

In the  
Supreme Court of Ohio

08-0418

STATE OF OHIO, et al., : Case No.  
: :  
Defendants-Appellants, : On Appeal from the  
: : Summit County  
v. : : Court of Appeals,  
: : Ninth Appellate District  
CITY OF AKRON, OHIO, et al., :  
: : Court of Appeals Case  
Plaintiffs-Appellees. : No. 23660

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MEMORANDUM IN SUPPORT OF JURISDICTION OF  
DEFENDANT-APPELLANT STATE OF OHIO

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## INTRODUCTION

In a 2-1 decision, the Ninth District Court of Appeals struck down R.C. 9.481, which protected the rights of municipal employees to live where they wished. In so doing, the appeals court undermined the General Assembly's authority under Article II, Section 34 to provide for the comfort, health, safety, and general welfare of all employees, and the court improperly held that cities' home-rule powers allow cities to impose residency requirements on its employees.<sup>1</sup>

The appeals court's decision warrants review because it addresses a fundamental question of State and local governance being litigated across the State. As a constitutional matter, the case involves issues of the allocation of state and local power and home rule. As a practical matter, the resolution of this case affects dozens of cities and thousands of municipal employees and, more broadly, every citizen in the State.

Article II, Section 34 empowers the General Assembly to pass laws providing for the "comfort, health, safety, and general welfare" of employees. Under that authority, the General Assembly enacted R.C. 9.481 to regulate the residency requirements a political subdivision may impose on its employees. The State contends that the law is a legitimate exercise of the Assembly's power under Article II, Section 34, so it is exempt from home rule analysis. Further, even under home rule analysis, R.C. 9.481 is a legitimate exercise of the Assembly's power to enact statutes of general and statewide concern and is therefore consistent with home rule. The Ninth Appellate District, however, improperly concluded that the General Assembly's enactment of R.C. 9.481 was unconstitutional. The appeals court found that R.C. 9.481 was subject to

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<sup>1</sup> This is the second appeals court to interpret improperly Article II, Section 34 and strike down R.C. 9.481. See *City of Lima v. State* (3rd Dist. Dec. 3, 2007), 2007-Ohio-6419, 2007 Ohio App. Lexis 5626. On January 17, 2008, the State of Ohio filed its Notice of Appeal and Memorandum in Support of Jurisdiction in *City of Lima v. State*. While the Third and Ninth Districts provided differing rationales for striking down R.C. 9.481 as unconstitutional, most of the underlying public and great interests included in this brief apply to both cases.

home rule analysis because the legislature's authority to regulate the welfare of employees under Article II, Section 34 of the Ohio Constitution is limited and requires that "legislation adopted under [Article II, Section 34] must also either secure the blessings of freedom to citizens of Ohio or further the 'general welfare' of the state." *State v. City of Akron* (9th Dist. Jan. 9, 2008), 2008-Ohio-38, 2008 Ohio App. Lexis 33 ("App. Op.") (attached as Ex. 1), ¶ 19. The appeals court then improperly applied the four-part home rule test of *Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, and it found that R.C. 9.481 failed the "general law" prong. The court erred in both its Section 34 analysis and its home rule analysis; equally important, both errors warrant the Court's review.

First, by adopting an overly narrow view of Article II, Section 34, the decision below severely restricts the General Assembly's power to address matters involving the "comfort, health, safety, and general welfare" of employees, and indeed, the decision invites challenges to long-settled Ohio laws that were passed pursuant to that Section. The Ninth District's restrictive view of Section 34, along with the Third District's similarly narrow view, potentially undermines several laws that govern all workers, or that focus on state workers, such as laws concerning sick and disability leave, pensions, collective bargaining agreements, and the ethics requirements for elected and appointed public officials. In particular, the Ninth District held that the Assembly could not, in the name of protecting the general welfare of employees, pass a law that affected only government workers but not private ones, and that theory especially threatens other laws that similarly focus on public servants, such as pension laws and ethics laws.

Second, by improperly applying the four-part *Canton* test, the appeals court struck down a valid exercise of the General Assembly's authority to pass laws of statewide concern. The *Canton* test is properly applied only in home rule cases involving a municipality's police powers.

This is not that case. Rather, R.C. 9.48 involves a city's purported use of its power to govern issues of local self-government, not a city's police power; so the appeals court should have applied the statewide concern test. By applying the wrong test, the court not only reached the wrong result but it also established a mistaken precedent that could confuse future home rule cases. That, too, calls for review.

Indeed, the need for review here is so great that many Ohio cities should share the State's interest in review, even if they disagree with the State on the merits, and of course, this issue affects the city workers caught in the middle. Surely no one can doubt that the issue here affects every city that has such residency laws, and it may affect other cities as well. Litigation is currently ongoing between the State and Akron, Cleveland, Cincinnati, Dayton, Lima, Toledo, and Youngstown. Together, these municipalities employ thousands of municipal workers, all of whom are strongly affected by this issue. Further, even beyond this massive effect on cities and city workers, the law here affects Ohio's millions of citizens in our cities, because the services these employees provide include such basic and necessary services as police and fire protection, as well as all other services that cities provide. In sum, the case has a great practical effect, as well as a major effect on legal doctrine, so the need for review is especially strong.

No one doubts the intensity of the disagreement over whether the State can prohibit political subdivisions from imposing residency requirements on its full-time employees. And no one should doubt that this issue is fully ripe for review by the Court. The validity of R.C. 9.481 is a pure question of Ohio constitutional law that this Court is best equipped to decide. With every trial court deciding on home rule for the State, and the Third and Ninth Appellate Districts finding for the municipalities, the question is not *whether* the Court will hear this issue. Rather, the real question is *when* the Court will hear it: now, under discretionary review, or later, on a

certified conflict. The State suggests that the Court should address the issue now, and settle it for all the many entities and individuals needing an answer.<sup>2</sup>

### STATEMENT OF THE CASE AND FACTS

**A. The General Assembly enacted R.C. 9.481 to prohibit political subdivisions from requiring full-time employees to reside in a specific area of the State.**

In January 2006, the General Assembly enacted R.C. 9.481, which generally prohibits any political subdivision from requiring its permanent full-time employees, as a condition of employment, to reside in any specific area of the State. The General Assembly recognized that “employees of political subdivisions of this state have the right to reside any place they desire.” R.C. 9.481(C). To preserve a balance between this right of employees and the need for adequate response times to emergencies or disasters, however, the Act permitted local governments to require residency “either in the county where the political subdivision is located or in any adjacent county in this state.” R.C. 9.481(B)(2)(b).

In enacting the statute, the General Assembly declared its intent to recognize two aspects of the Ohio Constitution. First, it recognized the “inalienable and fundamental right of an individual to choose where to live pursuant to Section 1 of Article I.” 126th General Assembly, Sub. S.B. No. 82, § 2(A). Second, it noted that under Section 34 of Article II, “laws may be passed providing for the comfort, health, safety, and general welfare of all employees, and that no other provision of the Ohio Constitution impairs or limits this power,” including the home rule provisions of Section 3, Article XVIII. *Id.*, § 2(B).

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<sup>2</sup> Because the State’s request for review in *City of Lima v. State*, Case No. 2008-0128, was filed first, the State asks that this Court accept jurisdiction over that case, and it may simply hold this case for resolution of the Lima case. If, however, the Court denies jurisdiction in *City of Lima*, the State asks that the Court review this case for the reasons set forth in this Memorandum.

**B. The trial court held that the General Assembly enacted R.C. 9.481 under Article II, Section 34 and therefore invalidated Akron's employee residency requirement.**

R.C. 9.481 became effective on May 1, 2006. On that same day, the City of Akron sued the State in the Summit County Common Pleas Court, seeking an order declaring the statute unconstitutional. App. Op. at ¶ 5. On May 2, 2006, the Fraternal Order of Police, et al., filed a separate action against the State, the City of Akron, and its mayor seeking a declaration that R.C. 9.481 was constitutionally enacted under Article II, Section 34 of the Ohio Constitution and that Akron's employee residency requirements were unenforceable. *Id.* at ¶ 6. The trial court consolidated the two cases, and the parties later filed cross-motions for summary judgment. *Id.* at ¶ 7. On those motions, the trial court "concluded that the Ohio General Assembly enacted *Section 9.48.1* pursuant to its authority under *Article II Section 34 of the Ohio Constitution* to pass laws providing for the 'general welfare' of employees." *Id.* The trial court then found that "[b]ecause *Article II Section 34* explicitly provides that 'no other provision of the constitution shall impair or limit this power[,] . . . the constitutional authority of the General Assembly to enact *Section 9.48.1* supersedes the city's home rule authority to pass a local employee residency requirement." *Id.* Accordingly, the trial court held that R.C. 9.481 invalidated Akron's employee residency requirement. *Id.*

**C. The court of appeals limited the General Assembly's authority under Section 34, Article II.**

The appeals court reversed. The appeals court first analyzed the General Assembly's power to pass laws "providing for the comfort, health, safety, and general welfare of all employees" under Article II, Section 34. *Id.* at ¶¶ 12-14. If R.C. 9.481 was passed under the General Assembly's Article II, Section 34 powers, then the statute could not be invalidated under home rule. The focus on the court's analysis was whether the legislative authority to pass laws providing for the "general welfare" encompassed authority to enact R.C. 9.481. *Id.* at ¶ 14.

In its review, the appeals court noted the Ohio Supreme Court had stressed that “the language of *Article II, Section 34* was clear and unequivocal and that ‘it is the duty of courts to enforce the provision as written.’” *Id.* at ¶ 16 (citing *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St. 3d 1, 15 (“*Rocky River IV*”). Nevertheless, the appeals court concluded that, on its face, that the term “general welfare” was “so broad and vague that it provides no ascertainable limit on the scope of the General Assembly’s authority.” *Id.* at ¶ 17. In an effort to limit the scope of Section 34, the appeals court created a new test: “[w]hile *Article II Section 34* explicitly authorizes legislation for the general welfare of employees, legislation adopted under it *must also either secure the blessings of freedom to citizens of Ohio or further the ‘general welfare’ of the state.*” *Id.* at ¶ 19 (emphasis added). This new test appears to require legislation either to secure unwaivable fundamental rights or to address “significant social issues impacting the public at large” and be part of “a comprehensive legislative scheme.” *Id.* at ¶ 24-27.

The court then analyzed R.C. 9.481 under its new Article II, Section 34 test. The court first concluded that the “sole purpose of Section 9.48.1 [sic] is to invalidate employee residency requirements by political subdivisions. This legislation does not address any significant social issues impacting the public at large; it is not part of a comprehensive legislative scheme, but deals with a single issue; and it applies to a relatively small segment of the population.” *Id.* at ¶ 24. Further, the court found that employees had no right to insist on employment with the government and that they “voluntarily agreed to give up their ‘right’ to choose to live elsewhere when they accepted employment with the city.” *Id.* at ¶¶ 26-27. Therefore, because it concluded that R.C. 9.481 was only a “single-issue statute,” which sought “to reinstate a non-fundamental right that the employees voluntarily surrendered when they accepted employment,” the appeals

court ruled that R.C. 9.481 did not fall under the General Assembly's authority under Article II, Section 34 to pass laws for the "general welfare of employees." *Id.* at ¶ 28.

**D. The court of appeals held that the General Assembly's enactment of R.C. 9.481 violated home rule.**

The appeals court further decided that R.C. 9.481 was not enacted under the General Assembly's Article II, Section 34 authority and therefore applied home-rule analysis. Without analyzing whether R.C. 9.481 was passed as a matter of local self-government or local police powers, the appeals court applied the four-part home-rule test set out in *Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005. Applying the Canton test, the court focused on a single prong of that test—holding that R.C. 9.481 prevails only if it qualifies as a general law. *Id.* at ¶ 31. Citing the Third District's recent decision in *City of Lima v. State* (3d Dist. Dec. 3, 2007), 2007-Ohio-6419, 2007 Ohio App. Lexis 5626, ¶ 80, the court concluded that R.C. 9.481 is not a general law because it "does not set forth police, sanitary, or similar regulations but merely limits the municipality's power to do the same[.]" *Id.* at ¶ 32. The appeals court further found that prohibiting residency as a condition of employment is not an overriding state interest. *Id.* Consequently, the appeals court found that R.C. 9.481 violated Akron's home rule authority under Section 3, Article XVIII of the Ohio Constitution. *Id.* at ¶ 33.

**THIS CASE PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION  
AND IS OF PUBLIC AND GREAT GENERAL INTEREST**

- A. This case presents substantial constitutional questions regarding the General Assembly's powers under Article II, Section 34 of the Ohio Constitution and the balance between state and municipal power over public employment.**
- 1. The Ninth Appellate District's improper reading of Article II, Section 34 of the Ohio Constitution invites challenges to already-settled Ohio law.**

The Ninth District's newly created test for the term "general welfare" improperly restricts the State's constitutional authority to regulate the health and welfare of employees by requiring

that “legislation adopted under [Article II, Section 34] must also either secure the blessings of freedom to citizens of Ohio or further the ‘general welfare’ of the state.” *Id.* at ¶ 19. This limitation is not supported by the text of Article II, Section 34 or its interpreting case law and invites constitutional challenges to already-settled Ohio law.

For example, many public-employment matters that have historically been subject to state regulation, such as sick leave and pensions, arguably do not fit within the Ninth District’s new framework. Sick leave for public employees is a fringe benefit, *Ebert v. Stark Cty. Bd. of Mental Retardation* (1980), 63 Ohio St. 2d 31, 33, that compensates for “absence from previously scheduled work.” R.C. 124.38(C). A pension, likewise, is money paid to a fund member upon retirement, R.C. 742.37(C), or to a deceased member’s surviving spouse, R.C. 742.37(D). These fundamental benefits are forms of compensation that may not meet the restrictive requirements of Ninth District’s new test, because they do not impact the public at large and are not part of a comprehensive legislative scheme. App. Op. at ¶ 19. Accordingly, if allowed to stand, the ruling below opens the door to home-rule-based constitutional challenges to state legislation on these and other subjects. The sheer volume of legislation open to constitutional attack under the lower court’s decision provides ample reason for this Court to exercise its jurisdiction.

**2. The Ninth Appellate District’s decision unduly interferes with the General Assembly’s power to pass legislation affecting public employment.**

The appeals court’s truncation of the State’s powers under Article II, Section 34 of the Ohio Constitution and the court’s unworkable application of home-rule analysis are not only matters of constitutional import; they also create significant problems for municipal-state relations in general and public-employment law in particular. By subjecting public employment legislation to *Canton’s* four-part test, the appeals court unduly limits the General Assembly’s ability to legislate further in the area of public employment. The appeals court held that R.C.

9.481 violates home rule because it “does not set forth police, sanitary, or similar regulations but merely limits the municipality’s power to do the same.” *Id.* at ¶ 32. The court further held that prohibiting municipalities from “requiring residency as a condition of employment is not an overriding state interest.” *Id.* (citing *City of Lima*, 2007-Ohio-6419, at ¶ 80).

The court was wrong on both counts. First, laws passed under Article II, Section 34 should not be subject to home rule analysis. Second, the *Canton* test is not the proper home rule analysis. The Court has repeatedly explained that some city laws are passed under a city’s police power, while others are passed under a city’s power to exercise rights of local self-government. When cities pass residency restrictions, such restrictions involve the city’s hiring power, i.e., its control over the machinery of city government, not its police power to govern citizens’ behavior within city limits. Thus, regardless of whether the city’s requirement should stand or fall under home rule analysis, it should plainly be weighed under the local self-government part of home rule analysis, not under the police power tests. The court’s use of the wrong test calls for review. Finally, it is not clear whether any legislation involving public employment or involving other units of government could meet the court’s new standards, and that, too, calls for review.

**B. This case warrants review because R.C. 9.481 is a matter of public or great general interest, as evidenced by the amount of current litigation involving the statute.**

Before R.C. 9.481 took effect, there was no stable rule governing residency requirements for public employees. Even though homeowners were making significant and long-term decisions in determining where to buy a house, municipalities could enact, amend, or repeal residency laws as the shifting currents of local politics dictated. By enacting R.C. 9.481, the General Assembly gave public employees the assurance that, so long as they bought a house no farther from their work than the adjacent county, they would not have to choose between keeping their homes and keeping their jobs.

Soon after the statute took effect, cities challenged its validity in several of the State's most populous counties: Allen, Cuyahoga, Lucas, Montgomery, Summit, and Trumbull. See *City of Lima*, 2007-Ohio-6419, at ¶ 17. All of the trial courts upheld the statute, and all of those judgments have been appealed. The Third and Ninth District opinions are the first appellate decisions on the subject. But until this Court rules, the conflicting interests of every municipal employee and every municipality in the State will remain unsettled.

As these intermediate appeals continue, government lawyers on both sides of the cases and the appellate courts themselves will go on spending public resources. If there were differing sets of facts, or differing applications of law to fact, against which to test the statute, it might be more appropriate for this Court to let these appeals run their course before taking jurisdiction. But that is not the case. The validity of R.C. 9.481 is purely a question of Ohio constitutional law, which this Court is best equipped to decide.

**C. The case warrants immediate review because the uncertainty in the constitutionality of R.C. 9.481 burdens family decisions and city planning.**

The municipal entities involved in actions across this State employ thousands of full-time municipal workers. The families of many of these employees may hope to move out of their municipalities for any one of a variety of reasons: alternative school districts, more affordable housing, easier access to important accommodations, and myriad other justifications. For many families, moving is a major life decision that implicates enormous and long-term budgetary concerns. When a family is presented with the opportunity to relocate to a more favorable location, its decision should be guided by the personal considerations rather than a mandated residency requirement imposed by a family member's municipal employer.

Moreover, the municipal residency requirements involve more issues than just where a municipal employee may live. These requirements also restrict where some individuals may

work. For example, a married, professional couple cannot live together and work for two different municipalities that have residency requirements. This unfortunate, and perhaps unintended, result is bad policy for this State.

In January 2006, the General Assembly, addressing these concerns, passed R.C. 9.481 to protect the right of municipal employees and their families to live where they choose. That law has now been in effect for two years, yet uncertainty about its validity remains. While trial and appellate courts wrestle with the constitutionality of R.C. 9.481, municipal employees and their families are stuck in limbo, not sure whether or where they are required to relocate. Those families have no choice but to await this Court's definitive resolution of the issue.

All these reasons support the Court's review of this issue, and further, these reasons support review sooner rather than later. Nothing new will be gained from having more cities and courts, along with the State, consume resources replicating the same battle on the same legal issue in case after case. Thus, the Court should review the issue now.

## ARGUMENT

### **The State of Ohio's Proposition of Law No. 1:**

*R.C. 9.481 is constitutional legislation enacted for the comfort, health, safety, and general welfare of employees under Article II, Section 34 of the Ohio Constitution.*

Article II, Section 34 of the Ohio Constitution empowers the General Assembly to enact laws "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." Despite the explicit language of Article II, Section 34 and this Court's decision in *Rocky River IV*, 43 Ohio St. 3d at 15, that *Article II, Section 34* was clear and unequivocal and that "it is the duty of courts to enforce the provision as written," the appeals court determined that the language of Article II, Section 34 was overly-broad and vague. App. Op. at ¶¶ 16-18. The court then improperly

created a limiting test requiring that “legislation adopted under [Article II, Section 34] must also either secure the blessings of freedom to citizens of Ohio or further the ‘general welfare’ of the state.” *Id.* at ¶ 19. While the appeals court did not fully explicate its new test, it appears that legislation adopted under Article II, Section 34 must either secure unwaivable fundamental rights or address “significant social issues impacting the public at large” and be part of “a comprehensive legislative scheme.” *Id.* at ¶ 24-27.

The court concluded that R.C. 9.481 failed to pass either prong of its new test. First, the appeals court held that the “sole purpose of Section 9.48.1 is to invalidate employee residency requirements by political subdivisions. This legislation does not address any significant social issues impacting the public at large; it is not part of a comprehensive legislative scheme, but deals with a single issue; and it applies to a relatively small segment of the population.” *Id.* at ¶ 24. While court held that R.C. 9.481 did not further the “general welfare” prong of its test, it is difficult to understand how the law fails to advances the “general welfare” of the state merely because it helps one group of employees. Typically, when the General Assembly addresses its citizens’ general welfare, or employees’ general welfare, it does so by seeking to enhance the well-being of groups that need help. Minimum-wage laws may not help the high-paid; labor laws may not help the non-unionized. But that does not mean that such laws are not laws for the general welfare.

Next, the court found that employees had no right to insist on employment with the government and that they “voluntarily agreed to give up their ‘right’ to choose to live elsewhere when they accepted employment with the city.” *Id.* at ¶¶ 26-27. While the law’s own language recognizes the “inalienable and fundamental right of an individual to choose where to live pursuant to Section 1 of Article I,” the Ninth District nonetheless reasoned that R.C. 9.481 did

not secure the blessings of freedom to citizens of Ohio. 126th General Assembly, Sub. S.B. No. 82, § 2(A). Therefore, the appeals court not only held that R.C. 9.481 was passed as only a narrow, “single-issue” statute, it also held that that “single issue” was not that important, as it said the law sought “to reinstate a non-fundamental right that the employees voluntarily surrendered when they accepted employment.” *Id.* at ¶ 28. Thus, reasoned the appeals court, R.C. 9.481 did not fall under the General Assembly’s authority under Article II, Section 34. But the appeals court’s apparent view—namely, that Section 34 can only be used to protect rights that are already fundamental rights under another clause—cannot be right. If a given right is already fundamental, then the Assembly would never need to establish it. Further, many rights established under this provision, such as pensions, are not pre-existing fundamental rights.

Thus, the appeals court’s view is wrong. Article II, Section 34 should not read narrowly, but should be read broadly, as the Court has always done, to allow the General Assembly to protect employee’s interests. See, e.g., *Rocky River IV*, 43 Ohio St. 3d at 15. T

**The State of Ohio’s Proposition of Law No. 2:**

*R.C. 9.481 does not unconstitutionally conflict with municipal home rule.*

The regulation of residency requirements is a matter of statewide concern, and thus, R.C. 9.481 supersedes Akron’s residency requirement. As discussed above, Akron’s home rule arguments need not be considered because R.C. 9.481 was properly enacted under Article II, Section 34. Nonetheless, should the Court determine that it is necessary to apply home rule analysis, R.C. 9.481 does not unconstitutionally conflict with municipal home rule. Specifically, the issue of residency requirements is a matter of statewide concern due both to the extraterritorial effects that these requirements have on other communities throughout the State and their statewide effects on families. As a result, the regulation of residency has transitioned

from a matter exclusively of local self-government to one of statewide concern, and was properly addressed by the General Assembly in statewide legislation.

Akron's powers of local self-government are not unlimited. A municipality's local self-government power originates in the Home Rule Amendment, which states:

Municipalities 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, Section 3, Ohio Constitution. While municipalities enjoy great freedom to legislate in the area of local self-government, the Ohio Supreme Court has "never held that the powers of local self-government under Section 3 are unlimited." *City of Reading v. Pub. Util. Comm'n of Ohio*, 109 Ohio St. 3d 193, 2006-Ohio-2181, ¶ 32. In fact, while the powers granted under the Home Rule Amendment relate to local matters, "even in the regulation of such local matters a municipality may not infringe on matters of general and statewide interest." *Cleveland Elec. Illuminating Co. v. City of Painesville* (1968), 15 Ohio St. 2d 125, 129. Therefore, the Home Rule Amendment prohibits political subdivisions from infringing on matters of statewide concern. *City of Reading*, 2006-Ohio-2181 at ¶ 36; *State ex rel. Evans v. Moore* (1982), 69 Ohio St. 2d 88, 90.

Rather than analyzing R.C. 9.481 under the statewide concern doctrine, the Ninth District improperly evaluated R.C. 9.481 under the four-part general law test of *Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, which requires that statutes "(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.*

syllabus. Focusing solely on the third prong, and citing the Third District's decision in *City of Lima*, 2007-Ohio-6419, ¶ 80, the Ninth District held that R.C. 9.481 failed because it "does not set forth police, sanitary, or similar regulations but merely limits the municipality's power to do the same[.]" *Id.* at ¶ 32. The appeals court further concluded that prohibiting residency as a condition of employment is not an overriding state interest. *Id.* As a result, because R.C. 9.481 it was not a general law under Article XVIII, Section 3 and therefore violated home rule.

But the Ninth District's analysis was entirely improper. As determined by this Court, the *Canton* four-part general law test is proper only when considering a municipality's local police powers, not, as here, when considering its powers of local self-government. See *Ohio Ass'n of Private Detective Agencies, Inc. v. City of North Olmsted* (1992), 65 Ohio St. 3d 242, 243 (citing *State ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191, paragraph four of the syllabus ("The words, 'as are not in conflict with general laws' found in Section 3 of Article XVIII of the Constitution, modify the words 'local police, sanitary and other similar regulations' but do not modify the words 'powers of local self-government.'")).

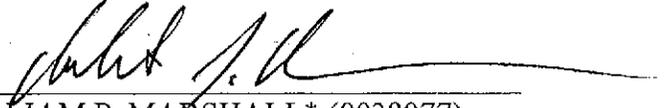
If R.C. 9.481 is subject to home rule analysis, then the courts must properly apply its provisions. Because the Ninth District did not do so in this case, the appeals court's decision should be reversed.

### CONCLUSION

For the above reasons, the Court should hold this case for its review of *City of Lima v. State*, Case No. 2008-0128. If the Court denies jurisdiction in that case, the Court should review the case here and reverse the decision of the court below.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "William P. Marshall", is written over a horizontal line.

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## CERTIFICATE OF SERVICE

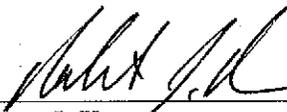
I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Defendant-Appellant State of Ohio was served by U.S. mail this 25th day of February 2008, upon the following counsel:

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COURT OF APPEALS  
DANIEL M. HERRIGAN

STATE OF OHIO )  
COUNTY OF SUMMIT )

IN THE COURT OF APPEALS  
AND NINTH JUDICIAL DISTRICT  
ss: 2008 JAN -9

STATE OF OHIO

SUMMIT COUNTY  
CLERK OF COURTS  
Case No. 23660

Appellees

v.

CITY OF AKRON, et al.

Appellants

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No. CV 2006-05-2759

DECISION AND JOURNAL ENTRY

Dated: January 9, 2008

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

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DICKINSON, Judge.

THE QUESTION

{¶1} This case presents one of the classic legal questions: who gets to decide? In this case, the question is who gets to decide whether people unwilling to live in the City of Akron should be employed by the city, the citizens of Akron or members of the Ohio General Assembly.

{¶2} For the past few decades, under amendments to its charter that were adopted by its citizens, Akron has required its employees to live in the city. Currently, Akron requires people it hires into classified positions to agree to

become city residents within 12 months and to continue to live in the city for as long as they are employed by the city. Section 9.48.1 of the Ohio Revised Code, which became effective on May 1, 2006, prohibits political subdivisions from requiring their employees to live within their boundaries.

{¶3} Because Section 9.48.1 conflicts with, and purportedly supersedes, Akron's employee residency requirements, Akron challenged the statute's constitutionality through a declaratory judgment action. Through a separate action, Akron police and firefighter unions sought a declaration that Section 9.48.1 is constitutional and that it supersedes the city's residency requirements. On cross-motions for summary judgment in this consolidated case, the trial court held that Section 9.48.1 is constitutional and that it invalidates Akron's employee residency requirements. This Court concludes that Section 9.48.1 of the Ohio Revised Code is unconstitutional and, therefore, the trial court erred in granting summary judgment to the state and the unions and against the city of Akron.

#### BACKGROUND

{¶4} Section 9.48.1 of the Ohio Revised Code provides, in relevant part, that "no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state." The statute exempts unpaid volunteers, as well as part-time and temporary employees. Section 9.48.1 further authorizes political subdivisions to require emergency response workers to

reside within the county or an adjacent county, if the political subdivision adopts a local law or resolution to that effect through the filing of an initiative petition.

{¶5} The city of Akron filed an action for declaratory judgment against the state of Ohio, its governor, and its attorney general, seeking both a declaration that Section 9.48.1 of the Ohio Revised Code is unconstitutional and an order enjoining its enforcement. Akron specifically maintained that Section 9.48.1 infringes upon its right of self-government and that the statute was not enacted pursuant to the General Assembly's authority under Article II Section 34 of the Ohio Constitution to pass legislation "providing for the comfort, health, safety and general welfare" of employees. Akron also sought a declaration that Section 9.48.1 is unconstitutional because it violates other provisions of the Ohio Constitution.

{¶6} The Fraternal Order of Police, Akron Lodge No. 7, and the Akron Firefighters Association, International Association of Firefighters Local 330, AFL-CIO, filed a separate action for declaratory judgment against the city, its mayor, and the state of Ohio through its attorney general, seeking a declaration that the Ohio General Assembly had enacted Section 9.48.1 pursuant to its authority under Article II Section 34 of the Ohio Constitution. They sought further declaration that Akron's employee residency requirements violate Section 9.48.1 and exceed Akron's home rule authority and, therefore, are unenforceable.

{¶7} The trial court consolidated the two cases and the parties eventually filed cross-motions for summary judgment. The trial court determined that Section 9.48.1 of the Ohio Revised Code is constitutional and that it prevails over the city's employee residency requirements. It, therefore, granted summary judgment to the state and the unions and denied Akron's motion for summary judgment. The trial court concluded that the Ohio General Assembly enacted Section 9.48.1 pursuant to its authority under Article II Section 34 of the Ohio Constitution to pass laws providing for the "general welfare" of employees. Because Article II Section 34 explicitly provides that "no other provision of the constitution shall impair or limit this power[.]" the trial court further held that the constitutional authority of the General Assembly to enact Section 9.48.1 supersedes the city's home rule authority to pass a local employee residency requirement. Consequently, the trial court held that Section 9.48.1 invalidated the city's employee residency requirement. The city has assigned four errors.

#### THIS COURT'S STANDARD OF REVIEW

{¶8} All of the city's assignments of error are challenges to the trial court's granting of summary judgment to the state and the unions and its denial of summary judgment to the city. In reviewing a trial court's order ruling on a motion for summary judgment, this Court applies the same standard the trial court was required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of

law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990). There are no disputed material facts in this case. Rather, the issues presented are legal questions.

#### GENERAL WELFARE

{¶9} By its first assignment of error, the city has argued that the trial court incorrectly rejected its argument that, in adopting Section 9.48.1 of the Ohio Revised Code, the General Assembly was not properly acting within the authority granted it by Article II Section 34 of the Ohio Constitution. Article II Section 34 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.

{¶10} The parties agree that the General Assembly's authority under Article II Section 34 supersedes the city's home rule authority to pass local legislation. Therefore, if this Court concludes that the General Assembly enacted Section 9.48.1 pursuant to its authority under Article II Section 34 of the Ohio Constitution, the state statute prevails and invalidates Akron's local residency requirement.

{¶11} In *Rocky River v. State Emp. Relations Bd.*, 39 Ohio St. 3d 196 (1988) ("*Rocky River I*"), the Ohio Supreme Court held that the legislative authority under Article II Section 34 did not encompass laws pertaining to public employee collective bargaining rights, but that it was limited to laws pertaining to

employee wages and hours. On reconsideration, the Supreme Court reversed its holding six months later and held that the General Assembly's authority under Article II Section 34 encompasses laws pertaining to the general welfare of employees. *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St. 3d 1 (1989) ("*Rocky River IV*").

{¶12} In *Rocky River IV*, the Court's more expansive interpretation of the General Assembly's authority under Article II Section 34 focused on the language "and providing for the comfort, health, safety and general welfare of all employees." The Court applied a basic rule of construction that this phrase must have been included for a reason, indicating a clear intention by the framers to expand the General Assembly's authority under Article II Section 34 beyond wage and hour legislation. Focusing in particular on the term "general welfare," the majority in *Rocky River IV* held that the Ohio Public Employees Collective Bargaining Act, set forth in Chapter 4117 of the Ohio Revised Code, was enacted within the General Assembly's broad authority under Article II Section 34 of the Ohio Constitution.

{¶13} The majority in *Rocky River IV* explained that the General Assembly's authority under Article II Section 34 is broad:

This provision constitutes a broad grant of authority to the legislature to provide for the welfare of all working persons, including local safety forces. The provision expressly states in "clear, certain and unambiguous language" that *no other provision* of the Constitution may impair the legislature's power under Section

34. This prohibition, of course, includes the “home rule” provision contained in Section 3, Article XVIII.

*Rocky River IV* at 13 (internal citations omitted, emphasis in original). The Ohio Supreme Court has continued to follow the *Rocky River IV* holding that Article II Section 34 of the Ohio Constitution is a broad grant of authority to the General Assembly to enact laws pertaining to the “general welfare” of employees. See, e.g., *American Assoc. of Univ. Professors v. Central State Univ.*, 87 Ohio St. 3d 55, 61 (1999).

{¶14} The focus of the parties’ dispute is whether the legislative authority to pass laws providing for the “general welfare” of employees under Article II Section 34 includes authority to enact Section 9.48.1 of the Ohio Revised Code, a law that prohibits Akron’s existing employee residency requirement. As was noted above, Akron requires applicants for classified positions to agree that, if they are hired, they will become residents of Akron within 12 months and remain Akron residents throughout their employment. No one is disputing that, prior to the effective date of Section 9.48.1, Akron’s employee residency requirement was valid and enforceable. The dispute is whether Akron’s employee residency requirement is now unenforceable due to the state’s enactment of Section 9.48.1.

{¶15} It is the position of the state and the unions that the General Assembly’s constitutional authority under Article II Section 34 to pass laws providing for the “general welfare” of employees encompasses the authority to enact Section 9.48.1, which prohibits employee residency requirements by

political subdivisions so that employees will have the freedom to choose where to reside. Akron's position, on the other hand, is that the scope of the General Assembly's authority to pass laws for the general welfare of employees under Article II Section 34 is not without limits and does not extend to this legislation.

{¶16} The majority in *Rocky River IV* stressed that the language of Article II Section 34 is clear and unequivocal and that "it is the duty of courts to enforce the provision as written." See *Rocky River IV*, 43 Ohio St. 3d at 15. Nonetheless, the focus of dispute in the *Rocky River I* and *Rocky River IV* was whether Article II Section 34 encompassed employment legislation beyond wages and hours. The majority in *Rocky River IV* did not define "general welfare," for it concluded that "the Public Employees' Collective Bargaining Act[] is indisputably concerned with the 'general welfare' of employees." *Rocky River IV*, 43 Ohio St. 3d at 13. It is not so clear, however, whether the legislation at issue in this case pertains to the "general welfare" of employees within the meaning of Article II Section 34.

{¶17} It is a basic rule of construction that words should be given their reasonable, ordinary meaning. *In re Adoption of Huitzil*, 29 Ohio App. 3d 222, 223 (1985). On its face, the term "general welfare" is so broad and vague that it provides no ascertainable limit on the scope of the General Assembly's authority under Article II Section 34. See *The Legitimate Objectives of Zoning*, 91 Harvard Law Review 1443, 1445 (1978). The meaning of the term "general welfare" "is as

incapable of specific definition as is the police power itself.” 16A American Jurisprudence 2d, Constitutional Law, Section 363.

{¶18} This, however, does not mean that the phrase “general welfare” as used in Article II Section 34 is without limits. As vague and all-encompassing as the term “general welfare” may appear to be, it cannot reasonably encompass everything that arguably benefits some employees. Without some boundaries on the scope of the term “general welfare,” the General Assembly would feasibly have the authority under Article II Section 34 to enact legislation that furthered the interests of a few employees, yet harmed the welfare of the public at large. Moreover, as Article II Section 34 explicitly provides that “no other provision of the constitution shall impair or limit this power,” the General Assembly’s authority under this provision would be virtually endless and could potentially undermine the home rule authority of municipalities to make any employment decisions.

{¶19} While Article II Section 34 explicitly authorizes legislation for the general welfare of employees, legislation adopted under it must also either secure the blessings of freedom to citizens of Ohio or further the “general welfare” of the state. “All government power derives from the people, but these grants of power are limited.” Akhil Reed Amar, *The Bill of Rights* 123 (Yale University Press) (1998). The scope of the power granted Ohio by its citizens is found in the preamble of the Ohio Constitution:

We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.

As this Court noted in *Porter v. City of Oberlin*, 3 Ohio App. 2d 158, 164 (1964), the Ohio Constitution only authorizes laws that secure freedom for its citizens or further their common welfare:

It here appears that the Constitution was established to secure the blessings of freedom, and to promote the common welfare. All laws enacted pursuant thereto must be subject to such mandate.

{¶20} In interpreting the General Assembly's broad authority under Article II Section 34, the Ohio Supreme Court has recognized the societal notion of "common welfare." Although the Court has not explicitly articulated a limitation on the General Assembly's authority under Article II Section 34 to enact legislation for the "general welfare" of employees, it has been unnecessary for it to do so in the prior cases before it.

{¶21} The legislation at issue in *Rocky River IV*, the Ohio Public Employees Collective Bargaining Act, encompassed the entire Chapter 4117 of the Ohio Revised Code, which includes dozens of provisions that burden as well as benefit public employees and public employers, in the public interest. Chapter 4117 includes comprehensive provisions that apply to public collective bargaining units throughout the state, define the scope of collective bargaining rights and obligations, and provide for uniform dispute resolution throughout the state. Chapter 4117 also includes provisions that offer primarily a public benefit such as

limitations on the ability of certain public employees to strike and the requirement that records of the state employment relations board be kept public. See Section 4117.15 and 4117.16; Section 4117.17. Moreover, Chapter 4117 did not purport to create collective bargaining rights that did not previously exist, but instead defined the scope of existing rights and obligations of public employees and employers.

{¶22} In an earlier decision by the Ohio Supreme Court, *State ex rel. Bd. of Trustees of Pension Fund v. Bd. of Trustees of Relief Fund*, 12 Ohio St. 2d 105 (1967), the Court determined that Chapter 742 legislation providing for creation, administration, maintenance, and control of a state police and fireman's disability and pension fund was validly enacted within the General Assembly's authority under Article II Section 34. Again, the legislation at issue involved a comprehensive statutory scheme that included over 100 separate provisions and encompassed an entire chapter of the Ohio Revised Code. This legislation likewise did not create employee pension rights that had not previously existed, but sought to preserve and regulate the pension and disability benefits of police and firefighters through the creation and maintenance of a state fund. See Chapter 742.

{¶23} In its most recent decision interpreting the General Assembly's authority under Article II Section 34, the Supreme Court held that "the public's interest in the regulation of the employment sector" includes legislation that

burdens as well as benefits employees. *American Association of Univ. Professors v. Central State Univ.*, 87 Ohio St. 3d 55, 61-62 (1999). The statute at issue, Section 3345.45 of the Ohio Revised Code, required public universities to develop standards for professors' instructional workloads and exempted the issue from collective bargaining. The Court made reference to many other employment-related laws enacted under the authority of Article II Section 34, emphasizing that state legislation in the employment area under Article II Section 34 is focused on public interest, not necessarily benefit to the employees. *Id.*

{¶24} Section 9.48.1 of the Ohio Revised Code, on the other hand, bears no similarity to any of the employee "general welfare" legislation discussed above. The sole purpose of Section 9.48.1 is to invalidate employee residency requirements by political subdivisions. This legislation does not address any significant social issues impacting the public at large; it is not part of a comprehensive legislative scheme, but deals with a single issue; and it applies to a relatively small segment of the population (those who are employed by political subdivisions, are subject to residency requirements, and would choose to live elsewhere if allowed to do so).

{¶25} Further, unlike any of the legislation that the Supreme Court has determined falls within the scope of Article II Section 34 as providing for the general welfare of employees, Section 9.48.1 does not pertain to the protection or regulation of any existing right or obligation of the affected employees. Instead, it

is an attempt to circumvent municipal home rule authority and reinstate a “right” that the employees voluntarily surrendered when they accepted government employment.

{¶26} As the New Jersey Supreme Court stressed when it addressed a challenge to Newark’s employee residency requirement as an infringement upon the employees’ rights and freedom under its state constitution:

The question is not whether a man is free to live where he will. Rather the question is whether he may live where he wishes and at the same time insist upon employment by government.

*Kennedy v. Newark*, 29 N.J. 178, 183, 148 A.2d 473 (1959). The “right” to insist upon employment by government is not a “freedom” within the meaning of the preamble of the Ohio Constitution.

{¶27} Although the parties dispute whether Akron’s residency requirement is a condition of or qualification for city employment, it is undisputed that Akron city employees voluntarily agreed to give up their “right” to choose to live elsewhere when they accepted employment with the city. Residency was required by their employer as either a condition of or qualification for employment, “similar in this regard to minimum standards of age, health, education, experience, or performance in civil service examinations.” *Ector v. Torrance*, 10 Cal. 3d 129, 132, 514 P.2d 433 (1973). Akron city employees surrendered any “right” that they once had to choose where to live when they agreed to become employees of the city of Akron, just as they may have agreed to other limitations on their personal

freedoms, such as their freedom to dress, groom themselves, or behave as they choose.

{¶28} Laws passed for the “general welfare” of employees do not encompass a single-issue statute that seeks to reinstate a non-fundamental right that the employees voluntarily surrendered when they accepted employment. Applying another fundamental rule of construction, Article II Section 34 should not be interpreted in a manner that would yield an absurd result. See *Mishr v. Poland Bd. of Zoning Appeals*, 76 Ohio St. 3d 238, 240 (1996). To construe the legislative authority under Article II Section 34 to pass laws providing for the “general welfare” of employees to be so broad as to encompass a law that reinstates a right that employees voluntarily surrendered upon accepting employment would yield an absurd result, and could potentially give limitless power to the General Assembly to undermine all home rule authority of municipalities to make decisions about their employees.

{¶29} Consequently, the trial court erred when it concluded that the General Assembly’s enactment of Section 9.48.1 of the Ohio Revised Code was within its authority under Article II Section 34 to pass laws providing for the “general welfare” of employees. The first assignment of error is sustained.

#### HOME RULE

{¶30} Akron’s second assignment of error is that Section 9.48.1 is an unconstitutional infringement of its home rule authority to pass local legislation.

It is not disputed that Akron's residency requirement was enacted pursuant to the city's home rule authority.

{¶31} Section 3, Article XVIII of the Ohio Constitution provides:

Municipalities 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.

Therefore, Section 9.48.1 of the Ohio Revised Code prevails over the city's residency requirement only if it qualifies as a "general law." In *Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, syllabus, the Ohio Supreme Court announced a four-part test defining what constitutes a general law for purposes of home-rule analysis: "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."

{¶32} As explained above, Section 9.48.1 is an attempt by the General Assembly to circumvent the home rule authority of municipalities to maintain residency requirements for their employees. The Third District Court of Appeals recently held, in *Lima v. State*, 3d Dist. No. 1-07-21, 2007-Ohio-6419, at ¶80, that Section 9.48.1 of the Ohio Revised Code is not a general law because it "does not set forth police, sanitary, or similar regulations but merely limits the

municipality's power to do the same[.]” It further held that “prohibiting political subdivisions from requiring residency as a condition of employment is not an overriding state interest.” *Id.* This Court agrees.

{¶33} Consequently, Section 9.48.1 of the Ohio Revised Code is not a general law, but violates the city's home rule authority under the Ohio Constitution to enact local employee residency requirements. Akron's second assignment of error is sustained.

### III.

{¶34} Akron's first and second assignments of error are sustained. The third and fourth assignments of error are moot because of this Court's disposition of the first and second assignments of error and are, therefore, overruled. The judgment of the Summit County Court of Common Pleas is reversed and the cause is remanded.

Judgment reversed and  
the cause remanded.

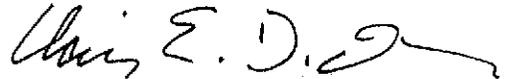
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The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, 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 appellees.



CLAIR E. DICKINSON  
FOR THE COURT

CARR, J.  
CONCURS

SLABY, P. J.  
DISSENTS, SAYING:

{¶35} I respectfully dissent. I would affirm the decision of the trial court because R.C. 9.481 is a valid exercise of the authority granted to the legislature by Article II, Section 34, of the Ohio Constitution pursuant to *City of Rocky River v. State Emp. Rel. Bd.* (1989), 43 Ohio St.3d 1.

{¶36} The plain language of Article II Section 34 of the Ohio Constitution is expansive: "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.” It may be, as the majority concludes, that the phrase “general welfare” is “incapable of specific definition” and “vague and all-encompassing.” Nevertheless, these words are those used in the Ohio Constitution, and we must apply them under the guidance of the Supreme Court of Ohio. I find the majority’s distinction between this case and other cases arising under Article II Section 34 unpersuasive, and I would affirm the judgment of the trial court.

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