

IN THE SUPREME COURT OF OHIO

THE BUCKEYE INSTITUTE, et al.	:	Ohio Supreme Court Case
	:	No. 2022-0052
Plaintiffs-Appellees,	:	
	:	
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-Appellants.	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF *AMICUS CURIAE* NATIONAL TAXPAYERS UNION FOUNDATION**

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL TAXPAYERS UNION
FOUNDATION 2

STATEMENT OF CASE AND FACTS 3

 PROPOSITION OF LAW: THIS CASE RAISES SUBSTANTIAL CONSITUTIONAL
 QUESTIONS AND INVOLVES A QUESTION OF PUBLIC AND GREAT GENERAL
 INTEREST 3

CONCLUSION..... 7

CERTIFICATE OF SERVICE 8

TABLE OF AUTHORITIES

Cases

Home Building & Loan Assn. v. Blaisdell,
290 U.S. 398 (1934)..... 3

International Shoe Co. v. State of Washington,
326 U.S. 310 (1945)..... 4

McCullough v. Maryland,
4 Wheat. (17 U.S.) 316 (1819)..... 4

Miller Bros. v. State of Maryland,
347 U.S. 340 (1954)..... 4

Wisconsin v. J.C. Penney Co.,
311 U.S. 435 (1940)..... 4

Other Authorities

Adam B. Thimmesh, *The Tax Hangover: Trailing Nexus*, 33 Va. Tax. Rev. 497 (2014)..... 5

Andrew Moylan & Andrew Wilford, “Don’t Let COVID Remote Work Become a Tax Trap,”
NTUF Issue Brief (Apr. 24, 2020), <https://www.ntu.org/foundation/detail/dont-let-covid-remote-work-become-a-tax-trap> 3

Bloomberg Tax, *2019 Survey of State Tax Departments* (2019)..... 5

Joseph Bishop-Henchman, *The History of Internet Sales Taxes from 1789 to the Present Day*,
Cato Supreme Court Review 2017-18 6

INTRODUCTION

Tens of millions of Americans have begun telecommuting regularly for the first time, because of the COVID-19 pandemic. For those who live and work in different jurisdictions with different tax policies, many suffer the consequences of complex and confusing tax nexus rules in dire need of modernization.

Ohio taxpayers are among those subject to this confusion. Generally income tax is imposed on someone who lives or works in a jurisdiction. If a person neither lives nor works in a jurisdiction, that jurisdiction is properly without power to collect income tax from that person. For much of 2020 and 2021, Ohio's General Assembly set aside this general rule, directing local governments to collect income tax from individuals based on their *employer's* location rather than their residence and place of remote work. The legislation was justified as preserving the status quo during temporary disruption and preventing revenue losses for the municipalities.

Do municipalities now have the power to tax non-residents who lack minimum contacts in the jurisdiction, seemingly in violation of the Due Process Clause of the Constitution? Does the state have the power to authorize municipalities to tax individuals outside their borders? How long does the power to tax a non-resident who does work in the jurisdiction last, once established? Was the tax change of HB 197 (Section 29) permissible as a temporary emergency measure or is it a power that the General Assembly can utilize anytime? Taxpayers deserve answers to these questions, raised directly by this case.

**STATEMENT OF INTEREST OF *AMICUS CURIAE*
NATIONAL TAXPAYERS UNION FOUNDATION**

Pursuant to S. Ct. Prac. R. 7.06, the National Taxpayers Union Foundation (NTUF) submits this jurisdictional memorandum as *amici curiae* in support of jurisdiction in the above-captioned matter.

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect them. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in litigation upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

Because *Amicus* has testified and written extensively on the issues involved in this case, because this Court's decision may be looked to as authority by the many courts considering this issue, and because any decision will significantly impact taxpayers, small businesses, and tax administration, *Amicus* have an institutional interest in this Court's ruling.

STATEMENT OF CASE AND FACTS

PROPOSITION OF LAW: THIS CASE RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND INVOLVES A QUESTION OF PUBLIC AND GREAT GENERAL INTEREST

Amicus respectfully requests that this Court agree to review the Tenth District’s Decision.

“Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.” *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 425 (1934).

Citing emergency, Ohio upended its system of municipal taxation in 2020. Prior to 2020, many Ohio workers commuted into central cities every weekday and consequently owed local income tax there based on their presence in the jurisdiction. With the onset of the COVID-19 pandemic and stay-at-home orders, commuting into central cities nationwide drastically dropped off as many workers began telecommuting from their homes. An analysis by the National Taxpayers Union Foundation estimated at least 2.1 million Americans that previously crossed state lines for work are now working from home in accordance with public health guidelines. *See, e.g.*, Andrew Moylan & Andrew Wilford, “Don’t Let COVID Remote Work Become a Tax Trap,” NTUF Issue Brief (Apr. 24, 2020), <https://www.ntu.org/foundation/detail/dont-let-covid-remote-work-become-a-tax-trap>. Many of these workers and the businesses that employ them are unaware of, or are unprepared to deal with, the exposure to new tax jurisdictions this can create.

In Ohio, this threatened municipal tax collection: no presence means no income tax revenue. Pressed by municipalities, the Ohio Legislature enacted HB 197 (Section 29), which directed local income tax withholding based on the location of the employer rather than the employee, for the duration of the COVID-19 emergency. To maintain the status quo of revenue flowing to municipalities, the General Assembly upended the status quo of the income tax being

based on presence of the individual in the jurisdiction. Plaintiffs in this action are not residents of Columbus and may not even set foot in Columbus but are paying Columbus income tax on 100 percent of their earnings. Perhaps intended as applying for only a few weeks, as the COVID-19 emergency extended so did the duration of this temporary rule.

Whether temporary or permanent, the Ohio enactment is a sharp change from the Due Process standard that this court and courts around the country have repeatedly upheld: you don't owe tax to a jurisdiction where you have no connection. *See, e.g., Miller Bros. v. State of Maryland*, 347 U.S. 340, 344-45 (1954) (“But the course of decisions does reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax. Thus, the Court has frequently held that domicile or residence, more substantial than mere presence in transit or sojourn, is an adequate basis for taxation, including income, property, and death taxes.”); *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) (“[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940) (“That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.”); *McCullough v. Maryland*, 4 Wheat. (17 U.S.) 316, 429 (1819) (“All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.”). Here, Ohio established taxation not

based on physical or economic presence by the individual in the jurisdiction, but by either past presence or the presence of the individual's employer.

If Ohio's policy is justified, explicitly or implicitly, on past presence by the individual in the jurisdiction, this is a problem because nexus should expire. At the state level, out of concerns for due process, you cannot *have* nexus merely because you *had* nexus prior to the taxing year. For example, when a business has engaged in a sufficient level of activity to create nexus for corporate income tax purposes, in all but a few states nexus lasts for just that taxable year. *See* Bloomberg Tax, *2019 Survey of State Tax Departments* (2019) at 33-37 (reporting that in nearly all states, nexus ends upon the end of the calendar year of the nexus-creating activity; in Mississippi, nexus ends upon the cessation of the nexus-creating activity); Adam B. Thimmesch, *The Tax Hangover: Trailing Nexus*, 33 Va. Tax. Rev. 497, 504 (2014) (estimating that 35 states continue business tax nexus past cessation of nexus-creating activity). When state tax officials were asked if nexus continues, or trails, for an additional year, no state acknowledged that to be the case although three states gave equivocal answers. *See* Bloomberg Tax, *2019 Survey of State Tax Departments* (2019) at 33-37 (California, Georgia, Hawaii). Similarly, for sales tax, while half the states enforce nexus for an entire year in the year of a nexus-creating activity, only two states (Missouri and Rhode Island) continue nexus into the subsequent year with five other states including Massachusetts giving equivocal guidance. *See* Bloomberg Tax, *2019 Survey of State Tax Departments* (2019) at 358-62. The indefinite period of the policy when enacted also raises obvious Due Process Clause concerns.

If Ohio's policy of taxing individuals is justified based on the presence of a separate person, *i.e.*, the person's employer, this raises the question of whether such "attributional nexus" comports with due process. *See, e.g.*, Joseph Bishop-Henchman, *The History of Internet Sales Taxes from*

1789 to the Present Day, Cato Supreme Court Review 2017-18 269, 285 (quoting the U.S. Supreme Court as describing attributional nexus cases as the “furthest extension” of nexus). Given that remote workers in Ohio and elsewhere are susceptible to greatly expanded risk of taxation if they may owe tax wherever their employer owes tax, taxpayers deserve fair notice if this is the standard embraced in Ohio courts.

While characterized as a continuation of the status quo, Ohio’s enactment was actually a dramatic change in how we think about individual taxation. Instead of the price we pay for the services we receive where we live and work, income taxes would instead be unmoored from presence in a jurisdiction. Such a dramatic policy change such as this, with the potential to affect the many Americans who formerly commuted between states but now telecommute from one location, is a matter of grave public concern and worthy of consideration by the state’s highest court.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that the Court accept jurisdiction and reverse the judgment below.

Dated: January 14, 2022

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 *Amicus* National Taxpayers Union Foundation was served by electronic mail this 14th day of January, 2022 upon the following counsel:

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