In the

Supreme Court of Ohio

JOSH SCHAAD,	:	Case No.
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	On Appeal from the Hamilton
	:	County Court of Appeals,
KAREN ALDER, et al.,	:	First Appellate District
	:	
	:	Court of Appeals
	:	Case No. C-2100349
Defendants-Appellees.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFF-APPELLANT JOSH SCHAAD

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INTRODUCTION

Over seventy years ago, this Court held that the Ohio Constitution's Home Rule Amendment permits municipalities to impose an income tax. *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E.2d 250 (1950). The *Angell* Court was clear that in exercising their home rule power to tax, cities must comport with Due Process. *Id.* Due Process requires that the taxing entity have either *in personam* jurisdiction over the taxpayer or *in rem* jurisdiction over the work being taxed. *Willacy v. Cleveland Bd. of Income Tax Rev.*, 159 Ohio St.3d 383, 2020-Ohio-314, 151 N.E.3d 561 (2020); *Hillenmeyer v. Cleveland Bd. of Rev.* 144 Ohio St.3d 165, 2015-Ohio-1623, ¶ 42, (2015) (internal citations omitted). In an unbroken line of cases beginning with *Angell* in 1950 and continuing to the present, this Court has consistently held that the Due Process Clause allows municipalities to tax two—and only two—types of income: (1) income earned by residents who live in the municipality, and (2) income earned by non-residents for work performed within the geographical limits of the municipality. *See McDonnell v. City of Columbus*, 172 Ohio St. 95, 173 N.E.2d 760 (1961); *Thompson v. City of Cincinnati*, 2 Ohio St.2d 292, 208 N.E.2d 747 (1965); *Hillenmeyer* at ¶ 42; *Willacy* at ¶¶ 23-24.

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

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

nonresidents working from home due to the pandemic were—for municipal tax purposes—still performing their work at their principal place of business in the city. This enactment fundamentally altered what had been the law for 70 years and required workers to pay income taxes to cities in which they neither lived nor worked, and in many cases, had not set foot in for months. The First District abandoned this Court's bright-line location test and—relying on the principle that "[a] state's taxing jurisdiction may be exercised over all of a resident's income based upon the state's *in personam* jurisdiction over that person"—held that the legislature's work-around provided Schaad "with all the process he was due under the law" because "Section 29 was a dictate of the Ohio General Assembly, and Schaad is a citizen of Ohio." App.Op ¶ 7 (internal citations omitted). In doing so, the First District mistakes the taxing entity: the tax in question is a municipal income tax, and as such, the taxing city must have *in personam* over a resident, or *in rem* jurisdiction over the work performed by a nonresident. As the work in question was performed outside the geographical limits of Cincinnati, the City lacked taxing jurisdiction.

The First District also sought to distinguish the *Angell-Willacy* line of cases by noting that those cases dealt with "interstate taxation and not intrastate taxation." *Id.* at 9. Even setting aside that this Court did not limit the applicability of the holdings in *Hillenmeyer* and *Willacy* to interstate taxation, the First District's decision was in error because this Court's decisions in *Angell, McDonnell, and Thompson* all addressed the application of Due Process to *intrastate* municipal taxation. And Due Process applies to municipal income tax provisions putatively modified and expanded by emergency state actions with the same force as it does to municipal income tax provisions and collections made without State assistance. Nor has this Court—nor any court in any reported case in Ohio—ever found that an *employer's* presence within a taxing jurisdiction to be a sufficient "fiscal connection" to satisfy Due Process to tax an employee

performing his or her work outside the geographical limitations of the taxing jurisdiction. *Hillenmeyer*, 144 Ohio St.3d at 175; *see also*, *Vonkaenel v. City of New Philadelphia* (2001), 5th Dist. Tuscarawas No. 2000AP-04-0041, 2001 WL 81700, *3"); *Czubaj v. Tallmadge*, 9th Dist. Summit No. 21389, 2003-Ohio-5466, ¶ 12 (Oct. 15, 2003); *Aul Jones v. City of Massillon*, BTA No. 2018-2137, 2021 WL 1270305 (Mar. 29, 2018). Instead, for over 70 years the Due Process analysis for nonresident taxation has been "black-and-white." Because the First District's decision departs from this Court's long-established rule, this case presents a substantial constitutional question and a question of public and great general interest.

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

STATEMENT OF THE FACTS AND CASE

1. On March 14, 2020, in response to the public health threat posed to Ohio residents by the COVID-19 virus. Ohio Governor Mike DeWine issued Executive Order 2020-01D ("the Emergency Declaration"), which declared a state of emergency, authorized the Ohio Department of Health to issue "guidelines for private businesses regarding appropriate work and travel restrictions, if necessary" and urged "[a]ll citizens . . . to heed the advice of the Department of Health and other emergency officials regarding this public health emergency in order to protect their health and safety." Executive Order 2020-01D, Declaring a State of Emergency, https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2020-01-d (accessed Jan. 14, 2022).

On March 22, 2020, in response to the virus's rapid spread, the State Director of Health issued an Order that required, subject to certain exceptions, "all individuals currently living within

the State of Ohio . . . to stay at home or at their place of residence" ("the Stay-at-Home Order"). The Stay-at-Home Order further required that "[a]ll businesses and operations in the State," except "Essential Business and Operations" as defined in the Order, "cease all activity within the State…" Ohio Department of Health, Director's Stay At Home Order;https://coronavirus.ohio.gov/static/publicorders/DirectorsOrderStayAtHome.pdf(accessed Jan. 14, 2022).

The Ohio General Assembly responded by passing H.B. 197, an omnibus COVID relief bill, which included changes to Ohio's unemployment system, emergency aid to small businesses, and numerous other short-term programs to address the health and economic impacts of the pandemic. The bill also contained a provision to address municipal taxation during the pandemic in light of the sudden shift to remote work. Based on this Court's prior decisions and long-standing practice, Ohio cities imposed income tax on nonresidents based on the work that the nonresident performed within the city's geographical limits. But with millions of workers who had once commuted from suburbs to a central city suddenly forced to work from home by the Stay-at-Home order, the central cities faced a tremendous potential loss in tax revenue. The legislature found a creative solution that at once invoked the long-held rule that a city's power to tax nonresidents ended at the city limits but still purported to allow cities to collect income tax revenue from nonresidents working outside of the city. Because law had for 70 years tied taxation to where the work was performed, the legislature would simply "deem" that employees working from their home were actually working at their typical work location. Specifically, Section 29 of H.B. 197 provided that:

> "[D]uring the period of the emergency declared by Executive Order 2020-01D, issued on March 9, 2020, and for thirty days after the conclusion of that period, ***any day on which an employee performs personal services at a location, including the employee's home***, which the employee is required to report for employment duties because of the declaration

> ***shall be deemed to be a day performing personal services at the employee's principal place of work***."

(H.B. 197 Sec. 29, as enrolled (emphasis added)). On March 28, 2020, Governor DeWine signed H.B. 197 into law.

2. Plaintiff-Appellant Josh Schaad is employed in the financial services industry. His principal place of work is located in downtown Cincinnati. Before the pandemic, he typically spent several days a week either traveling for business or working from home. Beginning in March 2020, however, in compliance with the Stay-at-Home Order, on the days when he would typically go into his Cincinnati office, Mr. Schaad instead worked from his home in Blue Ash. His employer, pursuant to H.B. 197 and Ohio Revised Code's pre-existing municipal income tax withholding requirement, continued its withholding from Mr. Schaad's paychecks for the payment of municipal income taxes potentially owed to the City of Cincinnati. Mr. Schaad began returning to the office several days a week in November of 2020.

On January 11, 2021, Mr. Schaad applied for a refund of the municipal income tax withheld from his pay for the days when he worked outside of the City during 2020. Mr. Schaad filed his return in person. The City of Cincinnati, through employees of its Tax Department, initially told Mr. Schaad that this year he was ineligible for any refund from the City for days worked outside of the City because of H.B. 197.

On February 9, 2021, Mr. Schaad 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 Defendant Karen Alder ("the City"), in her capacity as Finance Director of the City of Cincinnati pursuant to R.C. 2723.03, and Ohio Attorney General Dave Yost pursuant to the requirements of R.C. § 2721.12 (A). Complaint, T.d. 2. On March 12, 2021, the City filed a Motion to Dismiss. Mot. to Dismiss, T.d. 12. On March 26, 2021, the Plaintiffs filed a Memorandum in Opposition to the

City's Motion to Dismiss. Mem. in Opp., T.d. 13. On April 6, 2021, 2021, the City filed a Reply in Support of its Motion to Dismiss. Reply, T.d. 17. The Court heard oral argument on the motions on May 4, 2021. On June 16, 2021, the Court issued an Order Granting the City's Motion to Dismiss. Ent. Granting Mot. to Dismiss, T.d. 24. On June 17, 2021, the Plaintiff-Appellant filed a timely Notice of Appeal and requested that this case be assigned to the Court's Accelerated Docket. Not. of Appeal, T.d. 25.

3. The First District Court of Appeals affirmed the trial court's dismissal of the case. App.Op. ¶ 1. The Tenth District relied on the Sec. 29's presumptive constitutionality and seemed to rely on the State's *in personam* jurisdiction over Mr. Schaad as an Ohio resident as substitute for the City of Cincinnati's lack of *in rem* or *in personam* jurisdiction. (Id. at ¶12). The Court of Appeals rejected the Appellant's arguments regarding the *Angell-Willacy* line of cases on the basis that taxpayers in *Hillenmeyer* and *Willacy* were not Ohio residents. (Id. at ¶). The First District's decision also distinguished the *Angell-Willacy* line of cases on the basis that the extraterritorial taxation at issue here occurred pursuant to an "emergency" act of the General Assembly rather than by operation of a municipal tax ordinance. (Id. ¶ 18)

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

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

1. This Court should agree to review this case because the First District's decision conflicts with this Court's long-standing Due Process analysis for municipal taxation that focused on where the taxpayer performed the work. The First District's decision calls into question this Court's holdings in *Hillenmeyer* and elsewhere that "local authorities may tax nonresidents only if theirs is the jurisdiction 'within which the income actually arises and whose authority over it operates *in rem*.'" *Hillenmeyer,* 144 Ohio St. 3d at 175 at ¶ 42, *citing Shafer v. Carter*, 252 U.S.

37, 55, 40 S. Ct. 221, 64 L. Ed. 445 (1920). The First District's decision—like the Tenth District's decision in *The Buckeye Institute v. Kilgore*, 10th Dist. Franklin No. 21AP-193, 2021-Ohio-4196, which is pending jurisdictional review before this Court—presents a substantial departure from established jurisprudence and goes so far as to indicate that the mere presence of an employer within a city's limits may be enough of a fiscal connection for that city to tax its employees, regardless of where they work. No Ohio appellate court, aside from the Tenth District in *Kilgore*, has ever adopted this rule, and its implications in a world where remote work is likely to become more common raise significant constitutional as well as public policy questions.

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

Following the First District's decision to its logical conclusion, a future General Assembly confronted with a fiscal crisis in the City of Cincinnati could respond by simply deeming that Ohioans who are not Cincinnati residents are—for tax purposes—working in Cincinnati. For example, Proctor and Gamble, which is headquartered in Cincinnati, has employees throughout the state. Applying the First District's decision, the General Assembly could authorize the City of Cincinnati to tax the income of all of these employees, regardless of whether they ever visited the "home office." This would represent a sea change in municipal tax law and would raise serious

questions regarding due process and political accountability. At first blush, this hypothetical seems far-fetched. But consider that in 2019, enacting a measure deeming work actually performed in one taxing jurisdiction as being performed in another for purposes of taxation would have seemed equally remote. Even assuming, *arguendo*, that a legislative act can somehow work around the Due Process limitations, this Court should clarify whether the legislature's general power to limit, regulate, and standardize the collection of municipal income taxes recognized in *Athens* extends so far as to allow the General Assembly to impose municipal tax liability on nonresidents working outside the geographical limits of the taxing jurisdiction.

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

4. Almost every Ohioan is subject to some form of municipal taxation. Even after the pandemic finally runs its course, it seems unlikely that all of the downtown workers will return to their offices. Cities will still need revenue and will look at any available avenue to find it. Simply put, tax treatment of remote work will remain an issue when the pandemic ends. These issues

affect millions of Ohioans as well as local governments across the State. This case thus presents a question of public and great general interest.

In sum, this case presents issues concerning fundamental issues of Due Process that will affect taxpayers and local governments across the State for years to come. It calls into question this Court's established jurisprudence and the bright line location test that has governed municipal taxation of nonresidents for nearly a century and implies that *any* connection between a nonresident and a taxing jurisdiction—even a connection as thin as a fiberoptic line or the radio waves of a 5G connection—might, if blessed by the legislature, be substantial enough to satisfy Due Process. This case is thus worthy of this Court's attention.

ARGUMENT

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

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

The City of Cincinnati is a chartered municipal corporation pursuant to Art. XVIII, Sec. 7 of the Ohio Constitution. The Home Rule provision of the Ohio Constitution broadly authorizes cities like Cincinnati "to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." The clause "within their limits," however, imposes a significant commonsense restriction on municipalities. It means that a city's home rule authority is necessarily coextensive with and limited to its geographic limits. *See Prudential Co-op. Realty Co. v. City of Youngstown*, 118 Ohio St. 204, 207, 160 N.E. 695, 696 (1928). ("The direct authority given by that article [the Home Rule Provision] is expressly limited to the exercise of powers within the municipality.")

The Ohio Supreme Court first recognized that the Home Rule Amendment authorized a municipality to tax its residents in *Angell v. City of Toledo*, 153 Ohio St. 179, 183–84, 91 N.E.2d 250 (1950). In *Angell*, this Court answered two questions. The first, which it answered in the affirmative, was whether a municipality had any authority under the Home Rule Amendment to tax income. The second question that *Angell* court answered—the question on which this case turns—involves how to reconcile a city's power to tax "within its limits" with the fundamental requirement that in order for a tax to satisfy Due Process, the political entity must exercise either *in personam* or *in rem* jurisdiction over the person or activity being taxed. *Id.* at 185.

The *Angell* court relied on the U.S. Supreme Court's decision in *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 425, 61 S.Ct. 246, 85 L.Ed. 267 (1940) to adopt a "fiscal relation" test, which requires that the tax bear "some fiscal relation to the protections, opportunities, and benefits given by the state," and applied it municipal taxation. *Id*. at 185. In applying the fiscal relation test, the Court found that Angell was actually working within the City of Toledo and that the City afforded him "not only a place to work but a place to work protected by the municipal government of Toledo." *Id.* Unlike Mr. Angell, Mr. Schaad did not rely on the City of Cincinnati to provide him with a place to work. Although Mr. Schaad's office was in Cincinnati, he actually (as opposed to the legal fiction of "deeming") performed his job remotely and worked remotely for part of the week even before the pandemic, during which time the City tacitly conceded its lack of taxing authority by granting to him regular refunds for taxes withheld during periods he worked remotely. (See Cmplt, at ¶¶s 11-12). While working from home, Mr. Schaad did not drive on Cincinnati's roads, make use of its infrastructure, or rely on its safety services. Mr. Angell, on the other hand, received the benefit of the City's services—and thus established a fiscal relation between his work and the taxes paid—because he was working in the City.

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

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

Thus, when the *Hillenmeyer* case arrived before this Court in 2016, the law that "[l]ocal taxation of a nonresident's compensation for services must be based on *the location of the taxpayer* when the services were performed" was already well-established. *Hillenmeyer,* 144 Ohio St.3d at 175, ¶ 43 (emphasis added). As this Court explained, the location where the work was performed was paramount because "[u]nder *Shaffer*'s principle, the income of a nonresident is the "res," or

thing, that lies within the taxing jurisdiction by virtue of the activity being performed within that jurisdiction." *Id.* In 2020, this Court re-affirmed the location principle in *Willacy,* holding that a city's taxing authority "is limited by the Due Process Clause, which requires a municipality to have jurisdiction before imposing a tax." *Willacy,* 159 Ohio St.3d at 389.

B. The Decisions of the First District and the Tenth District Create a District Split on Municipal Taxing Authority.

What's more, Ohio appellate courts have also applied the location principle to prohibit cities from taxing nonresidents for work performed outside of city limits. *See Vonkaenel v. City of New Philadelphia,* 5th Dist. Tuscarawas No. 2000AP-04-0041, 2001 WL 81700, *3 (Jan. 23, 2001) ("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,* 2003-Ohio-5466, at ¶ 12 (holding severance pay not subject to municipal taxation because plaintiff's "forbearance of service cannot be deemed a service performed" within the municipality). These cases contradict the First District's holding that a mere "rational relationship between a statute and its purpose" satisfies Dues Process in this context. App. Op. ¶18. While that "rational relationship" test is generally appropriate where no competing fundamental right is present, it is not applicable here, where this Court has explicitly recognized that a tax imposed without jurisdiction "is simple confiscation and a denial of due process of law," and where it has clearly established the test for establishing whether taxation is permissible. *Corrigan v. Testa*, 149

Ohio St. 3d 18, 73 N.E.3d 381, 2016-Ohio-2805 at ¶15 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342, 74 S. Ct. 535, 98 L.Ed. 74 (1954)). [1]

Taking these cases together, a direct conflict exists between this Court's *Angell-Willacy* location-centered jurisprudence and the First District's treatment of State *in personam* jurisdiction as a substitute for municipal jurisdiction to tax. The Court should take this case to address the substantial constitutional question of whether—as *Hillenmeyer* holds—local taxation of nonresidents is limited to the work the nonresidents perform within the city, or whether, as the First District held, the General Assembly can simply deem that *Hillenmeyer's* jurisdictional prerequisites have been met.

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

The Home Rule Amendment allows cities to exercise all powers of local self-government," including taxation of income "within their limits," but no further. *Czubaj* at ¶ 12. Yet assuming—consistent with the *Angell-Willacy* line of cases—that the City of Cincinnati lacks Home Rule authority to tax the Plaintiff-Appellant on work he performed outside its borders, Section 29 of H.B. 197 and the First District's opinion poses a second substantial constitutional question: Can the State authorize the City to impose and collect such a tax in the absence of Home Rule authority? Ohio courts have held that the General Assembly can, in fact, allow a city to act extra-territorially in some circumstances, where it would lack authority to do so under Home Rule. *See,* e.g. *Prudential Co-op,* 118 Ohio St. 204. But taxation is not one of those circumstances. *Id* at 214. The Ohio Constitution grants General Assembly authority only to "limit the power of

[1] The First District's decision also threatens to sow confusion in administrative agencies, which have applied the location rule. *See Aul Jones v. City of Massillon*, BTA No. 2018-2137, 2021 WL 1270305 (Mar. 29, 2018).

municipalities to levy taxes." Ohio Constitution, Article XVIII, Section 13. The First District's decision would read this provision, and the Court's decision in *Athens v. McClain*, to imply the power to allow a municipality to tax nonresidents working outside of its limits. But *Athens* simply recognizes the uncontroversial rule that the State can regulate how cities collect taxes. It does not imply that the State can authorize cities to engage in extraterritorial taxation—that is, taxation beyond what the Home Rule Amendment or Due Process permits.

Similarly, the First District's opinion misconstrues *Time Warner Cable, Inc. v. City of Cincinnati*, 2020-Ohio-4207, 157 N.E.3d 941 to hold that the State can authorize municipalities to engage in extraterritorial taxation. But the *Time Warner* court said no such thing. Instead, *Time Warner* court made clear that "[c]ontrary to the City's contention [regarding extraterritorial taxation]," Time Warner was already subject to the City's income tax by virtue of its presence in the City. *See Time Warner Cable, Inc. v. City of Cincinnati,* 2020-Ohio-4207 at ¶ 16. The whole nonresident analysis doesn't apply because Time Warner was a resident (corporation), and as such, the taxing jurisdiction could reach income earned by Time Warner anywhere in the world. This is the rule for residents, but not for nonresidents. In other words, the threshold due process jurisdictional question had already been answered because the City had *in personam* jurisdiction over Time Warner. Moreover, the case on which the *Time Warner* court relied in making this statement, *Prudential Co-op. Realty Co. v. City of Youngstown*, did not involve taxation or the Due Process concerns that accompany it. *Prudential*, 118 Ohio St. at 207. On the contrary, in *Prudential*, the Court drew a bright line between taxation and other extraterritorial actions that might be authorized by statute. *See id* at 214-15 (noting that if fees charged substantially exceeded costs, then the legislation could be an invalid use of municipal taxing power).

Appellant's Third Proposition of Law:

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

Finally, the First District's decision relies on *Kilgore* and notes that Sec. 29 was passed during the public-health emergency and implies that the General Assembly's power somehow increases during an emergency. App.Op. ¶17-18. But the emergency law provision merely changes an enactment's effective date and insulates it from the referendum provisions of Sec. 1c. Ohio Const. art. II, Sec. 1d. It does not diminish the level of constitutional scrutiny afforded to an act because it was passed as an emergency or allow courts to defer on constitutional questions based on "exigent circumstances" occurring at the time of the law's passage. The suggestion that constitutional protections ebb and flow based on the "exigent circumstances" present when a law is enacted is both novel and troubling and presents a substantial constitutional question of whether an emergency clause attached to legislation entitles the enactment to a different constitutional analysis

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum In Support of Jurisdiction of Plaintiffs-Appellants The Buckeye Institute, et al. was served by e-mail this 24th day of March 2022, upon the following counsel:

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