

IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO

THE BUCKEYE INSTITUTE, et al.	)	CASE NO: 20-CV-4301
	)	
	)	
Plaintiffs,	)	
	)	JUDGE CARL AVENI
vs.	)	
	)	
KILGORE, Columbus City Auditor; et al.	)	
	)	
	)	
Defendants.	)	
	)	<u>NOTICE OF APPEAL</u>

Pursuant Ohio Appellate Rule 4, please take Notice that Plaintiffs, The Buckeye Institute, Greg Lawson, Rea Hederman, and Joe Nichols hereby appeal the final appealable order of this Court granting Defendants’ Motion to Dismiss, entered on April 27, 2021, to the Tenth District Court of Appeals. A copy of the Court’s Decision is attached to this Notice as Exhibit A.

Respectfully submitted,

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*Attorneys for Plaintiff-Appellants  
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Rea S. Hederman, and Joe Nichols*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that all parties of record were served with this Notice via the Court's electronic filing system, this 28<sup>th</sup> day of April 2021.

*/s/ Jay R. Carson*

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Counsel for Plaintiffs/Appellants

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

THE BUCKEYE INSTITUTE, ET AL. :  
Plaintiffs, : Case No. 20CV004301  
-v- : JUDGE CARL A. AVENI  
MEGAN KILGORE, ET AL. :  
Defendants :

**DECISION AND ENTRY GRANTING DEFENDANT COLUMBUS CITY AUDITOR  
MEGAN KILGORE'S MOTION TO DISMISS FILED AUGUST 25, 2020**  
**AND**  
**DECISION AND ENTRY GRANTING DEFENDANT ATTORNEY GENERAL YOST'S  
MOTION TO DISMISS FILED SEPTEMBER 28, 2020**  
**AND**  
**DECISION AND ENTRY DENYING DEFENDANT COLUMBUS CITY AUDITOR  
MEGAN KILGORE'S MOTION TO STRIKE PLAINTIFFS' BRIEF IN OPPOSITION  
TO DEFENDANT KILGORE'S MOTION TO DISMISS FILED SEPTEMBER 16, 2020**  
**AND**  
**DECISION AND ENTRY GRANTING PLAINTIFFS THE BUCKEYE INSTITUTE,  
GREG LAWSON, REA HEDERMAN, AND JOE NICHOLS' MOTION FOR LEAVE TO  
FILE RESPONSE BRIEF OUT OF TIME AND INSTANTER  
FILED SEPTEMBER 17, 2020**

**I. Introduction**

This case challenges the authority of Ohio's General Assembly to legislatively limit, coordinate and regulate municipal taxing authorities in their respective treatment of employees working remotely under the exigent circumstance of the COVID-19 pandemic. Because this Court finds the General Assembly to possess such authority, the Court **GRANTS** Defendants' Motions to Dismiss.

**II. Procedural History**

Plaintiffs filed this action on July 2, 2020, during the third month of the state of emergency first declared by Ohio's Governor, Mike DeWine on March 9, 2020.

On August 25, 2020, Defendant Megan Kilgore, Columbus City Auditor, filed a Motion to Dismiss Plaintiffs' Complaint. On September 9, 2020, Plaintiffs The Buckeye Institute, Greg Lawson, Rea Hederman, and Joe Nichols filed a Memorandum in Opposition. On September 16, 2020, Defendant Kilgore filed a Motion to Strike Plaintiffs' Memorandum in Opposition. In addition, Defendant Kilgore filed a Reply in support of her Motion to Dismiss. On September 17, 2020, Plaintiffs filed a Memorandum in Opposition to Plaintiffs' Motion to Strike, and a Motion for Leave to File Response Brief Out of Time and Instantly. On September 18, 2020, Defendant Kilgore filed a Memorandum in Opposition to Plaintiffs' Motion for Leave to File Response Brief Out of Time and Instantly. On September 23, 2020, Plaintiffs filed a Sur-reply. On September 28, 2020, Defendant Ohio Attorney General Dave Yost filed a Motion to Dismiss wherein he joined Defendant Kilgore's Motion to Dismiss. On September 30, 2020, Plaintiffs filed a Memorandum in Opposition to Defendant Yost's Motion to Dismiss. On October 7, 2020, Defendant Yost filed a Reply in support of his Motion to Dismiss. On November 12, 2020, Defendant Yost filed a Notice of Supplemental Authority.

### **III. Statement of the Case**

On March 22, 2020, in response to the unprecedented public health emergency of the COVID-19 pandemic, Ohio's State Director of Health issued an Order directing that "all individuals currently living within the State of Ohio... stay at home or at their place of residence." The following week, on March 27, 2020, Ohio's General Assembly passed Section 29 of HB 197. This temporary law sought to regulate and limit the disruption and uncertainty that the statewide Stay-at-Home Order would otherwise have on municipal taxation, by establishing a uniform set of equally statewide rules applicable for the duration of the emergency. To that end, Section 29 of HB 197 treated remote work performed under the Stay-at Home Order as if it had occurred at the

employee's principal place of business. Specifically, Section 29 of HB 197 provides that "during the period of emergency declared by Executive Order 2020-01D, issued on March 9, 2020, and for thirty days after the conclusion of that period," for municipal income tax purposes, "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 declaration shall be deemed to be a day performing personal services at the employee's principal place of work." Am, Sub. H.B. 197, § 29.

On July 2, 2020, Plaintiffs The Buckeye Institute, Greg Lawson, Rea Hederman, and Joe Nichols filed a declaratory judgment action against Defendant Columbus City Auditor and the Ohio Attorney General, challenging Section 29 of HB 197. Plaintiffs Lawson, Hederman, and Nichols are all employees of Plaintiff The Buckeye Institute, which is headquartered in downtown Columbus, Ohio (See Compl. at ¶¶ 8, 14, 16, 18.) Plaintiffs allege that, due to the Ohio Department of Health's March 2020 stay-at-home order, they worked from their non-Columbus area homes instead of traveling to The Buckeye Institute's Columbus headquarters. (*Id.* at ¶¶ 7, 14-19.) Plaintiffs further allege that Section 29 of HB 197 forces each of them to pay municipal income taxes to the City of Columbus at a higher rate than the suburbs in which they reside and worked during the pandemic. (*Id.* at ¶ 54.)

Plaintiffs' Complaint asserts Section 29 of HB 197 violates Plaintiffs' due process rights protected by the Ohio and United States Constitution. Specifically, Plaintiffs allege:

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.

(*Id.* ¶ 48.) As a result, Plaintiffs "seek a declaration that the City of Columbus's taxing of nonresidents on income earned outside of the City of Columbus is unconstitutional." (*Id.* at ¶¶ 47,

53.) In addition, Plaintiffs seek a refund from the City of Columbus of the taxes they paid to Columbus while working exclusively from home during the pandemic. Finally, Plaintiffs seek to enjoin the City of Columbus from collecting future taxes on income earned outside Columbus while Section 29 of HB 197 remains in force. (*Id.* ¶ 62.)

#### **IV. Standard of Review**

A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Civil Rule 12(B)(6) tests the sufficiency of the pleading. *Harvest Credit Mgmt. VII v. Ryan*, 10th Dist. No. 09AP-1163, 2010-Ohio-5260, ¶ 4. In construing a claim for purposes of a Civ. R. 12(B)(6) motion, it is presumed that all factual allegations in the claim are true, and it must appear beyond doubt that a party can prove no set of facts warranting recovery. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. As such, "all reasonable inferences must be drawn in favor of the nonmoving party." *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991).

#### **V. Discussion**

##### **A. Defendant Kilgore's Motion to Strike and Plaintiffs' Motion for Leave to file a Memorandum in Opposition to Defendant Kilgore's Motion to Dismiss.**

As a preliminary matter, before the Court turns to the substance of Defendants' Motions to Dismiss, the Court will address Defendant Kilgore's Motion to Strike filed September 16, 2020 and Plaintiffs' Motion for Leave to File Response Brief Out of Time and Instanter filed September 17, 2020. Defendant Kilgore seeks to strike Plaintiffs' Memorandum in Opposition to her Motion to Dismiss on the grounds that Plaintiffs' response was filed one day late.

In applying the basic tenet of Ohio jurisprudence that cases should be decided on their merits, a court may, in its discretion, accept late responses to a motion. See *Perotti v. Ferguson*, 7

Ohio St.3d 1, 454 N.E.2d 951 (1983). Thus, leave should be granted to file untimely responses if it will aid in presenting the merits of the case, and the party who obtained the admission will not be prejudiced. *See Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, 67.

Accordingly, the Court **DENIES** Defendant Kilgore's Motion to Strike and **GRANTS** Plaintiffs' Motion for Leave to File Response Brief Out of Time and Instantly.

#### **B. Defendants' Motions to Dismiss**

1. Ohio's General Assembly has temporally and geographically regulated municipal taxes as part of a statewide coordinated framework even before the exigent circumstances of the COVID-19 pandemic.

Plaintiffs' Complaint seeks a declaratory judgment that Section 29 of HB 197 is unconstitutional on the grounds that it violates Plaintiffs' due process rights under the U.S. and Ohio Constitutions. Initially, the Court notes that Section 29 of HB 197 is not unprecedented. Ohio law has long recognized that an employee may temporarily work outside of the employee's principal place of work during the tax year and yet be subject to an annual tax by the municipality where the employee's principal place of work is located. R.C. 718.011, which concerns municipal income taxes, contains a procedure for employees who occasionally work from home.

Under the 20-day rule, municipal income tax must be withheld for the employee's principal place of work for the first 20 days an employee works in another Ohio municipality; *i.e.*, the nonprincipal place of work municipality. After the first 20 days, municipal income tax must be withheld and paid to the employee's nonprincipal place of work municipality. The 20-Day Rule authorizes the municipality in which the employee is required to report for employment duties "on a regular and ordinary" basis to retain the power to tax employees working elsewhere. At the same time, the 20-Day Rule limits the power of the municipality in which the employee is working, by not allowing the municipality to impose a tax. Simply put, the Ohio General Assembly has long

regulated municipal taxing authority, both temporally and geographically, even before the exigent circumstances of the COVID-19 pandemic.

2. Ohio's statutes enjoy a presumption of constitutionality.

Nevertheless, Plaintiffs assert that Section 29 of HB 197 violates their due process rights. This is a difficult argument to sustain for several reasons. As an initial matter, every enactment of the General Assembly enjoys a presumption of constitutionality. *Haight v. Minchak*, 146 Ohio St.3d 481, 2016-Ohio-1053, ¶ 11. "[B]efore a court may declare [a statute] unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Id.*, quoting *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955), paragraph one of the syllabus. Courts have a duty to liberally construe statutes in order to save them from constitutional infirmities. *Id.*, citing *Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 538, 1999 Ohio 368, 706 N.E.2d 323 (1999); *Eppley v. Tri-Valley Local Sch. Dist. Bd. of Educ.*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, ¶ 12.

Moreover, "[t]he party challenging the constitutionality of the statute bears the burden of proving its constitutional infirmity." *Id.*, quoting *Univ. Hts. v. O'Leary*, 68 Ohio St.2d 130, 429 N.E.2d 148 (1981). This is a particularly significant burden, because "the General Assembly may pass any law *unless it is specifically prohibited* by the state or federal Constitutions." *Id.*, quoting *State ex. Rel. Jackman v. Cuyahoga Cty. Court of Common Pleas*, 9 Ohio St.2d 159, 162, 224 N.E.2d 906 (1967)(emphasis added).

3. The Ohio General Assembly enjoys broad powers of intrastate taxation.

Indeed, this presumption of legislative regularity is particularly robust in the area of a state's wholly internal powers of taxation. As the United States Supreme Court observed long ago, "[t]he right of the several States to exercise the widest liberty with respect to the imposition



of internal taxes has always been recognized in the decisions of the Court.” *Schaffer v. Carter*, 252 U.S. 37, 51 (1920). *Accord, Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 463 (1995)(noting that the Due Process Clause “allows a State to tax all the income of its residents, even income earned outside the taxing jurisdiction”). As the Ohio Supreme Court similarly observed, “[a] state’s taxing authority may be exercised over all of a resident’s income based upon the state’s *in personam* jurisdiction over that person.” *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, ¶ 31. *Accord Ohio Apt. Assn. v. Levin*, 127 Ohio St.3d 76, 2010-Ohio-4414, ¶ 35 (“the assessment of taxes is fundamentally a legislative responsibility, with the result that ‘[t]his already deferential standard is especially deferential in the context of classifications arising out of complex taxation law.’”) (quoting *Park Corp. v. City of Brook Park*, 102 Ohio St.3d 166, 2004-Ohio-2237, ¶ 23).

Against this backdrop, Plaintiffs build their due process challenge here primarily on two Ohio Supreme Court cases involving the wholly separate question of *interstate* taxation. (*See, e.g., Hillenmeyer v. Cleveland Bd. of Rev.*, 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164; and *Willacy v. Cleveland Bd. of Income Tax Rev.*, 159 Ohio St.3d 383, 2020-Ohio-314, 151 N.E.3d 561). Neither is apposite for the facts at hand.

*Hillenmeyer* concerned the city of Cleveland's taxing of former Chicago Bears linebacker Hunter T. Hillenmeyer, an Illinois resident who worked for an Illinois corporation with no Cleveland office. In so doing, the *Hillenmeyer* court admittedly analyzed work performed both inside and outside of Cleveland; but did so solely in the context of *interstate* taxation. (*See, e.g., id.*, at ¶ 40) (“In guarding against *extraterritorial* taxation, ‘the Due Process Clause places two restrictions on a state’s power to tax income generated by the activities of an *interstate* business.’”)

(emphasis added). Similarly, the question in *Willacy* was whether the City of Cleveland could tax a *Florida* resident's income from stock options tendered while working in Cleveland.

Plaintiffs contend that *Hillenmeyer* and *Willacy* both stand for the proposition that an individual's Due Process rights are infringed whenever a municipality taxes income earned outside of the taxing municipality's jurisdiction. This argument is misplaced. Neither *Hillenmeyer* nor *Willacy* address the Ohio General Assembly's longstanding power to tax Ohio residents wholly within Ohio's borders, or to set appropriate coordinating limitations between Ohio municipalities for an efficient, organized and coordinated intrastate taxing schema.

Here, the municipal tax is an annual tax based on the principle place of employment as declared at the beginning of the year. Regardless of where Plaintiffs perform their work, the income they receive comes from the fact that the work they perform benefits their employer who is located in Columbus. The Court finds the General Assembly enjoys the authority to establish municipal income allocation rules among Ohio taxing authorities in order to efficiently and uniformly coordinate intrastate taxation of Ohio residents. As a general principle, Ohio courts have interpreted the Ohio Constitution to allow the General Assembly to regulate municipal taxation where necessary to police taxation among municipalities. *Cincinnati Imaging Venture v. City of Cincinnati*, 116 Ohio App.3d 1, 2, 686 N.E.2d 528 (1st Dist.1996). The Home Rule Amendment to the Ohio Constitution provides the power to impose municipal taxes, expressly subject to the limits and the control of the General Assembly. See Oh. Const. Art. XVIII, § 13; *Cincinnati Imaging Venture, supra*.

Nor is the Court persuaded by Plaintiffs' argument that Section 29 of HB 197 impermissibly *expands* municipal taxing authority, where, under Home Rule, the General Assembly may only act instead to *limit* local power. (See, e.g., Plaintiffs' Memorandum in

Opposition, Sept. 9, 2020, at 10.) Notwithstanding Plaintiffs' characterization, Section 29 of HB 197 is an express limitation on municipal latitude in taxation; providing uniform rules regulating the circumstances in which municipalities can and cannot tax. Whether a municipality gains or loses in any particular instance, they are constrained by the General Assembly's overarching direction and regulation—and thus are limited for purposes of construing Home Rule.

Indeed, this is wholly in keeping with the Ohio Supreme Court's recent assessment in *City of Athens v. McClain*, Slip Opinion No. 2020-Ohio-5146. As the Court explained:

[w]e hold that the General Assembly's authority to limit the power of municipalities to tax allows it to broadly preempt municipal income taxes and to require that such taxes be imposed in strict accordance with the terms dictated by legislation passed by the General Assembly.”

*Id.*, at ¶ 51.

For each of these reasons, the Court finds the Ohio General Assembly to have acted within its authority by enacting Section 29 of HB 197, thereby legislatively limiting, coordinating and regulating municipal taxing authorities in their respective treatment of employees working remotely under the exigent circumstance of the COVID-19 pandemic.

For the reasons discussed above, Defendant's Motion to Dismiss is hereby **GRANTED**, and Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE**. This is a final appealable order.

**IT IS SO ORDERED.**

*Copies to all counsel via electronic filing system.*

Franklin County Court of Common Pleas

**Date:** 04-27-2021  
**Case Title:** THE BUCKEYE INSTITUTE ET AL -VS- COLUMBUS CITY  
AUDITOR ET AL  
**Case Number:** 20CV004301  
**Type:** ENTRY

It Is So Ordered.

A handwritten signature in cursive script, appearing to read 'C. Aveni II', is written over a circular official seal. The seal contains the text 'FRANKLIN COUNTY OHIO' and 'ALL THINGS ARE PRESENT WITH GOD'.

/s/ Judge Carl A. Aveni II

Electronically signed on 2021-Apr-27 page 10 of 10

Court Disposition

Case Number: 20CV004301

Case Style: THE BUCKEYE INSTITUTE ET AL -VS- COLUMBUS CITY AUDITOR ET AL

Case Terminated: 08 - Dismissal with/without prejudice

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 20CV0043012021-03-2599980000  
Document Title: 03-25-2021-MOTION TO DISMISS - DEFENDANT: OHIO ATTORNEY GENERAL  
Disposition: MOTION GRANTED
2. Motion CMS Document Id: 20CV0043012021-02-1199970000  
Document Title: 02-11-2021-MOTION - DEFENDANT: COLUMBUS CITY AUDITOR - AMENDED AND UNOPPOSED MOTION TO CONSOLID  
Disposition: MOTION GRANTED
3. Motion CMS Document Id: 20CV0043012020-09-2899960000  
Document Title: 09-28-2020-MOTION TO DISMISS - DEFENDANT: OHIO ATTORNEY GENERAL  
Disposition: MOTION GRANTED
4. Motion CMS Document Id: 20CV0043012020-09-2399980000  
Document Title: 09-23-2020-MOTION FOR LEAVE TO FILE - PLAINTIFF: THE BUCKEYE INSTITUTE  
Disposition: MOTION RELEASED TO CLEAR DOCKET
5. Motion CMS Document Id: 20CV0043012020-09-1799970000  
Document Title: 09-17-2020-MOTION FOR LEAVE TO FILE - PLAINTIFF: THE BUCKEYE INSTITUTE  
Disposition: MOTION RELEASED TO CLEAR DOCKET



6. Motion CMS Document Id: 20CV0043012020-09-1699970000  
Document Title: 09-16-2020-MOTION TO STRIKE - DEFENDANT:  
COLUMBUS CITY AUDITOR  
Disposition: MOTION DENIED
  
7. Motion CMS Document Id: 20CV0043012020-08-2599980000  
Document Title: 08-25-2020-MOTION TO DISMISS -  
DEFENDANT: COLUMBUS CITY AUDITOR  
Disposition: MOTION GRANTED