

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, et al. :
Appellants, : Supreme Court Case No. 08-0418
v. :
CITY OF AKRON, et al., : On Appeal from the Summit
Appellees. : County Court of Appeals,
: Ninth Appellate District
:

MERIT BRIEF OF APPELLANTS
FRATERNAL ORDER OF POLICE, AKRON LODGE NO. 7 AND
AKRON FIREFIGHTERS ASSOCIATION, IAFF LOCAL 330, et al.

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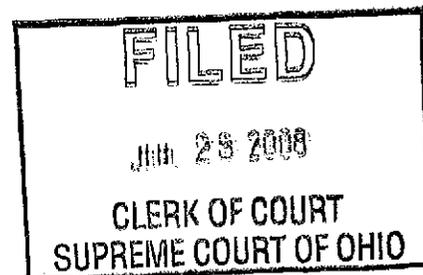


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STATEMENT OF FACTS

The case arises from the attempts of Appellants, Fraternal Order of Police, Akron Lodge No. 7 and the Akron Firefighters Association, IAFF Local 330, as well as Paul Hlynsky, personally and on behalf of FOP, Akron Lodge No. 7 and Phil Gaucr, personally and on behalf of IAFF Local 330 (“Union Appellants” or “the Unions”), to enforce Section 9.481 of the Ohio Revised Code, which prohibits political subdivisions from requiring their employees to reside in any specific area of the state as a condition of employment.

- A. **R.C. 9.481 is enacted by the General Assembly to prohibit political subdivisions from requiring their employees to reside in a specific area of the State as a condition of employment.**

On March 1, 2005, Senate Bill 82 (which would eventually become R.C. 9.481) was introduced to the Ohio Legislature. (CP R. 45; Supp. 1)¹. In essence, Senate Bill 82 proposed to prohibit municipal employers from requiring their employees to maintain residency in their municipalities as a condition of employment. Senate Bill 82 stated that the residency requirement prohibition was proposed to preserve the “inalienable and fundamental right of an individual to choose where to live pursuant to Section 1 of Article 1 [of the] Ohio Constitution,” with the understanding that Article II, Section 34 of the Ohio Constitution allowed the General Assembly to pass laws that provide for “the comfort, health, safety, and general welfare of all employees.” (CP R. 45; Supp. 2). Section 3 of Senate Bill 82 expressly states that in enacting R.C. 9.481, the General Assembly finds it “necessary to generally prohibit political subdivisions from requiring their employees, as a condition of employment, to reside in any specific area of the state

¹ “CP R.” refers to the Common Pleas Court record. “CA R.” refers to the Court of Appeals record.

in order to provide for the comfort, health, safety, and general welfare of those public employees.” (CP R. 45; Supp. 3).

Following its introduction, the contents and purpose of Senate Bill 82 were repeatedly discussed at length and debated intensely within the General Assembly. (CP R. 45; Supp. 5-162). Proponents and opponents of Senate Bill 82 across the State of Ohio provided both legal and lay opinion regarding the bill over the course of several hearings before the State and Local Government and Veterans’ Affairs Committee of the Ohio Senate. (CP R. 45; Supp. 28-162). On June 14, 2005, after having considered weeks worth of testimony, documents, legal opinions, etc., the Committee passed Senate Bill 82. (CP R. 45; Supp. 163). On June 21, 2005, Senate Bill 82 was passed by the Ohio Senate. (CP R. 45; Supp. 163). Days later, on June 23, 2005, Senate Bill 82 was introduced to the Ohio House of Representatives to restart the deliberation process anew. (CP R. 45; Supp. 163). After months of further deliberation, on January 18, 2006, the Ohio House of Representatives also passed Senate Bill 82. (CP R. 45; Supp. 163). On January 27, 2006, Ohio Governor Robert Taft signed Senate Bill 82 into law as R.C. 9.481, with an effective date of May 1, 2006. (CP R. 45; Supp. 163). R.C. 9.481 states, in relevant part: “[N]o political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state.” (Appx. 93).

B. The trial court held that R.C. 9.481 was validly enacted pursuant to Article II, Section 34 of the Ohio Constitution, thereby invalidating the City of Akron’s residency requirement.

On May 1, 2006, Appellee, City of Akron (“the City”) filed a Complaint claiming R.C. 9.481 was unconstitutional and that its residency requirement should be upheld with the Summit County Common Pleas Court, Case No. CV 2006-05-2759. (CP R. 1). A

day later, on May 2, 2006, the Unions filed a Complaint for Declaratory Judgment seeking to enforce R.C. 9.481 over the City's residency requirement in the Summit County Common Pleas Court, Case No. CV 2006-05-2797. (CP R. 1). On June 14, 2006, the two suits were consolidated by the trial court into Case No. CV 2006-05-2759. (CP R. 8; CP R. 12).

The City's residency requirement, City Charter § 106(5b), states in relevant part, "[N]o person shall hold an appointed or promoted position in the classified service of the City of Akron unless he shall become a resident citizen of the City of Akron within twelve (12) months of his appointment or promotion, and remain a resident citizen of the City of Akron during the term of his employment." (Supp. 164). In subsequent deposition testimony, City of Akron Mayor Donald L. Plusquellic stated that the City had the right to require an employee to live within the City, "For the same reason that we require them to work 40 hours." (CP R. 45; Supp. 171). Similarly, in his deposition testimony, City of Akron Director of Public Service, Gerald Holland, stated that the City had the right to establish a residency requirement because "[T]he cities dictate the working conditions of the employees..." (CP R. 45; Supp. 198).

On December 8, 2006, the City, the Unions, and the State of Ohio ("the State") filed motions for summary judgment. (CP R. 41-45). On March 30, 2007, the trial court denied the City's motion for summary judgment and granted summary judgment in favor of the Unions and the State. (Appx. 23). The trial court held that R.C. 9.481 was validly enacted under Article II, Section 34 of the Ohio Constitution, and as such, prevailed over the City's conflicting residency requirement. Citing the Supreme Court of Ohio's decision in *City of Rocky River v. State Employment Relations Board* (1989), 43 Ohio

St.3d 1, 539 N.E.2d 103 (“*Rocky River IV*”), the trial court determined that Article II, Section 34 of the Ohio Constitution is clear and unambiguous and that it confers upon the General Assembly the authority to enact legislation for the “general welfare” of employees. (Appx. 26-27). R.C. 9.481, the trial court determined, was for the general welfare of employees; therefore, it was validly enacted under Article II, Section 34 of the Ohio Constitution and trumped the home rule amendment. (Appx. 27). Further, the trial court rejected the City’s arguments that R.C. 9.481 violated the Uniformity Clause (Article II, Section 26), Due Process Clause or Equal Protection Clause of the Ohio Constitution. (Appx. 28). On April 3, 2007, the City appealed the trial court’s decision to the Ninth District Court of Appeals, Case No. 23660. (CA R. 1).

C. The court of appeals restricted the General Assembly’s authority to enact legislation under Article II, Section 34.

On January 9, 2008, the Ninth District Court of Appeals reversed the common pleas court’s decision. (Appx. 5). The court of appeals began its analysis by examining the General Assembly’s authority to enact R.C. 9.481 pursuant to Article II, Section 34 of the Ohio Constitution. (Appx. 9). The court of appeals acknowledged that the General Assembly’s authority under Article II, Section 34 supersedes the City’s home rule authority to enact local legislation. (Appx. 9). The court of appeals, however, questioned whether R.C. 9.481 had been validly enacted under Article II, Section 34.

In reviewing the Supreme Court’s prior decisions, the court of appeals noted that the Court has made it clear that the language of Article II, Section 34 is clear and unequivocal that it is a broad grant of authority to the General Assembly to enact laws pertaining to the “general welfare” of employees. (Appx. 11). Despite this, the court of appeals concluded that the term “general welfare” is “so broad and vague that it provides

no ascertainable limit on the scope of the General Assembly's authority," and as such, "some boundaries" must exist to limit the scope of the term "general welfare." (Appx. 12-13). These boundaries, the court of appeals stated, are based upon the preamble of the Ohio Constitution, and require that "[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." (Appx. 13-14). Further, the court of appeals stated, legislation validly enacted under Article II, Section 34 must address "significant social issues impacting the public at large," be a part of a "comprehensive legislative scheme," and apply to more than a "relatively small segment of the population." (Appx. 16).

Analyzing R.C. 9.481 under the new requirements imported into Article II, Section 34, the court of appeals concluded that R.C. 9.481 had not been validly enacted, as R.C. 9.481 "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 populations..." (Appx. 16). Further, the appeals court stated that R.C. 9.481 did not pertain to the protection or regulation of an existing right, as the employees that were subject to the residency requirement "surrendered any 'right' that they once had...when they agreed to become employees of the city..." (Appx. 16-17).

Having determined that R.C. 9.481 was not validly enacted under Article II, Section 34, the court of appeals turned to whether the City's residency requirement superseded R.C. 9.481 under the City's home rule authority. (Appx. 18). Applying the home rule test set forth in *Canton v. State* (2002), 95 Ohio St.3d 149, 766 N.E.2d 963, the

court of appeals determined that R.C. 9.481 was not a “general law,” and therefore, did not supersede the City’s authority under the home rule amendment. (Appx. 19-20). The court of appeals then concluded that R.C. 9.481 violated the City’s home rule authority to enact local employee residency requirements under Article XVIII, Section 3 of the Ohio Constitution. (Appx. 20).

On February 25, 2008, the Unions filed their notice of appeal to the Supreme Court of Ohio. (Appx. 1). On May 7, 2008, the Supreme Court granted jurisdiction to hear the case and accepted the appeal.

ARGUMENT

Proposition of Law No. 1:

The General Assembly’s authority to enact legislation pursuant to Article II, Section 34 of the Ohio Constitution is not limited by “societal notions of common welfare.”

It is well-established that legislative enactments enjoy a presumption of constitutionality and validity. *Adamsky v. Buckeye Local School Dist.* (1995), 73 Ohio St.3d 360, 361, 653 N.E.2d 212, 213-214. A statute that is subject to challenge will not be invalidated unless the challenging party proves that the statute is unconstitutional beyond a reasonable doubt. *State v. Anderson* (1991), 57 Ohio St.3d 168, 171, 566 N.E.2d 1224, 1226-1227; see also *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, ¶ 1 of the syllabus. In reviewing the validity of a statute, the reviewing court is to afford the challenged statute every possible presumption in favor of the validity. *State ex rel. Dickman*, 164 Ohio St. at 154, 566 N.E.2d at 67.

In reviewing the constitutionality of R.C. 9.481, as enacted by the General Assembly under Article II, Section 34 of the Ohio Constitution, the court of appeals

failed to provide R.C. 9.481 any presumption of validity. To the contrary, through what can only be described as “judicial activism,” the court of appeals disregarded the clear and unambiguous language of Article II, Section 34; ignored Supreme Court precedent concerning the appropriate interpretation of Article II, Section 34; and imported its own limitation on the legislative authority of the General Assembly under Article II, Section 34, solely for the purpose of evaluating the constitutionality of R.C. 9.481. The court of appeals afforded R.C. 9.481 every possible presumption *against* its validity, with the court of appeals’ imported limitation on the General Assembly’s authority under Article II, Section 34 being the prime example.

Article II, Section 34 of the Ohio Constitution states:

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.** (Emphasis added).

The Supreme Court has held that Article II, Section 34 states in “‘clear, certain and unambiguous language’ that *no other provision* of the Constitution may impair the legislature’s power under Section 34.” *Rocky River IV*, 43 Ohio St.3d at 13, 539 N.E.2d at 114; see also *American Assn. of Univ. Professors v. Central State Univ.* (1999), 87 Ohio St.3d 55, 61, 717 N.E.2d 286, 292; *State ex rel. Bd. of Trustees of Police and Firemen’s Pension Fund v. Bd. of Trustees of Police Relief and Pension Fund* (1967), 12 Ohio St.2d 105, 107, 233 N.E.2d 135, 137.

In *Rocky River IV*, this Court upheld the constitutionality of certain provisions of the Ohio Public Employees Collective Bargaining Act (specifically R.C. 4117.14), which permit a third-party neutral to issue a final and binding award in collective bargaining disputes. In that case, the employer argued that R.C. 4117.14(I) was unconstitutional

because it would allegedly deny municipalities the power to determine their employees' compensation, a power of local-government protected by the home rule amendment. The employer further argued that the binding arbitration provisions of R.C. 4117.14 were not validly enacted under Article II, Section 34, as Article II, Section 34 was intended to apply only to matters involving minimum wage. The Court rejected both arguments based upon the clear and unambiguous terms of Article II, Section 34:

If the framers of our Constitution had intended this section to apply only to minimum wage, almost half of the forty-one words contained in this section must be regarded as mere surplusage...Are we to believe, as appellant apparently does, that these words were not intended to have meaning? To ask the question is to answer it.

The same may be said of the final phrase of Section 34, which states that “* * * no other provision of the constitution shall impair or limit” the General Assembly's power to pass laws concerning the welfare of employees...Section 34 could not be clearer or more unequivocal. Appellant's contention, that Section 34 does not mean what it so obviously says, is indefensible. This is especially true when one considers that this court has already held that Section 34 contains “clear, certain and unambiguous language” providing that “no other provision of the Constitution may impair the intent, purpose and provisions” of Section 34, including the home-rule amendment.

Rocky River IV, 43 Ohio St.3d at 16, 539 N.E.2d at 116 (citing *Pension Fund*, *supra*.).

Nearly a decade later, in *Central State*, the Supreme Court would again affirm that Article II, Section 34 is to be interpreted as a broad grant of legislative authority to the General Assembly, not a limitation on its power to enact legislation. *Central State*, 87 Ohio St.3d at 61, 717 N.E.2d at 292. In *Central State*, the American Association of University Professors (“AAUP”) urged the Supreme Court to hold that R.C. 3345.45 was unconstitutional under Article II, Section 34 on the basis that it burdened employees, and

that only laws benefiting employees may be enacted under Article II, Section 34.² The Supreme Court rejected the limitation urged by the appellant, citing *Rocky River IV*. As in its decision in *Rocky River IV*, the Supreme Court cited its interpretation of the clear and unambiguous language of Article II, Section 34 as the basis for rejecting limiting the General Assembly's authority beyond the language of Article II, Section 34 itself. *Central State*, 87 Ohio St.3d at 61, 717 N.E.2d at 292. In further support, the Supreme Court cited several statutes that would be considered unconstitutional under AAUP's urged limitation of Article II, Section 34, pointing out that the listed statutes were not enacted solely for the benefit of employees, but were nonetheless within the General Assembly's constitutional authority to enact. *Id.* As the Supreme Court stated, legislation enacted pursuant to Article II, Section 34 "must be upheld unless it constitutes a plain affront to a specific provision of the Constitution." *Id.*

In this case, the court of appeals held that R.C. 9.481 is unconstitutional on the basis that it was not validly enacted by the General Assembly under Article II, Section 34. According to the court of appeals, the General Assembly's authority to enact legislation for the general welfare of employees is limited to legislation that "must also either secure the blessings of freedom to citizens of Ohio or further the 'general welfare' of the state." (Appx. 13). R.C. 9.481, the court of appeals determined, is not "employee 'general welfare' legislation, and as such, was not validly enacted under Article II, Section 34. This interpretation of Article II, Section 34 by the court of appeals is contrary to the clear and unambiguous language of Article II, Section 34 that "[l]aws may

² R.C. 3345.45 required state universities to "develop standards for instructional workloads for full-time and part-time faculty in keeping with the universities' missions..."

be passed...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.” Further, the court of appeals’ interpretation of Article II, Section 34 is in conflict with the Supreme Court’s decisions in *Rocky River IV* and *Central State*, which state that Article II, Section 34 must be interpreted as a broad grant of authority to the General Assembly to enact legislation and that legislation enacted pursuant to Article II, Section 34 must be upheld unless it constitutes “a plain affront to a specific provision of the Constitution.” *Rocky River IV, supra.; Central State, supra.*

In support of importing its “common welfare” limitation upon the General Assembly’s legislative authority under Article II, Section 34, the court of appeals cited 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...”) and its decision in *Porter v. City of Oberlin* (1964), 3 Ohio App.2d 158, 164, in which the Ninth District stated, “It here appears that the Constitution was established to secure the blessings of freedom, and to promote the common welfare.” See also *Palmer v. Tingle* (1896), 55 Ohio St. 423, 440, 45 N.E. 313, 314 (“[I]t must be presumed that the laws to be passed by the general assembly under the powers conferred by [the Ohio Constitution] are to be such as shall secure the blessings of freedom, and promote our common welfare.”). However, in *Porter* (and *Palmer*), the legislative authority of the General Assembly under Article II, Section 34 was not at issue. *Porter* involved an action by a resident of the city of Oberlin challenging a housing ordinance on the basis that it interfered with his property rights under Article I,

Section 19 of the Ohio Constitution, and is inapplicable to any interpretation of Article II, Section 34.

As to the court of appeals' application of the preamble to Article II, Section 34, the Supreme Court has never held that the General Assembly's authority under Article II, Section 34 is limited by societal notions of common welfare. Indeed, the court of appeals' reliance upon the preamble to limit the authority of the General Assembly under Article II, Section 34 is in conflict with the express terms of Article II, Section 34, and therefore, is misplaced. The supremacy clause of Article II, Section 34 is clear and unambiguous: **no other provision of the constitution shall impair or limit** the General Assembly's authority to enact legislation that provides for the comfort, health, safety and general welfare of employees. Thus, the only limitation upon the General Assembly's authority to enact legislation under Article II, Section 34 is the language found therein. By Article II, Section 34's own terms, the preamble cannot be interpreted to limit or impair the General Assembly's authority to enact legislation there under. The court of appeals' interpretation of Article II, Section 34 incorrectly ignored these express terms and Supreme Court precedent enforcing Article II, Section 34's express terms.

As the court of appeals acknowledged, "the [Supreme] 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." (Appx. 14). Nevertheless, the court of appeals reasoned that importing its limitation into Article II, Section 34 was permissible because the Supreme Court had not yet been compelled to import the limitation in previous cases such as *Rocky River IV*, *Central State*, and *Pension Fund*. The court of appeals' presumption that the Supreme Court would import a "common

welfare” limitation upon the General Assembly’s authority under Article II, Section 34 is at odds with the express and repeated pronouncements of the Supreme Court in those cases. *Pension Fund*, 12 Ohio St.2d at 107, 233 N.E.2d at 137 (“It appears in clear, certain and unambiguous language that no other provision of the Constitution may impair the intent, purpose and provisions of [Article II, Section 34].”); *Rocky River IV*, 43 Ohio St.3d at 13, 539 N.E.2d at 114 (“[Article II, Section 34] 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...”); *Central State*, 87 Ohio St.3d at 61, 717 N.E.2d at 292 (“This court has repeatedly interpreted Section 34, Article II as a broad *grant* of authority to the General Assembly, not as a limitation on its power to enact legislation.”).

In attempting to reconcile the Supreme Court’s decisions in *Rocky River IV*, *Pension Fund*, and *Central State* with its imported limitation on the General Assembly’s authority, the court of appeals stated that those decisions involved “employee ‘general welfare’ legislation,” whereas R.C. 9.481 does not. Thus, the court of appeals reasoned, the imported limitation is necessary in the instant case to prevent the General Assembly from enacting non-“general welfare” legislation. However, the court of appeals’ determination that R.C. 9.481 is not “employee ‘general welfare’ legislation” is based upon subjective opinion and should not be used as a pretext for restricting the General Assembly’s proper authority.

Indeed, the court of appeals' perception that a limitation is necessary does not in itself warrant amending the clear and unambiguous terms of Article II, Section 34. Under separation of powers, courts are to interpret the provisions of the Ohio Constitution based upon its express terms, existing constitutional precedent and other principles of statutory construction. The court of appeals does not have the authority to rewrite the provisions of the Ohio Constitution under the guise of interpretation. Even if out of a perceived "necessity," importing a "societal notions of common welfare" limitation into Article II, Section 34 is not within the authority of the court of appeals.

That being said, the court of appeals' assertion that it must import a limitation on the General Assembly's authority because the "general welfare" language of Article II, Section 34 provides the General Assembly authority with "no ascertainable limit" is inaccurate. The clear and unambiguous language of Article II, Section 34 limits the General Assembly's authority to enacting legislation that provides for the "comfort, health, safety and general welfare of all employees." This language of Article II, Section 34 has thus far served sufficient in guiding the Supreme Court in determining the validity of legislation enacted under Article II, Section 34. This Court has both upheld and invalidated legislation enacted under Article II, Section 34 in accordance with its express terms. See e.g. *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E. 2d 722 (Supreme Court held statute enacted under Art. II, Sec. 34 that removed employees' rights to remedy under common law in an intentional tort action was unconstitutional as it did not further the comfort, health, safety and general welfare of all employees); *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298, 707 N.E.2d 1107 (Supreme Court held statute enacted under Art. II, Sec. 34 that provided immunity to employers from civil

liability for employee injuries caused by intentional tortuous conduct was unconstitutional as it did not further the comfort, health, safety and general welfare of all employees). The court of appeals' conclusion that an imported limitation on the General Assembly's authority is necessary because no limitation currently exists is incorrect and ignores the existing express terms of Article II, Section 34.

Moreover, the court of appeals' rationale that the General Assembly's authority under Article II, Section 34 must be limited so legislation is not enacted that "further[s] the interests of a few employees, yet harm[s] the welfare of the public at large" is unsubstantiated. The court of appeals does not indicate the circumstances under which legislation that benefits employees across Ohio would constitute harm to the public's welfare; yet, it reasons that a limitation must be imported into the Constitution on this basis. However, under this limitation, is R.C. 742.26 now unconstitutional because it furthered the interest of police officers and firefighters through the creation of a statewide relief and pension fund for police and firefighters? Is R.C. 4115.03 through 4115.15 now unconstitutional because it set a prevailing wage for private construction employees and potentially raised the costs of public construction projects? Is R.C. 4117.14 now unconstitutional because it furthered the collective bargaining rights of Ohio's safety forces? The Court has previously held that these enactments are constitutional under Article II, Section 34. *Pension Fund, supra.*; *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 431 N.E.2d 311; *Rocky River IV, supra.* The court of appeals' new limitation on the General Assembly's authority suggests otherwise. All of these enactments, R.C. 742.26, R.C. 4115.03 through 4115.15, R.C. 4117.14, enhanced the economic well-being of segments of Ohio employees at the expense of State and/or local

governments. If the court of appeals' rationale were to stand, all of these employee economic improvement efforts of the General Assembly are arguably now subject to constitutional review.

The court of appeals' holding that Article II, Section 34 limits the General Assembly's authority to enact legislation that serves the general welfare of employees *and* "furthers the 'general welfare' of the state" is contrary to the express language of Article II, Section 34 of the Ohio Constitution and the Supreme Court's well-established precedent. The limitation the court of appeals has applied to Article II, Section 34 is based not upon law, but upon subjective opinions of whether R.C. 9.481 is for the "general welfare" of employees. Adding terms to the express provisions of the Ohio Constitution is not within the authority of the court of appeals. Further, permitting the court of appeals' limitation to stand will pose a significant threat not only to existing legislation enacted under Article II, Section 34, but future attempts by the General Assembly to enact legislation for the improvement of employees' lives. Therefore, the Supreme Court must reverse the court of appeals' decision and hold that the General Assembly's authority to enact legislation under Article II, Section 34 of the Ohio Constitution is not limited by "societal notions of common welfare," and that R.C. 9.481 was validly enacted under Article II, Section 34 for the comfort, health, safety and general welfare of employees.

Proposition of Law No. 2:

R.C. 9.481 is constitutional as it was enacted under Article II, Section 34 for the general welfare of public employees.

In addition to deeming R.C. 9.481 unconstitutional for allegedly failing to satisfy the requirement that it concurrently serves “societal notions of common welfare,” the court of appeals also stated that R.C. 9.481 was unconstitutional and not enacted for the “general welfare” of employees because unlike prior “general welfare” legislation before the Supreme Court, R.C. 9.481 “does not address any significant social issues impacting the public at large; it is not part of any comprehensive legislative scheme, but deals with a single issue; and it applies to a relatively small segment of the population.” (Appx. 16).

In so holding, the court of appeals acknowledged that no such limitations have been established by the Supreme Court in examining the constitutionality of legislation under Article II, Section 34. Nevertheless, the court of appeals asserted that these elements for determining whether legislation has been lawfully enacted for the “general welfare” of employees could be gleaned from the Supreme Court’s decisions in *Rocky River IV*, *Pension Fund*, and *Central State*. The court of appeals is incorrect. A review of the elements of “general welfare” legislation promulgated by the court of appeals demonstrates that they lack sufficient judicial support and that the elements have been created in order to support the court of appeals’ pre-conceived determination that R.C. 9.481 is invalid. For these reasons, as well as the incredible threat the court of appeals’ decision poses to prior and future legislation enacted under Article II, Section 34, the court of appeals’ determination that R.C. 9.481 was not validly enacted under Article II, Section 34 should be overturned.

In this case, the court of appeals determined that there were certain alleged commonalities between the statutes at issue in *Rocky River IV*, *Pension Fund*, and *Central State* that represent the minimum requirements for legislation to constitute legislation for the “general welfare” of employees. These “minimum requirements”—the elements promulgated by the court of appeals and then used to distinguish R.C. 9.481—are without judicial support and must be rejected for multiple reasons.

The elements promulgated by the court of appeals are in direct conflict with the express terms of Article II, Section 34 and the repeated statements of the Supreme Court in *Rocky River IV*, *Pension Fund*, and *Central State* that Article II, Section 34 is a broad grant of legislative authority to the General Assembly. *Pension Fund*, 12 Ohio St.2d at 107, 233 N.E.2d at 137; *Rocky River IV*, 43 Ohio St.3d at 13, 539 N.E.2d at 114; *Central State*, 87 Ohio St.3d at 61, 717 N.E.2d at 292. It is impossible to reconcile the qualifications for “general welfare” legislation set by the court of appeals with the repeated pronouncements of the Supreme Court that Article II, Section 34 should not be interpreted in a manner that limits the General Assembly’s authority to enact legislation. The elements promulgated by the court of appeals to distinguish R.C. 9.481 are a severe departure from the Supreme Court’s interpretation of Article II, Section 34 for decades. Years of precedent should not be overturned for the purpose of invalidating a single piece of legislation.

In addition to the conflict with established precedent, the court of appeals’ elements also fail because the elements are based upon mischaracterizations of the legislative enactments before the Court in *Rocky River IV*, *Pension Fund*, and *Central State*. One of the elements asserted by the court of appeals is that “general welfare”

legislation be a part of a “comprehensive legislative scheme.” In support, the court of appeals characterizes *Rocky River IV* as involving the constitutionality of “the entire Chapter 4117 of the Ohio Revised Code.” However, the constitutionality of the entire Ohio Public Employees Collective Bargaining Act was not in dispute, only the binding arbitration provision of R.C. 4117.14(D). *Rocky River IV*, 43 Ohio St.3d at 10-11, 539 N.E.2d at 111-112. Similarly, there was no “comprehensive legislation scheme” involved in *Central State*. In *Central State*, the AAUP contested the constitutionality of the requirement of R.C. 3345.45 that public universities develop standards for professors’ instructional workloads; there was no challenge to R.C. Chapter 3345. In fact, there is nothing in *Rocky River IV*, *Pension Fund*, or *Central State* that suggests or supports the court of appeals’ conclusion that a “comprehensive legislative scheme” constitutes legislation enacted for the “general welfare” of employees.

Likewise, there is a dearth of any support for the court of appeal’s proposition that “general welfare” legislation must “pertain to the protection or regulation of any existing right.” Contrary to the court of appeals’ characterization, the legislation at issue in *Rocky River IV* and *Central State* did not protect or regulate an “existing right.” The legislation in *Rocky River IV* created the requirement that the public employer adhere to the terms of the arbitration award issued to resolve its collective bargaining dispute with certain non-striking public employees. The legislation in *Central State* established instructional workload standards for professors. No existing rights were protected or regulated. To the contrary, new legal obligations were imposed upon the employers and employees in those cases.

The lack of judicial support for the court of appeals' newly promulgated elements is indicia of the result-driven rationale employed by the court of appeals to conclude that R.C. 9.481 is distinguishable from prior legislation enacted and upheld under Article II, Section 34. More compelling indicia of this result-driven rationale, however, is found in the court of appeals' inability to distinguish R.C. 9.481 from prior legislation, despite the newly promulgated elements for "general welfare" legislation.

In its decision, the court of appeals asserted that unlike the legislation in *Rocky River IV*, *Pension Fund*, or *Central State*, R.C. 9.481 "applies to a relatively small segment of the population," and is therefore not "general welfare" legislation. Yet, R.C. 9.481 is broader in scope than any of the legislation at issue in *Rocky River IV*, *Pension Fund*, or *Central State*. *Rocky River IV* pertained to non-striking public employees represented by a union and certified by SERB; *Pension Fund* pertained to retired police officers and firefighters; and *Central State* pertained to public university professors. R.C. 9.481 pertains to all full-time public employees. Undoubtedly, the size of the population R.C. 9.481 applies to is a significantly larger segment of the state's population than the legislation in the above-described cases. Yet, the court of appeals opted to characterize R.C. 9.481 as having a narrow scope in order to distinguish it from prior legislation upheld under Article II, Section 34.

Similarly, the court of appeals failed to adequately distinguish R.C. 9.481 from prior legislation even under its most subjective element for "general welfare" legislation—that the legislation address "significant social issues impacting the public at large." According to the court of appeals, R.C. 9.481 did not constitute "general welfare" legislation because it did not address a "significant social issue" similar to the legislation

before the Court in *Rocky River IV*, *Pension Fund*, and *Central State*. Yet, the court of appeals did not articulate what “significant social issue” was addressed by R.C. 4117.14(I), R.C. 3345.45, or R.C. 742.26, nor did it explain how the “social value” of these statutes was greater than that of R.C. 9.481. Indeed, the court of appeals gave no weight to the significant value of R.C. 9.481 to the hundreds of thousands of public employees throughout the state that currently forego the need to move out of their cities’ limits in order to keep their jobs.

As succinctly put by Judge Slaby in his dissent of the court of appeals’ opinion, “[T]he majority’s distinction between this case and other cases arising under Article II Section 34 [is] unpersuasive.” (Appx. 22). Even more troubling, however, is the impact the court of appeals’ decision could potentially have on Article II, Section 34 legislation (existing and future) if permitted to stand. The inherent subjective nature of the court of appeals’ requirement that “general welfare” legislation “address a significant social issue” allows a tribunal to determine the constitutionality of a legislation enactment based upon that tribunal’s own personal beliefs as to what constitutes a “significant social issue.” The court of appeals’ decision does not provide any guidance as how a court would assess a certain value of “social significance” to legislation, or what type of legislation is entitled to the heightened “social significance” necessary to make the legislation constitutional. The only guidance provided by the court of appeals is that R.C. 9.481 does not qualify for this esteemed status. This “guidance,” however, illustrates only the deficiency of the “significant social issue” requirement.

Prior to its enactment, R.C. 9.481 was debated for months within the General Assembly. Hearings and committee meetings were held to hear testimony and arguments

from employees and employers across the State concerning R.C. 9.481. After months of debate and crafting of R.C. 9.481 in consideration of the testimony and arguments presented, the House, the Senate, and the Governor all passed R.C. 9.481 for the general welfare of public employees in Ohio. Yet, in one fell-swoop, the court of appeals undid the General Assembly's efforts, overtook R.C. 9.481's presumption of validity, and deemed it unconstitutional on the basis that R.C. 9.481's "societal value" was insufficient.

The court of appeals' assessment of R.C. 9.481 flies in the face of the work and the role of the General Assembly, not to mention the thousands of public employees that advocated for the enactment of the legislation. The court of appeals' decision illustrates the incredible extent to which the court of appeals' newly promulgated elements for "general welfare" legislation undermine the General Assembly's legislative authority under R.C. 9.481. Moreover, the court of appeals' rationale for determining R.C. 9.481 did not address a "significant social issue" is devoid of judicial support and poses a significant threat to existing and future legislation enacted pursuant to Article II, Section 34.

The court of appeals opined that R.C. 9.481 failed to address a "significant social issue," because it sought to "reinstate a 'right' that the employees voluntarily surrendered." According to the court of appeals, the right to choose where to live was "voluntarily surrendered" when the public employees accepted employment. The idea that the legitimacy of a law improving conditions of employment is undermined by an employee "voluntarily surrendering" to the pre-existing conditions is contrary to the inherent purpose of Article II, Section 34. Certainly, construction workers hired on a

public works project at a certain wage prior to enactment of R.C. 4115.03 through 4115.15 did not “voluntarily surrender” their right to a prevailing wage, just as safety forces negotiating with their employer prior to the enactment of R.C. 4117.14 did not “voluntarily surrender” their right to have the contract dispute resolved by an arbitrator. Indeed, an employee cannot “voluntarily surrender” a right that has not previously been enforced through legislation. Yet, under the court of appeals’ rationale, the constitutionality of legislation aimed at improving the employee’s general welfare would be significantly undermined by virtue of the employee acceding to the pre-existing conditions at issue. What legislation enacted to *improve* the general welfare of employees could possibly overcome this burden? None. Hence, the dire need for the Supreme Court to reverse the court of appeals’ decision in this case.

For similar reasons, the Supreme Court should likewise reject the rationale of the Third District, Sixth District, and Eighth District Courts of Appeals in holding R.C. 9.481 was not validly enacted under Article II, Section 34. See *City of Lima v. State of Ohio* (3rd Dist., Dec. 3, 2007), 2007-Ohio-6419, 2007 WL 4248278 (Appx. 64); *City of Toledo and City of Oregon v. State of Ohio* (6th Dist., Apr. 25, 2008), 2008-Ohio-1957, 2008 WL 1837256 (Appx. 86); *City of Cleveland v. State of Ohio, et al.* (8th Dist., June 2, 2008), 2008-Ohio-2655, 2008 WL 2252542 (Appx. 37).

In *Lima*, *Toledo*, and *Cleveland*, the courts of appeals stated that Article II, Section 34 should be interpreted to limit the General Assembly’s authority to enact legislation that pertains to “work environment conditions” or “employee economic welfare,” and that R.C. 9.481 was not validly enacted under Article II, Section 34 because it was allegedly not related to “work environment conditions” or “employee

economic welfare.” Similar to the Ninth District’s opinion, the courts of appeals’ decisions in *Lima*, *Toledo*, and *Cleveland* restrict the authority of the General Assembly to enact legislation under Article II, Section 34 out of a perceived need to do so. Further, similar to the Ninth District, these three courts of appeals restricted the General Assembly’s authority by promulgated a test for determining if legislation is “general welfare” legislation validly enacted under Article II, Section 34 (i.e., legislation must relate to “work environment conditions” or “employee economic welfare”). Like the Ninth District’s opinion, the *Lima*, *Toledo*, and *Cleveland* decisions are in direct conflict with the clear and unambiguous terms of Article II, Section 34, and Supreme Court’s repeated pronouncements in *Rocky River IV*, *Pension Fund*, and *Central State* that Article II, Section 34 is a broad grant of legislative authority.

Furthermore, like the Ninth District’s “for the common welfare” requirement, the constitutional prerequisites espoused by the courts of appeals in *Lima*, *Toledo*, and *Cleveland* are contrary to existing employment-related legislation that were validly enacted under Article II, Section 34 and do not have a “nexus” to “work environment conditions” or “employee economic welfare.” See *Central State*, 87 Ohio St.3d at 61, 717 N.E.2d at 292; *City of Dayton v. State of Ohio, et al.* (2nd Dist., May 30, 2008), 2008-Ohio-2589, 2008 WL 2222716 (Appx. 46).

As indicated above, in *Central State* the Supreme Court rejected the appellant’s suggested limitation on the General Assembly’s legislative authority, in part, on the basis that the General Assembly has routinely enacted legislation that could not be reconciled with the appellant’s interpretation of Article II, Section 34 (i.e., that the General Assembly’s authority to enact legislation under Article II, Section 34 was limited to

legislation that benefited employees). *Central State*, 87 Ohio St.3d at 61, 717 N.E.2d at 292. The Supreme Court cited the statutes it referred to: R.C. 102.03 limits the gifts public employees may receive; R.C. 124.57 limits classified employees' solicitation of political contributions; R.C. 3301.32 and R.C. 2151.86 require employees of Head Start agencies and out-of-home child care employees to submit to criminal background checks; and R.C. 3701.249 states that an employee who contracts AIDS from a fellow employee has no cause of action for negligence against his employer. *Id.* All statutes were considered by the Court "legislation that the General Assembly has the constitutional authority to enact," despite the appellants' urged limitation. *Id.*

Just as the Supreme Court in *Central State* rejected AAUP's argument that only legislation that benefits employees may be enacted under Article II, Section 34, the Supreme Court should now likewise reject the courts of appeals' pronouncement that only legislation that has a "nexus" to "work environment conditions" or "employee economic welfare" is constitutional under Article II, Section 34. There is no "nexus" between work environment conditions or employee economic welfare and the requirement of R.C. 3301.32 and R.C. 2151.86 that certain child care employees submit to criminal record checks, nor is there any such "nexus" to R.C. 3701.249 prohibiting an employee from suing his employer for negligence after contracting AIDS from a fellow employee. Indeed, these statutes are at odds with improving "work environment conditions" and "employee economic welfare." Yet, these statutes were enacted by the General Assembly pursuant to Article II, Section 34, and were recognized by the Supreme Court as constitutional.

In the Second District Court of Appeals' recent decision *upholding* the constitutionality of R.C. 9.481, *City of Dayton v. State of Ohio, et al.* (2nd Dist., May 30, 2008), 2008-Ohio-2589, 2008 WL 2222716, the Second District acknowledged the conflict between the Supreme Court's decision in *Central State* and the courts of appeals' decisions in *Lima*, *Toledo*, and *Cleveland*, stating:

Some of the status mentioned by the Ohio Supreme Court bear no more "nexus" to the conditions of the "work environment" than the residency provisions in R.C. 9.481. *Lima*, 2007-Ohio-6419, at ¶ 18. For example, R.C. 102.03 places restrictions on the outside employment of various public employees for as long as twenty-four months after they leave public service. Likewise, granting immunity to employers for negligent transmission of the AIDS virus by fellow employees does not bear a significant nexus to the work environment itself. Nonetheless, the legislature's power to routinely enact these measures under Section 34 has been upheld. *Central State Univ.*, 87 Ohio St.3d at 61. The fact that the legislative ends do not bear a "nexus" to the conditions of the working environment does not mean that the legislature's goals in enacting these statutes is irrelevant. However, contrary to the Third District's conclusion, this does mean that Section 34 is not limited solely to legislation that bears a nexus to the conditions of the working environment as opposed to the status of being an "employee" – which attaches at hiring and sheds at firing. *Lima*, 2007-Ohio-6419, at ¶ 28.

Dayton, 2008-Ohio-2589, at ¶ 64.

Besides being clearly contrary to existing law, manipulating the scope of Article II, Section 34 merely in order to strike down R.C. 9.481 will result in a multitude of unintended consequences. The Ninth District's decision and the decisions in *Lima*, *Toledo*, and *Cleveland* muddy the previously clear scope of the General Assembly's legislative authority under Article II, Section 34 and invite an avalanche of lawsuits challenging the constitutionality of statutes on the basis that they are not "for the common welfare," or are not related to "working environment conditions." The residency

requirement prohibition of R.C. 9.481 is no different than prior legislation enacted and recognized by the Court as constitutional under Article II, Section 34. The Ninth, Eighth, Third, and Sixth District courts of appeals attempts to somehow distinguish R.C. 9.481 from prior legislation have fallen short, instead resulting in legal authority that constitutes a severe departure from the Supreme Court's previous precedent and brings into question the constitutionality of a wide array of existing and future legislation. Accordingly, the court of appeals' decision must be overturned and R.C. 9.481 upheld as a valid and constitutional enactment under Article II, Section 34 of the Ohio Constitution.

CONCLUSION

Through its enactment of R.C. 9.481, the General Assembly has determined that it is in the general welfare of public employees to be able to choose where to live, free of employment conditions to the contrary. R.C. 9.481 carries with it the presumption of validity and constitutionality, and is comparable to previous legislation that has been enacted and upheld pursuant to Article II, Section 34. In its decision, the court of appeals failed to distinguish R.C. 9.481 from prior legislation upheld by the Supreme Court under Article II, Section 34. Further, the elements promulgated by the court of appeals to define what is "general welfare" legislation under Article II, Section 34 are not only in conflict with established Supreme Court precedent, but are also indicia of the judicial activism exercised by the court of appeals in finding R.C. 9.481 invalid and, if permitted to stand, pose a significant threat to existing and future legislation enacted under Article II, Section 34.

Therefore, in order to uphold the clear and unambiguous terms of Article II, Section 34 and protect the General Assembly's authority to enact legislation for the

comfort, health, safety and general welfare of employees, the court of appeals' decision that R.C. 9.481 is unconstitutional must be overturned.

Respectfully submitted,

FAULKNER, MUSKOVITZ & PHILLIPS, LLP

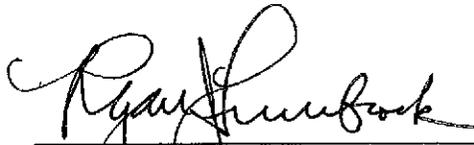


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MERIT BRIEF OF APPELLANTS FRATERNAL ORDER OF POLICE, AKRON LODGE NO. 7 AND AKRON FIREFIGHTERS ASSOCIATION, IAFF LOCAL 330, *et al.* was served via regular U.S. mail this 24 day of July, 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, 17th Floor, Columbus, Ohio 43215.



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IN THE SUPREME COURT OF OHIO

08-0418

FRATERNAL ORDER OF POLICE,
AKRON LODGE NO. 7 AND AKRON
FIREFIGHTERS ASSOCIATION,
IAFF LOCAL 330, et al.,

: On Appeal from the Summit
: County Court of Appeals,
: Ninth Appellate District
:
: Court of Appeals Case No. 23660

Appellants,

v.

CITY OF AKRON, et al.,

Appellees.

RECEIVED
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SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANTS

FRATERNAL ORDER OF POLICE, AKRON LODGE NO. 7 AND
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FILED
FEB 25 2009
CLERK OF COURT
SUPREME COURT OF OHIO

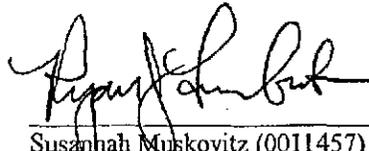
NOTICE OF APPEAL OF APPELLANTS
FRATERNAL ORDER OF POLICE, AKRON LODGE NO. 7 AND
AKRON FIREFIGHTERS ASSOCIATION, IAFF LOCAL 330, et al.

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, hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. 23660 on January 9, 2008.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

FAULKNER, MUSKOVITZ & PHILLIPS, LLP

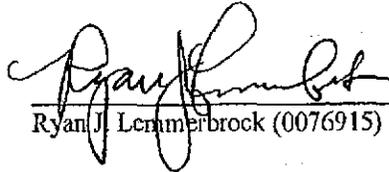


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF APPEAL was served via regular U.S. mail this 21 day of February, 2008, upon Deborah M. Forfia, Assistant Director of Law, City of Akron, 161 South High Street, Suite 202, Akron, Ohio 44308-1655, and Sharon A. Jennings, Esq., Assistant Attorney General, Constitutional Offices Section, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215.


Ryan J. Lemmerbrock (0076915)

STATE OF OHIO
COUNTY OF SUMMIT

COURT OF APPEALS
) DANIEL M. HORRIGAN
) ss:
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IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

SUMMIT COUNTY
CLERK OF COURTS
C.A. 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:

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

STATE OF OHIO

COUNTY OF SUMMIT

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COURT OF APPEALS
DANIEL M. HOPPIN
THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
JAN -9 AM 7:48

SUMMIT COUNTY
CLERK OF COURTS
C. A. No. 23660

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

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{¶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.

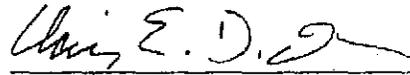
Judgment reversed and
the cause remanded.

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.

APPEARANCES:

MAX ROTHAL, Law Director, DEBORAH M. FORFIA and PATRICIA AMBROSE RUBRIGHT, Assistant Law Directors, for appellants.

MARC DANN, Ohio Attorney General, FRANK M. STRIGARI and JULIE KELLEY CANNATTI, Assistant Attorneys General, for appellees.

SUSANNAH MUSKOVITZ and RYAN J. LEMMERBROCK, Attorneys at Law, for appellees.

DANIEL H. HITCHCOCK, CLERK OF COURT
IN THE COURT OF COMMON PLEAS

2007 MAR 30 4:17:24 PM
SUMMIT COUNTY, OHIO

CITY OF AKRON)	CASE NO. CV 2006-05-2759
Plaintiffs,)	JUDGE BOND
-vs-)	
STATE OF OHIO, et al.,)	ORDER
Defendants.)	<u>Summary Judgment</u>

This cause came before the Court upon Defendants FOP 7 and IAFF Local 330, et al.'s Motion for Summary Judgment, Plaintiffs City of Akron and Donald L. Plusquellic's Motion for Summary Judgment, and Defendant State of Ohio's Motion for Summary Judgment. The parties have filed briefs in opposition and reply briefs. Upon consideration thereof, this Court finds as follows.

Senate Bill 82, as passed by the Ohio Legislature and signed into law on January 27, 2006, enacts R.C. 9.481, which provides 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 City of Akron, as articulated in its City Charter sections 105a and 106(5b), has a residency requirement that classified employees must be residents of Akron within twelve months of appointment or promotion. The City of Akron has chosen to keep its residency requirement despite the passage of R.C. 9.481. On May 1, 2006, the City of Akron filed this action for declaratory relief. On May 2, 2006, the Fraternal Order of Police, Akron Lodge No. 7 and the Akron Firefighters Association, IAFF Local 330 filed an action, CV 2006-05-2797,

seeking to enforce R.C. 9.481 over the City of Akron's residency requirement. On June 14, 2006, the cases were consolidated.

Pursuant to Civ. R. 56(C), summary judgment is proper if: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327. The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 293. The movant must point to some evidence in the record of the type listed in Civ. R. 56(C) in support of his motion. *Id.* Once this burden is satisfied, the nonmoving party has the burden, as set forth in Civ. R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.*

The State premises its authority to pass R.C. 9.481 on Article II, Section 34 of the Ohio Constitution, which 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.

The City of Akron premises its authority to retain its residency requirement on Article XVIII, Section 3 of the Ohio Constitution, which 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.

In *City of Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St. 3d 1, the Supreme Court of Ohio addressed the matter of how these constitutional provisions interact when the state passes a law under Article II, Section 34, that arguably interferes with a municipality's home rule powers under Article XVIII, Section 3. The state law at issue was a statutorily-mandated bargaining procedure.

[Article II, Section 34] 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.

R.C. Chapter 4117, the Public Employees' Collective Bargaining Act, is indisputably concerned with the "general welfare" of employees. Therefore, pursuant to Section 34, Article II, the power of the General Assembly to adopt the Act *may not be affected in any way by the "home rule" amendment*. The binding arbitration provision of R.C. Chapter 4117 is a valid exercise of the legislative function under Section 34, Article II.

Id.

Thus, if validly enacted under Article II, Section 34, R.C. 9481 would trump the City of Akron's residency requirement adopted under its home rule authority. The question becomes whether or not R.C. 9.481 is for the general welfare of employees and thus falls under the grant of authority given under Article II, Section 34. While the language of R.C. 9.481 mimics the constitutional language from Article II, describing itself as providing "for the comfort, health, safety, and general welfare of those public employees," that fact, by itself, is not dispositive of the issue. The next question that must be asked is whether or not the language of Article II, specifically the words "general

welfare," is clear and unambiguous. These words, if given their ordinary, broad meaning, would amount to a nearly limitless and unconditional grant of power. The issue requires closer examination.

The *Rocky River* Court performs that very examination by engaging in a discussion regarding the issue of constitutional construction and interpretation and the intent of the constitutional convention, only to arrive at the following:

But none of this really makes any difference. The language of Section 34 is so clear and unequivocal that resort to secondary sources, such as the constitutional debates, is actually unnecessary. Where the language of a statute or constitutional provision is clear and unambiguous, it is the duty of courts to enforce the provision as written. Debates of a constitutional convention are proper matter for consideration where they throw light on the correct interpretation of any provision of the Constitution, but if the provision is clear and may be read without interpretation, the discussion leading to its adoption is of no value, nor are the various statements by the members of the convention and the resolutions offered during the convention determinative of the meaning of the amendment.

Regardless of what was said or not said during the debates, the unalterable fact remains that Section 34, as it was ultimately adopted, transcends the limitations urged by appellant. If the framers of our Constitution had intended this section to apply only to minimum wage, almost half of the forty-one words contained in this section must be regarded as mere surplusage, since it further provides that laws may be passed "fixing and regulating the hours of labor * * * and providing for the comfort, health, safety and general welfare of all employes * * *." Are we to believe, as appellant apparently does, that these words were not intended to have meaning? To ask the question is to answer it.

Id. (citations and quotations omitted).

In *Rocky River*, the Supreme Court of Ohio has found that the language of Article II, Section 34, is clear and unambiguous, and that further examination of construction and interpretation are unnecessary. "Welfare" means well-being. Webster's Ninth New Collegiate Dictionary (1986). Black's Law Dictionary defines "general welfare" as health, peace, morals, and safety. Where the language of a statute or constitutional

provision is clear and unambiguous, it is the duty of courts to enforce the provision as written. *Bernardini v. Bd. of Edn.* (1979), 58 Ohio St. 2d 1. Given such an expansive reading, and because there is no constitutional construction analysis to engage in, this Court must find that R.C. 9.481 is for the general welfare of employees. Laws thus enacted under Article II, Section 34 of the Ohio Constitution trump the home rule provision, and a home rule analysis is never reached.

The ruling of this Court is reached because of its obligation to act within controlling precedent. But for this obligation, this Court's opinion would be adverse to the conclusion reached today. The Court points to the dissenting opinion of Justice Wright in *Rocky River* as offering a cogent and compelling analysis that is more insightful to the needs of a modern society than that offered by the majority opinion.

While the home rule arguments offered by the City of Akron are never reached, Plaintiffs also argue that R.C. 9.481 is unconstitutional because it violates the Uniformity Clause, Article II, Section 26, of the Ohio Constitution which provides "[a]ll laws of a general nature, shall have a uniform operation throughout the State." *State ex rel.*

Stanton v. Powell (1924), 109 Ohio St. 383, provides:

Section 26, Art. II of the Constitution, was not intended to render invalid every law which does not operate upon all persons, property or political subdivisions within the state. It is sufficient if a law operates upon every person included within its operative provisions, provided such operative provisions are not arbitrarily and unnecessarily restricted. . . . A law operates as an unreasonable classification where it seeks to create artificial distinctions where no real distinction exists.

Plaintiffs argue that because R.C. 9.481 creates arbitrary distinctions between both full-time and part-time employees, and public and private employees, it fails the Uniformity Clause. The Supreme Court of Ohio has more recently revisited the question

of "unreasonable classifications" with regard to the Uniformity Clause. In *Austintown Township Bd. of Trustees v. Tracy* (1996), 76 Ohio St. 3d 353, the Court explains:

[T]he fact that the Uniformity Clause does not bar classifications which are neither arbitrary nor unreasonable does not necessarily mean that a classification which is deemed to be arbitrary or unreasonable, necessarily violates the Uniformity Clause. This is so because arbitrary classifications violate the Uniformity Clause only where those classifications are contained in a statute first deemed to be special or local as opposed to general.

A statute is of general nature "if the subject does or may exist in, and affect the people of, every county, in the state . . ." *Desenco, Inc. v. City of Akron* (1999) 84 Ohio St. 3d 535. Because R.C. 9.481 is applicable to every part of the state and to all persons in the same category, it is a general statute and in uniform operation throughout the state. As such it does not violate the Uniformity Clause.

Plaintiffs further argue that R.C. 9.481 violates the Due Process Clause and the Equal Protection Clause of the Ohio Constitution because of these same arbitrary distinctions. These arguments are not well taken. *Avon Lake City School Dist. v. Limbach* (1988), 35 Ohio St. 3d 118, provides:

While there may be occasions where a political subdivision may challenge the constitutionality of state legislation, it is not entitled to rely upon the protections of the Fourteenth Amendment. A political subdivision . . . receives no protection from the Equal Protection or Due Process Clauses vis-a-vis its creating state.

As a political subdivision, The City of Akron cannot rely on the Equal Protection Clause or the Due Process Clause for its claims against the State of Ohio.

This Court finds that no genuine issue as to any material fact remains and that Defendants are entitled to judgment as a matter of law. The Court hereby finds R.C. 9.481 constitutional and denies the City of Akron and Donald L. Plusquellic injunctive

relief. The City of Akron's Charter Sections 105a and 106(5b) must succumb to state law. Therefore Defendant State of Ohio's Motion for Summary Judgment and Defendants FOP 7 and IAFF Local 330, et al.'s Motion for Summary Judgment are GRANTED. Plaintiffs City of Akron and Donald L. Plusquellic's Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

JUDGE JANE BOND

Pursuant to Civ.R. 58(B), the Clerk of Courts shall serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

JUDGE JANE BOND

cc: Attorney Susannah Muskovitz
Assistant Director of Law Deborah M. Forfia
Assistant Attorney General Frank M. Strigari

C
BALDWIN'S OHIO REVISED CODE ANNOTATED
GENERAL PROVISIONS
CHAPTER 9. MISCELLANEOUS
ADDITIONAL MISCELLANEOUS
→9.481 Residency requirements prohibited

(A) As used in this section:

(1) "Political subdivision" has the same meaning as in section 2743.01 of the Revised Code.

(2) "Volunteer" means a person who is not paid for service or who is employed on less than a permanent full-time basis.

(B)(1) Except as otherwise provided in division (B)(2) of this section, no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state.

(2)(a) Division (B)(1) of this section does not apply to a volunteer.

(b) To ensure adequate response times by certain employees of political subdivisions to emergencies or disasters while ensuring that those employees generally are free to reside throughout the state, the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state. For the purposes of this section, an initiative petition shall be filed and considered as provided in sections 731.28 and 731.31 of the Revised Code, except that the fiscal officer of the political subdivision shall take the actions prescribed for the auditor or clerk if the political subdivision has no auditor or clerk, and except that references to a municipal corporation shall be considered to be references to the applicable political subdivision.

(C) Except as otherwise provided in division (B)(2) of this section, employees of political subdivisions of this state have the right to reside any place they desire.

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SECTION 106. PERSONNEL DIRECTOR - RULES AND REGULATIONS.

The Personnel Director, under the direction of the Commission, shall direct and supervise the administrative work of the Personnel Department; shall prepare and recommend rules and regulations for the administration of the civil service provisions of the Charter, which shall become effective after approval by the Commission; shall administer such rules and regulations and shall propose amendments thereto; shall prepare an annual report to the Mayor for the Civil Service Commission and Council; shall keep minutes of the proceedings of the Commission; shall make investigation concerning the enforcement and regulations thereunder; shall perform such other functions as may be required by the Civil Service Commission.

It is hereby provided and the rules and regulations shall provide:

(1) For the classification and standardization of all positions in the classified service. The classification into groups and subdivisions shall be based upon and graded according to their duties and responsibilities, and so arranged as to permit the filling of the higher grades, so far as practicable through promotion. All salaries shall be uniform for like service in each grade, as the same shall be standardized and classified by the Civil Service Commission. The Commission shall have the sole power to create new classification.

(2) For open competitive examinations to be given under the direction of the Personnel Director to test the relative fitness of applicants for such positions. Employees of any public utility or agency taken over by the City who have been in the service of said utility or agency for three (3) years prior to the time of such acquisition shall come under the provisions of the merit system without examination; but vacancies thereafter occurring in such service shall be filled from eligible lists in the manner herein provided.

(3) For public notice of the time and place of all competitive examinations.

(4) For the creation by Personnel Director of eligible lists upon which shall be entered the names of successful candidates in the order of their standing in such examination or test.

(5) For the rejection by the Personnel Director, by authority of the Commission, of candidates or eligibles who failed to meet reasonable qualification requirements, or who have attempted deception or fraud in

connection with any application or examination.

(5a) Repealed; Amendment adopted by electors 11-4-80)

(5b) For declaring that no person shall hold an appointed or promoted position in the classified service of the City of Akron unless he shall become a resident citizen of the City of Akron within twelve (12) months of his appointment or promotion, and remain a resident citizen of the City of Akron during the term of his employment, except that such provisions shall not be applicable to:

1. Full-time permanent employees of the City of Akron whose continuous employment began prior to and continued through November 7, 1978; or

2. Appointment or promotion to a position entailing work performed primarily outside of the corporate limits of Akron; or

3. Employees of agencies which serve areas outside of the City of Akron and which receive most of their funding from other than City of Akron Funds. However, these employees must live within the region their agency serves.

(5c) For declaring methods of granting preference points to the passing grades of those persons taking non-promotional examinations who are resident citizens of the City of Akron continuously for one year immediately prior to examination.

(6) For the certification to the appointing authority by the Personnel Director from the appropriate eligible list to fill vacancies in the classified service of the persons with the three highest scores on such list, or of the person or persons on such list when the same contains less than three scores.

(7) For promotion based on competitive examinations and records of efficiency and seniority. Lists shall be created and promotions made in the same manner as in original appointments. Any advancement from one job classification to another for which the maximum rate of pay is higher shall constitute promotion. Whenever practicable, vacancies shall be filled by promotion.

(8) For transfer from a position to a similar position in the same class and grade for reinstatement on the eligible list within one year of persons who, without fault or delinquency on their part, are separated from the service or reduced in rank.

(9) (Repealed; V 107 p 582; approved by voters Nov. 2, 1971.)

(10) (Repealed; V 107 p 582; approved by voters Nov. 2, 1971.)

(11) For investigating and keeping a record of the efficiency of officers and employees in the classified service, and for requiring performance evaluations and records relative thereto from appointing officers. Each employee's own record shall be available for his/her inspection at all times.

(12) For a period of probation not exceeding six (6) months before an appointment or employment is made permanent, during which period a probationer may be discharged or reduced by the appointing authority without the right of appeal to the Commission; provided, however, that said probationary period shall be extended for each class of employee, for that period of time which is equivalent to the period of time during which employees entering service in that classification are required to participate in formal, full-time training programs. In no case shall the combined probationary and training period exceed nine (9) months.
(Approved by voters Nov. 4, 1975)

(13) Such other rules shall be adopted which are not inconsistent with the foregoing provisions of this section as may be necessary and appropriate for the enforcement of the merit system.
(V 46 p 444; Approved by voters Nov. 2, 1937)
(Amendment adopted by electorate 11-4-80)

SECTION 107. EXAMINATIONS.

All examinations shall be practical and impartial, and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the position for which appointment is sought.

SECTION 108. APPOINTMENTS.

When a position in the classified service is to be filled, the appointing authority shall notify the Personnel Director of the fact and the Personnel Director shall certify to such authority the names and addresses of the three candidates standing highest on the appropriate eligible list for the position. In the event of ties in total final grade or final score, those persons having final tie grades or final tie scores shall also be certified in their relative position on the eligible list as additional candidates. The appointing authority shall immediately appoint one of the persons certified to such position.

When the eligible list contains less than three names, then such names shall be certified from which number the appointing authority may appoint one for

such position. When no eligible list for such position exists or when the eligible list has become exhausted and until a new list can be created, the appointing authority may make a provisional appointment for a period of not to exceed ninety days upon authorization by the Personnel Director. A person certified three times from an eligible list to the same or similar position may be omitted from future certifications to such appointing authority. In the event that more than one position in the same classification is to be filled, the appointing authority shall fill one position before the Personnel Director shall certify any additional names.

Temporary appointments may be made for periods not to exceed two hundred and seventy days, and seasonal appointments may be made for the duration of the specified season. Wherever practicable, temporary or seasonal appointments shall be made from eligible lists in the manner provided herein.

(V 46 p 444; Approved by voters Nov. 2, 1937) (Amendment adopted by electorate 11-4-80)

SECTION 109. PRESENT CIVIL SERVICE EMPLOYEES.

(Repealed; V 95 p 107; Approved by voters Nov. 8, 1966.)

SECTION 110. CERTIFICATION OF PAY ROLL.

It shall be unlawful for the Director of Finance or other public disbursing officer to pay any salary or compensation for service to any person holding a position in the classified service unless the payroll or account for such salary or compensation shall bear the certificate of the commission that the persons named therein have been appointed or employed in accordance with the civil service provisions of this Charter and of the rules established thereunder. Any sums paid contrary to the provisions of this section may be recovered from any officer paying or authorizing the payment thereof and from sureties on his official bond.

SECTION 111. INVESTIGATIONS.

In any investigation conducted by the Commission it shall have the power to subpoena and require the attendance of witnesses and the production of books and papers pertinent to the investigation and to administer oaths to such witnesses.

SECTION 112. POLITICAL AND RELIGIOUS BELIEFS.

No persons in the classified service or seeking admission thereto, shall be appointed, rejected for admission, reduced, laid off, discharged or in any way favored or unlawfully discriminated against because of their political

Const. Art. II, § 34

C

BALDWIN'S OHIO REVISED CODE ANNOTATED
CONSTITUTION OF THE STATE OF OHIO
ARTICLE II. LEGISLATIVE

-O Const II Sec. 34 Wages and hours; employee health, safety and welfare

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 employes; and no other provision of the constitution shall impair or limit this power.

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Const. Art. XVIII, § 3

C
BALDWIN'S OHIO REVISED CODE ANNOTATED
CONSTITUTION OF THE STATE OF OHIO
ARTICLE XVIII. MUNICIPAL CORPORATIONS
→ **O Const XVIII Sec. 3 Municipal powers of local self-government**

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.

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Const. Art. XVIII, § 7

C
BALDWIN'S OHIO REVISED CODE ANNOTATED
CONSTITUTION OF THE STATE OF OHIO
ARTICLE XVIII. MUNICIPAL CORPORATIONS
→ O Const XVIII Sec. 7 Municipal charter

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

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Const. Art. II, § 26

C
BALDWIN'S OHIO REVISED CODE ANNOTATED
CONSTITUTION OF THE STATE OF OHIO
ARTICLE II. LEGISLATIVE

→ O Const II Sec. 26 General laws to have uniform operation; laws other than school laws to take effect only on legislature's authority

All laws, of a general nature, shall have a uniform operation throughout the State; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except, as otherwise provided in this constitution.

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Cleveland v. State
Ohio App. 8 Dist., 2008.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.
City of CLEVELAND, et al., Plaintiffs-Appellants
v.
STATE of Ohio, et al., Defendants-Appellees.
Nos. 89486, 89565.

Decided June 2, 2008.

Civil Appeal from the Cuyahoga County Court of
Common Pleas, Case Nos. CV-590414 and CV-
590463.

Robert J. Triozzi, Director of Law, Gary S. Singletary, Assistant Director of Law, Joseph G. Hajjar, Assistant Director of Law, Thomas J. Kaiser, Chief Trial Counsel, City of Cleveland, Cleveland, OH, for appellants.

State of Ohio, Office of the Attorney General, by Pearl M. Chin, Assistant Attorney General, Constitutional Offices Section, by Sharon A. Jennings, Assistant Attorney General, Chief Counsel's Staff, Columbus, OH, for appellees.

Henry A. Arnett, Livorno and Arnett Co., L.P.A., Columbus, OH, Amicus Curiae, OAPFF.

Joseph W. Diemert, Jr., Thomas M. Hanculak, Daniel A. Powell, Joseph W. Diemert, Jr. & Associates Co., Mayfield Heights, OH, for Cleveland Firefighters, et al.

Patrick A. D'Angelo, Cleveland, OH, for Cleveland Police Patrolmen's Association.

Ryan J. Lemmerbrock, Robert M. Phillips, Susannah Muskovitz, Faulkner, Muskovitz & Phillips, L.L.P., Cleveland, OH, for Fraternal Order of Police, et al.

Before: CELEBREZZE, J., CALABRESE, P.J., and

ROCCO, J.

FRANK D. CELEBREZZE, JR., J.

*1 (¶ 1) Appellant, City of Cleveland, brings this appeal of the trial court's decision granting summary judgment in favor of appellees, the State of Ohio, the Cleveland Police Patrolmen's Association, the Cleveland Firefighters Association Local 93, and the Fraternal Order of Police Lodge 8. The City of Cleveland also appeals the trial court's decision to deny summary judgment in its favor. At issue is whether R.C. 9.481 supersedes the City of Cleveland's home rule authority to enforce its residency requirement for city employees pursuant to City Charter Section 74. After a thorough review of the record and upon consideration of persuasive decisions on this issue in other districts,^{FN1} we reverse and remand.

FN1. At the time of the trial court's decisions, no appellate court had decided the issue now before us. Since these appeals were filed, both the Third and Ninth Districts have rendered opinions. See *City of Lima v. State*, Third Appellate No. 1-07-21, 2007-Ohio-6419, and *State v. City of Akron*, Ninth Appellate No. 23660, 2008-Ohio-38.

Procedural History

(¶ 2) On May 1, 2006, the City of Cleveland ("City") filed an action against the State of Ohio ("State") in the Cuyahoga County Court of Common Pleas seeking a declaration that R.C. 9.481 was unconstitutional (Case No. CV-590414). Also on May 1, 2006, in the same court, the Cleveland Police Patrolmen's Association, the Cleveland Firefighters Association Local 93, and the Fraternal Order of Police Lodge 8, and their members (collectively referred to as "Unions") filed a declaratory judgment and taxpayer action against the City, Mayor Frank Jackson, the City's Safety Director, the City's Civil Service Commission, and in-

dividual members of the Civil Service Commission, seeking to have the court hold that R.C. 9.481 was constitutional (Case No. CV-590463). On May 23, 2006, the two cases were consolidated because they both dealt with the constitutionality of R.C. 9.481.

{¶ 3} On October 16, 2006, all parties to the litigation filed motions for summary judgment, and subsequently all responsive briefs were filed. On February 23, 2007, the court entered its Order-Declaratory Judgment, granting summary judgment in favor of the State and Unions and denying summary judgment to the City, thereby upholding the constitutionality of R.C. 9.481.

{¶ 4} On February 26, 2007 and March 15, 2007, the City filed Notices of Appeal in Case Nos. CV-590414 and CV-590463, respectively. On March 19, 2007, the two appeals, Case Nos. 89486 and 89565, were consolidated. The City raises five assignments of error for our review. For clarity, we address them out of order.

Factual Background

{¶ 5} In 1912, the Ohio Constitution was amended to provide municipalities with the authority to adopt their own charters. Section 7, Article XVIII states:

{¶ 6} "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government." Section 3, Article XVIII states: "Municipalities shall have the authority to exercise all powers of self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with the general laws." This became known as the Home Rule Amendment.

*2 {¶ 7} On January 1, 1914, a City Charter became effective in Cleveland. As part of its Charter, Cleveland adopted an "Initiative and Referendum" procedure. On November 3, 1931, Cleveland voters

voted to amend the Charter by approving an employee residency requirement. On November 21, 1967, the voters repealed this amendment; however, on November 2, 1982, voters again approved an employee residency requirement through the enactment of City Charter Section 74.

{¶ 8} Section 74 of the City Charter states in relevant part:

{¶ 9} "Residency Requirements; Officers and Employees

{¶ 10} "(a) Except as in this Charter otherwise provided or except as otherwise provided by a majority vote of the Council of the City of Cleveland, every temporary or regular officer or employee of the City of Cleveland, including the members of all City boards and commissions established by the Charter or the ordinances of Cleveland, whether in the classified or unclassified service of the City of Cleveland, appointed after the effective date of the amendment, shall, at the time of his appointment, or within six months thereafter, be or become a bona fide resident of the City of Cleveland, and shall remain as such during the term of his office or while employed by the City of Cleveland."

{¶ 11} This amendment, as written, has remained the law in the City from the time of its adoption in November 1982 and has applied to all employees hired after its adoption.

{¶ 12} In 2006, the General Assembly enacted legislation that conflicts with Section 74 of the City Charter. R.C. 9.481(B)(1) states: "Except as otherwise provided in division (B)(2) of this section, no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state." Division (B)(2) exempts "volunteers," who are defined as any person "who is not paid for service or who is employed on less than a permanent full-time basis." R.C. 9.481(B)(2); see, also, (A)(2). Division (C) states: "[e]xcept as otherwise provided in division (B)(2) of this section, employees of political subdivisions

of this state have the right to reside any place they desire."R.C. 9.481.

{¶ 13} The parties agree that the inherent conflict between City Charter Section 74 and R.C. 9.481 is that which forms the basis of the case before us. These two laws cannot logically and legally coexist

{¶ 14} The trial court, in granting summary judgment in favor of the State and Unions, held that "R.C. 9.481 was lawfully enacted by the General Assembly to provide for the general welfare of the employees of Ohio's political subdivisions and is a matter of statewide concern. Section 34, Article II of the Ohio Constitution is the controlling provision, and conflicting local laws passed pursuant to the city's home rule power in Section 3, Article XVIII must succumb to state law, R.C. 9.481 is constitutional and upheld."(Order, Declaratory Judgment, Case Nos. CV-590414 and CV-590463, February 23, 2007.)

Review and Analysis

*3 {¶ 15} This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Cty Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "[T]he reviewing court evaluates the record * * * in a light most favorable to the nonmoving party. * * * [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741, 607 N.E.2d 1140.

{¶ 16} "Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable

minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 17} The trial court's decision essentially makes two distinct findings: that R.C. 9.481 was validly enacted under the Ohio Constitution and that, as enacted, it supersedes the City's home rule authority as it relates to Section 74 of the City Charter. We believe that the City's Assignments of Error V and III deal directly with these findings and are dispositive of this case; therefore, we address them first.

Assignment of Error V

{¶ 18} "The trial court erred with its determination that R.C. 9.481 was properly promulgated under Section 34, Article II of the Ohio Constitution."

{¶ 19} In its fifth assignment of error, the City argues that R.C. 9.481 was not validly enacted under Section 34, Article II of the Ohio Constitution. Specifically, it argues that Section 34 permits the General Assembly to enact laws to improve working conditions, but not to affect a city's authority to establish the qualifications, selection, and appointment of its employees. The State and Unions argue that prohibiting municipal residency requirements is within the purview of Section 34, Article II as being associated with providing for the "general welfare" of all employees.

{¶ 20} Two appellate courts have recently decided exactly this issue. In *City of Lima v. State*, Third Appellate No. 1-07-21, 2007-Ohio-6419; and *State v. City of Akron*, Ninth Appellate No. 23660, 2008-Ohio-38, each respective city was challenging whether R.C. 9.481 was validly enacted so as to supersede each municipality's employee residency requirement ordinance. In both cases, the trial courts had granted summary judgment in favor of the State on this issue. On appeal, both appellate courts re-

versed the lower court's decisions. We do the same.

*4 {¶ 21} Section 34, Article II states: "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." There is no dispute among the parties that Section 34, Article II supersedes a municipality's home rule authority as it relates to validly enacted state legislation. The dispute and this appeal, however, are premised on whether R.C. 9.481 is validly enacted legislation.

{¶ 22} Whether a statute is constitutional is a question of law reviewed de novo. *Wilson v. AC & S, Inc.*, 169 Ohio App.3d 720, 2006-Ohio-670, 864 N.E.2d 862. "[A]ll statutes are presumed constitutional, and the party challenging has the burden of proving otherwise" beyond a reasonable doubt. *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155, citing *Arnold v. City of Cleveland* (1993), 67 Ohio St.3d 35, 616 N.E.2d 163. "[I]t is not the function of a 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*, 76 Ohio St.3d 353, 356, 1996-Ohio-74, 667 N.E.2d 1174.

{¶ 23} We do not accept any interpretation of R.C. 9.481 to suggest it falls under the language in Section 34 that gives the legislature authority to enact this legislation by relating it to regulating hours or wages; therefore, we focus on whether the General Assembly derives its authority to enact R.C. 9.481 under the "general welfare of all employees" provision.

{¶ 24} In *Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St.3d 1, 539 N.E.2d 103 ("*Rocky River IV*"), the court held that "[t]his 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 unam-

biguous 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." (Internal citations omitted) *Rocky River IV*.

{¶ 25} The State and Unions argue that this broad grant of authority allows the General Assembly to enact legislation that prohibits residency requirements by municipalities. The City argues that to permit this legislation extends beyond the General Assembly's authority under the general welfare provision.

{¶ 26} The question before us is whether the general welfare clause extends to the status of being an employee, which transcends any particular locus, or whether it extends to employees acting within the scope of their employment. Since the definition of "employee" as "one who works for another in return for financial or other compensation" does not aid us in determining its commonly accepted meaning, we consider how it is used in the broader context of Section 34 as a whole. See *Lima*, supra.

*5 {¶ 27} As noted above, Section 34 contains separate clauses that extend the General Assembly's authority to pass legislation regarding employees' hours and wages. We believe the general welfare clause is to be read consistently with those clauses that regulate matters concerning employees acting within the scope of their employment. Just as the Third and Ninth Districts, we decline to interpret Section 34 to grant the General Assembly virtually limitless authority over municipalities in making employment decisions.

{¶ 28} Instead, we agree with the court in *Lima* that "[c]ommon sense dictates that the words 'comfort,' 'health,' and 'safety' relate to working environment conditions" and not to conditions of employment as the State argues. *Id.* at ¶ 35, 539 N.E.2d 103. We also agree with the recent appellate decisions in the Third and Ninth Districts, which found that the cases cited by the State are either

limited to employee economic welfare or have demonstrated some nexus between their legislative end and the working environment. See *Rocky River IV*, supra, and *State ex rel. Bd. of Trustees of Police & Fireman's Pension Fund v. Bd. of Trustees of Police, Pension Fund of Martins Ferry* (1967), 12 Ohio St.2d 105, 233 N.E.2d 135.

{¶ 29} R.C. 9.481 is not economic legislation, nor does it have a nexus between its legislative end and the working environment. To uphold it as a valid enactment by the General Assembly would be to extinguish the boundaries between the State's power and a municipality's authority to legislate the relationship between employee and employer. Therefore, we hold that R.C. 9.481 was not validly enacted pursuant to Section 34, Article II of the Ohio Constitution. Appellant's fifth assignment of error is sustained.

Assignment of Error III

{¶ 30} "The trial court erred in ruling that the City's Charter mandated residency requirement must succumb to R.C. 9.481 when the statute is not a 'General Law' under Section 34, Article II or for purposes of the General Home Rule Analysis."

{¶ 31} Having sustained the City's fifth assignment of error, we must address the City's third assignment of error as dispositive of the case. The City argues that the trial court erred in deciding that R.C. 9.481 was a law of "statewide concern that impacts the general welfare of working people." (See Order, p. 6.)

{¶ 32} We adopt an analysis similar to the courts in *Lima* and *Akron*. The critical inquiry here is whether the State has satisfied the three-prong preemption test in *City of Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, to demonstrate that R.C. 9.481 supersedes the City's residency requirement.

{¶ 33} The Ohio Supreme Court has adopted the three-part test set forth by the appeals court in *Can-*

ton. A state statute takes precedence over a local ordinance when (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government, and (3) the statute is a general law. *Canton*, supra.

*6 {¶ 34} The parties agree, as do we, that the first prong of the test is easily met. Section 74 of the City's Charter is in conflict with R.C. 9.481. As to the second prong, the parties seem to agree that Section 74 is not an exercise of the police power, but rather of local self-government. We have addressed that separately in the City's second assignment of error (see below). So it is in determining the third prong—whether R.C. 9.481 is a general law—that we believe disposes of this appeal.

{¶ 35} As stated above, Section 74 of the City's Charter was enacted pursuant to Section 3, Article XVIII, which grants municipalities home rule authority to pass laws, provided they do not conflict with general laws. Therefore R.C. 9.481 prevails over the residency requirement only if R.C. 9.481 is a general law.

{¶ 36} The court in *Canton* set forth a four-part test to determine 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." *Id.*

{¶ 37} We find the decision in *Lima* to be persuasive on this issue, and we hold that R.C. 9.481 is not a general law because it does not meet the third and fourth prongs of the *Canton* general law test.

{¶ 38} With respect to the third prong, the court in *Akron* held that "[s]ection 9.481 is an attempt by the General Assembly to circumvent the home rule authority of municipalities to maintain residency re-

quirements for their employees." *Akron*, supra. The *Lima* court held that because the exceptions contained in R.C. 9.481 are exemptions for "volunteers" and employees who were required to respond to emergencies and disasters, R.C. 9.481 "failed to set forth police, sanitary, or similar regulations and only served to limit the legislative authority of municipalities." *Lima*, supra. In essence, the court held that the State has not demonstrated that municipal employees have a constitutional right to choose where one lives and demand employment from an unwilling employer. *Id.* See, also, *Buckley v. City of Cincinnati* (1980), 63 Ohio St 2d 42, 406 N.E.2d 1106. Therefore, the court held that "prohibiting political subdivisions from requiring residency as a condition of employment is not an overriding state interest sufficient to meet" the third prong of *Canton's* general law test. *Lima*, at ¶ 80.

{¶ 39} The *Lima* court also held that R.C. 9.481 fails the fourth prong of the *Canton* general law test, and we agree. Specifically, the law does not prescribe a rule of conduct upon citizens generally since its plain language states: "[e]xcept as otherwise provided in division (B)(2) of this section, no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state." (Emphasis added.) On its face, R.C. 9.481 imposes a restriction on the conduct of political subdivisions, not on that of citizens generally; therefore, it fails to meet the fourth prong of the *Canton* general law test.

*7 {¶ 40} R.C. 9.481 cannot pass *Canton's* preemption test, having failed its third and fourth prongs; therefore, we sustain the City's third assignment of error.

Assignment of Error II

{¶ 41} "The trial court erred with its determination that R.C. 9.481 addressed a matter of statewide concern as the City's residency requirement is exclusively a matter of local self-government that

does not affect the general public of the state as a whole more than it does the City's local inhabitants."

{¶ 42} In its second assignment of error, the City argues that its residency requirement is a valid enactment of law as a matter of local self-government. The State agrees that the City acted as a matter of local self-government, as opposed to acting under its police powers. (See Appellee's brief, page 25.)

{¶ 43} The second prong of the *Canton* test, if satisfied, supports a finding that the state statute supersedes a municipality's home rule authority. The second prong requires that "the ordinance is an exercise of police power, rather than of local self-government." The difference in the positions of the parties lies in the fact that, under the City's theory, by acting as a matter of local government, it necessarily falls outside the second prong of the *Canton* test and, therefore, remains valid in the face of a conflicting state statute; while, under the State's theory, an ordinance that is an exercise of self-government places it outside the purview of *Canton* and, therefore, it must succumb to a conflicting state statute.

{¶ 44} We agree with the City and with the holding in *Am. Fin. Servs. Assn. v. City of Cleveland*, 112 Ohio St.3d 170, 173, 2006-Ohio-6043, 858 N.E.2d 776, that "[i]f an allegedly conflicting city ordinance relates solely to self-government, the analysis stops because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction."

{¶ 45} Although we adopt the City's reasoning, having held that R.C. 9.481 is not a general law under the third and fourth prongs of the *Canton* test, we do not expressly accept the State's concession. Therefore, we find the City's second assignment of error moot.

Assignment of Error I

{¶ 46} "The trial court erred in not recognizing long

standing precedent that municipal employee residency requirements do not deprive individuals of any fundamental rights. It is long standing Ohio law that there is no constitutional right to be employed by a municipality while living elsewhere."

{¶ 47} In its first assignment of error, the City argues that, while individuals have a right to live where they choose, this right does not include the right to demand employment from the government. There is ample case law in Ohio to support the City's contention. See *Buckley*, supra; *Senn v. City of Cleveland*, Cuyahoga App. No. 84598, 2005-Ohio 765; *State ex rel Fisher v. City of Cleveland*, Cuyahoga App. No. 83945, 2004-Ohio-4345. Indeed, the recent decisions in *Lima*, supra, and *Akron*, supra, lend additional support to this argument.

*8 {¶ 48} Having sustained the City's fifth and third assignments of error, we decline to explicitly sustain or overrule this assignment of error.

Assignment of Error IV

{¶ 49} "The trial court erred in holding that R.C. 9.481 does not violate section 26, Article II, Section 26(sic) of the Ohio Constitution as the class of employee affected by the statute is arbitrarily and capriciously drawn."

{¶ 50} Having held that R.C. 9.481 was not validly enacted, nor does it supersede Ohio's Home Rule Amendment, we do not need to determine whether it violates Article II, Section 26, the Uniformity Clause, of the Ohio Constitution. We do, however, struggle to accept the State's argument that R.C. 9.481 is uniform in its application when it carves out an exception for a category of volunteers, which includes paid part-time and temporary employees. Nonetheless, the City's fourth assignment of error is moot.

Conclusion

{¶ 51} The City's fifth and third assignments of er-

ror are sustained. The City's second and fourth assignments of error are moot in light of our disposition of the fifth and third assignments of error. Finally, we have declined to rule on the City's first assignment of error.

{¶ 52} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants recover of said appellees costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, J., Concurr (With Separate Opinion).

ANTHONY O. CALABRESE, JR., P.J., Dissents (With Separate Opinion).

KENNETH A. ROCCO, J., Concurring:

{¶ 53} I question the wisdom of the city's unbending residency requirement, which can and does impose hardships on some of its employees and their families and thus limits the city's ability to attract and retain the best and brightest in its employment. As the population ages, reducing the available pool of applicants for more physically and psychologically demanding municipal jobs like police and fire protection, the city may find an insufficient pool of qualified applicants willing to accept the residency requirement. However, I do not question the city's constitutional authority to make this decision for itself. Therefore, I agree that we must reverse the trial court's decision and find that the city charter supersedes R.C. 9.481.

{¶ 54} I whole-heartedly agree that R.C. 9.481 does

not regulate hours or wages, or provide for the comfort, health, safety, or general welfare of all employees. See *Lima v. State*, Allen App. No. 1-07-21, 2007-Ohio-6419. It was not enacted pursuant to the legislature's authority under Art. II, § 34 of the Ohio Constitution, and therefore does not have supremacy that section grants over enactments pursuant to other constitutional provisions.

*9 {¶ 55} City Charter § 74 is in conflict with R.C. 9.481, requiring us to address the question whether the city charter has precedence over the statute under the city's home rule powers under Art. XVIII, § 3. "The first step in a home-rule analysis is to determine whether the matter in question involves an exercise of local self-government or an exercise of local police power." *Am. Financial Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 858 N.E.2d 776, 2006-Ohio-6043, ¶ 23, citing *Twinsburg v. State Emp. Relations Bd.* (1988), 39 Ohio St.3d 226, 228, 530 N.E.2d 26. If the municipal enactment is an exercise of local police powers, then a "general" state law will take precedence over it. *Canton v. State*, 95 Ohio St.3d 149, 151, 766 N.E.2d 963, 2002-Ohio-2005, ¶ 9. If it is an exercise of local self-government, then it takes precedence. *Am. Financial Servs.*, supra.

{¶ 56} The parties here have agreed that City Charter § 74 is not an exercise of local police powers. Consequently, there is no need to address the question whether R.C. 9.481 is a general law. Judge Celebrezze's conclusion that R.C. 9.481 is not a general law must be regarded as a display of excessive caution. It is not a necessary part of the constitutional analysis in this case.

{¶ 57} I write separately to address more fully the question whether the city charter provision is an exercise of local self-government. In my view, it is difficult to imagine a more local concern than qualifications for municipal employment. See *State Personnel Bd. of Rev. v. Bay Village Civ. Serv. Comm.* (1986), 28 Ohio St.3d 214, 216, 503 N.E.2d 518 ("A municipality is considered to have general home-rule authority to regulate the appointment, re-

moval, qualifications, compensation, and duties of its officers and employment"). Residency can be rationally considered a legitimate job qualification, as residents are more likely than non-residents to be concerned about the success of the city and about the welfare of their fellow residents. The state has expressed concerns about the "extraterritorial effects" of residency requirements depriving other municipalities of residents they might otherwise have. However, no municipality can claim a right to residents, so I cannot view this extraterritorial effect as a matter of statewide concern subject to state regulation.

ANTHONY O. CALABRESE, JR., P.J., Dissenting:

{¶ 58} I respectfully dissent from my learned colleagues in the majority. I believe that there is substantial evidence in the record to support the trial court's decision. I believe the trial court's actions were proper and should be affirmed.

{¶ 59} "[I]t 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*, 76 Ohio St.3d 353, 356, 667 N.E.2d 1174, 1996-Ohio-74.

{¶ 60} "[A]ll statutes are presumed constitutional, and the party challenging has the burden of proving otherwise" beyond a reasonable doubt. *State v. Boczar*, 113 Ohio St.3d 148, 863 N.E.2d 155, citing *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 38-39, 616 N.E.2d 163; *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 224 N.E.2d 906 ("[W]hen an enactment of the General Assembly is challenged, the challenger must overcome a strong presumption of constitutionality"). All presumptions and applicable rules of statutory construction are applied to uphold a statute from constitutional attack. *State v. Dorso* (1983), 4 Ohio St.3d 60, 61, 446 N.E.2d 449; *State v. Stambaugh* (1987), 34 Ohio St.3d 34, 35, 517 N.E.2d 526.

*10 {¶ 61} In the case at bar, the General Assembly used its broad authority under Section 34, Article II to provide for the general welfare of public employees by enacting R.C. 9.481, which removes residency requirements as a condition of public employment. Moreover, R.C. 9.481 provides a broad grant of authority to the General Assembly to legislate for the general welfare of public employees. In addition, conditions of public employment, such as residency requirements, are within the General Assembly's authority to regulate and provide for the general welfare of public employees. R.C. 9.481 expressly conforms with R.C. Chapter 4117, and the regulation of the residency requirement is a matter of statewide concern and, thus, R.C. 9.481 supersedes Cleveland's residency requirement.

{¶ 62} Overturning a trial court and finding a statute to be unconstitutional is an extreme remedy. I do not believe the evidence in the case at bar rises to the level of unconstitutionality. I would, therefore, agree with the lower court and uphold the constitutionality of the statute passed by the Ohio legislature.

Ohio App. 8 Dist., 2008.
Cleveland v. State
Slip Copy, 2008 WL 2252542 (Ohio App. 8 Dist.),
2008 -Ohio- 2655

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Dayton v. State
Ohio App. 2 Dist.,2008.

Court of Appeals of Ohio,Second District, Mont-
gomery County,
DAYTON, Appellant,

v.

The STATE of Ohio et al., Appellees.
No. 22221.

No. 22221.

Decided May 30, 2008.

Background: City brought declaratory judgment action against state, challenging constitutionality of statute prohibiting political subdivisions from imposing a residency requirement as a condition of employment. The Court of Common Pleas, Montgomery County, No. 2006-CV-3507, entered summary judgment in favor of the state. City appealed.

Holdings: The Court of Appeals, Fain, J., held that: (1) grant of constitutional authority to legislature to provide for the general welfare of employees may not be impaired by any other provision of the state constitution; (2) statute prohibiting residency requirements was a valid exercise of legislature's broad authority to provide for the general welfare of employees; and (3) statute prohibiting residency requirements did not violate state constitutional Uniformity Clause.

Affirmed.

Grady, J., dissented and filed opinion.

[1] Constitutional Law 92 ↪990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality

92k990 k. In General. Most Cited

Cases
Courts must presume the constitutionality of law-fully enacted legislation.

[2] Constitutional Law 92 ↪990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality

92k990 k. In General. Most Cited

Cases

Constitutional Law 92 ↪1004

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality

92k1001 Doubt

92k1004 k. Proof Beyond a Reasonable Doubt. Most Cited Cases

When considering the constitutionality of legislation passed by the General Assembly, courts presume it to be constitutional and will not declare it to be unconstitutional unless it appears beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.

[3] Labor and Employment 231H ↪3

231H Labor and Employment
231HI In General
231Hk2 Constitutional and Statutory Provisions
231Hk3 k. In General. Most Cited Cases

Municipal Corporations 268 ↪65

268 Municipal Corporations

268III Legislative Control of Municipal Acts, Rights, and Liabilities

268k65 k. Local Legislation. Most Cited

Cases

Broad grant of constitutional authority to legislature to provide for the general welfare of employees may not be impaired by the home rule provision, or by any other provision of the Ohio Constitution, including the preamble. Const. Art. 2, § 34; Art. 18, § 3.

[4] Municipal Corporations 268 ⇨67(1)

268 Municipal Corporations

268III Legislative Control of Municipal Acts, Rights, and Liabilities

268k67 Appointment and Removal of Officers

268k67(1) k. In General. Most Cited

Cases

Statute prohibiting political subdivisions from imposing a residency requirement as a condition of employment was valid exercise of legislature's broad authority to provide for the general welfare of employees. Const. Art. 2, § 34; R.C. § 9.481.

[5] Administrative Law and Procedure 15A ⇨412.1

15A Administrative Law and Procedure

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(C) Rules and Regulations

15Ak412 Construction

15Ak412.1 k. In General. Most Cited

Cases

Municipal Corporations 268 ⇨120

268 Municipal Corporations

268IV Proceedings of Council or Other Governing Body

268IV(B) Ordinances and By-Laws in General

al

268k120 k. Construction and Operation.

Most Cited Cases

Statutes 361 ⇨210

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k210 k. Preamble and Recitals.

Most Cited Cases

A "preamble" is the introductory part of a statute, ordinance, or regulation that states the reasons and intent of the law or regulation or is used for other explanatory purposes.

[6] Constitutional Law 92 ⇨2350

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)2 Encroachment on Judiciary

92k2350 k. In General. Most Cited

Cases

Statutes 361 ⇨4

361 Statutes

361I Enactment, Requisites, and Validity in General

361k4 k. Powers and Duties of Legislature in General. Most Cited Cases

General Assembly may pass any law that is not constitutionally forbidden; if a particular law conflicts with existing case law, that is a matter for the courts to resolve.

[7] Municipal Corporations 268 ⇨124(3)

268 Municipal Corporations

268V Officers, Agents, and Employees

268V(A) Municipal Officers in General

268k124 Constitutional and Statutory Provisions

268k124(3) k. Eligibility and Qualification. Most Cited Cases

Statutes 361 ⇨73(1)

361 Statutes

36111 General and Special or Local Laws

361k70 Uniformity of Operation of General

Laws

361k73 Places

361k73(1) k. In General. Most Cited

Cases

Statute prohibiting political subdivisions from imposing a residency requirement as a condition of employment did not violate state constitutional Uniformity Clause; although law distinguished among "full-time" employees, "part-time" employees, and "volunteers," the subject matter of the statute, i.e., residency, was general, and law would apply uniformly throughout the state as to all persons in the same category. Const. Art. 2, § 26; R.C. § 9.481.

[8] Statutes 361 ↩71

361 Statutes

36111 General and Special or Local Laws

361k70 Uniformity of Operation of General

Laws

361k71 k. In General. Most Cited Cases

A two-part test is applied to assess constitutionality under the Uniformity Clause: (1) whether the statute is a law of a general or special nature, and (2) whether the statute operates uniformly throughout the state. Const. Art. 2, § 26.

[9] Statutes 361 ↩71

361 Statutes

36111 General and Special or Local Laws

361k70 Uniformity of Operation of General

Laws

361k71 k. In General. Most Cited Cases

Legislative classifications do not violate the Uniformity Clause merely because they are arbitrary. Const. Art. 2, § 26.

Green & Green, Thomas M. Green, Jane M. Lynch, and Jared A. Wagner, for appellant.
Nancy Hardin Rogers, Ohio Attorney General, and Frank M. Strigari, and Julie Kelley Cannatti, As-

sistant Attorneys General, for appellee state of Ohio.

Trisha M. Duff, for appellee IAFF Local # 136.
Livorno & Arnett Co., L.P.A. and Henry A. Arnett, for amicus curiae Ohio Association of Professional Fire Fighters.Green & Green, Thomas M. Green, Jane M. Lynch, and Jared A. Wagner, for appellant.Nancy Hardin Rogers, Ohio Attorney General, and Frank M. Strigari, and Julie Kelley Cannatti, Assistant Attorneys General, for appellee state of Ohio.Trisha M. Duff, for appellee IAFF Local # 136.Livorno & Arnett Co., L.P.A. and Henry A. Arnett, for amicus curiae Ohio Association of Professional Fire Fighters.FAIN, Judge

*1 ¶ 1 Plaintiff-appellant, the city of Dayton, has a residency requirement for employees. Defendant-appellee state of Ohio has enacted a statute that prohibits a political subdivision of the state from imposing residency requirements for its employees. This appeal concerns the constitutionality, under the Ohio Constitution, of the state's restriction on residency requirements. Specifically, Dayton appeals from a summary judgment rendered in favor of the state and third-party defendant-appellee International Association of Firefighters Local # 136 ("IAFF # 136"). After considering cross-motions for summary judgment, the trial court rendered summary judgment in favor of the state and IAFF # 136. In so doing, the trial court upheld the constitutionality of R.C. 9.481, which prohibits political subdivisions from requiring full-time employees, as a condition of employment, to reside in any specific area of the state.

¶ 2 Dayton contends that the trial court erred in finding that R.C. 9.481 was enacted pursuant to Section 34, Article II of the Ohio Constitution and in finding that R.C. 9.481 prevails over residency requirements adopted under Dayton's home-rule authority. Dayton also contends that the trial court erred in holding that R.C. 9.481 satisfies requirements for preempting local ordinances.

¶ 3 According to Dayton, R.C. 9.481 is an impermissible attempt by the legislature to interpret the

Ohio Constitution and create a right at variance with holdings of both the Supreme Court of the United States and the Supreme Court of Ohio. Finally, Dayton contends that R.C. 9.481 violates Section 26, Article II of the Ohio Constitution.

{¶ 4} We conclude that the enactment of R.C. 9.481 is authorized by the broad grant of authority to provide for the general welfare of working persons provided for in Section 34, Article II of the Ohio Constitution, that may not be impaired by the home-rule provision in Section 3, Article XVIII of the Ohio Constitution, or by any other provision of the Ohio Constitution, including the preamble.

{¶ 5} Because we conclude that R.C. 9.481 is authorized by Section 34, Article II of the Ohio Constitution, we need not consider Dayton's argument that the statute violates the home-rule provision of Section 3, Article XVIII, in that it conflicts with provisions of an ordinance adopted pursuant to home-rule powers.

{¶ 6} Finally, we conclude that the General Assembly did not impermissibly interfere with the role of the judiciary by enacting R.C. 9.481, nor does the statute itself violate the Uniformity Clause. Accordingly, the judgment of the trial court is affirmed.

I

{¶ 7} In 1912, Ohio citizens approved various amendments to their constitution, including Article XVIII ("the home rule amendment"), which allowed municipalities the ability to adopt charters and to exercise powers of self-government. Article II was adopted during the same process and gave Ohio's legislature broad authority over employee welfare.

*2 {¶ 8} In 1913, Dayton adopted its first charter. Subsequently, in 1978, Dayton's City Commission adopted Ordinance No. 25558. This ordinance required all employees in Dayton's Civil Service to be actual residents and reside physically in the city of

Dayton, and to continue to live in the city during the term of their employment. The commission also enacted Ordinance No. 27505 in 1987, for the purpose of placing the residency issue before the electorate. Based on the approval of the electorate in March 1987, Section 102 was placed in Dayton's charter.

{¶ 9} Section 102 provides:

{¶ 10} "(A) All employees in the Civil Service of the City of Dayton, appointed after the effective date of this Charter section, must and shall be actual residents of and physically live in the City of Dayton at the time of their appointment, and shall continue to be actual residents and physically live in the City of Dayton during the term of their employment.

{¶ 11} "(B) All employees in the Civil Service of the City of Dayton, required by Ordinance No. 25558, dated June 28, 1978, and/or personnel regulations, including, but not specifically limited to, Personnel Policies and Procedures Manual § 2.01, originally adopted June 28, 1978, as § 9.10 and revisions thereof, to have actual residence and physically live in the City of Dayton at the time of the effective date of this Charter section shall and must continue to be actual residents of and physically live in the City of Dayton during the term of their employment.

{¶ 12} "(C) Irrespective and notwithstanding any other provision of this Charter, violation of the provisions of this section shall result in discharge.

{¶ 13} "(D) The Commission may enact such ordinances as may be necessary and consistent with implementation of this section." Revised Code of General Ordinances of the City of Dayton ("R.C.G.O.") 102.

{¶ 14} Consistent with R.C.G.O. 102, Dayton employees have been required to reside in Dayton as a condition of employment, and the requirement has been routinely enforced.

{¶ 15} In 2006, the General Assembly passed S.B. 82, which became effective as R.C. 9.481, in May 2006. R.C. 9.481 applies to all political subdivisions and provides:

{¶ 16} "(B)(1) Except as otherwise provided in division (B)(2) of this section, no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state.

{¶ 17} "(2)(a) Division (B)(1) of this section does not apply to a volunteer.

{¶ 18} "(b) To ensure adequate response times by certain employees of political subdivisions to emergencies or disasters while ensuring that those employees generally are free to reside throughout the state, the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state. * * *

*3 {¶ 19} "(C) Except as otherwise provided in division (B)(2) of this section, employees of political subdivisions of this state have the right to reside any place they desire."

{¶ 20} The statute defines a "volunteer" as "a person who is not paid for service or who is employed on less than a permanent full-time basis." R.C. 9.481(A)(2). Thus, after R.C. 9.481 became effective, Dayton's full-time employees were no longer required to live in the city as a condition of employment. However, volunteers or part-time employees could be subjected to a residency requirement.

{¶ 21} Dayton was dissatisfied with this situation and filed a declaratory judgment action against the state of Ohio in May 2006, asking the trial court to declare that R.C. 9.481 is invalid and unenforceable

and that it violates the Ohio Constitution. Dayton also asked for preliminary and permanent injunctions barring enforcement of the statute.

{¶ 22} After the state filed an answer, IAFF # 136 was given permission to intervene as a third-party defendant. All parties then filed cross-motions for summary judgment. Dayton noted in its motion that the city's population had been declining steadily since the 1970 census. As of November 2006, Dayton had 2,195 employees, 70 percent of whom resided in the northeast and southeast portions of the city. Of these individuals, 819 are employed in the police and fire departments, and 80 percent live in the northeast and southeast sections of the city.

{¶ 23} Dayton's motion also noted that in February 2005, the city had 2,500 vacant residential properties. Dayton's economic expert predicted an adverse effect on the city's population, property values, and tax revenues if the residency requirement were abolished.

{¶ 24} According to the state, the General Assembly found that 125 cities and 13 villages in Ohio subject employees to residency requirements. The General Assembly also made the following legislative comments when it enacted S.B. 82:

{¶ 25} "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:

{¶ 26} "(A) The inalienable and fundamental right of an individual to choose where to live pursuant to Section 1 of Article I, Ohio Constitution.

{¶ 27} "(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.

{¶ 28} "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."

*4 {¶ 29} In June 2007, the trial court granted summary judgment in favor of the state and IAFF # 136 and denied Dayton's motion for summary judgment. The court concluded that R.C. 9.481 was properly enacted under the "general welfare" clause of Section II, Article 34 of the Ohio Constitution, which prevails over the home-rule provision in Section 3, Article XVIII of the Ohio Constitution. The court further concluded that even if Section 34 does not control, R.C. 9.481 is a general law that takes precedence over Dayton's city charter. Finally, the trial court held that R.C. 9.481 does not violate the Uniformity Clause of Section 26, Article II of the Ohio Constitution.

{¶ 30} Dayton appealed from the decision and also requested a stay of the trial court's decision pending appeal. A stay was granted in August 2007.

II

{¶ 31} Dayton's First Assignment of Error is as follows:

{¶ 32} "The trial court erred in finding that R.C. 9.481 was enacted pursuant to Section 34, Article II of the Ohio Constitution."

{¶ 33} Under this assignment of error, Dayton contends that the trial court improperly extended the scope of Section 34, Article II of the Ohio Constitution by interpreting "general welfare" to include every law that even tangentially affects employment. Dayton also claims that the phrase "general welfare" is ambiguous and that the history and le-

gislative debates accompanying the passage of Section 34 reveal that "general welfare" pertains only to working conditions, not other aspects of employment like residency. Finally, Dayton argues that the "general law" test used in home-rule cases applies to Section 34 analysis. According to Dayton, R.C. 9.481 is not a general law under home-rule standards and cannot prevail over conflicting municipal regulations.

{¶ 34} Before we address these arguments, we should note that we have reviewed the briefs of the parties, as well as a brief filed by amicus curiae, Ohio Association of Professional Fire-Fighters. We have also considered supplemental authority filed by both Dayton and the state.

{1}{2}{¶ 35} Turning now to the merits, we begin with the fundamental principle that courts "must 'presume the constitutionality of lawfully enacted legislation.'" (Citations omitted.) *Klein v. Lens*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633, at ¶ 4. Therefore, when "we consider the constitutionality of * * * legislation passed by the General Assembly, we presume it to be constitutional and will not declare it to be unconstitutional unless it 'appear[s] beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.'" *Kelleys Island Caddy Shack, Inc. v. Zolno*, 96 Ohio St.3d 375, 376, 2002-Ohio-4390, 775 N.E.2d 489 at ¶ 10, quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus.

{¶ 36} R.C. 9.481 was enacted pursuant to Section 34, Article II of the Ohio Constitution, which provides:

*5 {¶ 37} "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 employes; and no other provision of the constitution shall impair or limit this power."

{¶ 38} Section 34 was among a number of constitutional amendments that were proposed by the 1912 Constitutional Convention and approved by voters. Another amendment adopted during this process was Article XVIII, which is known as the home rule amendment. Section 3 of Article XVII is considered a key part of the home rule amendment, and states:

{¶ 39} "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."

{¶ 40} Dayton contends that its residency requirement involves the exercise only of local self-government and must prevail over any conflicting state legislation. Conversely, the state and IAFF # 136 argue that valid enactments under Section 34, Article II of the Ohio Constitution must prevail over conflicting local ordinances, due to the supremacy of Section 34.

[3][4]{¶ 41} In *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 539 N.E.2d 103 ("*Rocky River IV*"), the Ohio Supreme Court considered the constitutionality of a statute requiring binding arbitration of disputes between a city and its safety forces. *Id.* at 1-2, 539 N.E.2d 103.^{FNI} The city argued that the statute unconstitutionally denied cities the power to determine municipal safety employee compensation, in violation of the home-rule sections in Article XVIII. *Id.* at 12, 539 N.E.2d 103. However, the Ohio Supreme Court concluded that Section 34 of Article II governed and that the home-rule sections of the Constitution did not apply. *Id.* at 13, 539 N.E.2d 103.

{¶ 42} In discussing Section 34, the Supreme Court stressed:

{¶ 43} "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*, 43 Ohio St.3d at 13, 539 N.E.2d 103, quoting from *State ex rel. Bd. of Trustees of Police & Firemen's Pension Fund v Bd. of Trustees of Police Relief Fund* (1967), 12 Ohio St.2d 105, 106, 41 O.O.2d 410, 233 N.E.2d 135. The Ohio Supreme Court, therefore, concluded that because the statute in question was concerned with the general welfare of employees, "pursuant to Section 34, Article II, the power of the General Assembly to adopt the act *may not be affected in any way by the 'home rule' amendment.*" (Emphasis sic.) *Id.*

*6 {¶ 44} In *Rocky River IV*, the city argued that Section 34 did not apply to conciliation, but was intended to apply only to matters involving minimum wage. In rejecting this contention, the Ohio Supreme Court first focused on the history of Section 34, including the constitutional debates. After discussing the constitutional debates in detail, the court stressed:

{¶ 45} "But none of this really makes any difference. The language of Section 34 is so clear and unequivocal that resort to secondary sources, such as the constitutional debates, is actually unnecessary. Where the language of a statute or constitutional provision is clear and unambiguous, it is the duty of courts to enforce the provision as written. * * * 'Debates of a constitutional convention are proper matter for consideration where they throw light on the correct interpretation of any provision of the Constitution, but if the provision is clear and may be read without interpretation, the discussion leading to its adoption is of no value, nor are the various statements by the members of the convention and the resolutions offered during the convention determinative of the meaning of the amendment.' "

{¶ 46} "Regardless of what was said or not said during the debates, the unalterable fact remains that

Section 34, as it was ultimately adopted, transcends the limitations urged by appellant. If the framers of our Constitution had intended this section to apply only to minimum wage, almost half of the forty-one words contained in this section must be regarded as mere surplusage, since it further provides that laws may be passed 'fixing and regulating the hours of labor * * * and providing for the comfort, health, safety and general welfare of all employees * * *.' Are we to believe, as appellant apparently does, that these words were not intended to have meaning? To ask the question is to answer it." (Citations omitted.) *Id.* at 15-16, 539 N.E.2d 103.

{¶ 47} The Ohio Supreme Court continued:

{¶ 48} "The same may be said of the final phrase of Section 34, which states that ' * * * no other provision of the constitution shall impair or limit' the General Assembly's power to pass laws concerning the welfare of employees. * * * How can it be seriously maintained that the home-rule amendment is somehow exempt from this mandate? Section 34 could not be clearer or more unequivocal. Appellant's contention, that Section 34 does not mean what it so obviously says, is indefensible. This is especially true when one considers that this court has already held that Section 34 contains 'clear, certain and unambiguous language' providing that 'no other provision of the Constitution may impair the intent, purpose and provisions' of Section 34, including the home-rule amendment. *Penston Fund*, 12 Ohio St.2d at 107, 41 O.O.2d at 412, 233 N.E.2d at 137." *Rocky River IV*, 43 Ohio St.3d at 16, 539 N.E.2d 103.

{¶ 49} Dayton argues that we should adopt the view of the dissent in *Rocky River IV*, which argued that an overly broad interpretation of "general welfare" makes the remaining parts of Section 34, as well as Section 35, Article II of the Ohio Constitution "mere surplusage." *Id.* at 28, 539 N.E.2d 103, fn. 35 (Wright, J., dissenting). Justice Wright further argued in his dissent in *Rocky River IV* that the drafters of Section 34 intended to limit the General Assembly specifically to "wages, hours, and sanit-

ary conditions in industry." *Id.*

*7 {¶ 50} This is the view recently taken in *Lima v State*, Allen App. No. 1-07-21, 2007-Ohio-6419, 2007 WL 4248278. In *Lima*, the Third District Court of Appeals concluded after a lengthy analysis:

{¶ 51} "R.C. 9.481 was not validly enacted pursuant to Article II, Section 34 of the Ohio Constitution, because Section 34's language, legislative history, and case law support finding that laws providing for the "general welfare of all employees" [sic] must have, at minimum, some nexus between their legislative end and the working environment." *Id.* at ¶ 88.

{¶ 52} The Third District used four methods of interpretation in reaching this conclusion: (1) the common definition of "employee"; (2) "*noscitur a sociis*," which instructs courts to determine the meaning of statutory phrases by their immediately surrounding words; (3) the "legislative history" of Section 34; and (4) case law interpreting Section 34.

{¶ 53} The Third District conceded that "general welfare" is a broad term, but observed that the language in Section 34 is limited by its subject matter. The Third District thus framed the issue as follows:

{¶ 54} "The general-welfare clause's plain language requires that the General Assembly enact laws providing for the general welfare 'of all employees.' [sic] Lima's assignment of error, thus, raises the issue of whether the term 'employees' [sic] in Section 34 means employees acting within the scope of their employment (i.e. within the working environment) or whether 'employees' [sic] refers to the status of being an employee, which transcends any particular locus. In other words, does the term 'employees' [sic] refer to the status of being an employee 24 hours per day, which attaches at hiring and sheds at firing ('employee' in its broadest sense), or does the term have a more limited meaning, which is intricately tied to a particular locus;

here, the work environment? If the later interpretation is correct, the plain language would support finding that laws passed pursuant to Section 34's general-welfare clause must address issues related to the employees' working environment as Lima argues. If the former interpretation is correct, then the plain language would support finding that laws passed pursuant to Section 34 can address issues beyond the employees' working environment as the state argues." Id. at ¶ 28.

{¶ 55} After reviewing some common definitions of "employee," the Third District concluded that the definitions did not resolve the scope of the term as used in Section 34. The Third District then focused on "*noscitur a sociis*" and concluded that because the first and second clauses of Section 34 deal with working terms and conditions "within" the employment environment, the General Assembly would be limited to enacting laws that affect employees' "work environment conditions." FN2Id. at ¶ 35.

{¶ 56} Finally, the Third District reviewed historical circumstances in the early 1900s and the content of debates that occurred during the 1912 Constitutional Convention. Id. at ¶ 37-47. In this regard, the Third District again concluded that Section 34 was intended to empower the General Assembly with legislative authority over only labor hours, a minimum wage, and the working environment itself. Id. at ¶ 46.

*8 {¶ 57} As we noted, this is the view taken by the dissent in *Rocky River IV*. In arguing that the legislature could not enact compulsory arbitration legislation that would prevail over conflicting municipal law, Justice Wright's dissent in *Rocky River IV* suggested that "any fair-minded reader of the debates could only conclude that * * * [Section 34] refers to wages, hours and sanitary conditions in industry." *Rocky River IV*, 43 Ohio St.3d at 28, 539 N.E.2d 103 (Wright, J., dissenting). But this was not the view adopted by the majority of the Ohio Supreme Court.

{¶ 58} Justice Wright also reviewed case law interpreting Section 34. Like the Third District, Justice Wright concluded that Section 34 is limited in scope to "the minimum wage, hours of labor, or safety conditions." Id. at 35, 539 N.E.2d 103. Compare *Lima*, 2007-Ohio-6419, at ¶ 54 (stating that "Section 34 general welfare case law is limited to employee economic welfare"). Again, this was not the view expressed by the majority opinion in *Rocky River IV*, and we are bound by that decision until it is reversed or overruled. See, e.g., *Natl. City Bank v. Rhoades*, 150 Ohio App.3d 75, 84, 2002-Ohio-6083, 779 N.E.2d 799, at ¶ 31; *Louis A. Green, P.S. v. State Bd. of Registration for Professional Engineers and Surveyors*, Greene App. No. 05CA121, 2006-Ohio-1581, at ¶ 20; and *State v. Davis*, Clark App. No.2006 CA 69, 2007-Ohio-1030, at ¶ 43 (all referring to the binding effect of Ohio Supreme Court decisions).

{¶ 59} Furthermore, we find a logical inconsistency in the Third District's classification of the issues. In *Lima*, the Third District focused on whether "employee" refers to a status that attaches at hiring and sheds at firing (the state of Ohio's position in *Lima*), or whether "employee" is tied to a particular locus-the working environment (the city of Lima's position). The Third District concluded that in the first situation, Section 34's "plain language" would "support finding that laws passed pursuant to Section 34 can address issues beyond the employees' working environment." *Lima*, 2007-Ohio-6419, at ¶ 28. However, the Third District also stated that in the second situation, Section 34's "plain language" would "support finding that laws passed pursuant to Section 34's general-welfare clause must address issues related to the employees' working environment." Id.

{¶ 60} We find it difficult to understand how statutory language can be described as "plain" if it can be read to support each of two contrary positions. Moreover, if language is plain, it must be applied as written. See, e.g., *State v. Tuomala*, 104 Ohio St.3d 93, 96, 2004-Ohio-6239, 818 N.E.2d 272, at ¶

11-12, and *In re Blue Flame Energy Corp.*, 171 Ohio App.3d 514, 536, 2006-Ohio-6892, 871 N.E.2d 1227, at ¶ 43. As we have already stressed, the Ohio Supreme Court concluded in *Rocky River IV* that the language in Section 34 is unambiguous and may not be impaired by the home rule amendment. *Rocky River IV*, 43 Ohio St.3d at 16, 539 N.E.2d 103.

*9 {¶ 61} In 1999, the Ohio Supreme Court again rejected attempts to restrict Section 34, stressing that Section 34 has repeatedly been interpreted as a "broad grant of authority to the General Assembly, not as a limitation on its power to enact legislation." *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.* (1999), 87 Ohio St.3d 55, 61, 717 N.E.2d 286. In *Cent. State Univ.*, the American Association of University Professors ("AAUP") alleged that the General Assembly had violated Section 34 by enacting legislation that burdened state employees. The burden consisted of an increase in the employees' instructional workloads. The Ohio Supreme Court rejected the contention that Section 34 restricts the legislature solely to the enactment of laws benefiting employees, rather than burdening employees as well. *Id.* at 60, 717 N.E.2d 286. In this regard, the court noted that:

{¶ 62} "The General Assembly routinely enacts legislation that serves precisely the purpose AAUP would have us declare impermissible. R.C. 3319.22, for instance, allows rules imposing continuing education requirements upon teachers; R.C. 109.801 requires police officers to undergo annual firearm training; public employees are limited by R.C. 102.03 in gifts they may receive; and classified employees are limited in their solicitations of political contributions under R.C. 124.57. Furthermore, employees of Head Start agencies and out-of-home child care employees must submit to criminal record checks (R.C. 3301.32 and 2151.86); teachers and other school employees may be required to undergo physical examinations in certain instances at the discretion of school physicians (R.C. 3313.71); an employee who contracts AIDS

from a fellow employee has no cause of action in negligence against his employer (R.C. 3701.249); and board of health employees dealing with solid and infectious waste are required to complete certain training and certification programs (R.C. 3734.02).

{¶ 63} "These statutes provide only a few examples of laws burdening employees based upon legislative decisions to regulate the employment sector in the public interest. None of these statutes was enacted to benefit employees, but there can be no question that they constitute important legislation that the General Assembly has the constitutional authority to enact." 87 Ohio St.3d at 61, 717 N.E.2d 286.

{¶ 64} Some of the statutes mentioned by the Ohio Supreme Court bear no more "nexus" to the conditions of the "work environment" than the residency provisions in R.C. 9.481. *Lima*, 2007-Ohio-6419, at ¶ 18. For example, R.C. 102.03 places restrictions on the outside employment of various public employees for as long as 24 months after they leave public service. Likewise, granting immunity to employers for negligent transmission of the AIDS virus by fellow employees does not bear a significant nexus to the work environment itself. Nonetheless, the legislature's power to routinely enact these measures under Section 34 has been upheld. *Cent. State Univ.*, 87 Ohio St.3d at 61, 717 N.E.2d 286. The fact that the legislative ends do not bear a "nexus" to the conditions of the working environment does not mean that the legislature's goals in enacting these statutes are irrelevant. However, contrary to the Third District's conclusion, this does mean that Section 34 is not limited solely to legislation that bears a nexus to the conditions of the working environment as opposed to the status of being an "employee"-which attaches at hiring and is shed at firing. *Lima*, 2007-Ohio-6419, at ¶ 28.

*10 {¶ 65} In a recent decision, the Ninth District Court of Appeals employed a different analysis in assessing the constitutionality of R.C. 9.481. The issue before the Ninth District Court of Appeals was the same-whether the General Assembly acted

within the authority granted by Section 34, Article II of the Ohio Constitution. See *State v. Akron*, Summit App. No. 81506, 2008-Ohio-38, at ¶ 9. In *Akron*, the Ninth District Court of Appeals agreed that *Rocky River IV* had taken an expansive view of the General Assembly's power under Section 34. *Id.* at ¶ 15-18. However, the Ninth District Court of Appeals concluded that the phrase "general welfare" in Section 34 is not without limits. *Id.* at ¶ 18.

{¶ 66} The Ninth District Court of Appeals stressed that while the term "general welfare" appears to be all-encompassing, it "cannot reasonably encompass everything that arguably benefits some employees." *Id.* Instead, some boundaries must exist. To decide the boundaries, the Ninth District Court of Appeals looked to the "common welfare" clause of the preamble to the Ohio Constitution. In this regard, the Ninth District Court of Appeals observed:

{¶ 67} "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.' * * * The scope of the power granted Ohio by its citizens is found in the preamble of the Ohio Constitution:

{¶ 68} " '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.'" (Citations omitted.) *Id.* at ¶ 19.

{¶ 69} Based on the preamble, the Ninth District Court of Appeals concluded that Ohio's Constitution only authorizes laws securing freedom for citizens or furthering their common welfare, and that all laws are subject to this limitation. *Id.* The Ninth District Court of Appeals also found no barrier to this line of thought in the Ohio Supreme Court's previous decisions. In this regard, the Ninth District Court of Appeals noted:

{¶ 70} "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." *Id.* at ¶ 20.

{¶ 71} Consistent with the "common welfare" limitation, the Ninth District Court of Appeals distinguished *Rocky River IV*, *Pension Fund*, and *Central State Univ.* because those cases involved comprehensive legislation addressing significant social issues impacting the public at large. *Id.* at ¶ 21-24. In contrast, the Ninth District Court of Appeals concluded that R.C. 9.481 did not affect the common welfare. The Ninth District Court of Appeals concluded that the "sole purpose" of R.C. 9.481 is as follows:

*11 {¶ 72} "[T]o 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).

{¶ 73} " * * * 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 9.481 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." (Brackets added.) *Id.* at ¶ 24-25.

{¶ 74} We note that a preamble is "the intro-

ductory part of a statute, ordinance, or regulation that states the reasons and intent of the law or regulation or is used for other explanatory purposes.” *Christy v. Summit Cty. Bd. of Elections* (1996), 77 Ohio St.3d 35, 39, 671 N.E.2d 1, fn. 1, citing Webster’s Third New World International Dictionary (1986) 1783. The view of the Ninth District Court of Appeals on the effect of the preamble is supported by *Palmer v. Tingle* (1896), 55 Ohio St. 423, 45 N.E. 313. In *Palmer*, the Ohio Supreme Court indicated that the preamble of Ohio’s Constitution limits the powers of the General Assembly. Specifically, the court stated:

{¶ 75} “It is worthy of notice that the constitution is established to secure the blessings of freedom, and to promote the common welfare. As the constitution must be regarded as consistent with itself throughout, it must be presumed that the laws to be passed by the general assembly under the powers conferred by that instrument are to be such as shall secure the blessings of freedom, and promote our common welfare.” 55 Ohio St. at 440, 45 N.E. 313.

{¶ 76} *Rocky River IV* did not consider any limitations imposed on Section 34 by the concept of “common welfare”—presumably because the Ohio Supreme Court did not need to do so. As the Ninth District Court of Appeals noted, the statute involved in *Rocky River IV* was part of comprehensive legislation encompassing an entire chapter of the Ohio Revised Code. *Akron*, 2008-Ohio-38, at ¶ 21. See also *Rocky River IV*, 49 Ohio St.3d at 41, 550 N.E.2d 464 (noting that the statutory section involved in the case was part of the Ohio Public Employees Collective Bargaining Act, R.C. Chapter 4117). The idea of legislating for the “common welfare” also appears in *Central State Univ.*, as the court focused on the fact that statutes previously upheld as valid had been “based upon legislative decisions to regulate the employment sector in the public interest.” (Emphasis added.) 87 Ohio St.3d at 61, 717 N.E.2d 286.

*12 {¶ 77} Nevertheless, we are not persuaded that the grant of authority to the General Assembly, in

Section 34, Article II of the Ohio Constitution, to pass laws providing for the general welfare of all employees, is subject to a limitation based in the preamble to the Ohio Constitution. The last clause of Section 34, Article II unequivocally declares, “and no other provision of the constitution shall impair or limit this power.” The declaration includes the preamble to the Ohio Constitution as well as the home rule amendment. The effect is to render the grant of legislative power contained in Section 34, Article II plenary; no limitations to that power external to the language therein may be imposed.

{¶ 78} In short, Section 34, Article II of the Ohio Constitution gives the General Assembly the power to provide that employees of political subdivisions of the state shall be free to reside wherever they choose, because that is a provision providing for their general welfare. Dayton’s first assignment of error is overruled.

III

{¶ 79} Dayton’s second assignment of error is as follows:

{¶ 80} “The trial court erred in finding that R.C. 9.481 satisfies the three part test established in *City of Canton v. State of Ohio* and preempts the requirement set forth in the city’s charter that all city employees must reside within the city limits.”

{¶ 81} Under this assignment of error, Dayton contends that its residency rule is a matter of local self-government and that the trial court erred in finding that R.C. 9.481 is a general law that takes precedence over Dayton’s city charter. In response, the state and IAFF # 136 contend that R.C. 9.481 regulates matters of statewide concern and is a general law superseding Dayton’s home rule powers. In this regard, the state also claims that R.C. 9.481 has extra-territorial effects because it addresses the labor relationship between public-sector employers and employees and because society is no longer concentrated in insular, local communities.

{¶ 82} In view of our disposition of Dayton's first assignment of error, this assignment of error has become moot. R.C. 9.481 prevails over Dayton's city charter by reason of Section 34, Article II of the Ohio Constitution; it is not necessary to establish that it is a general law for it to prevail.

{¶ 83} Dayton's second assignment of error is overruled as moot.

IV

{¶ 84} Dayton's third assignment of error is as follows:

{¶ 85} "The trial court erred in failing to find that R.C. 9.481 is an impermissible attempt by the legislature to interpret the constitution and create a right at variance with both the United States and Ohio Supreme Courts."

{¶ 86} Under this assignment of error, Dayton contends that the legislature impermissibly interfered with the role of the judiciary by enacting legislation that interprets Article I, Section I of the Ohio Constitution in a way that is inconsistent with existing judicial decisions. The state responds by noting that Dayton failed to raise a "separation of powers" argument in its complaint. Citing *Johns v. Univ. of Cincinnati Med. Assn., Inc.*, 101 Ohio St.3d 234, 2004-Ohio-824, 804 N.E.2d 19, the state also points out that the General Assembly may pass any law that is not constitutionally forbidden.

*13 [6]{¶ 87} In this regard, we agree with the state. In *Johns*, the Ohio Supreme Court stated, "[T]he state Constitution is primarily a limitation on legislative power of the General Assembly; therefore, the General Assembly may pass any law unless it is specifically prohibited by the state or federal Constitutions." (Citations omitted.) *Id.* at ¶ 35. If a particular law conflicts with existing case law, that is a matter for the courts to resolve. Consistent with this principle, the Ohio Supreme Court has declared legislation invalid or unconstitutional on numerous occasions. The General Assembly has

also exercised the option of enacting legislation to supersede decisions with which it disagrees. A classic example of this interplay is the uninsured/underinsured motorists statute, which has long been a battleground between the legislature and courts. See R.C. 3937.18 and its uncodified law, indicating an intention to supersede various Ohio Supreme Court decisions, including *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116, and *Savvie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St.3d 500, 620 N.E.2d 809

{¶ 88} Dayton points to no federal or state constitutional provisions that specifically prohibit enactment of R.C. 9.481. As a result, the General Assembly was not precluded from enacting the statute.

{¶ 89} Dayton's third assignment of error is overruled.

V

{¶ 90} Dayton's Fourth Assignment of Error is as follows:

{¶ 91} "The trial court erred in finding that R.C. 9.481 does not violate Section 26, Article II of the Ohio Constitution."

{¶ 92} Dayton contends under this assignment of error that the trial court erred in failing to find that R.C. 9.481 violates the Uniformity Clause of the Ohio Constitution. In this regard, Dayton argues that R.C. 9.481 is unconstitutional because it creates arbitrary distinctions between full-time and part-time municipal employees. As we mentioned, R.C. 9.481(B)(1) provides that political subdivisions may not require employees to reside in any specific area of the state as a condition of employment. However, certain individuals, defined as either volunteers or persons with less than full-time employment, may be subjected to residency requirements.

{¶ 93} Section 26, Article II of the Ohio Constitution states:

{¶ 94} "All laws, of a general nature, shall have a uniform operation throughout the State; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except, as otherwise provided in this constitution."

[8]{¶ 95} A two-part test is applied to assess constitutionality under the Uniformity Clause: "(1) whether the statute is a law of a general or special nature, and (2) whether the statute operates uniformly throughout the state." (Citations omitted.) *Desenco, Inc. v. Akron* (1999), 84 Ohio St.3d 535, 541, 706 N.E.2d 323.

*14 {¶ 96} The first part of the test refers to subject matter, not geographical application. *Id.* at 542, 706 N.E.2d 323. In deciding whether a given subject matter is general or special, the Ohio Supreme Court has said that a matter is of a general nature "if the subject does or may exist in, and affect the people of, every county, in the state." *Id.* "On the contrary, if the subject cannot exist in, or affect the people of every county, it is local or special." *Id.* Based on this standard, which differs from the more complex criteria used to decide whether laws are "general" for purposes of the home-rule amendment, we conclude that the subject matter of R.C. 9.481 is general because the subject of the statute (residency) does or may exist in and affect the people of every county in the state.

{¶ 97} In *Austintown Twp. Bd. of Trustees v. Tracy* (1996), 76 Ohio St.3d 353, 356, 667 N.E.2d 1174, the Ohio Supreme Court stressed that "uniform operation throughout the State" means "universal operation as to territory; it takes in the whole state. And, as to persons and things, it means universal operation as to all persons and things in the same condition or category. When a law is available in every part of the state as to all persons and things in the same condition or category, it is of uniform operation throughout the state."

{¶ 98} Again, under this definition, we conclude that R.C. 9.481 does not violate the Uniformity

Clause. Although R.C. 9.481 distinguishes among "full-time" employees, "part-time" employees, and "volunteers," the law is available in every part of Ohio to all individuals occupying the same position or category. In other words, all part-time employees or volunteers in every municipality in Ohio may be subjected to a residency requirement, while full-time employees may live where they choose.

[9]{¶ 99} Dayton contends that these classifications violate the Uniformity Clause because they are arbitrary. However, the Ohio Supreme Court has rejected the idea that arbitrary classifications violate the Uniformity Clause. *Austintown*, 76 Ohio St.3d at 358, 667 N.E.2d 1174. In *Austintown*, the court stressed:

{¶ 100} "[A]rbitrary classifications violate the Uniformity Clause only where those classifications are contained in a statute first deemed to be special or local as opposed to general. * * *

{¶ 101} "Further, acceptance of the contention that the Uniformity Clause bars all legislatively created classifications deemed by the judiciary to be arbitrary would improperly and unnecessarily expand the scope of that constitutional provision. Traditionally, and more appropriately, it is equal protection analysis, rather than Uniformity Clause analysis, which mandates inquiry into whether legislatively created classifications of similarly situated persons bear a rational relationship to legitimate governmental purposes." *Id.* at 358-59, 667 N.E.2d 1174.

{¶ 102} Based on the Ohio Supreme Court's instruction in *Austintown*, we will not consider whether the classifications in R.C. 9.481 are arbitrary. We also note that Dayton failed to challenge R.C. 9.481 on equal protection grounds.

*15 {¶ 103} In light of the above discussion, we conclude that R.C. 9.481 does not violate the Uniformity Clause. Accordingly, Dayton's fourth assignment of error is overruled.

VI

{¶ 104} All of Dayton's assignments of error having been overruled, the judgment of the trial court is affirmed.

Judgment affirmed.

DONOVAN, J., concurs.

GRADY, J., dissents.

DONOVAN, J., CONCURS. GRADY, J., DISSENTS.

GRADY, J., dissenting:

{¶ 105} The question presented in this appeal is whether the residency requirement in the charter of the city of Dayton survives the prohibition against such regulations in R.C. 9.481. That question presents two issues of law. The first issue is whether the city's residency requirement is entitled to the protection of the home rule amendment, Section 3, Article XVIII of the Ohio Constitution. If that protection applies, then the second issue for determination is whether R.C. 9.481 was enacted pursuant to the authority conferred on the General Assembly by Section 34, Article II, which trumps the protections afforded local legislation by the home rule amendment.

{¶ 106} Section 3, Article XVIII provides:

*16 {¶ 107} "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."

{¶ 108} In *Canton v. State* (2002), 95 Ohio St.3d 149, 766 N.E.2d 963. 2002-Ohio-2005, the Supreme Court held:

{¶ 109} "To constitute 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." *Id.* at syllabus.

{¶ 110} R.C. 9.481 fails the tests for a general law in several ways, but most clearly because it does not "set forth police, sanitary, or similar regulations, (but) purport(s) only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations." By its terms, R.C. 9.481 is wholly and exclusively prohibitory. Therefore, R.C. 9.481 is not a general law for purpose of Section 3, Article XVIII that nullifies the residency requirement in the charter of the city of Dayton.

{¶ 111} Even if R.C. 9.481 were found to satisfy the test for a "general law," it would not prevail over the conflicting provisions of Dayton's residency requirement for its employees, because the city's residency requirement is an exercise of its proprietary authority, which is protected by Section 3, Article XVIII, from the state's exercise of its police power, absent some other prohibition.

{¶ 112} The general laws of the state to which Section 3, Article XVIII refers "are obviously such as refer to police, sanitary, and other similar regulations which apply uniformly throughout the State." *Fitzgerald v. Cleveland* (1913), 88 Ohio St. 338, 359, 103 N.E. 512. They are expressions of "that inherent sovereignty which it is the right and duty of the government or its agents to exercise whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires." *Miami County v. Dayton* (1915), 92 Ohio St. 217, 223-224.

{¶ 113} Municipalities may likewise exercise the police power. See, e.g., *State ex rel. Tomino v. Brown* (1989), 47 Ohio St.3d 119, 549 N.E.2d 505. However, the grant to municipalities of "all power

of local self-government" in Section 3, Article XVIII is broader than the authority to exercise the police power. Therefore, not all local legislation is necessarily an exercise of a municipality's police power. Further, it is only those enactments of "local police, sanitary and similar regulations" that are subject to the superseding provisions of the home rule amendment when they conflict with a general law. *State ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191, 151 N.E.2d 722.

{¶ 114} The police power is a governmental power, the power to prescribe rules regulating the conduct of the public generally in order to provide for the common welfare of the governed. *State v. Martin* (1958), 168 Ohio St. 37, 151 N.E.2d 7. As applied to business activities, it is the power to regulate them as opposed to the power to engage in them. *State v. Helvering* (1934), 292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307. When engaged in a business activity, a municipal corporation acts as a proprietor, not a governmental entity performing a regulatory function.

{¶ 115} Notwithstanding the fact that it is a municipality, and the fact that the city of Dayton's residency requirement regulates who may be its employees, that determination is an exercise of the city of Dayton's proprietary authority, not an exercise of its police powers. The city's exercises of its authority as a proprietor are protected by the home rule amendment from interference by the General Assembly through an exercise of the state's police powers, except to the extent that the city's exercise of its proprietary authority violates some other constitutional prohibition, such as the Equal Protection Clause, which the General Assembly may use its police powers to enforce. No such violation is argued. Therefore, regardless of any conflict with R.C. 9.481, that section, being an exercise of the police power, does not supersede the city's residency requirement pursuant to Section 3, Article XVIII, because the residency requirement is an exercise of the city's authority to act for its own proprietary purposes. The action that the city took in

adopting its residency requirement for employees is not different in kind and character from deciding from whom it will purchase its supplies, which is plainly a matter protected from state intrusion by the home rule amendment.

{¶ 116} Even if R.C. 9.481 fails as a general law for purposes of home-rule analysis, it nevertheless prevails over the protections the home rule amendment provides if the General Assembly passed R.C. 9.481 pursuant to the authority conferred on it by Section 34, Article II. That section states:

{¶ 117} "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 provisions of the constitution shall impair or limit this power."

*17 {¶ 118} The first thing to understand about Section 34, Article II is that, as a grant of authority to the General Assembly, it is redundant. Section 1, Article II of the Ohio Constitution provides: "The legislative power of the state shall be vested in a General Assembly * * *." That grant of authority was originally provided by Article I, Section 1 of the 1802 Ohio Constitution. *Swisher*, Ohio Constitution Handbook (1990), Editor's Comment, 209. The "legislative power" conferred on the General Assembly includes an inherent power to prescribe regulations that promote the education, health, safety, peace, morals, and general welfare of the community, which is exercised under the rubric "police power." *State v. Stouffer* (1971), 28 Ohio App.2d 229, 276 N.E.2d 651. The General Assembly's exercise of the police power is not plenary, but is subservient to other provisions of the Ohio Constitution. *French v. Dwiggin* (1984), 9 Ohio St.3d 32, 458 N.E.2d 827.

{¶ 119} The police power conferred on the General Assembly by Section 1, Article II is fully sufficient to authorize any legislation comprehended by Section 34, Article II. However, because of apprehensions that other provisions of the Constitution

might impair the General Assembly's exercise of its Section 1, Article II powers for that purpose, Section 34, Article II was adopted. Steinglass and Scarselli^{FN3} explain.

{¶ 120} "The adoption of Article II, section 34 was one of the major achievements of the Progressive movement at the 1912 convention. In 1912 shortly after the Constitutional Convention convened but long before it completed its work, the Ohio Supreme Court in *State, ex rel. Yaple v. Creamer* (1912)^{FN4} upheld the constitutionality of Ohio's first workers' compensation laws. However, the statute was voluntary, and the court suggested that coercive legislation would violate the Ohio Constitution (ibid.; see also *Taylor v. Academy Iron & Metal Co.* 1988: 151).^{FN5} Section 34 insulated a mandatory program of workers' compensation from constitutional attack by providing 'a broad grant of authority to the legislature to provide for the welfare of all working persons' (*Rocky River v. State Employment Relations Board*, 1989): 13-14)^{FN6} and by 'empower[ing] the General Assembly to regulate the employment relationship without running afoul of the now-obsolete judicial doctrine of 'economic substantive due process' (*Brady v. Safety-Kleen Corp.*, 571 N.E.2d 132, 1991: 639).^{FN7}

{¶ 121} "Section 34 accomplished the latter purpose by containing a statement, identical to the one in section 33, that 'no other provision of the constitution shall impair or limit this power.' This provision insulated the program from claims that legislation enacted under its authority violated other provisions of the Ohio Constitution."

{¶ 122} The history and origin of Section 34, Article II are germane to its coverage. An editor's note to the discussion of Section 34, Article II in Baldwin's Ohio Revised Code Annotated states that it was among "[t]he key reforms advocated by organized labor in the late nineteenth and early twentieth centuries (that) included a living wage, decent working conditions, and job security." Those matters concern the working environment. Since its ad-

option, judicial approval of legislation enacted pursuant to Section 34, Article II has been confined to matters that involve such conditions of employment. See *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 35, 539 N.E.2d 103 (Holmes, J., dissenting).

*18 {¶ 123} The trial court in the present case departed from that standard, reasoning that the "general welfare of all employees" clause in Section 34, Article II authorized enactment of R.C. 9.481, prohibiting limitations on the place of residence of municipal employees. The trial court erred when it so held, because application of a general provision to facts beyond the range of those in special provisions to which it is attached lets the tail wag the dog and risks extending a general provision to matters beyond the intention of those who adopted it. Determination of that intention is the goal of the canon of interpretation *noscitur a sociis*: to interpret a general term to be similar to more specific terms in a series. As we apply that principle, and consistent with its reference specifically to laws "establishing a minimum wage, and providing for the comfort, health, (and) safety" of all employees; the "general welfare" clause of Section 34, Article II authorizes only legislation regulating conditions of employment within the working environment.

{¶ 124} R.C. 9.481 goes beyond those limits by prohibiting municipal legislation that places limits on where employees of the municipality may reside. Such regulations apply to conditions for employment, not to conditions of employment, which are those that pertain to the working environment. Therefore, R.C. 9.481 was not validly enacted pursuant to Section 34, Article II, and its superseding provision does not trump the protections that the home rule amendment affords to Dayton's residency requirement. Instead, and necessarily, R.C. 9.481 was enacted pursuant to the authority conferred on the General Assembly by Section 1, Article 1, and to that extent is subject to Section 3, Article XVIII, the home rule amendment.

{¶ 125} I would hold that the city of Dayton's res-

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idency requirement for its employees, not being a "local police, sanitary or similar regulation," is not subject to the superseding provisions applicable to conflicts with general laws in Section 3, Article XVIII, and that R.C. 9.481 cannot supersede the Dayton residency requirement because that section, being only prohibitory, is not a general law given preference over local enactments by Section 3, Article XVIII. Further, because R.C. 9.481 exceeds the authority conferred on the General Assembly by Section 34, Article II, the superseding provisions of Section 34, Article II cannot apply to deny the city of Dayton's residency requirement for its employees the protections it is afforded by Section 3, Article XVIII, the home rule amendment. I would reverse the declaratory judgment that the trial court granted for those reasons and remand the case to the common pleas court to enter a declaratory judgment consistent with those reasons.

(1988), 36 Ohio St.3d 149, 522 N.E.2d 464.

FN6.*Rocky River v. State Emp. Relations Bd.*, (1989), 43 Ohio St.3d 1

FN7.*Brady v. Safety-Kleen Corp.* (1991), 59 Ohio St.3d 705, 571 N.E.2d 132.

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FN1. The Ohio Supreme Court issued four decisions in the *Rocky River* case, and the one cited in the main text is the last decision issued, in May 1989. Because the last decision is commonly referred to as *Rocky River IV*, we will use that designation throughout the rest of our opinion.

FN2. The Third District further concluded that the words within the "general welfare clause" itself ("health, safety, and comfort") also relate to "work environment conditions." *Id.* at ¶ 35.

FN3. Steven H. Steinglass and Gino J. Scarselli, "The Ohio State Constitution, A Reference Guide," Praeger Publishers (2004), 152.

FN4. *Yaple v. Creamer* (1912), 85 Ohio St. 349, 97 N.E. 602.

FN5. *Taylor v. Academy Iron & Metal Co.*

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2007 WL 4248278 (Ohio App. 3 Dist.)

Lima v. State
Ohio App. 3 Dist., 2007.

Court of Appeals of Ohio, Third District, Allen
County.

CITY OF LIMA, Appellant,

v.

The STATE of Ohio, Appellee.

No. 1-07-21.

No. 1-07-21.

Decided Dec. 3, 2007.

Background: City filed action against the State, challenging the constitutionality of statute limiting ability of political subdivisions to condition employment on residency, and seeking declaratory and injunctive relief. The Court of Common Pleas, Allen County, granted State's motion for summary judgment. City appealed.

Holdings: The Court of Appeals, Preston, J., held that:

- (1) laws enacted pursuant to general welfare clause of the wages and hours and employee health, safety and welfare provision of the Constitution must have a nexus between their legislative end and the working environment;
- (2) the challenged statute lacked a nexus with the working environment;
- (3) State did not have an overriding interest in limiting political subdivisions' ability to condition employment on residency;
- (4) the statute did not prescribe a rule of conduct on citizens generally, as required to constitute a general law; and
- (5) the statute violated municipal home rule provision of the Ohio Constitution.

Reversed and remanded.

[1] Appeal and Error 30 ⇨893(1)

30 Appeal and Error
30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In General. Most

Cited Cases

Whether a statute is constitutional is a question of law reviewed de novo.

[2] Constitutional Law 92 ⇨990

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional

Questions

92VI(C)3 Presumptions and Construction

as to Constitutionality

92k990 k. In General. Most Cited

Cases

Constitutional Law 92 ⇨1004

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional

Questions

92VI(C)3 Presumptions and Construction

as to Constitutionality

92k1001 Doubt

92k1004 k. Proof Beyond a Reasonable

Doubt. Most Cited Cases

Constitutional Law 92 ⇨1030

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional

Questions

92VI(C)4 Burden of Proof

92k1030 k. In General. Most Cited

Cases

All statutes are presumed constitutional, and the party challenging has the burden of proving otherwise beyond a reasonable doubt.

[3] Constitutional Law 92 ⇨990

92 Constitutional Law

- 92VI Enforcement of Constitutional Provisions
 - 92VI(C) Determination of Constitutional Questions
 - 92VI(C)3 Presumptions and Construction as to Constitutionality
 - 92k990 k. In General. Most Cited Cases

All presumptions and applicable rules of statutory construction are applied to uphold a statute from constitutional attack.

[4] Constitutional Law 92 ⇨2488

92 Constitutional Law

- 92XX Separation of Powers
 - 92XX(C) Judicial Powers and Functions
 - 92XX(C)2 Encroachment on Legislature
 - 92k2485 Inquiry Into Legislative Judgment
 - 92k2488 k. Policy. Most Cited Cases

Constitutional Law 92 ⇨2489

92 Constitutional Law

- 92XX Separation of Powers
 - 92XX(C) Judicial Powers and Functions
 - 92XX(C)2 Encroachment on Legislature
 - 92k2485 Inquiry Into Legislative Judgment
 - 92k2489 k. Wisdom. Most Cited Cases

It is not the function of a court reviewing the constitutionality of a statute to assess the wisdom or policy of a statute, but rather to determine whether the General Assembly acted within its legislative power.

[5] Constitutional Law 92 ⇨580

92 Constitutional Law

- 92V Construction and Operation of Constitutional Provisions
 - 92V(A) General Rules of Construction

92k580 k. In General. Most Cited Cases

Constitutional Law 92 ⇨593

92 Constitutional Law

- 92V Construction and Operation of Constitutional Provisions
 - 92V(A) General Rules of Construction
 - 92k590 Meaning of Language in General
 - 92k593 k. Existence of Ambiguity.

Most Cited Cases

Generally, in construing the Constitution, courts apply the same rules of construction that they apply in construing statutes; the inquiry begins with the statutory text, and ends there as well if the text is unambiguous.

[6] Statutes 361 ⇨188

361 Statutes

- 361VI Construction and Operation
 - 361VI(A) General Rules of Construction
 - 361k187 Meaning of Language
 - 361k188 k. In General. Most Cited Cases

Cases

The natural meaning of words is not always conclusive as to the construction of statutes.

[7] Statutes 361 ⇨184

361 Statutes

- 361VI Construction and Operation
 - 361VI(A) General Rules of Construction
 - 361k180 Intention of Legislature
 - 361k184 k. Policy and Purpose of Act.

Most Cited Cases

If the meaning of a provision cannot be ascertained by its plain language, a court may look to the purpose of the provision to determine its meaning.

[8] Statutes 361 ⇨181(2)

361 Statutes

- 361VI Construction and Operation
 - 361VI(A) General Rules of Construction
 - 361k180 Intention of Legislature
 - 361k181 In General

361k181(2) k. Effect and Consequences. Most Cited Cases

Statutes 361 ⇨184

361 Statutes

- 361VI Construction and Operation
 - 361VI(A) General Rules of Construction
 - 361k180 Intention of Legislature
 - 361k184 k. Policy and Purpose of Act.

Most Cited Cases

Statutes 361 ⇨215

361 Statutes

- 361VI Construction and Operation
 - 361VI(A) General Rules of Construction
 - 361k213 Extrinsic Aids to Construction
 - 361k215 k. Contemporary Circumstances. Most Cited Cases

In determining legislative intent when faced with an ambiguous statute, the court may consider several factors such as circumstances under which the statute was enacted, the objective of the statute, and the consequences of a particular construction.

[9] Labor and Employment 231H ⇨2217(1)

231H Labor and Employment

- 231HXIII Wages and Hours
 - 231HXIII(B) Minimum Wages and Overtime Pay
 - 231HXIII(B)1 In General
 - 231Hk2215 Constitutional and Statutory Provisions
 - 231Hk2217 Purpose
 - 231Hk2217(1) k. In General.

Most Cited Cases

The purpose of the provision of the Ohio Constitution governing wages and hours and employee health, safety, and welfare was to empower the General Assembly with legislative authority over (1) the hours of labor, (2) a minimum wage, and (3) working environment. Const. Art. 2, § 34.

[10] Labor and Employment 231H ⇨2216

231H Labor and Employment

- 231HXIII Wages and Hours
 - 231HXIII(B) Minimum Wages and Overtime Pay
 - 231HXIII(B)1 In General
 - 231Hk2215 Constitutional and Statutory Provisions
 - 231Hk2216 k. In General. Most Cited Cases

The provision of the Ohio Constitution governing wages and hours and employee health, safety, and welfare is a broad grant of legislative authority. Const. Art. 2, § 34.

[11] Labor and Employment 231H ⇨2218(1)

231H Labor and Employment

- 231HXIII Wages and Hours
 - 231HXIII(B) Minimum Wages and Overtime Pay
 - 231HXIII(B)1 In General
 - 231Hk2215 Constitutional and Statutory Provisions
 - 231Hk2218 Validity
 - 231Hk2218(1) k. In General.

Most Cited Cases

Laws enacted pursuant to the general welfare clause of the provision of the Ohio Constitution governing wages and hours and employee health, safety, and welfare must, at minimum, have some nexus between their legislative end and the working environment. Const. Art. 2, § 34.

[12] Municipal Corporations 268 ⇨124(3)

268 Municipal Corporations

- 268V Officers, Agents, and Employees
 - 268V(A) Municipal Officers in General
 - 268k124 Constitutional and Statutory Provisions
 - 268k124(3) k. Eligibility and Qualification. Most Cited Cases

Statute limiting political subdivisions' ability to condition employment on residency lacked any nexus between its legislative end and the working environment, and thus the statute was not validly

enacted pursuant to the general welfare clause of the provision of the Ohio Constitution governing wages and hours and employee health, safety, and welfare. Const. Art. 2, § 34; R.C. § 9.481.

[13] Municipal Corporations 268 ↪65

268 Municipal Corporations

268III Legislative Control of Municipal Acts, Rights, and Liabilities

268k65 k. Local Legislation. Most Cited Cases

The first step in a home-rule analysis is to determine whether the matter in question involves an exercise of local self-government or an exercise of local police power; if an allegedly conflicting city ordinance relates solely to self-government, the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction, but if the ordinance pertains to concurrent police power rather than the right to self-government, the ordinance that is in conflict must yield in the face of a general state law. Const. Art. 18, § 3.

[14] Municipal Corporations 268 ↪64

268 Municipal Corporations

268III Legislative Control of Municipal Acts, Rights, and Liabilities

268k64 k. Nature and Scope of Legislative Power in General. Most Cited Cases

To be a general law under prong three of the preemption test of *Canton v State*, 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 set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally. Const. Art. 18, § 3.

[15] Municipal Corporations 268 ↪67(1)

268 Municipal Corporations

268III Legislative Control of Municipal Acts, Rights, and Liabilities

268k67 Appointment and Removal of Officers

268k67(1) k. In General. Most Cited Cases

State did not have an overriding interest in limiting the ability of political subdivisions to condition employment on residency, as required for statute imposing such limitation to constitute a general law superseding city's home rule authority, although citizens of Ohio had a constitutional right to determine where they lived; there was no constitutional right to choose where one lived and, at the same time, demand employment from an unwilling employer, and exemptions for private parties, the state, volunteers, and emergency employees defeated statute's purpose of generally prohibiting residency restrictions. Const. Art. 1, § 1; Art. 18, § 3; R.C. § 9.481.

[16] Constitutional Law 92 ↪1114

92 Constitutional Law

92VII Constitutional Rights in General

92VII(B) Particular Constitutional Rights

92k1113 Liberty to Choose Occupation, Pursue Livelihood, or Enjoy Fruits of Labor

92k1114 k. In General. Most Cited Cases

Constitutional Law 92 ↪1280

92 Constitutional Law

92XII Freedom of Travel and Movement

92k1280 k. In General. Most Cited Cases

Although the citizens of Ohio may have a right to determine where they live under the Ohio Constitution, citizens do not have a right to live where they want and demand employment with a particular employer. Const. Art. 1, § 1.

[17] Municipal Corporations 268 ↪67(1)

268 Municipal Corporations

268III Legislative Control of Municipal Acts,
Rights, and Liabilities

268k67 Appointment and Removal of Of-
ficers

268k67(1) k. In General. Most Cited
Cases

Statute limiting the ability of political subdivisions to condition employment on residency did not prescribe a rule of conduct on citizens generally, as required to constitute a general law superseding city's home rule authority, but rather the statute purported to limit a municipality's legislative power. Const. Art. 1, § 1; Art. 18, § 3; R.C. § 9.481.

[18] Municipal Corporations 268 ↔ 67(1)

268 Municipal Corporations

268III Legislative Control of Municipal Acts,
Rights, and Liabilities

268k67 Appointment and Removal of Of-
ficers

268k67(1) k. In General. Most Cited
Cases

Statute limiting the ability of political subdivisions to condition employment on residency was not a general law and, thus violated municipal home rule provision of the Ohio Constitution, and did not preempt city's ordinance establishing a residency requirement for city employees, given that statute was not validly enacted pursuant to the general welfare clause of the provision of the Ohio Constitution governing wages and hours and employee health, safety and welfare. Const. Art. 2, § 34; Art. 18, § 3; R.C. § 9.481.

West Codenotes

Held Unconstitutional R.C. § 9.481.

Anthony L. Geiger, City Law Director, for appellant.

Frank M. Strigari, Assistant Attorney General, for appellee. Anthony L. Geiger, City Law Director, for appellant. Frank M. Strigari, Assistant Attorney General, for appellee. PRESTON, Judge.

I. Factual Background

*1 (¶ 1) Plaintiff-appellant, the city of Lima, appeals the Allen County Court of Common Pleas grant of summary judgment in favor of defendant-appellee the state of Ohio.^{FN1} Since the trial court erred in finding R.C. 9.481 was validly enacted pursuant to Section 34, Article II of the Ohio Constitution and meets the test of *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, we reverse and remand for further proceedings not inconsistent with this opinion.

{¶ 2} On November 2, 1920, Lima voters adopted a city charter pursuant to Section 3, Article XVIII of the Ohio Constitution. In 1974, section 72 of the Lima City Charter was amended to permit Lima City Council to determine by ordinance whether to establish a residency requirement for city employees.

{¶ 3} On October 23, 2000, Lima City Council passed Ordinance 201-00 pursuant to section 72 of the Lima City Charter, which "established a requirement for persons appointed by the Mayor as employees of the city on or after the date of passage of this ordinance, that as a condition of employment with the city all such employees shall live in a primary permanent residency within the corporate boundaries of the municipality."

{¶ 4} On May 1, 2006, the General Assembly enacted R.C. 9.481 pursuant to Section 34, Article II of the Ohio Constitution (hereinafter "Section 34"), which, except in specified circumstances, limited the ability of political subdivisions throughout Ohio to condition employment upon residency.

{¶ 5} On May 22, 2006, Lima filed an action for declaratory judgment and injunctive relief in the Allen County Court of Common Pleas against the state arguing that R.C. 9.481 is unconstitutional on several grounds. Cross-motions for summary judgment were filed on December 15, 2006, with both parties responding on January 12, 2007.

{¶ 6} On February 16, 2007, the trial court granted the state's motion for summary judgment upholding

the constitutionality of R.C. 9.481 and denied Lima's motion for summary judgment. On April 19, 2007, Lima appealed the trial court's grant of summary judgment to this court asserting three assignments of error.

II. Standard of Review

{¶ 7} We review a grant of summary judgment de novo. *Sharonville v. Am. Employers Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶ 5, citing *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Summary judgment is appropriate when "(1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing the evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party." *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241, citing *State ex. rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 219, 631 N.E.2d 150; Civ.R. 56(C).

*2 {1}[2]{3}{¶ 8} Whether a statute is constitutional is a question of law reviewed de novo. *Wilson v. AC&S, Inc.*, 169 Ohio App.3d 720, 2006-Ohio-6704, 864 N.E.2d 682, ¶ 61; *Akron v. Callaway*, 162 Ohio App.3d 781, 2005-Ohio-4095, 835 N.E.2d 736, ¶ 23. De novo review is independent and without deference to the trial courts determination. *Wilson*, 169 Ohio App.3d 720, 2006-Ohio-6704, 864 N.E.2d 682, at ¶ 61. "[A]ll statutes are presumed constitutional, and the party challenging has the burden of proving otherwise" beyond a reasonable doubt. *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155, ¶ 9, citing *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 38-39, 616 N.E.2d 163; *State ex. rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 38 O.O.2d 404, 224 N.E.2d 906, 908-909 ("[W]hen an enactment of the General Assembly is challenged, the challenger

must overcome a strong presumption of constitutionality"). All presumptions and applicable rules of statutory construction are applied to uphold a statute from constitutional attack. *State v. Dorso* (1983), 4 Ohio St.3d 60, 61, 4 OBR 150, 446 N.E.2d 449; *State v. Stambaugh* (1987), 34 Ohio St.3d 34, 35, 517 N.E.2d 526.

{4}{¶ 9} "[I]t 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, 22 O.O. 494, 40 N.E.2d 913; *Primes v. Tyler* (1975), 43 Ohio St.2d 195, 72 O.O.2d 112, 331 N.E.2d 723.

{¶ 10} "The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body." The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter Ed 1961) 468-469. "The principle that courts are not the creators of public policy and should not decide cases based on disagreement with a legislature has guided courts since the creation of the American judicial system." *Holeton v. Crouse Cartage Co.* (1992), 92 Ohio St.3d 115, 135, 748 N.E.2d 1111 (Moyer, C.J., dissenting).

III. Trial Court's Ruling

{¶ 11} Although we review constitutional questions de novo, for clarification purposes and an otherwise thorough review we set forth the essential findings of the trial court.

{¶ 12} This appeal follows the Allen County Court of Common Pleas grant of summary judgment in favor of the state of Ohio. The trial court set forth the following issue for its review:

[W]hether * * * O.R.C. 9.481 as enacted by the

General Assembly which provides employees of Ohio's political subdivisions with freedom to choose where they want to live, is unconstitutional because it conflicts with Section 3, Article XVIII of the Ohio Constitution * * *

*3 *Lima v. Ohio* (Feb. 15, 2007), Allen C.P. No. CV2006-0518, at 4. The trial court first considered the relevance of the *Canton* test and a traditional-home rule analysis. *Id.* at 6. The trial court concluded that laws validly passed pursuant to Section 34, Article II of the Ohio Constitution cannot be impaired by the Home Rule Amendment; and therefore, a traditional home-rule analysis was unnecessary. *Id.* at 10, citing *Rocky River v. State Employment Relations Bd., et al.* (1989), 43 Ohio St.3d 1, 539 N.E.2d 103.

{¶ 13} The trial court then concluded that R.C. 9.481 was validly enacted pursuant to Section 34. The trial court decided that Lima's residency requirement is a condition of employment. *Id.* at 11, citing *St. Bernard v. State Emp. Relations Bd.* (1991), 74 Ohio App.3d 3, 6, 598 N.E.2d 15. As a condition of employment, the trial court reasoned, R.C. 9.481's regulation of residency requirements concerned the general welfare of public employees; and therefore, the law was validly enacted pursuant to Section 34. *Id.*

{¶ 14} After it concluded that R.C. 9.481 was validly enacted pursuant to Section 34 and superseded the Home Rule Amendment, the trial court examined R.C. 9.481 under the traditional *Canton* home-rule analysis in the alternative.

{¶ 15} Prior to conducting a *Canton* analysis, the trial court found that residency requirements are an issue of statewide concern due to the extraterritorial effects that such requirements have on other Ohio communities. *Id.* at 12. The court then concluded that since residency requirements are a matter of state-wide concern, the state's power to regulate superseded the municipality's right to home rule. *Id.* at 12-13, citing *Cleveland Electric Illuminating Co. v. Painesville* (1968), 15 Ohio St.2d 125, 129, 44

O.O.2d 121, 239 N.E.2d 75; *Uniformed Firefighters Assn. v. New York* (1980), 50 N.Y.2d 85, 428 N.Y.S.2d 197, 405 N.E.2d 679.

{¶ 16} Finally, the trial court concluded that even if it applied the *Canton* test, the state of Ohio still prevailed. *Id.* at 13. Applying the four-part *Canton* test, the trial court reached the following conclusions:

1. Generally permitting employees of political subdivisions through [sic] the State of Ohio to live where they choose to live while providing political subdivisions with a process for enacting specific exceptions, constitutes a statewide and comprehensive legislative enactment in and of itself.

2. O.R.C. 9.481 operates uniformly throughout the State of Ohio because the statute applies across the State to all included within the statute's operative provisions.

3. Subject of providing employees of political subdivisions throughout the State of Ohio with the freedom to choose where they want to live is of a general nature for all of these employees. Specifically, the law's subject not only affects employees of the City of Lima by providing them with the freedom to choose where they want to live, but it also affects employees of every other political subdivision within the State of Ohio in the same manner.

*4 4. O.R.C. 9.481 qualifies as an exercise of police power. State's police power embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or public health. (Quoted from *Wessel[] v. Timberlake* (1916), 95 Ohio St. 21, 34 [116 N.E. 43])

5. O.R.C. 9.481 proscribes a rule of conduct on citizens generally. As noted by the State, the statute applies to political subdivisions, but "the practical effect of the legislation and common

sense tells us 'that O.R.C. 9.481 has a direct impact on the conduct of employees of political subdivisions generally'." *City of Canton*, supra, at 155, 766 N.E.2d 963.

For these reasons, the trial court concluded that R.C. 9.481 was constitutional under both *Canton* and the doctrine of statewide concern in addition to its earlier conclusion that R.C. 9.481 superseded Lima's ordinance under Section 34.

{¶ 17} Several other trial courts throughout the state have concluded that R.C. 9.481 is constitutional and supersedes municipal ordinances to the contrary for similar reasons. *Toledo v. State* (July 27, 2007), Lucas C.P. No. CI06-3235; *Dayton v. State* (June 6, 2007), Montgomery C.P. No. 06-3507; *Akron v. State* (Mar. 30, 2007), Summit C.P. No. CV 2006-05-2759; *Cleveland v. State* (Feb. 23, 2007), Cuyahoga C.P. No. 06-590463; *Am. Fedn. of State, Cty., & Mun. Emps. Local # 74 v. Warren* (Sept. 14, 2007), Trumbull C.P. No. 2006 CV 01489. The Ohio courts of appeals have not decided the constitutionality of R.C. 9.481.

IV. Analysis

{¶ 18} Lima asserts three assignments of error for our review. Since assignment of error two must be resolved before assignment of error one becomes relevant, we will analyze it first. Our disposition of assignments of error one and two renders assignment of error three moot.

{¶ 19} In its first assignment of error, Lima argues that the trial court incorrectly determined that R.C. 9.481 is constitutional pursuant to the doctrine of statewide concern. Lima contends that the trial court did not apply the doctrine of statewide concern within the context of the *Canton* test. 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963. Under a proper formulation of the *Canton* test, argues Lima, R.C. 9.481 is not a "general law"; and therefore does not supersede Lima's home-rule authority.

{¶ 20} The state argues that the proper analysis for

determining whether R.C. 9.481 is constitutional is not *Canton's* home-rule analysis, but rather the analysis outlined in *An Assn. of Univ. Professors v. Cent. State Univ.* and *Rocky River IV*, (1999), 87 Ohio St.3d 55, 717 N.E.2d 286, 43 Ohio St.3d 1, 539 N.E.2d 103. The state claims that *Cent. State Univ.* and *Rocky River IV*, like this case and unlike *Canton*, involved laws enacted pursuant to Section 34, Article II of the Ohio Constitution.

{¶ 21} Lima agrees with the state that laws validly enacted pursuant to Section 34, Article II of the Ohio Constitution supersede local ordinances passed pursuant to Article XVIII, Section 3 of the Ohio Constitution, the home-rule authority. However, Lima alleges in its second assignment of error that R.C. 9.481 was not validly enacted pursuant to Section 34, Article II of the Ohio Constitution.

*5 {¶ 22} Therefore, the first issue before this court is whether R.C. 9.481 was validly enacted pursuant to Article II, Section 34 of the Ohio Constitution. If the answer to this inquiry is 'yes,' the parties agree that R.C. 9.481 supersedes Lima Ordinance No. 201-00; if the answer is 'no,' then the *Canton* traditional home-rule analysis applies, and Lima's first assignment of error becomes relevant.

Assignment of Error No. II

The trial court erred in concluding R.C. 9.481 was a valid enactment pursuant to Article II, Section 34 of the Ohio Constitution.

{¶ 23} In its second assignment of error, Lima argues that R.C. 9.481 was not validly enacted pursuant to Article II, Section 34, because "Section 34 * * * address[es] employment issues directly related to the working environment." The state counters that Section 34's general welfare clause applies to "conditions of employment," and since residency is one such condition, R.C. 9.481 is within Section 34's grant of authority.

{¶ 24} At oral argument, Lima asserted that

"conditions of employment" and "conditions for employment" are distinct issues, because the former means conditions within the working environment, whereas the latter means qualifications for employment. Lima concedes that Section 34's grant of authority covers working environment conditions, but disagrees that it extends to qualifications for employment. We agree with Lima that Section 34's language, legislative history, and case law support a more limited grant of legislative authority than the state presents.

A. Section 34's Plain Language

[5]({¶ 25}) "Generally speaking, in construing the Constitution, we apply the same rules of construction that we apply in construing statutes." *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, ¶ 14. "[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 106 Ohio St.3d 70, 2005-Ohio-3807, 831 N.E.2d 987, ¶ 38, quoting *BedRoc Ltd. LLC v. United States* (2004), 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338.

{¶ 26} Section 34, Article II of the Ohio Constitution 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.

Section 34's plain text provides four clauses. The first three are grants of legislative authority; the fourth is a supremacy clause. First, Section 34 grants the General Assembly the authority to pass laws "fixing and regulating the hours of labor" ("hours clause"). Second, Section 34 grants the General Assembly authority to pass laws "establishing a minimum wage" ("minimum-wage clause"). Third, Section 34 grants the General As-

sembly authority to pass laws "providing for the comfort, health, safety, and general welfare of all employees" ("general-welfare clause"). Fourth, Section 34 provides that "no other provision of the constitution shall impair or limit this power" ("supremacy clause").

*6 ({¶ 27}) Lima argues that the general-welfare clause grants the General Assembly authority to pass laws addressing "employment issues directly related to the working environment." The general welfare clause states laws may be passed "providing for the comfort, health, safety, and general welfare of employees." The general-welfare clause, thus, provides that the General Assembly may pass laws providing for the 'general welfare.' General welfare means "[t]he public's health, peace, morals, and safety." *Black's Law Dictionary* (8th Ed.2004) 1625; *Murick v. Gims* (1908), 79 Ohio St. 174, 179, 86 N.E. 880. Usually, the term 'general welfare' is associated with the state's police powers, which are broad and discretionary. *Gims*, 79 Ohio St. at 179, 86 N.E. 880.

{¶ 28} The general-welfare clause's language is, however, limited by subject matter. The general-welfare clause's plain language requires that the General Assembly enact laws providing for the general welfare "of all employees." Lima's assignment of error, thus, raises the issue of whether the term "employees" in Section 34 means employees acting within the scope of their employment (i.e. within the working environment) or whether "employees" refers to the status of being an employee, which transcends any particular locus. In other words, does the term "employees" refer to the status of being an employee 24 hours per day, which attaches at hiring and sheds at firing ("employee" in its broadest sense), or does the term have a more limited meaning, which is intricately tied to a particular locus; here, the work environment? If the latter interpretation is correct, the plain language would support finding that laws passed pursuant to Section 34's general-welfare clause must address issues related to the employees' working environment

as Lima argues. If the former interpretation is correct, then the plain language would support finding that laws passed pursuant to Section 34 can address issues beyond the employees' working environment as the state argues.

{¶ 29} The common law already recognizes the status-conduct distinction of an employee, for example, in tort law. The doctrine of respondeat superior^{FN2} requires that an employer answer for torts committed by an employee. However, it is a settled tort law rule that an employer is only liable for the torts committed by an employee under the doctrine if the employee commits the tort while acting within the scope of his or her duties. See e.g. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 58, 565 N.E.2d 584. Consequently, the law recognizes that one may be an employee in status, but not by conduct. Since other areas of law draw this distinction, the scope of the term 'employees' in Section 34 should be considered.

{¶ 30} Since the meaning of the term "employee" is not defined within the text of the Section 34, we must interpret it consistent with common usage. R.C. 1.42; *State ex rel. Lee v. Karnes*, 103 Ohio St.3d 559, 2004-Ohio-5718, 817 N.E.2d 76, ¶ 23. Black's Law Dictionary defines 'employee' as

*7 [a] person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.

(8th Ed.2004) 564. The American Heritage Dictionary defines "employee" as: "[a] person who works for another in return for financial or other compensation." (2nd College Ed.1985) 250. Neither definition provides a definitive conclusion regarding the scope of the term 'employee.' Both definitions refer to the status of being an employee, but Black's Law definition also emphasizes employer control over work performance, which generally applies when an employee is acting within the scope of his or her employment.

{¶ 31} Since the common definition of "employee" does not satisfactorily resolve its scope and, thus, the extent of the General Assembly's general welfare authority under Section 34, we must utilize other rules of statutory interpretation.

B. Section 34 & Noscitur a Sociis

{¶ 32} As the Ohio Supreme Court has noted, "the natural meaning of words is not always conclusive as to the construction of statutes." *Cleveland*, 106 Ohio St.3d 70, 2005-Ohio-3807, 831 N.E.2d 987, at ¶ 40. When the meaning of a word or phrase is unclear, the statutory doctrine of noscitur a sociis instructs a reviewing court to determine its meaning by the words immediately surrounding it. Black's Law Dictionary (8th Ed.2004) 1087. See also, *Wilson v. Stark Cty. Dept. of Human Serv.* (1994), 70 Ohio St.3d 450, 453, 639 N.E.2d 105.

{¶ 33} The meaning of the Section 34's third clause, then, must be interpreted consistent with Section 34's first and second clauses, which, like the general-welfare clause, provide grants of legislative authority. We agree with Lima, that if the general welfare clause's grant of authority is read consistent with the hours clause and the minimum wage clause, as the doctrine of noscitur a sociis instructs, then the general welfare clause grants the General Assembly authority to pass laws regulating work environment conditions.

{¶ 34} The general-welfare clause of Section 34 grants the General Assembly authority to pass laws "providing for the comfort, health, safety, and general welfare of all employees." As we noted above, Section 34's first clause grants the General Assembly the authority to pass laws "fixing and regulating the hours of labor," and Section 34's second clause grants the General Assembly authority to pass laws "establishing a minimum wage." The hours and minimum-wage clauses address working terms and conditions within the working environment context; they do not address qualifications for employment nor do they address issues outside of

the working environment. Therefore, *noscitur a sociis* instructs that the general-welfare clause should, likewise, be interpreted to address working environment conditions.

{¶ 35} Not only should we interpret the scope of the general-welfare clause in the same context as the hours and minimum-wage clauses, we should also interpret the term "general welfare" within the third clause in relation to the words directly preceding and following it. Common sense dictates that the words "comfort," "health," and "safety" relate to working environment conditions. Moreover, these terms, like "general welfare," are followed by the limiting term "employees." We, should therefore interpret "general welfare" to be a grant of legislative authority for laws affecting the employees' work environment conditions.

*8 {¶ 36} Thus, the doctrine of *noscitur a sociis* applied to the general-welfare clause as a whole and to its components supports Lima's argument that the clause grants legislative authority for the purpose of passing laws that affect the employees' working environment.

C. Section 34 Legislative History ^{FN3}

[7][8]{¶ 37}"If the meaning of a provision cannot be ascertained by its plain language, a court may look to the purpose of the provision to determine its meaning." *Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, at ¶ 14, citing *Castleberry v. Evatt* (1946), 147 Ohio St. 30, 33 O.O. 197, 67 N.E.2d 861, paragraph one of the syllabus. "In determining legislative intent when faced with an ambiguous statute, the court may consider several factors such as circumstances under which the statute was enacted, the objective of the statute, and the consequences of a particular construction." *Bailey v. Republic Engineered Steels, Inc.* (2001), 91 Ohio St.3d 38, 40, 741 N.E.2d 121, citing R.C. 1.49; *State v. Jordan* (2000), 89 Ohio St.3d 488, 492, 733 N.E.2d 601. Since we have determined that the term 'employees' is ambiguous,

and we cannot ascertain the scope of authority granted under Section 34's general-welfare clause by looking at its plain language, we turn to the legislative history for guidance.

I. Historical Circumstances

{¶ 38} The early 1900s were difficult times for American factory workers. The working environment often included long hours, low wages, and dangerous working conditions. Murlo, Priscilla A.B. Chitty, *From the Folks Who Brought You the Weekend* (New Press 2001) 145. See also, generally, Derks, Scott, *Working Americans 1880-1999*, Volume 1: The working Class (Grey House Pub.2000). Legislative efforts to remedy these woes were stifled by both state and federal courts striking down laws for violating the freedom to contract, which courts found as a substantive due process right. *Rocky River*, 43 Ohio St.3d at 26, fn. 31-32, 539 N.E.2d 103 (Wright, J., dissenting). One of the most infamous of this line of cases was *Lochner v. New York*, wherein the U.S. Supreme Court struck down a New York law setting a sixty-hour-per-week maximum for work in bakeries. (1905), 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937

{¶ 39} The Ohio Constitutional delegates were aware of both factory working conditions and the legal climate when Section 34 was passed. Several delegates recognized the working conditions at factories. Mr. Farrell commented at length about the intolerable working conditions in American factories when debating Section 34's minimum-wage language:

But, gentleman of the Convention, I have been compelled to change my position on th[e] question [of minimum wage] in the last few years. When one considers the relentless war that has been waged against the trade union movement in this country, and the war of extermination that is now going on, and, in some instances, meeting with success, in putting some unions out of business, and the general application of "black list,"

all for no other reason than the piling up of capitalistic profits without any regard for justice in the premises, when we see the attempts making to build up industries on the foundations of wages too low to admit of decent standards of family life, and hours of labor too long to admit of sufficient rest and relaxation for even moderate health, we are driven to the knowledge that it is time that a decent humane effort should be made to remedy this un-American condition.

*9 (Emphasis added). 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio (1912) 1328.

{¶ 40} The delegates were also aware of the courts' hostile attitude toward progressive labor reform. Mr. Lampson asked Section 34's reporting committee, "Did you investigate the question as to whether that provision in the constitution relating to the passage of laws violating the obligation of contract has any bearing on this proposal?" Id. at 1335. In response, Mr. Dwyer answered:

The courts have been deciding cases. Take that bake-shop case in New York [i.e. *Lochner*]. The supreme court there decided it was a question of private contract about the hours of labor. Our courts are becoming more progressive. They are catching the spirit of the time and we should put a clause in the constitution that will give the courts an opportunity to more liberally construe these matters than they have done in the past.

Id. Thus, it is evident from Section 34's debates that the constitutional delegates were well aware of both the working conditions in American factories and the legal climate with respect to labor reform.

2. Section 34's Objective

{¶ 41} On January 24, 1912, what is now Section 34 was introduced to the Ohio Constitutional Convention by Mr. Farrell, a delegate from Cuyahoga County, as Proposal No. 122, entitled "Relative to employment of women, children and persons en-

gaged in hazardous employment." 1 Proceedings and Debates of the Constitutional Convention of the State of Ohio (1912) 106. On January 25, 1912, Proposal No. 122 was sent to the committee on labor. Id. at 118. On March 19, 1912, Proposal No. 122 was reported to the convention with an amendment to insert

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 employes; and no other provision of the constitution shall impair or limit this power.

Id. at 755. The report was agreed to and the language amended. Id.

{¶ 42} On April 22, 1912, Proposal No. 122 was brought before the convention and read a second time, whereupon some debate was heard. 2 Proceedings and Debates, supra, at 1328. Mr. Farrell began his remarks noting:

Since this proposal has been on the calendar I have heard some little objection to it, especially with reference to the clause which would permit the legislature to pass minimum wage legislation, and to that clause I intend to direct my remarks exclusively.

(Emphasis added). Id. On the other hand, Mr. Crites began his remarks noting that: "[f]irst, you will note that this proposal is for the sole purpose of limiting the number of hours of labor; second, to establish a minimum wage for the wageworker." Id. at 1331. (Emphasis added). During his remarks in support of the proposal, Mr. Dwyer commented that employers ought to

*10 give your employees fair living wages, good sanitary surroundings during hours of labor, protection as far as possible against danger, a fair working day. Make his life as pleasant for him as you can consistent with his employment.

(Emphasis added). Id. at 1332. Mr. Elson commen-

ted, "It seems to me that the kernel of this proposal is a minimum wage." *Id.* at 1336. On the other hand, Mr. Harris offered his support for Proposal No. 122, except the minimum-wage language:

I am very anxious to support the remainder of the proposal, and if the authors will strike the words "minimum wage," the proposal will receive not only the united support of this Convention but of the people of Ohio.

Id. at 1337. Following this debate, the question was called and the proposal passed for the first time with eighty yeas and thirteen nays. *Id.* at 1338.

{¶ 43} On May 22, 1912, Proposal No. 122 was reported from the committee on Arrangement and Phraseology with an amendment to "[s]trike out the title and insert: 'To submit an amendment by adding section 34, Article II of the constitution.-Welfare of employes' " and make other grammatical corrections. *Id.* at 1742.

{¶ 44} On May 23, 1912, Proposal No. 122 was read for the third time whereupon Mr. Harris offered an amendment to strike the words "minimum wage." *Id.* at 1784. Debate on the amendment proceeded, but, ultimately, the amendment was tabled and the proposal passed for the second time with 96 yeas and five nays. *Id.* at 1786. Proposal No. 122's language at that time read the same as Section 34 now reads. *Id.*

{¶ 45} On May 31, 1912, Proposal No. 122 was reported from the committee on Arrangement and Phraseology without amendment and passed a third and final time ^{FN4} with 87 yeas and eight nays. *Id.* at 1955.

{¶ 46} Reviewing the constitutional debates in light of the historical context preceding Proposal No. 122 (now Section 34), it is obvious that its purpose was to empower the General Assembly with legislative authority over (1) the hours of labor, (2) a minimum wage, and (3) working environment. Although the debates surrounding Proposal No. 122 focused on its minimum wage provision, it is clear

from our own review of the debates that the minimum wage provision was not Section 34's only subject. See also, *Rocky River*, 43 Ohio St.3d at 14-16, 539 N.E.2d 103. Mr. Dwyer and Mr. Harris's remarks demonstrate that Proposal No. 122's supporting delegates were also concerned with working environment conditions within Ohio.

{¶ 47} R.C. 9.481 does not fall within Section 34's original intent as evidenced by the historical context and the Convention proceedings. Rather, R.C. 9.481 attempts to regulate aspects of employment having nothing to do with the working environment-namely, where an employee resides after leaving work.

3. Interpretative Consequences

*11 {¶ 48} We must also consider the affect of interpreting Section 34's general welfare clause beyond the working environment. *Bailey*, 91 Ohio St.3d at 40, 741 N.E.2d 121, citing R.C. 1.49, *Jordan*, 89 Ohio St.3d at 492, 733 N.E.2d 601. If the general-welfare clause extends to issues outside the working environment, then what topic affecting employees would ever exceed its scope?

{¶ 49} Consider, for example, a law that would require employers to provide paid transportation to and from the workplace. Although the law does not concern the hours of labor or a minimum wage, it certainly affects the "general welfare" of employees. With soaring gas prices, congested traffic, and never-ceasing road construction, such a law would bring peace-of-mind to many employees across the state. If we agree with the state's interpretation of the general-welfare clause (i.e. beyond the working environment) this proposed law must also prevail. Like R.C. 9.481, the law would affect employees if we simply mean employees in status, as discussed above in Section IV A, but it would not affect employees within the scope of their employment. We simply cannot agree that Proposal No. 122's supporting delegates intended its language to extend beyond the working environment.

D. Section 34 Case Law

{¶ 50} The state argues that case law supports a broad interpretation of the General Assembly's authority under Section 34. The state further argues that the cases relied upon by Lima for its argument that Section 34's general-welfare clause is limited to issues directly related to the working environment expressly contradict this narrow interpretation. We agree, in part, and disagree, in part, with the state's interpretation of Section 34 general-welfare case law.

[10]{¶ 51} We agree with the state that Section 34 is a broad grant of legislative authority. *Am. Assn. of Univ. Professors v. Cent. State Univ.* (1999), 87 Ohio St.3d 55, 61, 717 N.E.2d 286 ("This court has repeatedly interpreted Section 34, Article II as a broad grant of authority to the General Assembly, not as a limitation on its power to enact legislation"); *Rocky River*, 43 Ohio St.3d at 13, 539 N.E.2d 103 (Section 34 "constitutes a broad grant of authority to the legislature to provide for the welfare of all working persons, including local safety forces," citing *State ex rel. Bd. of Trustees of Police Firemen's Pension Fund v. Bd. of Trustees of Police Relief & Pension Fund of Martins Ferry* (1967), 12 Ohio St.2d 105, 41 O.O.2d 410, 233 N.E.2d 135). However, the fact that the legislative grant of power is broad does not mean that the power exceeds the amendment's language or original intent; therefore, a further analysis is required.

{¶ 52} An example of an appropriate analysis is found in *Cent. State*, supra. In that case, the American Association of University Professors ("AAUP") challenged R.C. 3345.45, which required a mandatory ten percent increase in faculty classroom instruction at state universities. 87 Ohio St.3d at 56, 717 N.E.2d 286. In addition to its equal protection claims, AAUP argued that R.C. 3345.45 was outside the General Assembly's authority under Section 34. *Id.* at 60, 717 N.E.2d 286. AAUP argued that only laws benefiting employees could be passed pursuant to Section 34, and since R.C. 3345.45 burdened employees by increasing work

hours, it was invalid. *Id.* The Ohio Supreme Court disagreed.

*12 {¶ 53} The Ohio Supreme Court first noted that Section 34 powers are broad, as pointed out by the state. *Id.* at 61, 717 N.E.2d 286. However, the analysis did not stop there; instead, the court then went back to Section 34's plain language and reasoned that, in effect, AAUP was adding limiting language that did not exist in Section 34:

AAUP's position would require Section 34 to be read as a limitation, in effect stating: "No law shall be passed on the subject of employee working conditions unless it furthers the comfort, health, safety and general welfare of all employees."

Id. Beyond the plain language analysis, the court also examined the practical effect of AAUP's interpretation and found that it was problematic in the context of many existing laws other than R.C. 3345.45. *Id.* Therefore, the state's emphasis on the Ohio Supreme Court's interpretation of Section 34 powers as "broad," although relevant, is not dispositive to the issue raised in this case; a further analysis is required.

{¶ 54} To begin with, we disagree with the state that *Pension Fund* or *Rocky River* "expressly contradict" Lima's argument that Section 34's general-welfare clause is limited to the working environment. On the contrary, these cases, read in their totality with an understanding of the laws at issue therein, lend support to Lima's argument that Section 34's general welfare clause is more limited in scope than the state alleges. Furthermore, consistent with the amendment's primary concern, Section 34 general welfare case law is limited to employee economic welfare.

{¶ 55} In *Pension Fund*, the municipality challenged several sections of R.C. Chapter 742 and specifically R.C. 742.26, which required that municipalities transfer their firefighter and police pension and relief fund assets into a state-controlled

disability and pension fund. 12 Ohio St.2d at 106, 41 O.O.2d 410, 233 N.E.2d 135. The Ohio Supreme Court upheld R.C. 742.26 apparently under Section 34's general-welfare clause.

{¶ 56} The state of Ohio argues that pensions and disability benefits, the subject of *Pension Fund*, are not directly related to the work environment; and therefore, the General Assembly's Section 34 general-welfare authority extends beyond the work environment. The state reasons that pensions are received after retirement; and therefore, R.C. Chapter 742 is not related to the employee's working environment. Although pensions are received after retirement and, therefore, the effects of R.C. Chapter 742 are realized after the employee is no longer in the working environment, R.C. Chapter 742 pension and disability benefits are calculated based on an employee's wages and years of service. R.C. 742.3716 and 742.39; Ohio Adm.Code 742-3-02. Consequently, R.C. Chapter 742 pension and disability benefits, upheld by the Ohio Supreme Court, are related to the working environment, since they are calculated with respect to time and wages earned in the workplace.

*13 {¶ 57} Furthermore, pensions and disability benefits are nothing more than additional wages and compensation. Section 34's minimum-wage clause was enacted to give the state the authority to establish a wage foundation, but certainly the state is free to go beyond that foundation. The state, as employer, is also able to contract with its employees regarding wages and compensation, and does so regularly. Nothing in Section 34 was meant to limit this preexisting state power.

{¶ 58} In *Rocky River v. State Emp. Relations Bd.*, the Ohio Supreme Court determined that the Public Employees' Collective Bargaining Act, R.C. Chapter 4117, which provided for binding arbitration, addressed the "general welfare" of employees; and therefore, was a valid exercise of the General Assembly's Section 34 powers. 43 Ohio St.3d 1, 13, 539 N.E.2d 103. Like *Pension Fund*, R.C. Chapter 4117's legislative end was related to the work environment

and the worker as an 'employee' working within the scope of his or her duties. The purpose of a collective bargaining agreement is to provide for agreed-upon wages, hours, benefits, and other terms and conditions of employment, and the binding arbitration provided by R.C. Chapter 4117 was enacted to reach such an agreement. R.C. 4117.10. Wages, hours, benefits, and other terms and conditions of employment impact the worker in the work place.

{¶ 59} Contrary to the state's arguments, both *Pension Fund* and *Rocky River* do suggest that laws enacted pursuant to Section 34's general welfare language must have, at minimum, some nexus between their legislative end and the working environment. R.C. 9.481, unlike the laws in *Pension Fund* and *Rocky River*, lacks any nexus between its legislative end and the working environment. Rather, R.C. 9.481 attempts to regulate where an employee may reside outside of the work place.

{¶ 60} More important, like *Rocky River* and *Pension Fund*, other cases interpreting Section 34's general-welfare language are limited to legislation providing for the economic welfare of employees. See e.g. *State ex rel. Mun. Const. Equip. Operator's Labor Council v. Cleveland*, 114 Ohio St.3d 183, 2007-Ohio-3831, 870 N.E.2d 1174 (sick-leave benefits); *State ex rel. Horvath v. State Teachers Retirement Bd.* (1998), 83 Ohio St.3d 67, 697 N.E.2d 644 (teacher's savings plans); *Cincinnati v. Ohio Council 8, Am. Fedn. of State, Cty., & Mun. Emp.* (1991), 61 Ohio St.3d 658, 576 N.E.2d 745 (collective bargaining). In fact, Justice Cook has noted that "[e]conomic legislation related to the welfare of employees, including pension funds for public employees, is granted favored status under Section 34. Article II of the Ohio Constitution." *Horvath*, 83 Ohio St.3d at 74, fn. 2, 697 N.E.2d 644. One of the main purposes behind Section 34 was to address the economic welfare of employees who were earning meager wages during the 1900's. Consistent with Section 34's genesis, the Ohio Supreme Court has limited the scope of Sec-

tion 34's general-welfare clause to economic legis-
lation.^{FN5}

*14 {¶ 61} R.C. 9.481, unlike the laws upheld under Section 34's general welfare clause, is not economic legislation. Consequently, upholding R.C. 9.481 under Section 34's general welfare clause would expand its scope beyond that recognized by the Ohio Supreme Court; and this, we decline to do. Furthermore, if the laws passed under Section 34's general welfare clause do not have *some* nexus between their legislative end and the working environment, we see no boundary to the state's power over the employee and employer. We cannot agree that the 1912 Constitutional delegates intended such a result.

E. Conclusion

{¶ 62} First, we determined that Section 34's plain language provides that laws may be passed providing for the "general welfare of all employees." Second, since the plain meaning of the term "employees" can be more limited than simply signifying a status and is, therefore, ambiguous, we applied the statutory doctrine of *noscitur a sociis* and determined that the general-welfare clause should be limited to the working environment. Third, we analyzed the legislative history, including the historical context in which Section 34 was passed and the debates, and again determined that Section 34's general-welfare clause should be limited to the working environment. Fourth and finally, we analyzed Section 34 general welfare case law and determined that although Section 34 general-welfare powers are broad, they are broad within the context of the working environment. Further, we noted that cases interpreting Section 34's general welfare clause are limited to laws affecting employee economic welfare.

[11]{12}{¶ 63} For all these reasons, we conclude that laws enacted pursuant to Section 34's general-welfare clause must, at minimum, have *some* nexus between their legislative end and the working envi-

ronment. Since R.C. 9.481 lacks any nexus between its legislative end-restricting political subdivisions from requiring residency as condition of employment-and the working environment, we hold that R.C. 9.481 was not validly enacted pursuant to Article II, Section 34 of the Ohio Constitution.

{¶ 64} Lima's assignment of error two is therefore sustained.

Assignment of Error No. 1

The trial court erred in finding R.C. 9.481 is a general law of statewide concern

{¶ 65} Lima's second assignment of error having been sustained, Lima's first assignment of error is now relevant and dispositive to this case. In its first assignment of error, Lima argues that the trial court incorrectly determined that R.C. 9.481 is constitutional pursuant to the doctrine of statewide concern. Lima contends that the trial court did not apply the doctrine of statewide concern within the context of the *Canton* test. Under a proper formulation of the *Canton* test, argues Lima, R.C. 9.481 is not a "general law"; and therefore, does not supersede Lima's home-rule authority. In addition, Lima argues that its residency requirement is a matter of local self-government; and therefore, prevails under the *Canton* test.^{FN6}

*15 {¶ 66} The state argues that regulation of residency requirements has transformed into a matter of statewide concern due to the extraterritorial effects that such requirements have on other communities. Further, the state argues that since Lima enacted its residency pursuant to its local self-government power and not its police power, the *Canton* test does not apply. We disagree with the state's interpretation of the applicable case law and therefore find that the state's arguments lack merit.

{13}{¶ 67} First, the state's argument that *Canton* does not apply when a municipality acts pursuant to its local self-government power is correct, but it certainly does not mean that the state prevails.^{FN7}

The first step in a home-rule analysis is to determine "whether the matter in question involves an exercise of local self-government or an exercise of local police power." If an allegedly conflicting city ordinance relates solely to self-government, the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction. On the other hand, if, as is more likely, the ordinance pertains to concurrent police power rather than the right to self-government, the ordinance that is in conflict must yield in the face of a general state law.

Am. Financial Servs. Assn. v. Cleveland, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776, ¶ 23, citing *Twinsburg v. State Emp. Relations Bd.* (1988), 39 Ohio St.3d 226, 228, 530 N.E.2d 26, overruled on other grounds, *Rocky River*, 43 Ohio St.3d 1, 539 N.E.2d 103. On the contrary, if Lima enacted its residency requirement pursuant to its local self-government power, the "analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction," and Lima prevails. *Id.*

{¶ 68} This result is also supported from the fact that the *Canton* three-prong preemption test was developed in order to determine whether a municipal ordinance must yield to the provisions of a state statute. *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 9; *Ohio Assn. of Private Detective Agencies, Inc. v. N. Olmsted*, 65 Ohio St.3d 242, 244, 602 N.E.2d 1147. *Canton* prong two requires that: "the ordinance is an exercise of the police power, rather than local self-government." Therefore, if (1) the *Canton* test determines whether a municipal ordinance must yield to the provisions of a state statute, (2) *Canton* prong two requires that Lima enacted its residency requirement pursuant to the police power, and (3) Lima enacted its residency requirement as an act of local self-government as the state argues, then Lima's ordinance need not yield to R.C. 9.481.

{¶ 69} Second, the state is appealing to the doctrine of statewide concern as an independent ground for preemption. That argument, however, was rejected by the Ohio Supreme Court in *Am. Fin. Servs.*, supra. The Ohio Supreme Court explained, "We recognize, however, that the application of 'statewide concern' as a separate doctrine has caused confusion, because some courts have considered the doctrine a separate ground upon which the state may regulate." 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776, at ¶ 29, citing *Dayton*, 157 Ohio App.3d 736, 2004-Ohio-3141, 813 N.E.2d 707, ¶ 32-76. The court in *Am. Financial Servs.* clarified that the statewide-concern doctrine is part of the *Canton* three-prong preemption test and used to determine whether "the ordinance is an exercise of the police power, rather than local self-government" (*Canton* prong two). *Id.* 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 30.

*16 {¶ 70} Since we do not believe that the state intended to admit that *Canton* prong two is lacking, we will proceed with the *Canton* analysis, beginning with Lima's first argument that R.C. 9.481 is not a "general law" as required by *Canton* prong three. If *Canton* prong three is met, we must determine whether *Canton* prong two is met; however, if prong three is not met, then the *Canton* test fails and the inquiry is over.

{14}{¶ 71} Prong three of *Canton's* preemption test requires that the state statute be a "general law." 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 9. Whether the state statute is a general law is, itself, determined by a separate four-prong test. *Id.* at ¶ 21. To be a general law under prong three of *Canton's* preemption test, the 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.

Id. Lina argues that R.C. 9.481 does not meet prongs three and four of the *Canton* general-law test. We agree.

A. Police, Sanitary, or Similar Regulation

{¶ 72} The court in *Canton* explained that “general laws” within Section 3, Article XVIII of the Ohio Constitution means “statutes setting forth police, sanitary or similar regulations and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations.”⁹⁵ Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 31, citing *W. Jefferson v. Robinson*, 1 Ohio St.2d 113, 30 O.O.2d 474, 205 N.E.2d 382, at paragraph three of the syllabus. R.C. 9.481 provides: “Except as otherwise provided in division (B)(2) of this section, no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state.” Thus, on its face, R.C. 9.481 clearly purports “to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations.” Id.

{¶ 73} However, in *Canton* the court determined that paragraph three of *Robinson*, supra, really meant “that a statute which prohibits the exercise by a municipality of its home rule powers without such statute serving an overriding statewide interest would directly contravene the constitutional grant of municipal power.” (Emphasis added.) Id., citing *Clermont Environmental Reclamation Co. v. Wiederhold* (1982), 2 Ohio St.3d 44, 48, 2 OBR 587, 442 N.E.2d 1278. Thus, the critical inquiry in this case is whether allowing political subdivision employees to reside in any part of the state is an “overriding state interest.”

*17 {¶ 74} The court in *Canton* did not explain what it meant by “overriding state interest,” nor did it definitely conclude that the law at issue in that

case was one such “overriding state interest.” Rather, the court in *Canton* merely concluded that “R.C. 3781.184(C), on its face, appears more affordable housing options across the state.” (Emphasis added.) 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 33. The court in *Clermont*, on the other hand, concluded that the issue of “whether there will be safe and properly operated hazardous waste disposal facilities within this state to receive the potentially dangerous wastes from Ohio industry and, by so doing, prevent such wastes from fouling our water and countryside” was an overriding state interest. 2 Ohio St.3d at 49, 2 OBR 587, 442 N.E.2d 1278.

{15}[16]{¶ 75} Even if there may be a state interest at stake in this case, it is not an “overriding” one. When passing R.C. 9.481, the General Assembly declared its intent to recognize “[t]he inalienable and fundamental right of an individual to choose where to live pursuant to Section 1 of Article I, Ohio Constitution.” Sub. S.B. No. 82, 2. However, “[i]nterpretation of the state and federal Constitutions is a role exclusive to the judicial branch.” *Beagle v. Walden* (1997), 78 Ohio St 3d 59, 62, 676 N.E.2d 506. Although the citizens of Ohio may have a right to determine where they live under Article I, Section 1, citizens do not have a right to live where they want and demand employment with a particular employer. See *Smeltzer v. Smeltzer* (Nov. 24, 1993), 7th Dist. No. 92-C-50, 1993 WL 488235, at *1, citing *Allison v. Akron* (1974), 45 Ohio App.2d 227, 343 N.E.2d 128; *Cutshall v. Sundquist* (C.A.6, 1999), 193 F.3d 466, 479; *Morgan v. Cianciola* (Dec. 28, 1987) 7th Dist. No. 87 C.A. 130, 1987 WL 31935, at *1 (“The constitution does not guarantee the right to hold a specific job with a particular employer, but, rather, the right ‘to follow a chosen trade or occupation, and to earn a livelihood for oneself * * *’”).

{¶ 76} Certainly the preservation of a constitutional right would be an “overriding state interest” on the same scale as the state’s interest in protecting the

water supply from hazardous waste. However, there is no constitutional right to choose where one lives and, at the same time, demand employment from an unwilling employer. So, the state's interest in prohibiting political subdivisions from passing residency restrictions is not an 'overriding' one, like the state's interest was in *Clermont*, supra.

{¶ 77} On the other hand, Lima's interest in establishing residency as a qualification of employment is substantial. The mayor of Lima gave several important reasons for the residency requirement, specifically that it

(1) promotes the City's interest in the employment of individuals who are highly committed to the betterment of the City where they both live and work;

*18 (2) enhances the quality of work performance by employing individuals who are knowledgeable about and aware of issues and conditions in the City;

(3) promotes the employment of individuals with a greater empathy for the real and long term concerns and problems of the people of Lima;

(4) promotes the development and maintenance of a workforce with a greater personal stake in working to ensure the City of Lima's improvement and progress over the long term;

(5) promotes the availability of resident employees who are easily available for emergency situations and who can respond promptly if on-call for certain duties;

(6) promotes the ability of the City to maintain a workforce that reflects the racial and ethnic diversity of its population and its absence would undermine those efforts;

(7) produces economic benefits that flow to a city from having resident employees which are of a particular importance in an economically depressed city such as Lima;

(8) promotes the value of real estate in the City;

(9) promotes the development and maintenance of strong neighborhoods anchored by stable, wage-earning City employees and their families; and

(10) promotes numerous other benefits to the City of Lima and helps avoid other harms.

(Mayor of Lima Affidavit at 8). In addition to these reasons, the qualification, duties, and selection of municipal officers has traditionally been within a municipality's home-rule authority. *State ex rel Lentz, v. Edwards* (1914), 90 Ohio St. 305, 107 N.E. 768; *State ex rel Frankenstein v Hillenbrand* (1919), 100 Ohio St. 339, 343-345, 126 N.E. 309; *State ex rel. Mullin v Mansfield* (1971), 26 Ohio St.2d 129, 55 O.O.2d 239, 269 N.E.2d 602; *N. Ohio Patrolmen's Benevolent Assn. v Parma* (1980), 61 Ohio St.2d 375, 15 O.O.3d 450, 402 N.E.2d 519; *State Personnel Bd. of Review v Bay Village Civ. Serv. Comm.* (1986), 28 Ohio St 3d 214, 216, 28 OBR 298, 503 N.E.2d 518. The Ohio Supreme Court has extended the home-rule authority to the appointment and regulation of police officers and other civil service functions as well. *Harsney v. Allen* (1953), 160 Ohio St. 36, 40, 50 O.O. 492, 113 N.E.2d 86, citing *State ex rel Lentz v. Edwards* (1914), 90 Ohio St. 305, 107 N.E. 768; *State ex rel. Regeiz v. Cleveland Civ. Serv. Comm.* (1995), 72 Ohio St.3d 167, 169, 648 N.E.2d 495, citing *State ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191, 5 O.O.2d 481, 151 N.E.2d 722; *State ex rel. Meyers v. Columbus* (1995), 71 Ohio St.3d 603, 606, 646 N.E.2d 173, citing *State ex rel. Bardo v. Lyndhurst* (1988), 37 Ohio St.3d 106, 108, 524 N.E.2d 447; *State ex rel. Hipp v. N. Canton* (1996), 75 Ohio St.3d 221, 224, 661 N.E.2d 1090. Lima has a similar interest in the qualifications of its other employees as well, and exercising legislative authority in furtherance of this interest should be within the home-rule authority.

{¶ 78} Even if the state had an "overriding" interest

in this case, R.C. 9.481 has several exceptions similar to the law in *Canton*, which defeats the state's proposed interest. The court in *Canton* recognized that the state's proposed interest in passing R.C. 3781.184(C) was to provide affordable housing options across the state; however, the law had an exception for restrictive covenants in private deeds. 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 33, citing R.C. 3781.184(D). The court in *Canton* found that this exception actually defeated the state's purpose; and therefore, the law failed to set forth police, sanitary, or similar regulations and only served to limit the legislative authority of municipalities. Id.

*19 {¶ 79} The General Assembly's purpose in passing R.C. 9.481 was

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. No. 82, Section 3. First, R.C. 9.481, like R.C. 3781.184(C), on its face exempts private parties and the state, itself. R.C. 9.481(C). Second, like R.C. 3781.184(C), R.C. 9.481 has two further exemptions for "volunteers" and for employees required to respond to "emergencies" or "disasters." R.C. 9.481(B)(2)(a) and (B)(2)(b). Thus, R.C. 9.481 has exemptions that defeat its purpose of generally prohibiting residency restrictions and, like the law at issue in *Canton*, fails to set forth police, sanitary, or similar regulations.

{¶ 80} We, therefore, find that R.C. 9.481 does not set forth police, sanitary, or similar regulations but merely limits the municipality's power to do the same, and prohibiting political subdivisions from requiring residency as a condition of employment is not an overriding state interest sufficient to meet prong three of *Canton's* general-law test.

B. Prescribing a Rule of Conduct on Citizens Generally

[17]{¶ 81} Prong four of *Canton's* general-law test requires that the statute "prescribe a rule of conduct upon citizens generally." 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 21. The court in *Canton* explained that a general law "is [not] a limitation upon law making by 'municipal legislative bodies' " and has "no special relation to any of the political subdivisions of the state." " 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 34, 38, citing *Youngstown v. Evans* (1929), 121 Ohio St. 342, 168 N.E. 844 (statute providing "that all municipal corporations shall have general power 'to make the violation of ordinances a misdemeanor, and to provide for the punishment thereof by fine or imprisonment, or both, but such fine shall not exceed five hundred dollars and such imprisonment shall not exceed six months' " does not prescribe a rule of conduct upon citizens generally); *Schneiderman v. Sesanstain* (1929), 121 Ohio St. 80, 84, 167 N.E. 158 (speed limits), quoting *Froelich v. Cleveland* (1919), 99 Ohio St. 376, 386, 124 N.E. 212; *Clermont*, 2 Ohio St.3d 44, 2 OBR 587, 442 N.E.2d 1278 (hazardous-waste facility).

{¶ 82} This same standard has been applied by the Ohio Supreme Court in other home rule cases. *Robinson*, 1 Ohio St.2d at 117, 30 O.O.2d 474, 205 N.E.2d 382 (statute that purported to grant a municipality power to license solicitors does not prescribe a rule of conduct upon citizens generally); *Linndale v. State* (1999), 85 Ohio St.3d 52, 55, 706 N.E.2d 1227 (prohibiting local law-enforcement officers from issuing speeding and excess-weight citations on interstate freeways does not prescribe a rule of conduct upon citizens generally).

*20 {¶ 83} Like the statutes in *Canton*, *Youngstown*, and *Linndale*, R.C. 9.481 only purports to limit a municipality's legislative power and has a special relationship to the state political subdivisions. R.C. 9.481's plain language states: "Except as otherwise provided in division (B)(2) of this section, no political subdivision shall require any of its

employees, as a condition of employment, to reside in any specific area of the state." R.C. 9.481 is, on its face, a limitation of local legislative power and applies only to political subdivisions. As such, it fails prong four of *Canton's* general-law test.

C. Conclusion of *Canton's* General-Law and Preemption Tests

[18] ¶ 84 R.C. 9.481 fails prongs three and four of *Canton's* general-law test; therefore, R.C. 9.481 does not preempt Lima Ordinance No. 201-00 since it fails *Canton's* three-part preemption test. 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 9, 21. Because we have determined that R.C. 9.481 fails prong three of *Canton's* preemption test and all three prongs must be met, we need not consider the parties' arguments on whether R.C. 9.481 also fails prong two of *Canton's* preemption test. *Id.*, at ¶ 9. Since R.C. 9.481 fails *Canton's* preemption test, it violates Section 3, Article XVIII of the Ohio Constitution. *Id.*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 39.

¶ 85 Lima's second assignment of error is, therefore, sustained.

Assignment of Error No. III

The trial court erred in not finding R.C. 9.481 violates Article II, Section 26 of the Ohio Constitution.

¶ 86 In its third assignment of error, Lima argues that the trial court erred in not finding that R.C. 9.481 violates Article II, Section 26 of the Ohio Constitution (the Uniformity Clause). Since we have decided that R.C. 9.481 violates Section 3, Article XVIII of the Ohio Constitution, we need not decide whether it also violates the Uniformity Clause. *Canton*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 39; *Linddale*, 85 Ohio St.3d at 55, 706 N.E.2d 1227.

V. Conclusion

¶ 87 A few closing remarks are appropriate before we conclude. We understand that residency requirements have a real impact on Ohio citizens and are often felt most by working families. Were we members of the Ohio legislature, our decision might be different than that required of us today. We, however, are judicial officers and have taken an oath to uphold the Ohio Constitution and the laws of this state—and to that oath we hope to be found faithful by those who have so entrusted us. Thus constrained, we summarize our conclusions of law:

¶ 88 R.C. 9.481 was not validly enacted pursuant to Article II, Section 34 of the Ohio Constitution, because Section 34's language, legislative history, and case law support finding that laws providing for the "general welfare of all employees" must have, at minimum, some nexus between their legislative end and the working environment.

¶ 89 R.C. 9.481 is not a general law under *Canton* that would preempt Lima Ordinance No. 201-00; therefore, R.C. 9.481 violates Section 3, Article XVIII of the Ohio Constitution. Lima Ordinance No. 201-00 is a valid exercise of local self-government pursuant to Section 3, Article XVIII of the Ohio Constitution and prevails, R.C. 9.481 notwithstanding.

*21 ¶ 90 Having found error prejudicial to the appellant herein in the particulars assigned and argued, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

ROGERS, P.J., and WILLAMOWSKI, J., concur.
ROGERS, P.J., AND WILLAMOWSKI, J., CONCUR.

FN1. Amicus curiae, Local 334 of the International Association of Fire Fighters, has also submitted a brief in support of the

state of Ohio in this case.

FN2. "Respondeat superior" is defined as "The doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." Black's Law Dictionary (8th Ed.2004) 1338.

FN3. Much of the information herein was explained by the court in *Rocky River*; however, a fresh look at the legislative history is prudent.

FN4. Proposal No. 122 was passed three times, twice for committee report changes/amendments and one final time with all the amendments incorporated.

FN5. That is not to say that Section 34's *only* purpose was to address economic concerns or only minimum wages. As we have explained, the plain language of Section 34 also provides for (1) hours of labor, (2) minimum wages, (3) health, (4) comfort, and (5) safety. See *Rocky River*, 43 Ohio St.3d at 14-16, 539 N.E.2d 103.

FN6. Both the state and Lima concede that *Canton* prong one is met. The disagreement is whether prongs two and three are met.

FN7. In fact, Lima is arguing that its residency requirement was passed pursuant to its local self-government power and therefore *Canton* prong two fails.

Ohio App. 3 Dist.,2007.

Lima v. State

--- N.E.2d ----, 2007 WL 4248278 (Ohio App. 3 Dist.), 183 L.R.R.M. (BNA) 2755, 2007 -Ohio- 6419

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Toledo v. State
Ohio App. 6 Dist., 2008.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Lucas
County.
City of TOLEDO and City of Oregon, Appellant
v.
STATE of Ohio, Appellee.
No. L-07-1261.

Decided April 25, 2008.

Background: City brought action against state, challenging validity of state statute invalidating municipal charter provisions requiring municipal employees to reside within the boundaries of the municipality as a precondition of their government employment. The Court of Common Pleas, Lucas County, found statute valid and entered summary judgment in favor of state. City appealed.

Holdings: The Court of Appeals, Osowik, J., held that:

- (1) statute improperly infringed on constitutional municipal home rule authority, and
- (2) city's residency requirement was a valid and proper exercise of the constitutional grant of municipal home rule authority.

Reversed.

Singer, J., dissented and filed opinion.

West Headnotes

[1] Municipal Corporations 268 ⇐79

268 Municipal Corporations
268III Legislative Control of Municipal Acts,
Rights, and Liabilities

268k77 Operation and Effect of Legislative
Acts

268k79 k. Conflict with Charter or Act of
Incorporation. Most Cited Cases
Statute invalidating municipal charter provisions
requiring municipal employees to reside within the
boundaries of the municipality as a precondition of
their government employment improperly infringed
on constitutional municipal home rule authority;
residency requirement did not entail "on-duty"
hours worked, wages earned, or workplace condi-
tions, but rather involved an "off-duty" right volun-
tarily waived as a precondition of employment by
those seeking and accepting municipal employ-
ment. Const. Art. 2, § 34, Art. 18, § 3; R.C. §
9.481.

[2] Municipal Corporations 268 ⇐67(1)

268 Municipal Corporations
268III Legislative Control of Municipal Acts,
Rights, and Liabilities
268k67 Appointment and Removal of Of-
ficers

268k67(1) k. In General. Most Cited
Cases
Municipal charter provision requiring municipal
employees to reside within the boundaries of the
municipality as a precondition of their government
employment, which provision expressly authorized
the granting of residency waivers in the interest of
justice, was a valid and proper exercise of the con-
stitutional grant of municipal home rule authority.
Const. Art. 2, § 34, Art. 18, § 3.

West Codenotes

Held Unconstitutional R.C. § 9.481
John Madigan, City of Toledo Director of Law, and
Adam Loux, Senior Attorney, for appellant.
Marc Dann, State of Ohio Attorney General, Shar-
on A Jennings and Pearl M. Chin, Assistant Attor-
neys General, for appellee.
Henry A. Arnett, for amicus curiae.
OSOWIK, J.

*1 ¶ 1 This is an appeal from a judgment of the Lucas County Court of Common Pleas, which granted summary judgment to appellee and denied it to appellant. The essence of this case revolves around the validity of a state statute enacted in 2006, R.C. 9.481, expressly to invalidate municipal charter provisions throughout Ohio requiring municipal employees to reside within the boundaries of the municipality as a precondition of their government employment.

¶ 2 Under the disputed municipal charter residency requirements, prospective municipal employees voluntarily waive the right to maintain residency outside the boundaries of the municipality offering them employment upon acceptance of said employment. The residency requirement provision does incorporate flexibility, enabling exceptions to be made. Specifically, the city of Toledo Charter residency provision specifically allows residency waivers to be granted in order to accommodate unique circumstances or cases where it is shown that a waiver is required in the interests of justice.

¶ 3 R.C. 9.481, was drafted to constitute a general prohibition of municipal charter employee residency requirements in Ohio, even where waivers are permitted in the interest of justice. R.C. 9.481 was enacted ostensibly under the legislature's authority to regulate the wages and working conditions of labor granted under Section 34, Article II of the Ohio Constitution.

¶ 4 In its summary judgment ruling, the trial court declared R.C. 9.481 lawful and prevailing as applied to the conflicting municipal employee residency requirement provision of the city of Toledo Charter. For the reasons set forth below, this court reverses the judgment of the trial court.

¶ 5 Appellant, the city of Toledo, sets forth the following two assignments of error:

¶ 6 "No. 1 The trial court erred when it granted the State's motion for Summary Judgment, because Ohio Revised Code 9.481 was not properly enacted

pursuant to Art. II, § 34 of the Ohio Constitution.

¶ 7 "No. 2 The trial court erred when it denied the City's Motion for Summary Judgment because the City's Charter residency requirements prevail over Ohio Revised Code Section 9.481."

¶ 8 The following undisputed facts are relevant to the issues raised on appeal. Section 34, Article II, Ohio Constitution, authorizes state legislation regulating wages and employment conditions affecting workers engaged in the performance of labor. It states, "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." This provision, by the plain meaning of its own language, was clearly intended to address the compelling public interest in regulating hours required to be worked, wages paid, and conditions in the workplace in order to protect employees from abusive wages, hours and unsafe conditions.

*2 ¶ 9 Another portion of the Ohio Constitution is highly consequential to our analysis of this matter. Ohio municipalities enjoy constitutional authority to enact local rules in the exercise of local self-government. Article XVIII of the Ohio Constitution establishes, "Any municipality may frame and adopt or amend the charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government." This is commonly referred to as the "home rule" provision.

¶ 10 Pursuant to this constitutional grant of legislative home rule power, the city of Toledo Charter establishes in relevant part, "every officer and employee must be a resident of the city of Toledo." However, in order to permit exceptions and accommodate special and compelling cases, the Charter specifically provides authority to grant municipal residency requirement waivers where, "justice to such employee so requires."

{¶ 11} On January 27, 2006, then Governor Taft executed Senate Bill 82. This bill was codified as R.C. 9.481 with an effective date of May 1, 2006. R.C. 9.481 states in pertinent part, "no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state." Given its direct contravention to municipal charter employee residency requirements, including Toledo's Charter residency provision enacted pursuant to the home rule provision of the Ohio Constitution, Toledo filed a complaint on April 28, 2006, requesting a judicial determination that R.C. 9.481 is unconstitutional. On June 9, 2006, the state of Ohio filed its answer. On November 13, 2006, opposing motions for summary judgment were filed.

{¶ 12} On April 26, 2007, two municipal employee unions, namely, Toledo Firefighters Local 92 and the Toledo Police Patrolmen's Association, requested and were granted leave to file amicus curiae briefs in support of the state position that their members should not be required to reside in the municipality that provides them government employment. These plaintiffs argued that residing in Toledo has a significant adverse impact on them. They assert that, "some employees may be hard pressed to afford housing in the community where they work, while more affordable housing may exist just across the city limits." No supporting factual data is furnished to establish that housing opportunities are more affordable in area suburbs of Northwest Ohio or Southeastern Michigan in comparison to the city of Toledo so as to support the financial hardship argument as relevant to Toledo's residency requirement.

{¶ 13} In addition, they argue that the residency requirement creates additional quality of life burdens such as inhibiting them from shopping where they would like, going to church where they would like, or sending their children to the school they would like. Again, other than their assertions, the plaintiffs have failed to submit any factual evidence or data to demonstrate how residing within the

boundaries of Toledo as a condition of their employment by Toledo burdens or inhibits its municipal employees from shopping, worshipping, or educating their children.

*3 {¶ 14} Further, to address any individual concerns, the Toledo Municipal Charter expressly contains a waiver provision for any unique and special cases where an undue burden of some kind can be established such that justice requires a waiver.

{¶ 15} In its first assignment of error, appellant asserts that the trial court erred in granting appellee's motion for summary judgment. In support, appellant contends that R.C. 9.481 is not a proper legislative enactment pursuant to Section 34, Article II as argued by appellee. It is axiomatic that rules and provisions of law be interpreted and applied given their reasonable, plain and ordinary meaning. The crux of the state's position in support of R.C. 9.481 is that it is a proper legislative enactment pursuant to Section 34, Article II. Article II states in relevant part, "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."

[1]{¶ 16} Consistent with the language of the constitutional provision, Ohio Supreme Court precedent analyzing the scope of powers granted by Section 34, Article II consistently pertain to the public interest in workload, workplace, and compensation issues affecting employee welfare as opposed to preconditions to qualify for the employment. For example, *American Assn. of Univ. Professors v. Central State Univ.* (1999), 87 Ohio St.3d 55, 717 N.E.2d 286 dealt with R.C. 3345.45, which exempted public university professor workloads from collective bargaining. By contrast, R.C. 9.481 involves an "off-duty" right voluntarily waived as a precondition of employment by those seeking and accepting municipal employment. It does not entail "on-duty" hours worked, wages earned, or workplace conditions. As such, R.C. 9.481 does not fall within the purview of Article II, Section 34 and improperly undermines the well-established home rule

provision set forth in Article XVIII of the Ohio Constitution.

{¶ 17} Our review of summary judgment determinations is conducted on a de novo basis, applying the same standard used by the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d-127, 129, 572 N.E.2d 198; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Summary judgment will be granted when there remains no genuine issue of material fact and, considering the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 18} We have carefully reviewed and thoroughly considered the record of evidence. In applying the above legal principles to appellant's first assignment of error, we find that R.C. 9.481 does not pertain to the protection of employees' welfare from adverse wages, hours, or working conditions. Rather, it pertains to "off-duty" residential location preferences. Such residential preferences were voluntarily waived upon the acceptance of municipal employment. Terms and conditions of employment and the choice of whether to accept employment with certain terms and conditions are inherent in all employment decisions in a free market economy.

*4 {¶ 19} The unconvincing and unsupported reasons offered in an effort to establish an unacceptable or unfair burden imposed upon municipal employees by the residency requirement are not persuasive.

{¶ 20} Reasonable minds can only conclude that R.C. 9.481 is not a proper legislative enactment encompassed by Section 34, Article II of the Ohio Constitution. It is an obvious attempt to circumvent constitutional municipal home rule authority established granted by Article XVIII of the Ohio Constitution. Appellant's first assignment of error is found well-taken.

{¶ 21} In its second assignment of error, appel-

lant asserts that the trial court erred in denying Toledo's motion for summary judgment to declare its Charter residency requirement a valid exercise of its home rule authority pursuant to Article XVIII of the Ohio Constitution. First, we note that the disputed Charter provision expressly authorizes the granting of residency waivers in the interest of justice.

{¶ 22} Given our holding that R.C. 9.481 is not encompassed by or constitutional pursuant to Article II, the express incorporation of a justice waiver in the Charter, and the home rule authority established by Article XVIII of the Ohio Constitution, we find that the Toledo Charter residency requirement is a valid and proper exercise of the constitutional grant of municipal home rule authority. Appellant's second assignment of error is found well-taken.

{¶ 23} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded the Lucas County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

WILLIAM J. SKOW, J. and THOMAS J. OSOWIK, J., Concur.

ARLENE SINGER, J., dissents, and writes separately.

SINGER, J. I respectfully dissent.

{¶ 24} I recognize the benefits that inure to a municipality when its public employees reside within its boundaries. Logic tells us that public taxpayer dollars are more likely to be reinvested in the community and help maintain the municipality's vitality. Public salaries will most likely be reinvested in the city. Employees may invest in real estate, with attendant property taxes supporting the schools and

other city services; may support community businesses; and may support the municipality's community, cultural, social and political programs and projects.

{¶ 25} And logic also tells us that when a public employee resides within the employer community, that employee is enfranchised. Employees are able to vote for (or against) the elected officials who set policy and make the decisions directly affecting employment, as well as tax and other income generation devices that provide fair salaries and benefits and employment opportunity. Convenience and minimal expense of travel to nearby employment may be also a benefit to the employee who resides within the employer municipality.

*5 {¶ 26} However, all cities and communities cannot offer their employees the necessary and desired quality of life services and conditions. Hospitals and other medical services, religious institutions, educational opportunities as well as other necessities may not be readily available within the city limits. Municipalities may argue that unless their employees live within the city it may be without sufficient resources to provide or maintain those very same services and conditions. Employees may argue that because the city does not provide or maintain certain services or conditions, they must choose between their own and their family's needs and municipal employment.

{¶ 27} Resolution of this conflict, by requiring municipal employees to reside within the employer-municipality, places the burden on the employees as a condition of employment. This clearly, to me, affects their comfort, health, safety and, most particularly, their general welfare. R.C. 9.481 removes this burden by prohibiting a political subdivision to dictate where their employees may live.

{¶ 28} Section 34, Article II, Ohio Constitution authorizes state legislation regulating wages and employment conditions and includes " providing for the comfort, health, safety and general welfare of all employees."

{¶ 29} The trial court relied on *State ex rel Bd. Of Trustees of Pension Fund v. Bd. Of Trustees of Relief Fund* (1967), 12 Ohio St.2d 105, 233 N.E.2d 135 and *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d and found R.C. 9.481 constitutional.

{¶ 30} The trial court correctly relied on that line of cases. Section 34, Article II, Ohio Constitution must be broadly construed. Therefore, residency restrictions by political subdivisions affect the general welfare of employees. I would hold that R.C. 9.481 is constitutional.

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OH Const. Art. II, § 34

Baldwin's Ohio Revised Code Annotated Currentness
Constitution of the State of Ohio
Article II. Legislative (Refs & Annos)

→ O Const II Sec. 34 Wages and hours; employee health, safety and welfare

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.

(1912 constitutional convention, adopted eff. 1-1-13)

EDITOR'S COMMENT

1990:

The key reforms advocated by organized labor in the late nineteenth and early twentieth centuries included a living wage, decent working conditions, and job security. These reforms are reflected in this section. Various provisions arising from this section are found throughout RC Title 41.

This section is one of the measures growing out of the Progressive Movement, and incorporated into the Constitution in the 1912 Amendments. For a discussion of the movement, see Commentary to §33, Article II. Other measures resulting from this movement include the initiative and referendum in §1 to 1g, Article II, the provisions on mechanics' and materialmen's liens, workmen's compensation, conservation of natural resources, and the eight-hour day in §33, 35, 36, and 37, Article II, and direct primary elections in §7, Article V.

CROSS REFERENCES

Child labor law; employment of minors, Ch 4109

Day's work equals 8 hours, 4113.01

Defenses of fellow servant, assumption of risk, and contributory negligence not available to employer in certain actions brought by employee, 4113.05 to 4113.08

Employer charged with knowledge of defect or unsafe condition causing injury; prima facie evidence of neglect, 4113.04

Mine safety; administration of mining laws, Ch 4151 to 4161

Minimum fair wage standards, Ch 4111

Overtime pay; 40-hour week, 4111.03

Payment of wages, 4113.15, 4113.16

Promise in employment contract not to join union is void, 4113.02

OH Const. Art. XVIII, § 3

Baldwin's Ohio Revised Code Annotated Currentness
Constitution of the State of Ohio (Refs & Annos)
§ Article XVIII. Municipal Corporations (Refs & Annos)

→ **O Const XVIII Sec. 3 Municipal powers of local self-government**

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.

(1912 constitutional convention, adopted eff. 11-15-12)

UNCODIFIED LAW

2002 H 386, § 3, eff. 5-24-02, reads:

(A) The provisions of the Revised Code, including, but not limited to, Titles XI, XIII, XVII, and XLVII, relating to the origination, granting, servicing, and collection of loans and other forms of credit prescribe rules of conduct upon citizens generally, comprise a comprehensive regulatory framework intended to operate uniformly throughout the state under the same circumstances and conditions, and constitute general laws within the meaning of Section 3 of Article XVIII of the Ohio Constitution.

(B) The provisions of the Revised Code, including, but not limited to, Titles XI, XIII, XVII, and XLVII, relating to the origination, granting, servicing, and collection of loans and other forms of credit have been enacted in furtherance of the police powers of the state.

(C) Silence in the Revised Code, including, but not limited to, Titles XI, XIII, XVII, and XLVII, with respect to any act or practice in the origination, granting, servicing, or collection of loans or other forms of credit shall not be interpreted to mean that the state has not completely occupied the field or has only set minimum standards in its regulation of lending and other credit activities.

(D) It is the intent of the General Assembly to entirely preempt municipal corporations and other political subdivisions from the regulation and licensing of lending and other credit activities.

EDITOR'S COMMENT

1990:

This is the key section in the Home Rule Amendment. It confers "powers of local self-government" on all municipalities, while preserving the state's power to dictate state policy and enact general laws.

This section is and has been productive of much litigation to define its parameters. At the outset, there was confusion on whether Article XVIII was self-executing or required additional action to make the "powers of local self-government" available to municipalities. In an early case, the Ohio Supreme Court held that it was not self-executing, and that state laws regulating municipal government were not changed until amended by general laws, or by enactment of additional laws ratified by the voters under §2, or by adoption by the voters of a muni-

Baldwin's Ohio Revised Code Annotated Currentness

General Provisions

Chapter 9. Miscellaneous

Additional Miscellaneous

→ 9.481 Residency requirements prohibited

(A) As used in this section:

(1) "Political subdivision" has the same meaning as in section 2743.01 of the Revised Code.

(2) "Volunteer" means a person who is not paid for service or who is employed on less than a permanent full-time basis.

(B)(1) Except as otherwise provided in division (B)(2) of this section, no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state.

(2)(a) Division (B)(1) of this section does not apply to a volunteer.

(b) To ensure adequate response times by certain employees of political subdivisions to emergencies or disasters while ensuring that those employees generally are free to reside throughout the state, the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state. For the purposes of this section, an initiative petition shall be filed and considered as provided in sections 731.28 and 731.31 of the Revised Code, except that the fiscal officer of the political subdivision shall take the actions prescribed for the auditor or clerk if the political subdivision has no auditor or clerk, and except that references to a municipal corporation shall be considered to be references to the applicable political subdivision.

(C) Except as otherwise provided in division (B)(2) of this section, employees of political subdivisions of this state have the right to reside any place they desire.

(2006 S 82, eff. 5-1-06)

UNCODIFIED LAW

2006 S 82, §§ 2 and 3, eff. 5-1-06, read:

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.

CROSS REFERENCES

Appointment and duties of superintendent, evaluation, renewal, vacation leave, 3319.01

RESEARCH REFERENCES

Encyclopedias

OH Jur. 3d Schools, Universities, & Colleges § 186, Superintendents of Schools.

Treatises and Practice Aids

Gotherman, Babbit and Lang, Baldwin's Ohio Practice, Local Government Law-- Municipal, § 3:6, Local Affairs and Matters of Statewide Concern.

Gotherman, Babbit and Lang, Baldwin's Ohio Practice, Local Government Law-- Municipal, § 10:13, Residence Requirement.

Hastings, Manoloff, Sheeran, & Stype, Ohio School Law § 12:1, Authority to Hire Nonteaching Employees.

Hastings, Manoloff, Sheeran, & Stype, Ohio School Law § 7:16, Assistant Superintendents, Principals, and Other Administrators--In General, Authority to Hire.

Hastings, Manoloff, Sheeran, & Stype, Ohio School Law § 8:24, Nomination and Appointment of Teachers.

Princehorn, Baldwin's Ohio Practice, Local Government Law--Township, § 12:3, Hiring.

NOTES OF DECISIONS

Constitutional issues 1 Remedies 2

1. Constitutional issues

Fire fighters' union's mandamus action to compel city to comply with new statute prohibiting a political subdivision from requiring any of its employees, as a condition of employment, to reside in any specific area of the state was a matter of first impression involving two apparently competing provisions of state constitution, and thus, because resolution of matter was not at all certain, city did not have a clear legal duty, and union did not have a clear legal right to the requested relief. Cleveland Fire Fighters Assoc. Local 93 of Internatl. Assoc. of Firefighters v. Jackson (Ohio App. 8 Dist., Cuyahoga, 02-22-2006) No. 87708, 2006-Ohio-800, 2006 WL

416525, Unreported. Mandamus ↪ 76

Statute limiting the ability of political subdivisions to condition employment on residency was not a general law and, thus violated municipal home rule provision of the Ohio Constitution, and did not preempt city's ordinance establishing a residency requirement for city employees, given that statute was not validly enacted pursuant to the general welfare clause of the provision of the Ohio Constitution governing wages and hours and employee health, safety and welfare. *Lima v. State* (Ohio App. 3 Dist., 12-03-2007) 2007-Ohio-6419, 2007 WL 4248278. Municipal Corporations ↪ 67(1)

State did not have an overriding interest in limiting the ability of political subdivisions to condition employment on residency, as required for statute imposing such limitation to constitute a general law superseding city's home rule authority, although citizens of Ohio had a constitutional right to determine where they lived; there was no constitutional right to choose where one lived and, at the same time, demand employment from an unwilling employer, and exemptions for private parties, the state, volunteers, and emergency employees defeated statute's purpose of generally prohibiting residency restrictions. *Lima v. State* (Ohio App. 3 Dist., 12-03-2007) 2007-Ohio-6419, 2007 WL 4248278. Municipal Corporations ↪ 67(1)

Statute limiting political subdivisions' ability to condition employment on residency lacked any nexus between its legislative end and the working environment, and thus the statute was not validly enacted pursuant to the general welfare clause of the provision of the Ohio Constitution governing wages and hours and employee health, safety, and welfare. *Lima v. State* (Ohio App. 3 Dist., 12-03-2007) 2007-Ohio-6419, 2007 WL 4248278. Municipal Corporations ↪ 124(3)

Waiver provision of city ordinance requiring certain municipal employees, including firefighters, to reside in city absent permission from city council to live outside the city was not unconstitutionally vague; although waiver provision did not explain circumstances in which a waiver would be granted, discriminatory enforcement was no more invited in ordinance than it was in any other provision allowing city council to pass legislation. *Association of Cleveland Fire Fighters v. City of Cleveland, Ohio* (C.A.6 (Ohio), 09-25-2007) 2007 WL 2768285. Municipal Corporations ↪ 594(2)

Firefighters' vagueness challenge to waiver provision of city ordinance requiring municipal employees to establish residency in city absent permission from city council to live outside the city would be evaluated according to less-stringent standard, since there was no constitutional right to be employed by city while living elsewhere. *Association of Cleveland Fire Fighters v. City of Cleveland, Ohio* (C.A.6 (Ohio), 09-25-2007) 2007 WL 2768285. Constitutional Law ↪ 4166(2)

Firefighters, challenging city ordinance requiring municipal employees to establish residency in city, failed to allege they were treated differently from other firefighters, as required to state an as-applied challenge to the ordinance under the Equal Protection Clause. *Association of Cleveland Fire Fighters v. City of Cleveland, Ohio* (C.A.6 (Ohio), 09-25-2007) 2007 WL 2768285. Constitutional Law ↪ 967

City ordinance requiring that certain municipal employees, including firefighters, establish residency in city did not violate the Equal Protection Clause, since presence of firefighter in city, whether on duty or not, provided a trained person immediately available. *Association of Cleveland Fire Fighters v. City of Cleveland, Ohio* (C.A.6 (Ohio), 09-25-2007) 2007 WL 2768285. Municipal Corporations ↪ 197

City ordinance requiring that certain municipal employees, including firefighters, establish residency in city did

not violate constitutionally protected right to travel. Association of Cleveland Fire Fighters v. City of Cleveland, Ohio (C.A.6 (Ohio), 09-25-2007) 2007 WL 2768285. Municipal Corporations ↪ 197

2. Remedies

Statute prohibiting a political subdivision from requiring any of its employees, as a condition of employment, to reside in any specific area of the state was not yet in effect, and thus fire fighters' union's action seeking writ of mandamus to compel city to comply with statute was not ripe; statute would not become effective until 90 days after the governor had filed it with the Office of the Secretary of State. Cleveland Fire Fighters Assoc. Local 93 of Internat. Assoc. of Firefighters v. Jackson (Ohio App. 8 Dist., Cuyahoga, 02-22-2006) No. 87708, 2006-Ohio-800, 2006 WL 416525, Unreported. Mandamus ↪ 16(1)

Fire fighters' union's mandamus action to compel city to comply with statute prohibiting a political subdivision from requiring any of its employees, as a condition of employment, to reside in any specific area of the state, was actually a declaratory judgment action asking court to find city's charter provision requiring residency of its employees null and void, and thus Court of Appeals lacked jurisdiction to hear action. Cleveland Fire Fighters Assoc. Local 93 of Internat. Assoc. of Firefighters v. Jackson (Ohio App. 8 Dist., Cuyahoga, 02-22-2006) No. 87708, 2006-Ohio-800, 2006 WL 416525, Unreported. Declaratory Judgment ↪ 207.1; Mandamus ↪ 141

R.C. § 9.481, OH ST § 9.481

Current through 2008 Files 1 to 119, 121, 123 & 125 to 127 of the 127th GA (2007-2008), apv. by 6/23/08, and filed with the Secretary of State by 6/23/08.

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