IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND,	:	
	:	Case No. 2018-0097
Appellee,	:	
	:	ON APPEAL FROM THE
vs.	:	CUYAHOGA COUNTY COURT OF
	:	APPEALS, EIGHTH APPELLATE
	:	DISTRICT, Case No. 105500
STATE OF OHIO,	:	
	:	
	:	
Appellant.	:	

MERIT BRIEF OF AMICUS CURIAE OHIO CONTRACTORS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF OHIO, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND OHIO CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT STATE OF OHIO

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

These proceedings involve the constitutionality of legislation enacting R.C. 9.75, which will protect the interests of families and the livelihoods of employees of construction companies across the entire state of Ohio. In the last fifteen years, Ohio has seen a patchwork of local hire ordinances enacted by municipalities that hurt Ohioans who are not residents of a particular municipality. Cleveland, for example, requires a contractor to employ Cleveland residents for 20% of the hours worked on a public works project. Akron requires 50% of the hours worked on a public project be performed by Akron residents. Cincinnati's ordinance requires 30% to 40% participation by local residents. Columbus' requirement is 50% as a prequalification factor to bid for work. These ordinances undermine worker residency protections created by the Ohio General Assembly, who seeks to ensure such protections are applied uniformly across the state of Ohio.

Contrary to the lower court's reasoning, R.C. 9.75 is not about contract terms, such as payment or retainage provisions, between public authorities and contractors. This case is about the rights of individuals to choose where they live because the ordinances at issue make municipal residency a condition of working on a public project for a certain percentage of employees.

R.C. 9.75 states that "no public authority shall require a contractor to employ a certain number or percentage of individuals who reside within the defined geographic area of the public authority" as laborers for a specific public improvement. The legislation, H.B. 180, expressly stated that the intent of the bill was to recognize the "inalienable and fundamental right of an individual to choose where to live pursuant to Section 1 of Article I, Ohio Constitution." Section 4 of the legislation stated:

> The General Assembly finds, in enacting section 9.49 of the Revised Code in this act, that 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 that it is necessary in order to provide for the comfort, health, safety, and general welfare of those employees to generally prohibit public authorities from requiring contractors, as a condition of accepting contracts for public improvement projects, to employ a certain number or percentage of individuals who reside in any specific area of the state.

The citizens of Ohio have the right to choose where they live and not be penalized for that choice. Governmental entities should not dictate, as a condition of working on a public project, where free individuals and their families can live. A construction worker should not have to pull up roots and take his or her family to reside in the next city as a condition to work on a project in that city, and then repeat that process for the next project several months down the road. A person who is employed by a construction company should not have to be laid off or not work on a specific project because he or she is not a resident of the project's city.

After the City of Cleveland enacted its Fannie Lewis local hiring requirement, the cities of Akron, Cincinnati, and Columbus followed suit. These municipalities are in essence building walls against outside communities by insisting that as a condition for working, a certain percentage of individuals employed by the awarded contractor must reside within the boundaries of the municipality. Workforce mobility is critical to construction companies and their employees. The municipal local hiring requirements restrict workforce mobility and limit job opportunities for all Ohioans, particularly those from suburban and rural parts of the State.

II. STATEMENT OF INTEREST

Amicus curiae Ohio Contractors Association ("OCA") and the Associated General Contractors of Ohio ("AGC") represent over 500 companies that are involved in the construction of buildings, highways, streets, and other public improvements. Its members include general

contractors, subcontractors, and material suppliers, who all engage in construction projects throughout the state of Ohio. The OCA and AGC member contractors employ approximately 119,000 workers in the heavy/highway construction trades in Ohio whose freedom of residency is of great importance to them.

Amicus curiae Ohio Chamber of Commerce ("Ohio Chamber") was founded in 1893 and is Ohio's largest and most diverse statewide advocacy organization. It works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate.

Amicus curiae National Federation of Independent Business ("NFIB") is an association with 23,000 members in Ohio, making it the state's largest association dedicated exclusively to serving the interests of small and independent business owners. NFIB's members typically employ fewer than twenty-five people and record annual revenue of $1,000,000 or less. NFIB's members come from all eighty-eight counties and industry types including many in the construction, manufacturing and retail/service sector. NFIB's interest is in its members' ability to bid and work on any public works project and not be excluded because of size and/or where their employees reside.

The work these construction companies perform is widespread, spanning many municipalities and counties. The projects are not found in one city, and few contractors and their workforces can survive working in only one city. Therefore, it is imperative that the construction industry has a mobile workforce. It is the nature of the industry that a construction company headquartered in one part of the state seeks and contracts to perform work with its workforce in another part of the state, or in another state. The members of the OCA, AGC, the NFIB, and the

Ohio Chamber have an interest in consistency in employment and living conditions that protect the choices of where to live and work.

A. Local Hiring Ordinances Harm Ohioans

This Court has previously held that a municipality cannot require that its own employees live within its borders. *Lima v. State*, 122 Ohio St.3d 155, 909 N.E.2d 616, 2009-Ohio-2597. Yet, the City of Cleveland and other municipalities in Ohio have ordinances that require a certain percentage of hours worked on a public project must be performed by residents of that municipality.

These ordinances provide for punishments (i.e., bid rejection or suspension from bidding) and financial penalties for contractors who do not meet the local hiring requirements. In no other industry does the government prescribe where individual employees of private employers must reside. Local hire ordinances actually inhibit the construction worker who is a resident of Cleveland but is not able to work on projects in another municipality because his/her employer must meet that municipality's resident hiring requirement.

When the contractor has to displace part of its existing workforce to hire Cleveland residents, new jobs are not created. In fact, the contractor may have to displace the recently hired Cleveland residents when the contractor's next project is in another city which has a similar ordinance that requires that a percentage of all work hours be performed by residents of that municipality.

Ironically, the impact of the Fannie Lewis local hiring requirement contradicts the City of Cleveland's intent in passing the ordinance. Local hiring ordinances actually give a competitive advantage to out-of-state companies and those companies who employ out-of-state workers. In

order to avoid violating the Privileges and Immunities Clause[1], the City of Cleveland's Fannie Lewis Law and the other municipal local hire ordinances expressly exempt out-of-state companies from the local hire requirements.[2]

On the federal level, making contractors employ public construction workers based on geography is not permitted in the interest of full and open competition. *Cf.* 2 CFR §200.319. By shrinking the pool of available individuals capable of construction work, the City of Cleveland, along with other municipalities who have enacted similar ordinances, is inadvertently making it increasingly difficult for contractors to bid on public construction projects and for the cities' own residents to gain full-time employment.

These local resident hiring requirements place an undue burden and constitute an unwarranted barrier to those individuals who wish to work for a construction company but who would have to live in that city for that particular project. The result is fundamentally at odds with the General Assembly's goal of a uniform protection of the right to live and work where one chooses. The objective should be to broaden the source of the available workforce and not to narrow it by restricting it to a geographic area.

Substantial resources are being put forth for individual training, apprenticeship programs, high school, career technical and two-year college programs for the sole purpose of providing a skilled workforce for full-time employment in the construction industry. Individual companies, contractor-related organizations, and numerous governmental and quasi-governmental agencies

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[1] The Privileges and Immunities Clause, Article IV, Section II of the U.S. Constitution, prohibits states from treating residents of other states in a discriminatory manner in favor of their own. *See United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 219 (1984) (The Supreme Court held that the ability to pursue a common calling is "one of the most fundamental of those privileges protected by the Clause."). Employment on public works projects is a fundamental right protected by the Privileges and Immunities Clause. *Id.* at 221-22.

[2] Cleveland Ordinance No. 188.01(c) (Construction Work Hours excludes the number of hours of work performed by non-Ohio residents).

are heavily involved and invested with providing those resources to train and equip people for the construction workforce. The various local hire requirements for contractors have a disparate impact, and undercut the employment of individuals seeking to build a career in the construction industry.

III. STATEMENT OF THE CASE AND FACTS

The amicus parties adopt and incorporate herein the Statement of the Case and Facts as presented in the Merit Brief filed by the Appellant State of Ohio.

IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

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

> "R.C. 9.75 is a valid exercise of authority under Ohio Constitution, 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."

The amicus parties agree with the State that the determinative issue in this case is whether the General Assembly exercised its authority to enact H.B. 180 under Ohio Constitution, Article II, Section 34. Article II, Section 34 provides that the State can protect the safety and general welfare for all employees. Freedom of where to live and work is a right that the State of Ohio has an interest in protecting through the application of a uniform law across the state of Ohio. The Ohio Supreme Court has held that Article II, Section 34 grants the General Assembly the authority to ban residency requirements by political subdivisions for its own employees. *Lima v. State*, 122 Ohio St.3d 155, 909 N.E.2d 616, 2009-Ohio-2597. The OCA adopts the arguments of the State of Ohio regarding the constitutionality of R.C. 9.75.[3]

[3] Tennessee enacted a law similar to R.C. 9.75 titled "Public Construction Projects' Income or Residency Requirements"; which states:

> Notwithstanding any state law to the contrary, neither the state, its political subdivisions, agencies, or instrumentalities thereof, or any local government shall require a company bidding or contracting to provide services on a public

Although the amicus parties believe H.B. 180 was properly enacted pursuant to Ohio Constitution, Article II, Section 34, the OCA, AGC, NFIB, and the Ohio Chamber will address the home rule analysis performed by the lower courts. The Fannie Lewis Law and the other local resident hiring ordinances are the exercise of police powers. These ordinances conflict with R.C. 9.75, a general law of statewide scope. R.C. 9.75 must prevail over the local resident hiring ordinances because of the statewide impact of this legislation.

B. 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 significant extraterritorial effects residency quotas have on Ohioans living outside the relevant local jurisdiction."

R.C. 9.75 serves an overriding state interest and does not unconstitutionally infringe upon the municipal home rule authority established by Ohio Constitution, Article XVIII, Section 3.

Home Rule Analysis

The Home Rule Amendment to the Ohio Constitution provides that "municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, *as are not in conflict with general laws.*" Ohio Constitution, Article XVIII, Section 3 (emphasis added). Ohio municipalities do not have constitutional authority to enforce local ordinances under their police power if the ordinances conflict with general state laws. When there is a conflict between an ordinance and a statute, the state statute supersedes a municipal ordinance under home-rule

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> construction project to employ individuals who reside within the jurisdiction of the state or local government or who are within a specific income range, unless otherwise required by federal law.

T.C.A. § 12-4-117 (2016).

analysis if a) the ordinance is an exercise of police power; b) that statute is a general law; and c) the ordinance is in conflict with the statute. *State ex rel. Morrison v. Beck Energy Corporation*, 143 Ohio St.3d 271, 2015-Ohio-485, 37 N.E.3d 128, ¶ 14.

a. The local residency hiring ordinances involve the exercise of police power.

An ordinance is enacted under the local police power "if it has a real and substantial relation to the public health, safety, morals or general welfare of the public." *Downing v. Cook*, 69 Ohio St.2d 149, 150, 431 N.E.2d 995 (1982). The issue to be considered in this case is whether the City of Cleveland's enactment of the Fannie Lewis Law was pursuant to its police power to protect the public welfare by requiring successful bidders, as a condition for working on local public construction projects, to hire local unemployed residents to address local unemployment and to hire local low income residents to address local poverty. The lower courts, on the other hand, have characterized the Fannie Lewis Law as an exercise of local self-government that is simply creating contracting requirements for public construction projects that are analogous to the usual bidding and retainage requirements.

The Fannie Lewis Law requires private contractors to hire Cleveland residents for public construction projects for the stated purpose of combatting unemployment and poverty of Cleveland's residents. The Preamble to the Fannie Lewis law recites that the City has a higher unemployment rate and higher poverty rate than Cuyahoga County and surrounding communities; therefore, its enactment was envisioned to help alleviate unemployment and poverty in the city. Exhibit B to City of Cleveland's Complaint.

This Court has previously ruled that a minimum wage law, enacted by the Ohio General Assembly, preempted a local ordinance because it manifested a statewide concern for employees' rights in the collective bargaining process in the construction industry and had

expansive reach beyond the scope of municipal authority. *State ex rel. Evans v. Moore*, 69 Ohio St.2d 88, 88 (1982). In *Evans*, this court held that the city of Upper Arlington could not "unilaterally exempt itself", under the justifications of local self-government or police powers, from compliance with the state statute. *Id.* at 89. The court emphasized that under the "statewide concern" doctrine, a municipality cannot impose conflicting ordinances which relate to matters of general concern. *Id.* at 90. Finally, the court acknowledged the legislature's interest in supporting employee and employer relations consistently across the state by preventing the undercutting of employee wages.

The Supreme Court of Ohio should apply the same principles to the instant case, which also relates to municipalities imposing restrictions on employment in the construction industry. In the instant case, the sponsor of House Bill 180 stated that a primary purpose of this legislation was to curtail the disruptive impact that the Fannie Lewis Law would have on collective bargaining agreements. Ohio House of Rep. Senate Government Oversight and Reform Committee. *Sponsor Testimony* for House Bill 180. This parallels the justifications cited in *State ex rel. Evans v. Moore,* which the court accepted.

Furthermore, the Ohio General Assembly enacted R.C. 9.75 to protect the workers' choice of residency, which it stated was a "matter of statewide concern to generally allow the employees working on Ohio's public improvement projects to choose where they live." H.B. 180 §4. R.C. 9.75 was enacted to protect workers in the construction industry around the state of Ohio from being required to uproot their lives in order to be employed for the next construction project. This court has previously accepted arguments in support of a statute under the justification of statewide concern in matters concerning employment in the construction industry. *See State ex rel. Evans v. Moore*, 69 Ohio St.2d 88, 92-93 (1982).

Preambles to ordinances can show that a municipality's intent in enacting the ordinance was to promote the public health, safety and welfare. These are terms associated with an exercise of police power. *See In re Complaint of Reynoldsburg*, 134 Ohio St.3d 29, 979 N.E.2d 1229, 2012-Ohio-5270 (2011), ¶ 29, *citing Downing*, 69 Ohio St.2d at 150. The City of Cleveland expressly enacted the Fannie Lewis law under its police power to alleviate unemployment and poverty by mandating contractors hire Cleveland residents, and specifically low-income residents; those who fail to do so are subject to monetary penalties for non-compliance.

The Supreme Court of Ohio has previously held that "police power relates not merely to the public health and the public physical safety, but also to public financial safety." *Holsman v. Thomas*, 112 Ohio St. 397,404-05(Ohio 1925). In *Holsman*, the court reasoned that ordinances that are passed with the intent of protecting the public from financial loss fall under the realm of police powers. *Id.* at 404.

In the instant case, the Council of the City of Cleveland has explicitly stated that the Fannie Lewis Law was enacted "to alleviate the lack of use of city residents. . ." and "improve the quality of life for residents by . . . helping to ensure that the unemployed have the ability to get decent jobs". The City Council enacted the Fannie Lewis Law to protect its citizens from financial loss and unemployment; thus, the ordinance was enacted under the city's police powers.

The Fannie Lewis Law and the similar local hiring ordinances were a result of other municipalities exercising their police powers. Ohio Courts have recognized as much. In *Dalton v. Kunde*, 31 Ohio Misc. 75, 286 N.E.2d 483 (Montgomery C.P. 1972), the charter city of Dayton enacted an ordinance requiring city officials to consider minority group representation in the bidder's operations in order to determine the lowest and best bid for municipal construction

contracts. Each contractor was required to submit with its bid an Affirmative Action Assurance Plan that would indicate the number of minority employees presently on the work force and how many the contractor will add if awarded the contract to ensure that minorities are represented in all trades required for the project. Judge Rice, in holding that the ordinance is a valid exercise of the municipality's police power, stated in *Dalton*:

> Can there be anyone who can argue that this ordinance is not an exercise of the municipality's police power – that since it is legislation designed to secure equal opportunity for employment of all qualified applicants for employment….. that it is not directly related to the public welfare of not only the minority members of the community but also the community as a whole?

Id. at 85-86. *See also State ex rel. Tomino v. Brown*, 47 Ohio St.3d, 119, 549 N.E.2d 505 (1989) (Cleveland ordinance authorizing issuance of construction revenue notes and entering into contracts for the construction of low income housing "is essentially police-power legislation undertaken for the public welfare").

The cases the lower court relied upon to find that the Fannie Lewis Law was an exercise of local self-government did not involve issues affecting or involving the employment status or welfare of the respective municipalities' residents. *Dies Elec. Co. v. City of Akron*, 62 Ohio St.2d 322, 405 N.E.2d 1026 (1980); *Trucco Constr. Co. v. Columbus*, 10th Dist. Franklin No. 05AP-1134, 2006-Ohio-6984. The *Dies* case dealt with a municipality's control of the bid opening and contract letting procedures. The *Trucco* case involved a city's control of when retainage of contract monies the City withholds on a project can properly be released. Local laws regulating the contract award process or the release of retainage process have completely different origins and purposes than an ordinance's requirement that only local and low income residents be employed for a specified percentage of available work. The latter is the exercise of the municipality's police power.

Ordinances that implicate health, safety, or the general welfare of the public are an exercise of the municipalities' police power. *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, ¶ 30. In the instant case, Cleveland's City Council explicitly provided that the Fannie Lewis law was to address the high unemployment and alleviate poverty of its residents. The City of Cleveland chose to express its concern for the health and welfare of its citizens by exercising its police power to enact the law. Describing the Fannie Lewis Law as simply the City's authority to negotiate the terms of public construction contracts under its local self-government powers ignores and diminishes the intent and stated purpose of the ordinance. In essence, the Fannie Lewis Law, and those ordinances similar to it, would discriminate against the workforce that does not live in the respective municipalities.

The enactment of the Fannie Lewis ordinance was an exercise of the police power, not an exercise of local self-government. This meets the first of the three-part test discussed in *Morrison.*

b. H.B. 180 (R.C. 9.75) is a general law.

The second part of the home-rule analysis when the ordinance involves the exercise of police power, is whether the statute is a general law under the four-part test set forth in *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, syllabus. General laws are statutes which set forth police, sanitary or similar regulations which involve a concern of the state of Ohio for the peace, health and safety of all its residents distinct from any of its political subdivisions. *The Payphone Assn. of Ohio v. Cleveland*, 146 Ohio App. 3d 319, 328, 766 N.E.2d 167 (2001) citing *Fitzgerald v. Cleveland*, 88 Ohio St. 338, 359, 103 N.E. 512 (1913).

1. The statute is a part of a statewide and comprehensive enactment.

R.C. 9.75 does have a statewide impact, protecting employees residing in various cities across Ohio. Furthermore, the statute is part of a comprehensive legislative enactment intended to act uniformly across all public agencies, political subdivisions and public authorities. One of the primary reasons that R.C. 9.75 was enacted was because a contractor's workforce and that workforce's compliance with one city's local hire ordinance would have to be different to affect compliance with Cleveland's, Akron's, Cincinnati's or Columbus' ordinances. Each city requires contractors to tailor their hiring and employment to the peculiarities of the law of each municipality. The result is fundamentally at odds with a goal of uniformity the General Assembly sought when implementing H.B. 180.

The provisions of R.C. 9.75 addressing employment requirements on public improvements illustrate the General Assembly's intent to prohibit variant employment requirements by public authorities, including state agencies and political subdivisions throughout the state. The statute applies to all parts of the state and operates uniformly throughout the state.

2. The statute sets forth police, sanitary, or similar regulations, rather than purport to grant or limit legislative power of a municipality to set forth police, sanitary, or similar regulations.

R.C. 9.75 sets forth regulations to address a statewide concern over local residency requirements that affect the employees' right to choose where to live and work. This involves the police power, but does not solely grant or limit legislative power. The statute was enacted to protect the interests of employees of the construction companies who work in various cities, and to make employment consistent and more predictable. R.C. 9.75 was not enacted to restrict the powers of municipal corporations.

The provisions of R.C. 9.75 pertain to all public authorities that contract for public improvements, not only to municipalities. R.C. 9.75 adds a standard regulation for employment on public improvement projects that promotes the public health, safety and welfare of the state's residents. This serves an overriding state interest in providing a statewide system for public improvements and employment of workers. The legislation's purpose is to uniformly protect workers' rights to choose where they live and the conditions of their employment.

3. The statute sets forth a rule of conduct for citizens generally.

R.C. 9.75 satisfies this prong because its provisions apply generally to all persons who work on public improvement projects in Ohio, and those who oversee such projects. The statute is directed at, and applies generally to, the persons who work on, and those seeking to work on, public improvements in Ohio. This statute applies to citizens generally because it grants them the freedom to live wherever they choose to do so.

V. CONCLUSION

For the reasons discussed above, this Court should adopt Appellant State of Ohio's Proposition of Law No. 1 and Proposition of Law No. 2 in the affirmative, reverse the decision of the Court of Appeals, and hold that R.C. 9.75 is constitutional and enacted pursuant to the authority granted to the General Assembly by Section 34, Article II of the Ohio Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served, by regular U.S. Mail, postage prepaid, this 29th day of June, 2018, upon the following counsel of record:

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