IN THE SUPREME COURT OF OHIO

City of Cleveland,	:	
	:	
Plaintiff-Appellee,	:	Supreme Court Case No. 2018-0097
	:	
v.	:	On Appeal from the
	:	Cuyahoga County Court of Appeals,
State of Ohio,	:	Eighth Appellate District,
	:	Case No. 105500
Defendant -Appellant.	:	

AMICUS CURIAE AIA OHIO MEMORANDUM IN SUPPORT OF APPELLANT STATE OF OHIO

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I. Amicus Curiae AIA Ohio

AIA Ohio, a society of the American Institute of Architects, represents a membership of approximately 2,000 Ohio licensed architects and architectural interns, working through seven local chapters state-wide, to impact public policy through its government affairs program.

AIA Ohio's program concentrates on helping to produce positive legislative and governmental agency rule changes for the architectural profession by addressing such issues as professional liability, building codes, economic development, architect selection procedures, licensing requirements, and public works appropriations. AIA Ohio establishes priorities each year so that resources are utilized most effectively.

The American Institute of Architects was organized in 1857 as a membership organization for professional registered architects. The objects of the AIA is to organize and unite in fellowship the membership of the architectural profession; to promote the aesthetic, scientific, and practical efficiency of the profession; to advance the science and art of planning and building by advancing the standards of architectural education, training and practice; to coordinate the building industry and the profession of architecture to ensure the advancement of the living standards of people through their improved environment; and to make the profession of ever-increasing service to society.

II. Statement of the Case and Facts

Amicus AIA Ohio adopts the Statement of the Case and Facts as stated in Defendant-Appellant State of Ohio's Merit Brief.

III. Argument in Support of the Propositions of Law

Proposition of Law No. I: 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.

Proposition of Law No. II: 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.

Cleveland's Ordinance Chapter 188 at issue in this case is known as the "Fannie M. Lewis Cleveland Resident Employment Law," named after the former Cleveland Ward 7 City Council Member and passed in 2004. Encyclopedia of Cleveland History, Case Western Reserve University, https://case.edu/ech/articles/l/lewis-fannie.

The Ordinance mandates that each prime Construction Contract require that "one (1) or more [Cleveland] Residents perform twenty percent (20%) of the total Construction Worker Hours ("Resident Construction Worker Hours") performed under the Construction Contract." Section 188.02(a).

This particular Cleveland residency requirement for Construction Contracts does not apply to "professional services." Nevertheless, given 247 Ohio cities and the

variations of local residency requirements over the years, architects share Appellant State's concern along with construction employers that requiring a quota of local residents is bad precedent toward requiring the same of design professionals. Finding the statute broadly unconstitutional on a narrow reading that the local ordinance merely is job creation is to ignore the statewide experience underpinning the legislation.

In debating House Bill 180 in 2016 to enact current R.C. 9.75 (originally R.C. 9.49) prohibiting such residency requirements for construction contracts, representatives of the Cities of Akron, Columbus, Dayton, Lima, and Youngstown testified on June 9, 2015 in opposition to House Bill 180 based on their own variation of using local residency as a requirement for construction projects, including for design professionals.

In passing R.C. 9.75 the General Assembly intended the statute to supersede local Home Rule authority as "providing for the comfort, health, safety and general welfare of all employees", Section 34, Article II, Ohio Constitution, as an exercise of police power and as a general law, Section 3, Article XVIII, Ohio Constitution. We know of the General Assembly's intent to pass the legislation not subject to municipal Home Rule provisions, because the legislation contains a statement of such intent. House Bill 180, Sections 3 and 4, as cited by the Court of Appeals below, *Cleveland v. State*, 2017-Ohio-8882, ¶¶7 and 8. This Court can consider legislative intent, R.C. 1.49.

The Home Rule standard generally is as follows:

> Nevertheless, a municipal ordinance must yield to a state statute if "(1) the ordinance is an exercise of the police power, rather than of local

> self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute." *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶ 17.

Dayton v. State, 151 Ohio St.3d 168, 2017-Ohio-6909, 87 N.E.3d 176 [red light cameras].

Regardless of Home Rule authority, if the General Assembly adopted the statute pursuant to Section 34, Article II, Ohio Constitution, then the provisions in House Bill 180 "override any conflicting law of a political subdivision, including residency requirements imposed by municipalities pursuant to the Home Rule Amendment…." *Lima v. State*, 122 Ohio St.3d 155, 2009-Ohio-2597, 909 N.E.2d 616, ¶1.

House Bill 180 should survive under either analysis.

In testimony on House Bill 180 before the Ohio Senate Government Oversight and Reform Committee, the legislation's sponsor expressed direct concern for architects when he noted that "The purpose of this legislation is to protect taxpayer dollars by prohibiting the state and local governments from imposing residency requirements on contractors and design professionals." [emphasis added.] Representative Ron Maag, 62nd House District (Warren County), October 21, 2015, attached hereto as Exhibit A.

House Bill 180's sponsor relied upon this Court's precedent in his testimony: "The Ohio Supreme Court ruled in 2009 in *Lima v. State* that in spite of Home Rule, cities cannot require their employees… to reside in the city of employment because it is a violation of that employee's protected rights." Enumerated paragraph 1, page 1, id.

The sponsor cited eight additional statewide, public concerns to be avoided by

enactment of the law, including mere displacement of existing workers instead of job creation, and an unfair exemption for out-of-state competitors. Id.

The Court of Appeals usurps the legislative prerogative of deciding policy in chastising the American Council of Engineering Companies of Ohio for seeking to insure equal access for engineering contracts in contrast to the local residency bar. *Cleveland v. State*, 2017-Ohio-8882, ¶25.

Inconsistent even with its own local residency policy, out-of-state contractors are exempt from Cleveland's residency requirement. Cleveland City Ordinances Section 188.01(c); *Cleveland v. State*, 2017-Ohio-8882, ¶2. The City's stated purpose of employing local residents is undermined by this arbitrary exception, creating a competitive advantage for work hours performed out-of-state by non-Ohioans. Of concern to Ohio's licensed architects: 151 Ohio registered architects reside out-of-state. https://elicense.ohio.gov/OH_VerifyLicense. The Court is requested to take judicial notice of these state agency statistics, publicly available and verifiable. Evid. R. 201.

The General Assembly's stated intent is not the only manner by which we know that the statutory purpose is an exercise of police power and is a general law, because Ohio law also regulates professional design practice in many other ways. A residency requirement interferes with several state laws designed to insure the professionalism of the practice of architecture. A municipality cannot just hire a local resident for design of public works absent compliance with other state regulations, notwithstanding Home

Rule authority.

- Architect's License: R.C. 4703.18, 4703.182(B) require any person holding themselves out as an architect or architectural firm to obtain a license, after meeting educational and testing requirements.
- Qualifications-Based Selection: R.C. 153.65 through 153.691 require that the municipality select a design professional on the basis of qualifications, and not bid on price.
- Contract: O.A.C. 4703-3-09 prohibits an architect from serving a municipality without a written contract.
- Seal Law: R.C. 3791.04 requires that the municipality obtain the professional seal of a license architect or engineer on all plans and specifications (blueprints) for purposes of issuing a building permit.

Thus, the Court of Appeals errs when finding no exercise of police power in this already-regulated area, narrowly claiming that the local provisions merely are a job creation tool, and "only come into play if a contractor chooses to bid on and receives a municipal contract…." *Cleveland v. State*, 2017-Ohio-8882, ¶33. Under this hypothesis, a municipality might eliminate state licensure entirely on the theory that a license is an employment obstacle to practicing architecture within city boundaries.

Similarly, the Ohio Construction Industry Licensing Board licenses construction skilled trades contractors, R.C. Chapter 4740. These statutes expressly prohibit an

exercise of local Home Rule in regard to the trades' contractor license:

> R.C. 715.27(B) No municipal corporation shall require any specialty contractor who holds a valid license issued pursuant to Chapter 4740. of the Revised Code to complete an examination, test, or demonstration of technical skills to engage in the type of contracting for which the license is held, within the municipal corporation.
>
> (C) A municipal corporation may require a specialty contractor who holds a valid license issued pursuant to Chapter 4740. of the Revised Code to register with the municipal corporation and pay any fee the municipal corporation imposes before that specialty contractor may engage within the municipal corporation in the type of contracting for which the license is held. Any fee shall be the same for all specialty contractors who engage in the same type of contracting. ****
>
> R.C. 4740.12(A) No political subdivision, district, or agency of the state may adopt an ordinance or rule that requires contractor registration and the assessment of a registration or license fee unless that ordinance or rule also requires any contractor who registers and pays the registration or license fee to be licensed in the contractor's trade pursuant to this chapter.
>
> (B) Except as provided in division (A) of this section, nothing in this chapter shall be construed to limit the operation of any statute or rule of this state or any ordinance or rule of any political subdivision, district, or agency of the state that does either of the following:
>
> (1) Regulates the installation, repair, maintenance, or alteration of plumbing systems, hydronics systems, electrical systems, heating, ventilating, and air conditioning systems, or refrigeration systems;
>
> (2) Requires the registration and assessment of a registration or license fee of tradespersons who perform heating, ventilating, and air conditioning, refrigeration, electrical, plumbing, or hydronics construction, improvement, renovation, repair, or maintenance.

Analogously, the Court has held that a municipality cannot cite Home Rule to abrogate the state's Prevailing Wage law and collective bargaining for construction contractor employees bidding on municipal projects. *State ex rel. Evans v. Moore*, 69

Ohio St.2d 88, 431 N.E.2d 311 (1982); *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 114 Ohio St.3d 183, 2007-Ohio-3831, 870 N.E.2d 1174 (2007). Certainly Prevailing Wage and its impact on collective bargaining provides a direct and applicable precedent of state interest in regulating construction project employment. Cleveland's quota directly conflicts with construction hiring halls and collective bargaining agreements in accord.

These legal requirements all are at risk if local Home Rule allows a municipality to repudiate state employment regulation and a uniform application statewide in the hiring of licensed construction professionals. Clearly these are general laws, in the exercise of police power, and not of isolated, local self-government.

In practical application, the economics of the design professions simply cannot support a residency quota. Architects generally work in small employment settings, such that they are unable to meet any quota requirement.

Ohio currently licenses 6,355 Architects in 1,651 registered firms. Credential Roster Report, Amy M. Kobe, Hon AIA, Executive Director, Ohio Architects Board www.arc.ohio.gov. Therefore, the average architecture firm employs less than four professionals.

Registered as headquartered in Cleveland are only 119 architectural firms, or 7% of Ohio's profession. Only 126 architects list Cleveland as their locale. Thus, the average firm size in the City of Cleveland is only one architect per firm.

https://elicense.ohio.gov/OH_VerifyLicense. These are sole practitioners.

If each of Ohio's cities enacted local residency requirements, no architectural firm could design public works except in the arbitrary location where an architect might happen to live. Certainly this would impact an architect's professional practice in seeking public work elsewhere.

If a County-residing architect is not able to practice in Cleveland City, suburbs might consider retaliatory or reciprocal ordinances. As an example, R.C. 4740.08 directs the Ohio Construction Industry Licensing Board to recognize contractor license reciprocity only upon the condition "that the other state extends similar reciprocity to persons licensed under this chapter." This is a retaliatory state licensure statute enacted to ensure equality of treatment for Ohio licensed professionals.

The Court of Appeals below distinguishes *Lima v. State*, supra on the factual determination that "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." *Cleveland v. State*, 2017-Ohio-8882, ¶24. Certainly this over-generalized analysis fails when considering a sole practitioner architect, who does not hire a multitude of workers.

IV. Conclusion

Ohio has an historic and statewide interest in providing for the health and welfare of persons involved in public works construction. The Court of Appeals' narrow characterization that the City of Cleveland merely acts in its self-government

capacity for "job creation" with its ordinance threatens to undermine a broad scope of regulatory matters, and should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Amicus Curiae AIA Ohio Memorandum was served this 29th day of June, 2018 upon all parties appearing of record, by electronic e-mail, and by U.S. Mail postage pre-paid upon those individuals indicated below:

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House Bill 180
Sponsor Testimony
Senate Government Oversight and Reform Committee

Chairman Coley, Vice Chair Seitz, Ranking Member Yuko, and members of the Senate Government Oversight and Reform Committee, thank you for allowing me to provide sponsor testimony on House Bill 180.

The purpose of this legislation is to protect taxpayer dollars by prohibiting the state and local governments from imposing residency requirements on contractors and design professionals. The inclusion of geographical residency requirements in construction contracts is poor public policy for a number of reasons.

1. The Ohio Supreme Court ruled in 2009 in *Lima v. State* that in spite of home rule, cities cannot require their employees, for example police and firefighters, to reside in the city of employment because it is a violation of that employee's protected rights. Furthermore, Section 34, Article II of the Ohio Constitution reads, "the General Assembly may enact laws providing for the comfort, health safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power."
2. It increases project costs for contractors and taxpayers by negatively impacting competitive bidding. Residency requirements increase project costs by restraining competition, as fewer contractors will bid projects with unknown labor costs brought about by labor constraints.
3. It creates unfair labor requirements for the construction industry. In no other industry, when public funds are involved, does the state or a city prescribe where individual employees must reside. Cities already are able to derive benefit from out-of-town construction workers as those workers must pay local income taxes if they work in the municipality for more than 20 days.
4. It forces the employment of those who are not trained or have little understanding of what a career in construction entails. Forcing the placement of under-trained, in-experienced individuals in a dangerous work environment can lead to disastrous consequences. The days of handing an untrained worker a shovel so they can work on a jobsite are far behind us, as today's complicated equipment requires highly-skilled employees who have been through years of industry training.

5. It disrupts collective bargaining agreements. When a contractor requests labor from a union hall for a project, the next person "on deck" is offered the position. Placing a residency prequalification on that personnel request may cause that next person to be passed over for a work opportunity.
6. Residency requirements disrupt the natural flow of workers and prohibit them from getting the work they are qualified for simply because they live in the wrong zip code. Local hire requirements do not create new jobs. Instead, they displace a contractor's existing workforce.
7. When an Ohio governmental entity implements a residency restriction, that restriction cannot be applied to out-of-state employees of any contractor, or out-of-state contractors. Ironically, this gives an unintended competitive advantage to out-of-state contractors. This provides preferential opportunities to those largely out-of-state companies and their out-of -state employees to the detriment of Ohio-based companies who hire predominantly in-state, qualified construction employees.
8. Residency requirements build walls against employment. Citizens who live in a suburb of a core city would not even be eligible for a large percentage of jobs within the city's corporation limit. Additionally, infrastructure projects require a skilled, mobile workforce, and it is not cost-effective to expect a contractor to recruit and train a workforce that is geographically customized to each project.
9. Local residency requirements increase contractors' insurance and bonding costs, resulting in higher contract costs to taxpayers. A key factor in the surety industry's assessment of a contractor's insurance rates and bonding capacity is the level of training and length of employment of the contractor's workforce. A contractor's Workers Compensation rates could also be increased. Forcing a contractor to employ an unknown and untrained workforce that changes for each project reduces efficiencies and only serves to cost taxpayers more money by increasing project costs.

Chairman Coley and members of the Government Oversight and Reform Committee, thank you again for giving me the opportunity to provide sponsor testimony on House Bill 180. This is a vital piece of legislation for the state of Ohio that will promote economic development and job security for Ohio citizens. To put it simply, it just makes sense. I would be happy to answer any questions from the committee members at this time.