IN THE SUPREME COURT OF OHIO

STATE OF OHIO, et al.	:	
Appellants,	:	Supreme Court Case No. **08-0418**
v.	:	
CITY OF AKRON, et al.,	:	On Appeal from the Summit County Court of Appeals, Ninth Appellate District
Appellees.	:	
	:	

REPLY BRIEF OF APPELLANTS
FRATERNAL ORDER OF POLICE, AKRON LODGE NO. 7 AND
AKRON FIREFIGHTERS ASSOCIATION, IAFF LOCAL 330, et al.

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REPLY ARGUMENT

I. APPELLEES' "STATEMENT OF FACTS" ARE NOT FACTS, NOR ARE THEY RELEVANT TO THE COURT'S CONSTITUTIONAL ANALYSIS OF R.C. 9.481 UNDER ARTICLE II, SECTION 34 OF THE OHIO CONSTITUTION.

In their "Statements of Facts," Appellees, City of Akron and Mayor Donald L. Plusquellic ("City"), and their supporting amicus curiae parties, have painted an apocalyptic portrait of the future of Ohio municipalities under R.C. 9.481. A future in which a vast majority of public employees move several miles away from municipalities, taking the communities' safety and tax dollars with them. This portrayal of the effects of R.C. 9.481 by the City and its proponents is fiction.

The cataclysmic events foretold by the City and its proponents are, at best, speculative and are based solely upon self-serving affidavits and the report of Dr. Robert Simons. Dr. Simons's report is not objective; he was retained by the City, and several other municipalities, to provide a report against R.C. 9.481. Further, the accuracy of Dr. Simons's estimates is highly questionable. Dr. Simons's estimates for the City are based upon the results of 190 completed surveys, out of 1,883 potential employees. Questions asked in the survey were biased towards the answer sought by Dr. Simons and the City.[1] Despite this, approximately half of the sample indicated they would not move out of the City. The other half indicated they *might* move out of the City within seven (7) years, if permitted. No conclusions were reached by Dr. Simons concerning where the employees would move, if they did. Yet, the City asserts to this Court that if R.C. 9.481 were

[1] For instance, question 7 in the survey asks, "If the current city residency requirement were removed, and you could keep your job and live in any city you wished, you could consider moving outside the City you now live in. If so, which of the following is the most likely outcome?" The question then provides 8 options, with six of them being "move out...(in a specific time period)."

enacted, house fires would go unanswered, snow covered streets would not be plowed, water mains would break without repair, while all available employees sit at home 70 miles away in the comfort of an adjoining county. Such assertions by the City are hyperbole aimed at frightening the Court into the type of judicial activism practiced by the Ninth District Court of Appeals in holding R.C. 9.481 unconstitutional.

Indeed, testimony provided by members of the City's Administration concerning the impact of R.C. 9.481 is at odds with the City's speculations. Contrary to the assertions made in his affidavit (offered by the City, Appellee Supp. C), Deputy Mayor of Public Safety George Romanoski testified in deposition that it was "speculative" as to how many employees would move out of the City and that the quality of public services offered by the City would not be affected by removal of the City's residency requirement. (CP R. 45)[2]. Similarly, in deposition testimony Fire Chief Charles Gladman testified that he had no idea how many employees would move out of the City, while Police Chief Michael Matulavich testified that he believed it would be only a handful of employees that move out. (CP R. 45). Further, Public Service Director Gerald Holland testified that in his opinion the quality of services provided by City employees would not be affected by R.C. 9.481. (CP R. 45; Appellants Supp. 202).

The City's doomsday scenario is not only purely speculative, but is irrelevant to the Court's constitutional analysis of R.C. 9.481; irrelevant to the point that neither the trial court nor the court of appeals even mentions the City's speculations concerning R.C. 9.481 in their respective decisions. The issue before the Court is whether the General Assembly had the authority to enact R.C. 9.481 under Article II, Section 34 of the Ohio

[2] "CP R." refers to the Common Pleas Court record.

Constitution. The City's speculations as to the potential effects of R.C. 9.481 do not address whether R.C. 9.481 was lawfully enacted by the General Assembly. Rather, the City's hyperbole only distracts the Court from the appropriate analysis. The City's "Statement of Facts," as well as those of the amicus curiae briefs in support of the City, should therefore be disregarded.

II. *STATE EX REL. CANADA V. PHILLIPS* AND PRECEDENT RELATING TO CIVIL SERVICE LAWS IS INAPPLICABLE TO THE COURT'S ANALYSIS OF THE CONSTITUTIONALITY OF R.C. 9.481.

Citing *State ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191, 151 N.E.2d 722, the City asserts that legislation enacted pursuant to Article II, Section 34, such as R.C. 9.481, may not preempt municipal civil service laws, and that *State ex rel. Canada* compels the Court to find that R.C. 9.481 unlawfully interferes with the City's home rule authority. The City's argument fails for multiple reasons.

This Court has expressly held that *State ex rel. Canada v. Phillips* is inapplicable to the analysis of legislation enacted pursuant to Article II, Section 34 of the Ohio Constitution, and further stated that *State ex rel. Canada*'s interpretation of Article XVIII, Section 3 (the home rule amendment) is at odds with the home rule amendment's legislative history. *City of Rocky River v. State Employment Relations Board* (1989), 43 Ohio St.3d 1, 13, 539 N.E.2d 103, 113 ("*Rocky River IV*").

In *Rocky River IV*, the Court stated:

> *Canada* is a case involving civil service and concerns Section 10, Article XV of the Ohio Constitution. It does not deal in any way with Section 34, Article II, which is so central to the case before us today.
>
> In any event, a review of the constitutional debates concerning Section 3, Article XVIII reveals that the narrow interpretation adopted by the *Canada* court is unwarranted. Mr. George W. Knight, a convention

> delegate and a chief proponent of the amendment, characterized its purpose as follows: "[T]his proposal undertakes * * * to provide that municipalities shall have the power to do those things which are not prohibited, that is, those things with reference to local government, with reference to the affairs which concern the municipality, which are not forbidden by the lawmaking power of the state, *or are not in conflict with the general laws of the state* under the police power and the general state regulation. * * * "...Obviously, this characterization of Section 3, Article XVIII is totally inconsistent with the interpretation espoused by the *Canada* court.

The Court's assessment that home rule analysis under Article XVIII, Section 3 of legislation enacted under Article II, Section 34 is inapplicable to the Court's evaluation of the constitutionality of such legislation is clear, making *Canada* inapplicable to the instant matter. For the same reason, other precedent cited by the City, such as *Ohio Association of Public School Employee v. City of Twinsburg* (1988), 36 Ohio St.3d 180, 522 N.E.2d 532, *State Personnel Bd. of Review v. City of Bay Village Civil Service Comm.* (1986), 28 Ohio St.3d 214, 503 N.E.2d 518, and *City of Kettering v. State Employment Relations Bd.* (1986), 26 Ohio St.3d 50, 496 N.E.2d 983, are inapplicable.

In *Twinsburg*, *Bay Village*, and *Kettering*, the Court's analysis focused upon whether a state law or conflicting local law controlled under Article XVIII, Section 3. There was no analysis by the Court of whether the state legislation was constitutional under Article II, Section 34. Yet incredibly, the City claims the Court rejected arguments concerning Article II, Section 34 in these cases and cites the majority opinions' *omission* of analysis under Article II, Section 34 as support!

In *Kettering*, the only mention of Article II, Section 34 is found in Justice Douglas's concurrence, in which Justice Douglas pointed out that Article II, Section 34 was enacted at the same time as the home rule amendment; that Article II, Section 34 conferred upon the General Assembly a broad grant of authority to enact legislation "for

the comfort, health, safety and general welfare of all employees;" and that laws enacted under Article II, Section 34 supersede local legislation. *Kettering*, 26 Ohio St.3d at 57, 496 N.E.2d at 989. In *Bay Village*, the Court referenced Article II, Section 34 only to list it as one of the Articles cited in the appellant's argument; there was no further discussion of Article II, Section 34. *Bay Village*, 28 Ohio St.3d at 215, 503 N.E.2d at 520. And in *Twinsburg*, the only mention of Article II, Section 34 is in Justice Douglas's dissent, in which Justice Douglas states that Article II, Section 34 was not raised by the parties, but that it nevertheless negated any need for legislation (enacted under Article II, Section 34) to be examined under Article XVIII, Section 3, as legislation enacted under Article II, Section 34 clearly superseded local legislation enacted under the home rule amendment. *Twinsburg*, 36 Ohio St.3d at 186, 522 N.E.2d at 538.

This interpretation of Article II, Section 34 and Article XVIII, Section 3 by Justice Douglas in *Kettering* and *Twinsburg* would be affirmed by the Court two (2) years later in *Rocky River IV*. It is this same interpretation of Article II, Section 34 in *Rocky River IV* that now compels the Court to reverse the Ninth District Court of Appeals and hold that R.C. 9.481 is constitutional.

Like the Public Employees Collective Bargaining Act before the Court in *Rocky River IV*, R.C. 9.481 was enacted by the General Assembly for the "comfort, health, safety and general welfare" of employees. R.C. 9.481 restricts a public employer's ability to require an employee to live in its boundaries as a condition of employment, thereby protecting public employees' freedom to choose where to live—a freedom that is enjoyed by all other employees in the State. As such, under Article II, Section 34, R.C. 9.481 supersedes conflicting local legislation.

Putting aside the supremacy clause of Article II, Section 34, the City's argument nevertheless fails as R.C. 9.481 is not civil service legislation. R.C. 9.481 does not regulate or otherwise interfere with the City's internal civil service procedures as they relate to promotional procedures as the state law at issue did in *State ex rel. Regetz v. Cleveland Civil Service Comm.* (1995), 72 Ohio St.3d 167, 648 N.E.2d 495 or *State ex rel. Hipp v. North Canton* (1996), 75 Ohio St.3d 221, 661 N.E.2d 1090. R.C. 9.481 does not impose procedures that infringe upon municipalities' internal governance of their civil service commissions as in *Bay Village, supra.* Further, R.C. 9.481 does not state that the City cannot consider residency as a factor in hiring or promotion, nor does R.C. 9.481 dictate who or how the City can hire or remove its employees. As stated, R.C. 9.481 merely states that political subdivisions cannot require their employees to live within the political subdivision as a condition of employment.

The trial court and court of appeals declined to consider the City's argument that R.C. 9.481 is unconstitutional because it is "civil service legislation." So too should this Court. *State ex rel. Canada* is inapplicable to the instant case and the legislation at issue in the precedent cited by the City is in no way analogous to R.C. 9.481. The City's request that the Court strike R.C. 9.481 down as "civil service legislation" is clearly at odds with this Court's precedent, and only distracts the Court from the appropriate analysis—whether the General Assembly had the authority to enact R.C. 9.481 under Article II, Section 34 of the Ohio Constitution.

III. ADOPTION OF THE LIMITATIONS ON THE GENERAL ASSEMBLY'S AUTHORITY UNDER ARTICLE II, SECTION 34 URGED BY THE CITY WOULD BE CONTRARY TO THE EXPRESS LANGUAGE OF THE OHIO CONSTITUTION AND WOULD REQUIRE REVERSAL OF ESTABLISHED PRECEDENT.

The City asserts that the General Assembly has exceeded its authority under Article II, Section 34 by enacting R.C. 9.481 in two different respects. First, the City claims that based upon the language of Article II, Section 34 and its legislative history, the General Assembly's authority to enact legislation pursuant to Article II, Section 34 is limited to "pass[ing] laws to improve working conditions," and that R.C. 9.481 is thereby unconstitutional because it does not improve working conditions. The City cites to *City of Lima v. State of Ohio* (3rd Dist., Dec. 3, 2007), 2007-Ohio-6419, 2007 WL 4248278, *City of Toledo and City of Oregon v. State of Ohio* (6th Dist., Apr. 25, 2008), 2008-Ohio-1957, 2008 WL 1837256, *City of Cleveland v. State of Ohio, et al.* (8th Dist., June 2, 2008), 2008-Ohio-2655, 2008 WL 2252542.

Second, the City claims that the General Assembly's authority to enact legislation under Article II, Section 34 is limited to legislation that "furthers the common welfare of the citizens of the State of Ohio." The City cites to the Ninth District Court of Appeals decision in the instant case.

Both limitations urged by the City on the General Assembly's legislative authority under Article II, Section 34 are in direct conflict with the express language of Article II, Section 34 and this Court's previous decisions interpreting Article II, Section 34 and the General Assembly's authority thereunder. In fact, adoption of the limitations urged by the City would constitute such a severe departure from Ohio Supreme Court precedent interpreting Article II, Section 34, that the Court would be in effect reversing its decisions in cases such as *Rocky River IV, American Assn. of Univ. Professors v. Central State Univ.* (1999), 87 Ohio St.3d 55, 717 N.E.2d 286, and *State ex rel. Bd. of Trustees of Police and Firemen's Pension Fund v. Bd. of Trustees of Police Relief and*

Pension Fund (1967), 12 Ohio St.2d 105, 233 N.E.2d 135. Such a reversal would bring into question the constitutionality of legislation previously enacted under Article II, Section 34 and substantially limit the General Assembly's authority to enact legislation for the improvement of employees' lives in the State of Ohio. The City's desire to keep its employees within its municipal boundaries should not serve as the catalyst for such a dramatic change in Ohio law.

A. The General Assembly's Legislative Authority Under Article II, Section 34 Is Not Limited To Passing Laws To Improve Working Conditions.

The Court has previously rejected limitations on the General Assembly's authority under Article II, Section 34 similar to those now urged by the City. In *Rocky River IV*, the municipality argued that the General Assembly's legislative authority under Article II, Section 34 was limited to laws pertaining to a minimum wage, and that R.C. Chapter 4117 was thereby unconstitutional as it did not pertain to a minimum wage. The Court rejected the urged limitation, stating (in part) that "[Article II, Section 34] constitutes a broad grant of authority to the legislature to provide for the welfare of all working persons..." and that R.C. Chapter 4117 pertained to the "general welfare" of employees. *Rocky River IV*, 43 Ohio St.3d 13-14, 539 N.E.2d at 114.

In an effort to distinguish R.C. 9.481 from R.C. Chapter 4117's enactment under Article II, Section 34, the City argues that R.C. 9.481 is not for the "general welfare" of employees. The City, however, fails to explain how R.C. 9.481 is not for the "general welfare" of employees, thereby failing to distinguish the instant case from *Rocky River IV*. As the legislative record of R.C. 9.481 shows, thousands of employees across the state, as well as employee organizations, have advocated for the enactment of R.C. 9.481.

Testimony from these employees sufficiently demonstrated to the General Assembly that their individual liberties were abridged by residency requirements, and that lifting these requirements would improve the quality of life for themselves and their families. R.C. 9.481 would not be before this Court today but for the fervent belief of public employees that this legislation is necessary to improve their lives. The City's representation to the contrary is not only unsupported, but is clearly contrary to the entire legislative history of R.C. 9.481 and the procedural history of this case.

Referring to *Rocky River IV*, the City nevertheless claims that a review of the legislative history of Article II, Section 34 supports its proposition that R.C. 9.481 is not a law providing for the general welfare of employee because "general welfare" refers only to improving employee conditions within the workplace. Yet, in *Rocky River IV*, the Court stated that analysis of Article II, Section 34's legislative history was unnecessary:

> The language of Section 34 is so clear and unequivocal that resort to secondary sources, such as the constitutional debates, is actually necessary.

Id. at 15, 115. And further:

> Regardless of what was said or not said during the debates, the unalterable fact remains that Section 34, as it was ultimately adopted, transcends the limitations urged by appellant. If the framers of our Constitution had intended this section to apply only to minimum wage, almost half of the forty-one words contained in this section would be regarded as mere surplusage, since it further provides that laws may be passed "fixing and regulating the hours of labor...and providing for the comfort, health, safety and general welfare of all employees..."

Id. at 15-16, 116.

Article II, Section 34 does <u>not</u> state that "laws may be passed...providing for the improvement of conditions within the workplace." Further, the Court has not interpreted Article II, Section 34 in such a manner. In fact, the Court's previous decisions have

interpreted Article II, Section 34 in a manner that directly conflicts with the City's urged interpretation.

In *Rocky River IV*, the Court upheld R.C. Chapter 4117, stating that it was enacted for the general welfare of employees. R.C. Chapter 4117, the Public Employees Collective Bargaining Act did not directly improve conditions in the workplace, but rather gave employees the right to bargain for such improvements. Under the City's urged interpretation of Article II, Section 34, is R.C. Chapter 4117 now unconstitutional? The City's rationale suggests that it would be.

In *Rocky River IV*, the Court relied upon its prior decision in *Pension Fund*, in which the Court upheld R.C. Chapter 742, legislation that created a state-controlled disability and pension fund for police officers and firefighters. The *Pension Fund* court upheld R.C. Chapter 742 on the basis that it was a valid enactment under Article II, Section 34. *Pension Fund*, 12 Ohio St.2d at 107, 233 N.E.2d at 137. In *Rocky River IV*, the Court reaffirmed the decision in *Pension Fund*, noting that the legislation at issue in *Pension Fund* was much more intrusive on municipalities' home-rule authority than R.C. Chapter 4117, but was nonetheless a valid enactment under Article II, Section 34. *Rocky River IV*, 43 Ohio St.3d at 16-17, 539 N.E.2d at 116-117.

R.C. Chapter 742 did not pertain to "working environment conditions." As stated, it transferred local disability and pension funds for police officers and firefighters into a state-controlled fund. Yet the Court *twice* upheld that it provided for the "comfort, health, safety and general welfare" of employees under Article II, Section 34. *Pension Fund, supra.*; *Rocky River IV, supra.* These holdings in *Pension Fund* and *Rocky River IV* are in direct conflict with the interpretation urged by the City and the courts of appeals

in *Lima*, *Toledo*, and *Cleveland* that the "general welfare" clause of Article II, Section 34 limits the General Assembly's authority to enact legislation that pertains to "working environment conditions." As such, they must be rejected.

Seemingly acknowledging the weakness of the "working environment conditions" limitation on the "general welfare" clause, the City also argues that it is necessary to at least limit the General Assembly's authority under the "general welfare" clause to enacting legislation that has a "nexus" to the working environment <u>or</u> to legislation that "address[es] the economic welfare of the employee." (Appellants Brief, p. 32 (citing *City of Lima, supra.*; *City of Cleveland, supra.*)). By asserting this secondary interpretation of Article II, Section 34 that the "general welfare" clause does allow for "economic welfare" legislation, the City undermines its own argument. The City cannot argue that based upon legislative history and interpretive principles that the "general welfare" clause of Article II, Section 34 must be read to pertain only to "working environment conditions," but at the same time state that it allows legislation that addresses "the economic welfare of the employee." The "economic welfare" exception to the "working environment" interpretation urged by the City and the courts of appeals in *Lima* and *Cleveland* is not rooted in an interpretation of Article II, Section 34; rather, it is solely an attempt to distinguish R.C. 9.481 from the legislation enacted in *Rocky River IV* and *Pension Fund*—a distinction that fails for reasons described above and further herein.

While R.C. Chapter 4117 and R.C. Chapter 742 pertain to the economic welfare of employees in different ways, the Court in *Rocky River IV* and *Pension Fund* did not uphold the legislation at issue solely on the basis of a "nexus" between the legislation and the economic welfare of employees. There is no mention in the Court's decisions in

Rocky River IV or *Pension Fund* of a limitation of the General Assembly's authority under the "general welfare" clause to legislation that promoted the economic welfare of employees. Indeed, ten years after *Rocky River IV* in *American Assn. of Univ. Professors, supra.* ("*AAUP II*")[3], the Court expressly rejected such a limitation.

As discussed in Appellants' Merit Brief, in *AAUP II*, legislation that instructed state universities to develop instructional workload standards for their faculties was challenged by an employee organization, in part, on the basis that it was unconstitutional under Article II, Section 34. *AAUP II*, 87 Ohio St.3d at 60-61, 717 N.E.2d at 292. The employee organization argued that while the legislation (R.C. 3345.45) was enacted pursuant to Article II, Section 34, Article II, Section 34 allowed the General Assembly to enact only laws that benefited employees, and because R.C. 3345.45 did not benefit employees, it was not validly enacted under Article II, Section 34. *Id.* The Court rejected the argument, noting that it has "repeatedly interpreted Section 34, Article II as a broad *grant* of authority to the General Assembly, not as a limitation on its power to enact legislation." *Id.* at 61, 292. The Court stated:

> AAUP's position would require Section 34 to be read as a limitation, in effect stating: "No law shall be passed on the subject of employee working conditions *unless it furthers* the comfort, health, safety and general welfare of all employees." Under that approach, however, Section 34 would prohibit all legislation imposing any burden whatsoever on employees, regardless of how beneficial to the public that legislation might be. The invalidity of this position becomes strikingly apparent when viewed in the context of *existing* employment-related laws.

Id.

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[3] *American Assn. of Univ. Professors v. Central State Univ.* (1999), 87 Ohio St.3d 55, 717 N.E.2d 286 was referred to as "*Central State*" in Appellants' Merit Brief. Appellees', however, referred to the case as "*AAUP II.*" In order to avoid any confusion, Appellants refer to the case as "*AAUP II*" herein.

Like the AAUP's argument in *AAUP II*, the City urges this Court to read Article II, Section 34 as a limitation, stating: "No law shall be passed unless it furthers working environment conditions or the economic welfare of all employees." And like the Court's decision in *AAUP II*, the Court should likewise reject the City's urged interpretation of Article II, Section 34 which impermissibly limits the General Assembly's legislative authority.

Moreover, it should be noted that the legislation upheld under Article II, Section 34 in *AAUP II* did not improve "working environment conditions," nor did it address the economic welfare of employees. Still, the Court upheld the legislation as a valid enactment under Article II, Section 34. The Court's decision in *AAUP II*, like *Rocky River IV* and *Pension Fund*, is in direct conflict with the interpretation of Article II, Section 34 urged by the City. Further, as pointed out by the Court in *AAUP II*, interpreting Article II, Section 34 as limiting the General Assembly's authority, as urged by the City, would undermine the constitutionality of existing employment-related laws, as well as potential future enactments. In *Rocky River IV*, *Pension Fund* and *AAUP II* the Court repeatedly rejected attempts to have Article II, Section 34 interpreted as a restriction on the General Assembly's authority. So too should the Court in the instant case.

B. The General Assembly's Legislative Authority Under Article II, Section 34 Is Not Limited To Legislation That Furthers The "Common Welfare Of The State's Citizens."

Citing the court of appeals' decision in the instant case, the City claims that the "common welfare" limitation on the General Assembly's legislation authority is necessary because "Article II, §34 is not without limits." The City's characterization of

Article II, Section 34 is wholly inaccurate. The General Assembly's authority under Article II, Section 34 is not without limits. Article II, Section 34 itself expressly identifies the subject matter of legislation lawfully enacted under Article II, Section 34—laws that fix and regulate "hours of labor, establish[] a minimum wage, and provid[e] for the comfort, health, safety and general welfare of all employees..." Consistent with this, the Court has held that it is within "the General Assembly's power to pass laws concerning the welfare of employees." *Rocky River IV*, 43 Ohio St.3d at 16, 539 N.E.2d at 116. Previous legislation enacted under Article II, Section 34 which did not concern the welfare of employees has been struck down by the Court. See e.g. *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E. 2d 722 (Supreme Court held statute enacted under Art. II, Sec. 34 that removed employees' rights to remedy under common law in an intentional tort action was unconstitutional); *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298, 707 N.E.2d 1107 (Supreme Court held statute enacted under Art. II, Sec. 34 that provided immunity to employers from civil liability for employee injuries caused by intentional tortuous conduct was unconstitutional).

The City asserts that the "common welfare" limitation is based upon the preamble of the Ohio Constitution and Ohio Supreme Court precedent. Neither the Ohio Constitution nor Ohio Supreme Court precedent support the City's proposition. Article II, Section 34 states, "no other provision of the constitution shall impair or limit this power." Article II, Section 34's supremacy clause is clear—other provisions of the Ohio Constitution may not impair or limit the General Assembly's authority under Article II, Section 34. As discussed above, the Court has repeatedly held that Article II, Section 34 is to be read "as a broad *grant* of authority to the General Assembly, not as a limitation

on its power to enact legislation." *AAUP II*, 87 Ohio St.3d at 61, 717 N.E.2d at 292. The Ohio Supreme Court has never held that provisions of the Ohio Constitution should be read to limit the General Assembly's authority.

In *AAUP II*, the Court did state that pursuant to Article II, Section 34 the General Assembly has the authority to "regulate the employment sector in the public interest." *Id.* However, contrary to the City's characterization, the *AAUP II* Court did not suggest in any way that the General Assembly's authority under Article II, Section 34 was limited to "common welfare" legislation. Rather, the Court expressly rejected limiting the General Assembly's authority, and described the General Assembly's legislative authority under Article II, Section 34 as expansive, allowing the General Assembly to enact employment sector legislation when the General Assembly believed it to be in the public's interest. The Court stated:

> Jurists may not agree that such a remedy is the best or most effective means of resolving the problem. Nevertheless, the remedy must be upheld unless it constitutes a plain affront to a specific provision of the Constitution.
>
> We conclude that R.C. 3345.45 does not constitute such an affront to Section 34, Article II. As set forth above, the public's interest in the regulation of the employment sector often requires legislation that burdens rather than benefits employees. Section 34 should continue to be interpreted as a broad grant of authority to the General Assembly to pass such legislation.

Id. at 61-62, 292-293.

R.C. 9.481 is not legislation that constitutes an affront to Article II, Section 34. See *AAUP II, supra.* R.C. 9.481 is not legislation that is "totally repugnant" to furthering the "comfort, health, safety and general welfare of all employees." See *Safety-Kleen*, 61 Ohio St.3d at 633, 576 N.E. 2d at 729; *BP Chemicals*, 85 Ohio St.3d at 304, 707 N.E.2d

at 1112. R.C. 9.481 was enacted for the general welfare of full-time public employees across the State. And if upheld by the Court, R.C. 9.481 will benefit more employees than the legislation at issue in *Rocky River IV* or *Pension Fund.* Like R.C. 3345.45 in *AAUP II*, jurists may disagree that R.C. 9.481 is the most effective means of promoting the individual liberties of full-time public employees, yet it was the means ultimately determined by the General Assembly.

As with the City's urged "working environment conditions" limitation, the urged "common welfare" limitation also poses an incredible threat to existing and future legislation enacted pursuant to Article II, Section 34, perhaps even more so. As more fully discussed in Appellants' Merit Brief, the "common welfare" limitation brings into question the constitutionality of legislation such as R.C. Chapter 742, R.C. 4115.03 through 4115.15, and R.C. Chapter 4117, as well as future legislative efforts of the General Assembly to improve the lives of employees in the State. This threat is illustrated by the City's claims that R.C. 9.481 should be struck down because it is not for the "common welfare." The City's conclusion that R.C. 9.481 is contrary to the "common welfare" is based purely upon speculation and the subjective opinions of some of the City's representatives. Thousands of employees and those employees' family members across the State that advocated for the enactment of R.C. 9.481 believe otherwise. The General Assembly has heard from both groups, and as the citizens' representatives, has determined that R.C. 9.481 should be enacted for the "comfort, health, safety and general welfare" of employees. The City cannot be permitted to stifle the authority of the State's representatives under Article II, Section 34 through a newly-imported and entirely subjective limitation.

IV. ARTICLE II, SECTION 34 OF THE OHIO CONSTITUTION GOVERNS THE INSTANT CASE, MAKING HOME-RULE ANALYSIS INAPPLICABLE; HOWEVER, EVEN UNDER HOME-RULE ANALYSIS, R.C. 9.481 MUST BE UPHELD.

As the Court has previously held, if it is determined that the General Assembly had the authority to enact R.C. 9.481 under Article II, Section 34, analysis of R.C. 9.481 under the home rule amendment is unnecessary. See *Rocky River IV, supra.*; *Pension Fund, supra.* Assuming *arguendo*, however, that the Court considers the constitutionality of R.C. 9.481 under the home rule amendment, R.C. 9.481 must still be upheld.

Municipalities, in regulating local matters, "may not infringe on matters of general and statewide concern." *Cleveland Elec. Illuminating Co. v. Painesville* (1968), 15 Ohio St.2d 125, 129, 239 N.E.2d 75, 78; see also *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 90, 431 N.E.2d 311, 312 ("It is a fundamental principle of Ohio law that, pursuant to the 'statewide concern' doctrine, a municipality may not, in the regulation of local matters, infringe on matters of general and statewide concern."). A matter is of "general and statewide concern" if the subject matter affects the general public of the state as a whole more than it affects the inhabitants of the local municipality. *Cleveland Elec.*, 15 Ohio St.2d at 129, 239 N.E.2d at 78.

In enacting R.C. 9.481, the General Assembly expressly stated "...that it is a matter of statewide concern to generally allow the employees of Ohio's political subdivisions to choose where to live...in order to provide for the comfort, health, safety, and general welfare of those public employees." R.C. 9.481, however, does not address a matter of statewide concern merely because the General Assembly described R.C. 9.481 as such. Application of the balancing test set forth in *Cleveland Elec.* demonstrates that

R.C. 9.481 *is* a matter of statewide concern that requires preemption of local residency requirements.

Under the *Cleveland Elec.* balancing test, the inalienable and fundamental right of employees to choose where to live is juxtaposed with the right of the political subdivision to require employees to live in the city as a condition of employment. Appellants believe it to be self-evident that preservation of this inalienable and fundamental right of the State's public employees far outweighs the City of Akron's interest in setting such a condition of employment, particularly when the interests asserted by the City are purely speculative.

As the Court has noted, "Due to our changing society, many things which were once considered a matter of purely local concern and subject strictly to local regulation, if any, have now become a matter of statewide concern, creating the necessity for statewide control." *State ex rel. McElroy v. City of Akron* (1962), 173 Ohio St. 189, 181 N.E.2d 26, 28. Suburban sprawl and improved means of transportation to and from metropolitan centers have resulted in essential and higher quality services moving outside of municipalities' borders into neighboring suburbs. Public employees, however, have been held within those boundaries, having to choose between gainful employment and improvements in their quality of life. The only means of now providing these public employees the same rights all other employees within the State enjoy is a statewide regulation of residency requirements.

Over the years, the Court has affirmed that the establishment of a police and fire pension fund, the establishment of a prevailing wage, the establishment of vacation-leave credits, the enforcement of collective bargaining rights, and the resolution of collective

bargaining disputes through third-party awards are all issues that have become matters of statewide concern requiring statewide control. See *Pension Fund, supra.*; *State ex rel. Evans, supra.*; *State ex rel. Adkins v. Sobb* (1986), 26 Ohio St.3d 46, 496 N.E.2d 994; *Kettering, supra.*; *Rocky River IV, supra.* The General Assembly has now likewise recognized residency requirements as a statewide concern that requires statewide control. Promoting the fundamental right of public employees to choose where to live is no less of a statewide "code of conduct" than establishing a prevailing wage or vacation-leave credits, or enforcing collective bargaining rights. As such, the Court should uphold the statewide prohibition of residency requirements.

The highest courts of other states have concluded similarly. In *Uniformed Firefighters Assn. v. City of New York* (1980), 50 N.Y.2d 85, 90, 428 N.Y.S.2d 197, New York's highest court stated:

> While the structure and control of the municipal service departments in issue here may be considered of local concern within the meaning of municipal home rule...the residency of their members, unrelated to job performance or departmental organization, is a matter of State-wide concerning not subject to municipal home rule.

In *Doris v. Police Comm'r of Boston* (Mass. 1978), 374 Mass. 443, 447, 373 N.E.2d 944, 947, Massachusetts' high court upheld state-wide residency legislation, stating:

> Whether the problems associated with residency requirements would better be left to municipal government rather than to the State Legislature is therefore entirely within the discretion of the Legislature to decide.

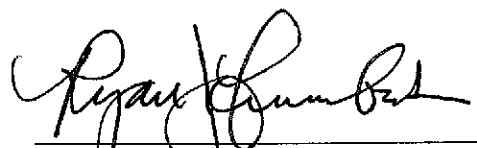
And in *Atlanta v. Myers* (Ga. 1977), 240 Ga. 261, 264, 240 S.E.2d 60, 63, the Georgia Supreme Court held that a city ordinance requiring police officers and firefighters to reside within city was a special law in contravention of general law and

was therefore unconstitutional and void under Georgia law. This Court should hold similarly.

Therefore, while R.C. 9.481 is constitutional as a valid and lawful enactment by the General Assembly under Article II, Section 34, making analysis of R.C. 9.481 under the home rule amendment unnecessary, the statewide concern for the enactment of R.C. 9.481 nevertheless compels the Court's enforcement of R.C. 9.481 over the conflicting residency requirement of the City of Akron.

Respectfully submitted,

FAULKNER, MUSKOVITZ & PHILLIPS, LLP



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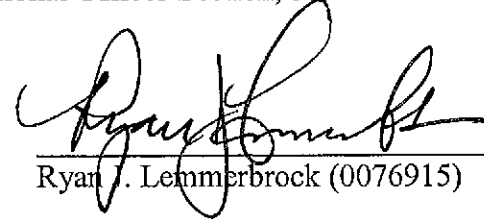
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY BRIEF OF APPELLANTS FRATERNAL ORDER OF POLICE, AKRON LODGE NO. 7 AND AKRON FIREFIGHTERS ASSOCIATION, IAFF LOCAL 330, et al. was served via regular U.S. mail this 2 day of October, 2008, upon Deborah M. Forfia, Assistant Director of Law, City of Akron, 161 South High Street, Suite 202, Akron, Ohio 44308, and Benjamin C. Mizer, Solicitor General, Constitutional Offices Section, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215.



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