IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

DR. MANAL MORSY Plaintiff, vs. JAMES GENTILE, in his official capacity as interim Finance Director Defendant.	))))))))))))	CASE NO. 21-946057 JUDGE MARK MAJER PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Dr. Manal Morsy opposes the Motion for Summary Judgment filed by James Gentile, in his official capacity as Interim Finance Director of the City of Cleveland ("the City"). The arguments that the City raises in its Summary Judgment motion are identical to those made in its Motion to Dismiss, which the Court denied.

Dr. Morsy is not required to exhaust any administrative remedies—to the extent such remedies even exist—because under R.C. 2723.01, this court has original jurisdiction over constitutional challenges to illegal taxes. *Musial Office, Ltd. v. Cuyahoga Cty*, 8th Dist. No. 99781, 2014-Ohio-602, 8 N.E. 3d 992, ¶ 16 (8th Dist. 2014). Indeed, because hers is a constitutional challenge to a statute, the City's Tax Review Board cannot provide the relief she requests and any attempt to exhaust administrative remedies would be futile.

The City's other arguments are variations on the theme that the Ohio General Assembly has broad authority over intrastate taxation generally and municipal taxation specifically. There is no doubt the state legislature nearly limitless authority to enact *state* taxes on Ohio residents and *state* taxes on activity occurring within its borders. But H.B. 197 did neither.

More importantly, any state statute must still comport with due process. For more than 70 years the Ohio Supreme Court consistently has held that the Fifth Amendment's Due Process Clause as applied to the states by the Fourteenth Amendment allows municipalities to tax two—and only two—types of income: (1) income earned by residents who live in the municipality, and (2) income earned by non-residents for work done within the municipality. *Hillenmeyer v. Cleveland Bd. of Rev.,* 144 Ohio St.3d 165 (2015), 2015-Ohio-1623, 41 N.E.3d 1164, ¶ 42, *citing Shaffer v. Carter,* 252 U.S. 37, 55, 40 S. Ct. 221, 64 L. Ed. 445 (1920); *see also, Thompson v. City of Cincinnati*, 2 Ohio St.2d 292, at syllabus, 208 N.E.2d 747 (1965) ("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.")). This limitation flows from the Ohio Supreme Court's 1950 decision in *Angell v. City of Toledo* (1950), 153 Ohio St. 179, 91 N.E.2d 250, in which the Court first recognized a municipality's authority to tax non-residents only for work actually performed in the taxing jurisdiction, through *Willacy v. Cleveland Bd. of Income Tax Rev.*, 159 Ohio St.3d 383, 2020-Ohio-314, 151 N.E.3d 561, decided just two years ago. Neither residency in nor work performed in the taxing City is present here. Similarly, the City's claim that it can exercise *in personam* jurisdiction over Dr. Morsy for the entire year of 2020 merely because she worked in the City for part of year finds no support in Ohio case law.

Moreover, by expanding its taxing authority extraterritorially via Sec. 29 of H.B. 197, the City improperly discriminates against interstate commerce in contravention 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 where an Ohio resident would not. This violates the "bedrock principle" that "a State [and 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)).

In its Motion, the City makes some extraordinary assertions regarding its authority to tax income earned outside of its borders. These propositions are as novel as the coronavirus that H.B. 197 was written to address and the City cites no authority to support them. Nor does the City attempt to reconcile its expansive theory of jurisdiction to tax with the well-established body of State and federal law—such as *Hillenmeyer*, *Corrigan*, and *Allied-Signal*, *supra*—that contradicts it.

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.

LAW AND ARGUMENT

A. The Doctrine of Exhaustion of Administrative Remedies Does Not Apply Here

1. R.C. 2723.01 Provides this Court with Original Jurisdiction to Enjoin and Order the Refund of an Illegal Tax and Does not Require a Plaintiff to Exhaust Administrative Remedies.

The City first argues that it should be granted summary judgment because Dr. Morsy has allegedly failed to exhaust her administrative remedies by seeking review at the City's Board of Tax Review. The law is clear, however, that when challenging the legality or constitutionality of a tax, plaintiffs are not required to exhaust administrative remedies. *See Musial* 2014-Ohio-602 at ¶ 16 ("[O]ne of Musial's claims was brought pursuant to R.C. 2723.01, which expressly confers jurisdiction on the common pleas court to hear claims for recovery of overpaid taxes. Musial is therefore not required to comply with the statutorily prescribed administrative proceedings for valuation disputes for the common pleas court to have jurisdiction over Musial's claims."). This is consistent with longstanding Ohio law. *See Fox v. Lakewood*, 84 Ohio App.3d 202, 205, 616 N.E.2d 588, 590 (8th Dist.1992) (holding that R.C. 2723.01 provides for original jurisdiction to challenge illegally levied income taxes); see also *Aspinwall v. Mentor Bd. of Tax Rev.*, 146 Ohio App.3d 466, 473, 766 N.E.2d 1034, 1039–40 (11th Dist. 2001) ("[W]hen seeking to enjoin an illegal collection of taxes, pursuant to R.C. 2723.01, a party does not have to exhaust all administrative remedies."); *St. Francis Community Urban Redevelopment Corp. v. Rhodes*, 1st Dist. Hamilton No. C-960514, 1997 WL 71296, *2 (*quoting Conn v. Jones*, 115 Ohio St. 186, syllabus, 152 N.E. 897, 4 Ohio Law Abs. 394 (1926)) ("Under [R.C. 2723.01], a property owner may apply for an injunction to restrain the levy or collection of a tax upon the ground that the property to be taxed is exempt, without proceeding under [R.C. 5715.27] *et seq.* These sections provide a concurrent and not an exclusive remedy.").

Courts have recognized a taxpayer's ability to challenge a tax's constitutionality directly without intermediate administrative steps as far back as 1926, when the Ohio Supreme Court, interpreting the General Code's version of R.C. 2723.01, held that "[w]hen the question raised is as to the very power to lay the tax, and not as to the valuation of the property, nor as to the amount of the assessment, injunction will lie under section 12075 [R.C. 2723.01]. That section gives a remedy against the levy of an unauthorized tax concurrent with the remedy contained in sections 5616, 5611-1, and 5611-2, General Code." *Conn*, 115 Ohio St. at 196–97.

The City argues that the Eighth District Court's decision in *BP Communications Alaska, Inc. v. Cent. Collection Agency*, 136 Ohio App.3d 807, 737 N.E. 2d 1050 (2000), requires Dr. Morsy to exhaust her administrative remedies because she has "conceded" that the City of Cleveland has the power to impose an income tax. See City's MSJ at 8. But the City ignores the fundamental distinction on which *BP Communications* turned. In *BP Communications*, the court held that because BP challenged the constitutionality of City's *actions*, rather than the constitutionality of a *statute*, BP had to exhaust its administrative remedies:

> BP['s] . . . request did not specifically raise the constitutionality of a statute or ordinance; instead, it raised an issue as to the constitutionality of CCA's actions as applied to the ordinances.

Id.

The court took pains to distinguish cases like *BP*'s, which dealt with "valuation, or amount of assessment" from those that challenged "the very power to lay the tax." *Id.* at 815, quoting *Conn*, 115 Ohio St. at 195. Here, Dr. Morsy has challenged the constitutionality of H.B. 197, which purports to expand municipal taxing authority extraterritorially. The court further expressed its concern that if BP was not required to exhaust its administrative remedies relating to the calculation of its taxes, a reviewing court would be denied the benefit of the agency's "special expertise in tax matters" and "would permit an R.C. 2723.01 action for any claim that a tax was wrongly computed, as opposed to limiting it to those levied with no authority whatsoever." *Id.* at 815.

Those factors are not present here, however, where Dr. Morsy plainly, specifically, and unambiguously seeks a declaration that Sec. 29 of H.B. 197 is unconstitutional under the Due Process Clause. While BP did not raise a constitutional challenge to a statute, the first count of Dr. Morsy's Complaint is captioned: COUNT ONE: ACTION FOR DECLARATORY JUDGMENT BASED ON UNCONSTITUTIONALITY OF H.B. 197. Complaint at 12 (emphasis in original). Further, Dr. Morsy requests relief in the form of "a declaration stating and an Order holding that Sec. 29 of H.B. 197 of the 133rd Ohio General Assembly is unconstitutional and void." *Id.* at 14. Of the complaint's fifty-seven paragraphs, more than twenty specifically mention the Constitution, Due Process, or the Commerce Clause. Complaint, *passim*. Properly construed, *BP Communications* supports Dr. Morsy's position that R.C. 2723.01 is the proper vehicle to challenge the constitutionality of a tax, without the need for administrative exhaustion.

Certainly, Dr. Morsy acknowledges the City's right to impose municipal income tax on work that she actually performed in Cleveland. But that acknowledgement is a far cry from conceding that a state statute authorizes the City to tax work performed in Pennsylvania. By way of analogy, one can agree that the Cleveland Police have the power to make arrests without conceding that they can do so anytime, anywhere, or without probable cause.

2. Appeal to the City's Board of Tax Review Would Be Futile Because the Board Lacks the Authority to Declare Sec. 29 Unconstitutional.

The City's argument that Dr. Morsy failed to exhaust her administrative remedies also ignores the equally substantial body of law holding that "parties need not pursue their administrative remedies if doing so would be futile or a vain act." *Driscoll v. Austintown Assoc.*, 42 Ohio St.2d 263, 275, 328 N.E.2d 395 (1975). A "vain act" occurs when an administrative body lacks the authority to grant the relief sought. *State ex rel. Teamsters Local Union 436 v. Cuyahoga Cty. Bd. of Commrs.*, 132 Ohio St.3d 47, 2012-Ohio-1861, 969 N.E.2d 224, ¶ 24, citing *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 115, 564 N.E.2d 477 (1990). Indeed, the *BP Communications* court, on which the City relies, held that it is "futile to force a party to exhaust an administrative appeal to an agency that can afford no meaningful relief." *BP Communications*, 136 Ohio App.3d at 813 (internal citations omitted).

The City's Board of Tax Review is an administrative agency, and as such, "lacks jurisdiction to determine the constitutional validity of statutes." *State ex rel. Mallory v. Pub. Emp. Retirement Bd.* (1998), 82 Ohio St.3d 235, 240, 694 N.E.2d 1356, 1361; see also *State, ex rel. Columbus Southern Power Co., v. Sheward*, 63 Ohio St.3d 78, 81, 585 N.E.2d 380, 382 (1992) ("It is settled that an administrative agency is without jurisdiction to determine the constitutional validity of a statute."); see also, *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, 407, 11 O.O.2d 157, 166 N.E.2d 139 ("[T]he Board of tax Appeals, being an administrative agency and not a court, was without jurisdiction to consider and determine a question of constitutional validity. Hence, nothing could have been accomplished by raising the question there."). Again, Dr. Morsy is seeking a declaration that Sec. 29 of H.B. 197—an act of the state legislature—is unconstitutional. This is not a remedy that the City's Board of Tax Review can provide.

Further, even if the Board had the power to grant Dr. Morsy the relief she seeks, it lacks jurisdiction to hear her complaint. An administrative agency can exercise only the jurisdiction conferred on it by statute. *M6 Motors, Inc. v. Nissan of N. Olmsted, LLC*, 8th Dist. No. 100684, 2014-Ohio-2537, 14 N.E.3d 1054, ¶ 41; see also, *State ex rel. Shaker Square Co. v. Guion* (App.1957), 145 N.E.2d 476 (A municipal administrative agency . . . "that is created by a legislative body is limited to exercise only such authority granted to it by the legislative body.")

The Board of Tax Review's authorizing ordinance, as well as R.C. 718.01 and 718.11, limits its jurisdiction to "appeals by taxpayers of ***<u>assessments</u>* issued by the Tax Administrator** regarding a municipal income tax obligation that is subject to appeal as provided in RC Chapter 718, this chapter or the rules and regulations." Cleveland City Ordinance § 192.40 (a) (*emphasis added*); see also, R.C. 718.11(C) ("Any person ***who has been issued an <u>assessment</u>*** may appeal the assessment to the board created pursuant to this section by filing a request with the board.") (emphasis added).

An "assessment" does not encompass every adverse determination or act by the Tax Department. Rather, it is a defined and limited term in the Revised Code:

> "Assessment" means a written finding by the tax administrator that a person has underpaid municipal income tax, or owes penalty and interest, or any combination of tax, penalty, or interest, to the municipal corporation that commences the person's time limitation for making an appeal to the local board of tax review pursuant to section 718.11 of the Revised Code and has "ASSESSMENT" written in all capital letters at the top of such finding.

R. C. 718.01(PP)(1). Highlighting the term's limited meaning in the context of tax appeals, R.C. 718(PP)(2) adds that an "'Assessment' does not include an informal notice denying a request for refund issued under division (B)(3) of section 718.19 of the Revised Code, [or] a billing statement notifying a taxpayer of current or past-due balances owed to the municipal corporation, ..." R.C. 718.01 (PP)(2).

Here, the City has not issued any assessment to Dr. Morsy. Indeed, because her employer has already withheld all of the disputed taxes and they have been transferred to the City, there is no reason the City would issue an assessment. And without an assessment, the Board lacks jurisdiction to hear any "appeal" from this dispute. Simply put, Dr. Morsy has no administrative remedies to exhaust.

B. The General Assembly Cannot Authorize Cities to Engage in Extraterritorial Taxation.

The City next argues that the General Assembly has the authority to "establish municipal tax classifications among Ohio municipal corporations." Through this euphemism, the City asks the Court to accept that the State of Ohio has explicitly authorized the City of Cleveland to tax a Pennsylvania resident for work that she performed in Pennsylvania.

The City bases this proposition on a misreading of *Athens v. McClain*, 163 Ohio St.3d 61 (2020) and *Prudential Co-op. Realty Co. v. City of Youngstown*, 118 Ohio St. 204, 160 N.E. 695 (1928). But a review of these cases shows that neither even hints that the legislature can expand a city's taxing power to reach non-Ohio residents working outside of the state. More importantly, the City ignores the fundamental principle that any State statute must conform to the Due Process Clause.

1. *Athens v. McClain* Does Not Allow the General Assembly to Expand a Municipality's Jurisdiction to Tax.

The *Athens* case did not speak to the legislature's power to expand municipalities' taxing power. Rather, *Athens* dealt with a statute enacted to create uniformity in municipal tax collection procedures for corporate net-profits taxes. The statute at issue provided for "the centralized administration of municipal net-profits taxes" and allowed corporate taxpayers to choose whether to file their tax returns with the individual municipalities or through the new centralized procedure. *Id.* at 63. The goal of the statute in *Athens* was to relieve the administrative burden on corporate tax filers who otherwise would have to file separate returns in each municipality in which they did business. *Id*. at 62-62. Several cities, however, challenged the statute an intrusion on their home rule authority.

The Court held that pursuant to the General Assembly's specific authority "to limit the power of municipalities to levy taxes" set forth in Article XVIII, Sec. 13 of the Ohio Constitution, the legislature had the power enact the statute. Notably, not a word in *Athens* relates to "establishing tax classifications" among cities or "allocating" tax revenue from one city to another. Indeed, in the first line of the *Athens* decision, Justice Donnelly acknowledges the Due Process limits recognized in the *Angell-Hillenmeyer* line of cases, stating "[m]any Ohio municipalities impose a tax on income earned within their boundaries." *Id.* at 414. In fact, Justice Donnelly went on to cite *Angell*—and implicitly its limitations on municipal taxing power—in his discussion of municipal taxing power.

The City asks this Court to imply from *Athens's* holding that the General Assembly has the authority to limit and regulate the how municipal taxes are collected, that the General Assembly can also authorize a municipality to tax nonresidents working outside of its limits. But *Athens* simply recognizes that under Article XVIII, Sec. 13's grant of authority to "limit the power of municipalities to tax," the State can regulate how cities collect taxes. It does not even hint that the power to enact laws standardizing the collection of certain corporate taxes would allow the State to enlarge a city's power to levy a tax.

Moreover, 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 have said so specifically. Reading the Ohio Constitution's grant of authority to limit municipal taxation to mean that the General Assembly can expand municipal taxing authority of nonresidents not only beyond the city limits but beyond the State would render the Ohio Constitution's Art.

XVIII, Sec. 13 grant of authority to limit municipal taxation meaningless, and would do violence to the Home Rule Clause.

Indeed, the *Athens* court based its decision on the General Assembly's specifically enumerated constitutional power to place *limits* on municipal taxation. *Id.* at 61, 67, citing Ohio Cont. Art. XVIII, Sec. 13; see also 81 ("The Ohio Constitution places a check on municipal authority to levy taxes.") (Kennedy, J. concurring). 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.

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). 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 as it did in *Athens*, based on the power delegated to the General Assembly by Art. XVIII, Sec. 13 of the Ohio Constitution. Again, this limitation makes sense when one considers that cities are separate political entities from the State of Ohio. 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. H.B. 197, under which the City purports to have the authority to tax a Pennsylvania resident for work performed in Pennsylvania, cannot be reasonably characterized as a "limit" on municipal taxing power. Before H.B 197, Dr. Morsy never paid Cleveland municipal tax on days worked outside of the City. After H.B. 197, the City claims the right to tax Dr. Morsy anywhere in the world on the basis that she "had been staying in Ohio multiple days per week" before the pandemic. City MSJ, at 12. The City thus finds no help in the *Athens* decision.

2. Neither *Prudential Co-op*. nor *Time Warner* Allow the General Assembly to Authorize a City to Engage in Extraterritorial Taxation.

The City next looks to *Prudential Co-op. Realty Co. v. City of Youngstown,* 118 Ohio St. 204, 160 N.E. 695, 698-99, 6 Ohio Law Abs. 175 (1928) for the proposition that "[t]he General Assembly can further grant powers to municipalities beyond those granted by the Home Rule Clause." City MSJ, at 8. The Court in *Prudential Co-op* did indeed hold that the General Assembly can allow a city to act extra-territorially in some circumstances where it would lack authority to do so under home rule. *See Prudential Co-op.* 118 Ohio St. at 207. But municipal 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. *Id*. 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. And again, under the interpretive principle of *expressio unius est exclusion alterius*, this silence should be interpreted as prohibition.

Similarly, *Time Warner Cable, Inc. v. City of Cincinnati*, 2020-Ohio-4207, which cites *Prudential Co-op*. in dicta, cannot be read to allow the General Assembly to authorize extraterritorial taxation by municipalities. The City claims that the *Time Warner* court "stated that Cincinnati could enforce its tax ordinance outside its municipal boundaries given that the legislature has so authorized [it] in that instance." City MSJ at 11. But the *Time Warner* court said no such thing.

First, *Time Warner* did not deal with extraterritorial taxation. It dealt with whether the General Assembly could—as it did in *Athens*—reduce the burden on taxpayers by requiring cities to adopt standardized and simplified tax procedures. The statute at issue at in issue in *Time Warner* required cities to accept consolidated tax return from companies that were an "affiliated group" under federal tax law. *Id*. at ¶2-3. The City of Cincinnati challenged the statute, claiming that it would require it to engage in unconstitutional extraterritorial taxation. The *Time Warner* court described the City of Cincinnati's concerns as a "dubious proposition" and 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. In other words, there was no extraterritorial taxation issue because Cincinnati already had *in personam* jurisdiction over Time Warner because Time Warner was located in Cincinnati. Dr. Morsy, by comparison, does not live in the City of Cleveland.[1] While before the pandemic she typically spent the work week in Cleveland, she was not living or working in Cleveland when she earned the income that the City is trying to tax. There is simply no authority to support the notion that a municipality has the power to continue to tax people simply because they used to live or work within its borders.

Second, the consolidated return filing at issue in Time Warner made it easier for groups of companies like Time Warner that filed consolidated federal income tax returns. But far from abandoning the *Angell-Hillenmeyer* principles that income must be taxed where it is earned, the consolidated return embraced those principles, requiring entities to calculate their taxable income by (1) combining the income of all entities included in the return and (2) determining the portion of income subject to Cincinnati municipal income tax based on the combined activities of all entities included in the return. This was consistent with the city's tax code, which allowed a business situated in Cincinnati to calculate its net profits based on the average of the percentage of the business' property within Cincinnati compared with its property outside of the City, the percentage of wages, salaries and other taxable income paid by the business within the City, and the ratio of gross receipts earned by the business within the City to those earned outside the City. In other words, in *Time Warner* the statute concerning consolidated tax returns at issue and the

[1] The City seems to suggest that because Dr. Morsy spent significant time working in the City of Cleveland before the pandemic, that she is somehow a resident of the City. See e.g., City's Mot. Summ. Judg. at 17-18. First, the tax ordinance that the City seeks to enforce defines "resident" as "an individual domiciled within the City." City of Cleveland Ordinances, §191.0301. Plainly Dr. Morsy is not a resident under the City's own codified definition. Regardless, Dr. Morsy has testified by affidavit that she is a resident of Blue Bell, Pennsylvania. On a motion for summary judgment, the Court is bound to determine whether the facts, viewed in the light most favorable to the non-moving party, are subject to reasonable dispute. *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 106, 483 N.E. 2d 150 (1985). Viewing the facts in the light most favorable to Dr. Morsy, based on her affidavit and definition found in the City's own tax ordinance, her residency outside of Cleveland is not subject to reasonable dispute.

relevant city's tax ordinance maintained the principle that tax liability must be determined based on the proportion of the business's activities occurring within the jurisdiction.

This is entirely consistent with *Hillenme*yer, which noted that "[i]ncome derived from the conduct of a unitary *trade or business* [like that in *Time Warner*] may be apportioned by a general formula, while *nonbusiness* income [e.g., wages] must usually be more specifically allocated to that place where the particular increment of income is earned." *Hillenmeyer,* 144 Ohio St.3d at 175, *citing* Peters & Miller, *Apportionability in State Income Taxation: The Uniform Div. of Income for Tax Purposes Act & Allied-Signal*, 60 Tax Law. 57, 71 (2006) (*emphasis in original*).

Accordingly, neither *Prudential Co-op* nor *Time Warner* allow the General Assembly to authorize Cleveland to tax a Pennsylvania resident for days that she did not work in Cleveland—and *Angell* and *Hillenmeyer* forbid Cleveland from doing so. Dr. Morsy is willing to pay municipal income tax for those days that she actually worked in the City—indeed she has already paid them. But that is not what H.B. 197 and the City demand.

3. Any State Statute Purporting to Expand Municipal Taxing Power Must Still Comport With Due Process

Lastly, the City's arguments regarding the State's sovereign power over intrastate taxation fail to address the most fundamental limitation on state power. Even setting aside whether H.B.197—which 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, while the General Assembly has flexibility to fashion withholding rules like the 20-Day rule or to require certain procedures for accepting municipal tax returns as in *Time Warner* or requiring centralized administration of business net-profits taxes in *Athens v. McClain*, 163 Ohio St.3d 61, 2020-Ohio-5146, 168 N.E.3d 411, these rules do not—and constitutionally could not—"re-allocate" tax liability from one city to another beyond the permissible categories of resident *in personam* and non-resident *in-rem* local income taxation recognized in *Angell, Thompson,* and *Hillenmeyer.*

The City's suggestion that a State can statutorily authorize what the Due Process Clause forbids is hard to take seriously. See *Bd. of Ed. of City School Dist. of City of Cincinnati v. Walter*, 58 Ohio St.2d 368, 383, 390 N.E.2d 813, 823 (1979), citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803) ("[W]here enactments violate the basic law, it was determined early in our judicial history that the courts have not only the power but the duty to declare such enactments invalid.") This is particularly true when Ohio's highest Court has held—twice within the last five years—that a municipality lacks jurisdiction to tax a nonresident on work performed outside of its border. A tax imposed without jurisdiction, whether authorized by state statute or not, violates Due Process. *See Corrigan,* 149 Ohio St.3d at 19; see also *Allied-Signal*, 504 U.S. at 777 ("[A] State may not tax value earned outside its borders.").; *see also, Hillenmeyer*, 2015-Ohio-1623 at ¶46 ("Due process requires an allocation that reasonably associates the amount of compensation taxed with work the taxpayer performed *within the city*.") (emphasis supplied).

Because *Angell, Hillenmeyer, Willacy*, et al., make clear that taxing a nonresident for work performed outside of a municipality violates Due Process, 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.").

C. No Ohio Court Has Ever Recognized the City's Expansive View of Personal Jurisdiction

1. Neither the State of Ohio Nor The City Has In Personam Jurisdiction Over Dr. Morsy

The City next argues that Due Process is not offended because—although Dr. Morsy is not an Ohio resident and the work on which she is being taxed was performed in Pennsylvania—she is "plainly subject to the authority of the Ohio General Assembly" because she had worked several days a week in Ohio before the pandemic. City MSJ at 12. In other words, the City argues that because Dr. Morsy spent time in Ohio and worked in Ohio before the pandemic, she is subject to regulation by the State of Ohio, and because she is subject to the regulations of the State of Ohio, she can be required to pay income tax to the City of Cleveland, for work performed in Pennsylvania.[2] The City improperly conflates the State's jurisdiction to regulate persons within its borders and the City's jurisdiction to tax nonresidents. Again, the State and the City are separate political entities. Dr. Morsy is not challenging a *State* income tax.[3] She is challenging the City's imposition of its municipal income tax on her, and the constitutionality of a state law that purports to deem work to be performed some place where it was not actually performed.

The City's argument that Dr. Morsy is subject to the Ohio General Assembly's authority because she worked in Cleveland before the pandemic is an extraordinary claim, and the City provides no authority to support it. No court has ever held that an employee can be subject to the income tax of a foreign city or State simply because her employer is located there. On the contrary, *Angell*, *Corrigan*, *Hillenmeyer*, and *Willacy* all premise municipal taxation on the worker's

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[2] Obviously, Dr. Morsy does not dispute—consistent with *Hillenmeyer, et al*.— that she is subject to the laws of Ohio *while she is actually in Ohio*.

[3] Under Ohio's State tax reciprocity agreement with the State of Pennsylvania, as a Pennsylvania resident, Dr. Morsy pays no taxes to the State of Ohio, regardless of how much time she spends working in Ohio. See R.C. 5747.06.

location when the work was performed. *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."). The City's failure to address the dissonance between these cases and its proposition that a city has *in personam* jurisdiction over anyone who has 'minimum contacts' speaks volumes. If the *Corrigan*, *Hillenmeyer*, and *Willacy* courts (as well as the federal courts they drew from) 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 ("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*.'").

Again, in making the *in personam* jurisdiction argument, the City conflates the "minimum contacts" principles used to determine long-arm jurisdiction over out-of-state defendants with the jurisdiction to tax discussed in *Angell*, *Hillenmeyer* and *Shaffer*. Those cases explained that the jurisdiction to tax depended upon the government's power to enforce its mandate by action taken *within its borders*. *Corrigan v. Testa* (2016), 149 Ohio St.3d at 21 (internal citations omitted) (emphasis added). Thus, for taxation purposes, a local government has *in personam* jurisdiction only over its residents, and "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 175-176; *see also, Vonkaenel,* 2001 WL 81700 at *3.

Similarly, the City's argument that because Dr. Morsy physically worked in Cleveland early in 2020, her work in Pennsylvania is "rationally related" to Cleveland because the City provided services to her employer is unavailing. As the *Vonkaenel* Court made clear, an employers' presence in the taxing jurisdiction is not a sufficient fiscal connection to create jurisdiction over an employee. There, even though the employees reported to work in New Philadelphia, picked-up their trucks and deliveries in New Philadelphia, and New Philadelphia protected their employer from fire and theft, the court found that "the mere fact that the City of New Philadelphia provides services to appellants' employer . . . 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." *Vonkaenel,* 2001 WL 81700 at *3

2. No Court Has Recognized the City's Theory of Virtual Jurisdiction

To avoid the well-delineated requirements of *in personam* and *in rem* jurisdiction, the City lands on an even more attenuated theory: The State of Ohio/City of Cleveland can exercise jurisdiction over Dr. Morsy because she has "virtual" connection to the State or City. The City "paraphrases" the U.S. Supreme Court's decision in *South Dakota v. Wayfair, Inc.,* 585 U.S. __, 2093, 138 S. Ct. 2080 (2018) to argue that "a worker may be present in a city in a meaningful way by means of an internet-enable device." City MSJ at 16. Such a rule—which no court has ever adopted—would eliminate any jurisdictional limits on taxation and regulation. This is plainly inconsistent with existing case law as well as with common sense notions of fairness. More troubling, the City's proposed rule admits to no limiting principle. For example, Progressive Insurance company, located in Ohio, employs roughly 43,000 people across the country and sells insurance in 48 states. Fortune, Fortune 500 Company Rankings, Progressive, https://fortune.com/company/progressive/fortune500.

Many, if not all, of these employees communicate electronically with the home office in Ohio. Under the City's rationale, the General Assembly could require all of them to pay municipal tax to the City of Mayfield. The digital connections we now enjoy are fundamentally improvements on earlier methods of communication like mail, telegraph, and telephone. Simply put, remote work—while more prevalent because of the pandemic—is not new. Ohio courts have developed a substantial body of case law addressing exactly these questions, and as recently as 2020 have re-affirmed that local taxation of a nonresidents income must be based on where the work was performed. *See Willacy,* 2020-Ohio-314 at ¶26 (for tax purposes, "compensation must be allocated to the place where the employee performed the work.")

3. Wayfair Does Not Apply to this Case

Moreover, in relying on *Wayfair,* the City conflates the power to regulate corporate activity with the jurisdiction to tax an individual. The *Wayfair* case arose out of the State of South Dakota's efforts to collect sales taxes on online sales. South Dakota enacted a statute requiring out-of-state merchants making online sales into South Dakota to collect and remit sales tax on those transactions. Wayfair, an internet furniture seller, challenged the statute as an unconstitutional burden on interstate commerce under the dormant Commerce Clause.

Importantly, the statute at issue in *Wayfair* did not impose a tax on the selling corporation. Instead, it required Wayfair to collect and remit sales taxes from *South Dakota customers*, who were ultimately responsible for the payment of the sales tax. *Wayfair,* 138 S. Ct. at 2084. Sales tax is paid by the purchaser based on the State's *in personam* jurisdiction over him as a resident or the State's in rem jurisdiction over a sale made (that is, with goods or services delivered) within its borders, but ordinarily is collected by the seller at the point of sale and then remitted to the State. This is entirely consistent the *Angell, et al*. and does not even hint at the judicial expansion of *in rem* jurisdiction over nonresident taxpayers.

More importantly—in 2020 and with the benefit of the *Wayfair* decision—the Ohio Supreme Court in *Willacy* reaffirmed the *Angell-Hillenmeyer* test. The Court held that because "what Willacy received was deferred compensation for her Cleveland-based work," she owed Cleveland municipal income tax on the stock sale proceeds, even though she was outside of Cleveland when she sold the stock. *Willacy*, 2020-Ohio-314 at ¶ 29. In reaching its decision, the Ohio Supreme Court again emphasized that Due Process required that "compensation must be allocated to the place where the employee performed the work" and explained that the extraterritorial ordinance it had struck down in *Hillenmeyer* violated Due Process because it imposed income tax on "compensation earned while [the taxpayer] was working outside Cleveland." *Id.*, at ¶ 26 (internal citations omitted).

The Ohio Supreme Court had the benefit of the *Wayfair* decision when it decided *Willacy*. If the court had believed that *Wayfair* had somehow loosened the Due Process requirements relating to municipal income taxation and the taxpayer's physical presence, it could have said so. Its silence on this issue is telling. Even more telling is that the sole dissenter in *Willacy* actually cited *Wayfair*, but nevertheless would have held that there was an insufficient nexus for the City of Cleveland to tax Willacy's stock proceeds. *See id*., at ¶¶s 45-47, (Fischer, J., dissenting). The City's focus on inapposite federal cases relating to businesses selling into another State—where there are recent Ohio Supreme Court cases directly on point speaking to the Due Process limits on municipalities vis-à-vis employees—is telling.

Moreover, the City argues against a strawman when it claims the premise of Dr. Morsy's suit is that the Due Process Clause requires a physical presence in the taxing jurisdiction. Dr. Morsy has made no such claim. Rather, she argues consistent with *Corrigan*, *Hillenmeyer*, *Willacy*, *Shaffer*, *Allied-Signal, et al.* that Due Process requires a municipal income tax to be based on either *in personam* jurisdiction—which Ohio reviewing courts have universally construed to mean residence within the taxing district—or *in rem* jurisdiction—which Ohio reviewing courts have construed to mean work performed or property owned within the taxing district. Further, *Wayfair* and the physical presence cases that proceeded it dealt with businesses making remote sales into another state, not employees earning individual income. Plainly, if the *Wayfair* Court had intended to overturn the rule articulated in *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 61 S. Ct. 246, 85 L.Ed. 267 (1940)—the rule adopted and applied to municipal corporations in *Angell*—it would have said so directly. But the *Wayfair* Court never mentions *J.C. Penney Co*. in its discussion. This is not surprising considering that in *J.C. Penney*, the tax that the State sought to impose related only to corporate dividends that were realized "out of income derived from property located and business transacted within [Wisconsin.]" Id. at 443. In other words, the State of Wisconsin was not seeking to tax all of J.C. Penney's shareholder's dividends; it was only seeking to tax those dividends to the extent that they could be allocated to J.C. Penney's activities within Wisconsin. *Id*. at 442 ("The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin . . . "). Nor did the Wayfair Court authorize extraterritorial State taxation on all of a foreign corporation's income. Instead, it merely said that a State may make the collection of tax on in-state sales a condition of doing business in that State.

D. 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 within its borders.

H.B.197 fails *Complete Auto* second prong because the tax is not "fairly apportioned." In fact, the tax is not apportioned at all. Dr. Morsy has been forced to pay Cleveland municipal income tax on all her earnings in 2020. 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 Blue Bell, Pennsylvania and Cleveland Ohio. Morsy Affidavit, attached to Morsy MSJ; See also Morsy Tax Returns, filed under seal.

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*. in 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 provided no services to Dr. Morsy from early March of 2020, when the pandemic shutdown began, through the end 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

The Ohio Supreme Court has held time and again that municipal corporations can tax only two types of income: (1) income earned by residents who live in the municipality (under its *in personam* jurisdiction over those residents), and (2) income earned by non-residents for work done within the municipality (under its *in rem* jurisdiction over the work). Here, the City has taxed the income of a nonresidents for work performed outside of its borders—indeed outside the State's borders. Due Process and the dormant Commerce Clause do not permit it. Enforcing Due Process rights will often result in difficulties for municipalities and the State 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.

The Plaintiff has provided evidence that she is a resident of Pennsylvania and that the City of Cleveland has taxed her for work that she performed in Pennsylvania. Such extraterritorial taxation directly conflicts with the *Angell-Hillenmeyer* line of cases as well as federal decisions prohibiting discrimination against interstate commerce. The City has raised on summary judgment the same arguments that were rejected in its motion to dismiss. Based on controlling Ohio Supreme Court precedent, the City is not entitled to judgment as a matter of law.

For the all the foregoing reasons, the City's Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March 2022, a true and accurate copy of the foregoing *Brief in Opposition to Defendant's 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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