



working from home the only option for some workplaces. In many cases, those workplaces discovered that—subject to some minor inconveniences—employees could still successfully perform their jobs remotely, without physically setting foot in their offices.

3. It is well-established, however, that where an employee performs his or her work has tax consequences. Specifically, courts have allowed municipalities to impose income taxes on nonresidents only to the extent that the income was earned for work performed within the municipality's limits. Indeed, in 2015, the Ohio Supreme Court has held that “[l]ocal taxation of a nonresidents’ compensation for services must be based on the location of the taxpayer when the services were performed.” *Hillenmeyer v. Cleveland Bd. of Rev.* (2015), 144 Ohio St. 3d 165, 2015-Ohio-1623, ¶ 43.

4. The constitutional basis for taxing nonresidents based on work performed in the municipality was that the employee enjoyed the benefits of the city’s infrastructure and public safety services while performing work within the city. There was thus a direct fiscal relation between the work performed within the city’s limits and the city’s public expenditures, which contributed to the employee’s ability to work within the city.

5. But when employees are required to work outside of the city, that fiscal link is severed. In an attempt to ease the collection of municipal income taxes during the health crisis, the Ohio General Assembly enacted a provision in uncodified law requiring that work performed by an employee at his or her home as a result of the health crisis would be deemed to have been performed, for municipal tax purposes, at the employee’s regular place of business.

6. Although the General Assembly’s stated motive in enacting this provision was to clarify and simplify municipal income tax collection during the health crisis, allowing a municipality to tax employees without some fiscal relation between the municipality and the

work performed violates the due process rights of those employees under the Fifth and Fourteenth Amendments to the U.S. Constitution. Further, the Ohio Constitution is specific in the powers it grants to the General Assembly and municipal corporations. The Ohio Constitution does not authorize the General Assembly to expand the taxing power of municipalities.

7. Mr. Denison brings this suit to challenge the constitutionality of the “deemed to have been performed” provision of H.B. 197 and the imposition of municipal income tax under that provision by the City of Columbus (“the City”).

8. Mr. Denison is a frontline worker, and an employee of the Ohio Department of Health (“ODH”). In his position with ODH, Mr. Denison is frequently sent on long-term assignment to areas outside of the City of Columbus. Since approximately March 17, 2020, Mr. Denison has been working, at ODH’s direction, in Groveport, Ohio. The State, however, in H.B. 197 has “deemed” Mr. Denison’s work to have been performed in the City of Columbus for tax purposes, thereby subjecting him to higher municipal income taxes, while at the same time depriving Groveport—the municipality in which Mr. Denison was actually working—of potential tax revenue for the city services provided to him while he was working there. The Orwellian operation of these two conflicting State requirements—the first, ODH sending Mr. Denison to work in Groveport, and the other, the Ohio General Assembly and the City of Columbus deeming the fiction for the purpose of taxation that the Mr. Denison did in fact work in the City of Columbus—offends basic principles of equity, and the Due Process requirements of the United States and Ohio Constitutions.

## **PARTIES**

9. Eric Denison is a resident of the City of Westerville, Ohio. He is employed by the Ohio Department of Health in its Radiologic Licensure Division as a Senior Health Physicist. His employer's usual place of business is located within the City of Columbus.

10. Before the COVID-19 pandemic, Mr. Denison frequently worked on assignment at various locations throughout the state, often for weeks or months at a time. Mr. Denison's employer would withhold Columbus municipal income tax from his pay, pursuant to R.C. 718.03. Each year, Mr. Denison tracked his days worked inside and outside of Columbus and applied for a tax refund pursuant to the City's codified ordinances and tax forms for days worked outside of Columbus, which he always received.

11. Since early March of 2020, however, at ODH's direction, Mr. Denison's primary assigned work location has been Groveport, Ohio where he has been assisting in ODH's pandemic response and most recently, COVID-19 vaccine delivery efforts.

### **Defendants and Related Parties**

12. Defendant Megan Kilgore is the City Auditor of the City of Columbus, and in her official capacity is responsible for implementation of the City's tax ordinances and collection of municipal income tax. Pursuant to R.C. 2723.03, she is the proper statutory defendant in an action to enjoin illegal taxes or to recover taxes.

13. The City of Columbus Ohio is a chartered municipal corporation pursuant to Art. XVIII, Sec. 7 of the Ohio Constitution.

14. Defendant Dave Yost is the Attorney General of the State of Ohio, and in his official capacity is a necessary nominal party to this action pursuant to R.C. § 2721.12 (A).

## Historical and Legal Background of Municipal Income Tax in Ohio

15. The Ohio Constitution does not explicitly grant municipalities the power to tax. Rather, Sec. 3, Article XVIII of the Ohio Constitution broadly authorizes municipalities “to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”

16. During the early decades of the twentieth century, the Ohio Supreme Court held that Sec. 3, Article XVIII gave municipalities the power to levy certain types of taxes, but in dicta, expressed doubt whether that power extended to a municipal income tax. *State ex rel. Zielonka v. Carrel* (1918), 99 Ohio St. 220, 228 (“It may be said in this connection that it is clearly to be implied from the Constitution that municipalities are without power to levy an income or inheritance tax.”)

17. Subsequent courts, however, took a more expansive view of Sec. 3, Article XVIII, holding that “unless and until the State of Ohio enacts laws providing for an income tax, a municipality may do so<sup>1</sup>.” *Stockwell v. City of Columbus*, 55 Ohio Law Abs. 168, 86 N.E.2d 822, 825 (Ohio Com.Pl.1949).

18. In 1950, the Ohio Supreme Court spoke authoritatively on the issue of both the constitutionality of municipal income taxes, and their application to nonresidents who worked within the municipality. In *Angell v. City of Toledo* (1950), 153 Ohio St. 179, the Court held that Section 3 of Article XVIII, along with Section 7 of XVIII (allowing a municipality to adopt a charter and exercise “all powers of local self-government”) invested municipalities with the

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<sup>1</sup> The State of Ohio did, in fact, enact a statewide income tax in 1971, but did not preempt municipal income taxes.

authority to levy an income tax and that such a tax does not violate the due process clause when such tax is levied on a nonresident for work performed within the municipalities borders.

19. Section 13 of Article XVIII of the Ohio Constitution specifically grants the Ohio General Assembly the power to “limit the power of municipalities to levy taxes and incur debts for local purposes.” But the power to limit is not the power to *expand*, and the Ohio Constitution is notably silent regarding the General Assembly’s ability to *expand* municipal tax authority. Applying the well-established principle of legal interpretation that *expressio unius est exclusio alterius* to Section 13 of Article XVIII, the General Assembly would exceed its constitutional limitations were it to attempt to expand a municipality’s taxing power. Further, the Ohio Supreme Court has long held that the General Assembly may exercise only those powers delegated to it by the Ohio Constitution. *State ex rel. A Bentley and Sons v. Pierce*, 117 N.E. 6 (Ohio 1917); *State ex rel. Robertson Realty Co. v. Guilbert*, 78 N.E. 931 (Ohio 1906).

20. A decade later, in *McDonnell v. City of Columbus* (1961), 172 Ohio St. 95, the Ohio Supreme Court again relied upon the fiscal connection between the City’s constitutional authority to tax income and the physical location where the employee earned that income. In *McDonnell*, the Court upheld the City’s income tax on an employee of The Ohio State University reasoning that even though the employee worked for an arm of the State and on property owned by the State, he nevertheless performed his work and thus earned his income within the City of Columbus.

21. More recently, in *Hillenmeyer v. Cleveland Bd. of Revision*, a case involving municipal taxation levied on a professional athlete who played one game a year in Cleveland, the Ohio Supreme Court unanimously recognized the jurisdiction limits on municipal taxation, holding that “[b]eyond in personam taxing jurisdiction over residents, local authorities may tax

nonresidents only if theirs is the jurisdiction ‘within which the income actually arises and whose authority over it operates *in rem*.’” *Hillenmeyer v. Cleveland Bd. of Rev.* (2015), 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164, ¶ 42, citing *Shafer v. Carter*, 252 U.S. 37, 55, 40 S. Ct. 221, 64 L. Ed. 445 (1920).

22. Simply put, the Due Process Clause, as interpreted by the Ohio and U.S. Supreme Courts, allows municipalities to tax two—and only two—types of income: (1) income earned by residents who live in the municipality, and; (2) income earned by non-residents for work done within the municipality. *Hillenmeyer v. Cleveland Bd. of Rev.*, 144 Ohio St.3d 165 (2015), 2015-Ohio-1623, 41 N.E.3d 1164, ¶ 42, citing *Shaffer v. Carter*, 252 U.S. 37, 55, 40 S. Ct. 221, 64 L. Ed. 445 (1920).

23. The City’s income tax ordinance as written respects this limitation, noting in its first section that: “The tax is an annual tax levied on the municipal taxable income of every person residing in or earning or receiving income in the City of Columbus.” Columbus Ohio, Municipal Code, § 311-1 (b).

24. The City of Columbus imposes a 2.5% income tax. The City of Groveport, imposes a 2% income tax.

### **The State’s Response to COVID-19 and H.B. 197**

25. On March 14, 2020, in response to the public health threat posed to Ohio residents by the COVID-19 virus, Ohio Governor Mike DeWine issued Executive Order 2020-01D (“the Emergency Declaration”), which declared a state of emergency, authorized the Ohio Department of Health to issue “guidelines for private businesses regarding appropriate work and travel restrictions, if necessary” and urged “[a]ll citizens . . . to heed the advice of the Department of

Health and other emergency officials regarding this public health emergency in order to protect their health and safety.” (See Emergency Declaration, ¶¶s 1,4,7).

26. On March 22, the State Director of Health issued an Order that required, subject to certain exceptions, “all individuals currently living within the State of Ohio . . . to stay at home or at their place of residence” (“the Stay-at-Home Order”). The Stay-at-Home Order further required that “[a]ll businesses and operations in the State,” except “Essential Business and Operations” as defined in the Order, “cease all activity within the State . . . .” (See Stay-at-Home Order, ¶¶s 1-2).

27. The Stay-at-Home Order, however, allowed nonessential businesses to continue operating to the extent that the continued operation consisted “exclusively of employees or contractors performing activities at their own residences (i.e., working from home.)” (Stay-at-Home Order, ¶2).

28. As an employee of the Ohio Department of Health, Mr. Denison is an essential worker.

29. As such, and at the direction of ODH, Mr. Denison began working from Groveport full time on March 17, 2020.

30. Since March 17, 2020, Mr. Denison has performed substantially all of his job duties from Groveport, Ohio. Specifically, as of December 31, 2020, he had worked 162 days in Groveport in calendar year 2020.

31. On March 28, 2020, the Governor signed into law H.B. 197, a measure designed to address various aspects of the health crisis. In that legislation, the General Assembly provided that employees working from home would be retroactively deemed to be working, for municipal income taxation purposes, at their typical work location.

32. Specifically, H.B. 197 provided that:

“[D]uring the period of the emergency declared by Executive Order 2020-01D, issued on March 9, 2020, and for thirty days after the conclusion of that period, ***any day on which an employee performs personal services at a location, including the employee's home***, which the employee is required to report for employment duties because of the declaration ***shall be deemed to be a day performing personal services at the employee's principal place of work.***”

(H.B. 197 Sec. 29, as enrolled (*emphasis added*)).

33. Mr. Denison’s employer has withheld Columbus income tax on all of his income in 2020.

34. In related litigation, the City of Columbus has made clear its policy that, pursuant to H.B. 197, it will not provide any refunds of withheld taxes on the basis that the taxpayer was working from home and the income was earned outside of the City. *See, e.g., The Buckeye Institute v. Kilgore*, Franklin Cty Common Pleas, Case No. 20 CV 004301, Def. Mot. to Dismiss.

COUNT ONE: ACTION FOR DECLARATORY JUDGMENT  
BASED ON UNCONSTITUTIONALITY OF H.B. 197

35. Mr. Denison restates the allegations of Paragraphs 1 through 34 and incorporates them as if fully rewritten here.

36. Ohio R.C. §2721.03 provides that “any person whose rights, status, or other legal relations are affected by a constitutional provision, statute . . . may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.”

37. Here, Mr. Denison seeks a declaration that Sec. 29 of H.B. 197, which for municipal income tax purposes deems income earned by persons working from any location that is not his principal place of work due to the health crisis to have been earned at the employee's

principal place of work, is an unconstitutional violation of his Due Process rights as secured by the Fifth and Fourteenth Amendments to the U.S. Constitution, as well as Art. I, Sec. 1 of the Ohio Constitution.

38. Specifically, Sec. 29 of H.B. 197 purports to remove the well-established requirement that a government entity must have either in personem jurisdiction over the person to be taxed or in rem jurisdiction over the property to be taxed. Or, as the *Angell* Court put it, there must be some “fiscal relation” between the municipality, the taxpayer, and the income being taxed. In this case, the City of Columbus, pursuant to authority purportedly arising under Sec. 29 seeks to tax income of nonresidents that was earned outside the City limits, where there is neither nexus nor fiscal relation between the City and the income being taxed.

39. Mr. Denison has had money withheld from his wages for work that was done outside of the City and over which the City has no taxing jurisdiction.

40. Mr. Denison therefore seeks a declaration that the City of Columbus’s taxing of nonresidents for income earned outside of the City is unconstitutional.

41. The municipal income taxes in Groveport, where Mr. Denison has worked since March 17, 2020, is lower than the 2.5% income tax rate imposed by the City of Columbus. Simply put, Mr. Denison was ordered by the State of Ohio to perform his professional duties as a frontline worker primarily from outside the City of Columbus, and then was deemed to have worked in the City for tax purposes, thereby financially penalizing him with higher taxes charged by a municipality in which he did not work and does not reside.

42. Accordingly, Mr. Denison respectfully requests that this Court declare Sec. 29 of H.B. 197, and all actions taken by the City of Columbus in reliance upon it to be unconstitutional and therefore void.

COUNT TWO: ACTION FOR DECLARATORY JUDGMENT BASED ON  
INAPPLICABILITY OF H.B. 197 TO PLAINTIFF

43. Mr. Denison restates the allegations of Paragraphs 1 through 42 and incorporates them as if fully rewritten here.

44. Section 29 of H.B. 197 by its own terms limits its applicability to persons working from home “because of” the health emergency. Specifically, H.B. 197 states that “any day on which an employee performs personal services at a location, including the employee's home, to which the employee is required to report for employment duties *because of the [Emergency Declaration]* shall be deemed to be a day performing personal services at the employee's principal place of work.”

45. Before the pandemic, Mr. Denison, by prior arrangement and assignment with his employer was typically working from outside of the City of Columbus for part of the year.

46. This pre-existing arrangement between Mr. Denison and his employer would have continued regardless of the pandemic or the Emergency Declaration.

47. In the past and consistent with Columbus codified ordinances and tax forms, Mr. Denison routinely applied for and received a tax refund based on the number of days that he worked outside of the City.

48. In 2020, however, the City has taken the position that all of his income is now taxable.

49. Accordingly, assuming that the Court does not find Section 29 unconstitutional on its face, Mr. Denison is entitled to a declaration that under H.B. 197, he is subject to Columbus municipal income tax only on days that he actually performed work inside the City, or worked

outside of the City “because of” the Emergency Order, and not on days during which he worked outside the City pursuant to his pre-existing agreement with his employer that required him regularly to perform his work at remote sites.

COUNT THREE: ACTION UNDER R.C. 2723.01  
TO ENJOIN AND RECOVER ILLEGAL TAX

50. Mr. Denison restates the allegations of Paragraphs 1 through 49 and incorporates them as if fully rewritten here.

51. Pursuant to Ohio R.C. 2723.01, et seq., “Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected.”

52. As set forth above, The City of Columbus’s levy of an income tax on income earned by nonresidents outside City limits and with no fiscal relation to the City, as defined by governing Ohio Supreme Court authority, is unconstitutional and thus illegal.

53. Mr. Denison has suffered and continues to suffer irreparable harm in the form of a continuing violation of his due process rights. Accordingly, Mr. Denison is entitled to a preliminary and permanent injunction enjoining the City of Columbus from collecting or requiring his employer to withhold wages for the payment of municipal income tax on income earned outside the City of Columbus based on H.B. 197, and requiring the City of Columbus to remit or otherwise refund any withholding of municipal income taxes for income earned while he was working exclusively outside of the City.

54. In the alternative, to the extent that the Court holds that Section 29 of H.B. 197 is valid, Mr. Denison is entitled to a refund of municipal income tax withheld for days when he was

already scheduled to work outside of the City pursuant to his pre-existing employment arrangement and duties.

WHEREFORE, Plaintiff prays for the following relief:

- (1) As to Count One, a declaration stating and Order holding that Sec. 29 of H.B. 197 of the 133<sup>rd</sup> Ohio General Assembly is unconstitutional and void;
- (2) As to Count Two, in the alternative, to the extent that the Court finds that Section 29 of H.B. 197 is valid, a declaration that his Columbus municipal tax liability is limited to days (if any) that he worked from home because of the Emergency Declaration and not to days that he worked outside of the City pursuant to the pre-existing arrangement with his employer that required him to perform his work at remote sites.
- (3) As to Count Three, a preliminary and permanent injunction enjoining the collection of municipal income taxes from nonresidents on income earned outside of the City of Columbus and a refund of all withholding or payments already collected on such income; or, in the alternative, a preliminary and permanent injunction enjoining the collection of municipal income taxes from nonresidents on income earned outside the City of Columbus on work that was performed outside the City due to a pre-existing agreement or similar arrangement of assignment with the nonresident's employer rather than the Emergency Declaration and a refund of all withholding or payments already collected on such income; and
- (4) All costs and fees, including attorneys' fees, and any additional relief the Court deems equitable; and

(5) Because this Complaint seeks declaratory judgment on a purely legal issue of pressing public importance, the Plaintiff respectfully requests that the Court set an expedited briefing and hearing schedule.

Respectfully submitted,

/s/ Jay R. Carson

Jay R. Carson (0068526)

Robert Alt (0091753)

The Buckeye Institute

88 East Broad Street, Suite 1300

Columbus, Ohio 43215

(614) 224-4422

Email: robert@buckeyeinstitute.org

*Attorneys for Plaintiff*

*J. Eric Denison*