In the

Supreme Court of Ohio

THE BUCKEYE INSTITUTE, et al.	:	Case No.
	:	
Plaintiffs-Appellants,	:	
	:	
v.	:	On Appeal from the Franklin
	:	County Court of Appeals,
MEGAN KILGORE, et al.,	:	Tenth Appellate District
	:	
	:	Court of Appeals
	:	Case No. 21-AP-000193
Defendants-Appellees.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFFS-APPELLANTS THE BUCKEYE INSTITUTE, ET AL.

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INTRODUCTION

Over seventy years ago, this Court held that the Ohio Constitution's Home Rule Amendment permits municipalities to impose an income tax. *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E.2d 250 (1950). Yet the Court was clear that in exercising their home rule power to tax, cities must comport with Due Process. *Id.* Due Process requires that the taxing entity have either *in personam* jurisdiction over the taxpayer or *in rem* jurisdiction over the work being taxed. *Willacy v. Cleveland Bd. of Income Tax Rev.*, 159 Ohio St.3d 383, 2020-Ohio-314, 151 N.E.3d 561 (2020); *Hillenmeyer v. Cleveland Bd. of Rev.* 144 Ohio St.3d 165, 2015-Ohio-1623, ¶ 42, (2015) (internal citations omitted). In an unbroken line of cases beginning with *Angell* in 1950 and continuing to the present, this Court has consistently 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 performed within the geographical limits of the municipality. *See McDonnell v. City of Columbus*, 172 Ohio St. 95, 173 N.E.2d 760 (1961); *Thompson v. City of Cincinnati*, 2 Ohio St.2d 292, 208 N.E.2d 747 (1965); *Hillenmeyer* at ¶ 42; *Willacy* at ¶¶ 23-24.

Throughout the *Angell-Willacy* line of cases, this Court has repeatedly emphasized that the location where the nonresident performed the work to be taxed was the dispositive factor in its Due Process analysis. *Hillenmeyer,* 144 Ohio St.3d at 175; *Thompson*, 2 Ohio St.2d at 298; *Willacy*, 159 Ohio St. 3d at 390. To paraphrase the old real-estate adage, since 1950, the three most important factors in determining whether municipal taxation of nonresidents comported with Due Process have been location, location, location. This test was easy to understand and to apply. A city could tax work performed by nonresidents within its limits, but not beyond them.

But in March of 2020, much that had once been established, predictable, and routine fell into confusion. The General Assembly enacted Section 29 of H.B. 197, "deeming" that

nonresidents working from home due to the pandemic were—for municipal tax purposes—still performing their work at their principal place of business in the city. This enactment fundamentally altered what had been the law for 70 years and required workers to pay income taxes to cities in which they neither lived nor worked, and in many cases, had not set foot in for months. The Tenth District abandoned this Court's bright-line location test and—applying the presumption of constitutionality of legislative acts—held that the legislature's work-around was not "'clearly incompatible' with due process clause tax limitations." App.Op ¶ 1.

The Tenth District sought to distinguish the *Angell-Willacy* line of cases by noting that the measure in question was an "emergency measure by the General Assembly" rather than a mere municipal tax ordinance and rejecting the "black-and-white premise that the Supreme Court of Ohio has determined that . . . municipal taxation of nonresidents' income can only be based on the physical location of the taxpayer when the services were performed." *Id*. at 13. But Due Process applies to municipal income tax provisions putatively modified and expanded by emergency state actions with the same force as it does to municipal income tax provisions and collections made without State assistance. Nor has this Court—nor any court in any reported case in Ohio—ever found that an *employer's* presence within a taxing jurisdiction to be a sufficient "fiscal connection" to satisfy Due Process to tax an employee performing his or her work outside the geographical limitations of the taxing jurisdiction. *Hillenmeyer*, 144 Ohio St.3d at 175; *see also*, *Vonkaenel v. City of New Philadelphia* (2001), 5th Dist. Tuscarawas No. 2000AP-04-0041, 2001 WL 81700, *3"); *Czubaj v. Tallmadge*, 9th Dist. Summit No. 21389, 2003-Ohio-5466, ¶ 12 (Oct. 15, 2003); *Aul Jones v. City of Massillon*, BTA No. 2018-2137, 2021 WL 1270305 (Mar. 29, 2018). Instead, for over 70 years the Due Process analysis for nonresident taxation has been "black-and-white." Because the Tenth District's decision departs from this Court's long-established rule,

this case presents a substantial constitutional question and a question of public and great general interest.

Moreover, the sweeping nature of Sec. 29 of H.B. 197 combined with the government and employer decisions that forced millions of Ohioans to work from home makes this question one of public and great general interest. This Court should therefore exercise jurisdiction to address the conflict between the Tenth District's decision and this Court's precedent.

STATEMENT OF THE FACTS AND CASE

1. 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." Executive Order 2020-01D, Declaring a State of Emergency, https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2020-01-d (accessed Jan. 14, 2022).

On March 22, 2020, in response to the virus's rapid spread, 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…" Ohio Department of Health, Director's Stay At Home Order;https://coronavirus.ohio.gov/static/publicorders/DirectorsOrderStayAtHome.pdf(accessed Jan. 14, 2022).

The Ohio General Assembly responded by passing H.B. 197, an omnibus COVID relief bill, which included changes to Ohio's unemployment system, emergency aid to small businesses, and numerous other short-term programs to address the health and economic impacts of the pandemic. The bill also contained a provision to address municipal taxation during the pandemic in light of the sudden shift to remote work. Based on this Court's prior decisions and long-standing practice, Ohio cities imposed income tax on nonresidents based on the work that the nonresident performed within the city's geographical limits. But with millions of workers who had once commuted from suburbs to a central city suddenly forced to work from home by the Stay-at-Home order, the central cities faced a tremendous potential loss in tax revenue. The legislature found a creative solution that at once invoked the long-held rule that a city's power to tax nonresidents ended at the city limits but still purported to allow cities to collect income tax revenue from nonresidents working outside of the city. Because law had for 70 years tied taxation to where the work was performed, the legislature would simply "deem" that employees working from their home were actually 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 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)). On March 28, 2020, Governor DeWine signed H.B. 197 into law.

2. The Buckeye Institute's offices are located in downtown Columbus. Complaint, 7/2/20 (Doc. F170-S59). But The Buckeye Institute's work, and the work of its employees, does not depend on employees being physically present in that office. (Id). For example, the bulk of

work performed by Plaintiffs Lawson and Hederman is policy research and writing conducted over the internet. (Id. at ¶ 12) The Buckeye Institute uses a cloud-based computing system for all of its email and document sharing needs. (Id.) This means that the computer servers that store and transfer the Buckeye Institute's data and email are not located in its Columbus office but are scattered around the world. Similarly, The Buckeye Institute's employees who are engaged in external relations, such as Mr. Nichols, conduct most of their work over the phone, through the internet, or through in-person meetings outside of the City of Columbus. (Id.).

Responding to the Governor's Emergency Declaration and the advice provided by 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 not report to work in Columbus but should work remotely from their homes. Thus, on March 18, 2020, The Buckeye Institute advised all of its employees, including Plaintiffs Lawson, Hederman, and Nichols, to work from home. (Id. at ¶ 35) Four days later, in compliance with the State's subsequent Stay-at-Home Order, The Buckeye Institute, as a non-essential business, changed its suggestion that employees work from home to a requirement (Id. at ¶ 36)

To heed their employer's request, and to comply with the Stay-at-Home Order, Plaintiffs Hederman, and Nichols worked from their homes in Powell and Newark Township, respectively, from March 18, 2020 to June 7, 2020. (Id. at ¶ 37) Mr. Lawson, however, continued to work from home throughout 2020 and into 2021. (Id. at ¶ 38) While working from their homes, none of the individual Plaintiffs entered into The Buckeye Institute's downtown Columbus office or performed any work within the City of Columbus. (Id. at ¶ 39)

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. 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. at ¶¶ 43-44) 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 refused to provide the Plaintiffs with the requested refunds.

3. 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 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).

The City moved to dismiss the action on the basis that it failed to state a claim for relief could be granted and the Plaintiffs responded. Mot. to Dismiss, 8/25/20 (Doc. F219-S50); Mem. in Opp., 9/9/20 (Doc. F235-K58). The City filed a Reply in Support of its Motion to Dismiss. Reply, 9/16/20 (Doc. F242-J87). On September 23, the Plaintiffs moved for leave to file a sur-reply to the Defendants Reply and attached the proposed Sur-reply to be filed instanter. Mot. for Leave, 9/23/20, (Doc. F252-M95). The Ohio Attorney General also filed a Motion to Dismiss, adopting by reference the arguments made by the City in its motion to which the Plaintiffs responded. Mot. to Dismiss, 9/28/20 (Doc. F256-V67); 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). The Plaintiffs-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).

4. The Tenth District Court of Appeals affirmed the trial court's dismissal of the case. App.Op. ¶ 1. The Tenth District relied on the Sec. 29's presumptive constitutionality to hold that the measure was not "'clearly incompatible' with due process clause tax limitations." (Id.) The Court of Appeals rejected the Appellant's arguments regarding the *Angell-Willacy* line of cases by noting that under a facial challenge, there might be some set of facts under which the statute might be constitutional. (Id. at ¶ 34). The Tenth District's decision also distinguished the *Angell-Willacy* line of cases on the basis that the extraterritorial taxation at issue here occurred pursuant to an "emergency" act of the General Assembly rather than by operation of a municipal tax ordinance. (Id. ¶ 33)

THIS CASE RAISES SUBSTANTIAL CONSITUTIONAL QUESTIONS AND INVOLVES A QUESTION OF PUBLIC AND GREAT GENERAL INTEREST

This Court should agree to review the Tenth District's Decision for four reasons.

1. This Court should agree to review the Tenth District's decision because the decision conflicts with this Court's long-standing Due Process analysis for municipal taxation that focused on where the taxpayer performed the work. The Tenth District's decision calls into question this Court's holdings in *Hillenmeyer* and elsewhere that "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,* 144 Ohio St. 3d at 175 at ¶ 42, *citing Shafer v. Carter*, 252 U.S. 37, 55, 40 S. Ct. 221, 64 L. Ed. 445 (1920). The Tenth District's decision presents a substantial departure from established jurisprudence and goes so far as to indicate that the mere presence of an employer within a city's limits may be enough of a fiscal connection for that city to tax its employees, regardless of where they work. No Ohio court has ever adopted this rule, and its

implications in a world where remote work is likely to become more common raise significant constitutional as well as public policy questions.

2. The related question of whether the General Assembly's authority allows it to expand municipal taxation—enlarging upon a city's Home Rule authority in order to circumvent this Court's clearly established Due Process restriction on municipalities taxing nonresidents who neither work nor live within the taxing municipality's borders is one of substantial constitutional import. The Ohio Constitution undoubtedly grants the General Assembly the authority to limit and regulate municipal taxation imposed under the Home Rule Amendment. *See e.g., Athens v. McClain*, 163 Ohio St.3d 61, 2020-Ohio-5146. But no Court has ever recognized a legislative power to expand municipal taxation or enlarge upon a city's Home Rule authority.

Following the Tenth District's court's decision to its logical conclusion, a future General Assembly confronted with a fiscal crisis in the City of Columbus could respond by simply deeming that Ohioans who are not Columbus residents are—for tax purposes—working in Columbus. For example, Nationwide Insurance, which is headquartered in Columbus, employs agents and other employees throughout the state. Applying the Tenth District's decision, the General Assembly could authorize the City of Columbus to tax the income of all of these employees, regardless of whether they ever visited the "home office." This would represent a sea change in municipal tax law and would raise serious questions regarding due process and political accountability. At first blush, this hypothetical seems far-fetched. But consider that in 2019, enacting a measure deeming work actually performed in one taxing jurisdiction as being performed in another for purposes of taxation would have seemed equally remote. Even assuming, *arguendo*, that a legislative act can somehow work around the Due Process limitations, this Court should clarify whether the legislature's general power to limit, regulate, and standardize the collection of municipal income

taxes recognized in *Athens* extends so far as to allow the General Assembly to impose municipal tax liability on nonresidents working outside the geographical limits of the taxing jurisdiction.

3. In its decision, the Tenth District emphasizes the fact that Sec. 29 of H.B. 197 was passed as an emergency measure and due to the "exigent circumstances" of the COVID-19 pandemic. While courts have routinely held that "exigent circumstances" under extremely limited circumstances may excuse compliance with certain Fourth Amendment protections, the idea that "exigent circumstances" should weigh in the constitutional Due Process analysis of legislation is novel and at odds with the Constitution. As the U.S. Court of Appeals for the Sixth Circuit recently stated: "While the law may take periodic naps during a pandemic, we will not let it sleep through one. *Maryville Baptist Church, Inc. v. Beshear,* 957 F.3d 610, 615 (2020). The instruction to weigh "exigent circumstances" or the presence of an emergency clause in evaluating legislation raises substantial constitutional questions.

4. Almost every Ohioan is subject to some form of municipal taxation. Even after the pandemic finally runs its course, it seems unlikely that all of the downtown workers will return to their offices. Cities will still need revenue and will look at any available avenue to find it. Simply put, tax treatment of remote work will remain an issue when the pandemic ends. These issues affect millions of Ohioans as well as local governments across the State. This case thus presents a question of public and great general interest.

In sum, this case presents issues concerning fundamental issues of Due Process that will affect taxpayers and local governments across the State for years to come. It calls into question this Court's established jurisprudence and the bright line location test that has governed municipal taxation of nonresidents for nearly a century and implies that *any* connection between a nonresident and a taxing jurisdiction—even a connection as thin as a fiberoptic line or the radio

waves of a 5G connection—might, if blessed by the legislature, be substantial enough to satisfy Due Process. This case is thus worthy of this Court's attention.

ARGUMENT

Appellant's First Proposition of Law:
Sec. 29 of HB 197 is clearly incompatible with Due Process and This Court's Angell-Willacy Line of Decisions interpreting the Due Process requirements for Municipal Taxation.

A. The City's Power to Tax Arises from the Home Rule Amendment of the Ohio Constitution

The City of Columbus is a chartered municipal corporation pursuant to Art. XVIII, Sec. 7 of the Ohio Constitution. The Home Rule provision of the Ohio Constitution broadly authorizes cities like Columbus "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 significant commonsense restriction on municipalities. It means that a city's home rule authority is necessarily coextensive with and limited to its geographic limits. *See Prudential Co-op. Realty Co. v. City of Youngstown*, 118 Ohio St. 204, 207, 160 N.E. 695, 696 (1928). ("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*, 153 Ohio St. 179, 183–84, 91 N.E.2d 250 (1950). In *Angell*, this Court answered two questions. The first, which it answered in the affirmative, was whether a municipality had any authority under the Home Rule Amendment to tax income. The second question that *Angell* court answered—the question on which this case turns—involves how to reconcile a city's power to tax "within its limits" with the fundamental holding that in order for a tax to satisfy Due Process, the political entity must exercise either *in personam* or *in rem* jurisdiction over the person or activity being taxed. *Id.* at 185.

The *Angell* court relied on 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, which requires that the tax bear "some fiscal relation to the protections, opportunities, and benefits given by the state," and applied it municipal taxation. *Id.* at 185. In applying the fiscal relation test, the *Angell* court found that Angell was actually working within the City of Toledo and that the City afforded him "not only a place to work but a place to work protected by the municipal government of Toledo." *Id.* Unlike Mr. Angell, the Plaintiffs here did not rely on the City of Columbus to provide them with a place to work—indeed, pursuant to state law, the Plaintiffs were legally prohibited from working in Columbus during significant periods of the dispute. Although the Buckeye Institute maintains its office in downtown Columbus, the Plaintiffs were perfectly capable of performing their jobs remotely. (See Cmplt, at ¶¶s 11-12). While working from home, they did not drive on Columbus's roads, make use of its infrastructure, or rely on its safety services. Mr. Angell received the benefit of the City's services—and thus established a fiscal relation between his work and the taxes paid—because he was working in the City.

If there were any doubt in *Angell* regarding the primacy of location in the Due Process analysis in taxation of nonresidents, later cases removed doubt and reaffirmed that Due Process's fiscal relation test requires that the benefit to the taxpayer arises out of the taxpayer's physical presence in the city and the work actually is performed within city limits. *See McDonnell,* 172 Ohio St. at 99-100. For example, in *McDonnell*, the Court upheld the City's power to tax an employee of The Ohio State University. The Court reasoned that even though the employee worked for an arm of the State and performed his job duties on property owned by the State, the employee still performed the work on which he was taxed within the City of Columbus, which provided him a place to work protected by its city safety services. *Id.* at 100.

Four years after *McDonnell*, this Court once again affirmed that a city's ability to tax the wages of nonresidents arises out of the work that the nonresident performs within the city's geographical limits. *Thompson*, 2 Ohio St.2d at 298. In *Thompson,* a resident of Loveland, Ohio who worked "within the boundaries of Cincinnati" challenged Cincinnati's authority to tax his income. As in *Angell* and *McDonnell*, the *Thompson* Court employed the language of geography, holding in its syllabus that "[a] municipal corporation may levy a tax on the wages *resulting from work and labor performed within its boundaries* by a nonresident of that municipal corporation. (*Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E.2d 250, approved and followed.)" *Id.* at syllabus (emphasis supplied) (citations in original).

Thus, when the *Hillenmeyer* case arrived before this Court in 2016, the law 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. *Hillenmeyer,* 144 Ohio St.3d at 175, ¶ 43 (emphasis added). As this Court explained, the location where the work was performed was paramount because "[u]nder *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." *Id.* In 2020, this Court re-affirmed the location principle in *Willacy,* holding that a city's taxing authority "is limited by the Due Process Clause, which requires a municipality to have jurisdiction before imposing a tax." *Willacy,* 159 Ohio St.3d at 389.

What's more, Ohio appellate courts have also applied the location principle to prohibit cities from taxing nonresidents for work performed outside of city limits. *See Vonkaenel v. City of New Philadelphia,* 5th Dist. Tuscarawas No. 2000AP-04-0041, 2001 WL 81700, *3 (Jan. 23, 2001) ("[t]he 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"); *Czubaj,* 2003-Ohio-5466, at ¶ 12 (holding severance pay not subject to municipal taxation because plaintiff's "forbearance of service cannot be deemed a service performed" within the municipality). These cases directly contradict the Tenth District's supposition that an employer's presence in the taxing district establishes a sufficient fiscal relation for the city to tax a nonresident employee on work done outside of city limits. The Tenth District's decision also threatens to sow confusion in administrative agencies, which have applied the location rule. *See Aul Jones v. City of Massillon*, BTA No. 2018-2137, 2021 WL 1270305 (Mar. 29, 2018).

Taking these cases together, a direct conflict exists between this Court's *Angell-Willacy* location-centered jurisprudence and the "flexible" test that the Tenth District applied.[1] The Court should take this case to address the substantial constitutional question of whether—as *Hillenmeyer* holds—local taxation of nonresidents is limited to the work the nonresidents perform within the city, or whether, as the Tenth District held, some lesser or indirect connection confers sufficient benefits on nonresident employees for the city to tax their incomes.

Appellant's Second Proposition of Law:
The General Assembly Cannot Authorize Municipalities to Engage in Extraterritorial Taxation.

The Home Rule Amendment allows cities to exercise all powers of local self-government," including taxation of income "within their limits," but no further. *Czubaj* at ¶ 12. Yet assuming—consistent with the *Angell-Willacy* line of cases—that the City of Columbus lacks Home Rule

[1] The Tenth District suggests that there is no conflict because this case presents a facial challenge and there are circumstances where the rule could be valid, such as if "some employees . . . continued to report to work at their normal place of employment or, perhaps, worked from home in the same municipality as their employer." App.Op. ¶ 36. But Sec. 29 of H.B. 197 would, by definition, not apply to the circumstances that the Tenth District identified. The Tenth District identified no set of circumstances where Sec. 29 would actually apply and have effect where it would not come into direct conflict with this Court's Due Process jurisprudence.

authority to tax the Plaintiffs-Appellants on work they performed outside its borders, Section 29 of H.B. 197 and the Tenth District's opinion poses a second substantial constitutional question: Can the State authorize the City to impose and collect such a tax? Ohio courts have held that the General Assembly can, in fact, allow a city to act extra-territorially in some circumstances, where it would lack authority to do so under home rule. *See,* e.g. *Prudential Co-op,* 118 Ohio St. 204. But taxation is not one of those circumstances. *Id* at 214. The Ohio Constitution grants General Assembly authority only to "limit the power of municipalities to levy taxes." Ohio Constitution, Article XVIII, Section 13. The Tenth District's decision would read this provision, and the Court's decision in *Athens v. McClain*, to imply the power to allow a municipality to tax nonresidents working outside of its limits. But *Athens* simply recognizes the uncontroversial rule that the State can regulate how cities collect taxes. It does not imply that the State can authorize cities to engage in extraterritorial taxation—that is, taxation beyond what the Home Rule Amendment or Due Process permits.

Similarly, the Tenth District's opinion misconstrues the First District's decision in *Time Warner Cable, Inc. v. City of Cincinnati*, 2020-Ohio-4207, 157 N.E.3d 941 (1st Dist.) to hold that the State can authorize municipalities to engage in extraterritorial taxation. But the *Time Warner* court said no such thing. Instead, *Time Warner* court made clear that "[c]ontrary to the City's contention [regarding extraterritorial taxation]," Time Warner was already subject to the City's income tax by virtue of its presence in the City. *See Time Warner Cable, Inc. v. City of Cincinnati,* 2020-Ohio-4207 at ¶ 16. The whole nonresident analysis doesn't apply because Time Warner was a resident (corporation), and as such, the taxing jurisdiction could reach income earned by Time Warner anywhere in the world. This is the rule for residents, but not for nonresidents. In other words, the threshold due process jurisdictional question had already been answered because the

City had *in personam* jurisdiction over Time Warner. Moreover, the case on which the *Time Warner* court relied in making this statement, *Prudential Co-op. Realty Co. v. City of Youngstown*, did not involve taxation or the Due Process concerns that accompany it. *Prudential*, 118 Ohio St. at 207. On the contrary, in *Prudential*, the Court drew a bright line between taxation and other extraterritorial actions that might be authorized by statute. *See id* at 214-15 (noting that if fees charged substantially exceeded costs, then the legislation could be an invalid use of municipal taxing power).

Appellant's Third Proposition of Law:

The General Assembly's authority to pass "Emergency Laws" under Art. II, Sec. 1d of the Ohio Constitution does not expand its substantive constitutional powers.

Finally, the Tenth District's decision gives substantial weight to the General Assembly's power to pass "emergency laws necessary for the immediate preservation of the public peace, health or safety" App.Op. ¶ 27-28, quoting Ohio Const. art. II, Sec. 1d. But the emergency law provision merely changes an enactment's effective date and insulates it from the referendum provisions of Sec. 1c. Ohio Const. art. II, Sec. 1d. It does not diminish the level of constitutional scrutiny afforded to an act because it was passed as an emergency or allow courts to defer on constitutional questions based on "exigent circumstances" occurring at the time of the law's passage. The suggestion that constitutional protections ebb and flow based on the "exigent circumstances" present when a law is enacted is both novel and troubling and presents a substantial constitutional question of whether an emergency clause attached to legislation entitles the enactment to a different constitutional analysis

CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction and reverse the judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum In Support of Jurisdiction of Plaintiffs-Appellants The Buckeye Institute, et al. was served by e-mail this 14th day of January 2022, upon the following counsel:

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