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INTRODUCTION

The Ohio Municipal League (the “League”), as amicus curiae on behalf of the City of Lima, Ohio, urges this court to uphold the decision of the Allen County Court of Appeals, Third Appellate District, which entered judgment on behalf of the City of Lima.

The “anti-residency” law, passed by the 126th Ohio General Assembly as Substitute Senate Bill 82 in 2006 (“S.B. 82,” appended hereto as “Appendix A”), and codified at Section 9.481 of the Ohio Revised Code, violates Article XVIII, Section 3 of the Ohio Constitution by intruding in a matter of local self-government. Because the state law conflicts with Lima’s charter, the state law must yield. The state’s reliance on Article II, Section 34 of the Ohio Constitution is misplaced because municipal residency requirements do not interfere with the constitutional rights of municipal employees and the statute does not provide “for the “comfort, health, safety and general welfare of all employees; ***.” Additionally, R.C. 9.481 will impose a significant burden on some communities’ operational efficiency without advancing any legitimate state interest.

R.C. 9.481 is unconstitutional, and should be declared so.

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League is a non-profit Ohio corporation composed of a membership of more than 750 Ohio cities and villages, all of which have an interest in maintaining constitutionally granted home-rule powers.

One of the benefits of the constitutionally guaranteed powers of local self-government is the opportunity for each municipality to establish employment relationships which best protect the health, safety and welfare of the municipality’s residents. The League takes seriously, and vigorously defends, the right and obligation of Ohio’s municipalities to exercise “all powers of

local self-government,” as expressly granted under the Ohio Constitution. When the Ohio General Assembly improperly attempts to prevent municipalities from exercising their constitutionally granted home rule powers, the League frequently assists municipalities defending those powers.

The League, by this brief, seeks to assist this court in analyzing the municipal issues in this case. The people of the City of Lima, through their charter, have determined that municipal employees should live in the city. Such requirements are common in Ohio, and directly advance the health, safety and welfare of the residents of Ohio’s municipalities.

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and statement of facts contained within the brief of the City of Lima.

The unspoken and incorrect premise of the S.B. 82 is that merely living in the community in which you work may be hazardous to your health. The absence of any evidence introduced in support of this premise should be fatal to R.C. 9.481. In the absence of a discernable harm or risk of harm to municipal employees which results from a residency requirement, this court should determine that the state’s reliance on Article II, Section 34 of the Ohio Constitution is a mere pretext for interfering with municipal employer-employee relationships.

On a state-wide basis, the attached maps (“Appendix B” to “Appendix H”) indicate the nature of the impact which R.C. 9.481 would have on various municipalities around the state. The statute requires that municipal employees must live within the same county as the political subdivision which employs them, or in an adjacent county.¹ This has potentially adverse impacts

¹ S.B. 82 does not explain by what right the state may intrude upon the so-called “inalienable and fundamental right of an individual to choose where to live pursuant to Section 1 of Article I, Ohio Constitution.”

on numerous municipalities throughout the state. For example: because the City of Dublin straddles Franklin, Union and Delaware Counties, municipal employees working in Dublin, Ohio, could be living in the furthest reaches of Ada, Ohio, in Hardin County, (See, “Appendix B”) a distance of over sixty (60) miles (“Appendix I”).² It is self-evident that a call-in for police or other employees in emergency situations who are exercising their statutorily granted “right” to live in Ada might have difficulty responding to the employer’s call to duty.

Other hypothetical cases (which are likely to arise) further highlight the practical impact of the state’s policy on the safety of residents of Ohio’s municipalities. If a lake-effect snow storm hits northern Ohio, and the municipal snow plow operators live an hour away from their employment (when the weather is good), how long will it take them to get to their snow plow, in order make the streets of the municipality passable and safe? If a municipality has two fire battalions, and the second battalion is routinely called in to stand-by for a second fire call while the first is fighting a fire, how will response times be affected if most of the second battalion lives forty (40) miles away, in another county? Lives are likely to be endangered by operation of the statute. This is not an acceptable risk, and it is not required by the Ohio Constitution.

ARGUMENT

Article II, Section 34

The State of Ohio has argued that R.C. 9.481 is authorized pursuant to Article II, Section 34 of the Ohio Constitution. This case, however, is not about the comfort, health, safety or

² This court may take judicial notice of maps, distances between cities, etc. *State v. Scott* (1965), 3 Ohio App.2d 239, 243, 210 N.E.2d 289. Evid.R.201.

general welfare of employees, and is not controlled by Article II, Section 34 of the Ohio Constitution. It is not about conditions of employment.

Rather, the case involves conditions preceding employment; specifically, the case is about a new employee's willingness to move into a municipality, and live there, as a condition of being permitted to start work for the municipality. And, ultimately, this case is about the health, safety and welfare of the people who live and work in Ohio's municipalities, and even those who are just passing through. In other words, this is a matter affecting the safety of those who live, work or own property in Ohio's municipalities.

Article II, Section 34 of the Ohio Constitution provides:

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

This language grants to the Ohio General Assembly the authority to protect workers in the work place, and was adopted in response to conditions of labor in the late nineteenth and early twentieth centuries, and in response to cases such as *Lochner v. New York* (1905), 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937. *See, Lima v. State*, 2007-Ohio-6419, ¶¶ 38-47. There is no basis for comparison of hour, wage and work place safety regulations, which directly affect worker safety, and a residency requirement, which does not.

The state relies upon *Rocky River v. State Employment Relations Board* (1989), 43 Ohio St.3d 1, 539 N.E.2d 103, in concluding that the Ohio General Assembly has broad authority to enact legislation for the benefit of employees. Such an analysis fails to consider whether the legislation at issue in fact provides for "the comfort, health, safety and general welfare of all employees;***." There is no evidence in this case that the employees of the City of Lima are or

were uncomfortable, unhealthy, unsafe or generally made “unwell” by a requirement that they reside in the City of Lima.

Furthermore, the *Rocky River* Court determined that the Public Employees’ Collective Bargaining Act addressed the general welfare of employees and was, thus, a valid exercise of the General Assembly’s Section 34 powers. *Id.* Collective bargaining agreements themselves concern wages, hours, benefits and other conditions of employment, all of which impact employees in the work place. The *Rocky River* decision itself suggests that laws enacted pursuant to Section 34’s general welfare language must have, at minimum, some nexus between their legislative end and the working environment. *See Lima v. State* (2007), 2007 Ohio 6419. Other cases have interpreted Section 34’s general welfare language are limited to legislation provided for the economic welfare of employees. *See e.g., State ex rel. Mun. Const. Equip. Operator’s Labor Council v. Cleveland*, 114 Ohio St. 3d 183, 870 N.E. 2d 1174 (sick leave benefits); *State ex rel. Horvath v. State Teachers Retirement Bd.* (1998), 83 Ohio St. 3d 67, 697 N.E. 2d 644 (teacher’s savings plans). As noted above, one of the main purposes behind Section 34 was to address the economic welfare of employees who were earning meager wages at the turn of the 20th Century. 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio (1912) 1328. This leads to the ultimate conclusion that although Section 34 general-welfare powers are broad, they are broad within the context of the working environment. This authority is properly limited to the enactment of laws which actually affect employee health and economic welfare.

In the absence of any evidence of harm which is caused by “residency,” there is no rational basis for legislation which purports to protect employees from that harm. Certainly there is no rational basis for a piece of legislation which threatens the lives of residents of Ohio’s

municipalities, or anyone who is merely in the municipality at the time of an emergency, while providing no real benefit to the municipal employees.

Home Rule

The genesis of municipal authority in Ohio is found at Article XVIII, Section 3 of the Ohio Constitution, which states: “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.”

There are two clauses in this section. The first grants “authority to exercise all powers of local self government***.” The second authorizes municipalities “to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” It is important to note that the language “not in conflict with general laws” modifies only the police power, not those powers of local self government which do not constitute “police powers.” *State Personnel Bd. of Review v. Bay Village Civil Service Commission* (1986), 28 Ohio St.3d 214, 217; *State, ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191, at paragraph 4 of the syllabus (“The words ‘as are not in conflict with general laws’ found in Section 3 of Article XVIII of the Constitution, modify the words ‘local police, sanitary and other similar regulations’ but do not modify the words ‘powers of local self-government.’”); *Fitzgerald v. Cleveland* (1913), 88 Ohio St. 338; 103 N.E.. 512. Thus, “conflict” cases relate solely to the exercise of police power and do not control the “powers of local self government” which are not police powers. *Id.*

When a charter provision conflicts with a state law which addresses the matter governed by the charter, the charter provision prevails. *State, ex rel. Lightfield v. Indian Hill* (1994), 69

Ohio St. 3d 441, 442, 633 N.E.2d 524; *State, ex rel. Bardo v. Lyndhurst* (1988), 37 Ohio St. 3d 106, 108-109, 524 N.E.2d 447.

In this case, the residency requirement established by Ordinance 201-00, pursuant to section 72 Section of the Lima City Charter, should prevail over the state's anti-residency statute.

It should also be noted that while the City of Lima has included its residency requirement in its charter, the arguments made herein apply with equal force to chartered and non-chartered municipalities which have chosen to impose a residency requirement via ordinance, and not by charter provision. This is a consequence of the issue being a substantive matter of local self-government, and a municipal ordinance in conflict with a state law on such an issue prevails pursuant to Article XVIII, Section 3 of the Ohio Constitution. *Northern Ohio Patrolmen's Benevolent Association v. City of Parma* (1980), 61 Ohio St.2d 375, 402 N.E.2d 519; *State, ex rel. Arey v. Sherrill* (1944), 142 Ohio St. 574, 53 N.E.2d 501; *Mansfield v. Endly* (1931), 38 Ohio App. 528, 176 N.E. 462; *Hugger v. Ironton* (1947), 83 Ohio App. 21, 82 N.E.2d 118.

No "Statewide Concern"

Matters which are of "statewide concern" are, by definition, not matters of "local self government." This is a separate analysis from the "conflict" clause of Article XVIII, Section 3 of the Ohio Constitution, which applies only to police powers. *State, ex rel. Canada v. Phillips, supra*; *Fitzgerald v. Cleveland, supra*.

In *Cleveland Electric Illuminating Company v. Painesville* (1968), 15 Ohio St.2d 125, the court identified that a balancing test must be performed to determine if a matter is properly a matter for the state legislature (and not a matter of local self government):

"Thus, even if there is a matter of local concern involved, if the regulation of the subject matter affects the general public of the state as a whole more than it does

the local inhabitants the matter passes from what was a matter for local self government to a matter of general state interest.”

Id., at 29.

Under *Painesville*, the courts apply a balancing test between the interests of the municipality in taking local action and the state’s interests in compelling a state standard in order to determine whether the subject matter is a “matter of local self government.”

In the case of a residency requirement, Lima’s (and other municipalities’) interests are compelling, and the state’s alleged interest is merely a pretext for which no evidentiary support has been introduced.

Municipalities have an interest in having employees as members of the community in which they work. By calling their place of work “home,” employees have a vested interest in the success of the community as a vibrant place to live. Employees living in the municipality which employs them ensures a certain amount of taxpayer dollars (paid to the municipal employees) will be reinvested in the community, through ordinary economic activities and through the support of the community’s public schools via the payment of property taxes.

In addition to these reasons, the qualification, duties and selection of municipal officers has traditionally been within a municipality’s home-rule authority. *State ex rel. Lentz v. Edwards* (1914), 90 Ohio St. 305, 107 N.E. 768; *State Personnel Bd. of Review v. Bay Village Civil Service Commission* (1986), 28 Ohio St.3d 214, 217, 503 N.E. 2d 518. The Ohio Supreme Court has recognized that home-rule authority includes the right to appoint and regulate the hiring of police officers and other civil service functions as well. *Harsney v. Allen* (1953), 160 Ohio St. 36, 40, 113 N.E. 2d 86; *State ex rel. Hipp v. N. Canton* (1996), 75 Ohio St. 3d 221, 224, 661 N.E. 2d 1090. It follows that the City of Lima has a similar interest in the qualifications of

its other employees as well, and exercising legislative authority in furtherance of this interest is within the home-rule authority. *See Lima v. State* (2007), 2007 Ohio 6419.

The legislature, found in §3 of Substitute Senate Bill 82 of the 126th General Assembly (“Appendix A” page 2) 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.

There is no statement of why it is a matter of statewide concern, or why it is “necessary to generally prohibit” municipalities from imposing residency requirements as a condition of employment. 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. Laws passed for the “general welfare” of employees do not encompass a single-issue statute that seeks to create a non-fundamental right that the employees voluntarily surrendered when they accepted employment. *State v. Akron* (2008), 2008 Ohio 38, ¶ 27.

No evidence has been produced of the necessity which is identified in the statute. It is respectfully suggested that none exists, and this court has both the authority and the duty to determine there is no “statewide concern,” pursuant to *Painesville, supra*. Self-serving determinations by the Ohio General Assembly, which are allowed to stand without meaningful judicial review, would destroy the home rule authority of municipalities which is expressly provided by Article XVIII, Section 3 of the Ohio Constitution. This court is urged to find that there is no “state-wide concern” which justifies the anti-residency bill and declare the statute unconstitutional.

Freedom of Residency

Section 2(A) of Sub. S.B. 82 identifies “inalienable and fundamental right of an individual to choose where to live.” Then, in contravention of this declared “right,” the legislation “allows” communities to enact residency requirements which require employees to live in the same county as the municipality, or any adjacent county. If the right to live anywhere is a “fundamental right,” by what authority does the legislature claim the ability to infringe upon this “right?” If response times are a permissible basis for the state to interfere with this “fundamental and inalienable right,” which is the stated basis for the limitation contained in Section 9.481(B)(2)(b)³, what makes the legislature better qualified to establish the appropriate distance from a municipality which would permit a reasonable response time to an emergency call-in? The absence of any response to these questions indicates that the state legislation is a pretext for interfering with the legitimate policy choice of Ohio’s municipalities which have enacted residency requirements.

The League agrees that, as a general principle, people can choose to live anywhere their budgets can afford, just as they can choose to work for an employer which is willing to hire them. But if a person wants to be elected to represent the people of the City of Lima on the Lima City Council, that person must be a resident of the city. No serious argument can be made that

³ 9.481 (B)(2)(b) provides:

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.

this requirement deprives any person of a “right” to live anywhere that person wants; but a residency requirement is rationally related to our representative form of government. Likewise, if one wishes to receive a paycheck from the taxpayers of Lima, one must be prepared to live in Lima.

Some communities have a distance-radius within which employees must live, and don’t even require residency. It’s a requirement, however, that the employee must be able to respond to work within a certain period of time. Under R.C. 9.481, however, even the “radius” ordinances are purported to be invalidated; the state legislature’s opinion of what is appropriate for the local community is alleged to be controlling.

Although the citizens of Ohio may have a right to determine where they live under Article I, Section 1, citizens do not have a right to live where they want and demand employment with a particular employer. *See Smeltzer v. Smeltzer* (Nov. 24, 1993) 7th Dist., 1993 WL 488235, at *1 (citing *Allison v. Akron* (1974), 45 Ohio App. 2d 227, 343 N.E. 2d 128; *Cutshall v. Sundquist* (6th Cir. 1999), 193 F. 3d 466, 479; *see also Morgan v. Cianciola* (Dec. 28, 1987) 7th Dist., 1987 WL 31395, *1 (“The constitution does not guarantee the right to hold a specific job with a particular employer, but, rather, the right “to follow a chosen trade or occupation, and to earn a livelihood for oneself * * *.”). The residency requirement of the City of Lima is a qualification for employment, “similar in regard to minimum standards of age, health, education, experience, or performance in civil service examinations.” *Ector v. Torrance* (Cal. 1973), 10 Cal. 3d 129, 132, 514 P. 2d 433. The choice of whether to accept employment with certain terms and conditions is inherent in all employment decisions in a free market economy. *Toledo v. State*, 2008 Ohio 1957.

The local legislation is supported by a rational basis, and the state legislature is without the authority to infringe upon such a choice by the residents of Ohio's municipalities.

CONCLUSION

The Ohio Municipal League respectfully requests this court to uphold the decision of the Allen County Court of Appeals, Third Appellate District. The General Assembly has unconstitutionally attempted to regulate the terms and conditions of the relationship between the City of Lima and its employees. The state's assertion of a "state-wide concern" is vastly outweighed by the municipal concerns which are protected by residency requirements.

The assertion that the legislation protects the comfort, health, safety or welfare of municipal employees is simply not borne out by the record in this case. Consequently, Lima has established that R.C. 9.481 is unconstitutional.

This Court is urged to uphold the appellate court's decision and enter judgment on behalf of the City of Lima.

Respectfully submitted,

STEPHEN L. BYRON (#0055657)
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The Ohio Municipal League

CERTIFICATE OF SERVICE

A copy of the within *Brief of Amicus Curiae the Ohio Municipal League Urging Reversal on Behalf of the Appellee the City of Lima*, has been mailed regular U.S. mail on the 31st day of July, 2008 to:

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The Ohio Municipal League

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.

DUBLIN (in three counties)
Total 13 Counties



REYNOLDSBURG (in three counties)

Total 12 Counties



FRANKLIN COUNTY

Total 7 Counties



SUMMIT COUNTY
Total 7 Counties



HAMILTON COUNTY
Total 4 Counties

MAHONING COUNTY

Total 5 Counties



LUCAS COUNTY
Total 5 Counties



STARK COUNTY
Total 9 Counties

MONTGOMERY COUNTY
Total 8 Counties



Sorry! When printing directly from the browser your map may be incorrectly cropped. To print the entire map, try clicking the "Printer-Friendly" link at the top of your results page.

MAPQUEST

START Dublin, OH US

END Ada, OH US

Total Est. Time:
1 hour, 18 minutes

Total Est. Distance:
64.41 miles

Maneuvers	Distance
1: Start out going NORTH on MILL LN toward W BRIDGE ST / US-33 / OH-161.	<0.1 miles
2: Turn LEFT onto W BRIDGE ST / US-33 W / OH-161 W. Continue to follow US-33 W.	17.7 miles
3: Take the OH-31 N exit toward KENTON.	0.7 miles
4: Keep RIGHT at the fork in the ramp.	0.1 miles
5: Stay STRAIGHT to go onto OH-31.	30.2 miles
6: Turn LEFT onto W FRANKLIN ST / OH-309. Continue to follow OH-309.	13.0 miles
7: Turn RIGHT onto OH-235.	2.5 miles
8: Turn RIGHT onto E LINCOLN AVE.	<0.1 miles
9: End at Ada, OH US	
Total Est. Time: 1 hour, 18 minutes	Total Est. Distance: 64.41 miles

APPENDIX I