IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
STATE OF OHIO

JOSH SCHAAD,	:	Appellate Case No. C- 2100349
	:	
	:	
Plaintiff-Appellant,	:	
	:	Trial Court Case No. A-2100517
v.	:	
	:	
KAREN ALDER, et al.	:	
et al.,	:	ACCELERATED CALENDAR
	:	
Defendant-Appellees.	:	

BRIEF OF APPELLANT JOSH SCHAAD

ORAL ARGUMENT REQUESTED

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I. TABLE OF CONTENTS AND ASSIGNMENTS OF ERROR

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.

ISSUE PRESENTED FOR REVIEW: 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 of of H.B. 197'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.

ASSIGNMENT OF ERROR NO. 2: The trial court erred in finding that the City had *in personam* jurisdiction to tax Mr. Schaad, a nonresident, where Ohio Supreme Court precedent has held that in personam jurisdiction in the municipal tax context is limited to residents of the municipality.

ISSUE PRESENTED FOR REVIEW: The Ohio Supreme Court has held, in *Hillenmeyer* and elsewhere, that for the purposes of municipal taxation, a municipality's *in personam* jurisdiction to tax is limited to residents of the municipality. Here, the trial court held that the City of Cincinnati has *in personam* jurisdiction to tax all of Mr. Schaad's income based on his occasional work in the City. **Does the trial court's holding that the City can exercise *in personam* jurisdiction over a nonresident comport with Hillenmeyer and other Supreme Court precedent?** No.

ASSIGNMENT OF ERROR NO. 3: The trial court erred in holding that the General Assembly can authorize extraterritorial taxation.

ISSUE PRESENTED FOR REVIEW: The Ohio Supreme Court has recognized that the General Assembly can, in certain instances, authorize a municipality to act extraterritorially. The Court, however, has never recognized extraterritorial taxation as one of those instances. **May the General Assembly authorize extraterritorial taxation in contravention of the Due Process Clause?** No.

II. STATEMENT OF THE CASE

A. Statement of Jurisdiction

This is an appeal from the trial court's June 16, 2021 order granting the Defendants' Motions to Dismiss the action in its entirety pursuant to Ohio R. Civ. P. 12(C). Ent. Granting Mot. to Dismiss, T.d. 24. Plaintiff-Appellant filed a timely Notice of Appeal on June 17, 2021 and requested that this case be assigned to the Court's Accelerated Docket. Not. of Appeal, T.d. 25.

B. Procedural Posture

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 February 9, 2021, Mr. Schaad 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 Defendant Karen Alder ("the City"), in her capacity as Finance Director of the City of Cincinnati pursuant to R.C. 2723.03, and Ohio Attorney General Dave Yost pursuant to the requirements of R.C. § 2721.12 (A). Complaint, T.d. 2.

On March 12, 2021, the City filed a Motion to Dismiss. Mot. to Dismiss, T.d. 12. On March 26, 2021, the Plaintiffs filed a Memorandum in Opposition to the City's Motion to Dismiss. Mem. in Opp., T.d. 13. On April 6, 2021, 2021, the City filed a Reply in Support of its Motion to Dismiss. Reply, T.d. 17.

On March 29, 2021, 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, T.d. 14. On April 7, 2021, 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., T.d. 19. The Court heard oral argument on the motions on May 4, 2021. On June 16, 2021, the Court issued an Order Granting the City's and Attorney General's Motions to Dismiss. Ent. Granting Mot. to Dismiss, T.d. 24. On June 17, 2021, the Plaintiff-Appellant filed a timely Notice of Appeal and requested that this case be assigned to the Court's Accelerated Docket. Not. of Appeal, T.d. 25.

C. Statement of Facts

The facts in this case are not disputed. On March 22, 2020, in response to the COVID-19 pandemic, 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-Stay-at Home Order, ¶¶s 1-2).[1]

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

Specifically, Section 29 of 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***

[1] https://coronavirus.ohio.gov/static/DirectorsOrderStayAtHome.pdf.

> ***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*)).

Mr. Schaad works in the financial services industry. His principal place of work is located in downtown Cincinnati. Before the pandemic, he typically spent several days a week either traveling for business or working from home. Beginning in March 2020, however, in compliance with the Stay-at-Home Order, on the days when he would typically go into his Cincinnati office, Mr. Schaad instead worked from his home in Blue Ash. His employer, pursuant to H.B. 197 and Ohio Revised Code's pre-existing municipal income tax withholding requirement, continued its withholding from Mr. Schaad's paychecks for the payment of municipal income taxes potentially owed to the City of Cincinnati. Mr. Schaad began returning to the office several days a week in November of 2020.

On January 11, 2021, Mr. Schaad applied for a refund of the municipal income tax withheld from his pay for the days when he worked outside of the City during 2020. Although the City has provided Mr. Schaad with a partial refund based on the time he typically worked outside of the City, pursuant to H.B 197 it has refused to grant him a refund for the days in 2020 on which he worked from home due to the Emergency Order.

II. ASSIGNMENTS OF ERROR AND ARGUMENT

Standard of Review Applicable to All Assignment of Error

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).

FIRST ASSIGNMENT OF ERROR: 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. See Ent. Granting Mot. to Dismiss, T.d. 24.

ISSUE PRESENTED FOR REVIEW: Does H.B. 197'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.

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

The Ohio Supreme Court has held that 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 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; 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 Cincinnati, pursuant to 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. As the unanimous Ohio Supreme Court held in *Hillenmeyer*, 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." *Hillenmeyer,* 144 Ohio St.3d at ¶42.

The municipal power to tax income arises from the Home Rule Amendment to Ohio's Constitution, rather than from any 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 its residents 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)**Error! Bookmark not defined.** 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 does not even apply to municipal income taxation if the employee resides in the same State as the taxing municipality. See Ent. Granting Mot. to Dismiss, T.d 24 at 7-8. 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).

Ohio appellate courts have also consistently applied the fiscal relation test to prohibit cities from taxing nonresidents for work performed outside of city limits. See *Vonkaenel v. City of New*

Philadelphia (2001), 5th Dist. Tuscarawas No. 2000AP-04-0041, 2001 WL 81700, *3 ("Any direct benefit that appellants [UPS drivers] receive from the City of New Philadelphia while they are working outside of New Philadelphia is limited.") In fact, the *Vonkaenel* court specifically rejected the notion that an employer's presence in the taxing jurisdiction does not create a sufficient nexus to tax work performed outside its borders, holding "the mere fact that the City of New Philadelphia provides services to appellants' employer, such as protection against fire and theft, is insufficient to justify a tax upon appellants under the "fiscal relation" test for work performed by appellants outside of the City of New Philadelphia" *Id*; see also, *Czubaj v. Tallmadge* (2003), 9th Dist. Summit No. 21389, 2003-Ohio-5466, ¶ 12 (severance pay not subject to municipal taxation because plaintiff's "forbearance of service cannot be deemed a service performed" within the municipality).

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.*

B. *Hillenmeyer* and *Willacy* are Not Legally Distinguishable from Mr. Schaad's Case.

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 Mr. Schaad is an Ohio resident, while the

plaintiffs in *Hillenmeyer* and *Willacy* were not. Indeed, the trial court claimed that *Hillenmeyer* involved "an unusual and very different" tax rule as distinct because it concerned a nonresident professional athlete. Ent. Granting Mot. to Dismiss, T.d 24 at 9. But the "games played" examined rule in *Hillenmeyer* was neither unusual nor different from the rule at issue here. As in *Hillenmeyer*, the City has taxed Mr. Schaad—a nonresident—for work that he performed outside of the municipality.

The *Hillenmeyer* court did not hedge or qualify its holding to persons living outside of Ohio. It held in plain and universal terms 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***." *Hillenmeyer,* 144 Ohio St.3d at ¶ 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. In so doing, the *Hillenmeyer* court merely restated the well-established Due Process principle that in order to impose a tax, a governmental entity must have jurisdiction over either the person or the thing—in this case the income—to be taxed. See *Id.* at ¶ 43 ("Under *Shaffer* 's principle, the income of a nonresident is the 'res,' or thing, that lies within the taxing jurisdiction by virtue of the activity being performed within that jurisdiction.")

The fact that the plaintiffs in *Hillenmeyer* and *Willacy* lived outside of Ohio was entirely irrelevant to the Court's holdings in those cases. The trial court thus seized on an immaterial distinction 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* Ent. Granting Mot. to Dismiss, T.d. 24 at 7, (*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) (*emphasis added*). But while it focused on Paragraph 40 of *Hillenmeyer*, the trial court overlooked the paragraphs immediately preceding and following it.

For example, in the paragraph 39, 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.[2] 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." But a reader must

[2] Similarly, Cincinnati's tax ordinance—the ordinance that it is enforcing to collect taxes from Mr. Schaad—defines a "nonresident' as "any individual domiciled outside of the Municipality." CINCINNATI, OH, CODE OF ORDINANCES (2021), §311-9-N4.

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.

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. See 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 as limited to out-of-state residents because the plaintiff in *Thompson,* like Mr. Schaad, was 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."). The City of Cincinnati has reached extraterritorially in exactly the same way by taxing Mr. Schaad for work he performed in Blue Ash.

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 (*emphasis added*). Again, if the unanimous *Hillenmeyer* court had intended to limit its holding to workers from out-of-state, it would have so indicated by using the words "outside Ohio" rather than "outside Cleveland."

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.

SECOND ASSIGNMENT OF ERROR: The trial court erred in finding that the City had *in personam* jurisdiction to tax Mr. Schaad, a nonresident, where Ohio Supreme Court precedent has held that *in personam* jurisdiction in the municipal tax context is limited to residents of the municipality. See Ent. Granting Mot. to Dismiss, T.d. 24.

> **ISSUE PRESENTED FOR REVIEW:** Does the trial court's holding that the City can exercise *in personam* jurisdiction over a nonresident comport with *Hillenmeyer* and other Supreme Court precedent? No. This issue is reviewed de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5

The trial court asserts—without citation—that Mr. Schaad "is subject to *in personam* jurisdiction with regards to matters arising out of his employment." Ent. Granting Mot. to Dismiss, T.d 24 at 7. To the extent that the trial court offers any reasoning to support its conclusion that the City had *in personam* jurisdiction over a nonresident, it notes that "Before, during, and after the stay at home order, Plaintiff was dividing his time between the two municipalities." Setting aside the factual error—Mr. Schaad was working exclusively from Blue Ash during the Stay-at-Home Order—the trial court apparently conflated the "minimum contacts" analysis used to determine jurisdiction under state long-arm statutes. These minimum contacts cases explained that the jurisdiction to tax depended upon the government's power to enforce its mandate by action taken within its borders. *Corrigan v. Testa* (2016), 149 Ohio St.3d at 21 (*internal citations omitted*). The *Hillenmeyer* court explained that for taxation purposes, a local government's *in personam* jurisdiction is limited to its residents. *See Hillenmeyer*, 144 Ohio St. 3d at 175-176 ("***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.*") (*emphasis added*). In other words, a City's taxing jurisdiction over nonresidents is necessarily limited to *in rem* jurisdiction over the work they perform in the City. Every Ohio appellate court that has examined the taxation of nonresidents has looked solely at the extent to which the municipality had in rem jurisdiction over the work performed. See, e.g., *Angell,* 153

Ohio St. at 185; *McConnell,* 172 Ohio St. at 99; *Thompson*, 2 Ohio St.2d at 297-98; *Vonkaenel*, 2001 WL 81700, *3, *Willacy*, 159 Ohio St.3d at 390 (all applying in rem jurisdiction based on where work was performed). Conversely, no Ohio appellate court has ever held that a city has *in personam* jurisdiction to tax nonresidents.

This distinction between the jurisdiction to tax and the minimum contacts analysis needed for a Court to exercise jurisdiction over an out-of-state litigant makes sense when one considers that an out-of-state driver who causes an accident could reasonably anticipate being haled into the foreign state to answer for his tort. But it would be entirely unreasonable to expect that a foreign state could tax the income of that driver simply because he crossed its borders. As the Ohio Supreme Court made clear in *Angell,* a city's taxation of nonresidents "must bear some fiscal relation to the protections, opportunities and benefits" that the city provides. Mr. Schaad does not object to paying Cincinnati municipal income taxes based on the days that he was actually in the City. Because on those days, he benefited from the protections, opportunities, and benefits of city services. He objects, however, to paying taxes to Cincinnati for days when he was enjoying the protections, benefits and opportunities afforded by Blue Ash. Those Ohio appellate courts to address the issue have rejected the notion advanced by the trial court that an employee's occasional presence or the employer's presence in the taxing jurisdiction creates the requisite fiscal connection to tax a nonresident's income earned from work outside of the municipality. See *Vonkaenel*, 2001 WL 81700, *3.

THIRD ASSIGNMENT OF ERROR: The trial court erred in holding that the General Assembly can authorize extraterritorial taxation. See Ent. Granting Mot. to Dismiss, T.d. 24.

ISSUE PRESENTED FOR REVIEW: May the General Assembly authorize extraterritorial taxation in contravention of the Due Process Clause? No. This issue is

> reviewed de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

Finally, the trial court seemed to reason that because the General Assembly has limited authority to permit municipalities to act extraterritorially, it can authorize extraterritorial municipal taxation. Importantly, the case that first noted this legislative authority, *Prudential Co-op. Realty Co. v. City of Youngstown*, not only did not involve taxation or the Due Process concerns that accompany it—it made clear that extraterritorial taxation is different in kind. 118 Ohio St. 204, 160 N.E. 695, 698-99, 6 Ohio Law Abs. 175 (1928). In *Prudential*, the Court drew a bright line between taxation and other extraterritorial actions that might be authorized by statute:

> This ordinance must be treated as an inspection ordinance and is invalid if it operates as a revenue ordinance. It is not necessary that the statute should specifically give to the municipality power to charge and collect a fee to cover the cost of inspection and regulation. Where the authority is lodged in the municipality to inspect and regulate, the further authority to charge a reasonable fee to cover the cost of inspection and regulation will be implied. The fee charged must not, however, be grossly out of proportion to the cost of inspection and regulation; otherwise it will operate as an excise tax, which is clearly beyond the power of a municipality to impose.

Prudential Co-op. Realty, 118 Ohio St. at 214. The question in *Prudential* was whether the fees charged were actually disguised taxes. Here, the municipal income tax is plainly what it purports to be: an extraterritorial tax imposed on a nonresident without *in personam* or *in rem* taxing jurisdiction.

Similarly, the trial court seemed to misconstrue the Ohio Constitution's grant of authority to limit municipal taxation to mean that any act of the General Assembly that limits municipal taxation in any way is *de facto* constitutional. 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." In this case, the Plaintiff is being charged taxes that he would not have

been charged before H.B. 197. The City of Cincinnati is imposing municipal income tax on nonresidents for work performed in Blue Ash—a place where it has never imposed income tax based upon nonresident work performed there before—because Cincinnati simply did not have the power to tax nonresidents for work performed beyond its borders. That the General Assembly might also restrict the Plaintiff's home municipality (Blue Ash) from imposing tax on that work cannot transmute this gross and unprecedented expansion into a "limitation."

Setting aside whether the trial court's determination that H.B.197—which allowed municipalities to tax nonresident employees on work performed outside their borders—was actually a limitation rather than an expansion of taxing authority, acts of the General Assembly must always comport with due process. *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*). Thus, under *Angell, Hillenmeyer*, *Willacy*, et al., whether Sec. 29 of H.B. 197 expands or limits municipal taxes is immaterial.

The City's arguments below and the trial court's reliance on the State's sovereign power over intrastate taxation or the 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.").

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 10th day of September 2021, the forgoing Merit Brief was served on all counsel of record via the Court's electronic filing system.

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