IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND,	**)**	**Case No. 2018-0097**
	)	
Plaintiff-Appellee	**)**	
	)	**On Appeal from the Cuyahoga**
vs.	**)**	**County Court of Appeals,**
	)	**Eighth Appellate District**
STATE OF OHIO	**)**	
	)	
Defendant-Appellant	**)**	**Court of Appeals**
	)	**Case No. 105500**

MERIT BRIEF OF APPELLEE CITY OF CLEVELAND

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I. INTRODUCTION

This Court has long recognized that a municipality's authority to make public improvements is included within the powers of local self-government guaranteed by Article XVIII, section 3 of the Ohio Constitution. See e.g. *Village of Perrysburg v. Ridgway*, 108 Ohio St. 245, 140 N.E. 595, 1 Ohio Law Abs. 484 (1923). Moreover, municipal authority to contract arises as a power of local self-government. *Dies Elec. Co. v. City of Akron*, 62 Ohio St.2d 322, 326, 405 N.E.2d 1026 (1980).

The General Assembly's 2016 enactment of R.C. 9.75[1] with House Bill 180 sought to restrict these recognized municipal powers through the adoption of preemption language that would limit municipal authority to set the terms of construction contracts entered into for locally funded public improvement projects. The General Assembly's attempt to justify its unconstitutional attempt to strip local governing authority by referencing Article II, Section 34 of the Ohio Constitution is simply not supported by that provision's language. R.C. 9.75 does not fix and regulate hours of labor, does not establish a minimum wage, and does not provide for the comfort, health, safety and general welfare of all employees in Ohio. The Eighth District Court of Appeals correctly understood that the General Assembly's reference to Article II, Section 34 was not supported:

> In this instance, the residency language in H.B. 180 is being improperly used to access the unassailable protections that Article II, Section 34 affords statutes enacted pursuant to that constitutional provision. As found by the trial court, R.C. 9.75 "seeks only to dictate the terms by which municipalities may contract for workers in construction contracts within their realm." Upon review, we agree that the General Assembly had no authority to enact R.C. 9.75 under Article II,

[1] While originally identified in H.B. 180 as R.C. 9.49, the statute was subsequently designated R.C. 9.75 in the Ohio Revised Code.

> Section 34. Accordingly, we shall proceed to consider whether the statute unconstitutionally infringes upon the City's home-rule authority.

City of Cleveland v. State, 8th Dist. No. 105500, 2017-Ohio-8882, 90 N.E.3d 979, ¶ 26.

The General Assembly's invocation of Article II, Section 34 as the justification for the attempted misapprehends the authority contained in the provision. The State notes on page 6 of the its brief that the General Assembly justified the new law because "it is a matter of statewide concern to generally allow the employees working on Ohio's public improvement projects to choose where to live" and because it is "[t]he inalienable and fundamental right of an individual to choose where to live pursuant to Section 1 of Article I, Ohio Constitution." R.C. 9.75 does not allow construction workers to choose where to live, construction workers already have freedom of choice to live wherever they want, and the State provides no logical argument or evidence to the contrary. The City of Cleveland has not enacted any law that regulates or restricts such inalienable and fundamental rights, and it is a misapplication of Article II, Section 34 for the General Assembly to suggest otherwise. The Eighth District correctly understood and noted the trial court's conclusion: "[t]he General Assembly's reference to Article II, Section 34 of the Ohio Constitution as a justification for enacting H.B. 180 is improper, not well taken, and unconstitutional." *City of Cleveland v. State,* supra ¶ 12.

The State incorrectly attempts to equate the General Assembly's attempt to preempt local contractual authority herein with this Court's municipal employee residency law analysis and holding in *City of Lima v. State of Ohio,* 122 Ohio St.3d 155, 2009 Ohio 2597. The State's argument that the *Lima* decision is the "starting point—and ending point—for this case" (Merit Brief at p.1) reveals a poor understanding of the direct employment relationship that was at issue in *Lima,* a relationship that drove the

analysis undertaken by this Court. The State's understanding that *Lima* upheld "a state law that shielded city employees from cities' residency requirements" (*Id*.) undercuts reliance on *Lima* and demonstrates the lack of application that the decision has to the issues in this litigation. First, the City in the present matter has no employer - employee relationship with any workers used by any independent contractor retained to meet the terms of a negotiated public improvement contract, whether those workers live in Cleveland or anywhere else. Second, the fact that construction workers already have the freedom to choose to live in Cleveland or anywhere else in Ohio differentiates them from those municipal employees who, prior to *Lima*, were subject to strict municipal residency requirements. The employees at issue in *Lima* had no freedom of choice as to residency if they wished to work for a governmental entity enforcing a residency requirement.

Cleveland's experience is emblematic of the importance of retaining its constitutionally based home rule authority to set the terms of local government funded construction contracts. The irony of R.C. 9.75 is that it would actually work to diminish the demonstrated gains in local construction worker welfare that have occurred following the City's 2003 enactment of Cleveland Codified Ordinance ("C.C.O.") Chapter 188—known as the "Fannie M. Lewis Law Cleveland Resident Employment Law" ("Fannie Lewis Law").[2] Before passing C.C.O. Chapter 188, Cleveland City Council had conducted hearings for over a year to study local unemployment and poverty conditions. The hearings documented that the City had both a higher unemployment rate and a higher

[2] Fannie Lewis was a beloved Cleveland City Councilwoman who served Cleveland City Council from 1980 to 2008. She is the only Cleveland Councilperson to ever have an ordinance officially named in their honor.
http://www.crainscleveland.com/article/20100524/FREE/305249979/fannie-lewis

poverty rate than Cuyahoga County and many of the surrounding communities. Council documented further that while Cleveland residents possessed the skills and training required for work on construction contracts, few of the employment opportunities associated with local construction contracts were going to workers living in Cleveland. Armed with such findings, Council passed the Fannie Lewis Law, a law providing, in pertinent part, that City funded public improvement contracts that exceeded $100,000 were to include contractual terms wherein contractors agreed to use workers living in Cleveland to perform twenty percent (20%) of the total construction worker hours associated with the project. Notwithstanding the State's repeated mischaracterization of R.C. 9.75 as the "residency-choice law", the City's Fannie Lewis Law does not regulate the residency of construction workers. Rather, the City's law, through terms of contracts entered into with qualified contractors, was enacted to provide that qualified construction workers living in Cleveland would receive a fair opportunity to get work on Cleveland funded public improvement projects—a situation that was documented to be sadly lacking prior to Council's 2003 legislative action.

In upholding the trial court's judgment in favor of the City, the Eighth District found "the Fannie Lewis Law is an exercise of local self-government in the form of terms or provisions of a contract incorporated into City construction projects. *City of Cleveland v. State*, *supra*, ¶ 35. The Eighth District well summarized the issues presented in declaring the General Assembly's actions to be unconstitutional:

> "The power of local self-government and that of the general police power are constitutional grants of authority equivalent in dignity. A city may not regulate activities outside its borders, and the state may not restrict the exercise of the powers of self-government within a city." *Canton v. Whitman*, 44 Ohio St.2d 62, 337 N.E.2d 766 (1975). R.C. 9.75 is an unconstitutional attempt to eliminate a local authority's powers of local self-government in negotiating the terms of

> public improvement projects. R.C. 9.75 was not a valid exercise of the legislature's authority pursuant to Article II, Section 34, and the statute unconstitutionally infringes upon the municipal home-rule authority guaranteed by Article XVIII, Section 3.

Id., ¶ 44.

The City's Fannie Lewis Law is not a residency law and does not prevent construction workers from choosing to live wherever they may want to live. Such workers are not employed by the City and the City exercises no control over individual choice of residency, nor control over who is hired by any contractor.

II. STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

Court of Common Pleas

On August 23, 2016 the City of Cleveland filed a "Verified Complaint for Declaratory Judgment, Temporary Restraining Order, and Injunctive Relief." The City requested with its complaint that the court (1) declare that R.C. 9.75 violated the Ohio Constitution by infringing upon the City's Home Rule Powers of local self-government, (2) that the court declare R.C. 9.75 was not a general law, and (3) that the court declare that the General Assembly's reference to Article II, Section 34[3] of the Ohio Constitution as a justification for enacting R.C. 9.75 was improper, not well taken, and was unconstitutional. Contemporaneously with its complaint, the City filed a Motion for Temporary Restraining Order and for Preliminary and Permanent Injunction. On August

[3] As a point of clarification: In the "Transcript of the Proceedings" from August 26, 2016, filed by the State in this matter, there are references made by counsel that read "234"—see e.g. pp. 10, 19, 36 etc. These oral references to "234" are intended to mean "Article II, Section 34" of the Ohio Constitution.

25 the State filed its "Memorandum Contra Plaintiff's Motion for Temporary Restraining order and Injunction."

On August 26 the trial court held a preliminary injunction hearing. Evidence in support of the City's motion was presented. (Trial Court, Journal Entry, 8/26/16). On August 30 the court released its order "hereby immediately and preliminarily restrained and enjoined [the State] from enforcing HB 180 and [R.C. 9.75] until determination of this matter by a trial on a permanent injunction." *Id*. at p. 6. The court's order set a full trial in the matter for November 7, 2016. *Id.*

On September 22, 2016 the State filed its Answer. On October 6, 2016 counsel for the State filed a "Joint Stipulation Waiving Further Argument or Submission of Evidence." The parties therein stipulated and submitted the matter based on the present record and waived "any opportunity for further argument or submission of evidence prior to the Court's decision as to a permanent injunction." (Joint Stipulation at pp. 1-2).

On January 31, 2017 the trial court issued its "Judgment Entry, With Opinion and Order Granting Permanent Injunction." (State Appendix, Exhibit 3) Holding "Judgment on all claims is hereby rendered in favor of the City of Cleveland and against the State of Ohio on all claims" (*Id*. at p. 6), the trial court, at page 2, further recognized:

> [T]he Fanny Lewis Law does not contain any residency requirements for employees of the political subdivision, nor does the law require the City's contractors to set any resident requirements for their employees; instead the Fannie Lewis Law sets thresholds for those persons assigned to work on public projects. These workers may or may not be employees of those contractors who contract with the City. There is no condition to employment or contract that the workers for the construction company reside in any specific area of the state.

Court of Appeals

On February 24, 2017 the State of Ohio filed its Notice of Appeal—CA -17-105500 with the Eighth District Court of Appeals. On April 24 the State filed the Appellant's brief. On June 13 the City filed Appellee's brief. On June 26 the State filed Appellant's reply brief. Oral argument was held on October 25. The court of appeals issued its Judgment Entry and Opinion affirming the trial court's judgment on December 7, 2017. (State's Appendix, Exhibit 2).

B. Statement of Facts

1. C.C.O. Chapter 188 was enacted in 2003

C.C.O. Chapter 188—Fannie Lewis Law was enacted through the passage of City Ord. No. 2031-A-02 on June 10, 2003. (Verified Complaint, Exhibit B, Ord. No. 2031-A-02). Ord. No. 2031-A-02 was passed as "[a]n ordinance to supplement the codified ordinances of Cleveland, Ohio, 1976, by enacting new Chapter 188 relating to employment of City residents for certain public improvement contracts." (*Id.*)

The enacting ordinance establishes that prior to enacting the Fannie Lewis Law, City Council had "conducted hearings on this matter for over one year" and had become familiar with local conditions concerning unemployment and poverty. (*Id.*). City Council directly recognized with the enacting language of Ord. No. 2031-A-02 that Council:

— "believes strongly in employment opportunities for Cleveland residents,"

— that "there are Cleveland residents who possess the skills and training required for work on construction contracts";

— that "despite the expenditure of millions of dollars in the City of Cleveland on projects recently completed or currently under construction few of the employment opportunities arising from those projects have gone to Cleveland residents"; and

— that "the City of Cleveland has a higher unemployment rate and higher poverty rate than Cuyahoga County and many surrounding communities." (*Id.*).

Additionally, City Council specifically recognized with the adoption of CCO Chapter 188 that "the employment of City residents on construction projects funded, in part or in whole, with City assistance will help alleviate unemployment and poverty in the City." (*Id.*).

R.C. 9.75(B)(1) states in pertinent part relevant to the City's declaratory judgment challenge that "No public authority shall require a contractor…for the construction of a specific public improvement …to employ as laborers a certain number or percentage of individuals who reside within the defined geographic area or service area of the public authority." Such law, if allowed to stand, would preempt the heart of the Fannie Lewis Law, which is contained at C.C.O. 188.02(a) (1) and (3). These two provisions establish the performance terms to be contained in every City Construction contract describing the use of construction workers living in Cleveland.

> (1) Require that one (1) or more Residents perform twenty percent (20%) of the total Construction Worker Hours ("Resident Construction Worker Hours") performed under the Construction Contract;
>
> * * *
>
> (3) Require the contractor and its Subcontractors to use significant effort to ensure that no less than four percent (4%) of the Resident Construction Worker Hours required by this division are performed by Low-Income Persons.

C.C.O. 188.02(a)(1) and (3). "Resident" is defined by ordinance as a person "domiciled within the boundaries of City of Cleveland [with] [t]he domicile [being] an individual's one (1) and only true, fixed and permanent home and principal establishment." CCO 188.01(g). "Low-Income Person" as referenced in is defined by ordinance as a "Resident who, when first employed by a contractor, is a member of a family having a total income

equal to or less than the "Section 8" Very Low-Income limit established by the United States Department of Housing and Urban Development." C.C.O. 188.01(f).

The term "Contractor" is defined in the ordinance as "any person or company receiving a Construction Contract from the City of Cleveland, any subdivision of the City, or any individual legally authorized to bind the City pursuant to said contract." C.C.O. 188.01(d). The term "Construction Contract" is defined in pertinent part to include:

> (b) …any agreement whereby the City either grants a privilege or is committed to expend or does expend its funds or other resources, …in an amount of one hundred thousand dollars ($100,000.00) or more, for the erection, rehabilitation, improvement, alteration, conversion, extension, demolition or repair of improvements to real property, including facilities providing utility service and includes the supervision, inspection, and other on-site functions incidental to construction, but does not include professional services….

2. The Fannie Lewis Law's Impact on the Welfare of Cleveland Workers.

As noted above, the goal of the City Council in passing the Fannie Lewis Law was to provide for the welfare of workers living in Cleveland by assisting in the alleviation of unemployment and poverty. CCO Chapter 188's positive impact on the welfare of workers who live in the City has been extraordinarily positive. The following table demonstrates the impact of the Fannie Lewis Law demonstrates on local workers.. The data for 2013 through 2015 represent full years, while the data for 2016 is partial, the data having been placed into evidence at the 2016 preliminary injunction hearing:

Year	Total Construction Hours	Cleveland Resident Hours	Cleveland Percent of Total Hours	Total Construction Wages	Cleveland Resident Wages	Cleveland Percent of Total Wages
2013	894,129	194,358	22%	$ 31,061,482	$ 7,418.684	24%
2014	1,982,724	409,387	21%	$ 83,864,726	$15,554,360	19%
2015	979,117	202,844	21%	$ 41,438,213	$ 7,808,929	19%

2016	491,611	91,281	19%	$ 19,823,661	$ 3,362,278	17%
Total	4,347,581	897,870	21%	$176,188,082	$34,144,251	19%

(Verified Complaint, Exhibit A Affidavit of Melissa Burrows, Ph.D, Director of the City's Office of Equal Opportunity and Exhibit A-1 (data table).

For this period of time Cleveland residents earned over $34 Million in construction worker wages. Of the 897,870 hours worked by Cleveland residents during this period, 100,638 hours were performed by Low-Income Persons—11% of total resident hours worked. Almost 80 Percent of the Cleveland based work has continued to go to those workers living outside of Cleveland. The peak year on the above chart for Cleveland construction work was 2014, where workers living in Cleveland worked 409,387 hours—21% of the total of the 1,982,724 construction hours. Assuming a hypothetical full time employee work year of 2080 hours, Cleveland workers' hours in 2014 represented the equivalent of 197 full time workers. In 2013 the effective number of full time workers for the 194,358 hours performed by Cleveland residents would equate to a statistical equivalent of 93 full time construction workers.

Dr. Melissa Burrows, Director of the City's Office of Equal Opportunity, further established that the City does not get involved with a contractor's hiring decisions and does not control their personnel decisions:

> Q. Now, when you administer these contracts and discover an employer does not have 20 percent Cleveland residents, do you require that employer to hire anybody?
> A. No. We do not get involved in the hiring process with any contract. It's up to the contractor.
> Q. The City's enforcement of the Fannie Lewis Law is solely related to the contractor; is that correct?
> A. That's correct. We deal with the contractor and overall maintenance of that contract.
> Q. Do you, at any time, require a contractor to fire anybody?

> A. We're not involved in the human resource aspects of or hiring aspects of the contractor. Just that they meet the requirements of that contract at the 20 percent and 4 percent.

(Transcript of Proceedings, August 26, 2016, at pp. 48-49).

3. R.C. 9.75

R.C. 9.75, was passed by the General Assembly in 2016 with HB 180. (State Appendix, Exhibit 5). The introduction of H.B. 180 and subsequent enactment of R.C. 9.75 followed the federal court's ruling in *Ohio Contractor's Association ("OCA") v. Akron*, N.D.Ohio No. 14CV0923, 2014 WL 1761611 (May 1, 2014). The OCA sought with this litigation to enjoin Akron's Local Hiring and Workforce Participation Policy on the grounds that Akron's policy violated the OCA's members' equal protection rights under both the United States Constitution and the Ohio Constitution. *Id.* at *1 - 2. After conducting a hearing the Court denied the OCA's attempt to enjoin Akron's local hiring policy. *Id*. at * 11. In reaching its decision the court concluded in part:

> [Akron's] Local Hiring Policy does not create a competitive disadvantage for OCA members, all of whom currently stand on equal footing under the Policy with each other and with other contractors.

Id. at *7.

As noted above, with the subsequently enacted R.C. 9.75 the State expressly sought to restrict and preempt all local authority to establish terms of contracts for public Improvements:

> (B)(1) No public authority shall require a contractor, as part of a prequalification process or for the construction of a specific public improvement or the provision of professional design services for that public improvement, to employ as laborers a certain number or percentage of individuals who reside within the defined geographic area or service area of the public authority.

"Public improvement" were defined to include:

> (a) A road, bridge, highway, street, or tunnel; (b) A waste water treatment system or water supply system; (c) A solid waste disposal facility or a storm water and sanitary collection, storage, and treatment facility; (d) Any structure or work constructed by a public authority or by another person on behalf of a public authority pursuant to a contract with the public authority.

R.C. 9.75(D)(7). The General Assembly expansively defined "Public Authority" at Paragraph to include, among other entities "[a] county, township, **municipal corporation**, or any other political subdivision of the state." R.C. 9.75(A)(6)(b) (emphasis added).

HB 180 also repealed two existing sections of the Revised Code – R.C.153.013 and R.C. 5525.26. These two sections, which had been enacted in 2010, included almost identical substantive language for state construction contracts relating to the hiring of local residents where a political subdivision was contributing the $100,000 threshold to the project as in the Fannie Lewis Law:

> [I]f the project is located in a municipal corporation with a population of at least four hundred thousand that is in a county with a population of at least one million two hundred thousand, and if a political subdivision contributes at least one hundred thousand dollars to the project, then a contractor for the project with regulations or ordinances of the political subdivision that are in effect before July 1, 2009, and that specifically relate to the employment of residents and local businesses of the political subdivision in the performance of the work of the project, and such ordinances or regulations shall be included by reference unambiguously in the contract between [the administering state agency] [the department of transportation or public authority][4] and the contractor for the project.

[4] RC § 153.013 arises under Chapter 153 of the Revised Code entitled "Public Improvements" and incorporates "the administering state agency" language. RC § 5525.26 arises under Chapter 5525 of the Revised Code entitled "Construction Contracts" and incorporates the referenced "the department of transportation or public authority" language. Notwithstanding which agency of the state would be entering the contract, both clearly would require contractor compliance with Cleveland's Fannie Lewis law.

Clearly, the State of Ohio's construction and public improvement contracts required compliance with the City's Fannie Lewis law. The enactment of the two state laws post-dated this Court's 2009 decision in *Lima*. There was clearly no thought in 2010 that the City's Fannie Lewis Law constituted an employee residency requirement that contradicted either the Ohio Supreme Court's earlier decision in *Lima* or Article II, Section 34 of the Ohio Constitution.

4. In an Attempt to Bolster its Argument, the State makes Numerous Factual Assertions not Supported by the Record.

At the hearing for preliminary injunction in this matter, the State of Ohio had an opportunity to present evidence to support its positions, but did not. Now, for the first time in this appeal the state makes factual assertions that have no basis in fact or the evidence in this case. Recognizing, that the R.C. 9.75 has no actual connection to worker conditions and welfare, the state makes assertions that have no basis in the evidence.

The assertion on page two of its brief that the law in question has to do with worker safety is not in the record, and is not supported by any fact. The apparent "factual" assumption being argued is that using workers living in Cleveland has made public construction workplaces less safe since contractors were "forced" to hire them. First, a contractor under the Fannie Lewis Law is free to hire whomever it wants. If it provided zero work hours for a Cleveland resident, the maximum contract penalty would be 2.5%. Second, the record contains no evidence that this safety consideration is true. In an area where Cleveland's population consists of 30% of the likely local work force, it would be an easy task to find safe workers from Cleveland.

On page 16 of its brief, the State again, without any evidence having been presented in the record of this case, endeavors to instruct this court on how work laws

operate. The state claims without proof that the Fannie Lewis Law "indisputably" harms workers living outside of the city. There is no evidence that contractors turn away suburban workers because of the Fannie Lewis Law goals. There is no evidence that the requirements of the Fannie Lewis Law "take" away from suburban workers. And, again, a contractor who wants to use 81% of its work force from outside Cleveland would only pay a contract penalty of one eighth of one percent (0.125%) of the final total amount of the Construction contract for the one percent below the Fannie Lewis Law requirement. See C.C.O. 188.05(b). On pages 16 and 17 of its Brief the State creates a fabricated hypothetical concerning union hall hiring. Given the demographics of Cuyahoga County, any union hall within a reasonable commuting distance of Cleveland should naturally have approximately 30% of its work force being Cleveland residents. That it may not is a result of the long standing discriminatory practices that the City's Fannie Lewis Law was designed to help remedy.

On page 18 of its brief the State, without any evidence and ignoring the actual record in this case, makes the untenable assertion that workers take a "big" risk by not living in Cleveland. The actual evidence suggests that even with the Fannie Lewis law intact, a suburban worker has a much greater chance (80% of the contractor's workforce) of obtaining a job with a contractor working on a Cleveland public project. Even after the Fannie Lewis Law, the record established that suburban workers remain more likely (79%) to obtain a job with a public contractor than Cleveland residents (21%).

The trial court and the Court of Appeals properly considered who was behind this current attack on a city's home rule. The Contractor's Association tipped their hand when they sued Akron in Federal Court. *Ohio Contractors Ass'n v. City of Akron*, 2014

U.S. Dist. LEXIS 61313, (N.D. Ohio). While not determinative of either court's opinion and judgment the trial court and court of appeals properly noted the OCA's interest and involvement.

III. ARGUMENT

The State's arguments are premised on an alleged relationship between R.C. 9.75 and the tenants of Article II, Section 34 that simply do not exist. R.C. 9.75 does not protect employees' residency freedom, because such freedom already exists. Simply put, R.C. 9.75 does not arise pursuant to Article II, Section 34 and in no manner provides for the comfort, health, safety and general welfare of all employees engaged in construction work. The State is arguing, in effect, for a return to a time that predated the enactment of Cleveland's Fannie Lewis Law in 2003, though the State admits that Cleveland's law "was undisputedly passed to improve residents' economic welfare." (State Brief at p. 9).

As documented by City Council, the time before the 2003 enactment of the Fannie Lewis Law was an era in Cleveland when construction workers living in the City received few of the employment opportunities associated with public construction projects funded by the City. That was unacceptable. The General Assembly's cynical, attempted preemption of such a recognized local self-government authority enactment to serve the welfare of local workers could well make life administratively easier for Ohio contractors, but the General Assembly's effort falls well short of providing for the general welfare of all employees who work in the construction trades, especially the general welfare of those living in Cleveland.

Appellant State of Ohio's Proposition of Law No. 1

R.C. 9.75 is a valid exercise of authority under Article II, Section 34, because it provides for the general welfare of employees by protecting them from local preferences. Thus, no home-rule analysis is needed

Appellee City of Cleveland's Position Re: Appellant's Proposition of law No. 1

The General Assembly's reference to Section 34, Article II of the Ohio Constitution in justifying the enactment of R.C. 9.75 is not a legitimate use of the authority provided by that section. Cleveland Codified Ordinance Chapter 188 ("Fannie Lewis Law") does not establish or otherwise regulate the residence of any construction workers in the State of Ohio, but addresses the terms for local public improvement contracts entered into between the City and sophisticated general contractors.

A. Notwithstanding its Broad Authority, Judicial Review is Necessary to Determine Whether the General Assembly Acted Within Its Constitutional Authority When It Cites to Article II, Section 34 as Authority to Preempt Municipal Powers of Local Self Government.

Article II, Section 34 of the Ohio Constitution provides:

> Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employe[e]s; and no other provision of the constitution shall impair or limit this power.

The State summarizes its argument that this Court should reverse the Eighth District's decision in favor of the City's Fannie Lewis Law arguing basically that the court failed to account for the broad power established with Article II, Section 34 and that R.C. 9.75, as in *Lima,* protects "employees' residency freedom by blocking local-hiring requirements." (State Brief at p.9). Contrary to the implication of the State's argument at page 12 of its Brief, the City is not arguing that the Home Rule Amendment is somehow exempt from the General Assembly's proper use mandate concerning the general welfare of all employees addressed in Article II, Section 34. The City's position throughout these

proceedings is that HB 180 and the enactment of R.C. 9.75 was not part of any legitimate mandate associated with Article II, Section 34.

The Eighth District well understood in reaching its holding that Article II, Section 34 provides a "broad grant of authority to the General Assembly, not as a limitation on its power to enact legislation." *City of Cleveland, supra* 2017-Ohio-8882, ¶ 17, quoting *Lima* at ¶ 11. After due consideration and analysis, however, the Eighth District properly understood the unconstitutional nature of R.C. 9.75 and concluded that the statute does not relate to the rights of an individual to choose where to live, does not implicate the general welfare of all employees, and instead seeks to limit the contracting power of the City and other municipalities on public improvement contracts:

> Unlike the statute involved in *Lima*, R.C. 9.75 does not relate to any residency requirement imposed as a condition of employment by employers upon public employees. Further, despite the General Assembly's representations expressed in H.B. 180, R.C. 9.75 does not relate to the right of an individual to choose where to live or a matter implicating the general welfare of all employees. As the trial court recognized, "[t]here are no protections afforded to employees under H.B. 180, and no portion of the bill relates to the comfort, health, safety or general welfare of these contractors." Rather, by its express terms, R.C. 9.75 seeks to limit the contracting powers of local authorities on public improvement projects.

City of Cleveland, supra ¶ 24. So finding the court concluded:

> the residency language in H.B. 180 is being improperly used to access the unassailable protections that Article II, Section 34 affords statutes enacted pursuant to that constitutional provision. As found by the trial court, R.C. 9.75 "seeks only to dictate the terms by which municipalities may contract for workers in construction contracts within their realm." Upon review, we agree that the General Assembly had no authority to enact R.C. 9.75 under Article II, Section 34.

Id., ¶ 26. It was only after finding that the statute was not properly enacted pursuant to the broad authority of Article II, Section 34 that the court undertook a home rule analysis

to determine whether R.C. 9.75 otherwise qualified as a general law that would displace the Fannie Lewis Law.

The State defines the test to be "whether a law's subject bears a reasonable connection to the comfort, health, safety, or general welfare of employees" (State Brief at p. 14). As noted, the Eighth District found no reasonable connection. "A statement by the General Assembly of its intent to preempt a field of legislation is a statement of legislative intent that may be considered in a home-rule analysis *but does not dispose of the issue*." *Am. Fin. Servs. Assn. v. Cleveland ("AFSA"),* 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776, ¶ 31 (emphasis added). Similarly, that the General Assembly seeks to justify the preemption of municipal home rule authority by merely referencing Article II, Section 34 is not dispositive. With *Lima* this Court made clear that it undertook an independent review to determine whether a challenged statute had been enacted pursuant to Article II, Section 34:

> Given this conflict, the issues before us are straightforward: was R.C. 9.481 enacted pursuant to Section 34, Article II of the Ohio Constitution, and if so, does it prevail over ordinances enacted pursuant to Section 3, Article XVIII of the Ohio Constitution?

Lima, *supra* at ¶ 9. See also *City of Rocky River v. State Emp. Relations Bd.,* 43 Ohio St.3d 1, 13, 539 N.E.2d 103 (1989) ("*Because we believe* that Section 34, Article II of the Ohio Constitution governs this case…)(emphasis added). In a pre-*Lima* appellate court ruling that upheld R.C. 9.481 as constituting a proper exercise of legislative authority under Article II, Section 34, the Eleventh Circuit Court of Appeals recognized with its analysis: "We first note that although the General Assembly declared in the uncodified portion of Senate Bill 82 that it was its intent to enact R.C. 9.481 pursuant to Section 34, Article II, Ohio Constitution, *a judicial review is still necessary to determine whether the*

General Assembly acted within its constitutional authority." *Am. Fedn. of State, Cty. & Mun. Emps. Local #£74 v. Warren*, 177 Ohio App.3d 530, 2008-Ohio-3905, 895 N.E.2d 238, (11th Dist.) ¶ 40 (emphasis added).

Within the context of reviewing such broad authority the Eighth District reviewed prior Article II, Section 34 decisions cited by the State in its appeal. In every case cited by the State, the rulings concerning Article II, Section 34 related to a direct employee-employer relationship. Such relationship is not present with the General Assembly's enactment of R.C. 9.75, and the intended statutory interference with City contracts entered into with independent contractors. Before proceeding, it must be stated that there is no local municipal ordinance that regulates any construction worker's freedom to choose where to live. Certainly, the Fannie Lewis Law does not do so, and the State presented no evidence to the contrary.

B. The General Assembly Did Not Properly Invoke the Authority of Article II, Section 34 with its Enactment of R.C. 9.75.

In attempting to argue Article II, Section 34 of the Ohio Constitution is a legitimate source for the General Assembly's action, the State cites to multiple past decisions addressing the broad authority provided therein. The multiple cases cited by the State addressing Article II, Section 34 (State Brief at pp. 13-14) involve statutory impacts on direct employer-employee relationships. In *State ex rel. Bd. of Trustees of Police & Firemen's Pension Fund v. Bd. of Trustees of Police Relief & Pension Fund of Martins Ferry*, 12 Ohio St.2d 105, 107, 233 N.E.2d 135 (1967), the court upheld the constitutionality of a statute that required local police and firefighters' pension funds to transfer their assets to a newly created state-controlled police and fireman's disability and pension fund. While little analysis accompanied the *Pension Fund* decision, this Court

was addressing the assets of local pension funds established for municipal fire and police employees being transferred to state-controlled fund for benefit of those employees. There is an obvious direct employee-employer direct connection that is simply not found in the language of R.C. 9.75.

In *City of Rocky River v. State Emp. Relations Bd*., 43 Ohio St.3d 1, 539 N.E.2d 103 (1989) the court upheld the constitutionality of a statute that mandated binding arbitration between a city and its safety forces in the event of a collective-bargaining impasse. One would be hard pressed to find a more direct employee-employer relationship. The State identifies *State ex. Rel. Strain v. Houston*, 138 Ohio St. 203 (1941) as a decision where the Court "upheld a law regulating work conditions for city firefighters." (State Brief at p. 13).

The State goes on to identify *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, ("*MCEO*") 114 Ohio St.3d 183, 2007-Ohio-3831 for the proposition that that this Court "enforced a law granting local construction workers sick-leave benefits," (State Brief at p. 13). To avoid any confusion concerning the employment status of the construction workers addressed in *MCEO*, this Court clearly identified: "This is an original action filed by relator, Municipal Construction Equipment Operators' Labor Council, the certified bargaining representative of construction-equipment operators and master mechanics *employed by respondent city of Cleveland*, Ohio, and certain individual construction-equipment operators and master mechanics *employed by Cleveland*." *MCEO* at ¶ 1(emphasis added). There is no "employed by Cleveland" construction worker status in the present public improvement contract circumstances addressed by Cleveland's Fannie Lewis Law.

In Akron & B.B.R. Co. v. Pub. Utilities Commission, 148 Ohio St. 282 (1947) the Court recognized "Railroad employees and particularly trainmen [who] constitute a clearly defined class of employees constantly engaged in an occupation attended by great hazard and exposure to the elements." *Id.* at 286.

The City does not argue that Article II, Section 34 is a bar to the State's attempt to enact a law such as R.C. 9.75; clearly the General Assembly has plenary powers beyond the language of Article II, Section 34. When the General Assembly exceeds the authority of Article II, Section 34, however, as found by the Eighth District, then the State-Municipal relationship addressed by Article XVIII, Section 3 does come into the requisite constitutional analysis. Neither *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St.3d 55, 1999-Ohio-248, 717 N.E.2d 286 (1999) where "the court upheld the constitutionality of a statute that increased teaching-hour requirements for faculty at state universities" or *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066 where this Court "found that R.C. 2745.01's limitations on an employee's intentional tort suit against an employer, does not violate Ohio Constitution, Article II, Section 34 or 35" have any significance concerning the State's claim that R.C. 9.75 arises under Article II, Section 34.See *City of Cleveland*, 2017-Ohoio-8882, at ¶¶ 20-22.

This Court's decision in *Cent. Ohio Transit Auth. v. Transport Workers Union of America, Local 208 ("COTA")*, 37 Ohio St.3d 56, 524 N.E.2d 151 (1988) (State Brief at p. 14) recognized Article II, Section 34's broad grant of authority to the legislature to provide for the "comfort, health, safety and general welfare of all employe[e]s." However, the *COTA* litigation involved a direct employer-employee bargaining unit

dynamic that is not present in this Court's consideration of R.C. 9.75. In the absence of the General Assembly's having enacted legitimate "employee legislation" with R.C. 9.75, this is indeed an extreme case that well overcomes any presumption. The Eighth District did not encroach on legislative prerogatives within the context of the court's analyzing R.C. 9.75 under Article II, Section 34, rather the appellate court well understood that "[i]t is readily apparent that R.C. 9.75 is no more than an attempt to preempt powers of local self-government and to restrict the contract terms between public authorities and independent contractors who choose to bid on local public improvement contracts." *Cleveland* at ¶ 25.The issue presented in *Phung v. Waste Mgt., Inc.*, 23 Ohio St.3d 100, 491 N.E.2d 1114 (1986), (State brief at p. 14) involved the discharge of an at-will employee. This Court recognized "the Ohio Constitution delegates to the legislature the primary responsibility for protecting the welfare of employees." *Id.* at 103. Again, R.C. 9.75 does not address an employer-employee relationship, but rather the arms-length relationship between municipalities and contractors in negotiating public contracts.

The State places great weight on the *Lima* decision. *Lima* involved municipal residency requirements that had to be met by municipal employees to work for a municipal employer—the relationship established was directly between an employer and its employees. The broad analysis undertaken by the Court in *Lima* in construing R.C. 9.481 understood that such restrictions applied to all existing municipal employees and those who might become municipal employees. For the State to argue "Like the ordinances in *Lima*, the local-hiring ordinances at issue here favor local residents to other Ohioans' disadvantage" (State Brief at p. 15) clearly indicates a misapprehension of *Lima*. The former local employment residency laws did not "favor" anybody, but such

residency laws imposed a requisite for public employment—living in the municipality. Local employees were certainly not clamoring for such a residency "preference." R.C. 9.481 was universal in application for public employees faced with residency requirements. Unlike R.C. 9.481, as was reviewed by this Court in *Lima* within the context of Article II, Section 34, R.C. 9.75 does not apply to municipal employees and clearly does not provide for the welfare of all construction workers around the State.

The State argues (Brief at p. 17) "But if, as the record suggests, Cleveland residents were getting more work hours due to the ordinance [Fannie Lewis Law], then other Ohioans were getting fewer work hours due to the ordinance." The City studied the sad landscape of local Cleveland resident construction workers not getting hired by contractors for public improvement contracts funded by the City before the Fannie Lewis Law was enacted. The State speculates (State Brief at p. 18) concerning future decisions that might involve local workers leaving Cleveland, but neither the State nor the General Assembly have comments concerning the actual need identified by City Council to enact the Fannie Lewis Law—the City wanted a little fairness for its residents, providing a small threshold for increasing their comfort and general welfare. As the data included in the Facts above shows, the Contractors have been hiring Cleveland construction workers, but tellingly such hires represent little more than the 20% required by the City's Fannie Lewis Law. The City can also speculate as to what may happen to construction workers who live in Cleveland if the State's unwarranted preemption statute is allowed to stand—with the documented lack of hiring before 2003 probably being a good indicator.

The State's argument concerning "safety" (Brief at p. 19) is made without a shred of evidence having been presented to the courts that safety was an issue considered by the

General Assembly in passing H.B. 180. Is there a safety issue presented when Cleveland's ordinance allows any contractor to hire 80% of its workforce from anywhere? Contractors make choices to bid on public construction contracts with the City with the knowledge of the Fannie Lewis Law. Did the General Assembly overlook such safety factors in 2010 when it enacted R.C. §§ 153.013 and 5525.26 and effectively incorporated the Fannie Lewis Law into State public improvement contracts in Cleveland when the City had contributed $100,000 to the cost of the State administered project? If the State is truly concerned with what it considers "local escalation" (Brief at p. 19-20), then perhaps it should review what may actually constitute a valid "general law" addressing such issue. The meat cleaver styled preemption in R.C. 9.75 does not serve the "comfort" or "general welfare" of all construction workers. The State rather made its argument a little more clearly to the Eighth District when it argued "residency quotas create a zero-sum scenario between residents and other Ohioans." (States' Eighth District Merit brief at p. 22). Clearly, if the State takes such analysis seriously, the State is ostensibly arguing that R.C. 9.75 was enacted for the benefit of "other Ohioans" at the expense of workers living in Cleveland and other municipalities. The impact of R.C. 9.75 is clear, with the State dividing construction workers into two groups – those living in municipalities with laws like Cleveland's Fannie Lewis Law and those living elsewhere. The City is not debating economic policy as suggested by the State at page 20 of its brief, rather the City has challenged the General Assembly's attempt to strip away local self-governing authority by enacting a preemption that does not arise under the broad authority granted by Article II, Section 34, and as addressed below does not constitute a "general law." Where as in the present case the General Assembly misappropriates the

language of Article II, Section 34 concerning the "general welfare of all employees" to strip away home rule, the proper forum for the legal debate is indeed the "courthouse" and not the "statehouse" as suggested by the State. (Brief at p. 20).

The State's three suggestions why it believes the Eighth District's decision was in error are not supportable. To argue that the Eighth District did not recognize a meaningful distinction between this Court's decision in *Lima* and the General Assembly's passage of R.C. 9.75 is turning a blind eye to reality. The Eighth District recognized that "[u]nlike the statute involved in *Lima*, R.C. 9.75 does not relate to any residency requirement imposed as a condition of employment by employers upon public employees. Further, despite the General Assembly's representations expressed in H.B. 180, R.C. 9.75 does not relate to the right of an individual to choose where to live or a matter implicating the general welfare of all employees." *Id.* at ¶ 24. Clearly, *Lima* was addressing the required residence circumstance of all affected public employees in Ohio. A contractual requirement that a contractor bidding on a Cleveland funded construction contract hire 20% of the local labor is simply not a residency requirement, as was presented in *Lima,* that affects all potential construction workers. The reason for the Fannie Lewis Law and the general welfare it brings to workers living in Cleveland is real and documented. *Lima* does not apply seamlessly here as suggested by the State (Brief at p. 21). The employees addressed in *Lima* had no freedom of choice as to residency. The Fannie Lewis Law does not regulate residency, and as history shows only 20% or so of the construction jobs hired for local projects go to workers residing in Cleveland.

It is heartening to see the State admits that it is not arguing that "Ohio's employee-welfare power is unlimited." (State Brief at p. 22). Contrary to the State's

further arguments with the second numbered reason that it disagrees with the Eighth District (*Id*. at p. 21-22), R.C. 9.75 actually has no "plausible connection to employee comfort, health, safety, or welfare [of all employees]." For the reasons addressed above the decisions in *Lima, Pension Fund,* and *Rocky River* are not dispositive as each involved actual direct employer-employee relationships that are not presented in the analysis of R.C. 9.75. Contrary to the State's argument the Eighth District did provide a "workable reason for the restriction" it placed on the General Assembly's enactment of R.C. 9.75: See *Id*. at ¶ 26. Contrary to the State's speculation, the beliefs of any lawmaker that R.C. 9.75 was enacted under the expansive authority of Article II, Section 34 would not be "reasonable" given the language contained in R.C. 9.75.

That the Eighth District believed the Ohio Contractors' Association was behind the enactment of R.C. 9.75 is a fairly reasonable belief given the timing of the law and the District Court's dismissal of its constitutional claims against Akron and its local worker policy in 2014. *Ohio Contractor's Association v. Akron, supra.* However, the Eighth District was not focusing on that circumstance as the reason to find R.C. 9.75 unconstitutional, nor was the court applying the approach employed in *Lochner v. New York,* 198 U.S. 45 (1905) as suggested by the State at pages 11 and 24 of its Brief. Notwithstanding the State's unrelated citation to *Epic Sys. Corp. v. Lewis*, _U.S._, 200 L.Ed. 889, 911 (2018), the Eighth District was not substituting any preferred economic policies for those of the General Assembly. As noted above, the court of appeals was analyzing and concluding that the General Assembly "had no authority to enact R.C. 9.75 under Article II, Section 34."

The Eighth District's analysis and opinion well serve the State of Ohio by examining and opining as to the unconstitutional misapplication of Article II, Section 34 by the General Assembly in this matter. The case presents this Court with an opportunity to provide limits to prevent the General Assembly's misuse of the authority of Article II, Section 34 to limit the Home Rule Authority guaranteed by Article XVIII, Section 3.

Appellant State of Ohio's Proposition of Law No. 2

R.C. 9.75 satisfies home rule. Cleveland's ordinance is an exercise of police power designed to serve general-welfare interests by shifting work to local residents. The challenged law is a general law that counteracts the significant extraterritorial effects residency quotas have on Ohioans living outside the relevant local jurisdiction.

Appellee City of Cleveland's Position Re: Appellant's Proposition of Law No. 2

R.C. 9.75 is not a General Law and violates the Ohio Constitution by improperly attempting to infringe upon the City's Home Rule powers guaranteed to it and all other municipalities by Section 3, Article XVIII of the Ohio Constitution. The City's right to establish the terms of contracts to include reference to the requirements of its Fannie Lewis Law is a proper exercise of the City's powers of local self-government.

A. An Expressed Intention by the General Assembly to Preempt Will Not "Trump" the City's Constitutional Home Rule Authority In the Absence of Conflict with a General Law.

The Eighth District undertook a home rule analysis only after first concluding that R.C. 9.75 was not enacted pursuant to Article II, Section 34. The Eighth District allowed that "[a]ccordingly, we shall proceed to consider whether the statute unconstitutionally infringes upon the City's home-rule authority." *Id.*, ¶ 26. The Eighth District began its analysis recognizing:

> Municipalities derive their powers of self-government directly from Ohio's Home Rule Amendment, Ohio Constitution, Article XVIII, Section 3, which provides as follows:

> 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.

Id., ¶ 28, citing *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 8.[5] "The purpose of the Home Rule amendments was to put the conduct of municipal affairs in the hands of those who knew the needs of the community best, to-wit, the people of the city." *Northern Ohio Patrolmen's Benevolent Assn. v. Parma* (1980), 61 Ohio St.2d 375, 379, fn.1 (1980).

Municipalities were given the authority to adopt their own governing charters through Ohio Const. Art XVIII, Section 7 which establishes that "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government." On July 1, 1913, the city of Cleveland enacted a charter for local self-government. *City of Cleveland v. Riebe.*, 8th Dist. Cuyahoga No. 34889, 1976 WL 190965, *2 (July 29, 1976). The City's Charter provides authority for obtaining local public improvements by way of contract through the competitive bidding process. City Charter Section 167 "Public Improvements" provides in pertinent part:

> " Public improvements of all kinds may be made by the appropriate department, either by direct employment of the necessary labor and the purchase of the necessary supplies and materials, with separate accounting as to each improvement so made, *or by contract duly let to the lowest responsible bidder after competitive bidding*…" (emphasis added).

City Council is specifically authorized at Section 143 of the Charter to provide for construction contracts:

[5] This Court has recognized "[S]ection 3, [A]rt. 18, as complete a grant of power as the General Assembly has received in [S]ection 1, Art. 2." *State ex rel. Zielonka v. Carrel* (1919), 99 Ohio St. 220, 227.

> "The Council *shall have power by ordinance to provide for the construction, reconstruction, repair and maintenance by contract* or directly by the employment of labor, *of all things in the nature of local improvements,…"* (emphasis added).

The Charter further establishes at Section 155 the Executive's authority to enter into contracts for public improvements:

> When the Council shall have passed an ordinance directing that an improvement be made, to be paid for in whole or in part by special assessments, the Mayor shall through the appropriate department or office, either directly by the employment of labor or *by entering into a contract therefor, as may be determined by the Council, cause the improvement to be made*. (emphasis added).

Ohio has consistently recognized that the power of home rule, "expressly conferred upon municipalities," cannot be withdrawn by the General Assembly. *Fondessy Ents., Inc. v. Oregon*, 23 Ohio St.3d 213, 215, 492 N.E.2d 797 (1986), citing *Akron v. Scalera*, 135 Ohio St. 65, 66, 19 N.E.2d 279 (1939). See also *West Jefferson v. Robinson*, 1 Ohio St.2d 113, 205 N.E.2d 382, (1965), paragraph one of the syllabus. The enactment and implementation of the Fannie Lewis Law was to govern certain terms incorporated into City construction contracts.

The authority to make public improvements is included within the City's powers of local self-government. See e.g. *Village of Perrysburg v. Ridgway*, 108 Ohio St. 245, 140 N.E. 595, 1 Ohio Law Abs. 484 (1923), Syllabus by Court ("The power to establish, open, improve, maintain and repair public streets within the municipality, and fully control the use of them, is included within the term 'powers of local self-government.'"). City Council's enactment of the Fannie Lewis Law addressed the terms of public construction contracts and was an exercise of local self-government and was not the exercise of the City's police power. In analyzing home rule within the context of local-

state authority this Court distinguishes the exercise of local self-government from the exercise of local police power:

> The first step in a home-rule analysis is to determine "whether the matter in question involves an exercise of local self-government or an exercise of local police power." *Twinsburg v. State Emp. Relations Bd.* (1988), 39 Ohio St.3d 226, 228, 530 N.E.2d 26, overruled on other grounds, *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 20, 539 N.E.2d 103. *If an allegedly conflicting city ordinance relates solely to self-government, the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction.*

American Fins. Servs. Assn. v. Cleveland, 112 Ohio St.3d 170, 2006-Ohio-6043 ("*AFSA*") at ¶ 23 (emphasis added). An expressed intention by the General Assembly to preempt will not "trump" the City's constitutional home rule authority:

> A statement by the General Assembly of its intent to preempt a field of legislation is a statement of legislative intent and may be considered to determine whether a matter presents an issue of statewide concern, but does not trump the constitutional authority of municipalities to enact legislation pursuant to the Home Rule Amendment, provided that the local legislation is not in conflict with general laws.

AFSA, ¶ 31; see also *Mendenhall v. Akron*, 117 Ohio St.3d 33, 37, 2008-Ohio-270, 881 N.E.2d 255, 260, ¶ 18 (2008).

B. The City's Authority to Enter Construction Contracts for the Purpose of Obtaining Public Improvements is a Power of Local Self-Government.

The State's attempt with R.C. 9.75 to preempt the local self-government authority exercised by the City with the Fannie Lewis Law unconstitutionally seeks to intrude into the City's home rule authority. A City's authority to contract arises as a power of local self-government under the Home Rule Amendment. *Dies Elec. Co. v. City of Akron*, 62 Ohio St.2d 322, 326 405 N.E.2d 1026 (1980), see also *Schwartz v. City of Youngstown*, 27 Ohio Law Abs. 229, 230 (7th Dist.1938) (Finding municipal authority to contract is a

power of local self-government equal to State authority to contract). The Eighth District correctly analyzed in considering the State's appeal:

> In *Dies*, the court determined that a charter city could, under the Home Rule Amendment, enact by ordinance retainage provisions for a contract for improvements to municipal property that differed from the retainage provisions of a state statute. *Id.* at 327, 405 N.E.2d 1026. The court stated: "[I]t is well established that this charter city had the power to contract and that the terms of its ordinance should be considered a part of that contract." *Id.* at 326–327, 405 N.E.2d 1026; *see also Trucco Constr. Co. v. Columbus*, 10th Dist. Franklin No. 05AP-1134, 2006-Ohio-6984, 2006 WL 3825262, ¶ 24 (finding city's procedure for letting of contracts was an exercise of local self-government and conflicting state statute relating to letting of contracts was inapplicable); *Greater Cincinnati Plumbing Contrs. Assn. v. Blue Ash*, 106 Ohio App.3d 608, 613–614, 666 N.E.2d 654 (1st Dist.1995) (finding city's design-build bidding process for public improvements was a proper exercise of the city's local self-government under the Home Rule Amendment).
>
> We agree with the City's position. We find the Fannie Lewis Law is an exercise of local self-government in the form of terms or provisions of a contract incorporated into City construction projects.

City of Cleveland v. State, 2017-Ohio-8882, ¶¶ 34-35.

C. The Fannie Lewis Law Establishes Terms of Contract and Is Not the Exercise of Police Power.

The State incorrectly characterizes the Fannie Lewis Law as constituting a police law (See State's Brief at pp. 25-28) because the City's ordinance was enacted to improve opportunities for workers living in Cleveland to get hired by contractors for public construction jobs contracted for by the City. In arguing that the City's Fannie Lewis Law is an exercise of the City's police power (see State's Brief at pp. 25-28), the State cites to *Marich v. Bob Bennett Construction* Company, 116 Ohio St.3d 353, 2008 Ohio-Ohio-92, and its reference to police power as seeking to "*protect* the public health, safety or morals, or the general welfare of the public." *Id.* at ¶ 11. (emphasis added). The trial court in granting a permanent injunction rejected such argument recognizing:

> [W]hile the Fannie Lewis Law benefits City residents, it is not a use of the City's police power. It does not protect the general welfare of the public. Rather, it is a job creation tool exercised by the City when City funds are expended. The Fannie Lewis Law is an exercise of local self-government to create contracting requirements within the municipality of Cleveland.

(State Appendix, Exhibit B, Judgment Entry, at p.4.)

The decisions cited by the State, relate to direct regulation of conduct, and do not address the terms of a contracts entered into by the City to obtain the construction services of an independent contractor and they are obviously distinguishable. The Fannie Lewis Law does not regulate traffic as was addressed in *Marich*; the City is not regulating local licensing requirements to be met by private security officers as was addressed in *Ohio Assn. of Private Detective Agencies, Inc. v. N. Olmsted*, 65 Ohio St.3d 242, 1992-Ohio-65, 602 N.E.2d 1147 (1992); the City is not regulating the actions of cable companies as addressed in *Vernon v. Warner Amex Cable Communications, Inc.*, 25 Ohio St.3d 117, 495 N.E.2d 374 (1986); nor is the City restricting the individual carry of concealed firearms in public parks as was addressed in *Concealed Carry Inc. v. City of Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605. The Fannie Lewis Law establishes at C.C.O. 188.02(b) that construction contracts include "the erection, rehabilitation, improvement, alteration, conversion, extension, demolition or repair of improvements to real property…" and the law does not regulate conduct.

Contrary to the State's arguments (State Brief at pp. 26-27), there is no issue of "statewide concern" presented in the exercise of the City's Fannie Lewis Law. The contract terms resulting from adoption of the City's Fannie Lewis Law relate solely to local City construction projects. Statewide concern only arises when a local regulation affects the general public of the state as a whole more than it does local inhabitants:

> Thus, 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 Electric Illuminating Co. v. Painesville (1968), 15 Ohio St.2d 125, 129, 239 N.E.2d 75 (1968). Cleveland's local self-governing authority to contract for public improvements does not affect the interests of the general public of the State as a whole more than it affects local City inhabitants. The State's argument concerning "significant extraterritorial effect," given what is at issue (local public improvements), (State Brief at p. 27) is simply not credible. As noted above, the City's contractual term that 20% of construction hours be performed by workers living in Cleveland uses a figure that is proportionately less than the City's percentage of the population in Cuyahoga County itself. It is evident that the Fannie Lewis Law does not affect the general public of the State as a whole more than it does local inhabitants. Moreover, District Court Judge Lioi in rejecting the OCA's Federal and State constitutional challenges to Akron's construction policy determined that Akron was addressing legitimate government issues:

> "(1) 'returning and reinvesting' to the taxpayers of Akron some of the tax money that will finance this public works project; and (2) 'reducing local unemployment and combating declining incomes' of its residents… [are] *two legitimate government interests* [that] are likely to pass constitutional muster.

Ohio Contractors Ass'n v. City of Akron, supra at *5. Cleveland's Fannie Lewis Law was enacted 15 years ago to serve the same legitimate local self-government interests.

Unlike the ordinances reviewed by this Court in in *Clyde* and *Ohio Assn. of Private Detective Agencies* (see discussion in State's Brief at p. 27) the Fannie Lewis Law is not "curbing… regulated behavior for the general welfare of a municipality's citizens." The State's further citation (State's Brief at p. 28) to penalties established by

the city of Clyde relating to the carry of firearms for the purpose of arguing a false equivalence, to wit that with the Fannie Lewis Law Cleveland is "'regulat[ing] behavior for the general welfare of [Cleveland's] citizens' See *Clyde,* 2008-Ohio-4605 ¶ 36'" is mistaken. Clyde's ordinance was an obvious police law regulating individual conduct to protect the public. The Fannie Lewis Law addresses terms of contract and potential agreed upon penalties for a contractor's non-compliance with terms of the contract and does not regulate individual conduct or otherwise "protect" the general public.

In the instant matter C.C.O. sections 188.02(a) and 188.05 together require that each construction contract will establish that a contractor who fails to meet the resident construction worker hours requirement (20%) shall pay the City one-eighth of one percent (0.125%) of the final total amount of the Construction Contract as a contract penalty for each percentage by which it fails to meet the requirement. Assuming a contractor did not hire a single worker residing in Cleveland, the maximum contract recognized monetary penalty would be 2.5 percent. In her two years (as of 2016) the City's OEO Director Dr. Melissa Burrows testified no contractor has suffered an adverse consequence form not meeting the 20 percent. (Transcript of Proceedings at p. 49). Each contractor bidding on a City funded construction contract would well understand the City is deemed to have been damaged by non-compliance with the terms of the contract to which it had agreed. Such percentage related assessment should be viewed as an enforceable liquidated-damages contractual provision:

> We reaffirm that Ohio law requires a court, when considering a liquidated-damages provision, to "examine it in light of what the parties knew at the time the contract was formed." *Jones,* 112 Ohio St. 43, 146 N.E. 894, at paragraph one of the syllabus; *Miller v. Blockberger,* 111 Ohio St. 798, 146 N.E. 206 (1924), paragraph one of the syllabus; *Sec. Fence Group,* 2003-Ohio-5263, 2003 WL 22270179, ¶ 11. *Accord Priebe & Sons,* 332

> U.S. at 412, 68 S.Ct. 123, 92 L.Ed. 32. "If the provision was reasonable *at the time of formation* and it bears a reasonable (not necessarily exact) relation to actual damages, the provision will be enforced." (Emphasis added.) *Lake Ridge Academy,* 66 Ohio St.3d 376 at 382, 613 N.E.2d 183.

Boone Coleman Constr., Inc. v. Piketon, 145 Ohio St.3d 450, 2016-Ohio-628, 50 N.E.3d 502, ¶ 35 (2016). Clearly, all parties to the City's construction contracts understand the terms incorporated therein and the City's governing endeavor to improve the general welfare of workers living in Cleveland.

As noted above, the City Council allowed in enacting the Fannie Lewis Law that "the employment of City residents on construction projects funded, in part or in whole, with City assistance will help alleviate unemployment and poverty in the City." Reducing local unemployment is a legitimate government interest. *Ohio Contractors Ass'n v. City of Akron*, *5. Here, the City of Cleveland is ensuring a local governmental interest through adoption of a law addressing local construction contract language that that has the added benefit of having expended local city funds invested back into the local community. It is long recognized that a City's authority to make public improvements is indeed included within the municipal powers of local self-government. See e.g. *Village of Perrysburg v. Ridgway*, 108 Ohio St. 245, 140 N.E. 595, 1 Ohio Law Abs. 484 (1923), Syllabus by Court ("The power to establish, open, improve, maintain and repair public streets within the municipality, and fully control the use of them, is included within the term 'powers of local self-government.'"). The Fannie Lewis Law establishes at C.C.O. 188.02(b) that construction contracts include "the erection, rehabilitation, improvement, alteration, conversion, extension, demolition or repair of improvements to real property…" Such work is contemplated as a function of local self-government.

In rejecting the State's argument that the Fannie Lewis Law was police law, the Eighth District concluded:

> We also reject the State's arguments that the ordinance has significant extraterritorial effects and imposes a monetary penalty for noncompliance. The Fannie Lewis Law is not a residency law. As the trial court noted:
>
> [T]he Fannie Lewis law does not contain any residency requirements for employees of the political subdivision, nor does the law require the City's contractors to set any resident requirements for their employees; instead the Fannie Lewis Law sets thresholds for those persons assigned to work on public projects. These workers may or may not be employees of those businesses who contract with the city. There is no condition to employment or contract that the workers for the construction company reside in any specific area of the state.
>
> The record reflects that the City enacted the Fannie Lewis Law to address local poverty and unemployment concerns. Cleveland City Council understood that "the employment of City residents on construction projects funded, in part or in whole, with City assistance will help alleviate unemployment and poverty in the City." Comparable to the case in *Dies*, the City enacted by ordinance provisions or terms associated with public construction contracts. Further, it was within the City's contracting authority to include a damages provision for noncompliance with the contractual terms or provisions.
>
> Upon review, we conclude that the Fannie Lewis Law was not an exercise of police power. We agree with the trial court's determination that "[t]he Fannie Lewis Law is an exercise of local self-government to create contracting requirements within the municipality of Cleveland."

City of Cleveland, supra ¶¶ 36-38. The Eighth District correctly held that Fannie Lewis Law is a proper exercise of the City's powers of local self-government under Ohio's Home Rule Amendment and not subject to State preemption.

D. The City Prevails as a Matter of Law Even Should the Fannie Lewis Law be Considered and Analyzed as an Exercise of the City's Police Power. R.C. 9.75 Does Not Qualify as a General Law as Would be Required to Displace the Fannie Lewis Law.

R.C. 9.75 improperly seeks to preempt local authority to contract and does not qualify as a general law that takes precedence over local home rule authority. The Eighth

District's analysis correctly established that R.C. 9.75 does not meet the general law test set by this Court with *Canton v. Ohio*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963. The trial court analyzed whether R.C. 9.75 would qualify as a "general law" under the Home Rule Amendment. The trial court conducted a general law analysis per the test established in *Canton* and concluded that even should the Fannie Lewis Law be considered 'an exercise of police power rather than of local self-government", the statute [R.C. 9.75] is not a general law as determined by the Ohio Supreme Court in *City v. Canton, supra*." (State Appendix, Exhibit 3, Judgment Entry, at p. 4).

Police-power ordinances "protect the public health, safety, or morals, or the general welfare of the public." *Clyde*, supra at ¶ 30 quoting *Marich, supra* at ¶11.There is no question but that the State and municipalities can exercise "the same police power." *Greenburg v. Cleveland* (1918), 98 Ohio St. 282, 286. "Thus, a municipality may regulate in an area ….whenever its regulation is not in conflict with the general laws of the state." *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006 -Ohio- 6573, ¶ 19, citing *Linndale v. State* (1999), 85 Ohio St.3d 52, 54, 706 N.E.2d 1227.

With R.C. 9.75 and prohibitions therein on local authority that begin at paragraph (B) with " No public authority shall require a contractor …", the State is attempting to withdraw and preempt home rule authority contrary to the Constitution. In *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008 -Ohio- 270, at ¶ 38 this Court rejected preemption as an argument for negating home rule authority:

> Some of the parties advance a preemption argument, claiming that the state has intended to completely occupy the field of traffic regulation, thereby preempting any action by municipalities. Such a home rule analysis has never been adopted by a majority of this court, and we decline to apply such an analysis today.

Simply put, an expressed intention by the General Assembly to preempt will not "trump" the City's constitutional home rule authority. See also *Cincinnati v. Baskin*, 112 Ohio St.3d 279, 2006-Ohio-6422:

> Because the Constitution is immutable, pronouncements by the General Assembly regarding preemption or statewide concern, while instructive in considering legislative intent, are powerless to affect the language of the Constitution that empowers municipalities to enact legislation, provided such legislation is not in conflict with a general law.

Baskin at ¶ 61 (concurring opinion of J. O'Donnell).

Only where a state statute is determined to be a "general law" will an ordinance be required to yield to the state statute. *Canton, supra* at ¶ 9.[6] Shortly after the 1912 Constitutional Convention it was held that a statute that did not meet the criteria of a "general law" would be unconstitutional and void where the State was attempting to prohibit local authorities from exercising their police authority under Section 3 of Article XVIII of the Constitution of Ohio. *Freemont v. Keating* (1917), 96 Ohio St. 468, syllabus. Ohio statutes attempting to limit municipal legislative authority that fail to qualify as a general law, "violate the Home-Rule Amendment, Section 3, Article XVIII, Ohio Constitution and, as such, must be struck down as unconstitutional." See *Canton*, supra at ¶¶10-11. The Ohio Supreme Court has recognized that *Canton* "summarize[s]

[6] The Court in *Fuldauer v. City of Cleveland* 32 Ohio St.2d 114 (1972) established a readily identifiable balance between the authority of the General Assembly to invoke Article II, Section 34 in support of laws purportedly providing for the general welfare of employees and the authority provided to municipalities by the Home Rule Amendment to the Ohio Constitution.

> 4. In the absence of conflict with general law, Section 34, Article II of the Ohio Constitution, has no application to a wage formula established by municipal charter and carried out annually by ordinance of council.

Id. at ¶ 4 of Syllabus. As noted R.C. 9.75 is not properly enacted pursuant to Article II, Section 34, and further as discussed below does not qualify as a general law.

the test for determining whether a municipal ordinance is displaced by a state measure." *Baskin,* at ¶ 9.

The *Canton* standard for determining when a local ordinance would have to defer to a state enactment involves an initial three part test:

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

Admittedly, the City's ordinance and R.C. 9.75 are in conflict. Even assuming for argument's sake the Fannie Lewis Law is an exercise of the police power under the second part of the test, the final and determinative prong of the *Canton* analysis requires the court to analyze whether the statutory restriction on local authority included in R.C. 9.75 constitutes a "general law" as such term has come to be defined.

The Eighth District applied the four-part general-law test set forth in *Canton*:

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

Cleveland, supra at ¶ 39 citing *Canton,* at syllabus. A statue failing "to meet all of these conditions" would not be a general law and "must yield to the municipal …ordinance in question.", *Canton* ¶ 21. A statue failing "to meet all of these conditions" would not be a general law and "must yield to the municipal …ordinance in question." *Id.* The state laws being challenged in *Canton* attempted to limit municipal authority to enact certain police laws and were struck down by the Court as being in violation of Article XVIII, Section 3 of the Ohio Constitution when the state enactments failed to meet all four parts

of the general law test identified in the decision. *Id.* at ¶¶ 37-39. Both the trial court and the Eighth District determined that R.C. 9.75 failed the first, third and fourth parts of the test.

(1) R.C. 9.75 Fails the First Part of the *Canton* Analysis as It is Not Part of a Statewide and Comprehensive Plan.

In *Dayton v. State of Ohio*, 157 Ohio App.3d 736, 2004-Ohio-3141 the Court defined "comprehensive" for purposes of the home rule analysis being undertaken as: "Comprehensive" means "covering a matter under consideration, completely accounting for or comprehending all or virtually all pertinent considerations." *Dayton*. at ¶ 89, citing Webster's Third New International Dictionary (1981) at 467. The Eighth District found

> "that R.C. 9.75 is not part of a statewide and comprehensive legislative enactment. It is not part of a comprehensive plan or scheme, but rather aims to preempt and restrict local authority in the establishment of the terms of contracts for public improvements. This is a matter embraced within the field of local self-government to which R.C. Chapters 153 and 5525 do not apply. *See Dies*, 62 Ohio St.2d at 326–327, 405 N.E.2d 1026."

City of Cleveland at ¶ 41. R.C. 9.75's preemption is the antithesis of "comprehensive."

In analyzing the State laws being challenged in *Canton* the Court concluded there was no comprehensive plan or scheme, finding "the state does not have a statewide zoning scheme, nor does the state have a comprehensive plan or scheme for the licensing, regulation, or registration of manufactured homes." *Id.* at ¶ 24. In *American Fins. Servs. Association* ("*AFSA*") the Court upheld the statutory limitations on local authority established in R.C. § 1.63, within the context of the City's local predatory lending laws, but only after construing and determining that there was a comprehensive scheme of laws governing lending in Ohio. *Id*. at ¶ 33.

The State's reliance on the Ohio Supreme Court's decision in *Cleveland v. State*, 128 Ohio St.3d 135, 942 N.E.2d 370, 2010 -Ohio- 6318 upholding the restriction on local authority contained in R.C. 9.68 in the field of certain firearm regulations is distinguishable and misplaced. In the firearm matter this Court identified multiple state laws that the Court felt demonstrated the comprehensiveness of state laws governing firearms, the Court concluded "that R.C. 9.68 is part of a comprehensive statewide legislative enactment." *Id.* at ¶ 17.

The State's argument that R.C. Chapters 153 and 5525 establish a statewide approach governing public construction and contracting is not well taken and at odds with the Home Rule Amendment and the Ohio Supreme Court's decision in *Dies*: "that work executed on a contract for the improvement of municipal property is a matter embraced within the field of local self-government." *Id.* at 327, see also *Trucco Constr. Co. v. Columbus,* 10th Dist. No. 05AP-1134, 2006-Ohio-6984 ("We further hold that appellee has exercised its Home Rule power to formulate its own procedure for letting of contracts and R.C. § 153.12 is inapplicable herein").

The repeal of former statutes R.C. 153.013 and R.C. 5525.26 (addressed above in the Facts) do not indicate, as suggested by the State, that R.C. 9.75 has been placed into a comprehensive scheme or that the State with the enactment of R.C. 9.75 the General Assembly was suggesting, much less requiring, that R.C. Chapters 153 and 5525 are now governing local authority to contract. The two repealed laws actually incorporated local contracting provisions, where applicable, into state contracting requirements and did not signal that Chapters 153 and 5525 were suddenly to be considered a comprehensive scheme that displaced the authority of Article XVIII, Section 3.

(2) R.C. 9.75 Fails the Third Part of the *Canton* General Law Analysis by Improperly Attempting to Limit Municipal Legislative Authority.

The trial court concluded that R.C. 9.75 "was undertaken to limit Home Rule authority as it relates to construction contracts." (State Appendix, Exhibit 3, Judgment Entry at p. 5). The Eighth District concluded:

> We also find that R.C. 9.75 does not set forth a police, sanitary, or similar regulation and only serves to limit the legislative power of a municipal corporation. The Supreme Court of Ohio has held that
>
> > "the words 'general laws' as set forth in Section 3 of Article XVIII of the Ohio Constitution means [sic] statutes setting forth police, sanitary or similar regulations and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations."
> > *Canton*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 15, quoting *W. Jefferson v. Robinson*, 1 Ohio St.2d 113, 205 N.E.2d 382 (1965), at paragraph three of the syllabus; *see also Linndale v. State*, 85 Ohio St.3d 52, 54–55, 706 N.E.2d 1227 (1999). The very language of R.C. 9.75 reflects an intent to preempt a public authority's exercise of local self-government in establishing the terms of its public improvement contracts, by providing: "No public authority shall require a contractor * * *."

Id. at ¶ 42.

The power of home rule, being "expressly conferred upon municipalities," cannot be withdrawn by the General Assembly. *Fondessy*, supra 23 Ohio St.3d at 215. Under *Canton* a statute must set forth police, sanitary or similar regulations rather than simply granting or limiting legislative power. There can be no other way of looking at the language of R.C. 9.75 than that concluded by the trial court:

> The statute provides no police, sanitary, or similar regulations. After more than a decade of successful application of the Fannie Lewis Law, the State is attempting to abrogate the City's self rule through the passage of H.B. 180 [R.C. 9.75].

(State Appendix, Exhibit 3, Judgment Entry at p. 5). In *Canton* the Court's syllabus recognized as previously held in *West Jefferson v. Robinson* (1965), 1 Ohio St.2d that:

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

In *Linndale, supra*, the Court reiterated concerning attempted limits and restrictions on local authority:

> As the trial court properly found, R.C. 4549.17 is "simply a limit on the legislative powers of municipal corporations to adopt and enforce specified police regulations." The statute before us is not a part of a system of uniform statewide regulation on the subject of traffic law enforcement. It is a statute that says, in effect, certain cities may not enforce local regulations; precisely the type of statute *West Jefferson* denounced. Moreover, this enactment does not prescribe a rule of conduct upon citizens generally as required by this court. See *Garcia, supra.*
>
> Because R.C. 4549.17 is not a general law, it unconstitutionally impinges on the home-rule powers of the affected municipalities.

Id. 85 Ohio St.3d at 55. The State incorrectly tries to plug the decisions in *Clyde* and *Clermont Environmental Reclamation Co. v. Wiederhold,* 2 Ohio St.3d 44 (1982) into the *Canton* analysis here. These cases did not involve mere preemptions on municipal home rule authority but involved regulatory schemes this Court had recognized as being comprehensive in scope. By contrast, R.C. 9.75 is nothing more than a preemption on local authority and fails the third prong of the *Canton* general law test.

(3) R.C 9.75 Fails the Fourth Part of the Canton Analysis and Does Not Prescribe a Rule of Conduct Upon Citizens Generally.

The fourth element of the requisite *Canton* analysis mandates that a general law prescribe a rule of conduct upon citizens generally. The trial court concluded that R.C.

9.75 "fails to proscribe [sic] a general rule of conduct for citizens across the state." (State Appendix, Exhibit 3, Judgment Entry at p. 5). Similarly, the Eighth District concluded:

> Additionally, we find the statute does not prescribe a rule of conduct upon citizens generally. A statute that merely imposes a limitation upon municipal legislative bodies is not a general law because the statute applies to municipal legislative bodies and does not prescribe a rule of conduct upon citizens generally. *Canton* at ¶ 34–36. As found by the trial court: "[R.C. 9.75] fails to [prescribe] a rule of conduct for citizens across the state. Instead, it [prescribes] requirements that municipalities must follow when contracting with construction companies. There is no text in H.B. 180 that is directed toward employees or contractors."

City of Cleveland, supra at ¶ 43.

The Ohio Supreme Court recognized in *Canton* that a statute that merely limits a municipality's legislative authority, fails to prescribe a rule of conduct upon citizens generally "because * * * the statute applies to municipal legislative bodies, not to citizens generally." *Canton*, supra at ¶ 36, citing *Linndale, supra* and *Youngstown v. Evans* (1929), 121 Ohio St. 342, 345. The Court had explained:

> In *Youngstown v. Evans* (1929), 121 Ohio St. 342, 168 N.E. 844, this court considered an ordinance prohibiting transportation of intoxicating beverages that provided different penalties than a state statute for the same offense. We held that the statute in question was "not a general law in the sense of prescribing a rule of conduct upon citizens generally. It is a limitation upon law making by municipal legislative bodies." *Id.* at 345, 168 N.E. 844.

Canton at ¶ 34. "Because a municipal corporation's authority to regulate…comes from the Ohio Constitution, a statute that …purports only to limit this constitutionally granted power is not a general law." *Linndale* at p. 55.

The State's attempt (State Brief at p.32) to read a rule of conduct on citizens into R.C. 9.75 by citation to *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 167 N.E. 158, 7 Ohio Law Abs. 349 (1929) and "*Cleveland Firearm*, 2010-Ohio-6318" is not supported.

Schneiderman involved a direct conflict police law analysis where State traffic laws existed that regulated speed and private conduct by individuals on the highways:

> General laws have been enacted regulating the manner of driving, and particularly the speed of automobiles upon the roads and highways of the state. These laws are safety regulations enacted in the interest of, and for the protection of, the public, and they definitely fix and prescribe the standard of care that must be exercised in the operation of automobiles throughout the state.

Id. at 84-85. Nothing similar is presented in R.C. 9.75. As to "*Cleveland Firearms*" the Supreme Court upheld the language of R.C. 9.68 only after determining the laws governing firearms to be comprehensive. *Cleveland v. State*, 128 Ohio St.3d 135 at ¶ 29:

> The court of appeals held that R.C. 9.68 does not prescribe a rule of conduct upon citizens generally but instead limits lawmaking by municipal legislative bodies. However, we note again that the court of appeals erred in considering R.C. 9.68 in isolation rather than as part of Ohio's comprehensive collection of firearm laws. In *Am. Fin. Servs.* and *Mendenhall*, this court looked to other statutes regulating the same subject to determine whether the particular statute in question prescribed a rule of conduct upon citizens generally. See *Am. Fin.*, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776, ¶ 36, and *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶ 27. Thus, when we consider the entire legislative scheme, as we must, we conclude that when interpreted as part of a whole, R.C. 9.68 applies to all citizens generally.

R.C. 9.75 is not part of any such scheme. The trial court noted that "[t]here is no text in H.B. 180 [R.C. 9.75] that is directed toward employees or contractors." (Judgment Entry at p. 5). The City's Fannie Lewis Law does not regulate where anyone lives nor does it regulate who chooses to bid on City contracts; and the State's rule of conduct arguments are not supported. R.C. 9.75 does not prescribe any rule of conduct upon citizens and the specific preemption language is without question solely seeking to place restrictions and limits on the City's home rule authority to enact local laws that are not in conflict with

general laws of the State. R.C. 9.75 was not enacted pursuant to the actual authority of Article II, Section 34, but also fails to qualify as a general law under the *Canton* analysis.

IV. CONCLUSION

The Eighth District Court of Appeals correctly held that R.C. 9.75 as passed by the General Assembly with H.B. 180 did not arise under the authority of Article II, Section 34 of the Ohio Constitution. Simply put, R.C. 9.75 does not provide for the "comfort, health, safety and general welfare of all employees" who may be hired by independent contractors to work on public improvement contracts funded by municipalities or other affected public authorities. This misuse of Article II, Section 34 provides the Court with an opportunity to examine the legitimate parameters associated with a proper exercise of the broad authority contained in Article II, Section 34. Mere reference to the provision by the General Assembly for the purpose of enacting legislation that seeks to preempt long-standing municipal home rule authority should not be tolerated as a matter of law. Under the separate *Canton* "general law" analysis, it is further evident that the State's attempted preemption is unconstitutional. R.C. 9.75 is not a general law and is unsupported by reference to Article II, Section 34. The City requests that this Court uphold the Eighth District's reasoned and well-taken decision.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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