

Plaintiffs Joel Curcio, Summer Curcio, and Chris Ackerman, by and through counsel, for their Complaint hereby states as follows:

NATURE OF THE SUIT

1. The novel coronavirus and the State of Ohio's efforts to limit its spread forced Ohioans to make significant changes to how they live and work. Though these changes were sudden and unexpected, by and large Ohioans responded by finding ways to continue to live and work safely.

2. Perhaps the most ubiquitous adaptation across Ohio workplaces was the shift to working from home. Indeed, in many cases, the health orders issued by the State of Ohio made 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 withholding requirements for employers 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. The Plaintiffs bring 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 Cities of Oregon and Toledo ("the Cities").

8. The Plaintiffs in this case were required by the State of Ohio, and later by their respective employers, to work from their homes. The State then in H.B. 197 "deemed" the work to have been performed in the City of Oregon or the City of Toledo for tax purposes, thereby subjecting the Plaintiffs to higher municipal income taxes, while at the same time depriving the municipalities in which the Plaintiffs were actually working of potential tax revenue for the city services provided to them while they were working from home. The Orwellian operation of

these two State requirements—the first forbidding the Plaintiffs from working in their places of business in the Cities of Oregon or Toledo respectively, and the other deeming the fiction for the purpose of taxation that the Plaintiffs did in fact work in their places of business in the Cities of Oregon or Toledo—offends the basic principles of equity, and the Due Process requirements of the United States and Ohio Constitutions.

PARTIES

9. Plaintiff Joel Curcio is a resident of the Springfield Township, Ohio. He is employed in the petroleum refining industry. His employer's usual place of business is located within the City of Oregon, Ohio.

10. Plaintiff Summer Curcio is a resident of the Springfield Township, Ohio. She is employed in the social services industry. Her employer's usual place of business is located within the City of Toledo, Ohio.

11. Plaintiff Chris Ackerman is a resident of Walbridge, Ohio. He is employed in the petroleum refining industry. His employer's usual place of business is located within the City of Oregon, Ohio.

12. From March 15, 2020, to the present, however, each of the Plaintiffs has worked entirely from his or her home in Springfield Township or Walbridge, respectively.

Defendants and Related Parties

13. Defendant Kathleen Hufford is the Finance Director of the City of Oregon, 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.

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

15. Defendant John Zawista is the Tax Commissioner of the City of Toledo, and in his official capacity is responsible for implementation of the City's tax ordinances and collection of municipal income tax. Pursuant to R.C. 2723.03, he is the proper statutory defendant in an action in enjoin illegal taxes or to recover taxes.

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

17. 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

18. 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."

19. 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. *See 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.")

20. 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.”¹ *Stockwell v. City of Columbus*, 55 Ohio Law Abs. 168, 86 N.E.2d 822, 825 (Ohio Com.Pl.1949).

21. 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 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.

22. 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).

23. 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

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

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.

24. 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).

25. 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).

26. The City of Oregon’s income tax rate for the relevant period is 2.25%. The City of Toledo’s income tax rate for the relevant period is also currently 2.25%.

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

27. 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).

28. 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).

29. 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).

30. In light of the Governor’s Emergency Declaration and the advice provided by public health officials, and to protect employee health and slow the spread of COVID-19, the Plaintiffs began working from home beginning on March 15, 2020. Although the State has loosened its stay-at-home requirements, the Plaintiffs’ respective employers have continued to require them to work from home.

31. While working from home, the Plaintiffs have performed all of their work duties from their home jurisdictions, Springfield Township or Walbridge, respectively.

32. 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.

33. 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*)).

34. The Plaintiffs’ employers have withheld Oregon or Toledo income tax, respectively, on all of the Plaintiffs income from March 15, 2020 through the present.

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

35. The Plaintiffs restate 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, the Plaintiffs seek a declaration that Sec. 29 of H.B. 197, which for municipal income tax purposes deems income earned by persons working from home 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 Cities, pursuant to authority purportedly arising under Sec. 29, seek to tax income of nonresidents that was earned outside the Cities’ limits, where there is neither nexus nor fiscal relation between the Cities and the income being taxed.

39. The Plaintiffs had money withheld from their wages for work that was done outside of the Cities and over which the Cities have no taxing jurisdiction.

40. The Plaintiffs therefore seek a declaration that the Cities taxing of nonresidents on income earned outside of the Cities is unconstitutional.

41. The municipal income taxes in the Plaintiffs’ home jurisdictions, where they actually have been working since March 15, 2020 are lower than the 2.5% income tax rate imposed by the Cities of Oregon and Toledo. Simply put, the Plaintiffs were required by the State of Ohio, and later his employer, to perform their professional duties from their homes outside of their employers’ usual place of business but were then deemed to have worked in the Cities of Oregon or Toledo, respectively, for tax purposes, thereby financially penalizing them with higher taxes charged by municipalities in which they neither lived nor worked.

42. Accordingly, Plaintiffs respectfully request that this Court declare Sec. 29 of H.B. 197, and all actions taken by the Cities of Oregon and Toledo in reliance upon it to be unconstitutional and therefore void.

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

43. The Plaintiffs restate the allegations of Paragraphs 1 through 42 and incorporate them as if fully rewritten here.

44. 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.”

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

46. The Plaintiffs have either already requested, or will, before April 15, 2021, request refunds from the Cities of Oregon or Toledo, using the standard tax forms to claim refunds for taxes withheld on income from work performed outside of the City.

47. Pursuant to H.B. 197, the Cities of Oregon and Toledo are required to withhold those refunds and to continue to collect tax withholding from the Plaintiffs’ employers.

48. Because the Cities of Oregon and Toledo are taxing persons who neither live nor work within their boundaries, the Cities have violated and continue to violate the Plaintiffs’ due process rights. Accordingly, the Plaintiffs are entitled to preliminary and permanent injunctions enjoining the Cities of Oregon and Toledo from collecting or requiring their employers to

withhold wages for the payment of municipal income tax on income earned outside the Cities' respective boundaries based on H.B. 197, and requiring the Cities of Oregon and Toledo to remit or otherwise refund any withholding of municipal income taxes for income earned while the Plaintiffs were working from home or otherwise outside of the Cities of Oregon and Toledo.

WHEREFORE, Plaintiffs pray for the following relief:

- (1) As to Count One, a declaration stating and Order holding that Sec. 29 of H.B. 197 of the 133rd Ohio General Assembly is unconstitutional and void;
- (2) As to Count Two, preliminary and permanent injunctions enjoining the collection of municipal income taxes from nonresidents on income earned outside of the Cities of Oregon and Toledo and a refund of all withholding or payments already collected on such income; and
- (3) All costs and fees, including attorneys' fees, and any additional relief the Court deems equitable; and
- (4) Because this Complaint seeks declaratory judgment on a purely legal issue of pressing public importance, the Plaintiffs respectfully request that the Court set an expedited briefing and hearing schedule.

Respectfully submitted,

/s/ Jay R. Carson

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