

In the
Supreme Court of Ohio

JOSH SCHAAD,	:	Supreme Court Case No. 2022-0316
	:	
Plaintiff-Appellant,	:	Appeal from the Hamilton County
v.	:	Court of Appeals,
	:	First Appellate District
KAREN ALDER, <i>et al.</i> ,	:	
	:	Court of Appeals Case No. C-210349
Defendants-Appellees.	:	

**BRIEF OF *AMICUS CURIAE* INDEPENDENT WOMEN’S LAW CENTER
SUPPORTING PLAINTIFF-APPELLANT**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Independent Women’s Law Center is a project of Independent Women’s Forum, a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic issues. Independent Women’s Forum promotes policies that advance women’s interests by expanding freedom, encouraging personal responsibility, and limiting the reach of government. Independent Women’s Law Center supports this mission by advocating for equal opportunity, individual liberty, and the continued legal relevance of biological sex.

INTRODUCTION AND SUMMARY

Section 29 of Ohio House Bill 179 (“Section 29”) places an acute burden on working mothers. For many of these women, the ability to work remotely is essential to balancing personal and professional duties. That was the case long before COVID-19. Although working from home provides these women and their families many benefits, it comes at a price: studies confirm that mothers who work remotely bear economic and reputational costs for that flexibility. The State’s decision to tax these women as though they were working in-office thus compounds the costs they have already paid and imposes an unjustifiable burden that bears no rational relationship to their true circumstances of employment. For these reasons, along with the reasons addressed more fully by Mr. Schaad, Independent Women’s Law Center urges this Court to reverse the Court of Appeals’ decision holding Section 29 is constitutional.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae adopts Appellant’s statement of the case and facts.

ARGUMENT

I. MANY MOTHERS CHOOSE TO WORK REMOTELY AND DID SO LONG BEFORE THE PANDEMIC.

Although COVID-19 ushered in a new era of telecommuting for many Americans, countless other employees depended on the ability to work remotely long before the pandemic. One 2017 study found that, out “of the employee-friendly alternative[]” work arrangements, “working from home” was the flexible arrangement “most valued” by workers. Alexandre Mas & Amanda Pallais, *Valuing Alternative Work Arrangements*, 107 Am. Econ. Rev. 3722, 3726 (2017); see Adam Hickman & Jennifer Robison, *Is Working Remotely Effective? Gallup Research Says Yes*, Gallup (Jan. 24, 2020), <https://tinyurl.com/bm44sbtv> (“Remote work . . . is a policy that the most talented employees desire.”) (accessed August 15, 2022). Even before the pandemic, “43% of all U.S. employees” reported “work[ing] off-site at least part of the time.” Adam Hickman & Ilana Ron Levey, *How to Manage Remote Employees*, Gallup (Aug. 14, 2019), <https://tinyurl.com/3p3et56s> (accessed August 15, 2022).

The ability to work from home was especially important to women, and mothers specifically: pre-pandemic research confirmed that women “place a higher value on working from home . . . than do men. This is particularly true for women with young children.” Mas & Pallais, 107 Am. Econ. Rev. at 3727; see also Linda N. Edwards & Elizabeth Field-Hendrey, *Home-based Work and Women’s Labor Force Decisions*, 20 J. Lab. Econ. 170, 170 (2002) (“[H]ome-based work is an attractive option for women for whom the fixed costs of work are high,” including “women who have small children[.]”). Consistent with this, one study before the pandemic reported that women were “slightly more likely to be in work-from-home jobs” than men were, Mas & Pallais, 107 Am. Econ. Rev. at 3727, and another noted that “many mothers with young

children said that they would not be in the labor force at all if they could not work at home,” Edwards & Field-Hendrey, 20 J. Lab. Econ. at 196. As recently as January 2020, “Gallup research on women in the workplace f[ound] that 53% of stay-at-home mothers say flexible hours or work schedules are a ‘major factor’ in their ability to take a job,” even though “only a third of working mothers say their employers are doing ‘very well’ at allowing them to work from home when they need to.” Hickman & Robison.

Women’s desire to work remotely remains strong. A 2021 survey of 2,100 people found that sixty percent of women would rather “look for a new job” than stay with a company that did not allow them to continue to work remotely, and eighty percent of women felt “remote-work options are among the most important factors to consider when evaluating a new job.” Rachel Pelta, *Survey: Men & Women Experience Remote Work Differently*, FlexJobs, <https://tinyurl.com/2p8vkzzh> (accessed August 15, 2022). In short, remote work remains an important and attractive option for many women.

II. REMOTE WORK OFFERS MOTHERS MANY BENEFITS, BUT THEY COME AT A COST.

The desire of many mothers to work from home is unsurprising given the many benefits remote work provides. This flexible work arrangement has improved the emotional and economic state of many families. Those advantages, however, come at a reputational and economic cost that Section 29 overlooks.

A. Remote Work Benefits Mothers

To begin, the ability to work remotely helps many mothers balance the twin demands of their personal and professional lives. Because it alleviates several time-consuming burdens of working, such as time spent commuting, “remote working significantly reduces family-work

conflict for mothers.” Eliot L. Sherman, *Discretionary Remote Working Helps Mothers Without Harming Non-mothers: Evidence from a Field Experiment*, 66 *Mgmt. Sci.* 1351, 1352 (2020); *id.* at 1365 (interviewing mother who explained: “when I was at home, it was closer, instead of taking me an hour and half to sort the kids out, I could do that in half an hour”). Others have reached similar conclusions. Tammy D. Allen, Timothy D. Golden & Kristen M. Shockley, *How Effective Is Telecommuting? Assessing the Status of Our Scientific Findings*, 16 *Psychological Sci.* in the *Pub. Interest* 40, 45 (2015) (“[M]ore extensive telecommuting has been associated with . . . progressively lower work-family conflict[.]”). Mothers working from home can more easily attend to the needs of their children (or others who depend on their care) than those working at a remote location. *See id.* at 54 (one of the “primary motives” given for wanting to telecommute was “[p]ersonal-life motives”: “the desire [to] accommodate nonwork needs (e.g., to attend to dependent care issues).”).

The flexibility of working from home accordingly provides mothers with important psychological advantages. Telecommuting generally is “associated with significantly lower work-role stress.” *Id.* at 48. And the evidence shows that “remote working—as distinct from other forms of flexibility—can provide psychological benefits to women with children in particular.” Sherman, 66 *Mgmt. Sci.* at 1355. Those benefits are especially critical now, as “[s]tudies show women are increasingly more burned out than men.” Katie Ussin, *Working Mothers Looking for More Flexibility, Demanding More From Their Employers Amid Burnout*, *News 5 Cleveland* (Mar. 30, 2022), <https://tinyurl.com/3cd3uf28> (accessed August 15, 2022); *see* Sherman, 66 *Mgmt. Sci.* at 1354 (“The collision of ideal worker and intensive mothering norms evokes guilt and emotional anguish in women.”); *see also* Edwards & Field-Hendrey, 20 *J. Lab. Econ.* at 196-97 (“Middle aged women nationwide are often the primary caregivers of their elderly parents. Having a full-

time corporate job, a full-time family life and caregiving of their parents puts an inordinate amount of stress on working women.” (internal citation omitted)).¹

The ability to telecommute provides mothers with significant economic benefits, as well. Most importantly, remote working is sometimes the only arrangement by which a mother may remain employed at all. *See* Edwards & Field-Hendrey, 20 J. Lab. Econ. at 176 (explaining that “the presence of the home-based work option leads some women who would have chosen to be out of the labor force” entirely “to enter as a home-based worker”); *see also* Ussin (some mothers feel “flexibility is an imperative at this point”). A mother’s ability to remain in the workforce is critical to the viability of many families’ finances, given the “wage penalty” paid by parents who leave their jobs to care for their children. *See* Joan R. Kahn, Javier García-Manglano & Suzanne M. Bianchi, *The Motherhood Penalty at Midlife: Long-Term Effects of Children on Women’s Careers*, 76 J. Marriage & Fam. 56, 57-59 (2014) (discussing wages stay-at-home parents forego while caring for children and decreased wages they receive when they return to work); Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There A Motherhood Penalty?*, 112 Am. J. Socio. 1297, 1299-1300 (2007). In addition, although some parents are able to recapture their former status when they reenter the workforce, many parents struggle to get a foothold professionally after taking time off to raise their families. Kahn, 76 J. Marriage & Fam. at 56, 59.

¹ A mother’s decision to work remotely also benefits her children. One 2014 study, for example, concluded that children’s educational performance improved when there was at least one parent at home. Eric Bettinger, Torbjørn Hægeland & Mari Rege, *Home with Mom: The Effects of Stay-at-Home Parents on Children’s Long-Run Educational Outcomes*, 32 J. Lab. Econ. 443, 463 (2014). Another study, conducted by the National Institute of Child Health, found that children who were cared for at home experienced lower levels of stress and aggression than those who spent a large amount of their day in daycare. Megan R. Gunnar, Erin Kryzer, Mark J. Van Ryzin, & Deborah A. Phillips, *The Rise in Cortisol in Family Day Care: Associations With Aspects of Care Quality, Child Behavior, and Child Sex*, 81 Child Dev. 851, 866 (2010).

Studies show that mothers who reenter work after having children experience between a five- and ten-percent pay gap *per child* compared with childless peers who never stopped working. *Id.* at 57.

The ability to work remotely not only permits many mothers to remain in the workforce but also enables them to succeed there. Although remote working “significantly improves job performance for most subgroups,” those “improvements are especially pronounced for mothers.” Sherman, 66 *Mgmt. Sci.* at 1352; *see id.* at 1367 (observing that research “hints at the possibility that remote working could ‘unlock’ productivity in others that would be otherwise contained by their disproportionate caregiving duties”); *see also* Christine Michel Carter, *Why Millennial Moms Are Seeing Accelerated Success Working From Home*, *Forbes* (Jan. 7, 2018), <https://tinyurl.com/4k5uck8y> (accessed August 15, 2022) (noting, before the pandemic, that remote work increased parents’ productivity).

B. Mothers Often Pay a Price for Working Remotely

Although remote work provides mothers many advantages, those benefits are not without cost. “[S]ome studies have suggested that those who request and/or use flexible work arrangements may be viewed as less committed to their career by others[.]” Allen, 16 *Psychological Sci.* in the *Pub. Interest* at 49. For example, a 2018 survey of tech companies found that “[e]mployees—many of whom . . . were mothers of young children—asking for partial or full-time work-from-home arrangements found themselves sidelined from important projects.” Margaret O’Mara, *The Limits of Telecommuting*, *Public Books* (Nov. 18, 2021), <https://tinyurl.com/4dddxmuc> (accessed August 15, 2022); *see generally* Sherman, 66 *Mgmt. Sci.* at 1352 (“[T]he gendered nature of reduced-hours policy usage perpetuates the very stereotypes regarding commitment and competence that continue to hinder women professionally[.]”).

Another study of women over a seven-year period “found that women who used telecommuting more frequently had lower wage growth than those who used it less, controlling for availability of the policy as well as work commitment and the number of children the women had during the study.” Allen, 16 *Psychological Sci. in the Pub. Interest* at 49. “This effect was strongest among women in professional or managerial jobs and those who stayed with a single employer over the course of the study[.]” *Id.* Other researchers compared the difference in earnings between men and women in the top 87 occupations by male income and concluded, after accounting for other factors, that “the remaining difference between men and women by occupation is largely due to the penalties imposed on women for greater job interruptions and their need for more flexibility.” Claudia Goldin & Lawrence F. Katz, *The Cost of Workplace Flexibility for High-Powered Professionals*, 638 *The ANNALS of the Am. Acad. of Pol. and Soc. Sci.* 45, 64 (2011); *see also* Mas & Pallais, 107 *Am. Econ. Rev.* at 3752 (women “seem to be willing to pay substantially more than are men for the ability to work from home”). As one study observed, “[a] number of papers suggest that women value flexibility and standard work schedules more than do men,” suggesting that “this may explain wage gaps.” Mas & Pallais, 107 *Am. Econ. Rev.* at 3751.

Even putting aside sex differences and parental roles, researchers have noted that “home-based work [is] less likely to be accompanied by fringe benefits than is on-site employment.” Edwards & Field-Hendrey at 188. Indeed, many teleworkers may already receive lower wages from employers simply because they work from home. Both Facebook and Twitter “have said they will cut the pay of employees who choose to relocate away from their head offices in the pricey San Francisco Bay area.” Karen Gilchrist, *From Facebook to Reddit, how Silicon Valley salary adjustments could redefine remote worker earnings*, CNBC (Nov. 5, 2020), <https://tinyurl.com/yma8nurn> (accessed August 15, 2022). Similarly, “[p]ayments platform Stripe

said it will offer employees \$20,000 to help with moving costs but will then cut pay by 10%.” *Id.* And under a wage calculator proposed by Google, “an employee living in Stamford, Connecticut, a town that has many people who commute into the Big Apple, would be paid 15% less, if they work from home.” Jack Kelly, *Google May Cut The Pay Of Remote Workers*, *Forbes* (Aug. 11, 2021), <https://tinyurl.com/3ctkhckj> (accessed August 15, 2022).

In short, although remote work arrangements benefit women, especially mothers, those benefits typically entail a significant cost—a cost that must be considered in assessing Section 29’s fairness and constitutionality.

III. SECTION 29 UNJUSTLY CONFISCATES THE ALREADY REDUCED WAGES OF WORKING MOTHERS.

When the Legislature passed Section 29, it wrongly declared all employees working from home to be on-site workers operating from their employers’ place of business. It did so regardless whether the employee had previously worked remotely, *see Schaad v. Alder*, 1st Dist. Hamilton No. C-210349, 2022-Ohio-340, ¶ 3, *appeal accepted*, 166 Ohio St.3d 1524, 2022-Ohio-1893, 188 N.E.3d 184, and irrespective of the very real costs many of those workers had to incur in order to obtain their flexible work arrangements. That arbitrary and capricious fiction cannot stand.

This Court has wisely held that “local taxation of a nonresident’s 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, 41 N.E.3d 1164 (emphasis added). Indeed, “[d]ue process requires an allocation [of tax burden] that reasonably associates the amount of compensation taxed with work the taxpayer performed within the city.” *Id.*; *see id.* at 177 (holding that Cleveland’s taxation method “imposes an extraterritorial tax in violation of due process, because it foreseeably imposes Cleveland income tax on compensation earned while [the

taxpayer] was working outside of Cleveland”). Section 29 violates due process by imposing a municipal tax on working mothers who deliberately avoided going into the municipality in the first place.

That is all the more true because many of these mothers decided to work remotely before the pandemic. The days those mothers spent working from home imposed no costs at all on the municipalities where their employers’ businesses were located and would have imposed no costs on those municipalities had the pandemic never occurred. On the contrary, as explained previously, the working mothers *themselves* incurred reputational and economic costs to avoid traveling to those locations in the first place. To doubly tax these women, particularly for an arrangement critical to satisfying their professional and personal responsibilities, is “mere unjustified ‘confiscation’” that cannot be squared with the requirements of Due Process. *N. Carolina Dept. of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, ___U.S.___, 139 S.Ct. 2213, 2220, 204 L.Ed.2d 621 (2019). This Court should thus hold Section 29 unconstitutional.

CONCLUSION

For the reasons set forth in this brief and the Brief of the Appellant, the Court should reverse the decision of the Court of Appeals and hold Section 29 unconstitutional.

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CERTIFICATE OF SERVICE

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