EXHIBIT A

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

THE BUCKEYE INSTITUTE	)	CASE NO: 20-CV-4301
	)	
	)	
Plaintiffs,	)	
	)	JUDGE WILLIAM WOODS
vs.	)	
	)	
KILGORE, Columbus City Auditor; et al.	)	
	)	
	)	PLAINTIFFS' SUR-REPLY
Defendants.	)	OPPOSING DEFENDANT'S
	)	MOTION TO DISMISS

Plaintiffs respectfully file this sur-reply to address arguments Defendant City Auditor Kilgore ("the City") raised for the first time in its Reply Brief ("Reply").

The City argues for the first time in its Reply Brief that subsection (C)(16) of R.C. 718.01 is evidence of the Ohio General Assembly's authority to regulate and expand municipal income taxation, presumably in a manner consistent with the City's unprecedented position that there are no Due Process limits on intrastate taxing authority. See Defendant's Reply Brief, at 4-5. By citing to and arguing based upon R.C. 718.01(C)(16) for the first time in its Reply, the City deprived Plaintiffs of the opportunity to correct the City's mischaracterization of that provision, thereby necessitating this sur-reply.

In an apparent attempt to bolster the City's theory that prior to the enactment of the tax provisions at issue in H.B. 197 the General Assembly had not just modified withholding rules, but had regulated in a way that could create tax liability for non-residents in a municipality where work was not performed, the City states that R.C. 718.01(C)(16) "provide[s] that income that is not subject to withholding under R.C. 718.011 is exempt[.]" Defendant's Reply Brief, at 4-5.

But R.C. 718.01(C)(16)(d) makes clear that such income is *not* exempt where the employer withholds and remits tax for the employee based upon the location of the employer's office (rather than where the work was actually performed), and where "[t]he employee receives a refund of the tax described in division (C)(16)(d)(i) of this section ***on the basis of the employee not performing services in that municipal corporation***." R.C. 718.01(C)(16)(d)(2)(emphasis added). Far from creating tax liability for non-residents in municipalities where work is not actually performed, in enacting R.C. 718.01(C)(16) the General Assembly clarified that employees are entitled to refunds for municipal tax withheld based on the 20-Day Rule or the Small Employer Rule if the services are not performed in that municipal corporation. Put simply, the General Assembly acknowledged that the withholding rules did not create tax liability in municipalities where work was not actually performed. Rather than undermining Plaintiff's argument, the City's new citation to R.C. 718.01(C)(16) confirms that the 20-Day Rule and the Small Employer Rule are rules of withholding—not rules creating tax liability—and therefore these rules do not support the City's attempt to engage in unconstitutional taxation of non-residents.[1]

Second, the City cites to subsection (C)(17) of R.C. 718.01for the first time in its Reply Brief to imply that this subsection allows extraterritorial taxation by municipalities. Defendant's Reply Brief, at 4-5. But the statute does nothing of the sort. In fact, this subsection of the Code, read in its entirety, has the exact opposite meaning.

[1] Even assuming *arguendo* that some other provision of the Revised Code contained an unlawful tax that fails the Due Process requirement the Supreme Court of Ohio applied to municipal taxation in *Hillenmeyer v. Cleveland Bd. of Rev.* (2015), 144 Ohio St.3d 165, but has not yet been subjected to judicial review, it is not clear how that would save the unconstitutional tax contained in H.B. 197.

Section C of R.C. 718.01 pertains to income that is exempt from municipal taxation. Subsection (17)(a), which the City omitted, provides

> (C) "Exempt income" means all of the following: * * *
>
> (17) (a) Except as provided in division (C)(17)(b) or (c) of this section, compensation that is not qualifying wages paid to a nonresident individual for ***personal services performed in the municipal corporation*** on not more than twenty days in a taxable year.

R.C. 718.01 (C)(17)(a)(*emphasis supplied*). In other words, an individual is not taxed on non-qualifying wage compensation earned during the first 20 days that they perform personal services ***in the city***.

Subsection (b) then sets out an exception to the exemption, stating that the exemption does not apply when the individual's "base of operation is located in the municipal corporation." R.C. 718.01(C)(17)(b)(i). But neither subsection (b) nor (c) removes the "performed in the municipal corporation" requirement from the statute. Rather, they simply say that non-qualifying wage compensation (for example disability payments, pension benefits, etc.) earned for work performed "in the municipal corporation" by individuals who have their "base of operation"[2] in the municipal corporation does not qualify for the 20-day exemption. R.C. 718.01(C)(17)(b)(i), *see also* Baldwin's Ohio Practice, Local Government Law- Municipal, § 12:13.

As subsection (a) makes clear, the premise of the exemption regime set forth in R.C. 718.01(C)(17)—and indeed, all of Chapter 718—is consistent with *Hillenmeyer's* directive that "[l]ocal taxation of a nonresident's compensation for services must be based on the location of the

[2] "Base of operation" is a defined term in the statute and is not synonymous with principle place of business. See R.C. 718.01(C)(17)(d). This section addresses two exceptions to the general exemption and applies only to "non-qualifying income" earned by individuals performing "personal services" Essentially (C)(17) provides that where a non-employee independent contractor does less than 20 days of work in the municipality, but maintains his or her base of operations there, then the compensation is properly taxable on in personam basis. Regardless, in the absence work being performed in the municipality, there is no tax liability. Notably, the work performed by the individual Plaintiffs here would not be classified as personal services, nor would The Buckeye Institute's Columbus office qualify as a "base of operation" for them.

taxpayer when the services were performed." *Hillenmeyer v. Cleveland Bd. of Rev.* (2015), 144 Ohio St.3d 165, 2015-Ohio-1623, ¶ 43.

Third, at page 5 of its Reply, the City complains that the Plaintiffs' brief failed to address temporary absences that occur when employees are, for example, travelling for business or working from home. The City claims that according to the Plaintiffs, "all these rules would violate the Due Process Clause unless each employee could obtain a tax refund for each moment the employee works outside the City." Defendant's Reply Brief, at 5. This argument is not only new, it is disingenuous. On the very same page on which this argument appears, the City cites to R.C. 718.011. That statute—specifically R.C.718.011(B)(2)—answers the questions posed by the City and again affirms the fundamental principle that municipal taxation of nonresident employees requires that the employee actually performed work within the municipal corporation on that day:

> For the purposes of division (B)(1) of this section, an employee shall be considered to have spent a day ***performing services in a municipal corporation only if the employee spent more time performing services for or on behalf of the employer in that municipal corporation than in any other municipal corporation on that day***.

R.C. 718.011 (B)(2)(emphasis added). The statute is consistent with *Hillenmeyer* and the long line of case that went before it—as it must be in order to comply with the minimum requirements of Due Process. It is nonetheless puzzling that the City should feign ignorance of how temporary absences should be treated given that the answer is found in the very statute that the City cited and is charged with enforcing.

Finally, the City highlights the number of times Plaintiffs cited *Hillenmeyer.* Defendant's Reply Brief, at 2. Fair enough. It is unsurprising that Plaintiffs rely on a binding Ohio Supreme Court precedent clarifying the minimum Due Process requirements for municipal income taxation of non-residents—i.e., "local taxation of a nonresident's compensation for services must

be based on the location of the taxpayer when the services were performed"—requirements that H.B. 197 plainly does not meet. *Hillenmeyer v. Cleveland Bd. of Rev.* (2015), 144 Ohio St.3d 165, 2015-Ohio-1623, ¶ 43. What is surprising is the City's maintenance of its position—in the face of such controlling precedent and with no citation to any Ohio Supreme Court authority to the contrary—that the Due Process Clause doesn't apply, or provides no limitation whatsoever to municipal income taxation of intrastate non-residents.

For all the foregoing reasons, the City's Motion to Dismiss should be Denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing Sur-Reply was served on all counsel of record via the Court's electronic filing system and on Julie Pfeiffer, Ohio Attorney General's Office, 30 East Broad St., 14th Floor, Columbus, Ohio 43215, regular U.S. Mail, postage prepaid this 23rd day of September 2020

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