IN THE SUPREME COURT OF OHIO

CITY OF DAYTON,	:	Supreme Court Case No. 08-0128
Appellee,	:	On Appeal from the Allen County Court of Appeals, Third Appellate District
vs.	:	
THE STATE OF OHIO, et al.	:	Court of Appeals Case No. 10721
Appellant.	:	

BRIEF OF AMICUS CURIAE THE CITY OF DAYTON IN SUPPORT OF APPELLEE THE CITY OF LIMA

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INTRODUCTION

The City of Dayton, as amicus curiae on behalf of the City of Lima, urges this Court to affirm the decision of the Allen County Court of Appeals, Third Appellate District, recognizing the right of municipalities to exercise their constitutionally granted home rule powers to require employees to reside within the municipality. As the Third District found, R.C. 9.481, which became effective on May 1, 2006, is an unconstitutional infringement by the General Assembly on the home rule powers granted to municipalities by Section 3, Article XVIII, Ohio Constitution. R.C. 9.481 cannot supercede municipal residency requirements as it was not enacted pursuant to Section 34, Article II, Ohio Constitution, and municipal residency requirements are matters of local self government. Additionally, R.C. 9.481 is an impermissible attempt by the legislature to interpret the Ohio Constitution to create rights at variance with this Court's prior precedents, thereby infringing upon the Judiciary's role as the ultimate interpreter of the constitution. Finally, R.C. 9.481 also violates Section 26, Article II, Ohio Constitution, the uniformity clause. For all these reasons, R.C. 9.481 is unconstitutional, and the Third District's decision should be affirmed.

STATEMENT OF AMICUS' INTEREST

Pursuant to Sections 3 and 7, Article XVIII, Ohio Constitution, Dayton adopted a charter on August 12, 1913. Section 102 of this Charter requires that all City employees reside within city limits for the duration of their employment and provides for termination of employment if such residency is not maintained.[1]

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[1] A certified copy of Section 102 of the City of Dayton's Charter was attached to the city's motion for summary judgment filed in the Montgomery County Court of Common Pleas and is therefore a part of the record in the city's appeal from the trial court's decision, which is currently pending before this Court in case number 2008-1252 and can be viewed by the Court there if desired.

Like the City of Lima, Dayton has challenged the constitutionality of R.C. 9.481. In fact, Dayton has an appeal pending before this Court in Case No. 2008-1252 on essentially the same issues, and this Court has already granted Dayton a stay of the appellate court's decision pending the outcome of the appeal. Therefore, Dayton has a great interest in the outcome of this case as the Court's decision will presumably determine the outcome of Dayton's pending appeal, the underlying questions regarding the constitutionality of R.C. 9.481, and the continued viability of Dayton's residency requirement.

In addition, it should be noted that Dayton's residency requirement is an important issue to both the city and its citizens. Section 102 was a part of the city's original 1913 Charter. In 1987, the City Commission passed Ordinance No. 27505.[2] The Commission felt it important to let the voters decide whether employees were required to be city residents. A special election was held on March 24, 1987. Language for and against residency was presented to the voters.[3] By a majority vote, the citizens elected to retain the residency requirement.

As a practical matter, prohibiting Dayton from requiring residency for its employees will have a detrimental effect, both economically and socially, on the city and throughout its neighborhoods. Dayton has over 2,100 employees with 70% living in the Northeast and Southeast sections of the city.[4] Eighty percent of the police and fire forces also live in these sections of the city.

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[2] Id.

[3] Id.

[4] See, the Affidavit of John Gower, which was attached to the city's motion for summary judgment filed in the Montgomery County Court of Common Pleas and is therefore a part of the record in the city's appeal from the trial court's decision, which is currently pending before this Court in case number 2008-1252 and can be viewed by the Court there if desired.

City employees who live in the neighborhoods provide a sense of unity, security, and commitment to the neighborhoods. These core essentials of maintaining a neighborhood will be greatly diminished if employees are permitted to live outside the city.[5]

Furthermore, even with the residency requirement, Dayton has struggled for years with a declining population and an increase in vacant residential properties.[6] As of February 2005, Dayton had 2,500 vacant residential properties, and there has also been a steady decline in population without any growth to replace the loss.[7] The absence of a city residency requirement would only add to the vacancy problem in the City, further diminishing property values, which in turn diminishes the amount of property taxes received and the number and/or quality of services that Dayton is able to provide. Prohibiting Dayton from requiring that its employees reside within the City would greatly exacerbate these issues, and causes a greater drain on the City's already stressed resources.

John Blair, a professor of economics, opines that Dayton will suffer adverse economic consequences absent a residency requirement.[8] These adverse economic consequences are the result of an expected high proportion of city employees relocating to surrounding areas, the increased supply of homes on the market, which will result in a significant decline in property values, and an exacerbation of Dayton's already declining population. The increased supply of homes and the

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[5] Id.; see, also, the Affidavits of Mayor Rhine McLin and John Blair, which were attached to the city's motion for summary judgment filed in the Montgomery County Court of Common Pleas and are therefore a part of the record in the city's appeal from the trial court's decision, which is currently pending before this Court in case number 2008-1252 and can be viewed by the Court there if desired.

[6] Id.

[7] Id.

[8] Blair Aff.

declining population would cause a domino effect of a decline in new construction and related employment that would eventually reach all sectors of city.

STATEMENT OF THE CASE AND FACTS

Dayton incorporates herein the statement of the case and facts as set forth in the City of Lima's merit brief

ARGUMENT

I. R.C. 9.481 is an unconstitutional infringement of the municipal powers of local self government granted by Section 3, Article XVIII of the Ohio Constitution

As set forth in detail below, R.C. 9.481 cannot preempt the City's residency requirement as it was not enacted pursuant to Section 34, Article II. Furthermore, R.C. 9.481 does not supercede the City's charter because (A) the residency requirement is an exercise of the City's power of local government and (B) R.C. 9.481 is not a general law. Accordingly, R.C. 9.481 is an unconstitutional infringement of the City's home rule powers granted by Section 3, Article XVIII.

II. R.C. 9.481 was not enacted pursuant to Section 34, Article II of the Ohio Constitution

The State of Ohio contends that R.C. 9.481 trumps municipal residency requirements because it was enacted pursuant to Section 34, Article II, which states as follows:

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

There appears to be no dispute that R.C. 9.481 does not relate to hours of labor, minimum wage, or the comfort, health or safety of employees. Rather, the State contends that an employee's choice of residency falls under the ambiguous phrase "general welfare."

Neither the phrase "general welfare" nor the scope of Article 34, Section II have ever been clearly defined by this Court and cannot be ascertained by the amendment's plain language. Thus, this Court must look to the intended purpose of the provision to determine its meaning, including the history of the amendment, the attending circumstances at the time of its adoption, and the remedy intended to be afforded by its drafters.[9] A review of the amendment's history and legislative debates reveals that "general welfare" applies only to working conditions and does not includes aspects of employment such as residency.[10]

In considering Section 34, Article II generally in previous cases, this Court has held that statutes relating to public utilities, employer responsibilities, minimum wage laws, the regulation of the hours of city fire department employees, and "frequenter" laws requiring employers to furnish a safe place of employment for employees and frequenters are all enacted under this amendment.[11] "Notably, *every one* of these cases deals with either the minimum wage, hours of labor or safety conditions."[12] "Clearly the purpose of Section 34 of Article II was not to define the word

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[9] *Gough v. Triner*, 7th Dist. No. 05 CO 33, 2006-Ohio-3522, at ¶ 15, citing *Cleveland v. Board of Tax Appeals* (1950), 153 Ohio St. 97, 103.

[10] See, *Rocky River v. State Employment Relations Bd. (Rocky River I)* (1988), 39 Ohio St.3d 196, 198-208; see, also, Justice Wright's Dissent in *Rocky River v. State Employment Rel. Bd. (Rocky River IV)* (1989), 43 Ohio St.3d 1, 22-44.

[11] *Akron & Barberton Belt Rd. Co. v. Pub. Utilities Comm.* (1947), 148 Ohio St. 282, 288-291; *Strain v. Southerton* (1947), 148 Ohio St. 153, paragraph two of the Syllabus; *State v. Kidd* (1958), 167 Ohio St. 521, 527-528; *Comerford v. Jones & Laughlin Steel Corp.* (1959), 170 Ohio St. 117, 119-120.

[12] *Rocky River IV*, 43 Ohio St.3d at 35.

'employees' but to empower the Legislature to pass laws that would promote the general welfare of employees by improving their *working conditions* * * *.[13]

An employee's place of residence is not related to his/her working conditions.[14] Rather, residency within the municipality is a requisite for employment acknowledged and voluntarily agreed to by the employee prior to being hired. As such, municipal residency requirements are not germane to an employee's "general welfare" and R.C. 9.481 does not fall under the ambit of Section 34, Article II.

Moreover, R.C. 9.481 by its very terms applies only to the limited number of Ohio citizens who are employed by a municipality that happens to have a residency requirement. Therefore, R.C. 9.481cannot be said to address the "general welfare of *all* employees" as required by Section 34, Article II. For this reason as well, R.C. 9.481 cannot be said to be enacted pursuant to Section 34, Article II.

The well-reasoned opinions of the Third and Ninth District Courts of Appeal are also very instructive on this issue.[15] In determining the scope of Section 34, Article II, the Third District utilized the doctrine of "noscitur a sociis" and considered the legislative history of the provision, the case law interpreting it, and the common definition of the term employee.[16] After considering the foregoing, the Third District found that "R.C. 9.481 was not validly enacted pursuant to Article

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[13] *State v. Iden* (1942), 71 Ohio App. 65, 72.

[14] See, *State ex rel. Disp. Print. Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, at ¶ 23-26.

[15] *Lima v. State*, 3d Dist. No. 1-07-21, 2007-Ohio-6419; *State v. Akron*, 9th Dist. No. 23660, 2008-Ohio-38.

[16] *Lima* at ¶ 28-47.

II, Section 34, because this Section's language, legislative history, and case law support a finding that laws providing for the 'general welfare of all employees' must have, at minimum, some nexus between their legislative end and the working environment."[17]

The Ninth District examined the preamble to the Ohio Constitution and found that the Legislature is authorized to pass only laws that secure freedom for Ohio's citizens or further the "common welfare."[18] Thus, the Ninth District held that the General Assembly's admittedly broad authority under Section 34, Article II is limited by the societal notion of "common welfare."[19] The court then compared R.C. 9.481 to other statutes held by the Supreme Court to be enacted under Section 34, Article II, and found that R.C. 9.481 "bears no similarity to any of the employee 'general welfare' legislation" previously considered.[20]

As discussed above, R.C. 9.481 does not relate to the "general welfare" of all employees since it "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)."[21] "[U]nlike 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

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[17] Id. at ¶ 88.

[18] *Akron* at ¶ 19.

[19] Id. at ¶ 20.

[20] Id. at ¶ 24.

[21] Id.

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."[22]

The interpretation of the phrase "general welfare" propounded by the State would result in any law arguably being held to be enacted pursuant to Section 34, Article II. Gun control laws could be enacted under the guise of employee safety. Abortion laws could be enacted to protect employee health. Indeed, the State seeks such a far sweeping interpretation of the phrase that the legislature could conceivably mandate daily church service for employees in the name of providing for their "general welfare." Such an all encompassing interpretation is contrary to the very language of Section 34, Article II and has the practical effect of nullifying the remainder of the constitution. The fact that the Legislature is attempting to use this phrase is abrogate the home rule powers granted to muncipalities under Sections 3 and 7, Article XVIII is no less onerous than the above cited examples. Only a reading of Section 34, Article II that is true to its original intentions and plain meaning, limiting it to laws affecting actual working conditions, will avoid the inevitable results that would occur should this Court accept the State's contention.

Additionally, Section 34, Article II should be not be read in a vacuum. It should be read *in pari materia* with Sections 3 and 7, Article XVIII to give effect to all three amendments.[23] As discussed above, Section 34, Article II does not grant the legislature exclusive jurisdiction over all

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[22] Id. at ¶ 25.

[23] *State ex rel. City of Toledo v. Lucas Cty. Bd. of Elections*, 95 Ohio St.3d 73, 78, 2002-Ohio-1383, citing *Toledo Edison Co. v. Bryan* (2000), 90 Ohio St.3d 288, 292.

matters but rather only to those matters concerning working conditions.[24] Sections 3 and 7, Article XVIII permit municipalities to "exercise thereunder *all* powers of local self-government." Accordingly, when Articles II and XVIII are read in pari materia so each is given its intended meaning, R.C. 9.481 cannot be said to be enacted under Section 34, Article II.

Finally, the majority's holding in *Rocky River IV* was based on a provision of the Collective Bargaining Act, which had already been found to be a general law.[25] In considering the interaction between Section 34, Article II and the home rule amendments, this Court held that "[i]n the absence of conflict with general law, Section 34, Article II of the Ohio Constitution, has no application to a wage formula established by municipal charter and carried out annually by ordinance of council."[26] Thus, this Court has held that a law must be (1) enacted pursuant to Section 34, Article II and (2) a general law under the home rule analysis, in order to supersede a law enacted under a municipality's home rule powers.[27] Since R.C. 9.481 is not a general law, as discussed below, it does not preempt the residency requirement in the city's Charter.

Because R.C. 9.481 does not provide for the general welfare of all employees and was not enacted pursuant to Section 34, Article II, it cannot automatically trump Dayton's residency requirement. Instead, a home rule analysis as set forth in *Canton* must be conducted to determine if R.C. 9.481 takes precedence over the residency requirement.

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[24] See, *Rocky River I*, 39 Ohio St.3d at 198-208; see, also, Justice Wright's Dissent in *Rocky River IV*, 43 Ohio St. 3d at 22-44.

[25] Id.

[26] *Fuldauer v. Cleveland* (1972), 32 Ohio St.2d 114, paragraph four of the syllabus.

[27] Id.

III. R.C. 9.481 does not satisfy the test established in *Canton v. State* and, therefore, does not preempt local ordinances that require all City employees to reside within City limits.

In *Canton v. State of Ohio*[28] this Court set forth a three part test for determining when a state statute takes precedence over a local ordinance.[29] This Court recently clarified the *Canton* test and held that it "should be reordered to question whether (1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute."[30] This Court also reiterated that "[i]f an allegedly conflicting city ordinance relates solely to self-government, the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction."[31]

The State argues that the doctrine of statewide concern is a separate basis upon which it may intrude upon home rule powers. However, as previously recognized by this Court, the issue of whether a statute involves a matter of statewide concern falls within the framework of the *Canton* test and "is relevant only in deciding, as a preliminary matter, whether a particular issue is not a matter of merely local concern, but is of statewide concern, and therefore not included within the power of local self-government."[32]

Legislation is considered within the area of local self-government when it affects only the municipality itself and involves "such powers of government as, in view of their nature and the field

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[28] 95 Ohio St.3d 149, 2002-Ohio-2005.

[29] Id. at ¶ 9.

[30] *Mendenhall v. City of Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, at ¶ 17.

[31] Id.

[32] *Am. Fin. Ser. Ass'n v. City of Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, at ¶ 29.

of their operation, are local and municipal in character."[33] A law is considered to be a matter of statewide concern where it is part of a comprehensive statutory plan that is necessary to promote the safety and welfare of all the citizens of this state.[34] Thus, if the regulation of the subject matter affects the general public of the state as a whole *more than* it does the local inhabitants, the matter passes from what was a matter for local government to a matter of statewide concern.[35]

The residency requirement in Dayton's Charter is a matter of local self-government. It does not extend beyond the territorial limits of the city and applies only to the city's employees. It is local and municipal in character and certainly does not affect the state as a whole *more than* its local inhabitants. Moreover, R.C. 9.481 is not part of a comprehensive statutory plan that promotes the safety and welfare of all the citizens of this State.

Because residency of municipal employees is a matter of local self-government, the analysis should stop there. However, for the sake of argument, the second prong of the *Canton* test is also discussed below.

The following four part test is used to determine whether a law is considered a "general law": (1) the law must be part of a statewide and comprehensive legislative enactment; (2) it must apply to all parts of the state alike and operate uniformly throughout the state; (3) it must set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a

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[33] *Cleveland Elec. Illum. Co. v. City of Painesville* (1968), 15 Ohio St.2d 125, 129; *State ex rel. Toledo v. Lynch* (1913), 88 Ohio St. 71, 97.

[34] Id. at ¶ 30.

[35] *Vill. of Beachwood v. Brd of Elec. of Cuyahoga Cty* (1958), 167 Ohio St. 369, 371 (emphasis added).

municipal corporation to set forth police, sanitary, or similar regulations, and (4) it must prescribe a rule of conduct upon citizens generally.[36]

The first prong is satisfied where the statute in question is part of a statewide statutory scheme.[37] R.C. 9.481 is a lone prohibition attempting to abrogate long standing rights of municipal self government and does not satisfy this prong. Likewise, R.C. 9.481 also does not satisfy the second prong of this test as it does not apply to part-time employees nor full-time emergency services employees.[38]

In order to satisfy the third prong of the general law test, R.C. 9.481 must 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.[39] R.C. 9.481 is clearly an attempt to limit the legislative power of municipalities and substitute the Legislature's judgment for the judgment of municipalities on the issue of employee residency. Accordingly, R.C. 9.481 also fails to satisfy the third prong.

In considering the fourth prong, this Court found that R.C. 4549.17 is not a general law because it only applies to *some* police officers.[40] Similarly, R.C. 9.481 is not a general law because

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[36] *Canton*, 95 Ohio St.3d., at syllabus of the Court.

[37] Id. at ¶ 22-24.

[38] See, R.C. 9.481(B)(2)(a) and (b).

[39] *Canton*, 95 Ohio St.3d, at syllabus of the Court.

[40] *Linndale v. State*, 85 Ohio St.3d 52, 55, 1999-Ohio-434.

it applies only to *some* municipal employees (those who are full-time, permanent employees[41] and do not qualify as emergency personnel[42]).

In sum, R.C. 9.481 does not supercede Dayton's residency requirement because (A) the residency requirement is an exercise of the City's power of local government and (B) R.C. 9.481 is not a general law.

IV. R.C. 9.481 infringes upon the Judiciary's role as the ultimate interpreter of the constitution by impermissibly attempting to interpret the Ohio Constitution and create a right at variance with the interpretations of both the Ohio and United States Supreme Courts.

R.C. 9.481(C) provides that "employees of political subdivisions of this state have the right to reside any place they desire." Additionally, the section notes for this statute provide that it was the intent of the General Assembly in passing this statute to recognize "[t]he inalienable and fundamental right of an individual to choose where to live pursuant to Section 1 of Article I, Ohio Constitution."

Both this Court and the United States Supreme Court have previously held that neither the United States nor the Ohio Constitutions include a right to be employed by a municipality when the employee lives elsewhere.[43] Municipal employees have been challenging the constitutionality of residency requirements for decades, but such requirements have always been found to be

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[41] R.C. 9.481(B)(2)(a) specifically exempts permanent part-time employees from its application.

[42] R.C. 9.481(B)(2)(b) allows voters to limit emergency personnel to residing in the county or an adjacent county.

[43] *McCarthy v. Philadelphia Civil Service Comm.* (1976) 424 U.S. 645, 646-647; *Buckley v. City of Cincinnati* (1980), 63 Ohio St.2d 42, 44.

constitutional despite Article I, Section 1, of the Ohio Constitution, which has allowed a person to choose where to live since 1851.[44]

It is the role of the judiciary and not the Legislature to determine constitutional questions.[45] "The interpretation of the Ohio Constitution is * * * not a legislative but a judicial question, which ultimately this court must decide."[46]

The General Assembly has plainly encroached upon the this Court's role as final interpreter of the constitution by enacting legislation that attempts to create rights under the Ohio Constitution that are incompatible with this Court's prior precedent. Therefore, R.C. 9.481 must be struck down as an invalid intrusion into the judiciary's authority by the legislature.

V. R.C. 9.481 violates Section 26, Article II of the Ohio Constitution

Section 26, Article II of the Ohio Constitution, commonly referred to as the Uniformity Clause, requires that "[a]ll laws of a general nature, shall have a uniform operation throughout the State." The two-part test to determine whether a statute violates the Uniformity Clause is: (1) whether the statute is a law of a general or special nature, and (2) whether the statute operates

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[44] See *Buckley*, 63 Ohio St. 2d at 44; *State ex rel. Brown, v. Summit Cty. Bd. of Elections* (1989), 46 Ohio St.3d 166, 169.

[45] *Cincinnati, Wilmington, & Zanesville RR Co. v. Commrs. of Clinton Cty.* (1852), 1 Ohio St. 77, at the syllabus of the Court; *State ex rel. Shkurti v. Withrow* (1987), 32 Ohio St.3d 424, 429.

[46] *Shkurti*, 32 Ohio St.3d at 429.

uniformly throughout the state.[47] In *Stanton v. Powell*,[48] this Court discussed the criteria for determining whether a statute operates uniformly:

> **[To satisfy Section 26, Art. II], 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.**[49]

Additionally, in *State ex rel. Zupancic v. Limbach*,[50] this Court stated:

> **Pursuant to Section 26, Article II of the Ohio Constitution, a court should inquire into the purpose underlying a statutory classification where such classification causes disparate results, and if the statute achieves a legitimate governmental purpose and operates equally on all persons or entities included within its provisions it shall be deemed constitutional.**[51]

Appellees cannot establish any rational, legitimate reason to create classifications between full-time and part-time municipal employees. Yet the trial court failed to address whether R.C. 9.481 operates uniformly throughout the Ohio, and the appellate court incorrectly rejected the argument that the Section 26, Article II prohibits arbitrary classifications amongst municipal employees. However, because R.C. 9.481 creates an arbitrary, irrational distinction between full-time and part-time municipal employees, it fails the uniform operation test and violates Section 26, Article II.

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[47] *Desenco, Inc. et al. v. City of Akron* (1992), 65 Ohio St.3d 449, 451.

[48] (1924), 109 Ohio St. 383.

[49] Id. at 385 (emphasis added).

[50] (1991), 58 Ohio St.3d 130.

[51] Id. at paragraph one of the syllabus.

CONCLUSION

For the reasons stated above, as well as those reasons set forth in the City of Lima's brief and the briefs of other amicus curiae filed on behalf of the City of Lima, Dayton respectfully asks that this Court uphold the decision of the Third District and strike down the General Assembly's illconcieved attempt to thrust its will upon municipalities as unconstitutional.

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Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail on September 10, 2008 upon the following:

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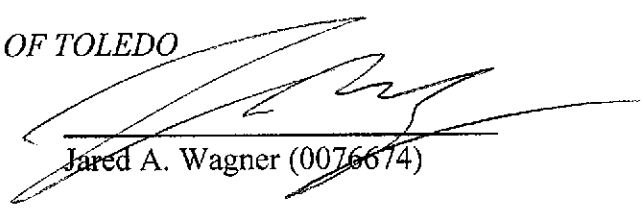

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