

In the
Supreme Court of Ohio

CITY OF LIMA, : Case No. 2008-0128
: :
Plaintiff-Appellee, : On Appeal from the
: Allen County
v. : Court of Appeals,
: Third Appellate District
STATE OF OHIO, :
: Court of Appeals Case
Defendant-Appellant. : No. 1-07-21
:

**REPLY BRIEF OF
DEFENDANT-APPELLANT STATE OF OHIO**

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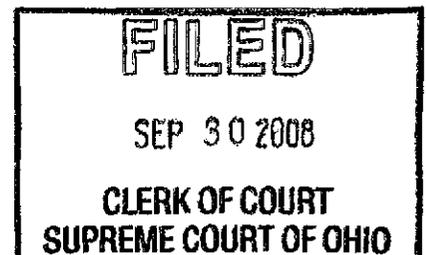


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INTRODUCTION

The parties to this case agree on a central premise: The “general welfare” clause of Article II, Section 34 of the Ohio Constitution grants the General Assembly authority to regulate those “issues directly related to or resulting from a person’s employment.” Lima Br. at 9. That agreement resolves this dispute.

The City of Lima’s residency requirement imposes on all municipal workers a straightforward term and condition of employment: To work for the City, a person must live within its limits. Indeed, the City effectively concedes as much when it calls its residency requirement “a selection and retention criterion.” Lima Br. at 12. As recognized by the Eleventh District, a residency requirement relates directly to the employment relationship between a city and its employees. See *AFSCME Local #74 v. City of Warren* (11th Dist.), 2008 Ohio App. Lexis 3298, 2008-Ohio-3905, ¶ 64. And Section 34 grants the State broad authority to regulate employment relationships between cities and their employees. See *City of Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St. 3d 1, 13 (“*Rocky River IV*”). It follows that the General Assembly acted entirely within its constitutional authority when it banned such residency requirements in the Freedom of Residency Act, R.C. 9.481 (“FRA”).

The Third District incorrectly interpreted Section 34 to govern only those terms and conditions of employment that “impact the worker *in the work place.*” *City of Lima v. State* (3d Dist.), 2007 Ohio App. Lexis 5626, 2007-Ohio-6419, ¶ 58 (emphasis added). This narrow interpretation—copied by the City of Lima—is grounded neither in the text of Section 34, which grants the State broad authority to regulate “for the general welfare of all employees,” nor in this Court’s decisions upholding state laws that relate only tangentially to the employee’s actual working environment. See, e.g., *Rocky River IV*, 43 Ohio St. 3d 1 (mandatory arbitration procedures between municipalities and safety forces); *State ex rel. Bd. of Trs. of Pension Fund v.*

Bd. of Trs. of Relief Fund (1967), 12 Ohio St. 2d 105 (“*Pension Fund*”) (mandatory transfer of assets and liabilities from local police pension funds to state police pension fund). If adopted, this crabbed interpretation would undermine many existing employment laws that this Court has already upheld—including continuing education requirements, training and certification requirements, restrictions on gifts to and political contributions from classified employees, mandatory criminal background checks for child-care employees, and more. See *Am. Ass’n of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.* (“*AAUP*”), 87 Ohio St. 3d 55, 61, 1999-Ohio-248.

Furthermore, even if the Court were to determine that the FRA does not fall within the scope of authority granted by Section 34, the City of Lima still has not established a violation of home rule. As discussed in the State’s Merits Brief, the increasing number of municipal residency requirements affects the right of citizens to live where they choose. The FRA addresses this issue of statewide concern by ensuring that public-sector employment opportunities are equally open and available to all Ohioans, regardless of their address. The Court therefore should reverse the appeals court’s decision and affirm the General Assembly’s ability to regulate the employment conditions of Ohio’s municipal employees.

ARGUMENT

A. Article II, Section 34 confers on the General Assembly broad authority to regulate the employment sector, including the terms and conditions of the employer-employee relationship.

The City of Lima urges this Court to follow the Third District and limit the scope of the general welfare clause of Article II, Section 34 to legislation concerning the working environment. The City endorses the appellate court’s reliance on the doctrine of *noscitur a sociis*, the historical circumstances of the early 1900s, the legislative debates from the 1912 Ohio Constitutional Convention, and the “interpretive consequences” of an alternative definition. See

City of Lima, 2007-Ohio-6419 at ¶¶ 32-49. The City further borrows from the common law principles of respondeat superior, the State’s workers’ compensation regime, and federal constitutional law to argue that the State’s authority under Section 34 is limited to those circumstances in which the employee is functioning as an agent of his employer—that is, in the workplace. Each of these arguments falls short.

First, the City’s proffered historical analysis is beside the point because this Court has explained that Section 34’s language is “clear and unequivocal,” making it unnecessary to “resort to secondary sources, such as the constitutional debates,” to determine the meaning of the provision. *Rocky River IV*, 43 Ohio St. 3d at 15. Contrary to the City’s arguments, the provision’s plain language is unbounded by place or time. See *City of Dayton v. State*, 176 Ohio App. 3d 469, 2008-Ohio-2589, ¶¶ 59-60; see also *AMFSE Local #74*, 2008-Ohio-3905 at ¶ 120 (Cannon, J., concurring) (“If this section were intended to apply only to the period of time when one is physically present at work, it could have been simply stated as such by providing for the ‘comfort, health, safety, and general welfare of all employees *during working hours.*’”). It refers generically to “all employees”—those individuals who are in the employ of another. Under Section 34’s plain text, then, the General Assembly can regulate any aspect of their general welfare.

Second, the City’s reliance on respondeat superior and workers’ compensation statutes to interpret Section 34 is misplaced. The City argues that, because an employer is liable only for torts committed by an employee while acting within the scope of his duties, and because workers’ compensation benefits are awarded to employees only for injuries incurred during the course of employment, Section 34’s use of the term “employee” must pertain only to those

occasions in which the individual is in the physical workplace or working environment of his employer.

The City offers no sound reason to extend the concept of “employee” as developed in these legal doctrines to Section 34—nor has this Court ever done so. Section 34’s language gives the General Assembly the authority to enact legislation pertaining to the workplace environment—tort liability, workers’ compensation, occupational safety, and the like. See *Kulch v. Structural Fibers, Inc.*, 78 Ohio St. 3d 134, 152, 1997-Ohio-219 (noting that Section 34 is one of a “host of statutes and constitutional provisions favoring safety in the workplace”). At no point, however, has this Court *limited* Section 34 to that context. On the contrary, the Court has repeatedly underscored Section 34’s broad conferral of authority on the General Assembly to regulate all facets of the employer-employee relationship—including the terms and conditions of employment—and has rejected challenges to such legislation. See, e.g., *State ex rel. Mun. Constr. Equip. Operators’ Labor Council v. City of Cleveland*, 114 Ohio St. 3d 183, 2007-Ohio-3831, ¶ 78 (affirming statute granting sick leave to municipal employees); *AAUP*, 87 Ohio St. 3d at 61 (affirming state law mandating ten percent increase in teaching workloads at state universities); *City of Cincinnati v. Ohio Council 8, AFSCME* (1991), 61 Ohio St. 3d 658, 662 (affirming state law specifying certain statutes that would prevail over conflicting provisions in collective bargaining agreements); *Rocky River IV*, 43 Ohio St. 3d at 17-18 (affirming mandatory arbitration procedures between municipalities and safety forces).

Third, the City notes that employees do not have a federal constitutional right to choose where they reside while working for a municipality. See *McCarthy v. Philadelphia Civil Serv. Comm’n*, 424 U.S. 645, 646-47 (holding that municipal residency requirements do not violate the right to interstate travel). That observation, while true enough, is irrelevant to this case, which is

about the General Assembly's authority *under the Ohio Constitution* to regulate by statute the terms and conditions of municipal workers' employment.

The City of Lima's position rests on the mistaken premise that legislation addressing the place of one's residence is "wholly outside the scope of employment," and, therefore, outside the purview of Section 34. Lima Br. at 9. On the contrary, when it adopted local residency as a term and condition of municipal employment, the City thrust the issue of residency into the purview of Section 34. This Court has already endorsed the General Assembly's decision to regulate employment relationships using all sorts of measures—criminal background, education, physical fitness, and job certifications. See *AAUP*, 87 Ohio St. 3d at 61. The General Assembly's decision to prohibit residency requirements is no different; Section 34 allows the legislature to prescribe or proscribe qualifications for employment within the state. As such, the FRA is constitutional, and the Court should reverse the decision below.

B. The FRA does not unconstitutionally impair the City of Lima's home rule powers.

The text of Article II, Section 34, stating that "no other provision of the constitution shall impair or limit this power," establishes its favored position in the Ohio Constitution. As this Court has recognized, legislation enacted under Section 34 is immune from a home rule challenge under Article XVIII, Section 3. See *Rocky River IV*, 43 Ohio St. 3d at 13 (citing *Pension Fund*, 12 Ohio St. 2d at 106-07). Accordingly, the City's home rule challenge to the FRA must fail. But even if the Court were to find that the FRA did not fall within the scope of Section 34, the statute still does not offend the home rule provisions of the Ohio Constitution. The General Assembly has expressly chosen to preempt all conflicting local ordinances with legislation about an issue of statewide concern.

1. Municipal residency requirements infringe on a matter of statewide concern.

Under Article XVIII, Section 3 of the Ohio Constitution, commonly known as the Home Rule Amendment, “[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, *as are not in conflict with general laws.*” (Emphasis added). The parties agree that the ordinance in question, limiting municipal employment to city residents, purports to implicate the exercise of local self-government. The State contends, however, that such an intrastate residency restriction on employment “is not a matter of merely local concern, but is of statewide concern, and therefore *not* included within the power of local self-government.” *Am. Fin. Servs. Ass’n v. City of Cleveland*, 112 Ohio St. 3d 170, 2006-Ohio-6043, ¶ 29 (internal quotations and citation omitted). After all, “even if there is a matter of local concern involved, if the regulation of the subject matter affects the general public of the state as a whole more than it does the local inhabitants the matter passes from what was a matter for local government to a matter of general state interest.” *Cleveland Elec. Illuminating Co. v. City of Painesville* (1968), 15 Ohio St. 2d 125, 129.

Under the Home Rule Amendment, a purported self-government ordinance “must relate ‘solely to the government and administration of the internal affairs of the municipality.’” *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St. 3d 553, 2008-Ohio-92, ¶ 11 (emphasis added and citation omitted). At first glance, the City’s position—that “[a] municipality’s qualifications for its own employees are a local issue”—might hold superficial appeal. Lima Br. at 15. Upon closer examination, however, the impact of municipal residency restrictions inevitably trenches on important state interests and extends well beyond the internal affairs of the municipality. As a result, the City’s desire to hire and retain only those employees who live within its boundaries must yield to contrary state law. See *Am. Fin. Servs. Ass’n*, 2006-Ohio-6403, at ¶ 28 (“[A]

municipality may not, in the regulation of local matters, infringe on matters of general and statewide concern.”) (citation omitted).

In passing on whether an issue is one of statewide concern, this Court has looked to whether the issue “has become of such general interest that is necessary to make it subject to statewide control so as to require uniform state regulation.” *State ex rel. McElroy v. Akron* (1963), 173 Ohio St. 189, 194. In this case, the fact that the matter has received the close attention of the legislature is instructive. See *Am. Fin. Servs. Ass’n*, 2006-Ohio-6403, at ¶ 31 (noting that “[a] statement by the General Assembly of its intent to preempt a field of legislation . . . may be considered to determine whether a matter presents an issue of statewide concern.”).

Moreover, this is an issue of statewide concern because surrounding communities will feel the impact of municipal residency restrictions. See *State ex rel. Evans v. Moore* (1982), 69 Ohio St. 2d 88, 90 (“[Municipal regulations which have significant extraterritorial effects are matters of statewide concern.”). As noted by the Eleventh District, a residency restriction “impairs competition among the municipalities for residents; it affects the tax revenue, housing market, and school systems of all surrounding communities.” *AFSCME Local #74*, 2008-Ohio-3905, at ¶ 84.

Finally, the FRA was enacted against a backdrop of important state policy interests. First, the State has a strong interest in ensuring open and fair access for all Ohioans to public-sector employment opportunities, particularly in a difficult economy. The City’s residency requirements are anti-competitive; they disqualify a number of applicants from municipal positions based on a factor that bears no relationship to their qualifications or performance. Second, the State has an interest in promoting the ability of its citizens and their families to change their residency without fear of adverse employment consequences. See *id.* at ¶ 123

(Cannon, J., concurring) (“[A] residency requirement also affects an employee when a change of circumstances occurs, such as a transfer of their spouse to a location where it is impractical to continue to work in the area or when a child’s special needs cannot be accommodated by the educational services available within the city.”). Third, the increasing number of municipal residency restrictions prompted the General Assembly to consider the issue and enact the FRA. The effect of a patchwork of residency restrictions on the State of the Ohio, particularly when considered in the aggregate, was a legitimate concern for the General Assembly. The State has a vital interest in preventing economic and social isolation between communities.

The City incorrectly relies on *City of Cleveland v. City of Shaker Heights* (1987), 30 Ohio St. 3d 49, to argue that this issue is not a matter of statewide concern. In that case, Cleveland objected to Shaker Heights’s decision to erect barricades on two streets within its jurisdiction, causing 7,000 to 14,000 cars to be rerouted through neighboring jurisdictions. *Id.* at 51 & n.2. This Court rejected arguments that Shaker Heights did not have home rule authority to install the barriers because it found no evidence of bad faith or arbitrary or capricious behavior. *Id.* at 53. *City of Cleveland* is irrelevant here because that dispute involved two municipalities without any claim of a conflicting state law, regulation, or policy. Accordingly, this Court had no occasion to discuss whether Shaker Heights’s traffic barricades implicated an issue of statewide concern.

The General Assembly enacted the FRA in response to concerns that jurisdictions were unduly restricting public-sector employment based on an individual’s residency and that such restrictions were increasing in popularity across the State. Regulating those terms and conditions of public-sector employment that have statewide implications is a quintessential component of the “state police power . . . left unimpaired by the adoption of the Home Rule Amendments.” *Am. Fin. Servs. Ass’n*, 2006-Ohio-6403, at ¶ 29 (citation omitted); see also *City of Kettering v.*

State Employment Relations Bd. (1986), 26 Ohio St. 3d 50, 55 (upholding Public Employees Collective Bargaining Act as addressing a matter of statewide concern); *Moore*, 69 Ohio St. 2d at 90-92 (holding that municipal compliance with prevailing wage law was a matter of statewide concern). Accordingly, the City of Lima's residency restrictions must yield to the FRA.

2. Assuming that the *Canton* test applies, the FRA is a general law that takes precedence over the City of Lima's residency requirement.

As previously explained in the State's merits brief, the four-prong general-law test of *City of Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, applies only when the State and a municipality are exercising concurrent police powers. The general-law test should not apply here because the powers of local self-government do not include blanket residency restrictions for municipal employment.

However, should this Court conclude that a *Canton* analysis is necessary, the FRA qualifies as a general law: (1) it is part of a statewide and comprehensive legislative enactment; (2) it applies to all parts of the state alike and operates uniformly throughout the state; (3) it sets forth police, sanitary, or similar regulations, rather than purporting only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations; and (4) it prescribes a rule of conduct upon citizens generally. *Id.* at syllabus.

a. The FRA is part of a statewide, comprehensive legislative enactment.

The FRA is part of a comprehensive statewide legislative scheme governing the statutory rights, benefits, and duties of public employees. The FRA is codified among other statutes that:

- Provide for the deduction of municipal income tax from the wages of school and public employees (R.C. 9.42);
- Require public employers to count an employee's prior service with the state or political subdivision in calculating vacation leave (R.C. 9.44, upheld in *State ex rel Evans v. Moore* (1982), 69 Ohio St. 2d 88 and *State ex rel Adkins v. Sobb* (1986), 26 Ohio St. 3d 46);

- Impose a duty on government employees to cooperate with antiterrorism measures (R.C. 9.63); and
- Provide for continuity of benefits for county employees who become municipal employees, and vice versa (R.C. 9.441).

As set forth above, the FRA also adds to the existing panoply of employee rights and protections upheld under Article II, Section 34, such as collective bargaining, sick leave, and pension benefits. The City of Lima has conceded that the statute meets the first prong of *Canton*. See *City of Lima*, 2007-Ohio-6419, at ¶ 65 n.6.

b. The FRA operates uniformly throughout the State.

With respect to the second prong of *Canton*, the City of Lima recognizes that the FRA “applies across the state.” *Lima Br.* at 19. The State agrees. The statute “applies to all municipalities in the same fashion, subject to the same exceptions. None is singled out or treated differently, and the statute does not operate differently based on different locations in our state.” *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 2008 Ohio Lexis 2539, 2008-Ohio-4605, ¶ 45.

The City argues that the FRA does not operate uniformly because it creates an arbitrary and illogical distinction between full-time employees, who are protected from municipal residency restrictions, and part-time employees and volunteers, who are not. See *Lima Br.* at 19-20. This argument has no merit.

“The requirement of uniform operation throughout the state of laws of a general nature does not forbid different treatment of various classes or types of citizens, but does prohibit nonuniform classification if such be arbitrary, unreasonable or capricious.” *City of Canton*, 2002-Ohio-2005, at ¶ 30 (citation omitted). The General Assembly’s distinction between full-time employees and part-time employees is hardly arbitrary; such classifications are well-established in state employment statutes. Full-time employees enjoy greater benefits with

respect to sick pay, vacation time, health benefits, life insurance, and the like. See *AFSCME Local #74*, 2008-Ohio-3905, at ¶ 102 (“It is axiomatic that full-time permanent employees enjoy more rights, privileges, and protections in law than part-time or temporary employees.”). Accordingly, the FRA satisfies the second prong of *Canton*.

c. The FRA qualifies as an exercise of police power that provides for the general welfare of employees.

The third prong of the analysis requires that the statute “set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation.” *City of Canton*, 2002-Ohio-2005, at syllabus. The appellate court misapplied this prong by focusing on the absence of an analogous constitutional right behind the FRA: “[T]here is no constitutional right to choose where one lives *and*, at the same time, demand employment from an unwilling employer. So, the State’s interest in prohibiting political subdivisions from passing residency restrictions is not an ‘overriding’ one” *City of Lima*, 2007-Ohio-6419, at ¶ 76. It further criticized the FRA, finding that its focus on only full-time employees “defeat[ed] its purpose of generally prohibiting residency restrictions.” *Id.* at ¶ 79.

This Court has never asked, however, whether the subject matter of the statute furthered a specific constitutional right. In *Canton* itself, this Court stated only that the law in question “serve[d] an overriding state interest in providing more affordable housing options across the state.” 2002-Ohio-2005, at ¶ 33; see also *Ohioans for Concealed Carry*, 2008-Ohio-4605, at ¶ 50 (noting that the statute “provides a program to foster proper, legal handgun ownership in this state”); *Am. Fin. Servs. Ass’n*, 2006-Ohio-6043, at ¶ 35 (noting that the statute meets the third prong because it “limits and regulates certain lending practices”).

As discussed above, the State has a strong interest in ensuring open and fair access for all Ohioans to public-sector employment opportunities and in promoting free choices by its citizens

as to where their families should reside, unimpaired by the risk of adverse employment consequences. The FRA furthers this interest by regulating the terms and conditions of public-sector employment—a traditional aspect of its police power. Moreover, the fact that the FRA does not extend to the private sector or the State itself does not defeat this interest; there is nothing in the record to suggest that either private employers or state agencies are imposing the same harsh residency requirements as the City of Lima.

d. The FRA prescribes a rule of conduct upon citizens generally.

With respect to the fourth prong of *Canton*, the FRA establishes a rule of conduct applicable to all public employees and public employers: “[E]mployees of political subdivisions of this state have the right to reside any place they desire.” R.C. 9.481(C). However, the municipality may restrict that statutory right if it decides, consistent with the procedures outlined in Section 9.481(B)(2)(b), that quick response times are necessary for certain employees in case of a disaster or emergency. For such positions, the municipality may restrict residency to the county where the political subdivision is located and any adjacent county.

The fact that the FRA also imposes constraints on municipal governments is not fatal to the *Canton* analysis. In *Ohioans for Concealed Carry*, the City of Clyde challenged a state law that prohibited municipalities from “attempt[ing] to restrict the places where a person possessing a valid license to carry a concealed handgun may carry a handgun concealed.” 2008-Ohio-4605, at ¶ 17 (citation omitted). In rejecting the city’s home rule challenge, this Court held that the statute satisfied the fourth prong of *Canton* because it “prescribe[d] a rule of conduct for any citizen seeking to carry a concealed handgun.” *Id.* at ¶ 51. In much the same vein, the FRA prescribes a rule of conduct—specifically, a term and condition of employment—for any current municipal employee *and* any citizen seeking employment with a municipality.

While the Court need not engage in the four-prong general-law test of *Canton*, the FRA nevertheless meets each part of that inquiry and constitutes a general law that supersedes the City of Lima’s residency requirement.

C. The FRA does not violate the Uniformity Clause.

In its response brief, the City briefly argues that the FRA violates Article II, Section 26 of the Ohio Constitution. See Lima Br. at 18. This provision, commonly known as the “Uniformity Clause, provides that “[a]ll laws, of a general nature, shall have a uniform operation throughout the State.”

The Third District did not address the merits of this claim, see *City of Lima*, 2007-Ohio-6419, at ¶ 86, and this Court accepted only two propositions of law in this appeal: (1) that R.C. 9.481 is properly enacted under Article II, Section 34 of the Ohio Constitution for the comfort, health, safety, and general welfare of employees; and (2) that R.C. 9.481 does not unconstitutionally conflict with municipal home rule. Because the FRA can and should be sustained as an exercise of the General Assembly’s Section 34 power, the Court need not reach the City’s Uniformity Clause claim. If the Court does reach this argument, however, the FRA should be upheld as consistent with the Uniformity Clause.

The Uniformity Clause analysis consists of two questions: “(1) whether the statute is a law of a general or special nature, and (2) whether the statute operates uniformly throughout the state.” *Desenco, Inc. v. City of Akron* (1999), 84 Ohio St. 3d 535, 541. Applying this test, the FRA does not violate the Uniformity Clause because it is a law of a general nature that operates uniformly as to all public employees included within the statute’s operative provisions.

The first step of the uniformity test inquires “whether a statute's subject matter is of a general or special nature.” *Id.* “[I]f the subject does or may exist in, and affect the people of, every county, in the state, it is of a general nature. On the contrary, if the subject cannot exist in,

or affect the people of every county, it is local or special.” *Id.* at 542 (citation omitted); see also *Austintown Twp. Bd. of Trustees v. Tracy* (1996), 76 Ohio St. 3d 353, 359 (asking whether the statute’s subject matter “affects every municipality and township in the state”). The subject matter of the FRA—the employment relationship between a municipal employer and its employees—is present in every county of the State. The statute therefore qualifies as a law of a general nature.

The second step of the inquiry asks whether “the law . . . operate[s] uniformly on the named subject matter in every part of the state.” *Austintown*, 76 Ohio St. 3d at 356 (citation omitted). In other words, the statute must operate “irrespective of the geographical part of the state in which those political entities lie.” *Id.* at 357; see also *Desenco*, 84 Ohio St. 3d at 542 (“[T]he law is equally valid if it contains provisions which permit it to operate upon every locality where certain specified conditions prevail.”) (citation omitted). As explained above, the FRA applies equally across the state. Every public employer is subject to its provisions. Accordingly, the statute does not offend the Uniformity Clause.

The City complains only that the FRA adopts an arbitrary and illogical distinction between full-time employees and part-time employees and volunteers. For reasons already discussed, these classifications are entirely reasonable in light of their consistent use throughout employment law. Even if the City’s position were correct and these distinctions were arbitrary, the City’s claim would still fail. In *Austintown*, this Court explained that “arbitrary classifications violate the Uniformity Clause only where those classifications are contained in a statute first deemed to be special or local as opposed to general.” 76 Ohio St. 3d at 358. Because the FRA’s subject matter is of a general nature, claims as to the arbitrariness of its classifications must be challenged on equal protection grounds. *Id.* at 359.

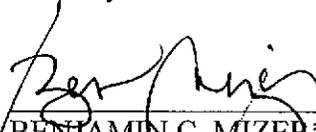
For these reasons, the City fails to show that the FRA violates the Uniformity Clause.

CONCLUSION

For the reasons set forth above and in the State's Merit Brief, the State of Ohio respectfully asks this Court to reverse the Third District and uphold the Freedom of Residency Act as a valid enactment under Article II, Section 34. In the alternative, this Court should uphold the Freedom of Residency Act as a valid statutory enactment on a matter of statewide concern.

Respectfully submitted,

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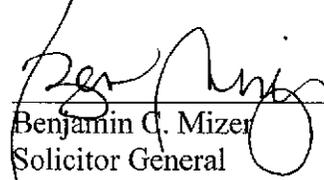
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