

IN THE SUPREME COURT OF OHIO

State of Ohio, <i>et al.</i>	:	Supreme Court Case No. 08-0418
	:	
Appellants	:	On Appeal from the Summit
	:	County Court of Appeals,
v.	:	Ninth Appellate District
	:	Court of Appeals
City of Akron, <i>et al.</i> ,	:	Case No. 23660
	:	
Appellantee	:	

APPELLEES' CITY OF AKRON AND MAYOR PLUSQUELLIC'S
MOTION TO CONSOLIDATE
WITH *CITY OF LIMA V. STATE OF OHIO*, Case No. 2008-0128

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Now come the City of Akron and Mayor Plusquellic and hereby move this Court to consolidate the above-captioned case with the case captioned *City of Lima v. State of Ohio*, Case No. 2008-0128, for the following reasons. The City of Lima concurs in this motion as indicated by its facsimile approval attached. The Ohio General Assembly passed Sub.S.B. 82 in January, 2006 enacting R.C. § 9.481, which became effective on May 1, 2006. R.C. 9.481 purports to prohibit a political subdivision from requiring its permanent full-time employees to live within the political subdivision. The City of Akron and the City of Lima each filed a lawsuit against the State of Ohio alleging that the State exceeded its authority pursuant to Art. II, § 34 when it enacted R.C. 9.481 and that R.C. 9.481 is unconstitutional in that it improperly deprives the City of Akron and the City of Lima of well-defined powers of local self-government. In Akron, the local police and firefighter unions also sued the City seeking a declaration that R.C. 9.481 prevailed over the City's charter residency requirement. The two Akron cases were consolidated below.

In both the *Akron* and *Lima* cases, the trial courts found in favor of the State of Ohio. On appeal, however, both appellate courts reversed. The Ninth District Court of Appeals and the Third District Court of Appeals held that the State exceeded its authority pursuant to Art. II, § 34 when it enacted R.C. 9.481 because the legislation was not for the general welfare of employees. In both cases, the Appellate Courts also found that R.C. 9.481 is not a general law and that the Cities' home rule authority permits the Cities of Akron and Lima to require their employees to live in their respective cities. (See, *State of Ohio v. City of Akron*, 2008-Ohio-38; *State v. Lima*, 2007-Ohio-6419 .)

Although the case histories and outcomes are similar, the cases differ in a very substantial and meaningful way. In the *Akron* case, the police and fire unions brought suit, challenging

Akron's residency requirement as contrary to R.C. 9.481. Throughout litigation of these issues, the City of Akron relied upon considerable evidence, via expert testimony, lay testimony, and affidavits to support its case. The presidents of the police and fire unions participated in discovery and a fully developed evidentiary record was presented to the court.

Both Lima and Akron proffered evidence as to the benefits to be gained by the residency requirement. In addition, Akron put on a plethora of evidence that R.C. 9.481 does not benefit Akron residents in any respect and actually harms Akron. The City's evidence included:

1. Deposition and affidavit of Akron's Deputy Mayor of Public Safety;
2. Deposition of Akron's (now former) Director of Public Service;
3. Deposition of the president of the FOP, Lodge No. 7
4. Deposition of the president of the IAFF, Local 330
5. Affidavit of Robert Simons, Ph.D., Akron's expert witness regarding the economic and fiscal impact of R.C. 9.481 on Akron;
6. Affidavit of Akron's Clerk of Council;
7. Two Affidavits of Donald Plusquellic, Mayor of the City of Akron;
8. Affidavit of Akron's Public Utilities Bureau manager;
9. Affidavit of Akron's Public Works Bureau manager;
10. Affidavit of Carol Pirt, keeper of the records of the City's personnel files;
11. State of Ohio's responses to Akron's request for interrogatories;
12. The Unions' responses to Akron's request for interrogatories;

The State has taken the position in this case and in the *Lima* case, (and the Unions have taken the position in this case), that facts are not necessary in determining the issues before this Court. However, evidence is crucial in determining whether or not R.C. 9.481 was adopted to

promote the welfare of all employees pursuant to Article II, Section 34 of the Ohio Constitution. Evidence is likewise important in determining whether Akron's residency Charter provision pertains to a matter of local self government, or whether R.C. 9.481 regulates a matter of general statewide concern. While the law is central for adjudication of this case, the facts are decisive. Akron's case provides those facts, in detail, to this Court.

Supreme Court of Ohio case law is clear that evidence is not only useful, but necessary when determining whether a matter is of local or statewide concern. See *City of Kettering v. State Employee Relations Bd.* (1986), 26 Ohio St.3d 50, 52; *Ohio Assoc. of Public School Employees, Ch. No. 471 v. City of Twinsburg* (1988), 36 Ohio St.3d 180, 184-185; *Cleveland Electric Illuminating Co. v. City of Painesville* (1968), 15 Ohio St.2d 125, 129.

The Supreme Court of Ohio clearly reviews facts and evidence when deciding cases of constitutional import, particularly with respect to home rule issues. This Court has adopted a balancing test to determine whether the subject of legislation involves a matter of local self-regulation or a matter of statewide concern. "[E]ven if there is a matter of local concern involved, if the regulation of the subject matter affects the general public of the state as a whole more than it does the local inhabitants the matter passes from what was a matter for local government to a matter of general state interest." *Cleveland Electric Illuminating Company v. Painesville* (1968), 15 Ohio St.2d 125, 129; See also *Kettering v. State Employment Relations Board* (1986), 26 Ohio St.3d 50, 54. (emphasis added.) The plain language of this initial test demonstrates that a court must examine the *effect* of the legislation. This necessarily consists of reviewing facts and evidence. See, *Kettering, supra* at 52; *Ohio Assoc. of Public School Employees, Ch. No. 471 v. City of Twinsburg* (1988), 36 Ohio St.3d 180, 184-185.

In *Kettering*, the Court considered evidence in deciding that the statewide concern doctrine was applicable, stating that “prior to passage of the Act there had been over four hundred public employee work stoppages in Ohio between 1973 and 1980.” *Kettering*, 26 Ohio St.3d at 55; see also at 52 (stating “... evidence in the record is not convincing...”, and “... there is abundant evidence ...”). Thus, the Court based its decision on facts and evidence. In *Twinsburg*, the Court stated: “*under appropriate facts*, the power possessed by the General Assembly . . . can override the interest of a city” *Twinsburg*, 36 Ohio St.3d at 184-5 (emphasis added). Thus, in order to determine whether a matter is one of statewide concern, the Court recognized that it was a determination to be made based on the specific facts of a case.

Additionally, the Supreme Court of Ohio recently held that a municipality waived its “as applied” constitutional challenge under Article XVIII, Section 3 of the Ohio Constitution by not presenting facts in the lower proceedings. See *City of Reading v. Pub. Util. Comm.*, 2006-Ohio-2181, 109 Ohio St.3d 193. The Court stated that “[w]here extrinsic facts are required to properly resolve the issue, the error must be specified at the first available opportunity.” *Id.* at ¶12. Also, “[w]hen a party challenges the constitutionality of a statute as applied to a specific set of facts . . . a record is required.” *Id.* at ¶15. In its Complaint, Akron sought relief claiming that R.C. §9.481 is unconstitutional both facially and as applied to the City. Accordingly, in this case, contrary to the State and Unions’ contentions, a factual record is required.

Not only is the City’s evidence relevant to a decision in this case, but other courts throughout the Country have upheld municipal residency requirements citing reasons that mirror the City’s evidence¹. *Ector v. Torrance*, 10 Cal.3d 135, 514 P.2d 433, 109 Cal.Rptr. 849. *Fraternal Order of Police v. Hunter*, 49 Ohio App.2d 199, 360 N.E.2d 708. *Krzewinski v.*

¹ The City’s evidence is set forth in the facts section of its Memorandum in Support of Jurisdiction filed contemporaneously with this Motion.

Kugler, (D.C. N.J. 1973), 338 F.Supp. 492, 499. *Carofano v. City of Bridgeport Conn.* (Conn. Jul 09, 1985), 196 Conn. 623, 495 A.2d 1011. See also, *Seabrook Police Association v. Town of Seabrook* (1993), 138 N.H. 177, 180-81, 635 A.2d 1371; *Detroit Police Officers Ass'n v. City of Detroit* 385 Mich. 519, 522-523, 190 N.W.2d 97, 98 (Mich. 1971); *City and County of Denver v. State*, 788 P.2d 764, 771 (Colo.,1990).

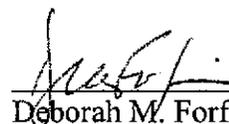
The City's evidence in this case is substantial and should be considered when determining the issues presented in the *Lima* and *Akron* cases. The City's evidence has been cited by Courts in other jurisdictions and should be before this Court for consideration.

The Court must balance the Cities' and State's interests in determining the issues in this case. Without consolidation, this Court is left to balance the State's interest and the interest of all of Ohio's cities with limited facts. Consolidation of the cases will facilitate this Court in reaching a decision based on the law after considering all the facts.

For all of these reasons, the City of Akron and Mayor Plusquellic respectfully request this case be consolidated with *Lima* case (Case No. 2008-0128).

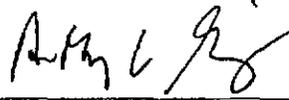
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I certify that a true copy of the foregoing Motion for Consolidation was mailed via Federal Express on this 21st day of March, 2008 to:

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