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

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

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

ORAL ARGUMENT REQUESTED

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ARGUMENT

Appellants Joel and Summer Curio and Chris Ackerman respectfully submit their Reply to the Merit Briefs filed by Appellees Kathleen Hufford and John Zawista, in their official capacities ("the Cities"). Because both Appellees raise similar arguments, in the interest of brevity, the Appellants respond in this single Reply Brief.

1. The General Assembly Cannot Legislatively Dispense with Constitutional Due Process Requirements

Appellees (the "Cities") ask this Court to bless the heretofore unknown practice they describe as "intrastate municipal taxation." As the Appellants set forth in their initial brief, the State of Ohio may—without doubt—levy and enforce *State* taxes on any Ohio resident and on any work performed within the State of Ohio. *Oklahoma Tax. Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462-63 (1995); *Corrigan v. Testa*, 149 Ohio St.3d 18, 21-22, 2016-Ohio-2805, 73 N.E.3d 381. Likewise, a municipality, acting under its constitutional Home Rule authority may—without doubt—levy and enforce a municipal income tax on any of *its* residents and on any work performed within its borders. *Angell v. City of Toledo*, 153 Ohio St. 179, 185, 91 N.E. 2d 950 (1950); *McConnell v. City of Columbus,* 172 Ohio St. 95, 99, 173 N.E.2d 760, 764 (1961); *Hillenmeyer v. Cleveland Bd. of Rev.,* 144 Ohio St.3d 165, 2015-Ohio-1623, ¶ 43; *Willacy v. Cleveland Bd. of Income Tax Rev.*, 159 Ohio St.3d 383, 389-390, 2020-Ohio-314, ¶¶s 21-25, 151 N.E.3d 561, 568.

It does not follow from either of those black-letter principles, however, that the State has any authority to expand a municipality's taxing jurisdiction by simply "deeming" that the work to be taxed was performed within the municipality. The Cities' argument that the General Assembly can authorize extraterritorial taxation assumes what is in dispute, namely that the purported authorization found in H.B. 197 creates an exception to the long-established Due Process

requirements regarding municipal taxation of nonresidents. Legislative authorization in the face of conflicting Due Process requirements must yield. *See Marbury v. Madison,* 5 U.S. 137, 177 (1803) ("[A]n act of the legislature, repugnant to the Constitution, is void.").

If legislative authorization were all that was needed to avoid the requirements of Due Process, then the protections of the Due Process Clause—and every other constitutional protection—would be meaningless. It is telling that before Sec. 29 of H.B. 197, the General Assembly had never attempted to assert such authority. Moreover, the manner in which the General Assembly expanded municipal taxation—by deeming the work to have been performed within the Cities' limits—explicitly acknowledges the *in rem* jurisdictional requirement that Ohio law has always applied to non-resident municipal taxation. The General Assembly did not impose a statewide tax on all Ohio residents for the purposes of supporting municipalities. It instead asked cities and nonresident municipal taxpayers to pretend that the due process jurisdictional requirement had been met. By analogy, the State of Ohio plainly has the general police power to pass criminal statutes and authorize municipalities to enforce these statutes. But neither the Ohio nor the U.S. Constitution would permit the General Assembly to pass a bill "deeming" that probable cause existed for certain searches or that a suspect had been read his Miranda rights, when in fact, he had not.

Similarly, the General Assembly cannot legislate around the well-established Due Process protections relating to nonresident taxation by simply deeming that the jurisdictional prerequisites for municipal taxation have been met or implicitly substituting its jurisdiction for that of the municipality. In fact, while the Ohio Supreme Court has recognized the General Assembly's ability to authorize municipalities to engage in certain extraterritorial actions, it has specifically stated that such authority would not include extraterritorial revenue measures. *See Prudential Co-op.*

Realty Co. v. City of Youngstown, 118 Ohio St. 204, 214-215 (1928) (noting that if fees charged substantially exceeded costs, then the state legislation could be an invalid expansion of municipal taxing power).

The Appellees, however, ask this Court to recognize the State's power to impose a municipal tax on individuals over whom the municipality would otherwise lack jurisdiction merely because the Appellants are Ohio residents. The Cities posit that while they lack jurisdiction over the Appellants based on the residency or the location where the work was performed, they can substitute the State's *in personam* jurisdiction over the Appellees to fill the gap. To support this novel doctrine, the Cities point to *Corrigan*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶31. But *Corrigan* dealt with the State's power to impose a *State* tax on a non-Ohio resident for capital gains arising from the sale of his Ohio business. More importantly, the *Corrigan* court applied the commonsense principle that the Curcios and Mr. Ackerman seek to apply here: nonresident taxation must be tied to place where the income was earned. The Court quoted *Hillenmeyer* at length and explained that the State of Ohio could properly reach income generated by the business in Ohio, but not the more indirect transfer of assets that resulted in Corrigan's capital gains. *Id.* at ¶¶s 34-36.

The Ohio Constitution grants the General Assembly the authority to *limit* municipal power to tax, but does not authorize the General Assembly to expand municipalities' power to tax nonresidents. Throughout the *Angell-Willacy* line of cases, the Ohio Supreme 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 165, 2015-Ohio-1623 at ¶ 175; *Thompson v. City of Cincinnati*, 2 Ohio St.2d 292, 208 N.E.2d 747 (1965); *Willacy v. Cleveland Bd. of Income Tax Rev.*, 159 Ohio St.3d 383, 2020-Ohio-314 at 390. There is no

constitutional basis for allowing the General Assembly to disregard over seven decades of precedent and unlink nonresident taxation from the *in rem* jurisdiction requirement.

2. The Ohio Supreme Court has Never Recognized "Virtual Jurisdiction" Over Nonresident Taxpayers

To avoid the well-delineated requirements of *in personam* and *in rem* jurisdiction, the Cities lands on an even more attenuated theory: The State of Ohio/City of Cleveland can exercise jurisdiction over the Curcios and Mr. Ackerman because they have a "virtual" connection to the taxing Cities. The City argues that advances in technology have erased the need for *in rem* jurisdiction to tax nonresidents, and looks to 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-enabled device." Oregon Res. Brf. at 11-12. 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 decided in the digital age. *See, e.g., Hillenmeyer*, 144 Ohio St.3d 165, 2015-Ohio-1623 at 175; *see also*, *Vonkaenel v. City of New Philadelphia,* 5th Dist. Tuscarawas No. 2000AP-04-0041, 2001 WL 81700, *3 (Jan. 23, 2001); *Czubaj v. Tallmadge*, 9th Dist. Summit No. 21389, 2003-Ohio-5466, ¶ 12; *Aul Jones v. City of Massillon*, BTA No. 2018-2137, 2021 WL 1270305 (Mar. 29, 2018).

In relying on *Wayfair*, the Cities conflate 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 *Id.* 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 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 with *Angell, et al*. and does not even hint at the judicial expansion of *in rem* jurisdiction over nonresident taxpayers.

Even 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,* 159 Ohio St.3d 383*,* 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 more specifically the requirements of *in rem* jurisdiction over work physically performed in a municipality, it could have said so. Its silence on this issue is telling. Even more telling is the fact 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 Cities' focus on

Wayfair – a federal case 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 speaks volumes.

Moreover, the Cities argue against a strawman when they claim the premise of the Appellants' suit is that the Due Process Clause requires a physical presence in the taxing jurisdiction. The Curcios and Mr. Ackerman have made no such claim. Rather, they argue consistent with *Corrigan*, *Hillenmeyer*, *Willacy*, *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.

Furthermore, *Wayfair* and the physical presence cases that preceded 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.

More troubling, the Cities' proposed rule admits to no limiting principle. For example, Progressive Insurance company, located in Mayfield, Ohio, employs roughly 43,000 people across the country and sells insurance in 48 states. FORTUNE, *Progressive Company Profile*, *Fortune 500 #79*, https://fortune.com/company/progressive/fortune500/ (accessed May 26, 2022). 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. While the digital connections we now enjoy are in many ways new, they are fundamentally improvements on earlier methods of communication like mail and the telegraph. 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,* 159 Ohio St.3d 383, 2020-Ohio-314 at ¶26 (stating that for tax purposes, "compensation must be allocated to the place where the employee performed the work").

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

Similarly, the Ohio Supreme Court's recent decision in *Athens v. McClain*, 163 Ohio St. 3d 61, 2020-Ohio-5146, 168 N.E. 3d 411 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 the *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 (emphasis added). 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 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 the General Assembly 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 beyond those powers otherwise authorized by the Ohio Constitution and the limits of Due Process.

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 to cover nonresidents beyond the Cities' limits would render the Ohio Constitution's Art. XVIII, Sec. 13 use of the term "limit" meaningless and would conflict with limitations found in the Home Rule Clause. *See* Ohio Const. Art. XVIII, Sec. 13 (limiting the power of municipalities to tax to within a municipalities limits). The General Assembly could commandeer municipal taxation to direct tax revenues from the places where they were earned to other locations based on political whim. Nonresident taxpayers—who have no say on the rate at which a municipality taxes them—would be forced to pay tax rates based on where the General Assembly "allocated" their work. This is, of course, what has already happened under H.B. 197. While H.B. 197 unlawfully allocated income to where the taxpayer worked before the pandemic, under the Cities' argument, the legislature's ability to allocate municipal revenue would be limited only by the legislature's imagination. Undoubtedly, the General Assembly could always find some rational basis for diverting revenue from one municipality to another, or even allowing municipalities that find it politically difficult to raise taxes to increase their revenue by taxing nonresidents who consume no city services and are not subject to the "protections, opportunities, and benefits" given by the city. *See Angell*, 153 Ohio St., 91 N.E. 2d 950 at 184.

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. *See State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 39 (applying *expressio unius* principle to Ohio Constitution). Therefore, 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*, 96 Ohio St. 44, 117 N.E. 6 (1917); *State ex rel. Robertson Realty Co. v. Guilbert*, 75 Ohio St. 1, 78 N.E. 931 (1906).

The State of Ohio may 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. But just because the State can limit a city's Home Rule authority to tax, it does not follow that the State can 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 Cities purport to have the authority to tax nonresidents on work performed outside of their borders, cannot reasonably be characterized as a "limit" on municipal taxing power. The Cities thus find no help in the *Athens* decision.

Further, setting aside whether H.B.197 was actually a limitation rather than 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*). The Due Process requirements present in *Angell*, *Hillenmeyer*, *Willacy*, *et al*. represent the Ohio Supreme Court's application of *federal* due process rights. Regardless of its authority over Ohio taxpayers, the General Assembly cannot

legislate around these constitutional protections.

4. The Cities Do Not Have *In Personam* Jurisdiction Over the Appellants

The Cities argue that the Appellants are subject to the respective Cities' taxing jurisdiction because they had worked in those cities in 2020 before the pandemic. The Appellants blurs the "minimum contacts" analysis used to determine jurisdiction under state long-arm statutes with *in personam* taxing jurisdiction. The Ohio Supreme Court has repeatedly held that the jurisdiction to tax depended upon the government's power to enforce its mandate by action taken within its borders. *Corrigan,* 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381 at 21 (*internal citations omitted*). For example, the *Hillenmeyer* court explained that for taxation purposes, a local government's *in personam* jurisdiction is limited to its residents. *See Hillenmeyer,* 144 Ohio St. 3d, 2015-Ohio-1623 at 175-176 ("***Beyond in personam taxing jurisdiction over residents***, local authorities may tax nonresidents only if theirs is the jurisdiction 'within which the income actually arises and whose authority over it operates *in rem.*'") (*emphasis added*). In other words, a City's taxing jurisdiction over nonresidents is necessarily limited to *in rem* jurisdiction over the work they perform in the City. And while "minimum contacts" are required for a municipality to impose a tax, there must also be a "connection to the [taxed] activity itself." *Corrigan*, 149 Ohio St. 3d 18, 2016-Ohio-2805, 73 N.E.3d 381 at 23. Minimum contacts alone are not enough.

Historically, under the *Angell-Hillenmeyer* analysis, Ohio courts have looked solely at the extent to which the municipality had *in rem* jurisdiction over the work performed. *See, e.g.*, *Angell v. City of Toledo,* 153 Ohio St. at 185, 91 N.E. 2d 950; *McConnell v. City of Columbus,* 172 Ohio St. at 99; 173 N.E.2d 760, *Thompson v. City of Cincinnati*, 2 Ohio St.2d at 297-98, 208 N.E. 2d 747; *Vonkaenel*, 5th Dist. Tuscarawas No. 2000AP-04-0041, 2001 WL 81700, *3, *Willacy*, 159 Ohio St.3d at 390, 2020-Ohio-314 (all applying *in rem* jurisdiction based on where the work was

performed). The notion that a taxpayer's work in a municipality for any part of the year allows that City to tax his or her income for the entire year contradicts *Hillenmeyer's* holding that "[l]ocal taxation of a nonresidents' compensation for services must be based on the location of the taxpayer ***when the services were performed***." *Hillenmeyer v. Cleveland Bd. of Rev*., 144 Ohio St. 3d 165, 176, 2015-Ohio-1623, ¶ 43 (emphasis added); *see also Willacy*, 159 Ohio St. 3d at 390, 2020-Ohio-314 at ¶25, quoting *Couchout v. Ohio State Lottery Comm*.,74 Ohio St. 3d 417, 659 N.E.2d 1225 (1996). It also violates fundamental notions of fairness and common sense. Further, if a taxpayer's work in the municipality for part of the year subjected the taxpayer's entire annual wages—regardless of where they were earned—to taxation by that municipality, Sec. 29 of H.B. 197 and its "deeming" work to have been performed in the municipality would have been entirely superfluous.

This distinction between the jurisdiction to tax and the minimum contacts analysis needed for a Court to exercise jurisdiction over an out-of-state litigant makes sense when one considers that an out-of-state driver who causes an accident could reasonably anticipate being haled into the foreign state to answer for his tort. But it would be entirely unreasonable to expect that a foreign state could tax the income of that driver simply because he crossed its borders. As the Ohio Supreme Court made clear in *Angell,* a city's taxation of nonresidents "must bear some fiscal relation to the protections, opportunities and benefits" that the city provides. Ohio appellate courts have rejected the notion that an employee's occasional presence or the employer's presence in the taxing jurisdiction creates the requisite fiscal connection to tax a nonresident's income earned from work outside of the municipality. *See, e.g., Vonkaenel v. City of New Philadelphia*, 5th Dist. Tuscarawas No. 2000AP-04-0041, 2001 WL 81700, *3 ("[T]he mere fact that the City of New Philadelphia provides services to appellants' employer, such as protection against fire and theft, is

insufficient, to justify a tax upon appellants under the "fiscal relation" test for work performed by appellants outside of the City of New Philadelphia."); *Toliver v. City of Middletown*, 12th Dist. Butler No. CA99-08-147, 2000 WL 895261, *6 (June 30, 2000) ("[I]ndirect benefits, such as protections afforded the employer against fire and theft, are insufficient to sustain a tax on a nonresident who works outside the city limits as a result of being employed within the city."), citing *Miley v. City Of Cambridge,* 1997 Ohio App. LEXIS 3243, at *7, Guernsey App. No. 96 CA 44, unreported.(June, 25, 1997); *Czubaj v. City of Tallmadge,* 9th Dist. Summit No. 21389, 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).

The test for whether the taxing scheme comports with Due Process is whether there is a fiscal relation between the Appellants' work and the City that is collecting the tax. *Angell*, 153 Ohio St. at 184; *McConnell*, 172 Ohio St. at 99. Here, there is no such fiscal relation, and the mere presence of the employer's office in the City is insufficient to create one. *Vonkaenel,* 2001 WL 81700 at *3; *Toliver,* 2000 WL 895261 at *6. The Cities' contention that a day's work in the jurisdiction gives a municipality perpetual *in personam* jurisdiction over the taxpayer and any income he or she earns is thus without precedent, and without merit.

5. *Hillenmeyer, Willlacy, et al.* Apply to this Dispute

Finally, the Cities seek to distinguish *Hillenmeyer* and the Ohio Supreme Court cases that went before it from the case presented here. The distinctions that the Cities draw, however, are irrelevant to the application of the well-established body of case law running from *Angell* through *Hillenmeyer* and *Willacy*. First, the Cities suggest that this case is different because the Appellants worked in the Cities for roughly three months, while Hillenmeyer only performed work in

Cleveland for two days. 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 is easy to understand and to apply. A city could tax work performed by nonresidents within its limits, but not beyond them. No Ohio court has ever proposed that a political entity's jurisdiction to tax relates to the amount of time the nonresident taxpayer worked in the jurisdiction.

The Cities also argue that this case is different because Hillenmeyer and Willacy resided out-of-state, while the Curcios and Mr. Ackerman are Ohio residents. Thus, the Cities say, the General Assembly can legislate what municipal tax rates apply to the Appellants regardless of where the perform their work. This is a variation on the Cities' earlier argument that a municipality can avoid the *in rem* jurisdiction requirements if the State allows it to do so. Again, this repeats the trial court's fundamental error in treating the expansion of municipal taxing authority as a State tax. Plainly the State would have jurisdiction to impose a State tax on the Appellants. And the State could impose a State tax on the Appellants and then direct the proceeds to certain municipalities. But the tax at issue is not a State tax—it is undisputedly a municipal income tax—enacted pursuant to the Cities Home Rule authority under the Ohio Constitution. The State does not have the authority to apply a municipally enacted income tax to nonresidents for income earned outside of the municipality—beyond the geographical limits of the municipality, and beyond the constitutional limits of Home Rule.

The Cities also suggest that the analysis might turn on the nature of the work performed. For example, technology allows some workers to perform their jobs remotely, but a professional football player like Hunter Hillenmeyer must appear for work in person. But the Ohio Supreme Court has never recognized this distinction. The Cities further posit that the jurisdictional basis for

such taxing might be the location of servers or other "vital equipment" in the employer's office. Of course, this is mere speculation by the Cities because there is no evidence in the record relating to the Appellants' employers office equipment or server location. Because this case comes to the Court on a motion to dismiss, the Court must treat all of the complaint's factual allegations as true and make all reasonable inferences in favor of the non-moving party. *State ex rel. Stone v. Forsthoefel*, 158 Ohio St.3d 1486, 2020-Ohio-2675, 143 N.E.3d 527, ¶ 2. Thus, any suppositions about office technology creating a fiscal relation with the municipality are of no moment. Ohio Supreme Court precedent is clear that what matters is the nonresident taxpayer's location when the work is performed. *Hillenmeyer,* 144 Ohio St. 3d at 176, 2015-Ohio-1623, ¶ 43; *Willacy*, 159 Ohio St. 3d at 390, 2020-Ohio-314 at ¶25. Those cases were decided in 2015 and 2020, well into the digital age, and in the case of *Willacy*, with the benefit of the U.S. Supreme Court's *Wayfair* decision. Neither of those cases, nor the long line of municipal tax cases that preceded them, even hinted that the number of days an employee works in a jurisdiction, the type of work he or she performs, or the technological connections between employee and employer have any bearing on whether the municipality has jurisdiction to impose a municipal income tax.

CONCLUSION

For all the foregoing reasons, the trial court's order should be reversed and remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of June 2022, the forgoing Reply Brief was served on all counsel of via the Court's electronic filings system.

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