

IN THE SUPREME COURT OF THE STATE OF OHIO

**Case No.
2008-0128**

**STATE OF OHIO
Appellant,**

-vs.-

**THE CITY OF LIMA,
Appellee.**

**On Appeal from the Allen County Court of Appeals
Third Appellate District Court of Appeals
Case No. CA-2007-021**

**BRIEF OF AMICUS CURIAE OF
FRATERNAL ORDER OF POLICE OF OHIO, INC.
IN SUPPORT OF APPELLANT, STATE OF OHIO ET AL.**

Robert J. Krummen (0076996)
Deputy Solicitor
Office of Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Tele: 614-466-8980
Fax: 614-466-5087
Email: rkrummen@ag.state.oh.us
Attorney for Appellant, State of Ohio

Anthony Geiger (0006150)
Law Director
209 North Main Street, 6th floor
Lima, Ohio 45801
Tele: 419-221-5183
Fax: 419-221-2176
Attorney for Appellee City of Lima

Paul L. Cox (0007202)
Chief Counsel (Counsel of record)
Gwen Callender (0055237)
Assistant Chief Counsel
Fraternal Order of Police of Ohio, Inc.
222 East Town Street
Columbus, Ohio 43215-4611
Tele.: 614-224-5700
Fax :614-224-5775
Email: pcox@fopohio.org
Counsel for Amicus Curiae
Fraternal Order of Police of Ohio, Inc.

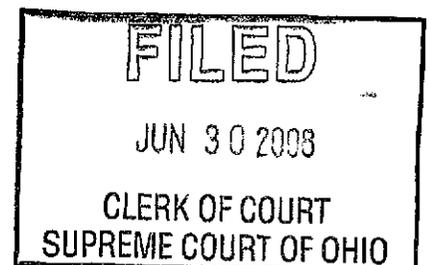


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STATEMENT OF THE CASE AND FACTS

The Statement of the case and Statement of facts provided by the State of Ohio (hereinafter Appellant) in this action will be sufficient and amicus curiae Fraternal Order of Police of Ohio, Inc. (F.O.P.) will not duplicate those statements here.

ARGUMENT

PROPOSITION OF LAW NO. 1

O.R.C. §9.481 WAS ENACTED PURSUANT TO THE AUTHORITY GIVEN TO THE GENERAL ASSEMBLY UNDER ARTICLE II SECTION 34 OF THE STATE OF OHIO CONSTITUTION. IT SUPERSEDES ANY AND ALL CONTRARY PROVISIONS OF LAW.

The Third District Court of Appeals (opinion at page 9) and the City of Lima both concede that if O.R.C. §9.481 were validly enacted pursuant to Article II section 34 of the Ohio Constitution, then O.R.C. §9.481 would supersede the Lima residency ordinance. Without question O.R.C. §9.481 was validly enacted under the authority granted the General Assembly by Article II Section 34 of the Constitution for the State of Ohio. That is clearly established by the unambiguous language contained in Article II section 34 and in the statute itself.

The Third District Court of Appeals overstepped its bounds when it decided to explore the policy and wisdom of this statute. The court dissected the statute and applied its own interpretation to the intent of the legislature. The fact that the court may have disagreed with the legislature does not give it authority to override a statute that is within the exclusive jurisdiction of the legislature. In interpreting a statute, the courts are bound by the language enacted by the General Assembly. The courts are to give affect to the words contained in the statute. The courts are not to place their own interpretation on those words nor can they displace the words contained therein. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393; see, also, *State v. Cress*, 112 Ohio St.3d 72, 2006-Ohio-6501, 858 N.E.2d 341.

The City of Lima inexplicably contends that O.R.C §9.481 violates Article II Section 34 of the Ohio Constitution. In fact Article II Section 34 grants the Ohio General

Assembly broad discretion when enacting laws affecting the comfort, health, safety and general welfare of employees. *City of Rocky River v. State Employment Relations Board* (1989), 43 Ohio St.3d 1. Under Article II Section 34 the General Assembly retains exclusive constitutional power and its decisions are entitled to due deference. *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624,632; *N. Ohio Patrolmen's Benevolent Assn. v. Parma* (1980), 61 Ohio St.2d 375, 377, 15 O.O.3d 450, 402 N.E.2d 519.

O.R.C. §9.481 imposes a statewide rule on residency restrictions. It affects employees, uniformly throughout the State of Ohio. The statute establishes a standard applicable to all political subdivisions in the State of Ohio. Local ordinances, such as the one at issue in the City of Lima, and numerous other municipalities, subject employees to a plethora of different restrictions dependent upon the quirks of the locality. The law as enacted affects numerous employees represented by the F.O.P. throughout the State of Ohio. Further, in accordance with the holding in *Canton v. State of Ohio* (2002), 95 Ohio St.3d 149, O.R.C. §9.481 absolutely qualifies as a General Law of statewide concern.

The Appellee believes that it has a right to establish residency restrictions under the Home Rule Section of the Ohio Constitution (Article II Section 26). Upon review of that section the court will find that it requires the uniform operation of all laws of a general nature. O.R.C. §9.481 is a law of general nature. This section as enacted operates uniformly upon every person within its operative provisions as constitutionally required. The law as enacted conforms to every prong of the requirements outlined in *Canton v. State of Ohio, Supra*.

According to the Appellee, O.R.C. §9.481 conflicts with the Home Rule Provision of the Ohio Constitution. The Home Rule Provision gives municipalities the right to exercise all powers of local self government and to adopt and enforce within their limits

such local police, sanitary and other similar regulations as are not in conflict with general laws. The Home Rule Provision clearly limits the authority of municipalities where a conflict with law is found or where the issue is of statewide concern. If it is determined that the ordinance prohibits what the State law permits, the State law prevails. *Struthers v. Sokol* (1923), 108 Ohio St. 263, 755 N.E.2d 857. The present case involves a matter of statewide concern and it is a law of a general nature because O.R.C. §9.481 operates uniformly throughout every county in the State of Ohio. This court has held that if the legislation bears extra-territorial affects, the issue is a matter for the General Assembly. *Beachwood v. Bd. of Elections of Cuyahoga County* (1958), 167 Ohio St. 369.

O.R.C. §9.481 does not violate Article II Section 26 of the Ohio Constitution since it is a matter of general state interest. This statute is applicable to every political subdivision within the state. The legislature determined that the public interest of the citizens of the State of Ohio was best served by enacting O.R.C. §9.481 and it was within their power to make such a decision. *American Financial Services Assn. v. Cleveland* (2006), 112 Ohio St.3d 170, 585 N.E.2d 776.

In *Canton, Supra*. the court stated that a general law 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.**

O.R.C. §9.481 satisfies each of these four prongs. Further, O.R.C. §9.481 and the residency ordinance for the City of Lima are in direct conflict. The ordinance is more

associated with an exercise of police power rather than of local self government wherefore the statute takes precedence over the ordinance.

O.R.C. §9.481 qualifies as a general law since it provides for the uniform regulation of residency for public employees in Ohio. The residency statute serves an overriding statewide interest by allowing all employees who are similarly situated, to locate affordable residences based upon their individual needs. *Canton, Supra*. This is not a law that affects the City of Lima in isolation. There are currently numerous local ordinances throughout the State of Ohio that restrict an employee's freedom to choose a residence and as such, this law affects employees in several occupations throughout the entire State of Ohio. The statute, as enacted, establishes a uniform minimum standard regarding residency, covering employees in municipalities through out the State of Ohio.

The sole function of the court of appeals in this case, was to determine whether or not the law as enacted exceeds the limits of legislative power afforded the General Assembly. *State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. of Edn.* (1942), 139 Ohio St. 427, 438, 22 O.O. 494, 40 N.E.2d 913. It is well established that legislative actions possess a strong presumption of constitutionality. In order to overcome that presumption, the City of Lima was required to prove beyond a reasonable doubt that the legislation and the Ohio Constitution are incompatible. The City of Lima failed to meet this burden. *Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59; *Kelleys Island Caddy Shack, Inc. v. Zaino*, 96 Ohio St.3d 375, 2002-Ohio-4930, 775 N.E.2d 489. The Ohio courts have further held that a statute "must be enforced unless it is in clear and irreconcilable conflict with some express provision of the constitution". *Spivey v. Ohio* (N.D. Ohio 1998), 999 F.Supp. 987, 999. O.R.C. §9.481 is not in conflict with any section of the constitution.

In *Reading v. Pub Util. Comm.* (2006), 109 Ohio St.3d 193 this court held that “It is a **fundamental principle** of Ohio law that, pursuant to the “statewide concern” doctrine, a municipality may not, in regulation of local matters, infringe on matters of general and statewide concern”(emphasis added). The court has continuously upheld this principle. *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 431 N.E.2d 311. The statute regulates residency for citizens throughout Ohio. As such the City of Lima’s home rule argument concerning residency can not withstand scrutiny. Several courts throughout Ohio have reviewed this matter and the majority have held that O.R.C. §9.481 is constitutional and prevails over the various ordinances involved in each of those cases.¹

The General Assembly and not the Third District Court of Appeals is the branch of state government charged by the Ohio Constitution under Article II section 34 with creating policies that protect the well being of the citizens of Ohio. The General Assembly by enacting O.R.C. §9.481 has not transgressed the limits of its legislative power so as to render that section unconstitutional. To the contrary the statute embraces the language contained in the Ohio Constitution.

The language in O.R.C. §9.481 is clear and unambiguous. The Third District Court of Appeals had no authority to interpret the language in O.R.C. §9.481, but was instead obligated to apply the statute as written. *Symmes Twp. Bd. of Trustees v. Smyth* (2000), 87 Ohio St.3d 549, 553, 721 N.E.2d 1057. Under Section 34, Article II of the Ohio Constitution, “[l]aws may be passed * * * providing for the comfort, health, safety

¹ *City of Lima v. State of Ohio* (Feb16, 2007), Allen C.P. No CV 2006-518; *City of Cleveland v. State of Ohio* (Feb. 23, 2007), Cuyahoga C.P. No. 590414, 06-590463; *City of Akron v. State of Ohio* (Mar. 30, 2007) Summit C.P. No. 2006-05-2759; *City of Dayton v. State of Ohio* (Jan. 6, 2007) Montgomery C.P. No. 06-3507; *City of Cincinnati v. State of Ohio* (Oct. 31, 2007) Hamilton C.P. No. Ao604513 ; *City of Youngstown v. State of Ohio* (Nov. 7, 2007) Mahoning C.P. No. 06 CV 1677; *AFSCME, Local #74 v City of Warren* (Sep. 29, 2007) Trumbull C.P. No. 2006 CV 01489; *City of Toledo and City of Oregon v. State of Ohio*, (July 27, 2007), Lucas C.P. No. C106-3235

and general welfare of all employees; and no other provision of the constitution shall impair or limit this power". Therefore, the statutory right to residency is a vested right which takes precedence over the authority granted to the City of Lima under the Home Rule Amendment. *State ex rel. Reuss v. Cincinnati* (1995), 102 Ohio App.3d 521, 524, 657 N.E.2d 551.

The Appellee argued and the Court of Appeals held that residency affects the qualifications for employment as opposed to the conditions of employment for those affected. That argument makes no sense. First the court should note that the Lima ordinance itself, defines the issue of residency as a condition of employment. If an employee had to reside within the limitations contained in Lima's ordinance upon hire, but could later after hiring move without suffering any ramifications, there would be no need for O.R.C. §9.481, because employees would be free to move to the residence of their choice. In reality however, an employee who moves after being hired by the employer is subject to termination of employment. That alone establishes residency as a condition of employment. The Lima ordinance makes it clear that once an applicant is hired, residency becomes a continuing condition of employment. An employee who is hired by the City of Lima can not take the position and then move to Maysville for example. Were that to happen the Appellee would then argue that the employee was subject to termination.

For no good reason the Court of Appeals digressed into the era of the 1900's. We no longer live under the conditions that existed in 1912. In 2008 choice of residence is paramount to maintaining a comfortable, healthy and safe lifestyle. The crime rate in different areas of Ohio varies and employees have the right to decide how much risk they wish to expose themselves and their families to. It is also undeniable that school systems

vary throughout the state. There are numerous other considerations that households, especially those with children, should be able to consider, such as; are there any children of the same age in the area, are there places where my child can safely play outside, is this an affordable area and so on. In many circumstances employees need to consider the available resources in the area, hospitals, specialized physicians, public transportation, and recreational facilities etc. There are areas of the state where an employee may be able to find a larger more affordable home or acreage. The reasons for allowing employees to exercise their right to choose the location of their residence far outweigh the reasons for residency requirements. An employee who is comfortable and whose family is secure is a better employee. Returning to the comforts of home is vital to the maintenance of a healthy mental state. O.R.C. §9.481 clearly provides for the comfort, health and safety and general welfare of the employees affected.

In *City of St. Bernard v. State Employment Relations Board* (1991), 74 Ohio App.3d 3, 598 N.E. 2d 15, the First District Court of Appeals held that residency was a mandatory subject of collective bargaining because it affects wages, hours terms and conditions of employment. It logically follows that the restriction in O.R.C. §9.481 affects wages, hours, terms and conditions of employment of all public employees. The court below should have rendered a decision upholding the residency clause in O.R.C. §9.481. The court had no authority to hold otherwise.

PROPOSITION OF LAW NO. 2

ARTICLE II SECTION 34 OF THE STATE OF OHIO CONSTITUTION GRANTS BROAD AUTHORITY TO THE GENERAL ASSEMBLY TO ENACT LAWS CONCERNING THE HEALTH SAFETY AND GENERAL WELFARE OF EMPLOYEES.

This court has repeatedly held that the health, safety and protection of employees are matters of statewide concern. (See *State ex rel. Villari v. Bedford Heights* (1984), 11 Ohio St.3d 222, 465 N.E. 2d 64; *State ex rel. Adkins v. Sobb*, 26 Ohio St. 3d 50, 496 N.E. 2d 994 (1986); *Kettering v. SERB* (1988), 26 Ohio St.3d 50, 496 N.E. 2d 963 (1986); *Rocky River v. SERB*, 39 Ohio St.3d 196). Both the *Villari* case and *Adkins v. Sobb, Supra.* involved the single issue of vacation leave. This court held that a statute concerning the issue of vacation involved a matter of statewide concern, manifests a concern for the security and protection of public employees and presented only a minimal intrusion upon matters of local concern. As the result the court held that the statute at issue prevailed.

This court has recognized the statewide interest associated in legislating the health and security of employees in the State of Ohio. In each of the above cases the court maintained the tenet that ..."even 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". (See also *Columbus v. Teater* (1978), 53 Ohio St.2d 253 ,7 O.O.3d 410; *State, ex rel. Evans, v. Moore* (1982), 69 Ohio St.2d 88). The doctrine of statewide concern is clearly applicable in this case as it will have a tremendous impact upon employees throughout the State of Ohio.

While it is true that political subdivisions possess the power to regulate matters of local concern, Article II, Section 34 of the Ohio Constitution subjugates the authority allotted to local authorities. It does not permit local authorities to regulate matters that constitute a statewide concern such as those at issue in this case. *Niehaus v. State ex rel. Board of Education* (1986), 111 Ohio St.3d 50. In *Evans v. Moore*, *Supra.*, this court held that "It is a fundamental principle of Ohio Law that pursuant to the "statewide concern" doctrine, a municipality may not, in the regulation of local matters infringe on matters of general and statewide concern. " *Id.* At pp. 89-90.

Similarly in *State ex rel. McElroy v. City of Akron* (1956), 173 Ohio St. 189, 181 N.E.2d 118 the court said:

Once a matter has become of such general interest that it is necessary to make it subject to statewide control so as to require uniform statewide regulation, the municipality can no longer legislate in the field so as to conflict with the state.

Id. At 194, N.E.2d at 30.

Therefore, when the legislature addresses or seeks to remedy an area of statewide concern a political subdivision can not be permitted to interfere with the statutory provisions as enacted, under the proviso of its home rule authority.

In *Kettering, Supra.* this court noted that the presumption of constitutionality afforded to the legislature in enacting laws pursuant to Article II, Section 34 of the Ohio Constitution, was adopted to protect the citizenry of Ohio. In *Kettering* the court upheld the constitutionality of O.R.C. §4117.01 (F)(2) despite the City's argument that it violated its home rule authority. The court reasoned that the rights of those employees to bargain collectively involved a matter of statewide concern and that the statute therefore over-ruled the City's home rule authority.

This court has also held that unless it can be shown by proof beyond a reasonable doubt that the law as enacted by the legislature is unconstitutional, it must be upheld. *Dickman v. Defenbacher* (1955), 164 Ohio St. 142. The City of Lima has failed to meet this burden of proof. This court need not challenge legislation in this case since the court has already set the precedent for this issue. The law as enacted is constitutional and should have been upheld in the Court of Appeals.

PROPOSITION OF LAW NO. 3

O.R.C. §9.481 IS A GENERAL LAW AFFECTING THE PUBLIC HEALTH, SAFETY, MORALS OR GENERAL WELFARE OF EMPLOYEES THROUGHOUT THE STATE OF OHIO.

The F.O.P. represents over 26,000 members located throughout the State of Ohio. The F.O.P.'s membership is located in every county in Ohio. A host of the political subdivisions/municipalities represented by the F.O.P. have enacted ordinances that conflict with this O.R.C. §9.481. Each member employed by one of those political subdivisions/municipalities is affected by this statute. The statute as passed by the General Assembly provides for the comfort, health, safety and general welfare of the F.O.P.'s membership. If the decision of the Allen County Court of Appeals is permitted to stand, thereby permitting the infringement of the Lima ordinance on citizens throughout the state, the membership of the F.O.P. statewide will lose a right established by O.R.C. §9.481.

The intent of the General Assembly in enacting O.R.C. §9.481 was referenced in the bill itself. The General Assembly explained its intent as follows:

Section 2. In enacting section 9.481 of the Revised Code in this act, the General Assembly hereby declares its intent to recognize both of the following:

- (A) The inalienable and fundamental right of an individual to choose where to live pursuant to Section 1 of Article I, Ohio Constitution.
- (B) Section 34 of Article II, Ohio Constitution, specifies that 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 Section 3 of Article XVIII, Ohio Constitution.

Section 3. The General Assembly finds, in enacting section 9.481 of the Revised Code in this act, that it is a matter of statewide concern to generally allow the employees of Ohio's political subdivisions to choose where to live, and that it is necessary to generally prohibit political subdivisions from requiring their employees, as a condition of employment, to reside in any specific area of the state in order to provide for the comfort, health, safety, and general welfare of those public employees.

Sub.S.B. 82

In its decision, the Third District Court of Appeals specifically contradicts the findings of the General Assembly. In doing so the court said that under its interpretation the language in Article II, Section 34 applies only to the work environment of employees. The legislature's authority according to that court does not extend to an employees right to select a residence. Looking back at the Proceedings and Debates of the Constitutional Convention it's clear that those attending held the belief that employment entailed more than having a place to work. Even in the early 1900's there was recognition of the need to protect an employee's terms and conditions of employment. To hold that residency has no affect on an employee's terms or conditions of work is preposterous. The interpretation of the Court of Appeals is simply incorrect. Even looking back to the 1900's the law as enacted is constitutional, affects the terms and conditions of employment and should have been upheld by the court of appeals.

The Court of Appeals made its ruling without any factual support that would either contradict the findings of the General Assembly or call such findings into question. Nothing in the record supports the conclusion that residency requirements are not a "condition of employment" for employees of the various cities which have chosen to unilaterally impose a multitude of various residential restrictions on their employees. Employees can be and are being disciplined for violating residency ordinances by some political subdivisions. Such discipline supports the argument that the O.R.C. § 9.481

affects the terms and conditions of their employment.

The court of appeals was apparently aware that it had no right to contradict the findings of the General Assembly. To wit; the court quoted the following cases in its decision; "It is not the function of the reviewing court to assess the wisdom or policy of a statute but, rather to determine whether the General Assembly acted within its legislative power". *Austintown Twp. Bd. of Trustees v. Tracy* (1996), 76 Ohio St.3d 353, 356, 667 N.E.2d 1174 citing *State ex rel. Bishop v. Mt. Orab Village Bd. of Edn.* (1942), 139 Ohio St. 427, 438, 40 N.E.2d 449. The court of appeals, despite this knowledge, chose to ignore the limitations placed upon it.

The requirements contained in O.R.C. §9.481 do not apply to the City of Lima in isolation. The current Lima ordinance 201-00 prevents uniformity by subjecting its employees to a local residency restriction. O.R.C. § 9.481 on the other hand applies residency uniformly to every public employee in the State of Ohio. The statute does not merely restrict the ability of the City of Lima to enact ordinances. To the contrary, it sets forth regulations for the implementation of residency that apply to all those affected. It is a general law that is part of a comprehensive and uniform statewide enactment setting forth regulations that prescribe a general rule concerning the application of residency to public employees in Ohio. *American Financial, Supra.*

Conclusion

O.R.C. §9.481 is a law of general nature and therefore prevails over Lima's ordinance which is in direct conflict with the law as written. The statute is constitutional and affects Ohio citizens statewide. The Lima residency ordinance conflicts with statutory law and is therefore void. The decision of the court of appeals undermines the intent of O.R.C. §9.481 and is contrary to the constitutional law of the State of Ohio. For the foregoing reasons, Amicus Curiae F.O.P. respectfully requests that this court reverse the decision of the Court of Appeals.

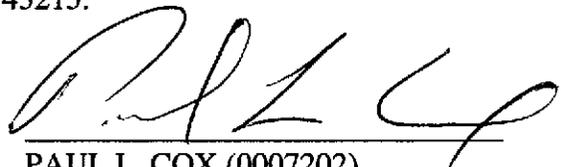
Respectfully submitted,



Paul L. Cox (0007202)
Gwen Callender (0055237)
Fraternal Order of Police of Ohio, Inc.
222 East Town Street
Columbus, Ohio 43215
(614) 224-5700
Attorneys for Amicus Curiae
Fraternal Order of Police of Ohio Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief Amicus Curiae was sent by regular U.S. mail this 30th day of June 2008 to Mr. Anthony Geiger, Law Director, City of Lima, 209 North Main Street, 6th Floor, Lima, Ohio 45801 and to Mr. Robert Krummen, Deputy Director, Office of Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215.



PAUL L. COX (0007202)
Attorney at Law