IN THE COURT OF APPEALS FOR THE EIGHTH DISTRICT OF OHIO, CUYAHOGA COUNTY

CITY OF CLEVELAND	)	CASE NO. CA-17-105500
Plaintiff-Appellee,	)	
	)	
vs.	)	On Appeal from the Cuyahoga County
	)	Court of Common Pleas
	)	
STATE OF OHIO	)	
Defendant-Appellant.	)	Case Number CV 16-868008

BRIEF AMICUS CURIAE ON BEHALF OF THE CAMPAIGN TO DEFEND LOCAL SOLUTIONS, LEGAL SCHOLARS AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF THE CITY OF CLEVELAND

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ASSIGNMENTS OF ERROR

Amicus Curiae adopt and incorporate the Assignments of Error asserted by Defendant-Appellant State of Ohio.

STATEMENT OF THE ISSUES PRESENTED

In 2003, the City of Cleveland enacted its well-known Fannie M. Lewis Resident Employment Law, Cleveland Codified Ordinance Chapter 188 ("Fannie Lewis Law"). The Fannie Lewis Law, among other things, requires that Cleveland residents perform at least twenty percent of total construction worker hours in every City construction contract of at least $100,000. In addition, those contractors and their subcontractors must "use significant effort to ensure that no less than four percent" of such resident worker hours are performed by low-income persons. Cleveland Code of Ordinances ("C.C.O.") §§188.01(b); 188.02(a)(1), (3).

Thirteen years after the law's adoption, in May 2016 the Ohio General Assembly sought to preempt this ordinance, enacting section 9.49 of the Ohio Revised Code. Section 9.49 is as clear in its focus as it is simple in its intent: "to prohibit a public authority from requiring a contractor to employ a certain percentage of individuals from the geographic area of the public authority for construction or professional design of a public improvement." R.C. 9.75 (preamble).[1] Rather than regulate for the general welfare of all employees, as required by Article II, Section 34 of the Ohio Constitution, the provision on

[1] As the trial court below noted, the Fannie Lewis Law covers a broader swath of activity than R.C. 9.75 seeks to preempt, including any agreement under which the City expends grant funding or grants a privilege. *See* Judgment Entry, With Opinion and Order Granting Permanent Injunction, at p. 3 (discussing C.C.O. §188.01(b)).

which the State relies for its authority, this statute merely deprives the City of Cleveland of the exercise of even the most modest aspect of its constitutional home-rule authority.

The Fannie Lewis Law was enacted as a job-creation tool by the City when public funds are expended. As such, the Fannie Lewis Law is not an exercise of police power, but rather an attempt to address legitimate welfare and poverty issues that were found to exist in the City. Is C.C.O. §188 preempted by R.C. 9.49 where R.C. 9.49 is not a proper exercise of authority under Art II, Sec. 34 of the Ohio Constitution and C.C.O. §188 is not an exercise of the City's police power?

R.C. 9.49 is not a part of a comprehensive and statewide legislative scheme. Rather, R.C. 9.49 is piecemeal in both its intent and application. As such, R.C. 9.49 is not a general law. Is C.C.O. §188 preempted by R.C. 9.49 where R.C. 9.49 is not a proper exercise of authority under Art II, Sec. 34 of the Ohio Constitution and R.C. 9.49 does not constitute a general law?

Local ordinances that seek to address unique local conditions, such as legitimate welfare and poverty issues, are a vital part of home rule authority for cities nationwide. Attempts by state legislatures to restrict or preempt essential local governmental powers must be closely scrutinized to verify and ensure that such state action is necessary and not a further needless erosion of local governmental powers.

STATEMENT OF INTEREST OF THE CAMPAIGN TO DEFEND LOCAL SOLUTIONS, LEGAL SCHOLARS, AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

The Campaign to Defend Local Solutions (hereinafter "CDLS") is a nonpartisan organization building an informal coalition of individuals, organizations, and elected

officials focused on raising awareness of the spread of state preemption of local laws, often pushed by special interest groups, occurring across the country. Launched by Tallahassee Mayor Andrew Gillum in January of 2017, CDLS's network consists of over 1,000 individuals spread across 43 states, including 35 elected officials from Arizona, Arkansas, California, Florida, Hawaii, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, South Dakota, Tennessee, Texas, Wisconsin, and the District of Columbia. CDLS also includes 15 national and Florida-based organizations concerned about stopping preemption. In addition to raising awareness and educating citizens about the threat that preemption represents to local values, CDLS works to provide tools and support to elected officials and cities whose rights are under attack from these laws, including recruiting and organizing amicus brief support.

Nestor Davidson is Professor of Law and Associate Dean for Academic Affairs at the Fordham University School of Law and Faculty Director of the Urban Law Center.

Paul Diller is Professor of Law at Willamette University College of Law and Director of the Certificate Program in Law and Government.

Laurie Reynolds is the Prentice H. Marshall Professor of Law, Emerita, at the University of Illinois College of Law, and co-author of Materials on State and Local Government Law (West 8th ed., 2016).

Richard Schragger is the Pierre Bowen Professor of Law at the University of Virginia Law School, and the author of City Power: Urban Governance in a Global Age (Oxford University Press, 2016).

The legal academics listed above come to the issues presented in this case from our vantage points as professors of state and local government law, state constitutional law,

and legislation law. As scholars, we understand the historical background and development of home rule across the country over the last century and a half. We are also familiar with the ways in which home rule has been indispensable to protecting local participatory democracy, and how it has improved lives and communities around the country. We submit this brief to provide our understanding of the specific legal conflict in this case, and to situate this conflict against the backdrop of recent trends both in Ohio and nationally that are undermining the important and essential value of home rule.

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

INTRODUCTION

At core, this is a case about the nature, validity, and future viability of constitutional home rule in Ohio. The authority that Charter Cities in Ohio retain over their own contracting is a central aspect of local self-government. In the court below, the City of Cleveland successfully defended its long-standing Fannie Lewis Law—an ordinance that

provides modest local-hiring and low-income participation requirements for certain public works—against an attempt at State preemption. Because the State was acting specifically to prevent the legitimate exercise of home-rule authority, rather than pursuant to a state-wide regime directed at the welfare of all employees under Article II, Section 34 of the Ohio Constitution, and because Cleveland's ordinance stands at the center of local self-government under Article XVIII, Section 3, the trial court's judgment should be affirmed.

STATEMENT OF THE CASE

Amicus Curiae adopt and incorporate the Statement of the Case asserted by Plaintiff-Appellee City of Cleveland.

STATEMENT OF THE FACTS

With cognizance of the local impact of the expenditure of city funds and grants that the City manages, Cleveland enacted Cleveland Codified Ordinance Chapter 188—the Fannie Lewis Law—to help alleviate local unemployment and respond to the challenge of poverty in the City. The Fannie Lewis Law, as noted, seeks to accomplish this through a requirement that a minimum of twenty percent of hours worked on City construction contracts be performed by Cleveland residents, with a further requirement that contractors and subcontractors use "significant effort to ensure" that at least four percent of those residents be low-income. C.C.O. §188.02(a)(1), (3). The Fannie Lewis Law also specifies that the City's Director of the Office of Equal Opportunity must establish standards and procedures to "specify that the employment of the minimum percentage of [Cleveland residents] may be reduced prior to or during construction . . . when a Contractor or

potential Contractor can demonstrate the high impracticality of complying with this percentage level for particular contracts or classes of employees." C.C.O. §188.03(b).

Taken as a whole, the Fannie Lewis Law is a modest, locally-tailored set of contract and grant requirements that, as the City demonstrated below, legitimately structures the use of City funding. To describe the ordinance as a "residency requirement" is simply a category error. As the trial court found, the "City provided evidence at the preliminary injunction hearing that the number of residents working for a contractor has no bearing in awarding" contracts and, significantly, that "any contractor on any project may employ between zero and 100% of Cleveland residents."[2] The Fannie Lewis Law does not regulate residency in Cleveland, even if such residency is reflected in a portion of project requirements for public construction contracts.

As discussed below, cities—in Ohio and across the country—regularly exercise their authority to set contract terms consistent with local priorities concerning the proper use of local funds. Local governments include any number of objectives in public contracts. In everything from goals around minority, women-owned, or socially and economically disadvantaged businesses,[3] to veterans preferences,[4] to sustainability mandates,[5] and other examples, local governments understand that it is a responsible aspect of public contracting to take into consideration the social impact of the local expenditure of funds. That recognition does not speak to the wisdom or efficacy of any such particular contract condition, but that is hardly at issue in evaluating whether Cleveland's choices about responsibly structuring its spending should be protected under the Ohio

[2] Judgment Entry, With Opinion and Order Granting Permanent Injunction, at p. 4.
[3] *See, e.g.*, New York, NY Code § 6-129 (2016); Philadelphia, PA Code §17-109 (2009).
[4] *See, e.g.*, Chicago, IL, Code § 2-92-418 (2014); Las Vegas, NV Code NRS 338.13844 (2009).
[5] *See* Bend, OR Ordinance 1.55.020(B)(2).

Constitution's grant of home rule authority over local self-governance. That is the central question that this case asks and the answer should be yes.

ARGUMENT

I. The Trial Court Properly Found that R.C. 9.75 Does Not Meet the Requirements of Article II, Section 34 of the Ohio Constitution and Therefore a Home Rule Analysis is Necessary.

It is important at the outset to contrast the intended breadth of Ohio's constitutional home rule under Article XVIII, Section 3 against the relatively narrow derogation of home rule embodied in the State's authority to regulate for the comfort, health, safety and general welfare of all employees under Article II, Section 34 of the Ohio Constitution.

In 1912, the citizens of Ohio amended the Ohio Constitution to enshrine and enhance important principles of local self-government through the Home Rule Amendment. Article XVIII, Section 3 of the Ohio Constitution provides that:

> Municipalities 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.

The Home Rule Amendment not only embodies a commitment to the basic values of local democracy but also concern about the influence of special interests over the state legislature.[6] At the time of Ohio's Constitutional Convention of 1912, the Progressive movement had prominently swayed reform efforts across the American landscape starting in the 1890s.[7] Much of the energy of these reform movements focused on making government more responsive to the will of the people and building bulwarks against the

[6] John D. Buenker, John C. Burnham & Robert M. Crunden, *Progressivism* 15 (1977).
[7] Arthur S. Link & Richard L. McCormick, *Progressivism* 1 (1983).

influence of the "interests."[8] And this led to reform efforts intended to restrain legislative supremacy, particularly at the state level.[9] A central goal of this agenda was to give cities control over their own affairs.

This progressive spirit was influential as the Ohio Constitutional convention of 1912 approached. The Home Rule Amendment to the Ohio Constitution was presented to the delegates on January 20, 1912.[10] As the Amendment came before the delegates, the Cleveland Plain Dealer noted:

> Home rule means self-government. The people are ruling themselves in these days in ways which could scarcely have been foreseen a few years ago. This is another step in the same direction, and an important one, about to be sanctioned by the constitutional convention.
>
> The intelligent citizenship of Ohio is a unit in hoping that this home rule measure may not be weakened or delayed by amendments proposed for its destruction.[11]

The import of the new Home Rule Amendment for Ohio was evident. As George W. Knight, the Vice Chair of the Municipal Government Committee, reported to the delegates:

> The proposal does not undertake, your committee believes, to detach cities from the state, but it does undertake to draw as sharply and as clearly as possible the line that separates general state affairs from the business which is peculiar to each separate municipality, be it a city or a village, in the state, and to leave the control of the state as large and broad and comprehensive in the future as it has been in the past with reference to those things which concern us all in the State of Ohio, whether we live in cities or in rural district, and on the other hand, to confer upon the cities for the benefit of those who live in the cities control over those things peculiar to the cities and which concern the cities as distinct from the rural communities. I repeat, to draw as sharply and as definitely as possible, a line between those two things and to leave the power of the state as broad hereafter with reference to the general affairs as it has ever been, and to have the power of

[8] John D. Buenker, John C. Burnham & Robert M. Crunden, *Progressivism* 15 (1977).
[9] *Id.* at 60.
[10] Cleveland Plain Dealer, January 21, 1912, at 1.
[11] *Id*. April, 23, 1912, at 6.

> the municipalities on the other hand as complete as they can be made with reference to those things which concern the municipalities alone, always keeping in mind the avoidance of conflict between the two so far as possible.[12]

Delegates accordingly focused on preserving the value of home rule. For example, one delegate argued that:

> The advocates of home rule merely insist that municipalities be allowed to solve their own problems and control their own affairs, independent of outside authority, whether that authority be a monarchy, an oligarchy or the people of a whole state. In short, the cities merely ask that the principle of self-government be extended to them….if there be a problem which affects the city of Cincinnati or Columbus or Toledo particularly, it is not home rule in any sense of the word if the people of the whole state of Ohio undertake to decide that question merely because those outside of the cities have more people to vote upon it than the particular municipality.[13]

As part of the 1912 amendments to Ohio's Constitution, municipalities were given the authority to adopt their own governing charters. Ohio Constitution Art. XVIII, § 7 established that "[a]ny 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."

Home rule was not the only reform sought by the delegates in the 1912 Convention. The welfare of workers was also an important issue. However, unlike the sweeping grant of power for home rule, the record of the Convention underscores that the employee amendment, Article II, Section 34 of the Ohio Constitution, was more narrowly designed to address two specific concerns: ensuring legislative authority to "limit[] the number of hours of labor" and to "establish a minimum wage for the wageworker."[14]

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[12] Ohio Constitutional Convention Proceedings and Debates (1912) at 1433.
[13] *Id*. at 1483 (quoting Mr. Crosser).
[14] *Id*. at 1331 (citing Mr. Crites). Other delegates echoed the limited purpose of the amendment. *See, e.g., id.* at 1328 (quoting Mr. Farrell's statement that "we should so write our constitution that minimum wage legislation will be permissible under it"); *id*. at 1332 (quoting Mr. Lampson's

This background is important, as it undermines the State's argument that the employee-protecting constitutional provision was meant to vitiate the core of basic charter cities' constitutionally protected home rule powers. It is not in dispute that the State of Ohio has authority to legislate for the "comfort, health, safety and general welfare of all employees" under Article II, Section 34 of the Ohio Constitution. As the trial court properly concluded, however, R.C. 9.75 on its face, and in its intent, does not regulate generally for the welfare of all employees. Article II, Section 34 is not magical constitutional language that the State can invoke without basis to circumvent home rule – there has to be some substance to the regulatory concerns invoked beyond rejecting the exercise of local authority.

There are certainly legitimate grounds for state oversight to ensure that important state-wide regulatory concerns that require uniformity are addressed in a comprehensive manner or to check the exercise of local authority when it imposes pernicious externalities. But none of those concerns are addressed in R.C. 9.75. The statute instead simply plucks one narrow strand of the authority that local governments have and seeks to remove it.

Ohio's statute is a stark example of preemption in the absence of a state comprehensive scheme. The lack of an affirmative regulatory regime signals that R.C. 9.75 is simply intended to preclude local activity—not to regulate but rather to override.[15] The purpose of home rule is to prevent arbitrary withdrawals of local authority simply because state legislatures have different preferences than local ones. Here that concern is even more

statement that "the theory of this proposal is to authorize the legislature to pass laws by which arbitrary minimum wages can be determined by a board").

[15] *Cf.* Cleveland v. State, 2013-Ohio-1186, 989 N.E.2d 1072 (8th Dist.) (concluding that that the Ohio Informed Consumer Food Choice Law was an unconstitutional attempt to preempt Cleveland's regulation of trans fat for public health).

heightened as the Ohio statute fails to address the very real concerns motivating local governments to act in this context, concerns such as heightened unemployment in large cities and among lower-income populations, as well as income inequality.

Because R.C. 9.75 is, on its face, not a regulatory provision designed to advance the general welfare of all Ohio employees, the trial court was correct in its interpretation of Article II, Section 34 and properly turned to the question of home rule authority under Article XVIII, Section 3.

II. The Trial Court Properly Found that R.C. 9.75 Does Not Preempt Cleveland's Fannie Lewis Law because the Fannie Lewis Law is not a Police Power Regulation and R.C. 9.75 is not a "General Law."

Turning to the question of home rule, then, the trial court again properly understood the nature of the conflict at issue. In *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, the Court adopted a multi-factor test to analyze whether a local ordinance is protected from preemption under Article XVIII, Section 3. Under *Canton*, a local ordinance will yield to a state statute "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.* ¶ 9; *see State ex rel. Morrison v. Beck Energy Corp.*, 143 Ohio St.3d 271 (2015) ¶ 15 (citing *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶ 17, for a similar framework). The second part of this test recognizes that while in Article XVIII, Section 3, "the words 'as are not in conflict with general laws' place a limitation upon the power to adopt 'local police, sanitary and other similar regulations,'" the Ohio Constitution by contrast does "not restrict the power to enact laws for 'local self-government.'" Dies Elec. Co. v. City of Akron, 62 Ohio St.2d 322, 325 (1980). In other

words, to validly preempt the Fannie Lewis Law, R.C. 9.75 must be a general law and the Fannie Lewis Law must be a police power regulation rather than the exercise of local self-government.

It should be noted that the extent of the actual conflict between the state statute and the ordinance is not entirely clear, as the trial court noted. R.C. 9.75 is arguably narrower than C.C.O. §188, and some of the effect of the ordinance may fall outside the scope of the state statute. But to the extent there is a conflict, the trial court was correct in concluding the Fannie Lewis Law is not a police power regulation nor is R.C. 9.75 a "general law."

As to the line between police power regulation and local self-government, contract authority and oversight is central to local self-government, as the Ohio Supreme Court recognized in *Dies Electric Company*. In that case, notwithstanding a conflicting state statute, the Court concluded that the terms of "work executed on a contract for the improvement of municipal property is a matter embraced within the field of local self-government." *Dies. Elec. Co.*, 62 Ohio St.2d at 326. How a charter city like Cleveland chooses to structure the public works contracts it enters into surely falls on the proprietary, self-government side of the ledger.

This is hardly a surprising conclusion, as the exercise of local authority to ensure that at least a portion of local funding addresses concerns such as localized poverty and unemployment are common across the country. Since 1984, for example, Washington D.C.'s First Source Employment Program has had a goal of providing a percentage of new public funding jobs in larger projects to residents of the District.[16] Similarly, going back to 1985, Boston's Residents Construction Employment Standards have provided that

[16] *See* DC Code § 2–219.05 (2011).

contractors and developers use best-faith efforts to employ Boston residents in public contracts.[17] And, since 2009 St. Louis, Missouri, has had a project-labor goal for major public-works contracts of twenty percent local resident involvement.[18] A variety of similar programs—with varying specific requirements, but with similar goals—can be found across the country.[19]

If the City's goals for local employment had been accomplished through individual contract provisions, the self-government/regulatory distinction would be self-evident. That the City has pursued these goals through an ordinance that applies to all relevant municipal contracts does not change the nature of the local policy. Indeed, it is surely more efficient, effective, and transparent for contractors when local governments set cross-cutting ground rules for their contracts and grants outside of the terms of any individual agreements.

Because the Fannie Lewis Law is not a police power regulation, that should end the analysis and the provision should be upheld as an exercise of local self-government.[20] However, Cleveland should also prevail on the question whether R.C. 9.75 is a "general law." Here *Canton* again supplies the test. To qualify, a statute must "(1) [be] part of a

[17] *See* Boston, MA, Code §§ 8-9.1—8-9.7 (1983).
[18] *See* St. Louis, MO, Code § 68412 (2009).
[19] *See* Erin Luke, Heather A. Bartzi, & Jack Clark, *Local Hiring Programs – Recent Updates and Legislation*, Under Construction, ABA, Winter 2017 (describing programs not only in Washington, Boston and St. Louis, but also in San Francisco, New Orleans, Baltimore, Seattle, and others); Construction Contracts Law Report, *Local Hire Laws—Attempt To Reverse Local Unemployment In Construction Sector*, 35 Construction Contracts Law Report 58 (2011) (describing similar programs in Los Angeles, Oakland, and a number of other California cities).
[20] Although not addressed by the decision below, the Fannie Lewis Law's exercise of the power of local self-government is also not preempted by the "statewide-concern doctrine," under which cities "may not, in the regulation of local matters, infringe on matters of general and statewide concern." Am. Fin. Servs. Assn. v. Cleveland, 112 Ohio St.3d 170, 2006-Ohio-6043. The analysis here should converge with the arguments for why selectively removing local authority over conditions of local public contracting do not constitute a "general law" under the *Canton* analysis, as discussed below. To hold otherwise would be to convert virtually any aspect of local self-governance into a matter of statewide concern, no matter how incidental the external effects, vitiating home rule.

statewide and comprehensive legislative enactment; (2) [apply] to all parts of the state alike and operate[s] uniformly throughout the state; (3) [set] forth police, sanitary, or similar regulations, rather than granting or limiting municipal legislative power; and (4) prescribe[s] a rule [of] conduct upon citizens generally." *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005 ¶ 21.

Conceding for the sake of argument that on its face, R.C. 9.75 applies to all parts of the state alike and operates uniformly throughout the state,[21] the statute clearly fails the other three elements. The relevant comprehensive state regulatory regime the State invokes is "public improvements" and "construction contracts"—surely the State would not hold to the position that the State has occupied a field to which so much outside of the selective removal of authority in R.C. 9.75 is left to local discretion?

More to the point, the last two prongs of the *Canton* test converge in this instance on the same proposition: R.C. 9.75 by its terms and its effects, operates to limit municipal authority, rather than set general terms of conduct for citizens. If the power of the State to reign in specific strands of local authority can so easily be converted to general laws, then the general laws constraint would have little, if any meaning. There would be nothing left of local home rule if the exercise of a local government's proprietary authority to place certain limited terms in its own municipal contracts when funded by its own monies could be so easily overridden by state law.

[21] More would need to be known about how selective the preemption R.C. 9.75 sought to achieve was in order to full evaluate this prong of the *Canton* general laws test.

III. The Ohio Legislature is Threatening to Undermine Constitutional Home Rule in Ohio and Reflects a Troubling Nationwide Assault on Home Rule.

For the reasons that the trial court articulated, the decision below should be upheld. Taking a step back, Amicus Curiae wish to emphasize that this conflict represents a troubling pattern of the erosion of home rule, not only in Ohio, but across the country. When the people of a state seek to empower local democracy, as the people of Ohio did in 1912, the state will always be tempted to undermine that constitutional delegation of authority. It critically falls to the judiciary to ensure that the values of local self-government enshrined in the Home Rule Amendment retain their core meaning.

Repeatedly, as noted, the Ohio General Assembly has taken to enacting provisions that seem only designed to block the preferences of the majority of citizens in Ohio municipalities. In 2002, the General Assembly preempted home rule authority for cities to respond to serious local problems involving predatory lending.[22] In 2004, the General Assembly, barred local governments from regulating oil and gas drilling.[23] In 2006, the General Assembly preempted local authority over residency for city employees,[24] and removed long-standing home rule authority to regulate gun safety.[25] This list only begins to scratch the surface of examples of the State selective removing local authority, albeit in the regulatory context, not in the context of the kind of local self-governmental choices at issue in this case.[26]

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[22] *See* R.C. §1349.25.
[23] *See* R.C. §1509.02.
[24] *See* R.C. §9.481.
[25] *See* R.C. §9.68.
[26] *See, e.g.,* R.C. §4921.25 (preempted Cleveland City Ordinance 677A.11); R.C. Chapter 4115 (prevailing wage); R.C. §124.40 (preempting municipal authority over municipal employees).

With all of these encroachments on local authority, the Ohio General Assembly has turned basic tenets of constitutional home rule on their head. Instead of leaving charter cities free to use home rule powers to structure their self-governance to respond to local situations and local problems, the legislature has put Ohio municipalities on a short leash, repeatedly intervening and selectively targeting specific powers for removal. The cumulative result of these encroachments is the evisceration of home rule as a whole. With this barrage of hostile preemptive statutes, municipal authority has been cabined into a narrow range of policy choices deemed acceptable to the State. As the State legislature repeatedly deprives home rule units of power in specific areas, those local governments are increasingly unable to respond to local needs and the preferences of local residents. State intervention prevents local governments from dealing with local challenges in the way that is most appropriate for the unique confluence of demographic, geographic, economic, and social factors that are present in a particular municipality.

The State's repeated efforts to remove home rule powers morphs the State's oversight well beyond its limited purpose as a tool to assure the consistency of local policy with comprehensive statewide regulatory frameworks or general statewide minimum standards. State legislative preemption in Ohio today is degenerating into a series of narrow attacks on the decision-making authority of local communities. In the process, these attacks are eroding the protection guaranteed to home rule units by the Ohio Constitution.[27] The Ohio Constitution clearly contemplates that localities will

[27] Moreover, many of these attacks on local autonomy have specifically targeted Cleveland and other large cities in the state. *E.g.*, Cleveland v. State, 2013-Ohio-1186, 989 N.E.2d 1072 (8th Dist.) (invalidating 2011 state law that targeted Cleveland ban on trans fat); *see also* 2006 S. 82, codified as R.C. § 9.481 (2016) (prohibiting residency requirements for municipal employees); Joe Mulligan, *Not in Your Backyard: Ohio's Prohibition on Residency Requirements for Police Officers, Firefighters, and Other Municipal Employees*, 37 U. Dayton L. Rev. 351, 368-69 (2012)

exercise their local discretion to deal with problems in their own individual ways, without State approval, and that these choices should be respected as long as there are no statewide regulatory concerns at issue. Policy experimentation and the ability to respond to unique local situations are essential aspects of a strong and vibrant home rule system. The State's relentless preemption of specific powers has eroded that system and left local governments ill-equipped to deal with local problems. The cumulative effect of these individual assaults is transformative, as Ohio marches one step at a time away from a constitutional recognition of home rule and toward the cramped view of local self-determination in Dillon's Rule that constitutional home rule was meant to abandon.[28]

The current rash of hostile preemption—in Ohio and elsewhere—is in reality nothing more than a reincarnation of the practice of so-called "ripper" bills. Like those 19th century anti-urban measures, today's hostile preemption is a tool used by

(discussing residency requirements in Dayton, Cincinnati, Akron, Cleveland, and Youngstown invalidated by R.C. § 9.481). There is evidence that gerrymandering has infected the state's legislative process in the last decade, resulting in legislation targeting disfavored areas and populations. *See* David Stebenne, *Re-Mapping American Politics*, *in* 5 Origins: Current Events in Historical Perspective (February 2012), *available at* http://origins.osu.edu/article/re-mapping-american-politics-redistricting-revolution-fifty-years-later (discussing gerrymandering in Ohio after 2010 census); Paul A. Diller, *Reorienting Home Rule: Part 1 – The Urban Disadvantage in National and State Lawmaking*, 77 La. L. Rev. 287, 339 (2016) (analyzing gerrymandering in Ohio and other states); *see also* Paul A. Diller, *Reorienting Home Rule: Part 2 – Remedying the Urban Disadvantage Through Federalism and Localism*, 77 La. L. Rev. 1045, 1079-80 (2017) (analyzing the effect of gerrymandering in states like Ohio). In 2015 the state's voters demonstrated their distaste for gerrymandering by overwhelmingly approving an initiative that puts districting in bipartisan hands as of 2020. Ohio Bipartisan Redistricting Commission Amendment, Issue 1 (2015); Ohio Secretary of State, Elections and Voting in Ohio, 2015 Official Election Results (click through to Official Statewide Results), *available at* https://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2015Results.aspx (reporting 71.5 % in favor and 28.5 % against).

[28] Under a Dillon's Rule regime, grants of local government authority from the State are construed strictly against the local government and would only be interpreted as transferring the following powers: "(1) those granted in express words; (2) those necessarily or fairly implied in ... the powers expressly granted; and (3) those essential to the accomplishment of the [purposes of the state law.]" Richard Briffault & Laurie Reynolds, Cases and Materials on State and Local Government Law 327 (8th ed. 2016).

legislatures to deprive cities of the initiative powers they need to respond to their own specific local issues. As Professor Richard Briffault has noted:

> One notorious abuse of the period was the practice by rural-dominated state legislatures of adopting "ripper bills"—laws that wrested municipal functions out of urban hands and transferred them to state appointees. Home rule was intended to change the traditional rule of plenary state legislative authority over local matters, to protect cities from opportunistic, partisan state meddling, and thus to vindicate the principle of local self-government.[29]

Hostile preemption today is just as inconsistent with the Constitutional protection of home rule as are the ripper bills that home rule conclusively rejected, and it is hard to imagine that today's court would allow the continuation of a tactic that prompted the adoption of home rule in the first place.

Home rule is under strain not only in Ohio, moreover, but in jurisdictions across the country that similarly recognize and value local self-government. As the National League of Cities recently reported, forty-two states now impose some form of tax and expenditure limitation on local governments; thirty-seven states preempt ride sharing regulation; twenty-five preempt local minimum wage laws; nineteen preempt paid leave regulations; among others.[30] Seemingly no domain of local policy is safe from state

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[29] Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 Colum. L. Rev. 775, 805-06 (1992) (citations omitted); *see also* Lyle Kossis, *Examining the Conflict Between Municipal Receivership and Local Autonomy*, 98 Va. L. Rev. 1109, 1125-26 (2012) ("One of the driving forces behind the home-rule movement was frustration with the use of state 'ripper bills.' Ripper bills were state laws that transferred control of local matters to state officials. For example, one ripper bill in Michigan was used to transfer the provision of local utilities to state boards, and another in New York was used to lodge control over local police forces in the state capitol. Perhaps most strikingly, Pennsylvania used a ripper bill to transfer control over the construction of City Hall in Philadelphia to the state. What is more, ripper bills were quite common. In New York alone, the state passed 212 laws in 1870 that controlled local functions in towns and villages throughout the state.") (citations omitted).

[30] National League of Cities, *City Rights in an Era of Preemption: A State-by-State Analysis* 3 (2017).

infringement, with preemption conflicts across the country also arising over antidiscrimination,[31] campaign finance,[32] environmental protection,[33] housing,[34] public health,[35] public safety,[36] and others.

And attacks on home rule across the country are beginning to sound in much more fundamental terms, evincing much more sweeping levels of state legislative hostility toward local self-determination. The Florida legislature, for example, considered a bill this past session that would have entirely removed the ability of local governments to regulate any "business, profession, and occupation unless the regulation is expressly authorized by law." H.B. 17, 2017 Leg., Reg. Sess. (Fla. 2017). SB 1158 would have gone even further, expressly preempting local "regulation of matters relating to commerce, trade, and labor" and "authorizing a local government to seek nullification of an ordinance, rule, or regulation of another [local government] upon the affirmative vote of the governing body of the local government that the ordinance, rule, or regulation" is in violation of the statute's broad prohibition. S.B. 1158, 2017 Leg., Reg. Sess. (Fla. 2017). In other words, this bill would have given one municipality the power to invalidate another municipality's ordinance. Quite simply, these laws are astonishing in their blatant disregard of the basic constitutional foundations of state and local government law, and are a sign of what is emerging across the country.

[31] *See* Tenn. Code Ann. § 7-51-1801(1) & (2) (2011).
[32] *See* N.Y. Elec. 16-A (2016).
[33] *See* Colo. Rev. Stat. § 34-60-105 (2016).
[34] *See* Tex. Loc. Gov't Code Ann. § 250.007.
[35] *See, e.g.*, Kan. Stat. Ann. §12.16.137; Ga. Code Ann. § 26-2-373 (2011).
[36] *See* Minn. Stat. § 471.633 (2017).

It is not only that state legislatures are steadily eroding constitutional home rule, moreover, but preemption has also taken a decidedly punitive turn. Recently, a new trend has emerged in preemption conflicts with legislation that goes beyond preemption to seek to hold local governments—and local *officials*—liable for policy disputes. For example, in the recently enacted S.B. 4, the Texas legislature subjects *individual* local officials to civil penalties for violating its preemptive terms up to $25,000 for multiple violations, with each day an official continues to disagree constituting a separate violation.[37] Imposing potentially crippling financial penalties on legislators for their votes is an unprecedented and extreme use of preemption powers, in clear conflict with the right to local self-government. These laws and others like them represent the opening wedge of a nation-wide legislative attack on home rule generally. It is incumbent upon the judiciary to provide a robust check on these abuses, reading home rule grants as they were intended: as a bulwark for local self-government.

Amicus Curiae bring the national preemption landscape to the court's attention because it bears on the viability of the concept of home rule more generally. Each individual act of the state legislature that preempts may be seen as valid if it is not connected to a broader understanding of the value of self-government, as originally embodied in Ohio's Article XVIII, Section 3, and parallel provisions in other states. Once

[37] S.B. 4, 2017 Leg., 85th Sess. (Tex. 2017). Similar examples of punitive preemption potential subjecting public officials to individual liability can be found in several other states, with Arizona, *see* Ariz. Rev. Stat. §§13-3108, 13-3118 (2016); Florida, *see* Fla. Stat. 790.33(3)(a) (2016); Mississippi, *see* Miss. Code Ann. §§ 45-9-51(1), 45-9-53(1), and Oklahoma, *see* Okla. Stat. Ann. tit. § 21-1289.24 (2014), for example, imposing individual liability on public officials for conflicts over firearm preemption. Kentucky has gone one step further: it subjects public servants to potential criminal liability. *See* Ky. Rev. Stat. §65.870(6) (2017).

placed in a broader perspective, it is clear that courts need to be particularly vigilant in protecting the authority that the people have sought to invest in local governance.

CONCLUSION

For the reasons specified by the trial court and amplified in this brief, Amicus Curiae request that the trial court's judgment be sustained.

Respectfully submitted,

s/*Joseph F. Scott*

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CERTIFICATE OF SERVICE

I certify that on June 13, 2017, a copy of the foregoing Brief of Amicus Curiae was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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APPENDIX: CONSENTS

Subject:	Permission for Amicus brief
From:	Singletary, Gary (GSingletary@city.cleveland.oh.us)
To:	jfscld@yahoo.com;
Cc:	LLSHastings@city.cleveland.oh.us;
Date:	Thursday, June 8, 2017 9:49 PM

Mr. Scott:

This will acknowledge for purposes of the written consent addressed by Ohio Appellate Rule 17 that the City of Cleveland, by and through counsel, consents to the filing of amicus briefs by The Campaign to Defend Local Solutions in support of the City of Cleveland in the pending matter, *City of Cleveland v. State of Ohio,* 8th District Case No. CA-17-105500.

/s/ Gary S. Singletary

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From:	Singletary, Gary (GSingletary@city.cleveland.oh.us)
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Date:	Tuesday, June 13, 2017 9:34 AM

Joe

The City of Cleveland gives its consent to the International Municipal Lawyer Association to join an amicus brief in support of the City.

Gary Singletary (0037329)
Chief Counse
City of Cleveland

Sent from my iPhone

Subject:	amicus consent
From:	Zachery Keller (Zachery.Keller@ohioattorneygeneral.gov)
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Cc:	GSingletary@city.cleveland.oh.us; bridget.coontz@ohioattorneygeneral.gov; LLSHastings@city.cleveland.oh.us;
Date:	Friday, June 9, 2017 12:21 PM

Mr. Scott

This will acknowledge for purposes of the written consent addressed by Ohio Appellate Rule 17 that the State of Ohio, by and through counsel, consents to the filing of an amicus brief by The Campaign to Defend Local Solutions in support of the City of Cleveland in the pending matter, *City of Cleveland v. State of Ohio,* 8th District Case No. CA-17-105500.

s/ Zachery P. Keller

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Attachments

- image001.png (36.51KB)

Subject:	RE: amicus consent
From:	Zachery Keller (Zachery.Keller@ohioattorneygeneral.gov)
To:	jfscld@yahoo.com;
Date:	Tuesday, June 13, 2017 3:03 PM

Joseph,

As we discussed on the phone, Ohio gives its consent to the International Municipal Lawyers Association joining the amicus brief.

Sincerely,

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From: JOSEPH SCOTT [mailto:jfscld@yahoo.com]
Sent: Tuesday, June 13, 2017 2:57 PM
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Subject: Re: amicus consent