constitution have been recognized as functionally equivalent to the equal protection and due process rights protected by the United States Constitution. *Austintown Twp. Bd. of Trustees v. Tracy* (1996), 76 Ohio St.3d 353, 359, citing *State ex rel. Schwartz v. Ferris* (1895), 53 Ohio St. 314, 336 (equal protection); *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶48 (due process).

#### Due Process

{¶26} Appellants first argue that R.C. 3717, as applied, violates their due process rights. “When reviewing a statute on due-process grounds, we apply a rational-basis test unless the

quotations and citations omitted.) Id. Generally, courts reviewing a legislative exercise of the police power in furtherance of public health or other important interests will defer to the legislature's judgment. See, e.g., 16 Ohio Jur. 3d Constitutional Law §128.

{¶27} Appellants allege that the regulatory scheme unconstitutionally infringes upon property rights, their right to earn a livelihood, their freedom to contract, and their inherent, natural right to cooperate with friends and neighbors to acquire food as guaranteed by Section 1 of Article I of the Ohio Constitution. This section states:

“All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.” Section 1, Article I, Ohio Constitution

{¶28} We initially observe that the evidence in this case does not support Appellants' contention that the application of Ohio's food safety laws to Manna infringes on Appellants' right to cooperate with friends and neighbors. We do not doubt Appellants' sincere commitment to assisting friends and neighbors in obtaining the type of food that Manna offers, or their genuine belief that the services they provide are beneficial to Manna's members and their community. These laudable motives, however, do not transform a for-profit business into a cooperative community endeavor. Members do not do work for Manna or otherwise contribute to this for-profit enterprise other than by purchasing its products. Manna is clearly a business for-profit and the Appellants did not put forth any evidence that the licensing statute infringes on their right to cooperate with others within their community.

{¶29} Although we reject Appellants' contention that their right to cooperate with

police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, within the meaning of Section 1 of Article I of the Ohio Constitution[.]”). We note that Appellants have not suggested that the statute infringes upon the exercise of any fundamental rights and hence they do not suggest that anything other than rational basis review applies. See *Nebbia v. New York* (1934), 291 U.S. 502, 527-528 (“The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases.”). Under rational basis review, the statute is “valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.” *Benjamin*, 167 Ohio St. at 110.

{¶30} Appellants do not contest that food safety is substantially related to the public health and safety. Rather, they argue that the food safety regulations that would require Manna to obtain a license are unreasonable or arbitrary. “Whether an exercise of the police power \* \* \* is unreasonable or arbitrary [is] \* \* \* committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them.” *Benjamin*, 167 Ohio St. at paragraph six of the syllabus.

{¶31} This “clearly erroneous” standard of rational basis review is highly deferential. This Court need not agree with the legislature’s conclusions in order to determine that they are rational and not clearly erroneous. A proffered explanation for the statute need not be supported by evidence; rather, we will be satisfied with the government’s “rational speculation” linking the regulation to a legitimate purpose, even “unsupported by evidence or empirical data.” *Fed.*

some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.” *Id.* at 314. So long as some rational basis can be articulated to support the legislation, moreover, it is “constitutionally irrelevant [what] reasoning in fact underlay the legislative decision.” (Internal quotations and citation omitted.) *United State R.R. Bd. v. Fritz* (1980), 449 U.S. 166, 179 (1980).

{¶32} Regulation of Manna as a retail food establishment does have some rational relationship to public health and safety. Appellants transport and store a variety of foods. Some of these foods are unpackaged. Some are processed in Appellants’ home and apparently stored with their personal food items, including the family’s leftovers. Some of the items that Manna sells, such as raw meat and eggs, can easily carry foodborne illness. Some of the foodborne illnesses that could be carried on these food items, moreover, can be communicated from a person who eats that food to a person who did not eat the food and thereby travel among the general population.

{¶33} Appellants repeatedly cite the fact that there have been no reported incidents of foodborne illness contracted from Manna food. This assumes, first, that any incidence of illness from consumption of Manna’s food would have been recognized and reported. Second, the legislature may have reasonably intended to prevent such illnesses before a reported incident occurs. The absence of a documented illness is therefore irrelevant because Appellants have not provided evidence indicating that illness could not be carried by the food that Manna supplies. Because Appellants’ products can carry illness that could be transmitted to Manna’s members,

to conclude that regulation of this activity would further the public health. See *Benjamin*, 167 Ohio St. at paragraph six of the syllabs.

{¶34} Appellants also argue that because they sell food only to members, they should not be subject to food safety laws designed to protect the general public. Appellants emphasize that members may enter and inspect the Manna rooms in Appellants' home. Members, however, need not demonstrate any knowledge about food safety in order to join. Appellants were not able to cite any characteristic distinguishing members from the general public other than Jacqueline Stowers' belief in their honesty and trustworthiness. The legislature did not act arbitrarily or capriciously in declining to find this particular characteristic relevant to the licensing requirement. The legislature may have also rationally concluded that Manna members' right to inspect the Manna rooms is wholly disconnected from their inclination, ability, and qualification to do so with the thoroughness required to prevent the transmission of foodborne illness to members, their families, and the general public. Indeed, by the logic of Appellants' arguments, any store could avoid the licensing requirement if it was to simply allow its customers to inspect the store.

{¶35} Appellants also contest certain aspects of the food safety laws and licensure requirements. For example, Ohio Adm. Code 3717-1-02.4(B) requires that a license holder be able to demonstrate certain food safety knowledge during an inspection. Much of this knowledge is relevant to activities, such as preparing and serving hot food, that Appellants undisputedly do not do.

{¶36} Nonetheless, Appellants' argument is irrelevant to the declaratory judgment

they *obtain* a license. Appellants do not have a license at this time and they have not had a license revoked for failure to demonstrate certain knowledge. The mere possibility that Appellants might, in the future, have their currently non-existent license revoked for failure to demonstrate knowledge that may or may not, at the time of revocation, be relevant to their activities, is insufficient to maintain their current action. This action seeks to prohibit the application of Ohio's food safety laws to Manna and exempt them from the license requirement altogether.

{¶37} We note that the knowledge listed in the regulations is relevant to the broad group of activities in which one is permitted to engage after obtaining a retail food establishment license and therefore the regulations are not facially invalid. As they have not yet been applied to Appellants, we cannot determine that they are unconstitutional as applied to them.

{¶38} Appellants have not shown any due process violation. The legislature could have reasonably found that food safety bears a substantial relationship to the public health and furthermore that regulation of Manna and similar types of operations would improve food safety and, consequently, the public health. As neither of these conclusions is arbitrary or irrational, Appellants' due process rights have not been unconstitutionally infringed.

#### Equal Protection

{¶39} Appellants next argue that, as applied, R.C. 3717.21 violates their equal protection rights as guaranteed by the Ohio Constitution. Because the statutory classification at issue involves neither a suspect class nor a fundamental right, we again apply the rational basis test to determine if the classification has some reasonable basis. See, e.g., *McCrone v. Bank One*

fundamental right does not violate the Equal Protection Clause of the Ohio or United States Constitutions [sic] if it bears rational relationship to a legitimate governmental interest.”)

{¶40} Because the legislature’s findings are presumed to be reasonable, Appellants have the burden of demonstrating that there is no rational basis for subjecting Manna to the licensing requirement. Appellants argue that to subject Manna to the requirement treats them like a large grocery store or a restaurant. Appellants’ argument is misplaced in that it misconstrues the reach of the statute. We do not find any language in the statute suggesting that it is meant to apply exclusively to larger enterprises and restaurants. Manna does not indicate that the statute is inapplicable to smaller grocers and retailers that sell food. Manna also did not present any evidence indicating that officials enforcing the licensing requirement on behalf of the ODA or LGCHD had not enforced the license requirement with respect to smaller establishments.

{¶41} Appellants cite three cases in support of their contention that Manna may not reasonably be classified as a retail food establishment. See *Craigmiles v. Giles* (C.A.6 2002), 312 F.3d 220, 222 (finding requirement of funeral director license in order to sell funeral merchandise violated equal protection); *Cornwell v. Hamilton* (S.D.Cal. 1999), 80 F.Supp.2d 1101, 1103, 1118-1119 (finding that requiring African hair braiders to obtain cosmetology licenses violated equal protection); *Merrifield v. Lockyer* (C.A.9 2008), 547 F.3d 978, 989-992 (finding that exemptions for nonpesticide pest controllers of certain vertebrates, but not others, violated equal protection even though broad licensing scheme was otherwise constitutional). The primary inquiry here, as in the cases Appellants cite, is into the overlap between the challenger’s activities and the conduct the legislature deemed in need of regulation. Where a

*Charles v. City of Chicago* (1952), 413 Ill. 428, 434-436 (finding that legislative distinction between live-poultry and dressed-poultry retailers was not irrational or arbitrary and therefore did not violate due process or equal protection).

{¶42} Here, Appellants' primary activity is the transportation, storage, and sale of food. Appellants incidentally engage in other activities, such as processing raw meat. The fact that Appellants' incidental activities are correlated with a higher risk of foodborne illness than their primary activities does not negate the fact that Appellants' primary activities may result in the transmission of foodborne illness. The parties have not disputed that preventing the spread of foodborne illness is a primary purpose of Ohio's food safety laws and regulations. In this case, unlike *Craigmiles* and *Cornwell*, the challenged statute and regulation are intended to mitigate risks posed by conduct in which the challenger engages. The General Assembly did not, then, act irrationally in including entities like Manna in the scope of the regulation.

{¶43} Appellants also cite *Merrifield* to support their contention that the exemptions from Ohio's licensing scheme are irrational even if the overall licensing requirement is not. *Merrifield* does not, however, support Appellants' position. The *Merrifield* court specifically held that a single licensing scheme could rationally be applied to a broad range of activities. *Id.* at 988, quoting *Williamson v. Lee Optical* (1955), 348 U.S. 483, 488 ("The licensing statute does not fail because it is not tailored to each precise specialization within a field. 'It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.' "). The licensing scheme in *Merrifield* was only unconstitutional in that it irrationally exempted one group, but not another, when the two groups

indications in the legislative history that the statute was motivated by an economic animus. *Id.* at 991-992.

{¶44} Appellants argue that the exemptions from the licensing requirement are as irrational as the *Merrifield* exemption for certain pest controllers. The retail food establishment licensing exemptions include, *inter alia*, persons who sell eggs directly from a farm where they maintain five hundred or fewer birds, persons who maintain fewer than one thousand birds and sell chicken meat from the place where it is processed or at a farm auction, and a variety of instances in which people may sell foods that are not potentially hazardous, including unprocessed fruits and vegetables, cottage food products, honey, cider, etc. R.C. 3717.22(B). Foods that require refrigeration are among foods that are defined as potentially hazardous. R.C. 3715.01(A)(19)(c). Notably, the only exemptions available for the sale of potentially hazardous foods, like eggs and meat, apply only to sellers who produce the eggs or meat in their own small farming operations. See R.C. 3717.22(B).

{¶45} Appellants are not situated similarly to any of the exempted groups. Appellants purchase most of their food products from a wholesale company in Indiana. Appellants have not suggested that they contribute substantially to cottage food production of non-potentially hazardous foods or to small scale Ohio farming, both of which it appears the legislature sought to protect with the exemptions. Appellants have not introduced evidence suggesting that they sell any food that they produce themselves. Jacqueline Stowers, in fact, stated in her deposition that when the family had raised its own livestock, it had kept that meat for family consumption rather than selling it through Manna. The statute's exemptions are not unconstitutional as applied to

{¶46} The exempted groups are marked by at least one of two distinctive characteristics, neither of which applies to Appellants. The exempted groups are either selling exclusively non-potentially hazardous foods in small quantities or they are small producers selling directly to consumers. It is not required that the legislature demonstrate that all exemptions are necessary, so long as an exemption does not draw a distinction that cannot rationally suffice as a basis for different treatment. The legislature may, however, choose to protect small farming and cottage food operations and to treat those operations differently than Manna.

“[Equal protection requires] only that the classification challenged be rationally related to a legitimate state interest. \* \* \* [R]ational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations[;] \* \* \* in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with [Equal Protection].” (Internal citations and quotations omitted.) *City of New Orleans v. Dukes* (1976), 427 U.S. 297, 303-304.

{¶47} The legislature could have reasonably determined that it would further public health and safety to subject Manna to the licensing requirement for retail food establishments. We do not find that conclusion clearly erroneous. The legislature could have also determined that the burden of obtaining a license should not be imposed on small farm or cottage food production operations. Because the distinction between Manna and these exempted operations is not wholly arbitrary or irrational, those exemptions also do not violate the requirements of equal protection. For these reasons, Appellants’ second assignment of error is overruled.

### III.

Appellants' second assignment of error is overruled because Ohio's food safety laws are not unconstitutional as applied to Appellants. Accordingly, we affirm the judgment of the trial court.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

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EVE V. BELFANCE  
FOR THE COURT

WHITMORE, J.  
MOORE, J.  
CONCUR

SCOTT F. SERAZIN, Assistant County Prosecutor, for Appellee.

MICHAEL DEWINE, Ohio Attorney General, and JAMES R. PATTERSON, Assistant Attorney General, for Appellee.