

In the
Supreme Court of Ohio

STATE OF OHIO, et al., : Case No. 2008-0418
: :
Defendants-Appellants, : On Appeal from the
: Summit County
v. : Court of Appeals,
: Ninth Appellate District
CITY OF AKRON, et al., :
: Court of Appeals Case
Plaintiffs-Appellees. : No. 23660

**MERIT BRIEF OF
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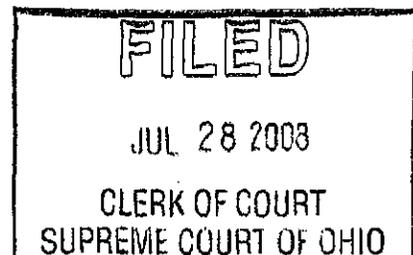


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INTRODUCTION

The General Assembly enacted R.C. 9.481 (“Freedom of Residency Act” or “FRA”) in 2006 to protect the rights of municipal employees to live where they choose and to guard against the fundamental unfairness that results when municipal residency restrictions are imposed on city employees and their families. In so doing, the General Assembly exercised its expansive powers under Article II, Section 34 to provide for the “comfort, health, safety, and general welfare” of employees. As the Court has repeatedly explained, the General Assembly’s powers under Section 34 are broad. The Court has therefore held that Section 34 authorizes the General Assembly to legislate on such important matters as public employee pension rights, sick and disability leave, and the right to engage in collective bargaining. See, e.g., *Am. Ass’n of Univ. Professors v. Central State Univ.* (1999), 87 Ohio St. 3d 55 (“AAUP”) (work hours); *City of Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St. 3d 1 (“Rocky River IV”) (arbitration in the Ohio Public Employees’ Collective Bargaining Act); *State ex rel. Bd. of Trustees of Pension Fund v. Bd. of Trustees of Relief Fund* (1967), 12 Ohio St. 2d 105 (pensions).

Although the Ninth District expressly noted that this 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,” *State of Ohio v. City of Akron* (9th Dist.), 2008 Ohio App. Lexis 33, 2008-Ohio-38, ¶ at 20 (App. Ex. A), the appeals court nevertheless decided to construct three new-found limitations of its own. Specifically, the Ninth District proclaimed that Section 34 was restricted to enactments that (1) secure freedom for Ohio citizens or further their common welfare in accord with the preamble of the Ohio Constitution, (2) encompass a comprehensive statutory scheme as opposed to a single-subject statute, and (3) define the scope of a pre-existing right as opposed to creating a new one. *Id.* at ¶¶ 19-23. None of the Ninth

District's limitations, however, have any support in text, precedent, or public policy, and accordingly should be rejected. Moreover, the appeals court's decision not only undermines this Court's previous decisions upholding state laws governing public employee pension rights, sick and disability leave, and the like, but also restricts the General Assembly's power to further protect or provide for public employees.

The Ninth District also erred in concluding that the FRA was vulnerable to a home rule challenge. First, that the General Assembly enacted the FRA under its Section 34 powers is dispositive of the issue. The Ohio Constitution specifically provides that "no other provision of the Ohio Constitution impairs or limits [Article II, Section 34] power," including the home rule provisions of Section 3, Article XVIII. Art. II, § 34. The fact that the Freedom of Residence Act is properly promulgated under Article II, Section 34, ends the inquiry, and this Court therefore need not reach the home rule issue.

Second, in any event, the Freedom of Residency Act does not violate home rule. Any home rule challenge must first resolve whether the local ordinance is an exercise of local police power or of local self-government. *Am. Fin. Servs. Ass'n v. City of Cleveland*, 112 Ohio St. 3d 175, 2006-Ohio-6043, ¶ 29 ("AFSA"). If an ordinance is a matter of local police power, then the home rule analysis moves to the *Canton* four-prong general law test (which the Ninth District erroneously applied here). *Id.* at ¶ 27; see *City of Canton v. State*, 95 Ohio St. 3d 149; 2002 Ohio 2005. On the other hand, if an ordinance is a matter of self-government, then the Court need ask only whether the issue is a purely local concern or a statewide concern. *Id.* at ¶ 29. In this case, all parties recognize that Akron's residency requirement involves an alleged issue of local self-government. Therefore, the appeals court should have applied the statewide concern doctrine

here. Unfortunately, the Ninth District erred when it instead applied the analysis applicable to ordinances enacted as local police powers.

The FRA must be upheld under the statewide concern doctrine. The doctrine provides that the powers of local self-government must yield to state statutes regulating issues of statewide concern. See *AFSA*, 2006-Ohio-6043 at ¶¶ 27-29. Here, Akron's residency requirement, along with all the other residency requirements throughout Ohio, affects such statewide concerns as the right of persons to live where they choose, school funding and other educational resource issues, and tax revenues. Moreover, the State has an important statewide interest in ensuring fairness in the conditions of employment imposed on public-sector employees. Because the FRA regulates issues of great statewide concern, Akron's residency requirement must give way and the Ninth District's decision should be reversed.

For these reasons and others set forth below, the Court should reverse the appeals court's decision and uphold the FRA as a valid enactment under Section 34 that is not limited by municipal home rule. Alternatively, even if the FRA is deemed to implicate home rule, the Court should uphold the law because residency restrictions involve matters of statewide concern, and therefore the FRA takes precedence over Akron's residency requirement.

STATEMENT OF FACTS

A. Akron's residency requirement prohibits its employees from residing outside its corporate boundaries.

The City of Akron Charter Sections 105a and 106(5b) ("Akron's residency requirement") prohibit both its unclassified service employees and classified service employees from residing outside the City of Akron if they wish to retain their jobs with the city. Specifically, Section 105a provides that "[n]o person shall retain any position in the unclassified service unless he be a resident citizen of the City of Akron within six months of his appointment and remain a resident

for the period during which he occupies said position.” City of Akron Charter § 105a (App. Ex. B). Section 106(5b) provides 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 months of his appointment or promotion, and remain a residency citizen of the City of Akron during the terms of his employment.” *Id.*, Section 106(5b) (App. Ex. C). Akron’s residency requirement resembles those enacted by other localities throughout the State.

B. The General Assembly enacted the Freedom of Residency Act to prohibit political subdivisions from requiring full-time employees to reside in a specific area of the State.

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

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

C. The trial court held that R.C. 9.481 was enacted for the comfort, health, safety, and general welfare of employees and did not violate the Ohio Constitution.

On May 1, 2006, the City of Akron sued the State in the Summit County Common Pleas Court, seeking an order declaring the statute unconstitutional. *City of Akron*, 2008-Ohio-38 at ¶ 5. 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 and its mayor seeking a declaration that the General Assembly had properly enacted R.C. 9.481. *Id.* at ¶ 6. On cross motions for summary judgment, the trial court determined that R.C. 9.481 was properly enacted under Article II, Section 34. See Summit County Court of Common Pleas Op. (App. Ex. E). Because laws enacted under Article II, section 34 “trump the home rule provision,” the trial court concluded that home rule analysis need not be reached. *Id.* at 5. Finally, the trial court concluded that the statute did not violate the Uniformity Clause, Due Process Clause, or Equal Protection Clause of the Ohio Constitution. *Id.* at 6.

D. The appeals court’s narrow reading of Article II, Section 34 limits the General Assembly’s legislative authority to “comprehensive statutory schemes” that define a pre-existing right in furtherance of a public benefit.

The Ninth District Court of Appeals disagreed with all of the trial court’s conclusions. The court began its analysis by considering the General Assembly’s legislative power to pass laws “providing for the comfort, health, safety, and general welfare of all employees” under Article II, Section 34. *City of Akron*, 2008-Ohio-38 at ¶ 9. While acknowledging that the Ohio Supreme Court “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,’” the appeals court, nevertheless, placed its own limits on the scope of the general welfare clause of Section 34. *Id.* at ¶ 16-18 (citing *Rocky River IV*, 43 Ohio St. 3d at 15). Looking first to the common welfare clause of the Ohio

Constitution's preamble, the court determined that Ohio's Constitution authorizes only those laws that "secure freedom for its citizens or further their common welfare." *Id.* at ¶¶ 19, 20. The Ninth District then distinguished the FRA from other legislative enactments upheld by the Ohio Supreme Court under Section 34 because the statutes at issue in those cases purportedly (1) met the preamble's requirement of securing freedom for Ohio citizens or furthering their common welfare, and further (2) encompassed a comprehensive statutory scheme as opposed to a single-subject statute, as well as (3) defined the scope of a pre-existing right as opposed to creating a new one. *Id.* at ¶¶ 19-23.

Using this new three-part test, the appeals court concluded that the FRA "does not address any significant social issue impacting the public at large; it is not part of a comprehensive legislative scheme, but deals with a single issue; and it applies to a relatively small segment of the population." *Id.* at ¶ 24. The appeals court further determined that the FRA "does not pertain to the protection or regulation of any existing right or obligation of the affected employees" because city employees "voluntarily surrendered" the right to choose where to live "when they accepted government employment." *Id.* at ¶ 25. Based on that analysis, the appeals court held that the FRA was not properly enacted under Article II, Section 34. *Id.* at ¶ 29.

E. The court of appeals held that the General Assembly's enactment of the FRA violated Akron's home rule power.

The appeals court next turned to the State's argument that R.C. 9.481 addresses an issue of statewide concern and therefore trumps Akron's municipal home rule powers. In rejecting that argument, the appeals court first concluded that Akron's residency requirement was enacted under the city's home rule authority, *id.* at ¶ 30, without distinguishing whether Akron's residency requirement implicated Akron's local police powers or its power of local self-

government. The court then applied the *Canton* four-prong general law test, which is applicable to ordinances of local police power—not ordinances of self-government.

Using that test, the appeals court determined that the Freedom of Residency Act is not a “general law” under *Canton* and advances no “overriding state interest,” and therefore violates the City of Akron’s home rule powers under Article XVIII, Section 3 of the Ohio Constitution. *Id.* at ¶ 32-33.

This timely appeal followed.

ARGUMENT

Appellant State of Ohio’s Proposition of Law No. 1:

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

At first blush, this case seems to present a home rule challenge involving municipal residency requirements. But this is not a home rule case. Rather, this dispute addresses the scope of the General Assembly’s authority under Article II, Section 34 of the Ohio Constitution. And, if the issues are properly construed, the Court need not reach the home rule question, because the General Assembly passed the FRA under its Section 34 powers.

Under Section 34, the General Assembly possesses supreme power to pass laws for “the comfort, health, safety and general welfare of all employees.” The Section specifically provides that “*no other provision of the constitution shall impair or limit this power.*” Art. II, § 34 (emphasis added). Accordingly, this Court has expressly recognized Section 34’s primacy over home rule, stating, “Section 3, Article XVIII of the Ohio Constitution, the home-rule provision, may not be interposed to impair, limit, or negate” legislation enacted pursuant to Article II, Section 34.” *Rocky River IV*, 43 Ohio St. 3d 1 at syllabus, ¶ 2.

Article II, Section 34 of the Ohio Constitution also sets out the General Assembly’s powers to legislate for the welfare of employees, establishing that “[l]aws 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.” In enacting the FRA, the General Assembly expressly stated its intent to exercise its powers under Section 34, declaring that its purpose was “to provide for the comfort, health, safety, and general welfare of . . . public employees.” 126th General Assembly, Sub. S.B. No. 82, Section 3. Because the General Assembly expressly intended to legislate under Section 34, the question before this Court is whether the FRA comes within the powers granted by that provision. If it does, the analysis ends and Akron’s residency requirement is invalid. As described below, the Freedom of Residency Act is a valid exercise of the General Assembly’s Section 34 powers, and the Court should uphold the FRA and reverse the Ninth District’s decision.

A. The General Assembly’s Article II, Section 34 power to provide for the comfort, health, safety, and general welfare of employees is broad and unambiguous.

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.” *AAUP*, 87 Ohio St. 3d at 61 (citing *Rocky River IV*, 43 Ohio St. 3d at 14). Given the well-settled breadth of Section 34’s grant of authority, this Court has repeatedly rejected attempts by litigants to narrow the provision’s scope. See, e.g., *Rocky River IV*, 43 Ohio St. 3d at 13 (rejecting an argument that Section 34 should be limited to “matters involving a minimum wage” in the course of a constitutional challenge to the arbitration provision of the Public Employee’s Collective Bargaining Act); *AAUP*, 87 Ohio St. 3d at 61 (rejecting plaintiffs’ challenge to a statute increasing teaching hours of staff at universities because plaintiffs’ claim that Section 34 be interpreted to allow only laws benefiting employees conflicted with Section 34’s “broad grant of

authority” to the legislature). Properly following this Court’s decisions, the Second District recently concluded that “[t]he effect [of the plain language of Article II, Section 34] 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.” *City of Dayton v. State* (2d Dist.), 2008 Ohio App. Lexis 2179, 2008-Ohio-2589, ¶ 77 (upholding the FRA as properly enacted under Article II, Section 34) (App. Ex. F).

A broad reading of the General Assembly’s Section 34 powers is also supported when the language of that provision is understood in its historical context. When adopted in 1912, laws—such as Section 34—providing for “comfort” and “health” and “safety” and “general welfare” were understood to be grounded in the state’s broad police power. See, e.g., *Atlantic Coast R.R. Co. v. City of Goldsboro* (1914), 232 U.S. 548, 559 (describing the police power as “the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community.”). This Court accordingly has traditionally recognized that the scope of the General Assembly’s power to legislate for “public safety, the public health and morals, and the general welfare [is] as broad as these conditions may require.” *Bd. of Comm’rs of Champaign County v. Church* (1900), 62 Ohio St. 318, 344; see also *Ghaster Properties, Inc. v. Preston* (1964), 176 Ohio St. 425, 435 (upholding the General Assembly’s authority to regulate public highway signs for aesthetic reasons because the “general welfare of the public encompasses more than the public health, safety, and morals” and includes the public’s “comfort, convenience, and peace of mind”).

Similarly, at the time of Section 34’s adoption, it was generally understood in employment regulation that laws regulating the “health” and “safety” and “general welfare of employees” applied to more than just wage and hour laws. See, e.g., *In re Berger* (Hamilton C.P. 1912), 22

Ohio Dec. 439, 441 (upholding statute prohibiting discharging or threatening to discharge an employee for “forming, joining, or belonging to a lawful labor organization” because the State’s police power permitted legislation for “the safety, health, morals, and general welfare of the public” (quoting *Adair v. United States* (1908), 208 U.S. 161, 173)). Thus, the historical context of Section 34’s enactment also supports the conclusion that the General Assembly’s Section 34 power is expansive.

B. The Freedom of Residency Act falls within Article II, Section 34’s grant of authority to provide for the comfort, safety, health, and general welfare of employees.

The General Assembly passed the FRA under its broad Section 34 powers. By providing employees of political subdivisions the freedom to choose where to live (subject to certain reasonable limitations), the FRA provides for the health, comfort, safety, and general welfare of those employees. See *City of Dayton*, 2008-Ohio-2589. When a city seeks to impose an unfair condition of employment that has nothing to do with an employee’s qualifications, competency, or job performance, Section 34 empowers the General Assembly to step in on behalf of those employees’ general welfare.

Like other statutes upheld under Section 34 that regulate the general welfare of employees, the FRA protects employees from unfair terms and conditions of employment. See *City of Kettering v. State Employment Relations Bd.* (1986), 26 Ohio St. 3d 50, 57 (state collective bargaining act upheld under General Assembly’s Section 34 powers to “enact legislation establishing *employee rights and protections*”) (Douglas J, concurring) (emphasis added). An employee’s general welfare is plainly affected by the terms and conditions she confronts at work, and the General Assembly’s regulation of residency requirements in other employment areas recognizes this self-evident connection. This logical link is not lost on Ohio courts, as they have continually held residency requirements are a proper subject of collective bargaining under a

state statute passed pursuant to Section 34. See *City of St. Bernard v. State Employment Relations Bd.* (1st Dist. 1991), 74 Ohio App. 3d 3, 6 (determining that a residency requirement is a mandatory subject of collective bargaining under the Ohio Public Employees' Collective Bargaining Act); see also *Santiago v. City of Toledo* (6th Dist. Feb. 13, 1998), 1998 Ohio App. Lexis 465 (residency requirements are a condition of employment and are subject to collective bargaining). As these decisions recognize, the General Assembly's determination to legislate in the area of residency restrictions furthers, under Section 34, the general welfare of employees.

The above-cited cases—*Rocky River IV*, *Kettering*, and *City of St. Bernard*—all demonstrate that under Section 34, the General Assembly has authority to enact laws that regulate employer-employee labor relations and to ensure the fairness of terms and conditions that public employers impose on employees. Residency requirements are employment conditions that unmistakably affect the general welfare of employees. As such, the FRA is a valid exercise of the General Assembly's Section 34 powers, and the decision below should be reversed.

C. The General Assembly's Section 34 power is not limited to comprehensive legislative enactments that define an existing right and affect common welfare of the public as a whole.

As discussed above, Section 34 grants the General Assembly broad authority to regulate the general welfare of employees. Nonetheless, the lower court improperly created, out of whole cloth, three limitations on this power. First, based on the preamble of the Ohio Constitution, the court insisted that the General Assembly could only enact laws that “secure freedom for its citizens or further their common welfare” and stated that an employee’s residency fell outside that limit because it does not address any “significant social issues impacting the public at large” and applies only to a “relatively small segment of the population”—that is, employees of political subdivisions. *City of Akron*, 2008-Ohio-38 at ¶¶ 19, 24. Second, the court improperly

concluded that under Section 34 the General Assembly can pass only “comprehensive legislative schemes,” and that the FRA did not qualify as such because it was a single issue statute. *Id.* at ¶¶ 22, 24. Third, the appeals court determined that the General Assembly’s powers under Section 34 are limited to defining the scope of an existing right, and that the FRA fails that test because municipal employees voluntarily surrendered that right to choose where to live when they accepted government employment. *Id.* at ¶ 25. But this tripartite test is inconsistent with the language of Section 34 itself and this Court’s precedent. Accordingly, the decision below should be reversed.

1. Reliance on the preamble of the Ohio Constitution to limit the General Assembly’s powers contravenes the express language of Section 34 and undermines existing legislation.

Article II, Section 34 of the Ohio Constitution specifically provides that “no other provision of the Ohio Constitution shall impair or limit” the General Assembly’s power to pass laws providing for the general welfare of employees. Art. II, § 34. Moreover, as the appeals court itself acknowledged, the Ohio 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.” *City of Akron*, 2008-Ohio-38 at ¶ 20. However, in contravention of this express language and this Court’s Section 34 jurisprudence, the Ninth District looked to the preamble of the Ohio Constitution to place boundaries on the general welfare language of Section 34. The preamble states as follows: “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.” Based on this broad language, the appeals court somehow concluded without relevant precedent or historical discussion that the Ohio Constitution only authorizes laws that “secure freedom for its citizens or further their common

welfare,” and that all laws, including those enacted under Section 34, are subject to this limitation. *Id.* at ¶ 19.

The appeals court then determined that the FRA fell outside that limitation because it “does not address any significant social issues impacting the public at large” and “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.” *Id.* at ¶ 24.

In its recent related decision, the Second District recognized the error of the Ninth District’s limiting construction of Section 34. *City of Dayton*, 2008-Ohio-2589 at ¶¶ 74-77. First, the Second District noted the limited purpose of a preamble as “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.” *Id.* at ¶ 74 (citing *Christy v. Summit County Bd. of Elections*, 77 Ohio St. 3d 35, 39 n.1). The Second District then referred to the last clause of Section 34, which unequivocally states that “no other provision of the constitution shall impair or limit” the General Assembly’s powers to provide for the general welfare of all employees, including the preamble. *Id.* at ¶ 77. Next, the Second District determined that the cases cited by the Ninth District—purporting to limit Section 34 to comprehensive statutory schemes and pre-existing rights—do not so limit the Section. *Id.* at ¶¶ 76-78. Instead, those cases support an expansive reading of the General Assembly’s Section 34 power. See, e.g., *AAUP*, 87 Ohio St. 3d at 61 (“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.”). Accordingly, the Second District rightly determined that “the grant of legislative power contained in Section 34, Article II [is] plenary; no limitation to that power external to the language therein may be

imposed,” *City of Dayton*, 2008-Ohio-2589 at ¶ 77, and therefore the FRA is a valid enactment providing for the general welfare of employees, *id.* at ¶ 78.

The Second District’s critique is well-taken. In contrast, the Ninth District’s three-part test requiring laws be passed for the common welfare not only flies in the face of the express language of Section 34; it also undermines existing legislation enacted under the General Assembly’s Section 34 powers. See, e.g., *Bd. of Trustees of Relief Fund*, 12 Ohio St. 2d 105 (police and firefighters disability and pension fund); *State ex rel. Horvath v. State Teachers Retirement Bd.* (1998), 83 Ohio St. 3d 67 (STRS fund); *State ex rel. Mun. Const. Equipment Operator’s Labor Council v. Cleveland*, 114 Ohio St. 3d 183, 2007-Ohio-3831 (sick leave). For example, many public-employment matters that have historically been subject to state regulation, such as sick leave and pensions, arguably do not fit within the Ninth District’s new framework. Sick leave for public employees is a fringe benefit, *Ebert v. Stark Cty. Bd. of Mental Retardation* (1980), 63 Ohio St. 2d 31, 33, that compensates for “absence from previously scheduled work.” R.C. 124.38(C). A pension, likewise, is money paid to a fund member upon retirement, R.C. 742.37(C), or to a deceased member’s surviving spouse, R.C. 742.37(D). Minimum-wage laws may not help the high-paid; labor laws may not help the non-unionized. These fundamental benefits are forms of compensation that may not meet the restrictive requirements of the Ninth District’s new test, because they may not benefit the public at large. But such laws, like the FRA, are proper because they are necessary for the general welfare of employees.

2. Section 34 does not limit the General Assembly’s powers to enact comprehensive legislative schemes that define a preexisting right.

The appeals court also incorrectly invalidated the FRA on the grounds that it is “not part of a comprehensive legislative scheme” and “does not pertain to the protection or regulation of any existing right or obligation of the affected employees.” *City of Akron*, 2008-Ohio-38 at ¶¶ 24-25.

These additional limitations on Section 34 suffer from the same infirmities as the appeals court's reliance on the "common welfare" language of the Ohio Constitution's preamble: the court improperly added an external limitation that does not exist in the language of Section 34 or in this Court's precedent. The appeals court acknowledged as much by noting that the Ohio Supreme Court "has not explicitly articulated a limitation on the General Assembly's authority under Article III[,] Section 34 to enact legislation for the 'general welfare' of employees." *Id.* at ¶ 20. Rather, the "comprehensive legislative scheme" and "preexisting rights" limitations arise from the appeals court's own attempt to place boundaries on Section 34. As explained above, this was done in contravention of the express language of Section 34.

Furthermore, these new limitations created by the appeals court are simply without foundation. Nothing in the text of Section 34 (or any other provision of the Constitution) suggests that it is relevant to ask whether an enactment creates a new right or merely defines a preexisting right. The General Assembly may create a new statutory right, as it did with pensions, or further explain an already existing statutory right. The Ninth District's rule would preclude the General Assembly from creating new statutory rights for employees even though the Ohio Constitution—through Article II, Section 1 and Article II, Section 34—undeniably vests the General Assembly with that power.

Simply put, the General Assembly's Section 34 power to provide for the general welfare of employees is broad. And the Court's precedent makes clear that Section 34 legislation is not limited to a comprehensive legislative scheme that furthers the common welfare and defines a pre-existing right. Because the General Assembly properly enacted the FRA under Section 34, the statute should be upheld.

Appellant State of Ohio's Proposition of Law No. 2:

R.C. 9.481 does not unconstitutionally conflict with Akron's municipal home rule powers.

A. Because the FRA was enacted under the General Assembly's Section 34 powers, it cannot be challenged under the home rule amendment.

Section 34, adopted in 1912 at the same time as the home rule amendment, expressly provides that "no other provision of the constitution shall impair or limit this power." This Court has held that language to mean that municipalities cannot avoid the application of statutes enacted under Section 34 by asserting home rule. *Rocky River IV*, 43 Ohio St. 3d 1 at syllabus, ¶ 2 ("Section 3, Article XVIII of the Ohio Constitution, the home-rule provision, may not be interposed to impair, limit, or negate" legislation enacted pursuant to Article II, Section 34.); see also *Bd. of Trustees of Relief Fund* (1967), 12 Ohio St. 2d at 106-07 (rejecting home rule challenge to statutes creating statewide fund to provide pension and disability funds for police and firefighters). Thus, the conclusion that the FRA falls within the scope of Article II, Section 34's legislative authority ends any need for this Court to address Akron's home rule argument.

B. Even if the FRA is subject to home rule challenge, Akron's residency requirement must be analyzed as the exercise of its power of local self-government, and the doctrine of statewide concern controls.

Even if this Court finds that the FRA was not enacted under the authority of Article II, Section 34 (and it was), the statute comports with the home rule amendment because the interest of all public employees to live where they choose is a statewide concern that transcends Akron's alleged powers of self-government. At the outset, under home rule analysis, a local ordinance must be classified in one of two ways: it either addresses a matter of self-government or constitutes an exercise of local police power. See Ohio Const. Art. XVIII, Sec. 3. These two types of local ordinances (self-government and police powers) are distinct. *State ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191, 197. And this distinction is fundamentally important to the

Court's home rule analysis. If an ordinance is a matter of local police power, then the home rule analysis moves to the *Canton* four-prong general law test. *AFSA*, 2006-Ohio-6043 at ¶ 27. On the other hand, if a municipal ordinance concerns a matter of self-government, the Court asks only whether the issue is a purely local concern or a statewide concern. *Id.* at ¶ 29.

Here, the appeals court improperly applied the four-prong *Canton* general law test, which is applicable to local police powers, even though Akron alleges that its residency requirements are matters of self-government and not police power regulation. See *City of Akron Ninth Dist. App. Br.*, pp. 8, 23. Thus, as this Court has held, the appeals court should have applied the statewide concern test for self-government, and not the *Canton* four-prong general law test for local police powers. See, e.g., *AFSA*, 2006-Ohio-6043 at ¶¶ 23, 29 (distinguishing the case before the Court from a case involving the exercise of powers of local self-government and holding that the doctrine of statewide concern applies to cases involving powers of local self-government); *Marich v. Bennett Constr. Co.*, 116 Ohio St. 3d 553, 2008-Ohio-92, ¶¶ 10-11 (outlining the different analysis that applies to powers of local self-government versus local police powers); *Phillips*, 168 Ohio St. at 197 (explaining that “[t]he words, ‘as are not in conflict with general laws’ found in Section 3 of Article XVIII . . . modify the words ‘local police, sanitary and other similar regulations’ but do not modify the words ‘powers of local self-government.’”).

As this Court has explained, the statewide concern doctrine test asks whether the ordinance in question constitutes a bona fide exercise of local self-government, or whether it intrudes on a matter of statewide concern that is properly regulated by the State. *AFSA*, 2006-Ohio-6043 at ¶¶ 27-29; see also *City of Reading v. Pub. Util. Comm'n of Ohio*, 109 Ohio St. 3d. 193, 2006-Ohio-2181, ¶ 32. The Court has “never held that the powers of local self-government under Section 3 are unlimited.” *City of Reading*, 2006-Ohio-2181 at ¶ 32. While political subdivisions

have home rule authority to regulate local matters, “even in the regulation of such local matters a municipality may not infringe on matters of general and statewide interest.” *Cleveland Elec. Illuminating Co. v. City of Painesville* (1968), 15 Ohio St. 2d 125, 129. Powers of local self-government must yield to state statutes regulating issues of statewide concern. See, e.g., *AFSA*, 2006-Ohio-6043 at ¶¶ 26-30 (holding that the doctrine of statewide concern applies to powers of local self-government); *City of Reading*, 2006-Ohio-2181 at ¶¶ 32-33 (providing that statewide concern doctrine limits all regulation of local matters, including alleged powers of local self-government). Thus, because residency requirements implicate a matter of statewide concern, as set forth below, the FRA does not violate the home rule amendment and controls over local regulation.

C. The FRA does not violate the home rule amendment because Akron’s residency restriction affects a matter of statewide concern.

The FRA easily satisfies the statewide concern inquiry. The statewide concern test asks whether an ordinance is truly limited to matters that affect only the municipality and its residents, or whether the ordinance has extraterritorial effects. *Cleveland Elec. Illuminating Co.*, 15 Ohio St. 2d at 129. If the result of a municipal ordinance “affects only the municipality itself, with no extraterritorial effects, the subject is clearly within the power of local self-government.” *Id.* However, if the impact of a local regulation is not confined to the particular municipality and “affects the general public of the state as a whole more than it does the local inhabitants the matter passes from what was a matter for local government to a matter of general state interest.” *Id.* Here, Akron’s residency requirement is not purely a matter of local self-government because of its wide ranging effects on adjacent communities’ residents, tax revenues, and housing markets. As such, under the statewide concern doctrine, the FRA supersedes Akron’s local residency requirement.

Akron's residency requirement closely resembles ordinances that this Court and the courts of other States have held to regulate matters of statewide concern. Most notably, in *Kettering*, the Court applied the statewide concern doctrine to civil service legislation, holding that public employees' collective bargaining is a matter of statewide concern. 26 Ohio St. 3d at 55 (explaining that "[w]hat the statewide concern doctrine perceives is that a comprehensive statutory plan is, in certain circumstances, necessary to promote the safety and welfare of all the citizens of this state"). The *Kettering* Court considered statutes governing public-sector labor relations, which were once locally regulated, to be matters now appropriate for statewide control. *Id.* at 56. Moreover, the courts of other States have found residency requirements to be a matter of statewide concern. See *Uniformed Firefighters Ass'n v. City of New York* (N.Y. 1980), 50 N.Y. 2d 85, 90 (holding that "the residence of [municipal employees], unrelated to job performance or departmental organization, is a matter of State-wide concern not subject to the home rule"); see also *Detroit Police Officers Ass'n v. City of Detroit* (Mich. 1974), 391 Mich. 44, 59-61 (holding that Detroit's residency requirement is subject to the state's collective bargaining act, and not under the city's unilateral control).

By their own terms, municipal residency requirements plainly affect statewide concerns. First, residency requirements affect statewide job-applicant pools. While the city may retain control over hiring and promotion decisions related to qualifications of employment and job performance, the city's residency requirement bears no relationship to an employee's job performance. Rather, it imposes conditions of employment unrelated to job performance, and those conditions have effects that reach far beyond city limits. By its own terms, the city's ordinance prevents non-residents from procuring employment in certain city positions, and thus affects not those who live in the city, but only those who reside outside of its territorial limits.

Residency requirements also prevent public employees from freely changing public employers because a change in employment may require a move, regardless of whether the employee believes such a move is necessary to take the new position.

Second, residency requirements like the City of Akron's also have a statewide effect on housing markets and public school resources. As municipal employees are forced to reside in the cities where they are employed, those cities benefit economically, to the detriment of cities without such requirements. Similarly, a residency requirement means that the school districts of cities imposing residency requirements benefit in terms of student enrollment and an increased property tax base, thereby depriving neighboring communities of those same resources. Thus, residency requirements have a significant effect on those who reside outside of the community, even if those communities themselves do not have residency requirements. Therefore, Akron's residency requirement has significant extraterritorial effects and thereby constitutes a matter of statewide concern.

Therefore, this Court should hold that the lower court's analysis was erroneous and should be reversed.

CONCLUSION

For the reasons set forth above, this Court should uphold the constitutionality of the Freedom of Residency Act as a valid enactment under Article II, Section 34 of the Ohio Constitution. In the alternative, this Court should uphold the Freedom of Residency Act as a valid statutory enactment of statewide concern. For all of these reasons, this Court should reverse the decision of the Ninth District Court of Appeals and order that judgment be entered in favor of the State of Ohio.

Respectfully submitted,

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COURT OF APPEALS
DANIEL M. HARRIGAN

STATE OF OHIO)
COUNTY OF SUMMIT)

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

STATE OF OHIO

SUMMIT COUNTY
CLERK OF COURTS
Case No: 23660

Appellees

v.

CITY OF AKRON, et al.

Appellants

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

DECISION AND JOURNAL ENTRY

Dated: January 9, 2008

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

DICKINSON, Judge.

THE QUESTION

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

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



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

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

BACKGROUND

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

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

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

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

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

THIS COURT'S STANDARD OF REVIEW

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

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

GENERAL WELFARE

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

Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HOME RULE

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

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

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

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Therefore, Section 9.48.1 of the Ohio Revised Code prevails over the city's residency requirement only if it qualifies as a "general law." In *Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, syllabus, the Ohio Supreme Court announced a four-part test defining what constitutes a general law for purposes of home-rule analysis: "a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally."

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

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

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

III.

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

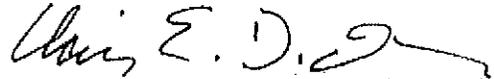
Judgment reversed and
the cause remanded.

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.



CLAIRE 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.

Remove highlighting.

CHARTER

CIVIL SERVICE

SECTION 105a. UNCLASSIFIED SERVICE--RESIDENCY REQUIREMENT.

No person shall retain any position in the unclassified service unless he be a resident citizen of the City of Akron within six months of his appointment and remain a resident for the period during which he occupies said position in the unclassified service, provided, however, that the provisions of this Section shall not be applicable to persons occupying said positions in the unclassified service on June 8, 1976.

(Approved by voters June 8, 1976) (Amendment adopted by electorate 11-6-90)

B

Remove highlighting.

CHARTER

CIVIL SERVICE

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 the 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 and who remain resident citizens of the City of Akron throughout the remainder of the selection process.

(5d) For declaring methods of granting preference points to the passing grades of those persons taking non-promotional examinations who are veterans of the Armed Forces of the United States irrespective of date of

C

honorable discharge from active duty.

(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 and 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.

(Amendment adopted by electorate 11-4-80; Amendment adopted by electorate 11-7-00)

AN ACT

To enact section 9.481 of the Revised Code to generally prohibit political subdivisions from imposing residency requirements on certain employees.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 9.481 of the Revised Code be enacted to read as follows:

Sec. 9.481. (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.

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.

Speaker _____ *of the House of Representatives.*

President _____ *of the Senate.*

Passed _____, 20____

Approved _____, 20____

Governor.

Sub. S. B. No. 82

4

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the
day of _____, A. D. 20____.

Secretary of State.

File No. _____ Effective Date _____

DANIEL M. HOFFMAN
IN THE COURT OF COMMON PLEAS

2007 MAR 30 SUMMIT COUNTY, OHIO

CITY OF AKRON,)	
CLERK OF COURTS)	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,

E

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. 9481 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. 9481 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:

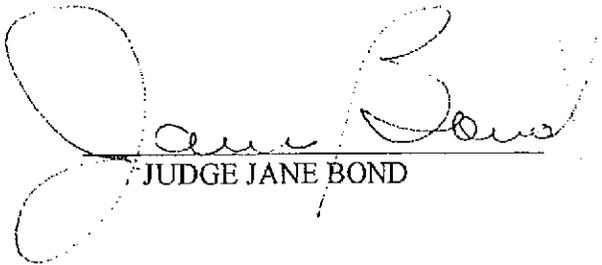
While there may be occasions where a political subdivision may challenge the constitutionality of state legislation, it is not entitled to rely upon the protections of the Fourteenth Amendment. A political subdivision . . . receives no protection from the Equal Protection or Due Process Clauses vis-a-vis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

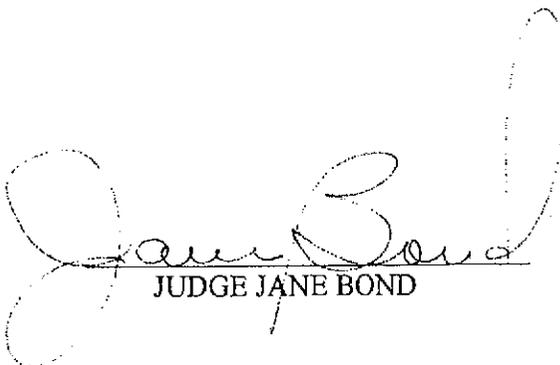
relief. The City of Akron's Charter Sections 105a and 106(5b) must succumb to state law. Therefore Defendant State of Ohio's Motion for Summary Judgment and Defendants FOP 7 and IAFF Local 330, et al.'s Motion for Summary Judgment are GRANTED. Plaintiffs City of Akron and Donald L. Plusquellic's Motion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

[Cite as *Dayton v. State*, 2008-Ohio-2589.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

CITY OF DAYTON

Plaintiff-Appellant

v.

STATE OF OHIO, et al.

Defendant-Appellees

Appellate Case No. 22221

Trial Court Case No. 2006-CV-3507

(Civil Appeal from
Common Pleas Court)

.....
OPINION

Rendered on the 30th day of May, 2008.
.....

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and JARED A. WAGNER, Atty. Reg. #0076674, Green & Green, 800 Performance
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Attorney for Amicus Curiae Ohio Association of Professional Fire Fighters
.....

FAIN, J.



{¶1} Plaintiff-appellant the City of Dayton has a residency requirement for employees. Defendant-appellee the 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.

{¶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.

{¶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 that:

{¶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, in

pertinent part, that:

{¶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. * * *

{¶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% of whom resided in the Northeast and Southeast portions of the city. 819 of these individuals are employed in the police and fire departments, and 80% 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."

{¶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 legislative 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.

{¶35} Turning now to the merits, we begin with the fundamental principle that courts "must 'presume the constitutionality of lawfully enacted legislation.'" *Klein v. Leis*, 99 Ohio St.3d 537, 538, 2003-Ohio-4779, 795 N.E.2d 633, at ¶ 4 (citations omitted). 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. Zaino*, 96 Ohio St.3d 375, 376, 2002-Ohio-4390, 775 N.E.2d 489 at ¶ 10, quoting from *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 that:

{¶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 [sic]; 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 that:

{¶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.

{¶41} In *City of 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. 43 Ohio St.3d at 1-2.¹ The city argued that the statute

¹The Ohio Supreme Court issued four decisions in the *Rocky River* case, and the

unconstitutionally denied cities the power to determine municipal safety employee compensation, in violation of the Home Rule sections in Article XVIII. *Id.* at 12. 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.

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

{¶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, quoting from *State ex rel. Bd. of Trustees of Pension Fund v. Bd. of Trustees of Police Relief Fund* (1967), 12 Ohio St.2d 105, 106, 233 N.E.2d 135 (*Pension Fund*). 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.*” *Id.* (Emphasis in original.)

{¶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

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 during the rest of our opinion.

detail, the Court stressed that:

{¶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." *Id.* at 15-16 (citations omitted).

{¶47} The Ohio Supreme Court went on to emphasize that:

{¶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. *Pension Fund, supra*, 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.

{¶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, n. 35 (Wright, 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 sanitary conditions in industry." *Id.*

{¶50} This is the view recently taken in *Lima v. State*. ___ Ohio App.3d ___, 2007-Ohio-6419, ___ N.E.2d ___. In *Lima*, the Third District Court of Appeals concluded after a lengthy analysis, that:

{¶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 employes" [sic] must have, at minimum, some nexus between their legislative end and the working environment." 2007-Ohio-6419, 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 employes.’ [sic] Lima’s assignment of error, thus, raises the issue of whether the term ‘employes’ [sic] in Section 34 means employees acting within the scope of their employment (i.e. within the working environment) or whether ‘employes’ [sic] refers to the status of being an employee, which transcends any particular locus. In other words, does the term ‘employes’ [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.”² *Id.* 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 only over labor hours, a minimum wage, and the working environment itself. *Id.* at ¶ 46.

{¶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 (Wright, dissenting). However, 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. Compare *Lima*, 2007-

²The 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.

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. 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.

{¶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, Central State Univ. Chapter v. Central State Univ.*, 87 Ohio St.3d 55, 61, 1999-Ohio-248, 717 N.E.2d 286. In *Central 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 benefitting employees, rather than burdening employees as well. 87 Ohio St.3d at 60. 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.

{¶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 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 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 sheds at firing. *Lima*, 2007-Ohio-6419, at ¶ 28.

{¶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 that:

{¶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.' " Id. at ¶ 19 (citations omitted).

{¶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 that:

{¶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 common welfare. The Ninth District Court of Appeals concluded that the "sole purpose" of R.C. 9.481:

{¶72} "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).

{¶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 9.48.1 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.” *Id.* at ¶ 24-25 (bracketed material added).

{¶74} We note that 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.’ ” *Christy v. Summit Cty. Bd. of Elections* , 77 Ohio St.3d 35, 39, n.1, 1996-Ohio-357, 671 N.E.2d 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 that:

{¶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.

{¶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 (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 “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.*” 87 Ohio St.3d at 61 (emphasis added).

{¶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 that: “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, since 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.

{¶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 STATE 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.

{¶87} In this regard, we agree with the State. In *Johns*, the Ohio Supreme Court stated that "the 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." *Id.* at ¶ 35 (citations omitted). 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.*, 85 Ohio St.3d 660, 1999-Ohio-292, 710 N.E.2d 1116, and *Savoie 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 that:

{¶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."

{¶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." *Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 541, 1999-Ohio-368, 706 N.E.2d 323 (citations omitted).

{¶96} The first part of the test refers to subject matter, not geographical application. 84 Ohio St.3d at 542. In deciding if 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 if 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*, 76 Ohio St.3d 353, 356, 1996-Ohio-74, 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.

{¶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. In *Austintown*, the court stressed that:

{¶100} “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. * * *

{¶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.

{¶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.

{¶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.

.....
DONOVAN, J., concurs.

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:

{¶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 *City of Canton v. State of Ohio* (2002), 95 Ohio St.3d 149, 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.*, Syllabus by the Court.

{¶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. City of Cleveland* (1913), 88 Ohio St.338; 359. 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. City of Dayton* (1915), 92 Ohio St. 217, 223-224.

{¶113} Municipalities may likewise exercise the police power. E.G., *State ex rel. Tomino v. Brown* (1989), 47 Ohio St.3d 119. 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" which 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.

{¶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. As applied to business activities, it is the power to regulate them as opposed to the power to engage in them. *State of Ohio 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 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 the City took in adopting its residency requirement for employees is no different in kind and character than 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."

{¶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, p. 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. 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*s (1984), 9 Ohio St.3d 32.

{¶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 Scarselli³ 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. Yapple v. Creamer* (1912)⁴ upheld the constitutionality of Ohio's first workers' compensation laws. However, the statute was voluntary, and the

³Steven H. Steinglass and Gino J. Scarselli, "The Ohio State Constitution, A Reference Guide," Praeger Publishers (2004), at p. 152.

⁴*Yapple v. Creamer*, (1912), 85 Ohio St. 349.

court suggested that coercive legislation would violate the Ohio Constitution (ibid.; see also *Taylor v. Academy Iron & Metal Co.* 1988: 151).⁵ 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)⁶ 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.*; 1991: 639).⁷

{¶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 adoption, 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 Employment Relations Board* (1989), 43 Ohio

⁵*Taylor v. Academy Iron & Metal Co.* (1988), 36 Ohio St.3d 149.

⁶*Rocky River v. State Employment Relations Board*, (1989), 43 Ohio St.3d

⁷*Brady v. Safety-Kleen Corp.* (1991), 59 Ohio St.3d 705.

St.3d 1, 35 (Holmes, J., dissenting).

{¶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. Applying 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 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 I, 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 residency 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 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.

.....

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In the
Supreme Court of Ohio

STATE OF OHIO, et al.,

Defendants-Appellants,

v.

CITY OF AKRON, OHIO, et al.,

Plaintiffs-Appellees.

Case No. **08-0418**

On Appeal from the
Summit County
Court of Appeals,
Ninth Appellate District

Court of Appeals Case
No. 23660

NOTICE OF APPEAL OF
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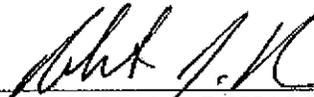
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**NOTICE OF APPEAL OF
DEFENDANT-APPELLANT STATE OF OHIO**

Defendant-Appellant State of Ohio gives notice of its claimed appeal of right and discretionary appeal to this Court, pursuant to Ohio Supreme Court Rules II(A)(2) and (3), from a Judgment Entry of the Summit County Court of Appeals, Ninth Appellate District, journalized in Case No. 23660, City of Akron, Ohio v. State of Ohio. That Judgment Entry was stamped "Filed" on January 9, 2008. The Judgment Entry and Opinion are attached to the Appellant-Defendant State of Ohio's Memorandum in Support of Jurisdiction. Reasons for this claimed appeal of right and discretionary appeal, including the substantial constitutional question and the great public and general interest involved in this case, are fully set forth in the accompanying Memorandum in Support of Jurisdiction.

Respectfully submitted,

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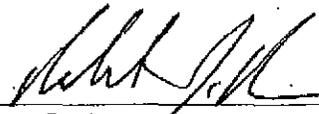
I certify that a copy of the foregoing Notice of Appeal of Defendant-Appellant State of Ohio was served by U.S. mail this 25th day of February 2008, upon the following counsel:

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