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## INTRODUCTION

"Seldom, if ever, have I observed an author of an opinion reach out peripherally in so many directions in an attempt to authoritatively support an untenable legal position." *City of Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St. 3d 1, 21, 539 N.E. 2d 103 ("*Rocky River IV*") (Holmes, C., dissenting).

"However, in the effort to achieve a result that meets the particularized need of the appellees, the lead opinion has, in my view, created some most unfortunate jurisprudence." *Rocky River IV*, 43 Ohio St. 3d 1, 22 (Wright, J., dissenting).

The Ohio Supreme Court's decision in *Rocky River IV* has played an instrumental role in the case now before this Court. It is the genesis for the primary arguments made by the State of Ohio. Merit Brief of Defendant-Appellant, 7-12, 17, *City of Lima v. State*, Case No. 2008-0128 ("Merit Brief of State"). Interpretation of it has also significantly impacted all of the appellate level cases addressing R.C. 9.481. See *State v. Akron*, 2008 WL 81506, 2008-Ohio-38, *Toledo v. State*, 2008 WL 1837256, 2008-Ohio-1957, *Dayton v. State*, 176 Ohio App.3d 469, 2008-Ohio-2589, *Lima v. State*, 2007 WL 4248278, 2007-Ohio-6419.

It must be recognized that the decision in *Rocky River IV* was and remains controversial as it relates to the scope of Article II, Section 34 and the relationship of this provision to home rule. *Rocky River IV* narrowly overturned *Rocky River I*, an earlier Ohio Supreme Court case that considered the same issues, but before the composition of the Court had changed. See *Rocky River IV*, 43 Ohio St. 3d 1. It inspired two scathing dissents, quoted from above, each of which expressed the concern that the decision involved poor jurisprudence by espousing broad and incorrect conclusions about the intended reach of Article II, Section 34, in the interest of reaching a favorable result in

the case then at issue, that would ultimately result in confusion and misunderstanding in future decisions addressing this provision. *Rocky River IV*, 43 Ohio St. 3d 1, 21-22. We believe the current split of decisions among the appellate level courts addressing R.C. 9.481 results from this confusion and misunderstanding.

For this reason, we urge the Court to take this opportunity to carefully consider the intended scope of Article II, Section 34 in reaching its decision in the case at issue. We believe that a close review of the legislative history and intended purpose of Article II, Section 34 and the cases interpreting it will support the City of Lima's and the Third Appellate District's ultimate conclusions that R.C. 9.481 is an unconstitutional infringement on the City of Lima's home rule authority. This is because, based on our extensive review of the history, it is clear that the original understanding of Article II, Section 34 was as a powerful, but limited, amendment aimed at improving workplace conditions and establishing wages and hour limitations for the benefit of workers at large. In contrast, R.C. 9.481 is a narrowly crafted attempt to substitute the judgment of the Ohio legislature for the judgment of local municipalities on decisions related to the appropriate distance municipal employees should live from the communities they serve.

Even if this Court found R.C. 9.481 within the scope of Article II, Section 34, we believe both a careful reading of the legislative history surrounding its adoption and sound judicial logic contradict the State's position (premised on *Rocky River IV*) that Article II, Section 34 renders any other provision of the Constitution that gets in its way null and void. Instead, the language of Article II, Section 34 indicating that no other part of the Constitution "shall impair or limit this power" should be read in context, recognizing the threat that the implied constitutional right to contract posed to early 20th-

century labor laws. Reading Article II, Section 34 as trumping the rest of the Ohio Constitution, including Article XVIII, Sections 3 and 7, as it relates to matters involving employees leads to absurd results and does not reflect the intent of the framers of these provisions.

Finally, we disagree with the State's contention that even if the Court finds R.C. 9.481 outside the scope of Article II, Section 34, R.C. 9.481 should not be rendered unconstitutional because it is a matter of statewide concern that would overcome a home rule challenge. Merit Brief of State, 17-22. We believe the caselaw clearly indicates that a city's hiring of its own employees is the quintessential example of local self-government. Interestingly, several of the reasons the State provides as to why R.C. 9.481 addresses a statewide concern – “its wide-ranging effects on adjacent communities residents, tax revenues, and housing markets” – possibly reveal a significant motivation behind R.C. 9.481. Merit Brief of State, 21. That is, not to promote “the general welfare of all employees,” but rather the welfare of the communities surrounding larger cities which would like to compete for their employees as residents. In any event, we think the caselaw is clear that municipal employee residency requirements are predominantly a matter of local concern.

#### STATEMENT OF AMICUS INTEREST

The Urban Development Lab (the "Lab") is a program at Case Western Reserve University School of Law created by Professor Matthew J. Rossman. The Lab researches legal and policy topics related to the development and redevelopment of urban areas, and

writes position papers reflecting its analysis as a way of educating law students about these topics and providing a service to the community.

One area of focus for the Lab is the interaction of the various branches and levels of government in addressing issues related to urban areas. Accordingly, the Lab has previously examined Ohio's Constitutional home rule provisions and their application to other issues. We believe that the case currently before this Court will have important consequences for home rule, and we hope that our research is helpful to the Court as it makes its decision.

The opinions expressed in this Brief of Amicus Curiae do not reflect the views or opinions of Case Western Reserve University School of Law.

#### STATEMENT OF THE CASE AND FACTS

We hereby adopt, in its entirety, and incorporate by reference, the statement of the case and facts contained within the brief of the City of Lima.

#### PROPOSITIONS OF LAW AND ARGUMENTS THAT SUPPORT THEM

##### **Amicus Curiae Urban Development Lab Proposition of Law No.I:**

*A review of the legislative history and original purpose of Article II, Section 34, to determine its intended scope, is appropriate and timely.*

The Third District held that R.C. 9.481 was not promulgated under the authority of Article II, Section 34 because it lacks any nexus between its legislative end and the working environment, the intended focus of Article II, Section 34. *City of Lima v. State*, 2007 WL 4248278, 2007-Ohio-6419, ¶ 65-86. The State urges this Court to reverse the

Third District's holding, and find instead that Section 34 is a "broad grant of authority," the interpretation of which requires no reliance on legislative history and context because the text is "clear and unequivocal." Merit Brief of State, 8. Presumably, the State would prefer that this Court conclude that any matter related to employment fall within Article II, Section 34, as arguably any such matter affects employees.

The fact of the matter is that the scope of Article II, Section 34 is not clear and has been fiercely debated. See, for example, the majority and dissenting opinions in *Rocky River IV* and their starkly different conclusions about the scope of this provision. *Rocky River IV*, 43 Ohio St. 3d 1, 21 (Holmes, J, dissenting). Even the majority opinion in *Rocky River IV*, which asserts that the scope is clear and unequivocal, stops short of articulating exactly what the scope is, stating only that it is broad, relates to the welfare of working persons and extends beyond matters concerning the minimum wage. *Rocky River IV*, 43 Ohio St.3d 1, 13. Possibly, this is because it seemed clear and unequivocal to the majority, given the other words contained in Article II, Section 34 (e.g. "Laws may be passed fixing and regulating the hours of labor \*\*\*,") that the provision addressed more than just the minimum wage and this limited finding was sufficient to dispose of the argument to the contrary made by appellant in *Rocky River IV*. But *Rocky River IV* does not go any further than this in establishing boundaries for Article II, Section 34; meanwhile, the trial and appellate courts that have attempted to apply the provision to R.C. 9.481 have reached a variety of results. See, e.g., *Am. Fedn. of State, County and Mun. Emp. Local #74 v. Warren*, Trumbull C.P. No. 2006 CV 01489, *Akron v. State*, Summit C.P. No. CV 2006-05-2759, *Toledo v. Ohio*, Lucas C.P. No. CI06-3235, *Dayton v. Ohio*, Montgomery C.P. No. 06-3507, *State v. Akron* (2008), 2008 WL 81506, 2008-

Ohio-38, *Toledo v. State* (2008), 2008 WL 1837256, 2008-Ohio-1957, *Dayton v. State* (2008) 176 Ohio App.3d 469, 2008-Ohio-2589. Therefore, *Rocky River IV* should not be relied upon as a definitive pronouncement on what Article II, Section 34 does and does not cover.

It is also worth noting that the Ohio Legislative Service Commission, the Ohio General Assembly's own legislative advisory service, which analyzes and comments upon new pieces of legislation, expressed reservations about the constitutionality of R.C. 9.481. Ohio Legislative Service Commission, Final Analysis of R.C. 9.481 (2006) Sub. S.B. 82. First, it observed that R.C. 9.481 may violate the Ohio Constitution's home rule provisions because municipal residency requirements are most likely a matter of local self-government. *Id.* at 2. Second, and more importantly for our argument in this section, it questions the drafters of R.C. 9.481's assertion that the provision falls within the scope of Article II, Section 34 given that the original purpose of this constitutional amendment was only "to ensure that laws regarding minimum wage and the like would not unconstitutionally impair contracts" and the fact that R.C. 9.481 was intended only for "certain governmental employees" while the language of Article II, Section 34 arguably only empowers legislation affecting all employees. *Id.* at 2. "Without a court interpretation, it is difficult to say whether [Article II, Section 34] applies \*\*\*," the Commission's report on R.C. 9.481 concludes. *Id.* at 3.

Considering the above points, we believe there is a compelling need for this Court to carefully revisit and clarify the scope of Article II, Section 34. Reference to the legislative history is a proper and necessary means of resolving these types of ambiguities. When clarifying a constitutional amendment, this Court is free to consider

legislative history. See *Cleveland v. Board of Tax Appeals* (1950), 153 Ohio St. 97, 103, 91 N.E.2d 480, 484. It may also consider the original purpose for the amendment. See *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, at ¶14.

**Amicus Curiae Urban Development Lab Proposition of Law No.II:**

*Convention delegates and citizens of Ohio adopted Article II, Section 34 in order to secure improvements in workplace conditions, including wages, safety, and hours of labor.*

**A. A central component of the labor movement in the early 1900s, and forefront in the minds of the constitutional convention delegates, was the fight for legislation protecting collective bargaining, implanting wage increases, and improving workplace conditions.**

Article II, Section 34 emerged from “raging controversy that surrounded the efforts to pass state and later federal legislation to regulate hours, wages, and the labor of women and children.” *Rocky River IV* (1989), 43 Ohio St.3d 1, 26, (Wright, J., dissenting). Article II, Section 34, originally Proposition 122, was put forward by Thomas S. Farrell, a waiter from Cleveland. 2 Proceedings and Debates, Constitutional Convention of Ohio (1913) 106. In addition to his role as a delegate to Ohio’s Constitutional Convention, Mr. Farrell was a representative of the Hotel and Restaurant Employees’ International Alliance at the American Federation of Labor’s (“AFL”) Constitutional Conventions. See American Federation of Labor, Report of Proceedings of the Twenty-Eighth Annual Convention (1908) at v. (Mr. Farrell was an AFL delegate in 1908 and again in 1918; presumably, he also served as a delegate to the Conventions

held in the years between, but the full record is unavailable). See American Federation of Labor, *History, Encyclopedia, Reference Book* (1919) 55. One of the largest and most active unions in the country, the AFL eschewed radical policies in favor of pragmatic ones, especially protection of the right to strike in order to win improvements to working conditions. See, e.g., Philip Taft, *The A.F. of L. in the Time of Gompers* (1957) 255, Foster Rhea Dulles, *Labor in America* (2d revised ed. 1960) 185, 199.

At the time that Mr. Farrell was involved, the AFL ran a constant political campaign aimed at legislation in support of the freedom of unions to organize. Marguerite Green, *The National Civic Federation and the American Labor Movement 1900-1925* (1956) 193-94. Mr. Farrell's Hotel and Restaurant Employees' union also launched strikes to win union protection, pay increases, a sixty-hour work week, overtime pay, and improved food and sanitation conditions. See Samuel Gompers, Letter to Jere Sullivan, January 27, 1913 reproduced in 8 *The Samuel Gompers Papers* (Peter J. Albert and Grace Palladino, eds. 1986) 452.

Labor's struggle for improved workplace conditions and the right to strike led to Proposition 122. Originally, Proposition 122 was titled "Relative to employment of women, children and persons engaged in hazardous employment." 1 *Proceedings and Debates, Constitutional Convention of Ohio* (1913) 106. This title reflected the Delegates' concern for working conditions—especially for women and children who were typically stuck with the least desirable jobs. See 2 *Proceedings and Debates, Constitutional Convention of Ohio* (1913) 1328, 1332 ("conditions in some of the industries, particularly those where women and children are employed ... demand

legislation of this character”). From the start, the heart of the proposition’s support was a basic and widely held concern for workplace conditions.

Mr. Farrell, the Proposition’s sponsor, commenced the debates by expressing his concern over the “conditions in some of the industries,” the “wage-slave conditions,” and the “appalling state of affairs . . . of the labor conditions in the steel industry.” *Id.* at 1328 (The steel industry was particularly notorious for requiring long hours in hot, grueling conditions. See Don D. Lescohier, III *History of Labor in the United States* (Augustus M. Kelley Publishers 1966) 99). In support of the Proposition, Mr. Dwyer urged his fellow delegates to: “give your employees fair living wages, good sanitary surroundings *during hours of labor*, protection as far as possible against danger, a fair *working day*.” (Emphasis added) 2 *Proceedings and Debates, Constitutional Convention of Ohio* (1913) 1332-33. Mr. Dwyer reiterated his concern for workplace conditions with his opposition to sweatshops, where there were “microbes of all kinds and character.” *Id.* at 1334. In fact, there was no mention at any point in the debates of the Proposition’s effects outside of the workplace, except on those occasions where it was said that the benefits of a good work environment and a fair wage extended to the employee’s home life. See, e.g., *Id.* at 1333 (“Their wages should be sufficient for them to live in reasonable comfort, to raise their children on nourishing food. . .”).

No court opinion questions that most of the language establishing the scope of Article II, Section 34 – “Laws may be past fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety *and general welfare* of all employees . . .” (*emphasis added*) – relates directly to wages, hours and workplace conditions. The debatable language is “*and general welfare*.” But when read

in context, with the proceedings and debates of the Ohio Constitutional Convention as a backdrop, it seems clear that general welfare is a catchall phrase meant to include other aspects of the circumstances under which a worker labors, not captured by “comfort”, “health” or “safety”. The evidence is strong – from the background of those who initiated Proposition 122 to the numerous comments of the delegates to the language of the provision itself – that Article II, Section 34 was not intended to include any and every law related to employment, but rather was a narrower restatement of the State's police powers over matters related to wages, hours and workplace conditions.

In contrast, R.C 9.481 relates to the rules made by individual municipalities to require particular municipal employees to live within city boundaries. These rules pertain to a condition of employment, no different than a law firm requiring its lawyers to maintain their licenses to practice in good standing while employed by the firm or a police department requiring its officers to stay in good physical condition. Such a condition of employment is clearly distinct from workplace conditions and, therefore, outside the scope of Article II, Section 34.

**B. The State's position relies primarily on cases which do not expand the scope of Article II, Section 34 as far as the State suggests.**

As noted in our Introduction, the State relies primarily on *Rocky River IV* for its contentions that R.C. 9.481 falls within the scope of Article II, Section 34 and that this conclusion is so clear that the Court should ignore the legislative history surrounding this constitutional provision. Merit Brief of State at 8. This Court has indeed remarked that “[t]he language of Section 34 is so clear and unequivocal that resort to secondary sources,

such as the constitutional debates, is actually unnecessary.” *Rocky River IV* (1989), 43 Ohio St.3d at 15, 539 N.E.2d at 115. But this statement was made in response to an appellant who was arguing to the Court that the scope of Article II, Section 34 only included minimum wage legislation. *Id.* It is clear that Section 34 covers more than that. How much more, the Court never said; it only said that the scope is broad and relates to the welfare of employees. *Id.* at 13. This failure to properly examine Article II, Section 34 in full historic context, and to properly define its boundaries, is what inspired the dissents of Chief Justice Moyer, Justice Holmes and Justice Wright in *Rocky River IV*. Subsequent Supreme Court cases have applied *Rocky River IV* without closely considering the implications of its overly broad holdings. See, e.g., *Am. Assn. of Univ. Professors v. Central State Univ.* (1999), 87 Ohio St.3d 55. We believe the time is right for the Court to revisit the history behind this provision and that doing so will reveal that *Rocky River IV*, intentionally or unintentionally, expanded the scope of Article II, Section 34 “far beyond its original purpose,” *Rocky River IV* (1989), 43 Ohio St.3d at 23 (Wright, J., dissenting).

**Amicus Curiae Urban Development Lab Proposition of Law No. III:**

*Article II, Section 34 does not grant the General Assembly the power to legislate in areas which have been reserved to municipalities by Article XVIII, Sections 3 and 7 of the Ohio Constitution.*

The Third District correctly held that R.C. 9.481 does not fall within the scope of Article II, Section 34. *Lima v. State*, 2007 WL 4248278, 2007-Ohio-6419 at ¶ 64. Yet

the Third District never considered the equally important argument that R.C. 9.481, even if it was passed under Article II, Section 34, is an unconstitutional infringement on Lima's home rule powers.

The State argues, and relies on *Rocky River IV* for the proposition that, laws passed pursuant to Article II, Section 34 prevail over all other provisions in the constitution that in any way inhibit those laws. This interpretation seems, at first glance, to flow from the text. The second half of Article II, Section 34 reads "no other provision of the constitution shall impair or limit this power." But, upon consideration, this Court will see that the State's interpretation yields absurd and detrimental results. Furthermore, it does not reflect the intention of the drafters of Article II, Section 34. Accordingly, we urge this Court to recognize the original purpose of the language and interpret it in a manner consistent with the rest of the Ohio Constitution, rather than allow it to run roughshod over any other section in the Constitution that may get in its way.

**A. The State's interpretation of Article II, Section 34 will yield absurd results by undermining the Constitution, so it must be rejected.**

The State asks this Court to interpret the final clause of Section 34 as a constitutionally unlimited grant of power to the General Assembly. Merit Brief of State at 9. The State primarily relies on *Rocky River IV* for the proposition that the General Assembly has "supreme power," unimpaired by the rest of the Constitution, on matters that fall within the scope of Article II, Section 34. *Rocky River IV* (1989), 43 Ohio St.3d 1, 539 N.E.2d 103. In his dissent to *Rocky River IV*, Judge Wright recognized that such an interpretation was completely untenable and a prime example of the sloppy

jurisprudence likely to result from the majority's opinion. *Id.* at 23-26 (Wright, J., dissenting).

Justice Wright produced a long list of constitutional provisions that would fall by the wayside when analyzed under *Rocky River IV*. *Id.* at 23-24 (Wright, J., dissenting). A few startling examples include the freedom of speech (Article I, Section 11), the right to redress in court (Article I, Section 16) and the Governor's power to veto legislation (Article II, Section 16). *Id.* Could the Ohio General Assembly pass a law prohibiting anyone from criticizing government employees? Such a law would surely make their jobs less stressful, and constitutional protections of speech apparently would not stand in the way. Could the Assembly likewise enact legislation requiring employers and employees to settle all of their disputes in arbitration? Pursuant to *Rocky River IV*, Article I, Section 16, providing the right to address the matter in court, could not impair or limit this law. How about a law setting aside a formality like the 90 day waiting period before a law becomes effective (Article II, Section 1c) for all matters that fall within the scope of Article II, Section 34? Clearly, this could not have been what the drafters of Article II, Section 34 intended, and yet each of these examples involves a constitutional provision that would otherwise strike down the law in question.

“It is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences.” *State ex rel Dispatch Printing Co. v. Wells* (1985), 18 Ohio St.3d 382, 384, 481 N.E.2d 632, See, also, *State ex rel. Summit Cty. Republican Party Executive Comm. v. Brunner*, 118 Ohio St.3d 515, 532, 2008-Ohio-2824, 890 N.E.2d 888. Cf. *Smith v. Leis*, 106 Ohio St.3d 309, 317, 2005-Ohio-5125, 835 N.E.2d 5, at ¶57. (“in construing the Constitution, the court applies the same rules of

construction that it applies in construing statutes”). “A construction which results in a ridiculous or absurd situation must be avoided if reasonably possible.” *State ex rel. Haines v. Rhodes* (1958), 168 Ohio St. 165, 170, 151 N.E.2d 716, 720. A text’s natural reading should be abandoned where it “would lead to gross absurdity or ... absurd consequences manifestly contradictory to common reason.” *Reid v. Muhlenberg Tp. Bd. of Ed.* (1906), 16 Ohio Dec. 414, 1906 WL 730 at 2. Instead, the provision should be given an interpretation “which will not defeat, but will effectuate, the purpose of its adoption as ascertained from the context.” *Crawford v. Weidemeyer* (1916), 93 Ohio St. 461, 464-65, 113 N.E. 267, 268. Cf. *Johnson v. U.S.* (2000), 529 U.S. 694.

We urge the Court in the case at issue to exercise its authority to construe Article II, Section 34 in a way that does not lead to such absurd results. Of course, the question remains: if this provision was not intended to reign supreme over every other section of the Constitution, then how should it be interpreted? Over what constitutional limitations should it prevail? Fortunately, the legislative history surrounding the adoption of Article II, Section 34 brightly illuminates the intended purpose of this language.

**B. Article II, Section 34 was not intended as a grant of power to the general assembly completely unlimited by the rest of the Constitution; rather, it was enacted to tip specific types of rights-based judicial balancing tests in favor of labor legislation.**

The background materials available on Article II, Section 34 provide ample evidence that the amendment was not intended to expand the state’s powers. Rather, the amendment was designed and ratified for the exclusive purpose of allowing the General

Assembly to pass labor legislation without regard for the now notorious liberty of contract. A viable modern interpretation of Article II Section 34 should recognize this history and interpret the provision as supreme only to similar challenges to labor laws.

- 1. The “supremacy” language of Section 34 was intended to protect laws related to wages and hour regulations and workplace conditions from being impaired or limited by the implied constitutional right to contract.**

Section 34 emerged from great social unrest. There was immense popular support for state protection of labor in wages, unionization, and working conditions. *Supra* § II. Labor and capital were at odds. Labor-friendly legislation was being enacted by popularly elected representatives. But the courts were stacked with judges educated in “the so-called classical school of political economists.” 2 Proceedings and Debates, Constitutional Convention of Ohio (1913) 1335. These courts viewed labor-friendly legislation as a threat to contract rights—which, at the time, were held to be constitutionally enshrined. See, generally, Roscoe Pound, *Liberty of Contract* (1909), 18 Yale L.J. 454 (discussing the emergence of the “liberty of contract,” and the disconnect between courts and working men). The most notorious case in which legislation meant to improve labor conditions was struck down is *Lochner v. New York* (1905), 198 U.S. 45, or, as it was colloquially called at the debates, “the bake-shop case in New York.” 2 Proceedings and Debates, Constitutional Convention of Ohio (1913) 1335. In *Lochner*, the court struck down a law that set a 60-hour-maximum work week in New York bakeries, holding it an unconstitutional infringement on the right of contract. *Id.* *Lochner* was used to cut down progressive legislation across the country. See, e.g., *Adair*

v. *United States* (1908), 208 U.S. 161 (striking down a law prohibiting firing based on union membership), *State v. Miksicek* (1910), 225 Mo. 561, 125 S.W. 507 (striking down a law regulating days and hours that employees may work in a bakery), *State v. Greeson* (1939), 10 Beeler 178, 124 S.W.2d 235 (striking down a law regulating barber shops).

The labor movement was galvanized by the *Lochner* decision. See, generally, Morton J. Horowitz, *The Transformation of American Law 1870-1960* (1992) 33-63 (discussing the rise of the progressive movement as, in large part, a reaction to the *Lochner* decision). In Ohio, anti-*Lochner* activism took form in Proposition 122, “a clause in the Constitution that will give the courts an opportunity to more liberally construe these matters than they have done in the past.” 2 Proceedings and Debates, Constitutional Convention of Ohio (1913) 1335 (Mr. Dwyer on the threat of *Lochner* and the need to protect labor laws).

The legislative history leaves little doubt that the implied Constitutional "right to contract" was the principal target of Article II, Section 34. Justice Wright, in his dissenting opinion in *Rocky River IV*, provides an extensive and well-documented review of the legislative history as it relates to this point. *Rocky River IV* (1989), 43 Ohio St.3d at 27-37, 539 N.E.2d at 115 (Wright, J., dissenting). In the interest of space, we will not repeat all of it here. But his review reveals significant evidence linking the language in the second half of Article II, Section 34 to the need to counteract the right to contract and we strongly encourage the Court to review it. *Id.* We will, however, point to one excerpt from the legislative history that strongly supports this conclusion – a discussion between two of the delegates discussing the possibility that Proposition 122 might violate the constitutional right to contract, as epitomized by *Lochner*:

"Mr. HOSKINS: *I wish to ask: Did your committee in its discussion find or conclude that there was anything in the constitution that would forbid the doing of everything provided for in this proposal?*

"Mr. DWYER: *We were of the opinion that possibly the power is now in the legislature to do that, but we wanted to have the power expressly conferred \* \* \*.*

"Mr. LAMPSON: *Did you investigate the question as to whether that provision in the constitution relating to the passage of laws violating the obligation of contract has any bearing on this proposal?*

"Mr. DWYER: *The courts have been deciding cases. Take that bakeshop case in New York. The supreme court there decided it was a question of private contract about the hours of labor. Our courts are becoming more progressive. They are catching the spirit of the time and they are changing very much to be in accord with public sentiment, and we should enable them to do that and we should put a clause in the constitution that will give the courts an opportunity to more liberally construe these matters than they have done in the past. \* \* \**" *Rocky River IV*, 43 Ohio St. 3d 1, 32 (Wright, J., dissenting) (emphasis added).

As Justice Wright notes after including this same excerpt in his dissent, "Mr. Dwyer's reference to *Lochner v. New York* is most significant, for it reveals the overall controversy giving rise to Proposal No. 122 – wage and hour legislation versus freedom of contract. The fundamental error embraced in today's majority opinion lies in its failure to place the language of Section 34, Article II within its historical context." *Id.* at 32-33 (Wright, J., dissenting).

2. **The language in the second half of Article II, Section 34 should be understood as applying exclusively to the right to contract and other sections of the Constitution that would have directly undermined its purposes.**

Because we believe that the majority in *Rocky River IV* failed to adequately consider the "supremacy language" in Article II, Section 34, we urge this Court to disregard the State's contention that R.C. 9.481 is not subject to the Constitution's home rule provisions in Article XVIII, Sections 3 and 7. The home rule provisions do not in any way resemble the right to contract. The latter involved an implied substantive right that would directly undermine the clearly stated purpose of Article II, Section 34. As noted above, the legislative history reveals that the very purpose of adding Article II, Section 34 to the Constitution, despite the fact that the legislature already possessed the right to pass laws relating to employment under its general police powers, was to overcome the right to contract as it pertained to labor legislation. Clearly, the power of the legislature pursuant to Article II, Section 34 was not meant to be "impaired or limited" by the right to contract or any constitutional limitation similar to it.

The Home Rule provisions, on the other hand, bear no relationship to the underlying purposes behind adoption of Article II, Section 34. The Constitutional Convention of 1912 drafted the Home Rule provisions in order to allocate decision-making authority on certain matters directly to municipalities. See *Wilson v. Zanesville* (1935) 130 Ohio St. 286, 288, 199 N.E. 187, 188. Prior to the Convention, "municipal corporations in their public capacity possessed such powers, and such only, as were expressly granted by statute." *Billings v. Cleveland R. Co.* (1915), 92 Ohio St. 478, 482,

111 N.E. 155. The legislature abused this power through destabilizing political appointments and chaotic reappointments. *Goebel v. Cleveland R. Co.* (1915), 17 Ohio N.P.(N.S.) 337, 1915 WL 956, at 4. Eventually the citizens grew tired of “having their local self-government upset by the great mass of legislators ... who neither understood their conditions and institutions nor knew the problems that they had to work out.” *Id.* The adoption of the Home Rule amendments “made a new distribution of governmental power.” *Billings*, 92 Ohio St. at 483. The Home Rule amendments “fixed the power in the Constitution itself,” and “put it in the hands of themselves who knew the needs of the community best, to-wit, the people of the city.” *Goebel*, 17 Ohio N.P.(N.S.) 337, 1915 WL 956, at 4.

As with other provisions of the Constitution that do not directly undermine the purposes behind Article II, Section 34, the "supremacy" language in the second half of Section 34 should have no bearing on the Home Rule provisions. Contrary to *Rocky River IV*, we argue that the history surrounding the adoption of Article II, Section 34 clearly indicates that the "supremacy" language was directed at particular constitutional "rights" that hampered the General Assembly's ability to pass labor law and not the entire Constitution.

**C. Municipal Employee Residency Requirements are not a matter of statewide concern so R.C. 9.481 is an unconstitutional infringement on the City of Lima's power of local self-government.**

Assuming the Court agrees that R.C. 9.481 was not passed pursuant to Article II, Section 34 and/or that legislation passed pursuant to Article II, Section 34 is not

immunized from the Ohio Constitution's Home Rule provisions, then R.C. 9.481 is subject to the same inquiry as any state law that affects a municipality. If it pertains to a matter of local self-government, then the municipality may make its own laws, even if they contradict state law. It is a central tenant of Home Rule that a municipality "may enact an ordinance which is at variance with state law in matters of substantive local self-government." *Northern Ohio Patrolmen's Benev. Assn v. City of Parma* (1980), 61 Ohio St.2d 375, 378, 402 N.E.2d 519, 522 (citing Sections 2, 3, 7, Art. XVIII, Ohio Constitution.) See also *City of Cleveland v. Raffa* (1968), 13 Ohio St.2d 112, 113-14, 235 N.E.2d 138.

As the State recognizes, the question turns on the doctrine of statewide concern. Merit Brief of State at 20. If the impact of a local regulation "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.* at 21, quoting *Cleveland Elec. Illuminating Co. v. City of Painesville* (1968), 15 Ohio St. 2d 125, 129.

The State asserts that municipal employee residency requirements are a matter of statewide concern significant enough to overcome Home Rule provisions. This argument is far-fetched for several reasons.

First, previous Ohio Supreme Court cases have overwhelmingly established that regulation of city civil service is a matter of local self-government. *Ohio Ass'n of Public School Employees, Chapter No. 471 v. City of Twinsburg* (1988), 36 Ohio St.3d 180, 182-83, 522 N.E.2d 532, 534. "The manner of regulating the civil service of a city is peculiarly a matter of municipal concern." *Id.* at 183, quoting *State, ex. rel. Lentz v.*

*Edwards* (1914), 90 Ohio St. 305, 309, 107 N.E. 768. That power includes “promotions,” and “[t]he responsibility and authority to control all police department employees,” *City of Kettering v. State Employment Relations Bd.* (1986), 26 Ohio St.3d 50, 53, 496 N.E.2d 983, 986 ,payment rates for military leave, *Northern Ohio Patrolmen's Benev. Assn v. City of Parma* (1980), 61 Ohio St.2d 375, 378, 402 N.E.2d 519, and the power to hire and appoint police officers, *State, ex. rel. Canada v. Phillips* (1958), 168 Ohio St. 191, 151 N.E. 2d 722; *State, ex. rel. Regetz v. Cleveland Civil Service Commission* (1995), 72 Ohio St. 3d 167, 648 N.E.2d 495. This Court has plainly stated that “[t]he General Assembly cannot withdraw from municipalities powers expressly conferred upon them by the Constitution.” *Am. Financial Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776, ¶28, citing *City of Akron v. Scalera* (1939), 135 Ohio St. 65, 66, 19 N.E.2d 279.

Second, the "extraterritorial effects" stemming from municipal employee residency requirements cited by the State are minimal and inadequate for overcoming the interests of local governments in having them. The State argues that the residency requirements impose a job requirement unrelated to job performance. Merit Brief of State at 22. No doubt, cities with residency requirements would contend that having safety forces reside close to the communities they serve and requiring all city employees to have a stake in the communities that pay their salaries by living within them is tied to job performance. While opinions may differ on the outcome of this debate, decision-making power over policy choices like whether or not a city should have a residency requirement would seem to be exactly the type of local governance decision Home Rule meant to allocate to cities.

The State also points to the negative impact on housing markets and tax revenues of communities situated around cities with residency requirements. It would seem, however, that any positive effect on housing markets and tax revenues that would be spread around the surrounding communities upon the repeal of residency requirements would be more than offset by the very concentrated negative impact such an action would have on the housing markets and tax revenues of those cities losing their residency requirements. The statewide concern doctrine reflects this dilemma by providing that a particular local law must “affect the general public of the state as a whole *more* than it does the local inhabitants” to constitute a statewide concern. *Cleveland Electric Illuminating Co. v. City of Painesville* (1968), 15 Ohio St.2d 125, 129, 239 N.E.2d 75, 78 (emphasis added). Every municipal action has the potential to, in some way, affect the immediately surrounding communities. That is why this Court resolved a similar situation by saying that “[a]dverse extraterritorial effects on a neighboring municipality are not, standing alone, enough to overcome the presumption of the validity of a legislative enactment taken under a municipality’s home rule powers.” *Cleveland v. Shaker Heights* (1987), 30 Ohio St.3d 49, 53, 507 N.E.2d 323, 326 (erection of traffic barricades which require several thousand drivers from neighboring communities to travel an extra mile or more every day is a local, not statewide, concern).

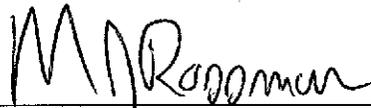
Finally, several of the reasons the State provides for why municipal employee residency requirements constitute a statewide concern are, perhaps, revealing as to the real motivation behind R.C. 9.481. That is, not to promote “the general welfare of all employees”, but rather to improve the economic condition of the communities surrounding larger cities which compete for their employees as residents. Improving the

economic condition of certain areas of the state at the expense of others would indeed be a misguided and unfortunate reason for rolling back the well-established doctrine of home rule on matters pertaining to local self-government.

CONCLUSION

The ruling of the Third District Court of Appeals should be affirmed on the grounds that Article II, Section 34 does not extend beyond minimum wage, hours of labor and workplace conditions, and that R.C. 9.481 is an unconstitutional infringement of the City of Lima's Home Rule authority.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Amicus Curiae Urban Development Lab in Support of Appellee the City of Lima was served by U.S. mail this 10th day of September, 2008, upon the following counsel:

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