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## Court of Common Pleas

**February 7, 2022 14:48**

By: JAY R. CARSON 0068526

Confirmation Nbr. 2467162

DR. MANAL MORSY

vs.

SHARON DUMAS, ET AL.

CV 21 946057

**Judge:** MARK R. MAJER

**Pages Filed:** 21

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

| | | |
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| DR. MANAL MORSY | ) | |
| | ) | CASE NO. 21-946057 |
| | ) | |
| Plaintiff, | ) | |
| | ) | JUDGE MARK MAJER |
| vs. | ) | |
| | ) | |
| SHARON DUMAS, in her official capacity as Finance Director of the City of Cleveland | ) | PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT |
| | ) | |
| | ) | |
| Defendant. | ) | |

## INTRODUCTION

Plaintiff Dr. Manal Morsy doesn't live in Cleveland. In fact, she doesn't even live in Ohio. She is instead a resident of Blue Bell, Pennsylvania, a suburb of Philadelphia. And from March 13, 2020 through December 31, 2020, Dr. Morsy did not perform any work in the City of Cleveland. In fact, between March 12, 2020 and December 31, 2020 (the period at issue in this case), Dr. Morsy never set foot in the State of Ohio. Yet, pursuant to Sec. 29 of H.B. 197, Ohio's COVID-19 relief bill passed in March of 2020, the City of Cleveland ("the City") has claimed the right to tax all of her income for 2020, even when she was working remotely from Pennsylvania.

In the seven decades since the Ohio Supreme Court first recognized municipalities' authority under Ohio's Home Rule Amendment to impose an income tax, courts have applied a simple rule: "[L]ocal 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 City's taxation of Dr. Morsy for work performed in Pennsylvania violates that rule.

Moreover, in those seven decades of municipal taxation in Ohio, no Ohio court in any reported case has ever found an *employer's* mere 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. *See, e.g., Hillenmeyer,* at ¶ 42; *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).

That the City's purported power to tax Dr. Morsy arises out of a state statute does not change this analysis. 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. Regardless, even if the City were to argue that the Ohio General Assembly could authorize some departure from due process for Ohio residents (which it manifestly cannot), it would have no jurisdiction to tax Dr. Morsy, who is not an Ohio resident.

Further, the City's taxation of a Pennsylvania resident improperly discriminates against interstate commerce in violation of the U.S. Constitution's dormant Commerce Clause. Under Sec. 29's scheme, Dr. Morsy, as a Pennsylvania resident, pays municipal income tax *twice* on the same income. This contravenes the "bedrock principle" that a State or by extension a municipality "may not tax value earned outside its borders." *Corrigan v. Testa*, 149 Ohio St.3d 18, 19, 73 N.E.3d 381 (2016) (quoting *Allied-Signal, Inc. v. Dir. Div. of Taxation*, 504 U.S. 768, 777, 784, 112 S. Ct. 2251, 119 L.Ed. 2d 533 (1992)). Accordingly, since the material facts are not in dispute and Dr. Morsy is entitled to judgment as a matter of law, summary judgment in her favor is warranted

## FACTS

Dr. Manal Morsy is a resident of the City of Blue Bell, Pennsylvania, a suburb of Philadelphia. (Affidavit of Manal Morsy, attached and incorporated herein, ¶¶s 2,3,4,5). Since 2013, she has been employed as the Senior Vice President and Head of Global Regulatory Affairs for Aethersys, a bio-tech company located within the City of Cleveland. (Id. at ¶ 6). In that position she oversees product development, and is charged with meeting regulatory requirements, including liaising and meeting with regulatory agencies such as the FDA on behalf of company. (Id. at ¶ 7).

Before the COVID-19 pandemic, Dr. Morsy commuted on a weekly basis from her home in Blue Bell to Cleveland. Dr. Morsy would typically fly into Cleveland on a Sunday evening or Monday morning and fly back to Blue Bell on Friday. (Aff. at ¶ 9). Dr. Morsy paid municipal income tax to the City of Cleveland based on the days that she worked in Cleveland. Pursuant to R.C. 718.03, her employer withheld Cleveland municipal income tax from her pay. (Id. at ¶ 10). Each year, Dr. Morsy tracked the days that she worked inside and outside of Cleveland and applied for a tax refund pursuant to the City's codified ordinances and tax forms, which she always received. (Id. at ¶ 12).

As the Court is well aware, in March of 2020, the working world changed dramatically. 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 Feb. 7, 2022). (See Emergency Declaration, ¶¶s 1,4,7). On March 22, 2020, 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"). Ohio Department of Health, Director's Stay At Home Order, https://coronavirus.ohio.gov/static/publicorders/DirectorsOrderStayAtHome.pdf (accessed Feb. 7, 2022). 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). In addition, the Stay-at-Home order limited travel to "Essential Travel" and "Essential Activity" only, which did not include Dr. Morsy's commute. Id. at ¶¶ 4, 5. Further, as a practical matter, in the early days of the pandemic, airlines substantially reduced flights, making it difficult if not impossible for Dr. Morsy to fly to Cleveland, even if she were legally permitted to do so.

Although Dr. Morsy's employer, which operates in the biotech sector, was considered an "essential business" under the Stay-at-Home Order, her work did not require her physical presence in Cleveland. Thus, her employer complied with the Stay-at-Home Order's directive "to allow as many employees as possible to work from home by implementing policies in areas such as teleworking and video conferencing" and ordered her to work from home beginning in March of 2020. Id. at ¶18 (a). Thus, to heed her employer's request, and to comply with the Stay-at-Home Order, Dr. Morsy began working from her home five days per week starting on March 12, 2020. Dr. Morsy did not set foot in the City of Cleveland—or the State of Ohio for the remainder of 2020. (Aff. at ¶ 16).

The Ohio General Assembly responded to the COVID-19 emergency by passing H.B. 197, an omnibus COVID-19 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 in light of the abrupt shift to remote work that the State itself had required. 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 Ohio law had for 70 years tied taxation to the place 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.

Pursuant to Sec. 29 of H.B. 197, Dr. Morsy's employer continued to withhold Cleveland's municipal income tax from all of her paychecks. But unlike years past, when Dr.

Morsy successfully applied for a refund of that municipal tax for the days on which she worked outside of Cleveland, the City of Cleveland took the position that all of Dr. Morsy's income was not merely subject to withholding but was taxable by the City regardless of where she actually performed the work.

Accordingly, when Dr. Morsy filed her 2020 Cleveland municipal income tax return and requested a refund for the days that she worked from Pennsylvania during 2020, the City declined to provide her a refund for the days from March 13 through December 21, 2020, when she worked exclusively from Pennsylvania.[1] Dr. Morsy brings this suit to challenge the constitutionality—both facially and as applied—of the "deemed to have been performed" provision of H.B. 197 and the imposition of municipal income tax under that provision by the City.

## LAW AND ARGUMENT

### A. Standard for Summary Judgment

Summary judgment is appropriate when three things are true:

> (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor.

*Horton v. Harwick Chem. Corp.*, (1995), 73 Ohio St. 3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id.*, citing *Dresher v. Burt*, (1996), 75 Ohio St. 3d 280, 292-293. Once the moving party satisfies its burden, the nonmoving party may not rest on the mere allegations and denials in the pleadings, but

[1] The City later provided Dr. Morsy a partial refund based on the days she had worked in Pennsylvania from January 1 through March 12, 2020, i.e. pre-pandemic, consistent with what its policy had been before H.B. 197.

rather, must point to or submit some evidentiary material that shows a genuine dispute over material facts exists. Civ. R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St. 3d 383, 385 (1996); *Henkle v. Henkle*, (1991), 75 Ohio App.3d 732, 735.

Statutes have a strong presumption of constitutionality and that it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible. *Libertarian Party of Ohio v. Husted* (2016), 10th Dist. No. 16AP-496, 2017-Ohio-7737, 97 N.E.3d 1083, ¶ 31. Nevertheless, "where the incompatibility between a statute and a constitutional provision is clear, a court has a duty to declare the statute unconstitutional." *Id.*, citing *Cincinnati City School Dist. Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 383, 390 N.E.2d 813. Here, there is no way to square Section 29 of H.B. 197 and the City's conduct under it with over 70 years of Ohio Supreme Court precedent holding 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 v. Cleveland Bd. of Rev.* (2015), 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164, ¶ 43.

**B. The Due Process Clause of the Fifth Amendment Prohibits Extraterritorial Municipal Taxation of Nonresidents of the Municipality.**

Both the U. S. Supreme Court and the Ohio Supreme Court have made the "venerable if trite observation that seizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law." *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶¶ 15-17, quoting *Miller Bros. Co. v. Maryland,* 347 U.S. 340, 342, 74 S.Ct. 535, 98 L.Ed. 744 (1954). Simply put, "[j]urisdiction is as necessary to valid legislative as [it is] to valid judicial action." *Id.* at 21*; Miller Bros. Co. v. State of Maryland,* 347 U.S. 340, 342, 74 S. Ct. 535, 98 L. Ed 744 (1954); *Gloucester Ferry Co. v. Com. Of Pennsylvania,* 114 U.S. 196, 209, 5 S. Ct. 826, 29 L.Ed. 158 (1885); *see also, City of*

*St. Louis v. Wiggins Ferry Co.*, 78 U.S. 423, 430, 20 L.Ed. 192 (1870)("Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void.")

Since 1950, consistent with the U.S. Supreme Court's holdings, the Ohio Supreme Court has recognized two—and only two—types of jurisdiction that would allow a municipality to levy a tax: (1) *In personam* jurisdiction arising out of the taxpayer's residence within the city's borders or; (2) *in rem* jurisdiction over work performed within the city's borders. *See Corrigan*, 149 Ohio St.3d at 18 ("in order for a governmental entity to tax someone, the governmental entity must have jurisdiction over the person or thing to be taxed"; *see also Hillenmeyer,* at ¶ 42; *Thompson v. City of Cincinnati*, 2 Ohio St.2d 292, at syllabus, 208 N.E.2d 747 (1965) (citing *Angell v. City of Toledo,* 153 Ohio St. 179, 91 N.E. 2d 950 (1950)).

These two types of jurisdiction correspond to the two—and again, only two—types of income that cities can tax: (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, *citing Shaffer v. Carter*, 252 U.S. 37, 55, 40 S. Ct. 221, 64 L. Ed. 445 (1920).

Here, the facts are undisputed. Dr. Morsy is not, nor has she ever been, a resident of the City of Cleveland. (Aff. at ¶¶s 1-5). Dr. Morsy lives in Blue Bell, Pennsylvania. (Id. at ¶ 2). She holds a Pennsylvania driver's license and is registered to vote in Blue Bell, Pennsylvania. (Id. at ¶¶s 3.4). From March 12, 2020 through December 31, 2020, Dr. Morsy worked exclusively from Blue Bell. (Id. at ¶¶s 13, 14). During that time, she did not set foot in the State of Ohio, much less the City of Cleveland. (Id. at ¶ 16).

Yet, relying on H.B. 197's provision "deeming" Dr. Morsy to be working at her employer's

principal place of business in Cleveland, the City has claimed the authority to tax the income that Dr. Morsy earned while working in Blue Bell, Pennsylvania. In other words, the legislature recognized the well-established principle articulated in *Hillenmeyer* 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" and applied the creative solution of simply deeming that employees that were working somewhere that they were not. Just as the General Assembly could not (even in an emergency) violate the principles of the Fifth Amendment as interpreted by the Supreme Court by deeming that the police notified a criminal defendant of his Miranda rights when they had not, the General Assembly and the City cannot violate the principles of Due Process as interpreted by the Ohio Supreme Court by pretending that Dr. Morsy was working in the City of Cleveland when she was, in fact, working in Blue Bell, Pennsylvania.

### 1. A City's Power to Tax Arises Out of—and is Circumscribed by—Ohio's Home Rule Amendment

The Due Process analysis for municipal taxation is necessarily tied to how that power arises. Ohio law is clear that a city's power to tax income arises solely 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 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.").

Nor can the General Assembly legislatively create or expand a city's taxing authority. Section 13 of Article XVIII of the Ohio Constitution specifically grants the Ohio General Assembly the power to "limit the power of municipalities to levy taxes and incur debts for local purposes." But the power to limit is not the power to *expand,* and the Ohio Constitution is notably silent regarding the General Assembly's ability to *expand* municipal tax authority. Applying the well-established principle of legal interpretation that *expressio unius est exclusio alterius* to Section 13 of Article XVIII, the General Assembly would exceed its constitutional limitations were it to attempt to expand a municipality's taxing power. Further, the Ohio Supreme Court has long held that the General Assembly may exercise only those powers delegated to it by the Ohio Constitution. *State ex rel. A Bentley and Sons v. Pierce*, 117 N.E. 6 (Ohio 1917); *State ex rel. Robertson Realty Co. v. Guilbert*, 78 N.E. 931 (Ohio 1906). This makes sense when one considers that cities are separate political entities from the State of Ohio. The State of Ohio may reasonably choose to protect Ohioans from unfair, overbearing, or economically inefficient taxes that municipalities might impose by limiting the municipal power to tax. But just because the State can limit a city's Home Rule authority to tax, it does not follow that the State could also adopt laws to expand a city's authority to regulate "within its limits" to persons living or working outside of those limits.

**2. The Ohio Supreme Court has Been Clear from 1950 to the Present that Municipal Taxation is Subject to the Limits of Due Process.**

Assuming, arguendo, that the Ohio Constitution authorized the General Assembly to expand upon a city's taxing power, the exercise of that power must still comport with Due Process. When the Ohio Supreme Court first recognized that the Home Rule Amendment authorized a municipality to tax nonresidents in *Angell*, it also recognized that that power was limited by the

Due Process Clause. In *Angell*, the 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 the *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 U.S. Supreme Court's fundamental holdings that to satisfy Due Process, the political entity must exercise either *in personam* or *in rem* jurisdiction over the person or activity being taxed. *Angell,* 153 Ohio St. at 185.

In answering that question, 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 pointed out that Mr. 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, Dr. Morsy has not relied on the City of Cleveland to provide her with a place to work. She, like millions of other employees during the pandemic, worked from home. Although Dr. Morsy's employer maintains an office in downtown Cleveland, Dr. Morsy was perfectly capable of performing her job remotely. (Aff. ¶ 15). While working from home in Blue Bell, she did not drive on Cleveland's roads, make use of Cleveland's infrastructure, or rely on Cleveland's safety services. In contrast, Mr. Angell received the benefit of the taxing city's services—and thus established a fiscal relation between his work and the taxes paid—because he was *actually working* in the taxing city.

Later cases reaffirmed that the 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 requires that the work actually to be performed within city limits. *See McConnell,* 172 Ohio St. at 99-100. For example, in *McConnell*, the Court upheld the city of Columbus's power to tax an employee of The Ohio State University. The Court reasoned that even though Mr. McConnell worked for an arm of the State and performed his job duties on property owned by the State, he 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 *McConnell*, the Ohio Supreme 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 *McConnell*, 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).

Ohio appellate courts have 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. Moreover, 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."); *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 v. Cleveland Bd. of Rev.* arrived before the Ohio Supreme 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. 144 Ohio St.3d 165 at ¶ 43. Then in 2020, 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, just as in *Hillenmeyer* and the cases that preceded it, the Court was unanimous in holding 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.* Thus, based on the unbroken chain running from *Angell* through *Hillenmeyer*, because Dr. Morsy is not a resident of the City of Cleveland and the work in question was not performed in Cleveland (or even in Ohio), Due Process does not permit the City to tax Dr. Morsy's income.

**3. Neither the City nor the State of Ohio has Jurisdiction to a Nonresident's Work Performed in Another State.**

Under *Angell-Hillenemeyer* line of cases, the constitutional analysis is straightforward. If the work was performed by a resident of the City, the City's *in personam* jurisdiction allows it to tax that resident. *See, e.g., Hillenmeyer,* at ¶ 4. Indeed, the City has the power to tax that resident for income earned anywhere in the world. Significantly, no Ohio court has ever held that an employee can be subject to *in personam* jurisdiction and thus the income tax of a foreign city or

State simply because her employer is located there. On the contrary, *Angell*, *Corrigan*, *Hillenmeyer*, and *Willacy*—as well as appellate decisions like *Vonkaenel* and *Czubaj*—all premise municipal taxation on the worker's physical location when the work was performed. If the *Corrigan*, *Hillenmeyer*, and *Willacy* courts (as well as the federal courts they relied upon for the fiscal relation standard) had understood *in personam* jurisdiction to apply to anyone with minimum contacts to the taxing jurisdiction, there would have been no reason for them to have drawn the *in personam-in rem* distinctions that they did. *See, e.g., Hillenmeyer,* 144 Ohio St. 3d at 175, *citing Shafer*, 225 U.S. at 55 ("[b]eyond *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*.'"). Indeed, there is no question that all of the taxpayers in the entire *Angell* line of cases would have satisfied the minimum contacts test. Were this standard correct, *Hillenmeyer* would have been resolved in favor of the city—but it was not. That is because for taxation purposes, a local government has *in personam* jurisdiction only over its residents. *See id., see also, Vonkaenel v. City of New Philadelphia*, 2001 WL 81700, *3 (City did not have *in personam* jurisdiction of UPS drivers headquartered in the city).

As for nonresidents, a City's *in rem* jurisdiction to tax their income is limited to income for work performed in the City. *See id.* at ¶ 43 ( "[T]he 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"); *see also, Hume v. Limbach*, 61 Ohio St. 3d 387, 389 (1991) (Applying same principle to taxation of professional baseball player, allocating income earned during spring training to Florida). For constitutional purposes, it is immaterial whether the nonresident taxpayer performed the work in Shaker Heights, Lakewood, or San Diego. Under the plain

language of the *Angell-Hillenmeyer* line of cases, the only question relevant to the City's power to tax nonresidents is whether the work was performed *in the City*. *See Hillenmeyer*, at ¶ 43 ("[L]ocal taxation of a nonresident's compensation for services must be based on the location of the taxpayer when the services were performed."); *see also Willacy*, 159 Ohio St. 3d at ¶26 ("[C]ompensation must be allocated the place where the employee performed the work.").

In fact, this commonsense principle is evident in the City's own income tax ordinance, which provides that the income tax is levied on the income of every person *residing, earning or receiving income in the municipal corporation* . . . ." Cleveland Municipal Code §192.01 (emphasis supplied). The City tax code further recognizes the geographic limitations of the City's power to tax, providing that the tax applies to "all qualifying wages earned or received . . . by nonresidents of the City for work done or services *performed or rendered within the City or attributable to the City* . . . ." Id. at §192.03 (b)(1) (*emphasis supplied*). Again, there is no dispute that Dr. Morsy does not reside in the City of Cleveland and that the tax that she contests arises out of work that she performed in Blue Bell, Pennsylvania. Indeed, by providing Dr. Morsy with a refund for the time she worked in Blue Bell in early 2020—before the pandemic—the City acknowledges that but for Sec. 29 of H.B. 197, its power to tax nonresidents under its own ordinance is limited to work performed within city limits.

Dr. Morsy is not now, nor has she ever been, a resident of the City of Cleveland. Dr. Morsy has never been a resident of the State of Ohio. And from March 13, 2020 through December 31, 2020, she did not perform any work within City limits. The City of Cleveland thus lacks any jurisdiction to tax the work that she performed in Pennsylvania and the State lacks the constitutional authority to expand the City's reach into Pennsylvania by simply pretending

that work performed there was performed in Cleveland. Dr. Morsy is therefore entitled to judgment as a matter of law.

### C. Sec. 29 of H.B. 197, as Applied to Dr. Morsy, Violates the Dormant Commerce Clause.

Finally, in addition to the Due Process Clause, the Supreme Court of the United States has read the Commerce Clause as "contain[ing] a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). "By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, [the dormant Commerce Clause] strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce." *Corrigan*, 149 Ohio St.3d at ¶ 16, citing *Maryland Comptroller of Treasury v. Wynne,* —— U.S. ——, 135 S.Ct. 1787, 1794, 191 L.Ed.2d 813 (2015). A State or local tax survives a Dormant Commerce Clause challenge only "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977). Although dormant Commerce Clause cases typically focus on direct State burdens on commerce, the dormant Commerce Clause likewise prohibits municipalities from burdening interstate commerce under color of State law. Regardless, H.B. 197 fails all four elements of the *Complete Auto* test.

First, the City has no substantial nexus to work performed entirely out-of-state by a non-resident. As the Supreme Court clarified in *Allied-Signal,* "[s]ubstantial nexus" requires that "there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax." *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 777-78 (1992). In

this case, the City doesn't even claim a connection to the actor it seeks to tax. It claims a connection to the actor's employer. The City stakes its claim to jurisdiction on Dr. Morsy's employer's location, rather than any connection to the work she performs. Far from cabining the authority to a substantial nexus, this novel argument admits to no limiting principle. If an employer's presence in a State is sufficient to confer taxing power upon any of its employees (and presumably any vendor or independent contractor) regardless of where the work is performed, the substantial nexus test would be toothless. The Constitution does not permit a State to just pretend that the work to be taxed was performed in within its borders.

Next, H.B.197 fails *Complete Auto's* second prong because the tax is not "fairly apportioned." In fact, the tax in this case is not apportioned at all. Dr. Morsy has been forced to pay Cleveland municipal income tax on all of her earnings in 2020. (Aff. at ¶ 21). The fair apportionment requirement "ensure[s] that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989), abrogated on other grounds by *Wynne*, 135 S. Ct. at 27 1798. Here, H.B. 197 absurdly deems that 100% of Dr. Morsy's work—which she actually performed in Pennsylvania—was, for taxation purposes, performed in Cleveland.

While this 100% apportionment would seem to require no further analysis, the test promulgated by this Court in *Oklahoma Tax Comm'n* is instructive. There, the Court held that a State exceeds its fair share of the value taxed when there is possibility of double taxation. *Oklahoma Tax Comm'n*, 514 U.S. at 184. In this case, double taxation is not merely a risk, it is a reality. Dr. Morsy is paying municipal tax on 100% of her salary to both the taxing entity in which she resides and Cleveland Ohio. (Aff. ¶ 21).

For similar reasons, H.B.197 fails *Complete Auto's* third prong, which prohibits discrimination against interstate commerce. This Court has invalidated similar tax schemes because they "had the potential to result in discriminatory double taxation of income earned out of state and created a powerful incentive to engage in intrastate rather than interstate economic activity." *Comp. of Treasury of Maryland v. Wynne*, 575 U.S. 542, 135 S. Ct. 1787, 1801-02 (2015). In *Wynne*, the Supreme Court of the United States applied the Commerce Clause's "internal consistency" test to strike down Maryland's taxation of certain individuals and S corporations that earned pass-through income in other States and paid tax on that income in those States.

The internal consistency test "'looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.'" *Id.* at 1802. Plainly, if every State allowed municipalities to tax out-of-state work, a taxpayer who worked in her State of residence would pay municipal income tax once, while her neighbor who worked remotely for a company across the State's border would—like Dr. Morsy—be subject to double taxation on her income performed in the same location, resulting in interstate commerce being "taxed at a higher rate than intrastate commerce." *Id.* at 1791. And if every State passed legislation like H.B. 197, the free movement of workers, goods, and services across state borders would suffer, as individuals would be less inclined to work across State lines. The Commerce Clause prevents precisely this type of "economic Balkanization." *Id.* at 1794.

Finally, the tax rule fails *Complete Auto's* fourth prong, which requires the State tax to be "fairly related to the services provided by the State." *Complete Auto,* 430 U.S. at 279. This prong mandates that "the measure of the tax be reasonably related to the extent of the contact, since it is

the activities or presence of the taxpayer in the State that may properly be made to bear a just share of state tax burden." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981). This echoes the Due Process test recognized in *Angell*. While working exclusively in Pennsylvania, Dr. Morsy has not used the roads, utilities, or safety services provided by the City or the State of Ohio. The City of Cleveland has provided no services to Dr. Morsy since early March of 2020. There is nothing the City or State has given for which it might ask for taxes in exchange. Accordingly, H.B.197 violates the dormant Commerce Clause.

## CONCLUSION

It is by now an over-worn cliché to call the events of 2020 "unprecedented." It is nevertheless true. In ordinary times, Section 29's problems would likely have come to light through the legislative process and the General Assembly might have found a solution that did not violate the Due Process Clause. Yet, while sympathy for the General Assembly's position may be appropriate, it cannot justify constitutional overreach. *See Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 277, 503 N.E.2d 717, 723 ("While the General Assembly is empowered to respond to circumstances or perceived crises that demand legislative initiative, legislation must comport with the rights and guarantees established in the Ohio Constitution.").

By creating a fiction deeming that work performed at home was actually performed at the employer's principal place of business, Section 29 plainly makes tax collection more convenient for employers, payroll companies, and municipal governments. Yet, as the U.S. Supreme Court has observed, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594, 2599, 180 L.Ed.2d 475 (2011).

Constitutional limits on government power apply even during—perhaps especially during—times of crisis. See *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.") And in this case, the binding Ohio Supreme Court precedent beginning with *Angell* and continuing in an unbroken line for more than 70 years holds that the General Assembly's enactment of Section 29 of H.B. 197, however well-intentioned or salutary for the City's finances, violates the Due Process Clause. Further, Sec. 29 violate the Dormant Commerce Clause's prohibition on discrimination against interstate commerce. Dr. Morsy—an employee of an Ohio based company—is being taxed twice because she is a resident of Pennsylvania.

Enforcing Due Process rights will often result in difficulties for municipalities and the State government. These rights are, after all, intended to be constraints on government. But constitutional rights that are subject to government convenience are no rights at all. As the Ohio Supreme Court explained over 150 years ago, "inconveniences may arise from this determination, but evils of much graver importance will be avoided." *State ex rel. Evans v. Dudley,* 1 Ohio St. 437, 444 (1853). The graver evil here would be to establish the principle that the General Assembly may expand municipal taxing authority beyond the limits of the Due Process Clause, simply because it is convenient to do so. Once the power to transgress Due Process limits is established, it may prove difficult to constrain that power to the current crisis. Because the incompatibility between Sec. 29 of H.B. 197 and the requirements of Due Process "is clear, this court has a duty to declare the statute unconstitutional." *Libertarian Party of Ohio v. Husted* (2016), 10th Dist. No. 16AP-496, 2017-Ohio-7737, 97 N.E.3d 1083, ¶ 31, citing *Cincinnati City School Dist. Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 383, 390

N.E.2d 813. For the foregoing reasons, the Plaintiffs Motion for Summary Judgment should be GRANTED.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of February, 2022, a true and accurate copy of the foregoing *Motion for Summary Judgment* was served via the Court's electronic filing system on all parties of record.

/s/ *Jay R. Carson*
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*One of the Attorneys for Plainitff, Dr. Manal Morsy*