In the
Supreme Court of Ohio

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

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

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STATEMENT OF THE ISSUES PRESENTED

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

In 2016, thirteen years after Cleveland adopted and successfully implemented the Fannie Lewis Law, the Ohio General Assembly sought to preempt the City's ordinance, enacting a provision eventually codified at section 9.75 of the Ohio Revised Code. R.C. 9.75 is as clear in its focus as it is simple in its intent: "to prohibit a public authority from requiring a contractor to employ a certain percentage of individuals from the geographic area of the public authority for construction or professional design of a public improvement." R.C. 9.75 (preamble).[1] Rather than regulate for the general welfare of all Ohio employees, as required by Article II, Section 34 of the Ohio Constitution, the provision on which the State relies for its authority, this statute is designed—and operates—solely to deprive the City of Cleveland of the exercise of even the most modest aspect of the City's constitutional home-rule authority over local self-government.

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

Cleveland passed the Fannie Lewis Law to determine the most appropriate use of the City's construction funding. As such, the Fannie Lewis Law is not an exercise of police power, but rather an attempt to address the implications of the City's funding for public projects being denied to City residents. The first question in this case, then, is whether the State's invocation of Article II, Section 34 to defend R.C. 9.75's attempt to preempt C.C.O. §188 is a proper exercise of authority under of the Ohio Constitution? As R.C. 9.75 operates solely as a limitation on the authority of charter cities, the answer to this threshold question is no.

Because the State cannot invoke the constitutional trump provided by Article II, Section 34, this Court must conduct a home-rule analysis under Article XVIII, Section 3 of the Ohio Constitution. Under that analysis, the Fannie Lewis Law must stand. The power to structure the choices the City makes in spending under C.C.O. §188 is a core aspect of the City's local self-government. Even if this Court were to conclude that C.C.O. §188, despite its function as a contract condition, is somehow a police power regulation, then R.C. 9.75 is not a "general law" under this Court's test. R.C. 9.75 is not a part of a comprehensive and statewide legislative scheme. Rather, R.C. 9.75 is piecemeal in both its intent and application, which is to single out local governments such as Cleveland exercising their valid home-rule authority. The second question this case presents, then, is whether R.C. 9.75 validly preempts C.C.O. §188 where C.C.O. §188 is an exercise of the power of local self-government and R.C. 9.75 does not constitute a general law? Again, the answer is no.

Local ordinances that seek to address unique local conditions, such as legitimate concerns about equity in city funding, are a vital part of home rule authority for cities

nationwide. Attempts by state legislatures to restrict or preempt essential local governmental powers must be closely scrutinized to verify and ensure that such state action is necessary and not a further needless erosion of local governmental powers.

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

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

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

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The

membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

INTRODUCTION

At core, this is a case about the nature, validity, and future viability of constitutional home rule in Ohio. The authority that Charter Cities in Ohio retain over their own contracting is a central aspect of local self-government. In the trial court and in the Eighth Appellate District, the City of Cleveland successfully defended the Fannie Lewis Law—an ordinance that provides modest local-hiring and low-income participation requirements for certain public works—against a targeted attempt by the State to fetter Ohio's cities. What Justice Wilkin noted about the nature of municipal self-government in his concurring opinion in Fitzgerald v. Cleveland, soon after the adoption of Ohio's Home Rule Amendment, still echoes today, even if the issues presented have evolved:

> If all powers of municipal self-government must be subject to general laws, then clearly cities do not have home rule; they have only such powers of local self-government as the legislature of the state allows to them, and cities of Ohio will still remain under the domination of the state legislature. Who does not know that this domination is the very thing that the people of Ohio intended to abolish?[2]

[2] 88 Ohio St. 338, 380 (1913).

Because the State in this case was acting specifically to prevent the legitimate exercise of home-rule authority, rather than pursuant to a state-wide regulatory regime directed at the welfare of all employees under Article II, Section 34 of the Ohio Constitution, and because Cleveland's ordinance stands at the center of local self-government under Article XVIII, Section 3, the Eighth District should be affirmed.

STATEMENT OF THE CASE

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

STATEMENT OF THE FACTS

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

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

Taken as a whole, the Fannie Lewis Law is a modest, locally-tailored set of contract and grant requirements that, as the City demonstrated below, legitimately structures the use of City funding. To describe the ordinance as a regulation that imposes a residency requirement, as the State repeatedly does, is simply a category error. As the trial court found, the "City provided evidence at the preliminary injunction hearing that the number of residents working for a contractor has no bearing in awarding" contracts and, significantly, given that the law addresses projects as a whole, "any contractor on any project may employ between zero and 100% of Cleveland residents."[3] The Fannie Lewis Law does not regulate residency in Cleveland, even if such residency is reflected in a portion of project requirements for public construction contracts.

As discussed below, cities—in Ohio and across the country—regularly exercise their authority to set contract terms consistent with local priorities concerning the proper use of local funds. Local governments include any number of valid objectives in public contracts. In everything from goals around minority, women-owned, or socially and economically disadvantaged businesses,[4] to veterans' preferences,[5] to sustainability mandates,[6] and other examples, local governments understand that it is a responsible aspect of public contracting to take into consideration the social impact of the local expenditure of funds. That recognition does not speak to the wisdom or efficacy of any particular

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

contract condition, but that is hardly the question in evaluating whether Cleveland's choices about structuring its spending in its jurisdiction should be protected under the Ohio Constitution's grant of home rule authority over local self-governance. That is the central issue this case presents and Amici Curiae urge this court to continue to recognize, as it has in the past, this core aspect of home rule.

ARGUMENT

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

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

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

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

The Home Rule Amendment not only embodies a commitment to the basic values of local democracy but also concern about the influence of special interests over the state legislature.[7] At the time of Ohio's Constitutional Convention of 1912, the Progressive

[7] John D. Buenker, John C. Burnham & Robert M. Crunden, *Progressivism* 15 (1977).

movement had prominently swayed reform efforts across the American landscape for the better part of two decades.[8] Much of the energy of these reform movements focused on making government more responsive to the will of the people and building bulwarks against the influence of the "interests."[9] And this led to reform efforts intended to restrain legislative supremacy, particularly at the state level.[10] A central goal of this agenda was to give cities control over their own affairs.

This Progressive spirit was influential as the Ohio Constitutional Convention of 1912 approached. The Home Rule Amendment was presented to the delegates on January 20, 1912.[11] As the Amendment came before the delegates, the Cleveland Plain Dealer noted:

> Home rule means self-government. The people are ruling themselves in these days in ways which could scarcely have been foreseen a few years ago. This is another step in the same direction, and an important one, about to be sanctioned by the constitutional convention.
>
> The intelligent citizenship of Ohio is a unit in hoping that this home rule measure may not be weakened or delayed by amendments proposed for its destruction.[12]

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

> The proposal does not undertake, your committee believes, to detach cities from the state, but it does undertake to draw as sharply and as clearly as possible the line that separates general state affairs from the business which is peculiar to each separate municipality, be it a city or a village, in the state, and to leave the control of the state as large and broad and comprehensive in the future as it has been in the past with reference to those things which

[8] Arthur S. Link & Richard L. McCormick, *Progressivism* 1 (1983).
[9] John D. Buenker, John C. Burnham & Robert M. Crunden, *Progressivism* 15 (1977).
[10] *Id.* at 60.
[11] Cleveland Plain Dealer, January 21, 1912, at 1.
[12] *Id*. April, 23, 1912, at 6.

> concern us all in the State of Ohio, whether we live in cities or in rural district, and on the other hand, to confer upon the cities for the benefit of those who live in the cities control over those things peculiar to the cities and which concern the cities as distinct from the rural communities. I repeat, to draw as sharply and as definitely as possible, a line between those two things and to leave the power of the state as broad hereafter with reference to the general affairs as it has ever been, and to have the power of the municipalities on the other hand as complete as they can be made with reference to those things which concern the municipalities alone, always keeping in mind the avoidance of conflict between the two so far as possible.[13]

Delegates accordingly focused on preserving the value of local self-determination. For example, one delegate argued that:

> The advocates of home rule merely insist that municipalities be allowed to solve their own problems and control their own affairs, independent of outside authority, whether that authority be a monarchy, an oligarchy or the people of a whole state. In short, the cities merely ask that the principle of self-government be extended to them….if there be a problem which affects the city of Cincinnati or Columbus or Toledo particularly, it is not home rule in any sense of the word if the people of the whole state of Ohio undertake to decide that question merely because those outside of the cities have more people to vote upon it than the particular municipality.[14]

As part of the 1912 amendments to Ohio's Constitution, municipalities were given the authority to adopt their own governing charters. Ohio Constitution Art. XVIII, § 7 established that "[a]ny municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

Home rule was not the only reform sought by the delegates in the 1912 Convention. The welfare of workers was also an important issue. However, unlike the sweeping grant of power for home rule, the record of the Convention underscores that the employee amendment, Article II, Section 34 of the Ohio Constitution, was more narrowly designed

[13] Ohio Constitutional Convention Proceedings and Debates (1912) at 1433.
[14] *Id*. at 1483 (quoting Mr. Crosser).

to address two specific concerns: ensuring legislative authority to "limit[] the number of hours of labor" and to "establish a minimum wage for the wageworker."[15]

This background is important, as it undermines the State's argument that the employee-protecting constitutional provision was meant to vitiate the core of charter cities' constitutionally protected home rule powers in as sweeping a manner as the State claims. It is not in dispute that the State of Ohio has broad authority to legislate for the "comfort, health, safety and general welfare of all employees" under Article II, Section 34 of the Ohio Constitution. But under the State's view, any legislation invoking Article II, Section 34 is essentially unreviewable. As both the trial court and the Eighth District properly concluded, however, R.C. 9.75 on its face does not regulate generally for the welfare of all Ohio employees—it merely removes an aspect of local self-government. And the Eighth District aptly noted that the State adopted R.C. 9.75 to advance the interests of contractors, not workers. App. Op. ¶ 25. Article II, Section 34 is not magical constitutional language that the State should be able to invoke to circumvent home rule—there has to be some genuine substance to the regulatory concerns invoked beyond rejecting the exercise of local authority.

There are certainly legitimate grounds for State oversight in the field of employee welfare to ensure that important state-wide regulatory concerns that require uniformity are addressed in a comprehensive manner or to check the exercise of local authority when it imposes pernicious externalities. But those concerns are not addressed in R.C. 9.75, as

[15] *Id*. at 1331 (citing Mr. Crites). Other delegates echoed the limited purpose of the amendment. *See, e.g.*, *id.* at 1328 (quoting Mr. Farrell's statement that "we should so write our constitution that minimum wage legislation will be permissible under it"); *id*. at 1332 (quoting Mr. Lampson's statement that "the theory of this proposal is to authorize the legislature to pass laws by which arbitrary minimum wages can be determined by a board").

they could have been had the State undertaken to enact an actual statewide regulatory regime. The statute instead simply plucks one specific strand of the authority that local governments in Ohio have and seeks to remove it.

The State cites a series of cases in which this Court has understood Article II, Section 34 to supersede the home-rule authority of Ohio municipalities, but each involved a considered state-wide regulatory regime. *See State ex rel. Bd. of Trs. of Police & Firemen's Pension Fund v. Bd. of Trs. of Police Relief & Pension Fund of Martins Ferry*, 12 Ohio St. 2d 105 (1967) (involving the creation of a state-wide disability and pension fund for the benefit of the entire state's police and firemen, and their families); *City of Rocky River v. State Empl. Rels. Bd.*, 43 Ohio St. 3d 1 (1989) (involving a comprehensive state legislative system for collective bargaining adopted through the Public Employees' Collective Bargaining Act); *State ex rel. Strain v. Houston*, 138 Ohio St. 203 (1941) (involving a comprehensive state statutory regime for fire protection and the welfare of fire fighters); *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. City of Cleveland*, 114 Ohio St. 3d 183 (2007) (involving state-wide public employee sick-leave statutes); *Akron & B.B.R. Co. v. Public Utilities Comm.*, 148 Ohio St. 282 (1947) (involving the legislatively delegated powers of the Ohio Public Utilities Commission to regulate conditions for railroad workers).

R.C. 9.75, by contrast, is a stark example of preemption in the absence of a state comprehensive scheme. The lack of an affirmative regulatory regime signals that is simply intended to preclude local activity—not to regulate but rather to override.[16] The purpose

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

of home rule is to prevent arbitrary withdrawals of local authority simply because the state legislature has a different preference. Here that concern is even more heightened as the Ohio statute fails to address the very real concerns motivating local governments to act in this context, concerns such as heightened unemployment in large cities and among lower-income populations, as well as income inequality, all of which are legitimate considerations when a city is expending its public funds.

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

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

Turning to the question of home rule, then, the Eighth District again properly understood the nature of the conflict at issue. In *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, the Court adopted a multi-factor test to analyze whether a local ordinance is protected from preemption under Article XVIII, Section 3. Under *Canton*, a local ordinance will yield to a state statute "when (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government, and (3) the statute is a general law." *Id.* ¶ 9; *see also State ex rel. Morrison v. Beck Energy Corp.*, 143 Ohio St.3d 271 (2015) ¶ 15 (citing *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶ 17, for a similar framework). The second part of this test recognizes that while in Article XVIII, Section 3, "the words 'as are not in conflict

with general laws' place a limitation upon the power to adopt 'local police, sanitary and other similar regulations,'" the Ohio Constitution by contrast does "not restrict the power to enact laws for 'local self-government.'" *Dies Elec. Co. v. City of Akron*, 62 Ohio St.2d 322, 325 (1980). In other words, to validly preempt the Fannie Lewis Law, R.C. 9.75 must be a general law and the Fannie Lewis Law must be a police power regulation rather than the exercise of local self-government.[17]

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

This is hardly a surprising conclusion, as the exercise of local authority to ensure that at least a portion of local funding addresses concerns such as localized poverty and unemployment are common across the country. Since 1984, for example, Washington D.C.'s First Source Employment Program has had a goal of providing a percentage of new public funding jobs in larger projects to residents of the District.[18] Similarly, going back to 1985, Boston's Residents Construction Employment Standards have provided that contractors and developers use best-faith efforts to employ Boston residents in public

[17] It should be noted that the extent of the actual conflict between R.C. 9.75 and C.C.O. §188 is not entirely clear, as the trial court below noted. R.C. 9.75 is arguably narrower than C.C.O. §188, and some of the effect of Cleveland's ordinance may fall outside the scope of the state statute.
[18] *See* DC Code § 2–219.05 (2011).

contracts.[19] And, since 2009 St. Louis, Missouri, has had a project-labor goal for major public-works contracts of twenty percent local resident involvement.[20] A variety of similar programs—with varying specific requirements, but with similar goals—can be found across the country.[21]

If the City's included requirements for local employment one contract at a time, it would be self-evident that the City was exercising its self-government authority. But rather than engage in contract-by-contract requirements for public construction, the City chose to set uniform terms on which it would enter those contracts. That the City has pursued these goals through an ordinance that applies to all relevant municipal contracts does not change the nature of the local policy. Indeed, it is surely more efficient, effective, and transparent for contractors when local governments set cross-cutting ground rules for their contracts and grants outside of the terms of any individual agreements.

Because the Fannie Lewis Law is not a police power regulation, that should end the analysis and the ordinance should be upheld as an exercise of local self-government.[22] However, Cleveland should also prevail on the question whether R.C. 9.75 is a "general

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[19] *See* Boston, MA, Code §§ 8-9.1—8-9.7 (1983).

[20] *See* St. Louis, MO, Code § 68412 (2009).

[21] *See* Erin Luke, Heather A. Bartzi, & Jack Clark, *Local Hiring Programs – Recent Updates and Legislation*, Under Construction, ABA, Winter 2017 (describing programs not only in Washington, Boston and St. Louis, but also in San Francisco, New Orleans, Baltimore, Seattle, and others); Construction Contracts Law Report, *Local Hire Laws—Attempt To Reverse Local Unemployment In Construction Sector*, 35 Construction Contracts Law Report 58 (2011) (describing similar programs in Los Angeles, Oakland, and a number of other California cities).

[22] Although not addressed below, the Fannie Lewis Law's exercise of the power of local self-government is also not preempted by the "statewide-concern doctrine," under which cities "may not, in the regulation of local matters, infringe on matters of general and statewide concern." Am. Fin. Servs. Assn. v. Cleveland, 112 Ohio St.3d 170, 2006-Ohio-6043. The analysis here should converge with the arguments for why selectively removing local authority over conditions of local public contracting do not constitute a "general law" under the *Canton* analysis. To hold otherwise would be to convert virtually any aspect of local self-governance into a matter of statewide concern, no matter how incidental the external effects, vitiating home rule.

law." Here *Canton* again supplies the test. To qualify, a statute must "(1) [be] part of a statewide and comprehensive legislative enactment; (2) [apply] to all parts of the state alike and operate[s] uniformly throughout the state; (3) [set] forth police, sanitary, or similar regulations, rather than granting or limiting municipal legislative power; and (4) prescribe a rule [of] conduct upon citizens generally." *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005 ¶ 21.

Conceding for the sake of argument that on its face, R.C. 9.75 applies to all parts of the state alike and operates uniformly throughout the state,[23] the statute clearly fails the other three *Canton* elements. The relevant comprehensive state regulatory regime the State invokes is "public construction and contracting," but even in areas as broad as the State invokes, much is left to local discretion outside of the selective removal of authority in R.C. 9.75.

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

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

III. The Ohio Legislature is Threatening to Undermine Constitutional Home Rule in Ohio, Reflecting a Troubling Nationwide Trend of Similar Threats to Home Rule

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

As noted above, the Ohio General Assembly has taken repeatedly to enacting provisions designed to block the preferences of the majority of citizens in Ohio municipalities. In 2002, the General Assembly preempted home rule authority for cities to respond to serious local problems involving predatory lending.[24] In 2004, the General Assembly barred local governments from regulating oil and gas drilling.[25] In 2006, the General Assembly preempted local authority over residency for city employees,[26] and removed long-standing home rule authority to regulate gun safety.[27] And in 2016, the General Assembly passed legislation seeking to preempt local authority to regulate wages, hours, location of work, scheduling, and fringe benefits.[28] This list only begins to scratch the surface of examples of the Ohio General Assembly's selective removal of local

[24] *See* R.C. §1349.25.
[25] *See* R.C. §1509.02.
[26] *See* R.C. §9.481.
[27] *See* R.C. §9.68.
[28] *See* Substitute Senate Bill 331 (2016) (amending R.C. §§4111.02, 4113.85).

authority, particularly in the regulatory context. That the State is increasingly extending its derogation of home rule to the kind of local self-governmental choices at issue in this case—among other examples[29]—is even more unfortunate.

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

The State's repeated efforts to remove home rule powers morphs the State's oversight well beyond its limited purpose as a tool to assure the consistency of local policy with comprehensive statewide regulatory frameworks or general statewide minimum standards. State legislative preemption in Ohio today is degenerating into a series of targeted attacks on the decision-making authority of local communities. In the

[29] *See, e.g.*, R.C. §4921.25 (preempting Cleveland City Ordinance 677A.11); R.C. Chapter 4115 (prevailing wage); R.C. §124.40 (preempting municipal authority over municipal employees).

process, these attacks are eroding the protection guaranteed to home rule units by the Ohio Constitution.[30] The Ohio Constitution clearly contemplates that localities will exercise their local discretion to deal with problems in their own individual ways, without State approval, and that these choices should be respected as long as there are no overriding statewide regulatory concerns at issue. Policy experimentation and the ability to respond to unique local situations are essential aspects of a strong and vibrant home rule system. The State's relentless preemption of specific powers has eroded that system and left local governments ill-equipped to deal with local problems. The cumulative effect of these individual assaults is transformative, as Ohio marches one step at a time away from a constitutional recognition of home rule and toward the cramped

[30] Moreover, many of these attacks on local autonomy have specifically targeted Cleveland and other large cities in the state. *E.g.*, Cleveland v. State, 2013-Ohio-1186, 989 N.E.2d 1072 (8th Dist.) (invalidating 2011 state law that targeted Cleveland ban on trans fat); *see also* 2006 S. 82, codified as R.C. § 9.481 (2016) (prohibiting residency requirements for municipal employees); Joe Mulligan, *Not in Your Backyard: Ohio's Prohibition on Residency Requirements for Police Officers, Firefighters, and Other Municipal Employees*, 37 U. Dayton L. Rev. 351, 368-69 (2012) (discussing residency requirements in Dayton, Cincinnati, Akron, Cleveland, and Youngstown invalidated by R.C. § 9.481). There is evidence that gerrymandering has unfortunately infected the State's legislative process in the last decade, resulting in legislation targeting disfavored areas and populations. *See* David Stebenne, *Re-Mapping American Politics*, *in* 5 Origins: Current Events in Historical Perspective (February 2012), *available at* http://origins.osu.edu/article/re-mapping-american-politics-redistricting-revolution-fifty-years-later (discussing gerrymandering in Ohio after 2010 census); Paul A. Diller, *Reorienting Home Rule: Part 1 – The Urban Disadvantage in National and State Lawmaking*, 77 La. L. Rev. 287, 339 (2016) (analyzing gerrymandering in Ohio); *see also* Paul A. Diller, *Reorienting Home Rule: Part 2 – Remedying the Urban Disadvantage Through Federalism and Localism*, 77 La. L. Rev. 1045, 1079-80 (2017) (analyzing the effects of gerrymandering in states like Ohio). In 2015, Ohio's voters demonstrated their distaste for gerrymandering by overwhelmingly approving an initiative that puts districting in bipartisan hands as of 2020. Ohio Bipartisan Redistricting Commission Amendment, Issue 1 (2015); Ohio Secretary of State, Elections and Voting in Ohio, 2015 Official Election Results (click through to Official Statewide Results), *available at* https://www.sos.state.oh.us/SOS/elections /Research/electResultsMain/2015Results.aspx (reporting 71.5 % in favor and 28.5 % against).

view of local self-determination in Dillon's Rule that constitutional home rule was meant to abandon.[31]

The current rash of hostile preemption—in Ohio and elsewhere—is in reality nothing more than a reincarnation of the practice of so-called "ripper" bills. Like those 19th century anti-urban measures, today's wave of preemption is a tool used by legislatures to deprive cities of the initiative powers they need to respond to their own specific local issues. As Professor Richard Briffault has noted:

> One notorious abuse of the period was the practice by rural-dominated state legislatures of adopting "ripper bills"—laws that wrested municipal functions out of urban hands and transferred them to state appointees. Home rule was intended to change the traditional rule of plenary state legislative authority over local matters, to protect cities from opportunistic, partisan state meddling, and thus to vindicate the principle of local self-government.[32]

Hostile preemption today is just as inconsistent with the Constitutional protection of home rule as were the ripper bills that home rule conclusively rejected, and it is hard

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

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

to imagine that today's court would allow the continuation of a tactic that prompted the adoption of home rule in the first place.

Home rule is being undermined not only in Ohio, moreover, but also in other states across the country that similarly have constitutional traditions that recognize and value local self-government.[33] Forty-two states now impose some form of tax and expenditure limitation on local governments; forty-one states preempt ride-sharing regulation; and twenty states preempt municipal broadband regulations.[34] Moreover, twenty-five states now preempt local minimum wage laws[35] and twenty-two states preempt paid leave regulations.[36] Seemingly no domain of local policy is safe from state infringement, with preemption conflicts across the country also arising over antidiscrimination law,[37] campaign finance,[38] environmental protection,[39] housing,[40] public health,[41] public safety,[42] and others.

Attacks on home rule across the country are beginning to sound in much more fundamental terms, evincing more sweeping arrays of state legislative hostility toward local self-determination. In some states, legislatures have taken to sweeping legislation that removes entire areas of local authority. Michigan, for example, enacted

[33] *See generally* Richard Briffault, *The Challenge of the New Preemption*, 70 Stan. L. Rev. 1995 (2018); Richard C. Schragger, *The Attack on American Cities*, 96 Tex. L. Rev. 1163 (2018).
[34] National League of Cities, *City Rights in an Era of Preemption: A State-by-State Analysis* 3 (2018 Update).
[35] National Employment Law Project, *Fighting Preemption: The Movement For Higher Wages Must Oppose State Efforts To Block Local Minimum Wage Laws* 2 (2017).
[36] Michael J. Soltis, *Turning the Paid Sick Leave Page to* 2018 (2018).
[37] *See* Tenn. Code Ann. § 7-51-1801(1) & (2) (2011).
[38] *See* N.Y. Elec. 16-A (2016).
[39] *See* Colo. Rev. Stat. § 34-60-105 (2016).
[40] *See* Tex. Loc. Gov't Code Ann. § 250.007.
[41] *See, e.g.*, Kan. Stat. Ann. §12.16.137; Ga. Code Ann. § 26-2-373 (2011).
[42] *See* Minn. Stat. § 471.633 (2017).

a statute called the Local Government Labor Regulatory Limitation Act[43]—but that has been popularly referred to as the Death Star bill[44]—preempts local-government authority over employee background checks, minimum wage, fringe benefits, paid or unpaid leave, work stoppages, fair scheduling, apprenticeships, and remedies for workplace disputes. Quite simply, these laws are astonishing in their blatant disregard of the basic constitutional foundations of state and local government law and are a sign of what is emerging across the country.

It is not only that state legislatures are steadily eroding constitutional home rule, moreover, but state-local relations are increasingly taking what can only be described as a decidedly punitive turn. Recently, a new trend has emerged in preemption conflicts with legislation that goes beyond preemption to seek to hold local governments—and local *officials*—liable in policy disputes. For example, in 2016 Arizona passed SB 1487, a statute that threatens to cut off state aid to local governments with preempted laws, requiring local governments to post a nearly impossible-to-fund bond even to challenge in court findings by the state's attorney general that a local law may be preempted.[45] And in 2017 Texas, enacted S.B. 4, a statute that subjects *individual* local officials to civil penalties for violating its preemptive terms up to $25,000 for multiple violations, with each day an official continues to disagree constituting a separate violation, and makes it *misdemeanor* to violate certain of its provisions.[46] Imposing potentially crippling financial penalties on

[43] No. 105, 2015 Mich. Pub. Acts 64 (codified at Mich. Comp. Laws §§ 123.1381-.1396 (2018)).
[44] *See* Briffault, *Challenge*, *supra* note 32, at 1999-2000.
[45] Act of Mar. 17, 2016, ch. 35, 2016 Ariz. Sess. Laws 161 (codified as amended in scattered sections of the Arizona Revised Statutes).
[46] S.B. 4, 2017 Leg., 85th Sess. (Tex. 2017). Similar examples of punitive preemption potential subjecting public officials to individual liability can be found in several other states, with Arizona,

legislators for their votes is an unprecedented and extreme use of preemption powers, in clear conflict with the right to local self-government. These laws and others like them represent the opening wedge of a nation-wide legislative attack on home rule generally. It is incumbent upon the judiciary to provide a robust check on these abuses, reading home rule grants as they were intended: as a bulwark for local self-government.

Amici Curiae bring the national preemption landscape to the court's attention because it bears on the viability of the concept of home rule more generally. Each individual act of the state legislature that preempts may be seen as valid if it is not connected to a broader understanding of the value of self-government, as originally embodied in Ohio's Article XVIII, Section 3, and parallel provisions in other states. Once placed in a broader perspective, it is clear that courts need to be particularly vigilant in protecting the authority that the people have sought to invest in local governance.

CONCLUSION

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

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see Ariz. Rev. Stat. §§13-3108, 13-3118 (2016); Florida, *see* Fla. Stat. 790.33(3)(a) (2016); Mississippi, *see* Miss. Code Ann. §§ 45-9-51(1), 45-9-53(1), and Oklahoma, *see* Okla. Stat. Ann. tit. § 21-1289.24 (2014), for example, imposing individual liability on public officials for conflicts over firearm preemption. Kentucky has gone one step further: like Texas, it subjects public servants to potential criminal liability. *See* Ky. Rev. Stat. §65.870(6) (2017).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 20, 2018, a copy of the foregoing Brief of Amici Curiae was served by U.S. Mail to all counsel of record.

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