IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

JOEL CURCIO, et al.	:	Appellate Case No. G-4801 CL-22-1009
Plaintiffs-Appellants,	:	Trial Court Case No. CI-2021-1522
v.	:	
KATHLEEN HUFFORD, et al.	:	
Defendants-Appellees.	:	

BRIEF OF APPELLANTS JOEL CURCIO, SUMMER CURCIO, AND CHRIS ACKERMAN

ORAL ARGUMENT REQUESTED

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ISSUE PRESENTED FOR REVIEW: The U.S. and Ohio Supreme Courts have long held that "[j]urisdiction is as necessary to valid legislative as [it is] to valid judicial action" and that "[w]here there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void." *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶¶ 15-17. The Due Process Clause allows a governmental entity to tax the income of nonresidents only where the municipality has in personam or in rem jurisdiction over the person or thing to be taxed While the State of Ohio has jurisdiction over the Appellants, the Defendant Cities, which are actually imposing the tax, do not. Can the Defendant Cities rely on the State's taxing jurisdiction to impose municipal income tax on nonresidents for work performed outside of their borders? No. 5

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I. STATEMENT OF THE CASE

A. Statement of Jurisdiction

This is an appeal from the trial court's December 16, 2021 order granting the Defendants' Motions to Dismiss the action in its entirety pursuant to Ohio R. Civ. P. 12(C). Opinion and Judgment Entry, 12/16/21, attached hereto. Plaintiffs-Appellants filed a timely Notice of Appeal on January 10, 2022. Not. Of App., 1/10/22.

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, Appellants Joel Curcio, Summer Curcio, and Chris Ackerman 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 Kathleen Hufford and John Zaswisza in their official capacities as fiscal officers for the cities of Oregon and Toledo ("the Defendant Cities") pursuant to R.C. 2723.03, and Ohio Attorney General Dave Yost pursuant to the requirements of R.C. § 2721.12 (A). Trial docket, 3/12/21, Complaint at ¶ 2.

The Defendant Cities filed a Motions to Dismiss, and the Appellants filed briefs in opposition to those motions. Trial docket, 6/11/21, Mot. to Dismiss, 6/11/21; Id., 6/25/21, Mem. in Opp. The Defendant Cities filed a Reply Briefs in Support of their Motions to Dismiss. Trial docket, 7/16/21, Replies, 7/16/21. The Appellants filed a Sur-Reply. Trial docket, 7/30/21, Sur-reply.

C. Statement of Facts

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, available at https://tinyurl.com/3nyckkw8, (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 the Ohio Supreme 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 potential loss in tax revenue[1]. 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 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.

Appellants Joel and Summer Curcio both reside in Springfield Township, Ohio. Mr. Curcio's employer is in the Defendant City of Oregon, Ohio and Ms. Curcio's employer is located in the Defendant City of Toledo, Ohio. Trial Docket, 3/12/21, Complt. ¶¶s 9, 10. Similarly, Chris Ackerman is a resident of Walbridge, Ohio, with his employer located in the Defendant City of

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[1] While revenue loss by cities was a concern when the Ohio General Assembly enacted H.B. 197, subsequent federal intervention has in large part offset those potential losses. For example, under the 2021 American Rescue Plan Act ("ARPA) the City of Toledo will receive of $180 million in federal funds. *Toledo Recovery Plan Announcement*, July 15, 2021, https://toledo.oh.gov/news/2021/07/15/toledo-recovery-plan-announcement. (Accessed 3/16/22).

Oregon. Id. at ¶12. The Appellants' principal places of work were within the Defendant Cities. Id. at ¶¶s 11, 12. The Appellants did not, however, for the period relevant to the complaint, work at that location or anywhere else within the Defendant Cities. Id. Pursuant Sec. 29 of H.B. 197 the Defendant Cities withheld and retained municipal taxes from the Appellants. Id. at ¶47. The Appellants sought refunds for taxes paid to the Defendant Cities based on the time in the 2020 tax year during which they worked from their homes outside of the Defendant Cities. Id. at ¶46. The Defendant Cities declined to provide the requested refunds and this litigation resulted.

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).

Statutes have a strong presumption of constitutionality. 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.

ASSIGNMENT OF ERROR NO. 1: The trial court erred by conflating the State of Ohio's jurisdiction to tax the Appellants with the Defendant Cities' jurisdiction to tax the Appellants, essentially treating Sec. 29 of H.B. 197 as a "State tax" rather than an expansion of a "local tax."

ISSUE PRESENTED FOR REVIEW: The U.S. and Ohio Supreme Courts have long held that "[j]urisdiction is as necessary to valid legislative as [it is] to valid judicial action" and that "[w]here there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void." *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶¶ 15-17. The Due Process Clause allows a governmental entity to tax the income of nonresidents only where the municipality has *in personam* or *in rem* jurisdiction over the person or thing to be taxed. While the State of Ohio has jurisdiction over the Appellants, the Defendant Cities, which are actually imposing the tax, do not. Can the Defendant Cities rely on the State's taxing jurisdiction to impose municipal income tax on nonresidents for work performed outside of their borders? No.

A. Sec. 29 of H.B. 197 Did Not Enact a State Tax

The trial court based its decision on a fundamental misunderstanding: It treated the taxes collected by the Defendant Cities under Sec. 29 of H.B. 197 as *State* taxes. See, e.g.,Trial docket, 12/16/2, Opinion and J.E.("*Hillenmeyer* and *Willacy* are distinguishable from the case at bar. Neither case cited addressed . . . the Ohio General Assembly's power to tax Ohio residents within Ohio borders . . . .") But Sec. 29 did not enact or expand any State tax. Instead, it impermissibly expanded municipal taxation by "deeming" that the Appellants were working in the Defendant Cities—and thus subject to the Defendant Cities' *in rem* jurisdiction—when in fact they were not.

That the tax in question is a municipal income tax is not in dispute. Indeed, The Defendant Cities characterize the tax appropriately as a municipal income tax. See, e.g. Trial Docket, 6/11/21, Toledo Mot. to Dismiss at 2. The trial court's treatment of the municipal income tax as a state income tax alone constitutes reversible error.

To satisfy the Due Process Clause as the Ohio Supreme Court has applied it to taxation, the taxing authority must show that it had *in personam* jurisdiction over the taxpayer by virtue of his or her residence in the taxing district or *in rem* jurisdiction over the work performed within the

taxing district's borders. *See, e.g., Hillenmeyer v. Cleveland Bd. of Rev.,* 144 Ohio St.3d 165, 176, 2015-Ohio-1623, 41 N.E.3d 1164, ¶ 43 ("[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*.'"); *see also*, *Willacy v. Cleveland Bd. of Rev.*, 159 Ohio St.3d 383, 390, 2020-Ohio 314, 151 N.E.3d 561; *Thompson v. City of Cincinnati*, 2 Ohio St.2d 292, 208 N.E. 2d 747 (1965), syllabus ("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 (1950), approved and followed.)" (emphasis supplied) (citations in original).

These decisions arise from the fundamental premise that where taxation is concerned, Due Process requires that the taxing entity have some form of jurisdiction over the person or thing to be taxed. *Corrigan v. Testa,* 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E. 3d 381 at ¶¶ 15-17. Both the U.S. Supreme Court and the Ohio Supreme Court have long recognized that "the seizure of property by the State [or local government] under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law." *Id.*, 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.,* 347 U.S. at 342; *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.")

Here, the Appellants were not residents of the Defendant Cities and the work for which they are being taxed was performed outside of the Defendant Cities. Yet the trial court reasoned

that because the Appellants were all residents of Ohio, the State of Ohio had *in personam* jurisdiction over all of them. From that inarguable premise the trial court reasoned that because the cities where the Appellants worked from home were located in Ohio, the income earned by the Appellants was "rationally related to the State of Ohio." Trial Docket, 12/16/21, Opinion and J.E at 8. This is correct, as far as it goes. But from there the trial court made the unsupportable leap that since the State of Ohio had *in personam* jurisdiction over the Appellants and over their income earned within the State of Ohio, then the Defendant Cities, which were also "rationally related" to the State of Ohio, essentially also have *in personam* jurisdiction over the Appellants. Id. In so doing, the trial court conflated the State's jurisdiction to tax with the Defendant Cities' jurisdiction to tax.

If Sec. 29 of H.B. 197 had imposed a new *State* tax, then the trial court's analysis would have been correct and the Defendant Cities' jurisdiction to tax the Appellants would have been irrelevant. But Sec. 29 did not create or impose any new *State* tax liability. The taxes collected under Sec. 29 of H.B. 197 were not collected by the *State* or paid to the *State*. The taxes that the Appellants contest are instead *local municipal* taxes, imposed by, collected by, and spent by the cities of Toledo and Oregon pursuant to their own municipal tax and appropriation ordinances.

This distinction between State and local taxing entities is critical because the State of Ohio and the Defendant Cities are separate and distinct political entities. Each entity's power to tax flows from a separate and distinct source. A city's power to tax income arises solely from—and is circumscribed by—the Home Rule Amendment to Ohio's Constitution. *Gesler v. Worthington Income Tax Bd. of Appeals*, 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 coextensive with its geographic limits. *See Prudential Co-op. Realty Co. v. City of Youngstown*, 118 Ohio St. 204, 207, 160 N.E. 695, 696, 6 Ohio Law Abs. 175 (1928) ("The direct authority given by that article [the Home Rule Amendment] is expressly limited to the exercise of powers within the municipality."). Thus, the Ohio Supreme Court has held that the Due Process Clause allows *municipalities* to impose *municipal* taxes on 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,* 144 Ohio St.3d 165, 176, 2015-Ohio-1623, 41 N.E.3d 1164, at ¶ 42; *see also*, *Willacy*, 159 Ohio St.3d 383, 2020-Ohio-314, 151 N.E. 3d 561, at ¶22-24.

In contrast, the Ohio Constitution allows State of Ohio to impose a *State* tax on any of its residents through its *in personam* jurisdiction over them or on non-residents based on work performed within the State through its *in rem* jurisdiction. *See Corrigan* at ¶ 31; citing *Hillenmeyer*, at ¶ 41.

But regardless of where the taxing power emanates, the Due Process Clause of the federal constitution requires that the taxing entity—whether it is the State or a local government— has jurisdiction to impose the tax. The Ohio Supreme Court has held that "[g]overnmental jurisdiction in matters of taxation * * * depends upon the power to enforce the mandate of the [taxing entity] by action taken within its borders, either *in personam* or *in rem.*" *Corrigan*, at ¶15, quoting, *Shaffer v. Carter,* 252 U.S. 37, 49, 40 S.Ct. 221, 64 L.Ed. 445 (1920); *see also Hillenmeyer,* at ¶42 ("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*.")

But the state possessing *in personam* jurisdiction is not sufficient to permit the imposition a municipal tax against a nonresident—the municipality itself must have jurisdiction, either *in personam* over residents, or *in rem* over nonresidents work performed within the jurisdiction—and Due Process does not permit the requirements of jurisdiction to be met by legislative legerdemain. *Corrigan,* 149 Ohio St. 3d 18 2016-Ohio-2805, 73 N.E. 3d 381 at ¶31; *Hillenmeyer*, 144 Ohio St. 3d 165, 2015-Ohio-1623, 41 N.E.3d 1164, at ¶40-43; *Thompson*, 2 Ohio St.2d at 298; *see also*, *Vonkaenel v. City of New Philadelphia* (2001)*,* 5th Dist. Tuscarawas No. 2000AP-04-0041, 2001 WL 81700, *3 ("[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.")

Indeed, following the trial court's reasoning to its conclusion results in absurd and patently unfair consequences. By the trial court's rationale, a future General Assembly confronted with a fiscal crisis in the City of Columbus could respond by simply deeming that Ohioans working in Lucas County are—for tax purposes—working in Columbus. 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 simply because it provided greater convenience to employers and preserved the status quo during a pandemic would have seemed equally remote.

B. The *Angell-Hillenmeyer* Line of Cases Holds that to Satisfy Due Process, the *Municipality* Must have Jurisdiction Over the Person or Thing Taxed.

Similarly, in the line of cases stretching from *Angell* in 1950 through *Willacy* in 2020, the Ohio Supreme Court made clear that to satisfy Due Process the *municipality imposing the tax*—not the State—had to have jurisdiction over the person or the thing taxed. In articulating this rule,

the Ohio Supreme Court analogized the situation to States imposing income taxes on nonresidents. Thus, in *Angell*, the Ohio Supreme Court looked to the U.S. Supreme Court's decision in *State of Wisconsin v. J.C. Penney Co.,* 311 U.S. 435, 439, 61 S.Ct. 246, 247, 85 L.Ed. 267 (1940) and applied its fiscal relation test to municipal taxation. *Angell*, 153 Ohio St. at 185. In the same manner, the *Hillenmeyer* Court cited *Shaffer v. Carter,* 252 U.S. 37, 49, 40 S.Ct. 221, 64 L.Ed. 445 (1920) for the proposition that a taxing entity—in that case the city of Cleveland—could impose a tax only where it had *in personam* or *in rem* jurisdiction. *Hillenemeyer*, at ¶42. The trial court apparently misconstrued these citations to infer that State jurisdiction over the person or thing taxed was sufficient or could substitute for municipal jurisdiction. But a review of the *Angell-Willacy* line makes clear that in those cases, the Ohio Supreme Court required the municipality—i.e., the taxing entity—to demonstrate jurisdiction over the person or thing to be taxed. Whether the State might have jurisdiction to impose a State tax on Ohio residents was immaterial.

For example, in applying the fiscal relation test, the *Angell* Court looked to whether the City of Toledo—not the State of Ohio—had provided something of benefit to the Plaintiff. *Angell*, 153 Ohio St. at 185. And in *McConnell v. City of Columbus,* 172 Ohio St. 95, 173 N.E.2d 760, 761 (1961) the Court upheld the city of Columbus's power to tax an employee of The Ohio State University, reasoning 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. The *Hillenmeyer* and *Willacy* Courts were similarly clear that they were addressing whether the municipality—not the State—had the jurisdiction necessary to impose the taxes at issue. *See Hillenmeyer*, 144 Ohio St. 3d 165, 2015-Ohio-1623, 41 N.E. 3d 1165 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."); *Willacy*, 159 Ohio St.3d 383, 2020-Ohio-314, 151 N.E. 3d 561, at ¶22 (noting the need for a connection and rational relationship between "the local taxing authority and the person, property or transaction it seeks to tax."). Indeed, if municipalities could impose income tax on nonresidents on the basis that the nonresident's income and the taxing city were both "rationally related" to the State of Ohio, the 70 plus years of Due Process jurisprudence relating to municipal taxation would be superfluous.

Nor can the legislature fill the constitutional gap in jurisdiction merely by "deeming" that the Appellants were working in the Defendant Cities. If that were the case, constitutional guarantees would be meaningless. In fact, by "deeming" work to have been performed in the Defendant Cities, Sec. 29 implicitly recognizes the Due Process limits and jurisdictional requirements set forth in the *Angell-Hillenmeyer* line of cases. Simply put, Sec. 29 asks cities—and this Court—to acknowledge that the taxable work was performed outside of the taxing city, but to pretend that the geographic jurisdictional requirements have nevertheless been met. Due Process will not allow this any more than it would allow the legislature to deem that the police had informed a criminal defendant of his Miranda rights when they in fact had not or allow the legislature to deem that payment had been made for the taking of private property when it in fact had not. The Due Process Clause does not allow the government to play "let's pretend" with constitutional rights.

C. The Defendant Cities Do Not Have In Personam Jurisdiction the Appellants

While the trial court's decision seems to be based on the premise that the Defendant Cities can somehow exercise ***in personam*** jurisdiction over the Appellants vicariously through the State's *in personam* jurisdiction over them, it is also states that the Defendant Cities have jurisdiction over the Appellants based on their employment in those cities. See Trial docket, 12/16/21, Opinion and

J.E. at 8 ("Summer Curcio is subject to in personam jurisdiction [in] the city of Toledo in [regard] to her employment in the city of Toledo.") To the extent that the trial court's decision can be read to hold that the Defendant Cities also have in personam jurisdiction over the Appellants independent of the State, that conclusion directly conflicts with the *Angell-Hillenmeyer* line of cases.

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 165, 2015-Ohio-1623, 41 N.E. 3d 1165 at ¶42 ("***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).

Moreover, as the *Vonkaenel* Court explained, the mere presence of an employer in a taxing district is not a sufficient fiscal contact to subject a nonresident employee to taxation. *Vonkaenel v. City of New Philadelphia* (2001)*,* 5th Dist. Tuscarawas No. 2000AP-04-0041, 2001 WL 81700, *3. Finally, the trial court's reliance on the text of H.B. 197 to establish *in personam* jurisdiction begs the question. Constitutional protections mean nothing if the government can simply deem them to have been satisfied.

ASSIGNMENT OF ERROR NO. 2: 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.

A. The General Assembly Lacks the Constitutional Authority to Allow Extraterritorial Municipal Taxation.

Just as the Ohio General Assembly cannot impose a municipal tax or deem that a municipality has met its jurisdictional requirements to impose a tax, the General Assembly cannot legislatively create or expand a city's taxing authority. The Home Rule Amendment allows cities to exercise all powers of local self-government," including taxation of income "within their limits," but no further. *See Czubaj v. Tallmadge,* 9th Dist. Summit No. 21389, 2003-Ohio-5466, ¶ 12 (Invalidating extraterritorial municipal tax on the basis that "[t]he direct authority given by that article is expressly limited to the exercise of powers *within the municipality.*") (Emphasis in original). Yet assuming—consistent with the *Angell-Willacy* line of cases—that the Defendant Cities lack Home Rule authority to tax the Appellants on work they performed outside its borders, the trial court's decision raises 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 allow a city to act extra-territorially in some circumstances, where it would lack authority to do so under the Home Rule Amendment. *See, Prudential Co-op. Realty Co. v. City of Youngstown Prudential Co-op,* 118 Ohio St. 204, 160 N.E. 695, 698-99. But local taxation is not one of those circumstances. In *Prudential Co-op*, the General Assembly statutorily authorized the city of Youngstown to act extraterritorially in inspecting and creating plat maps for property that the city planned to annex. The *Prudential Co-*

op court made clear that while the General Assembly could authorize the city to act extraterritorially in regard to the type of regulation necessary to inspect and plat the land, extraterritorial taxation is different in kind. The court thus 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.

Id. at 214 (emphasis added). The question in *Prudential Co-op* 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 without *in personam* or *in rem* taxing jurisdiction on a nonresident. Consistent with *Prudential Co-op*, 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 is notably silent regarding the legislature's power to create or expand municipal taxation. The power to limit is distinct from the power to *expand*. 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. *See, e.g. Bd. of Elections for Franklin Cty. v. State ex rel. Schneider*, 128 Ohio St. 273, 292, 191 N.E. 115, 123 (1934) (applying the doctrine of 'expressio unius' to the General Assembly's powers under the Ohio Constitution).

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 & Sons Co. v.*

Pierce, 96 Ohio St. 44, 117 N.E. 6 (1917); *State ex rel. Robertson Realty Co. v. Guilbert,* 75 Ohio St. 1, 78 N.E. 931 (1906). Again, this limitation 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 permit taxation of persons living and working outside of those limits.

The trial court's decision, however, would read this provision of the Ohio Constitution, and the Court's decision in *Athens v. McClain*, 158 Ohio St. 3d 1500, 2020-Ohio-2792, 144 N.E. 3d 437 (2020), to imply in the General Assembly 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.[2] Moreover, reading the Ohio Constitution's grant to the General Assembly 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 would render the provision meaningless. If the Framers of the Ohio Constitution had intended to give the General Assembly the power to expand municipal taxation or "allocate" tax revenue between municipalities—which would be entirely inconsistent with the Home Rule provision—they would

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[2] The trial court also states "Under the Ohio Constitution the General Assembly has the authority to establish municipal income tax allocation classifications among Ohio Municipal Corporations." Trial docket, 12/16/21, Opinion and J.E. at 6 (citing Ohio Const., Art. XVII, § 3 & 7). Presumably the court meant to cite to Art. XVIII, but in any event, the Ohio Constitution says no such thing, and no court has ever ruled as such.

have said so specifically. The Framers did not, but rather gave the General Assembly carefully circumscribed powers which do not include the power to expand taxation beyond the limits of the Home Rule Amendment.

The trial court's reliance on the State's sovereign power over intrastate taxation are thus of no moment. Even setting aside whether H.B.197—which putatively allowed municipalities to tax nonresident employees on work performed outside their borders—was a limitation or 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. 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 16th day of March 2022, the forgoing Merit Brief was served on all counsel of via the Court's electronic filings system.

/s/ Jay R. Carson
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