IN THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
STATE OF OHIO

THE BUCKEYE INSTITUTE, et al.,	:	Appellate Case No. 21-AP-000193
Plaintiff-Appellants,	:	Trial Court Case No. 20-CV-004301
v.	:	
MEGAN KILGORE, et al.,	:	ACCELERATED CALENDAR
Defendant-Appellees.	:	

ASSIGNMENTS OF ERROR AND MERIT BRIEF OF APPELLANTS THE BUCKEYE INSTITUTE, GREG LAWSON REA HEDERMAN, AND JOE NICHOLS

ORAL ARGUMENT REQUESTED

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ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred by failing to apply the well-established due process requirements governing nonresident municipal income tax first set forth by the Ohio Supreme Court in *Angell v. Toledo*, 153 Ohio St. 179, 191 N.E.2d 250 (1950) and most recently articulated in *Hillenmeyer v. Cleveland Bd. of Rev.* (2015), 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164 (2015) and *Willacy v. Cleveland Bd. of Income Tax Rev.* (2020), 159 Ohio St. 3d 383, 2020-Ohio-314, 151 N.E.3d 561.

ASSIGNMENT OF ERROR NO. 2: The trial court erred in relying on Ohio's Twenty Day Rule, codified at R.C. 718.011, to find that Ohio law recognizes the legislature's authority to allow municipalities to engage in extraterritorial taxation.

ASSIGNMENT OF ERROR NO. 3: The trial court erred by holding that Sec. 29 of H.B. 197 was a limitation on municipal taxing power and thus authorized under the Ohio Constitution.

ISSUES PRESENTED FOR REVIEW

1. The Ohio Supreme Court has long held that the U.S. Constitution's Due Process Clause allows a municipality to tax the income of nonresidents only where there is a fiscal connection between the income and the work conducted by the taxpayer in the municipal jurisdiction. The Court has consistently interpreted this to mean that "local taxation of a nonresident's compensation for services must be based on the location of the taxpayer when the services were performed." *Hillenmeyer*, 144 Ohio St. 3d at ¶42. **Does Sec. 29's provision "deeming" income earned outside of a city's limits to have been earned inside the city for tax purposes comport with the Due Process Clause?** No.

2. Ohio's 20-Day Rule requires employers to withhold municipal income for any municipality in which employees work for more than 20 days. The Rule contains no language that would allow the imposition of tax liability and in fact provides for refunds from cities where taxes were withheld but in which the employee did not work. **Can the 20-Day Rule establish the constitutionality of extraterritorial municipal taxation**? No.

3. Ohio's Constitution grants home rule to municipalities. It also allows the General Assembly to limit, but not expand the power of municipalities to levy taxes. Section 29 allows municipalities to impose income tax on nonresidents for work performed outside of their borders—thereby purporting to grant municipalities the power to tax income that they previously were forbidden from taxing. **Is Section 29 a limitation on municipal taxation?** No.

I. STATEMENT OF THE CASE

A. Procedural Background

This is an appeal from an Order granting the Defendants' Motions to Dismiss the action in its entirety pursuant to Ohio R. Civ. P. 12(C). The Complaint sought declaratory and injunctive relief declaring that Section 29 of H.B. 197 of the 133rd Ohio General Assembly unconstitutionally deprives the Plaintiffs of due process as guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution.

On July 2, 2020, Plaintiffs filed this action seeking declaratory and injunctive relief in the form of an order declaring Sec. 29 of H.B. 197 unconstitutional, and naming as Defendants Megan Kilgore ("the City"), in her capacity as City Auditor of Columbus pursuant to R.C. 2723.03, and Ohio Attorney General Dave Yost pursuant to the requirements of R.C. § 2721.12 (A). Complaint, 7/2/20 (Doc. F170-S59).

On August 25, 2020, the City filed a Motion to Dismiss. Mot. to Dismiss, 8/25/20 (Doc. F219-S50). On September 9, 2020, the Plaintiffs filed a Memorandum in Opposition to the City's Motion to Dismiss. Mem. in Opp., 9/9/20 (Doc. F235-K58). On September 16, 2020, the City

filed a Reply in Support of its Motion to Dismiss, as well as a Motion to Strike the Plaintiffs' Memorandum for being filed one day out-of-time. Reply, 9/16/20 (Doc. F242-J87), Mot. to Strike 9/16/20 (Doc. F242-K52). On September 17, 2020, the Plaintiffs opposed the City's Motion to Strike and moved for leave to file their Memorandum in Opposition out-of-time instanter. The Court granted the Plaintiffs' Motion for Leave and denied the Defendants' Motion to Strike. Order, 4/27/21 (Doc. F483-M7). On September 23, the Plaintiffs moved for leave to file a sur-reply to the Defendants merits Reply and attached the proposed Sur-reply to be filed instanter. Mot. for Leave, 9/23/20, (Doc. F252-M95).

On September 28, 2020, the Ohio Attorney General filed a Motion to Dismiss, adopting by reference the arguments made by the City in its Motion to Dismiss. Mot. to Dismiss, 9/28/20 (Doc. F256-V67). On September 30, 2020, the Plaintiffs filed a Memorandum in Opposition to the Attorney General's Motion to Dismiss, incorporating by reference the arguments made and authorities cited in its prior Memorandum, and adding additional argument and authority. Mem. in Opp., 9/30/20 (Doc.

F263-K3).

On April 27, 2021, the Court issued an Order Granting the City's and Attorney General's Motions to Dismiss. Decision & Entry, 4/27/21 (Doc. F438-M7). On April 28, 2021, the Plaintiff-Appellants filed a timely Notice of Appeal and requested that this case be assigned to the Court's Accelerated Docket. Not. of Appeal, 4/28/21 (Doc. F485-V14).

B. Statement of Facts

The facts are not in dispute. This case challenges the constitutionality of Sec. 29 of HB 197. On March 28, 2020, the Governor signed into law H.B. 197, a measure designed to address various aspects of the COVID-19 pandemic. In that legislation, the General Assembly provided that for municipal tax purposes, employees working from home because of the pandemic would be retroactively deemed to be working at their typical work location.

Specifically, Sec. 29 of H.B. 197 provided that:

> "Notwithstanding section 718.011 of the Revised Code, and for the purposes of Chapter 718, during 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*)).

In light of the Governor's Emergency Declaration and the advice of public health officials, The Buckeye Institute's management decided that to protect its employees' health and slow the spread of the Covid-19 virus, Buckeye Institute employees should work from home. Accordingly, on March 18, 2020, The Buckeye Institute advised all of its employees, including Plaintiffs Lawson, Hederman, and Nichols, to work from home. Complaint, 7/2/20 (Doc. F170-S59). Four days later, in compliance with the State's subsequent Stay-at-Home Order, The Buckeye Institute, as a non-essential business, required all of its employees to work from home until further notice. (Id.)

To heed their employer's request, and to comply with the Stay-at-Home Order, Plaintiffs Hederman and Nichols worked from their homes beginning on March 18, 2020, returning to the office only beginning on June 7, 2020, after new health orders permitted office environments to re-

open with certain restrictions. (Id.) Mr. Lawson, however, continued to work from home throughout 2020 and into 2021. (Id.) While working from their homes, none of the individual Plaintiffs entered into The Buckeye Institute's downtown Columbus office. All of the individual Plaintiffs worked exclusively from their homes in Westerville, Powell, and Newark Township, respectively. (Id.)

Pursuant to Section 29 of H.B 197, The Buckeye Institute withheld Columbus municipal income tax from the Plaintiffs' pay and remitted it to the City. By letters sent to City Auditor Kilgore and City of Columbus Finance Director Joe Lombardi, Plaintiffs Lawson, Hederman, and Nichols formally objected to the withholding and to any payment of municipal income tax during the period when they were working from their homes outside of the City of Columbus. Further, the individual Plaintiffs requested that the City Auditor return any amounts withheld or refund any amounts from that withholding that the City had deemed to have been paid. (Id.) The City declined to provide the requested refunds. (Id.) In addition, the individual Plaintiffs requested refunds from the City

of Columbus when they filed their 2020 tax returns. The City has refused to provide the Plaintiffs with the requested refunds.

II. LAW AND ARGUMENT

A. Standard of Review

An appellate court reviews a trial court order granting a motion to dismiss pursuant to Civ. R. 12(B)(6) under a de novo standard of review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. In reviewing whether a motion to dismiss should be granted, an appellate court must accept as true all factual allegations in the complaint and all reasonable inferences must be drawn in favor of the nonmoving party. *Rossford* at ¶ 5; *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). "To prevail on a Civ. R. 12(B)(6) motion to dismiss, it must appear on the face of the complaint that the plaintiff cannot prove any set of facts that would entitle him to recover." *O'Brien v. Univ. Community Tenants Union*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975).

B. Due Process Limits a Municipality's Authority to Tax a Nonresident to Work Actually Performed Within the Municipality.

1. Introduction

The Due Process Clause 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 nonresidents 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; *see also*, *Willacy v. Cleveland Bd. of Rev.* (2020), 159 Ohio St.3d 383, 390, 151 N.E.3d 561, 2020-Ohio 314. Neither circumstance is present here, where the City of Columbus, pursuant to the language of H.B. 197, claims the unprecedented and extraordinary power to tax the income of nonresidents for work performed outside of the City. There is no way to square Section 29 of H.B. 197 and the City's conduct under it with the Ohio Supreme Court's long line of decisions applying the U.S. Constitution's Due Process Clause to municipal taxation. Simply put, the Due Process Clause requires that "[l]ocal taxation of a nonresident's compensation for services

must be based on the location of the taxpayer when the services were performed." *Id.* at ¶42.

2. Due Process and Nonresident Taxation

The municipal power to tax income arises from the Home Rule Amendment to Ohio's Constitution, rather than from statutory grant from the Ohio General Assembly. *Gesler v. Worthington Income Tax Bd. of Appeals* (2013), 138 Ohio St.3d 76, 2013-Ohio-4986, 3 N.E.3d 1177, ¶ 17. The Home Rule Amendment 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." The clause "within their limits," however, imposes a common-sense yet significant restraint on municipal power. It means that a city's home rule authority is necessarily coextensive with its geographic limits. *See Prudential Co-op. Realty Co. v. City of Youngstown* (1928), 118 Ohio St. 204, 207, 160 N.E. 695, 696, 6 Ohio Law Abs. 175 ("The direct authority given by that article [the Home Rule Provision] is expressly limited to the exercise of powers within the municipality.")

The Ohio Supreme Court first recognized that the Home Rule Amendment authorized a municipality to tax nonresidents in *Angell v. City of Toledo* (1950), 153 Ohio St. 179, 183–84, 91 N.E.2d 250, 252–53. In so doing, the *Angell* court answered two questions. The first was whether a municipality had *any* authority whatsoever to tax the income of nonresidents. The court answered that question by holding that such authority exists pursuant to the home rule amendment, but subject to limitations that the legislature may impose under Article XVIII, Section 13 or Article XII, Sec. 6 of the Ohio Constitution. *Id.* at 182-84.

The second question that the *Angell* court answered—the question on which this case turns—involves the due process limitations on taxing nonresidents' income arising from the U.S. Constitution's Fifth and Fourteenth Amendments. *Id.* at 185. There, the *Angell* court borrowed from the U.S. Supreme Court's decision in *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 425, 61 S. Ct. 246, 85 L. Ed. 267 (1940) to adopt a "fiscal relation" test for municipal income tax, which requires that the tax bear "some fiscal relation to the protections, opportunities, and benefits

given by the state." *Angell,* 153 Ohio St. at 185. The Supreme Court of Ohio's "borrowing" of an interstate test to apply in the context of intrastate municipal income taxation is, of course, a far cry from the trial court's seeming acceptance of the City's novel argument—so novel that it is contrary to more than 70 years of unbroken precedent—that the Due Process Clause protection long-recognized by the Ohio Supreme Court does not apply to municipal income taxation if the employee resides in the same State as the taxing municipality. Indeed, *Angell* was an Ohio resident and the case involved only his liability for a municipal tax.

Later cases cemented *Angell*'s dual principles that a city's power to tax arises from the home-rule amendment and that due process requires a fiscal relation between the tax and benefits provided by the city. In *McConnell v. City of Columbus,* 172 Ohio St. 95, 173 N.E.2d 760 (1961), 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 still performed his work and thus earned his income within the City of Columbus. *Id.* at 100.

Four years after *McConnell*, the Ohio Supreme Court once again affirmed that there are two instances in which a city may tax wages: "a municipality may tax the wages realized within that municipality by a nonresident (*Angell*, *supra*) and may tax the wages of a resident realized from a source outside the municipality." *Thompson v. City of Cincinnati*, 2 Ohio St.2d 292, 298, 208 N.E.2d 747, 752 (1965).

Thus, when *Hillenmeyer* arrived before the court in 2016, the principle that "[l]ocal taxation of a nonresident's compensation for services must be based on the location of the taxpayer when the services were performed" was already well-established in Ohio law. *See Hillenmeyer v. Cleveland Bd. of Rev.,* 144 Ohio St.3d 165, 2015-Ohio-1623, ¶ 43. Last year, the Ohio Supreme Court re-affirmed the contours of municipal taxation in *Willacy v. Cleveland Bd. of Income Tax Rev.*, 159 Ohio St.3d 383, 2020-Ohio-314, 151 N.E.3d 561. There, as in *Hillenmeyer* and the cases that preceded it, the Court recognized that a municipality's power to tax income arose under the Home Rule Amendment and was "limited by the Due Process Clause, which requires

a municipality to have jurisdiction before imposing a tax." *Id.*

3. State Sovereignty Must Yield to the U.S. Constitution

The Plaintiffs do not dispute that the State enjoys broad authority to regulate intrastate taxation and to place limits on municipal taxation. But no matter how broadly that authority is construed, it can never exceed the boundaries established by the U.S. Constitution. *See Madden v. Commonwealth of Kentucky,* 309 U.S. 83, 93, 60 S.Ct. 406, 410, 84 L.Ed. 590 (1940) (States have "the "sovereignty to manage their own affairs *except only as the requirements of the Constitution otherwise provide.*") (*emphasis added*).

In relying on the State's sovereign power over intrastate taxation, the trial court conflates and confuses state taxes and municipal taxes. There is no doubt that the legislature can impose *state* taxes on anyone living in Ohio. Nor is there any doubt that the legislature can use its taxing and spending power to help fund municipalities. Indeed, the State of Ohio has, since the 1930s, operated a Local Government Fund, collected from state tax collections that is used to supplement local government revenue.

See, e.g., R.C. 5747.51 (formula for allocating Local Government Fund to subdivisions). Similarly, there is no question that the General Assembly can impose limitations on the enactment and administration of municipal taxes. *See Athens v. McClain*, 2020-Ohio-5146 (requiring municipalities to allow central State administration of municipal net-profits tax).

But Section 29 of H.B. 197 does none of these things. To be clear: The state is not the taxing authority in the instant case. The state does not impose the tax. The state does not collect the tax. The State and the City are separate governmental entities. The authority to tax is not the state's authority but belongs to the municipality under home rule. *See Angell*, 153 Ohio St. at 182-84; *Thompson,* 2 Ohio St.2d at 294, *Gesler*, 138 Ohio St. 3d at 80-81. The taxes at issue are not paid to the State, but directly to the City of Columbus, pursuant to the City's tax ordinances, at the rates set forth in those ordinances, which were enacted under the City's home-rule powers.

Because the City is the governmental entity collecting the tax, the City must meet the constitutional due process requirements established by

the Ohio Supreme Court. The City's arguments below and the trial court's reliance on the State's sovereign power over intrastate taxation are thus of no moment. The State cannot expand the authority of a municipality to tax, and even assuming arguendo that it could, it may not expand municipal taxing authority beyond the bounds permitted by Due Process. No State statute or municipal ordinance—on its face or in its application—may violate the Due Process Clause. Ever. Even during a pandemic. *Marysville Baptist Church, Inc. v. Beshear,* 957 F.3d 610, 615 (6th Cir. 2020) ("While the law may take periodic naps during a pandemic, we will not let it sleep through one.").

4. *Hillenmeyer* and *Willacy's* Holdings are not Limited to Interstate Taxation.

The directive that "[a]ll trial courts and intermediate courts of appeals are charged with accepting and enforcing the law as promulgated by the Supreme Court and are bound by and must follow the Supreme Court's decisions" is one of the first principle of American jurisprudence. *Consol. Rail Corp. v. Forest Cartage Co.* (8th Dist. 1990), 68 Ohio App.3d 333, 341, 588 N.E.2d 263, 268, citing *Thacker v. Bd. of Trustees*

of Ohio State Univ., 31 Ohio App.2d 17, 60 O.O.2d 65, 285 N.E.2d 380 (1971).

The trial court erred by deciding that the Ohio Supreme Court's decisions in *Hillenmeyer* and *Willacy* did not apply to the instant case because the Plaintiffs here are Ohio residents, while the plaintiffs in *Hillenmeyer* and *Willacy* were not. Indeed, the trial court characterized *Hillenmeyer* and *Willacy* as "involving the wholly separate question of *interstate* taxation." Dec. at 7, (*emphasis in original*) (Doc. F483-M7). The trial court stated that "the *Hillenmeyer* court admittedly analyzed work performed both inside and outside of Cleveland; but did so solely in the context of *interstate* taxation." (*Id., emphasis in original*).

But the fact that the plaintiffs in *Hillenmeyer* and *Willacy* lived outside of Ohio was entirely irrelevant to their holdings. The trial court seized on an immaterial fact and departed from clear and binding precedent. The texts of the *Hillenmeyer* and *Willacy* decisions do not support this artificial distinction. Nor is such a reading consistent with the 70 years of Ohio Supreme Court precedent on due process and municipal

taxation upon which *Hillenmeyer* and *Willacy* are based.

The trial court seems to have been led astray by the *Hillenmeyer* Court's quotation of *Moorman Mfg. Co. v. Bair*, which notes that "[i]n 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.'" *See* Dec., at 7, (Doc. F483-M7) (*emphasis in original*); *Hillenmeyer*, 144 Ohio St. 3d 165 at 175, ¶40 (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272-273 (1978) (no emphasis in original). Based on this single quotation, the trial court decided that *Hillenmeyer* applied "solely in the context of *interstate* taxation." Dec. at 7, *emphasis in original*) (Doc. F483-M7).

But *Hillenmeyer* did nothing more than *Angell* before it: borrowing analysis from U.S. Supreme Court precedent involving interstate Due Process challenges in analyzing the Due Process requirements applicable to nonresident municipal income taxation. This borrowing from the interstate context in no way limits the Due Process principles to interstate challenges—as *Angell*'s intrastate application makes perfectly clear.

While *Moorman* involved Iowa's attempts to tax an Illinois corporation based on activity that occurred in Illinois, the context of that quotation leaves no doubt that the Court was applying *Moorman's* governing principle—a tax must have some connection to activities conducted within the taxing jurisdiction and that the income apportioned to the taxing district must be rationally related to the values connected to that taxing district—to municipal taxation. In the paragraph directly preceding the *Moorman* quotation, the *Hillenmeyer* court makes clear that a city's authority to tax a nonresident's income depends on where that income was earned, not the taxpayers state of residency:

> The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution states that "[no] State [shall] deprive any person of life, liberty, or property, without due process of law." ***Cleveland's power to tax reaches only that portion of a nonresident's compensation that was earned by work performed in Cleveland***. The games-played method reaches income that was performed outside of Cleveland, and thus Cleveland's income tax as applied is extraterritorial.

*Hillenmeye*r, 144 Ohio St.3d at 175, ¶ 39 (*emphasis added*). Moreover, the Cleveland tax ordinance challenged in both *Hillenmeyer* and *Willacy* defines "nonresident" as "an individual domiciled outside the City of

Cleveland." CLEVELAND, OH, CODE OF ORDINANCES (2021), §191.0312.[1] The Ohio Revised Code similarly defines "nonresident" in the context of municipal taxation as a person who lives outside of the taxing municipality:

> (J) "Resident" means an individual who is domiciled in the municipal corporation as determined under section 718.012 of the Revised Code.
> (K) "Nonresident" means an individual that is not a resident.

R.C. 718.01(J)-(K). In distinguishing the governing case law from the instant case, the trial court's decision requires that "nonresident" be read to mean "nonresident of Ohio." A reader must assume that the Ohio Supreme Court chose its words deliberately. Had the *Hillenmeyer* Court meant its holdings to apply only to "nonresidents of Ohio," it would have said so, particularly since such a distinction would have implicitly overruled *Angell*, *McConnell*, *Thompson* and the appellate cases that relied on them.

[1] Columbus's tax ordinance defines a "nonresident' as "an individual that is not a resident of the Municipality." COLUMBUS, OH, CODE OF ORDINANCES (2021), §362.03 (X).

The paragraphs immediately following the *Moorman* quote likewise render the trial court's reading untenable. In paragraph 42, the *Hillenmeyer* court cites the U.S. Supreme Court's decision in *Shaffer v. Carter* to explain that due process requires that any government entity must have either in personam or in rem jurisdiction:

> Beyond 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***."

Id., at 175-176, ¶42 (*emphasis added*), citing *Shaffer v. Carter,* 252 U.S. 37, 49, 40 S.Ct. 221, 64 L.Ed. 445 (1920). Then in paragraph 43, the court applies *Shaffer's* principle to conclude that "***local taxation*** of a nonresident's compensation for services must be based on ***the location of the taxpayer*** when the services were performed." *Id*., at 176, ¶43 (*emphasis added*), citing *Thompson v. Cincinnati,* 2 Ohio St.2d 292, 208 N.E.2d 747 (1965), paragraphs one and two of the syllabus. S*ee also, Willacy* 159 Ohio St.3d at 391 ("compensation must be allocated to the place where the employee performed the work."). The citation to *Thompson v. Cincinnati* precludes reading *Hillenmeyer's* holding

regarding Due Process requirements as restricted to out-of-state residents. The plaintiff in *Thompson* was, like the Plaintiffs here, an Ohio resident.

Hillenmeyer's 46th paragraph prohibits the trial court's imputation that "extraterritorial" must be read to mean "interstate" rather than "outside the taxing authority's jurisdiction." The court explains that "[b]y using the games-played method, Cleveland has reached extraterritorially, beyond its power to tax. Cleveland's power to tax reaches only that portion of a nonresident's compensation that was earned by work performed in Cleveland." *Id.* at ¶46, *see also, Willacy*, 159 Ohio St. 3d at 389, ¶ 21 ("We have referred to a municipality's attempt to impose a tax outside the scope of its jurisdiction as "extraterritorial taxation.")

And in Paragraph 49, the *Hillenmeyer* court recapitulates the due process protections owed to nonresidents in broad terms applicable to all taxing jurisdictions, holding that "Cleveland's games-played method imposes an extraterritorial tax in violation of due process, because it foreseeably imposes Cleveland income tax on compensation earned while Hillenmeyer was working outside Cleveland" and is inconsistent with the

rule that "the taxing authority may not collect tax on a nonresident's compensation earned outside its jurisdiction . . . ." *Id.* at 177, ¶ 49.

Finally, in paragraph 52, the court removes Hillenmeyer's Illinois residency from the analysis altogether by declining to address his Dormant Commerce Clause argument. *See Hillenmeyer*, 144 Ohio St. 3d at 177, ¶ 52. The court considered this question separate and apart from the Due Process argument and concluded that "[b]ecause the due-process analysis is dispositive, we decline to address the Commerce Clause challenge." *Id.* In other words, Hillenmeyer proposed two separate avenues of relief to the court; the Commerce Clause, which turned on his status as an Illinois resident, and Due Process, which turned on where he performed the work. By declining to rule on the Commerce Clause claim on the basis that the due process claim provided complete relief, the court confirmed that its conclusion would have been the same if Hunter Hillenmeyer had played for the (in-state) Cincinnati Bengals rather than the Chicago Bears.

The *Willacy* court puts the trial court's interstate residency distinction to rest more succinctly, noting that "[i]t is well established that ***regardless of the taxpayer's residency status***, the first prong is satisfied when a state or locality imposes taxes on income arising from work performed within the jurisdiction." *Willacy*, 159 Ohio St.3d at 390 (*emphasis added*).

The trial court's reductive reading of *Hillenmeyer*, *Willacy*, and the cases that went before finds no support in their texts or in common sense. And because the due process rights at issue flow from the Fifth and Fourteenth Amendments, no measure of State sovereignty can abrogate or curtail them.

C. The 20-Day Rule Does Not Create or Allow Extraterritorial Municipal Taxation

The trial court begins its analysis by stating—incorrectly—that the extraterritorial taxation exercised by the City under Sec. 29 was "not unprecedented" and that "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." The trial court further stated that "[t]he 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.*" (Doc. F438-M7 at 5) (emphasis added).

From this erroneous premise, the trial court reasoned—*ipse dixit*—that if the 20-Day Rule allows municipalities to engage in extraterritorial taxation, then Section 29 of H.B. 197 must be constitutional as well. But even assuming that the 20-Day Rule authorizes extraterritorial taxation by municipalities (which it does not), its existence in the Ohio Revised Code would not render a subsequent legislative action constitutional. The 20-Day Rule was enacted in 2015 and has never been challenged in court. Even assuming that the 20-Day rule—in defiance of *Angell*, *Thompson*, *Hillenmeyer*, *et al.*—purported to authorize municipalities to tax nonresidents on work performed outside of the city limits, that would not make Section 29 constitutional. It would indicate that the 20-Day Rule suffered from the same infirmity.

But the 20-Day Rule does not authorize a city to tax nonresidents for work performed outside of the city's borders. Instead, the 20-Day Rule and the related Small-Employer Rule address speaks to an employer's duty to *withhold* municipal tax for nonresident employees. In pertinent part, the statute provides:

> Subject to divisions (C), (E), (F), and (G) of this section, an employer is not required to withhold municipal income tax on qualifying wages paid to an employee for the performance of personal services in a municipal corporation that imposes such a tax if the employee performed such services in the municipal corporation on twenty or fewer days in a calendar year . . . .

R.C. 718.011(B)(1); see also R.C. 718.011(D)(1) ("if, during a calendar year, the number of days an employee spends performing personal services in a municipal corporation exceeds the twenty-day threshold . . . the employer shall withhold and remit tax to that municipal corporation . . . .").

Moreover, nothing in R.C. 718.011 authorizes a municipality to levy an extraterritorial tax. On the contrary, the statute contemplates that employees may be eligible for refunds based upon withholding during days one through twenty of the 20-Day Rule that does not conform with

where the employee is actually working, and therefore to tax liability. *See* R.C. 718.01(C)(16)(d)(ii) (referring to employees subject to withholding at a principal place of business due to the 20-Day rule, who receive refunds "on the basis of the employee not performing services in that municipal corporation"). Simply put, withholding is not the same as tax liability. While the General Assembly has greater flexibility to fashion withholding rules like the 20-Day rule for the convenience of employers, these rules do not—and constitutionally could not—modify tax liability beyond the permissible categories recognized in *Hillenmeyer*. For this reason, the Revised Code anticipates refunds from the municipality where the principal place of work is located when municipal income taxes are withheld based on that location, but when work is actually performed elsewhere—even under the 20-Day Rule.

With due respect to the trial court, its understanding of the 20-Day Rule is flatly wrong based on the clear, black-letter law. The 20-Day Rule is a rule of withholding that does not deem work to be performed or impose tax liability.

D. Section 13, Article XVIII of the Ohio Constitution Does not Authorize Extraterritorial Taxation.

Section 13, Article XVIII of the Ohio Constitution provides a check on municipalities' constitutional home rule authority by specifically reserving to the Ohio General Assembly the power to "limit the power of municipalities to levy taxes and incur debts for local purposes." At the trial court, the Plaintiffs argued that even if the Due Process Clause did not prohibit extraterritorial municipal taxation, the General Assembly lacked the constitutional authority to expand cities' power to tax under the Ohio Constitution. The trial court seemed to misconstrue Section 13 to mean that if an act of the General Assembly limits municipal taxation in any way, it is de facto constitutional. The trial court then held that Section 29 was actually such a limitation, and therefore permissible. As with the State sovereignty argument, because acts of the General Assembly must still comport with due process, if *Angell, Hillenmeyer*, *Willacy*, et al. apply, then whether Sec. 29 of H.B. 197 expands or limits municipal taxes is immaterial.

Regardless, allowing the General Assembly to expand certain municipalities' taxing jurisdiction so long as it limited others would allow the exception to swallow the rule. In this case, the Plaintiffs are being charged taxes that they would not have been charged before H.B. 197. The City of Columbus is imposing municipal income tax on nonresidents for work performed in Westerville, Powell, and Newark Township—places where it has never imposed income tax based upon nonresident work performed there before—because Columbus simply did not have the power to tax nonresidents for work performed beyond its borders. That the General Assembly might also restrict the Plaintiffs' home municipalities from imposing tax on that work cannot transmute this gross and unprecedented expansion into a "limitation."

CONCLUSION

For all the foregoing reasons, the trial court's order should be reversed and remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 26th day of May 2021, the forgoing Merit Brief was served on all counsel of record via the Court's electronic filing system.

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