

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, et al.	)	CASE NO. 2008-0418
	)	
Appellants,	)	
vs.	)	On Appeal from the Summit
	)	County Court of Appeals,
	)	Ninth Appellate District
CITY OF AKRON, et al.	)	
	)	Court of Appeals
Appellees	)	Case No. 23660

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BRIEF OF *AMICUS CURIAE* THE CITY OF CLEVELAND  
IN SUPPORT OF APPELLEES THE CITY OF AKRON AND  
DONALD L. PLUSQUELLIC

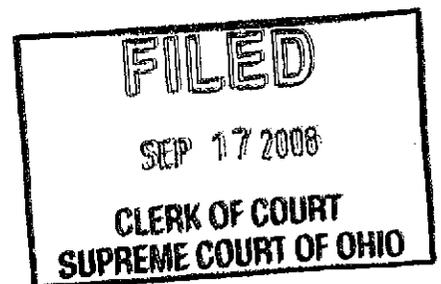
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## **I. INTEREST OF AMICUS CURIAE**

The City of Cleveland (“Cleveland”) adopted its charter shortly after the 1912 Home Rule Amendment to the Ohio Constitution took effect. The charter established Cleveland’s body politic and corporate existence and further established the city’s intention to exercise all powers granted to municipalities under the Ohio Constitution. Cleveland’s voters exercised such powers of local self-government in 1982 when they amended the city’s charter to require that all municipal employees become residents of city within six months of accepting a job with the City. With the enactment of R.C. 9.481 the Ohio General Assembly has improperly attempted to prohibit Cleveland, Akron, and other municipalities from exercising the long-standing powers of local self government guaranteed to them by the Home Rule Amendment to the Ohio Constitution.

Cleveland challenged the legitimacy of R.C. § 9.481 by way of a declaratory judgment action it filed on the same day the statute purportedly took effect. Simply put, R.C. § 9.481 is an unconstitutional statute that was intended to upset the balance between local and state sovereignty that came into being after the 1912 Ohio Constitutional Convention. The General Assembly attempts to misuse Article II, Section 34 in a manner that attacks the very bedrock of home rule – the ability under the powers of local self-government for a municipality to determine the qualifications of its employees.

## **II. STATEMENT OF FACTS**

Cleveland incorporates by reference herein the Statement of Facts included with the City of Akron’s merit brief. Additionally, in the interest of brevity Cleveland provides the following summary of relevant facts as are contained in the Eighth District’s

residency decision, *City of Cleveland v. State of Ohio*, 8<sup>th</sup> Dist. Nos. 89486, 89565, 2008-Ohio-2655<sup>1</sup>, at ¶¶ 5-11:

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

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

On January 1, 1914, a City Charter became effective in Cleveland. As part of its Charter, Cleveland adopted an “Initiative and Referendum” procedure. On November 3, 1931, Cleveland voters voted to amend the Charter by approving an employee residency requirement. On November 21, 1967, the voters repealed this amendment; however, on November 2, 1982, voters again approved an employee residency requirement through the enactment of City Charter Section 74.

Section 74 of the City Charter states in relevant part:

“Residency Requirements; Officers and Employees

“(a) Except as in this Charter otherwise provided or except as otherwise provided by a majority vote of the Council of the City of Cleveland, every temporary or regular officer or employee of the City of Cleveland, including the members of all City boards and commissions established by the Charter or the ordinances of Cleveland, whether in the classified or unclassified service of

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<sup>1</sup> The State has filed an appeal seeking the jurisdiction of this Court in *City of Cleveland v. State of Ohio*, Supreme Court case No. 2008-1240.

the City of Cleveland, appointed after the effective date of the amendment, shall, at the time of his appointment, or within six months thereafter, be or become a bona fide resident of the City of Cleveland, and shall remain as such during the term of his office or while employed by the City of Cleveland.”

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

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

### **III. ARGUMENT**

#### **A. Introduction.**

While courts may be reluctant to interfere with the legislative process, courts are not to abdicate the duty to enforce the Ohio Constitution. *State ex rel. Dix v. Celeste* (1984), 11 Ohio St.3d 141, 144. When the validity of a statute has been challenged on constitutional grounds, the court's duty is to determine the meaning and effect of the constitution vis-à-vis the challenged legislation and where the legislation at issue exceeds the limits of legislative power, the court must protect the rights of those affected by the

law and, if appropriate, declare the legislation invalid. *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298, 303.

The positions of the parties in the various residency challenges pending before this Court have been cogently identified in the opinion of Ninth District Court of Appeals as before this Court as follows:

It is the position of the state and the unions that the General Assembly's constitutional authority under Article II Section 34 to pass laws providing for the "general welfare" of employees encompasses the authority to enact Section 9.48.1, which prohibits employee residency requirements by political subdivisions so that employees will have the freedom to choose where to reside. Akron's position, on the other hand, is that the scope of the General Assembly's authority to pass laws for the general welfare of employees under Article II Section 34 is not without limits and does not extend to this legislation.

*State of Ohio v. Akron*, 9<sup>th</sup> Dist. No. 23660, 2008 -Ohio- 38, at ¶ 15.

With respect to Cleveland's challenge the Eighth District allowed that "The parties agree that the inherent conflict between City Charter Section 74 and R.C. 9.481 is that which forms the basis of the case before us. These two laws cannot logically and legally coexist." *City of Cleveland, supra*, 2008-Ohio-2655, at ¶ 12.

**B. Absent R.C. 9.481 qualifying as a general law, Article II, Section 34 of the Ohio Constitution has no application to resolving the conflict existing between the statute and municipal residency requirements**

The holding in *Fuldauer v. City of Cleveland* (1972), 32 Ohio St.2d 114 establishes a readily identifiable balance between the authority of the General Assembly to invoke Article II, Section 34 in support of laws purportedly providing for the general welfare of employees and the authority provided to municipalities by the Home Rule Amendment to the Ohio Constitution. The *Fuldauer* holding provides that in the absence of a conflict with a "general law," Article II, Section 34 of the Ohio Constitution has no application to a municipality's exercise of local self government.

4. In 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. Id. at ¶ 4 of Syllabus.

Application of the “general law” principle established in *Fuldauer* herein and more generally to the laws arising under Article II, Section 34 would establish a more certain standard in maintaining the constitutional balance between the State’s police authority and the municipal exercise of local self-government under the Home Rule Amendment.

In *Fuldauer* the appellant had argued that certain municipal provisions in setting the salary formula for city safety forces were unconstitutional and actually contrary to the limitations set forth by Article II, Section 34. Id. at 122. *Fuldauer* recognized, however, that “no law has been passed in which the General Assembly seeks to regulate the wages paid to policemen or firemen employed by municipal corporations.” Id. at 123. In crafting the above syllabus holding in response to the local self government challenge in *Fuldauer*, this Court rejected appellant’s argument, recognizing that Section 34 was not self executing and that the “laws may be passed”<sup>2</sup> language in the section referred to the power of the General Assembly to enact laws. Id. at 123, citing *Cincinnati v. Correll* (1943), 141 Ohio St. 535, 537.

R.C. § 9.481 is not a “general law” as would be required for the General Assembly to invoke the authority of Article II, Section 34 in attempting to prohibit the legitimate exercise of local self government inherent in municipal employee residency

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<sup>2</sup> Article II, Section 34 provides “Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.”

requirements.<sup>3</sup> While the concept of “general law” has been refined by this Court over the years since *Fuldauer*, the term’s meaning has not changed significantly from what had been defined previously in *W. Jefferson v. Robinson* (1965), 1 Ohio St.2d 113 as a statute that set forth police, sanitary or similar regulations:

3. The words ‘general laws’ as set forth in Section 3 of Article XVIII of the Ohio Constitution means statutes setting forth police, sanitary or similar regulations and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations.

With *Canton v. State of Ohio*, 95 Ohio St.3d 149, 2002-Ohio-2005 this Court more recently recognized a three part test that would have to be met before a statute could take precedence over a local law:

“A state statute takes precedence over a local ordinance when (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government, and (3) the statute is a general law.” *Id.* at ¶ 9. (emphasis added).

More recently in *Mendenhall v. City of Akron* 117 Ohio St.3d 33, 2008 -Ohio- 270 the Court shifted the order of *Canton*’s tripartite test. In reordering the application of the *Canton* prongs to consider first whether the local law involves an exercise of the “police power”, the Court recognized that where the local law at issue relates solely to an issue of local self government, the analysis stops:

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<sup>3</sup> This Court has upheld local residency requirements upon municipal employees in holding that “[t]here is no constitutional right to be employed by a municipality while living elsewhere.” *Buckley v. City of Cincinnati* (1980), 63 Ohio St.2d 42, 44 citing *McCarthy v. Philadelphia Civil Service Commission* (1976), 424 U.S. 645 (“In this case appellant claims a constitutional right to be employed by the city of Philadelphia while he is living elsewhere. There is no support in our cases for such a claim.” *Id.*, 424 U.S. at 646-647). See also *Senn v. City of Cleveland*, 8th Dist. No. 84598, 2005-Ohio-765 at ¶ 42 (“The Supreme Court of Ohio has held that a city may impose a residency requirement upon its employees.”)

Although it may seem that the three issues should be taken in sequence as stated, we must examine the two legislative enactments before determining whether a conflict exists. Thus, the *Canton* test 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.

The first part of the test relates to the ordinance. *As we have held, "If an allegedly conflicting city ordinance relates solely to self-government, the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction." Am. Fin. Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776, ¶ 23. If, on the other hand, the ordinance pertains to "local police, sanitary and other similar regulations," Section 3, Article XVIII, Ohio Constitution, the municipality has exceeded its home rule authority only if the ordinance is in conflict with a general state law. If that ordinance does not relate to local self-government, the second part of the test examines the state statute to determine whether it is a general law. If the statute is not a general law, the ordinance will not be invalidated. Only when the municipality has not exercised a power of self-government and when a general state law exists do we finally consider the third part of the test, whether the ordinance is in conflict with the general law. *Id* at ¶¶ 17-18. (emphasis added).

While the General Assembly's use of the prohibition language contained in R.C. 9.481 makes conflict with local residency laws a certainty, the necessary *Canton/Mendenhall* requirement that the local law at issue be an "exercise of the police power, rather than local self government" is without question not met. The State in addressing Cleveland's charter driven residency requirement before the Eighth District has "agree[d] that the City acted as a matter of local self-government, as opposed to acting under its police powers." *City of Cleveland v. State of Ohio*, 8<sup>th</sup> Dist. Nos. 89486, 89565, 2008 -Ohio- 2655, at ¶ 42. The State recognizes Akron's argument that the residency requirement arises under the powers of local self government and not as an exercise of local police power. (see generally State's Merit Brief at pp. 17-18).

The undisputed recognition that Cleveland's and Akron's residency requirements do not arise under any local exercise of the municipal police power, but rather constitute an exercise of local self-government effectively ends any analysis concerning whether R.C. 9.481 is a "general law" as would be necessary to displace the local laws under Article II, Section 34. Judge Rocco in his concurring opinion to *City of Cleveland*, *supra* 2008 -Ohio- 2655 correctly recognized in finding R.C. 9.481 to be unconstitutional that:

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

The parties here have agreed that City Charter § 74 is *not* an exercise of local police powers. Consequently, there is no need to address the question whether R.C. 9.481 is a general law. Judge Celebrezze's conclusion that R.C. 9.481 is not a general law must be regarded as a display of excessive caution. It is not a necessary part of the constitutional analysis in this case. *Id.* at ¶ ¶ 55-56.

The second step of the *Canton* analysis concerning whether: "(2) the ordinance [charter] is an exercise of the police power, rather than of local self-government" is an important hurdle in any conflict analysis implicating a purported state "general law" because "[t]he police power and the power of local self-government are constitutional grants of authority that are equal in dignity. The state may not restrict the exercise of local self-government within a municipality." *City of Columbus v. Teater* (1978), 53 Ohio St.2d 253, 257.

As this Court has long recognized “[t]he Eighteenth Amendment...the 'Home Rule' Amendment, was for the first time adopted as a part of the Constitution of Ohio, wherein the sovereign people of the state expressly delegated to the sovereign people of the municipalities of the state full and complete political power in all matters of 'local self-government'.” *Village of Perrysburg v. Ridgway* (1923), 108 Ohio St. 245, 255. The people of a municipality were given the power to construct the machinery of their own local government and to operate it themselves. *Dies Elec. Co. v. City of Akron* (1980), 62 Ohio St.2d 322, 325, citing *Froelich v. Cleveland* (1919), 99 Ohio St. 376. A charter municipality has the power under its charter to determine the form of its government, the functions and powers of its officers, and the manner of their selection. *Jones v. City of Cleveland* (1932), 124 Ohio St. 544, 549. It is long recognized in Ohio that “qualification, duties, and manner of selection of officers purely municipal, come within the purview of the provision granting a city local self-government.” *State ex rel. Frankenstein, v. Hillenbrand* (1919), 100 Ohio St. 339, 343.

As was recognized by the California Supreme Court “[a] requirement that a municipal employee reside within the borders of the city that hires and pays him has long been deemed a “*qualification*” for the employment in question, similar in this regard to minimum standards of age, health, education, experience, or performance in civil service examinations. *Ector v. City of Torrance* (1973), 10 Cal.3d 129, 514 P.2d 433, superseded by constitutional amendment, (emphasis added). As addressed by Judge Rocco in his concurring opinion in the Cleveland residency decision:

*[I]t is difficult to imagine a more local concern than qualifications for municipal employment. See State Personnel Bd. of Rev. v. Bay Village Civ. Serv. Comm. (1986), 28 Ohio St.3d 214, 216, 503 N.E.2d 518 (“A municipality is considered to have general home-rule authority to regulate*

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

*City of Cleveland, supra* 2008 -Ohio- 2655, at ¶ 57 (emphasis added).

This Court was aware of *Fuldauer’s* holding concerning “general law” and conflict analysis arising under Article II, Section 34 at the time of the *City of Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St.3d 1, (“*Rocky River IV*”) decision. Justice Douglas cited to the decision in recognizing the exclusive power of the General Assembly to enact laws under Article II, Section 34. *Rocky River IV* at 16, Fn. 15. Additionally, the opinion in *Rocky River IV* makes clear before proceeding with its analysis of Article II, Section 34 and Home Rule recognition that the General Assembly’s adoption of Chapter 4117 constituted an exercise of the State’s police power:

Also settled were the questions of whether the collective bargaining law is a law of general nature and whether the Act *was enacted pursuant to the police power of the state* to promote the general safety and welfare, thereby prevailing over laws of a municipality adopted in the exercise of its powers of local self-government. In these previous cases, both questions were answered in the affirmative.

*Id.* at p. 5.

Likewise, in *City of Kettering v. State Employment Relations Bd.* (1986), 26 Ohio St.3d 50, this Court recognized that “[u]ndeniably, the General Assembly was exercising its police power to promote the general safety and welfare in enacting the Public Employees Collective Bargaining Act.” *Id.* at 55; See also *Mayfield Hts. Fire Fighters v. DeJohn* (1993), 87 Ohio App.3d 358, 361-62 (“R.C. Chapter 4117, the Ohio Public Employees’

Collective Bargaining Act, is comprehensive legislation enacted in 1984 to eliminate the discord and strife occasioned by unlawful strikes by public employees.”), citing *Rocky River IV* at 43 Ohio St.3d 1, 19-20.

*Rocky River IV* when read in accord with *Fuldauer* is distinguished from the analysis to be undertaken concerning R.C. 9.481. In *Rocky River IV* Chapter 4117 was clearly considered to be a general law wherein the General Assembly had exercised the police power of the State in accord with the authority of Article II, Section 34 of the Ohio Constitution. No similar consideration arises with regard to R.C. 9.481, as the statute represents nothing more than a substitution of the General Assembly’s judgment for that of local government by way of a naked prohibition on local home rule authority.

As noted above, *Canton* established that even if the first two prongs of the precedence analysis (prongs 1 and 3 under *Mendenhall*) were met, the statute at issue would still need to be recognized as a “general law” to take precedence over a local law. Assuming, *arguendo*, that a municipal residency requirement arose under the city’s police authority [as noted above the assumption is simply not true], the R.C 9.481 would still not meet the requirements demanded of a “general law” because the statute does not set forth police regulations, but purports to limit municipal legislative authority, while failing to prescribe a rule of conduct on citizens generally.

Recognizing the steadfast parameters found in a variety of previous decisions<sup>4</sup> this Court with *Canton* enunciated a four-part test with its syllabus that is to be applied when determining whether a statute constitutes a “general law”:

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<sup>4</sup> With *Canton* the Supreme Court recognized that it had in fact previously “enunciated some steadfast parameters” in its prior holdings. These included *Schneiderman v. Sesanstein* (1929), 121 Ohio St. 80, 82-83 (general laws apply to all areas of state alike,

“To constitute a general law for purposes of home-rule analysis, a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.”

*Id.* (emphasis added)

As was cogently addressed by both the Eighth and Ninth Districts, R.C. § 9.481 is not a “general law” under *Canton* because it fails to meet the third (“set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations”) and fourth (“prescribe a rule of conduct upon citizens generally”) parts of the established test. See generally *City of Cleveland, supra* at ¶¶ 38-40.

With respect to the third prong, the words ‘general laws’ as set forth in Section 3 of Article XVIII of the Ohio Constitution mean statutes setting forth “police, sanitary or similar regulations and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations.” *West Jefferson, supra*, para 3 of syllabus. (emphasis added). In *Linndale v.*

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speed limit laws are general laws); *W. Jefferson v. Robinson* (1965), 1 Ohio St.2d 113, (statutes purporting to grant or prohibit the legislative power of municipal corporations are not general laws); *Garcia v. Siffirin Residential Assn.* (1980), 63 Ohio St.2d 259, (“general laws are laws operating uniformly throughout the state, \* \* \* which prescribe a rule of conduct upon citizens generally, and which operate with general uniform application throughout the state under the same circumstances and conditions”); *Clermont Environmental Reclamation Co. v. Wiederhold* (1982), 2 Ohio St.3d 44 (a statute that was a part of a comprehensive statutory scheme to regulate the state’s control of the disposal of hazardous wastes was a general law); *Ohio Assn. of Private Detective Agencies* (1991), 65 Ohio St.3d 242 (ordinance struck down because it conflicted with a statewide regulatory program), *Linndale v. State* (1999), 85 Ohio St.3d 52 (statute prohibiting certain municipal regulation of highway was struck down as not being part of a system of uniform statewide regulation on the subject of traffic law enforcement and because it did not impose a rule of conduct on citizens generally). See *Canton*, ¶¶ 13-19

*State of Ohio* (1999), 85 Ohio St.3d 52 this Court found a prohibitory traffic statute, though clearly addressing an exercise of police power, to be unconstitutional because, among other deficiencies, the statute represented little more than an improper attempt to limit local legislative powers. *Id.* at p.55.

With respect to the fourth part of the test, it is evident on the face of the statute that R.C. § 9.481 does not regulate conduct of citizens generally, but rather attempts to directly control and regulate the actions of political subdivisions in exercising their powers of local self government. *Canton* establishes that where a statute attempts to limit the police powers of a municipal corporations without prescribing or attempting to prescribe a rule of conduct on individuals such statute fails as a “general law”. *Canton*, supra at ¶¶34-35. The Eighth District similarly noted R.C. 9.481’s deficiency in this regard as follows:

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

Where a municipal charter provision is enacted in conformance with Article XVIII and the challenging state law is not a “general law,” then the state law must yield to the municipal law.” *Cleveland Fire Fighters Assoc. Local 93 of International Firefighters v. Jackson*, 8th Dist. No. 87708, 2006-Ohio-800, at ¶ 6, Fn 7 citing *Canton*, supra. Article II, Section 34 does not provide authority to the General Assembly to

control the exercise of local self government connected with determining the qualifications of local employees. As was held by the Eighth District:

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

*City of Cleveland, supra* 2008 -Ohio- 2655 at ¶ 29

*Fuldauer* unquestionably holds that “in the absence of conflict with general law”, Section 34, Article II of the Ohio Constitution would have no application to a local ordinance or charter provision. This imposes no unconstitutional burden on the General Assembly and would work to ensure the true objectives of the broad authority contained in that provision are properly secured, while maintaining the balance of sovereignty between the State and Local levels of government.

C. **R.C. 9.481 does not address a matter of statewide concern as the City’s residency requirement is exclusively a matter of local self government that does not affect the general public of the state as a whole more than it does the City’s local inhabitants.**

The 1912 amendments to the Ohio Constitution were intended to give “the broadest possible powers of self-government in connection with all matters that are strictly local and do not impinge upon matters which are of a state-wide nature or interest.” *State ex rel. Hackley v. Edmond* (1948), 150 Ohio St. 203, 212. Whether a statute addresses a “statewide concern” is a matter therefore of constitutional interpretation and presents a question for judicial determination. *City of Dublin v. State of Ohio* (Com. Pl. 2002), 118 Ohio Misc.2d 18. While a statement by the General Assembly creates one consideration for a court’s determination concerning whether a

matter presents an issue of statewide concern, such legislative statement does not trump the constitutional authority of municipalities. *American Financial Services Association v. Cleveland*, 112 Ohio St.3d 170, 206-Ohio-6043, at ¶ 31.

The concept of statewide concern requires as a starting point that local regulation of a particular issue affect the general public of the state as a whole more than it does the local inhabitants before the matter passes from what was a matter for local government to a matter of general state interest. *Cleveland Electric Illuminating Co. v. Painesville* (1968), 15 Ohio St.2d 125, 129.

1. **The appointment, removal, and establishment of qualifications, compensation, and duties required of municipal officers and employees are strictly matters of local self government that do not affect the general public of the State and do not implicate statewide concern.**

With the “The Eighteenth Amendment...the ‘Home Rule’ Amendment ...the sovereign people of the state expressly delegated to the sovereign people of the municipalities of the state full and complete political power in all matters of ‘local self-government’.” *Village of Perrysburg v. Ridgway* (1923), 108 Ohio St. 245, 255. “The purpose of the Home Rule amendments was to put the conduct of municipal affairs in the hands of those who knew the needs of the community best, to-wit, the people of the city.” *Northern Ohio Patrolmen's Benevolent Assn. v. Parma* (1980), 61 Ohio St.2d 375, 379, fn.1, citing *Goebel v. Cleveland Ry.* (1915), 17 Ohio N.P. (N.S.) 337, 343; *Billings v. Cleveland Ry.* (1915), 92 Ohio St. 478; *Froelich v. Cleveland* (1919), 99 Ohio St. 376, 385.

Recognizing the municipal charter to basically provide the constitution of the municipality the Supreme Court further acknowledged that through adoption and subsequent amendments to the Charter, the City’s citizens have collectively become the

City's ultimate legislative authority under the Constitution. *Fuldauer, supra* at 118.

*Fuldauer* recognized the local sovereignty and control of the citizens of a charter city in formulating their charter:

"[I]f Section 3 and Section 7 of Article XVIII of the Ohio Constitution are to have any meaning, and are not to be completely emasculated and eviscerated, we are constrained to hold that in matters of local concern the municipality has the right, in adopting its charter, to make provision that may be silly and unwise. If they prove to be so, the remedy is in the hands of the people who have adopted the charter. A majority of them has the power to amend it.' *Id.* 32 Ohio St.2d at 118-119, quoting *State ex rel. Hackley v. Edmonds* (1948), 150 Ohio St. 203, 217, 80 N.E.2d 769, 775.

It is long standing that "qualification, duties, and manner of selection of officers purely municipal, come within the purview of the provision granting a city local self-government." *State ex rel. Frankenstein, v. Hillenbrand* (1919), 100 Ohio St. 339, 343, 126 N.E. 309. General home rule authority has been held to include the authority to regulate the appointment, removal, qualifications, compensation and duties of both officers and employees. *Painter v. Graley* (8<sup>th</sup> Dist. 1992), 84 Ohio App.3d 65, citing *State Personnel Board of Review v. Bay Village Civ. Serv. Comm.*, *supra* at 216. The appointment of officers within a city's police department constitutes an exercise of local self-government within the meaning of the Home Rule Amendment. *State ex rel. Regetz v. Cleveland Civil Service Commission* (1988), 72 Ohio St.3d 167, 169, citing *State ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191, *State ex rel. N.E.2d* 722; see also *State ex rel. Hipp v. N. Canton* (1996), 75 Ohio St.3d 221, 224; *Meyers v. Columbus* (1995), 71 Ohio St.3d 603; *Harsney v. Allen* (1953), 160 Ohio St. 36, 41 ("The organization and regulation of its police force, as well as its civil service functions, are within a municipality's powers of local self-government.").

2. **Municipal residency requirements implicate only matters of local concern and are not a matter of statewide concern.**

Despite clear recognition over the years by the Courts that residency requirements are not unconstitutional and that employee qualification and selection are exclusively matters of local self government, the State incorrectly argues that R.C. § 9.481 is a matter of statewide concern.

The Home Rule Amendment grants two separate types of authority. First, municipalities are empowered to regulate matters of local self-government. Second, municipalities have the right to adopt and enforce within their limits police regulations that do not conflict with the State's general laws. *State Personnel Bd. of Review v. Bay Village Civil Serv. Comm'n* (1986), 28 Ohio St.3d 214, 217. The powers of a municipality arising under "local self-government" includes "such powers of government as, in view of their nature and the field of their operation, are local and municipal in character." *Billings v. Cleveland RR. Co.* (1915), 92 Ohio St. 478, 484. Such local self-government powers are "not only purely local and purely municipal, but purely governmental." *Garcia v. Siffrin Residential Assoc.* (1980), 63 Ohio St.2d 259, 270, citing *State, ex rel. Toledo v. Cooper* (1917), 97 Ohio St. 86, 91.

In *American Fin. Svcs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, this Court in addressing statewide concern made clear that the doctrine would have no application to a municipality when strictly powers of local self government as opposed to the exercise of local police powers are implicated:

The first step in a home-rule analysis is to determine "whether the matter in question involves an exercise of local self-government or an exercise of local police power." *Twinsburg v. State Emp. Relations Bd.* (1988), 39 Ohio St.3d 226, 228, 530 N.E.2d 26, overruled on other grounds, *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 20, 539 N.E.2d

103. *If an allegedly conflicting city ordinance relates solely to self-government, the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction.* (emphasis added).

It had been previously held that in matters of local self-government, where a municipal charter expressly conflicts with parallel state law, the charter provisions will prevail. *State ex rel. Minor v. Eschen* (1995), 74 Ohio St.3d 134, citing *State ex rel. Fenley v. Kyger* (1995), 72 Ohio St.3d 164, 165. See also *State ex rel. Lightfield v. Indian Hill* (1994), 69 Ohio St.3d 441, 442 (“In matters of local self-government, if a portion of a municipal charter expressly conflicts with a parallel state law, the charter provisions will prevail.”); *State ex rel. Bardo v. City of Lyndhurst* (1988), 37 Ohio St.3d 106, 108-109, 524 N.E.2d 447, (In matters of local self government, if there is a conflict between a charter provision and a statute, the charter provision prevails.), citing *State, ex rel. Devine v. Hoermle* (1959), 168 Ohio St. 461, *State, ex rel. Allison v. Jones* (1960), 170 Ohio St. 323.

*American Financial Services. Assn. v. Cleveland* recognized further that statewide concern implicated only those “areas where a municipality would in no way be affected or where state dominance seemed to be required.” *Id* at ¶ 27 citing Vaubel, *Municipal Home Rule in Ohio* (1978) 1107-1108.<sup>5</sup> The Court additionally recognized that “*exclusive municipal power* was created by the [Home Rule] Amendments insofar as local self-government power is exercisable by charter municipalities.” *Id.* Citing Vaubel

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<sup>5</sup> Vaubel comments further in attempting to grasp the distinction raised by “statewide concern” that “It might also be used to describe the extent of state power which was left unimpaired by the adoption of the Home Rule Amendments as well as to describe those areas of authority which are outside the outer limits of “local” power, i.e. those matters which are neither “local self-government” nor “local police and sanitary regulations.” Vaubel at 1108. Examples cited by Vaubel in this regard include the courts and public schools. *Id* at Fn 1.

at 1108. It is long recognized that municipal employee selection, compensation, and assigned duties are simply not a “concern of the state at large.”

“It would seem obvious not only from what this court has said with reference to the selection of municipal officers as being a matter of purely local concern, but also from the dictates of common sense, that the method of *selection* of municipal officers, their compensation and their purely local duties are matters which do not conflict with any general problem or concern of the state at large.”

*State ex rel. Hackley v. Edmond*, supra at 216. (emphasis added).

Earlier, this Court in *Reading v. Pub. Utilities Commission of Ohio*, 109 Ohio St.3d 193, 2006-Ohio-2181, had referenced that “[t]he doctrine of statewide concern had been cogently stated in *Cleveland Elec. Illum. Co. v. Painesville* (1968), 15 Ohio St.2d 125, 129, 44 O.O.2d 121, 239 N.E.2d 75.” *Reading* at ¶ 33. The *Painesville* Court had reasoned that “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 general state interest.” *Id.* at 129. Clearly, local residency requirements do not affect the general public of the state as a whole more than they impact on the local inhabitants of Cleveland, Akron, and other cities.

Statewide concern does not affect the exercise of local self government because what the doctrine obviously contemplates is the exercise of the State’s police power and not interference with local self-government. The Court has long held that “a statute which prohibits the exercise by a municipality of its home rule powers without such statute serving an overriding statewide interest would directly contravene the constitutional grant of municipal power.” *Clermont Environmental Reclamation Co. v. Wiederhold* (1982), 2 Ohio St.3d 44, 48. The language of Article 3, section 18 limiting the authority of municipalities to adopt and enforce ‘police, sanitary and other similar

regulations' which 'are not in conflict with general laws,' does not to limit municipalities with respect to other 'powers of local self-government.' *Fenton v. Enaharo* (1987), 31 Ohio St.3d 69, 70, see also *State, ex rel. Canada, v. Phillips* 1958, 168 Ohio St. 191; *State ex rel. Bindas v. Andrish* (1956), 165 Ohio St. 441, paragraph 1 of syllabus:

1. Although the Ohio Constitution limits the authority of municipalities to adopt and enforce 'police, sanitary and other similar regulations' to such regulations 'as are not in conflict with general laws,' there is no such limitation with respect to the 'authority to exercise all [other] powers of local self-government.'

Charter cities such as Cleveland and Akron are to be given the broadest possible powers of local self-government under the statewide concern doctrine:

[T]he statewide-concern doctrine falls within the existing framework of the *Canton* test, and courts should consider the doctrine when deciding whether "the ordinance is an exercise \* \* \* of local self-government," *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 9, or whether "a comprehensive statutory plan is, in certain circumstances, necessary to promote the safety and welfare of all the citizens of this state." *Kettering v. State Emp. Relations Bd.* (1986), 26 Ohio St.3d 50, 55, 26 OBR 42, 496 N.E.2d 983. As we explained more than 50 years ago, the Home Rule Amendment was designed to give the "broadest possible powers of self-government in connection with all matters which are *strictly* local," but the framers of the amendment did not want to "impinge upon matters which are of a state-wide nature or interest." *State ex rel. Hackley v. Edmonds* (1948), 150 Ohio St. 203, 212, 37 O.O. 474, 80 N.E.2d 769(emphasis added). American Fin. Svcs. Assn. at ¶30.

Such holding is in accord with *State ex rel. McElroy v. City of Akron* (1962), 173 Ohio St. 189, 194 wherein the Court made clear that restrictions on home rule relate to the exercise of the police power:

The home-rule amendment extends powers to municipalities as to matters which are purely of local concern, it does not invest exclusive powers in the municipalities, *and the police power, by the terms of the Constitution, is limited to those regulations which do not conflict with the general law.* Once a matter has become of such general interest that it is necessary to make it subject to statewide control so as to require uniform statewide

regulation, the municipality can no longer legislate in the field so as to conflict with the state. (emphasis added)

In a decision with many similarities to the present matter, the Colorado Supreme Court in *City and County of Denver v. State of Colorado* (Colo. 1990), 788 P.2d 764, was concerned with a constitutional challenge brought by the City of Denver to a state statute that had been enacted forbidding local governments from adopting residency requirements for their municipal employees. The Colorado Supreme Court in deciding the matter looked to see “whether the state interest [was] sufficient to justify preemption of inconsistent home rule provisions” and considered several general factors: “These include the need for statewide uniformity of regulation...[citations omitted] and the impact of the municipal regulation on persons living outside the municipal limits...[citations omitted]... (“statewide concern” means those things which are of significant interest to people living outside the home rule municipality).” *Id.* at 768. The Colorado Court recognized as would be the case in Ohio:

“The state has not asserted any particular state interest in uniformity of regulation with respect to residency requirements for municipal employees, nor do we perceive one. The Denver residency rule has been in existence since 1979. The fact that other municipalities may have declined to adopt such a requirement presents no special difficulties. In this regard we agree with the decision of the Oregon Supreme Court upholding a municipal residency requirement in *State ex rel. Heinig v. City of Milwaukie*, 231 Or. 473, 479, 373 P.2d 680, 684 (1962): In the appropriate case the need for uniformity in the operation of the law may be a sufficient basis for legislative preemption. But uniformity in itself is no virtue, and a municipality is entitled to shape its local law as it sees fit if there is no discernible pervading state interest involved.” *Id.* at 768-769.

The Colorado Supreme Court ultimately found there was little extraterritorial impact arising with Denver’s residency requirement in holding that the residency of employees of a home rule municipality is one of local concern. *Id.* at 772.

Cleveland has had an employee residency requirement off and on for approximately 61 of the last 77 years, since the voters first so amended the City's Charter in 1931. "The Ohio Supreme Court has construed [Section 3, Article XVIII] to mean that "municipal charter and ordinance provisions enacted under the power of local self-government prevail over state statutes, and only municipal regulations enacted pursuant to a city's police powers are subject to the general laws of the state." *Glick v. City of Cleveland*, 8<sup>th</sup> Dist. No. 812392003 -Ohio- 997 at ¶ 9, citing *Ohio Assn. of Pub. School Emp., Chapter No. 471 v. Twinsburg* (1988), 36 Ohio St.3d 180, 182 (citing *State, ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191). The appointment and qualification of local employees is a purely local concern that does not involve exercise of the local police power nor does the charter provision have any significant extra-territorial impact. It can not be seriously argued that the City's residency requirement affects the general public of the state as a whole more than it does the local inhabitants involved.

#### IV. CONCLUSION

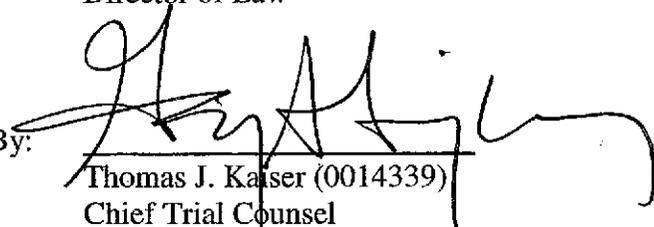
The State's attempt to use Article II, Section 34 as the authority for arguing R.C. 9.481 should preempt long standing local self government is misplaced. R.C. 9.481 is not a general law and to uphold this statute as a valid enactment under the broad powers of Article II, Section 34 would unconstitutionally extinguish the boundary established in 1912 that keeps the State's exercise of its police power separated from the City's exercise of its local exercise of self government. The State-City home-rule conflict analysis ends where only an exercise of local self government is implicated, as herein, because the Constitution authorizes the City and other municipalities to exercise all powers of local self-government within their jurisdictions. R.C. § 9.481 does not constitute a general law

that properly exercises the States police authority and the statute raises no issues that address any statewide concern. The City would respectfully request that this Court affirm the decision of the Third District Court of Appeals in favor of the City of Lima.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the "Brief of *Amicus Curiae* of the City of Cleveland in Support of Appellees City of Akron and Donald L. Plusquellic" was served by regular U.S. Mail on this 15th day of September, 2008 to:

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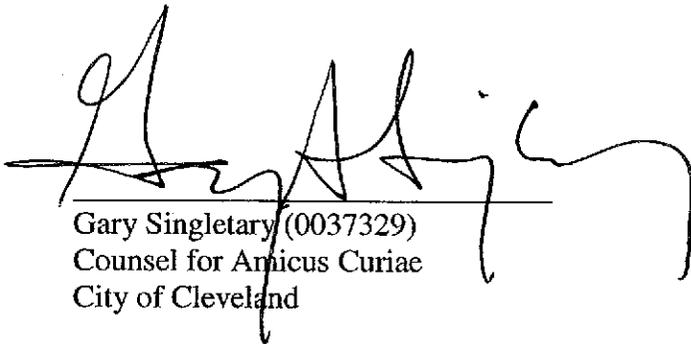
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**APPENDIX**

# CITY OF CLEVELAND CHARTER

## Chapter 11

### The Executive

Complete to June 30, 2006

#### § 74 Residency Requirements; Officers and Employees

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

(b) No person shall, in any way, falsify or misstate verbally or in writing any application, paper, document or form, which relates to his employment with the City, that he is a resident of the City of Cleveland, when in fact he is not a bona fide resident of the City of Cleveland. Any officer or employee of the City of Cleveland who is found to have supplied or furnished such false or misleading information concerning his true residence or who fails to become a resident as herein required, or who, being a resident or having become a resident of the City, subsequently establishes a residence outside of the City, shall, after hearing, according to law, be discharged from service with the City.

(c) A person who is a bona fide resident of the City of Cleveland for at least one year and desires to take an entrance level civil service examination, as determined by the Civil Service Commission, at the time of filing his or her application for examination, shall, if a passing grade is attained, as determined by the civil service bulletin for such examination, have added to his or her raw score ten (10) points.

Notwithstanding anything in this Charter to the contrary, every veteran who has served in the United States Armed Forces for a period of 180 consecutive days, if he has received an honorable discharge or separation or a general discharge under honorable conditions, shall receive an additional five (5) points added to his raw score. The Civil Service Commission may grant additional veterans preference points for servicemen having a service-connected disability not to exceed ten (10) points.

(d) The provisions of this section shall not apply to any officer or employee on the payroll of the City of Cleveland on the effective date of this section.

(Effective November 29, 1982; division (c) amended by the electors November 2, 1999)

## 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.

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*Speaker* \_\_\_\_\_ *of the House of Representatives.*

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*President* \_\_\_\_\_ *of the Senate.*

Passed \_\_\_\_\_, 20\_\_

Approved \_\_\_\_\_, 20\_\_

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*Governor.*

Sub. S. B. No. 82

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

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*Director, Legislative Service Commission.*

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

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*Secretary of State.*

File No. \_\_\_\_\_ Effective Date \_\_\_\_\_