IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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

Plaintiff Dr. Manal Morsy hereby replies in support of her Motion for Summary Judgment. The law on this case has been briefed extensively, both on the Defendant's Motion to Dismiss and on the cross-motions for Summary Judgment. To avoid repetition, Dr. Morsy therefore restates and incorporates all of the law cited and arguments made in the Plaintiff's Brief Opposing Defendant's Motion to Dismiss and the Plaintiff's Brief Opposing Defendant's Motion for Summary Judgment in this brief as if fully re-written[1]. To the extent that the City raises arguments not previously addressed, Dr. Morsy will respond to them briefly.

1. The Rational Basis Test Does Not Apply to Due Process Questions Involving Whether a Governmental Entity—In This Case, a Municipality—Has the Jurisdiction to Tax

The Defendant argues that the Court should apply a rational basis test to determine whether Sec. 29 of H.B. 197 is constitutional. In support of this proposition, the City argues that Sec. 29 is merely a "tax classification" statute. The City confuses rational basis review of a state tax classification statute under the equal protection clause, with the fundamental due process issue of

[1] To the extent Dr. Morsy directs the Court to specific pages in her prior briefs, she does so as an aid to the Court. Such references should not be construed to waive arguments made elsewhere in those filings.

whether the City has jurisdiction to tax nonresidents working outside of its borders. Simply put, whether there is a rational basis for the statute is irrelevant where the City lacks jurisdiction to enforce it. *See Corrigan v. Testa*, 149 Ohio St. 3d 18, 21, 73 N.E. 3d 381, 2016-Ohio-2805, ¶15 ("[G]overnmental jurisdiction in matters of taxation *** depends upon the power to enforce the mandate of the [taxing authority] taken within its borders, either *in personam* or *in rem*."). The City errs by painting Sec. 29 as a State tax rather than an expansion of local taxation. The taxing entity—the entity that decides the tax rate, collects the tax, benefits from the tax, and enforces non-compliance with the tax—is the City of Cleveland, not the State of Ohio. As such, the City must have *in rem* jurisdiction over the work performed or *in personam* jurisdiction over the taxpayer. *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.)").

2. Dr. Morsy Is Not Required to Exhaust Her Administrative Remedies

Dr. Morsy has responded to this argument at length at pages 8-10 of her Brief Opposing Defendant's Motion to Dismiss and pages 4-8 of her Brief Opposing Defendant's Summary Judgment Motion.

3. Sec. 29 of H.B. 197 is not a "Municipal Income Allocation Classification"—it is an Unconstitutional Expansion of Municipal Taxing Power

Dr. Morsy has responded to arguments regarding City of *Athens v. McClain*, 163 Ohio St. 3d 61, 2020-Ohio-5146 and *Prudential Co-op Realty Co. v. Youngstown*, 118 Ohio St. 204, 160

N.E. (1928) in her Brief in Opposing Defendant's Motion to Dismiss at pages 17-20 and her Brief Opposing Defendant's Motion for Summary Judgment at pages 9-15.

To the extent any further response is warranted, Dr. Morsy first points to the City's claim that the "grant of legislative power to limit municipal taxation does not imply that the Assembly [sic] lacks power to expand municipal powers of taxation." See City's Br. Opposing MSJ at 7. Leaving aside the clear linguistic errors contained in this claim, the Ohio Supreme Court has ruled to the contrary. Indeed, the Ohio Supreme Court has stated that "[i]f the maxim '*Expressio unius est exclusio alterius*' is involved, we must consider it." *Bd. of Elections for Franklin Cty. v. State ex rel. Schneider*, 128 Ohio St. 273, 283, 191 N.E. 115, 119 (1934) (applying the doctrine of *expressio unius* to the General Assembly's power under the Ohio Constitution). The Court has declared that under "[t]he familiar maxim of interpretation, 'Expressio unius est exclusio alterius,'. . . the express grant of certain powers and silence as to others is necessarily a withholding of those not named." *State ex rel. Robertson Realty Co. v. Guilbert*, 75 Ohio St. 1, 47, 78 N.E. 931, 935 (1906). Contrary to the City's claim, the inclusion in Art. XVIII, Sec. 13 of the Ohio Constitution of the power to limit municipal taxation and the absence of the power to expand municipal taxation "is necessarily a withholding" of the power to expand. *Id.* Words have meaning and the Ohio Constitution's words authorizing the General Assembly to "limit the power of municipalities to levy taxes" are clear.

Similarly, the City's argument that "because all legislative power is vested in the Assembly [sic], it may pass legislation that expands municipal tax powers beyond those granted by the Home Rule Clause" ignores the explicit limitation on that power contained in Art. XVIII, Sec. 13 of the Ohio Constitution. In asking this Court to read any legislative action related to municipal taxation as a "limitation," the City essentially asks this Court to excise the phrase "limit the power of

municipalities to levy taxes" from the Ohio Constitution. For that reason, the City's reliance on *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027 is likewise misplaced. The *Kaminski* Court held that grants of legislative power should be broadly construed. General speaking, this is correct. But when the constitutional grant of power also includes a specific purpose or limitation—which the Home Rule Provision does—those limits must be honored.

Finally, as Dr. Morsy has pointed out numerous times before, regardless of whether the Ohio Constitution permits the General Assembly to authorize cities to tax nonresidents working outside of Ohio, any act of the legislature or of the City government must still comport with Due Process. The Ohio Supreme Court has held that without *in rem* or *in personam* jurisdiction, such taxation is "simple confiscation." *Corrigan*, 2016 Ohio-2805 at ¶ 15; quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342, 74 S. Ct. 535, 98 L.Ed. 744 (1954). The City lacks *in personam* jurisdiction over Dr. Morsy, a resident of Pennsylvania, and lacks *in rem* jurisdiction over work that Dr. Morsy performed outside of the City.

4. Dr. Morsy's Due Process Claims are set forth at Length in Prior Briefing

In response to the City's argument that Dr. Morsy's "Due Process claims are without merit," Dr. Morsy refers the Court to the law and argument presented in Plaintiff's Brief Opposing Defendant's Motion to Dismiss and Plaintiff's Brief Opposing Defendant's Motion for Summary Judgment. To the extent that the City continues to rely on *South Dakota v. Wayfair, Inc.*, ___ U.S. __, 138 S. Ct. 2080 (2018) for the proposition that a State has jurisdiction to tax anyone, anywhere, who has a connection to the State, its reading is not supported by the case law that has followed *Wayfair*. As Dr. Morsy has argued before, the Ohio Supreme Court published its decision in *Willacy* after the *Wayfair* decision. In *Willacy*, the court reaffirmed the principle that it had relied

on in *Hillenmeyer*, stating in no uncertain terms that Due Process requires that income must be allocated to the place the employee performed the work:

> Hillenmeyer's minimum connection with Cleveland was not at issue; he had engaged in income-producing activities by playing games in the city. That meant that Cleveland had jurisdiction over the portion of his compensation that was earned for services performed in the city. The main question in *Hillenmeyer* concerned whether Cleveland had fairly determined the portion of Hillenmeyer's income that was attributable to his work in the city. On that question, we held that "compensation must be allocated to the place where the employee performed the work."

Willacy, 2020-Ohio-314, ¶ 26 (internal citations omitted).

Significantly, the dissent in *Willacy*, which cited *Wayfair*, would have gone even farther and held that even applying *Wayfair*, Willacy should not be taxed because there is a temporal element relating to when the benefits were earned. *Id.* at ¶¶s 45-48. When the Ohio Supreme Court decides a case in which it acknowledges U.S. Supreme Court precedent but finds it inapplicable, this Court is bound to follow that determination.

Lastly, a review of the 116 cases that have cited *Wayfair*, none have applied its "no physical presence" holding to local taxation. Nor has any court—in Ohio or elsewhere—interpreted *Wayfair* to hold that some electronic connection to another jurisdiction, by itself, allows a municipality to impose income tax on a nonresident. Indeed, the repercussions of such a holding would turn municipal tax law on its head.

5. Sec. 29 of H.B. 197 Violates the Dormant Commerce Clause

Dr. Morsy responds to the City's arguments regarding the Dormant Commerce Clause by directing the Court to pages 26-31 of her Brief Opposing Defendant's Motion to Dismiss and pages 21-24 of her Brief Opposing Defendant's Motion for Summary Judgment. In addition, Dr. Morsy responds to the City's claim that her "complaint of double taxation . . . is mistaken" by referring

the Court to the City's own footnote, which acknowledges that Dr. Morsy is subject to double taxation at the municipal level. See Def. Br. Opposing MSJ at 17.

For all the foregoing reasons, and all the reasons set forth in Dr. Morsy's Brief Opposing Defendant's Motion to Dismiss and her Brief Opposing Defendant's Motion for Summary Judgment, Dr. Morsy's Motion for Summary Judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply was served on all counsel of record via the Court's electronic filing system this 11th day of April, 2022.

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Dr. Manal Morsy