

IN THE SUPREME COURT OF OHIO

FRATERNAL ORDER OF POLICE, : Supreme Court Case No. 08-0418  
AKRON LODGE NO. 7 AND AKRON :  
FIREFIGHTERS ASSOCIATION, :  
IAFF LOCAL 330, et al., :  
Appellants, : On Appeal from the Summit  
County Court of Appeals,  
Ninth Appellate District  
v. :  
Court of Appeals Case No. 23660  
CITY OF AKRON, et al., :  
Appellees. :

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**UNION APPELLANTS' MEMORANDUM IN RESPONSE TO  
APPELLEES' MOTION TO CONSOLIDATE**

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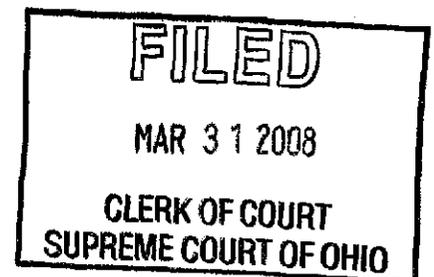
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NOW COME Appellants Fraternal Order of Police, Akron Lodge No. 7 and Akron Firefighters Association, IAFF Local 330, et al., as well as Paul Hlynsky, personally and on behalf of FOP, Akron Lodge No. 7 and Phil Gauer, personally and on behalf of IAFF Local 330 (“Union Appellants” or “Unions”), and hereby submits its Memorandum in Response to Appellees’ Motion to Consolidate with *City of Lima v. State of Ohio*, Case No. 2008-0128.

Union Appellants do not oppose the consolidation of the *Lima* case and *Akron* case, and potentially other cases involving R.C. 9.481, which are currently before various courts of appeals, as they all involve the same primary legal question—is R.C. 9.481 constitutional under the Ohio Constitution. Union Appellants do, however, object to the Motion to Consolidate filed by Appellees City of Akron and Mayor Donald Plusquellic (“City”) on the bases that: (1) the City has improperly used a Motion to Consolidate to request that the Court consider factual evidence that is irrelevant to the constitutional issue and has been disregarded by the trial court and court of appeals in the instant case; and (2) the City’s Motion is internally inconsistent in its rationale.

**A. THE CITY HAS IMPROPERLY USED A MOTION TO CONSOLIDATE TO ASK THIS COURT TO CONSIDER THE CITY’S IRRELEVANT “EVIDENCE.”**

In the instant matter, the single issue determined by the trial court and court of appeals was whether R.C. 9.481, as enacted, was constitutional under the Ohio Constitution. The trial court and the court of appeals did not examine the City’s and the Unions’ competing factual assertions relating to the benefit or burden of R.C. 9.481, as the factual assertions were irrelevant to the constitutionality of R.C. 9.481. Despite the City hypothesizing doomsday scenarios to the trial court and court of appeals, both courts

ignored the City's alleged "factual evidence" because it had no bearing on the ultimate issue—whether R.C. 9.481 was validly enacted under Article II, Section 34 of the Ohio Constitution.

Still, the City, through a Motion to Consolidate, has asked this Court to adopt its "evidence" (and only its "evidence") as a factual record. The City does not cite to any legal authority for the proposition that a Motion to Consolidate is the appropriate means of challenging a courts' findings of fact. In fact, it is unclear why the City has requested that the Court reconsider the lower courts' factual findings (or lack thereof) through a Motion to Consolidate, or how the Court can do so through such a motion.

The City's request that the Court consider its "evidence" through a Motion to Consolidate is an overt and inappropriate attempt to pull at the heart strings of the Court and invites a decision that is based not upon law, but upon personal opinion. Using personal and subjective opinions to apply and interpret the Ohio Constitution was a primarily failing of the erroneous decision of the Ninth District Court of Appeals. As such, the City's request that the Court consider its "evidence" should be denied.

**B. THE CITY'S MOTION TO CONSOLIDATE IS INCONSISTENT WITH ITS STATED RATIONALE.**

The City has urged this Court to consolidate the instant case with the *Lima* case, to adjudicate the cases immediately, and apply the alleged facts asserted by the City in the instant case to the *Lima* case, as well as all of the remaining R.C. 9.841 cases that are still before the courts of appeals. The City states in its Motion, "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." (See Appellee

Memorandum in Response, p. 6). There is no basis for the City to claim that its “evidence” has been considered by other jurisdictions. Further, there is no basis for the City to assert that the Court should apply the City’s “evidence,” and only the City’s “evidence,” to determine the constitutionality of R.C. 9.481. This request by the City is prejudicial, begs for inefficient adjudication of a relatively straightforward constitutional issue, and will result in unnecessary litigation if granted.

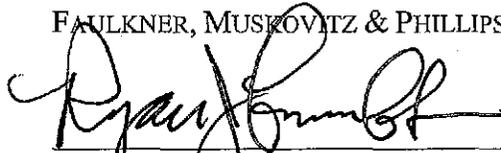
Furthermore, the rationale behind the City’s request to hear the two cases and apply the “evidence” in *Akron* to the *Lima* case (and potentially other pending cases) is internally inconsistent. The City has expressed to the Court the importance of considering all of the alleged facts involving R.C. 9.481, stating “without consolidation, this Court is left to balance the State’s interests and the interests of all of Ohio’s cities with limited facts.” (See Appellee Memorandum in Response, p. 6). Yet, the City has requested that the Court proceed immediately with adjudicating the *Lima* and *Akron* cases and to only consider the City of Akron’s alleged “evidence” in determining the constitutionality of R.C. 9.481. The City cannot on one hand assert that the Court should not hear the case on “limited facts,” and on the other hand assert that only its “evidence” should be used to determine a constitutional issue, when there are five (5) other pending R.C. 9.481 cases with potentially different facts and/or arguments. If the City seeks to provide the Court with an adequate amount of information (legal, factual, etc.) to fairly decide the case, then its request to apply the City’s irrelevant “evidence” to the *Lima* case (and potentially other pending R.C. 9.481 cases) is inconsistent with this objective.

Therefore, for the reasons articulate above, Union Appellants respectfully request that this Court deny the City’s request to consider irrelevant evidence, as requested in its

Motion to Consolidate. Union Appellants reiterate that they are not opposed to consolidating the *Akron* case with the *Lima* case (and potentially the remaining R.C. 9.481 cases). Union Appellants, however, are opposed to the City's request that this Court consider irrelevant evidence for the above reasons. The issue posed in *Akron* and *Lima* and other R.C. 9.481 cases is straightforward—is R.C. 9.481 constitutional under the Ohio Constitution. The lower courts have established the factual record and framed the appropriate constitutional analysis. The City's request to consider irrelevant evidence, as stated in its Motion to Consolidate, undermines this factual record and should be denied.

Respectfully submitted,

FAULKNER, MUSKOVITZ & PHILLIPS, LLP

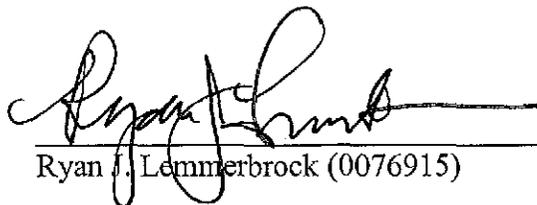


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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing MEMORANDUM IN RESPONSE TO APPELLEES' MOTION TO CONSOLIDATE was served via regular U.S. mail this 31 day of March, 2008, upon Deborah M. Forfia, Assistant Director of Law, City of Akron, 161 South High Street, Suite 202, Akron, Ohio 44308, and William P. Marshall, Solicitor General, Constitutional Offices Section, 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215.



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