

IN THE SUPREME COURT OF OHIO

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| JOSH SCHAAD | : | Case No. 2022-0316 |
| | : | |
| <i>Plaintiff-Appellant</i> | : | |
| | : | |
| v. | : | On Appeal from the Hamilton |
| | : | County Court of Appeals, |
| | : | First Appellate District |
| KAREN ALDER, et al., | : | |
| | : | |
| Defendants-Appellees. | : | Court of Appeals |
| | : | Case No. C-2100349 |

***AMICUS CURIAE BRIEF OF
NATIONAL TAXPAYERS UNION FOUNDATION
IN SUPPORT OF PLAINTIFF-APPELLANT JOSH SCHAAD***

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STATEMENT OF INTEREST

Founded in 1973, the National Taxpayers Union Foundation (“NTUF”) is a non-partisan research and educational non-profit organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF’s Taxpayer Defense Center advocates for taxpayers in the courts nation-wide and produces scholarly analyses upholding taxpayers’ rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

This case presents an important question of first impression for the Ohio Courts: whether municipalities may tax income on workers without sufficient nexus to their jurisdictions. NTUF staff have written extensively on this issue, including before the United States Supreme Court, and testified in jurisdictions around the country on remote worker rules. *Amicus* therefore has an institutional interest in this Court’s ruling.

STATEMENT OF THE CASE

Citing the COVID-19 pandemic as an emergency, Ohio radically changed its system of municipal taxation in 2020. Prior to the passage of HB 197, when many Ohio workers commuted into central cities every weekday, they generated income tax liabilities to these cities. But with the onset of the pandemic, public health officials issued stay at home orders, and commuting into the cities for work drastically fell as many workers switched to telecommuting. Kitchen tables and spare bedrooms became new workspaces for thousands of workers, while offices in the cities sat empty.

With no presence in the workspace, there would be no income tax revenue for the cities to extract from the workers. Pressed by municipalities, the state legislature passed HB 197, which directed local income tax withholding based on the location of the *employer* rather than

the location where the employee performed the work. This is a monumental shift in tax policy that implicates serious constitutional considerations. Instead of income taxes serving as the price for government service received where someone lives or works, HB 197 unmoors physical presence as the nexus that justifies the tax.

But the pandemic only accelerated a trend towards telecommuting. Even before March 2020, a significant minority of Americans worked from home at least some of the time. The Bureau of Labor Statistics found in its American Time Use Survey that “in 2019 24 percent of employed persons did some or all of their work at home on days they worked.” U.S. Dep’t of Labor, News Release, *American Time Use Survey-2019 Results* (2020).¹ And many commuters cross state lines. In 2011 (the most recent data available) the U.S. Census Bureau estimated that nearly 100,000 Ohioans worked in an adjacent state. Brian McKenzie, U.S. Dep’t of Commerce, *Out-of-State and Long Commutes: 2011, American Community Survey Reports* 10, Table 6 (2013).² Of course, many out of state workers cross the borders to work *in* Ohio as well. *Id.* (finding that 3.1% of Ohio's workforce commutes in from another state). Since the pandemic, NTUF estimates that at least 2.1 million Americans that previously crossed state lines for work are now working from home. Andrew Moylan & Andrew Wilford, *Don't Let COVID Remote Work Become a Tax Trap*, NATIONAL TAXPAYERS UNION FOUNDATION (Apr. 24, 2020).³ The pandemic only accelerated what was already happening: employers offering remote work options as a way to attract top talent. Far from being only a problem of Covid, HB 197 is touching on the beginning of a major shift in employment practices.

¹ Available at: <https://www.bls.gov/news.release/pdf/atus.pdf>.

² Available at: <https://www.census.gov/library/publications/2013/acs/acs-20.html>.

³ Available at: <https://www.ntu.org/foundation/detail/dont-let-covid-remote-work-become-a-tax-trap>.

Which brings us to the case at bar. Josh Schaad, a resident of Blue Ash, Ohio, works for an employer based in Cincinnati. Before the pandemic, Mr. Schaad would work from his home or in other locations outside of Cincinnati. Prior to the passage of HB 197, he was entitled to a tax refund for the days he was working outside the Cincinnati office. But the new law ended that as he was “deemed” to be working at his office, despite his real location. In February 2021, Mr. Schaad challenged the statute, asserting his Due Process rights. The Hamilton County Court of Common Pleas heard the case and, in June 2021, granted the City of Cincinnati’s Motion to Dismiss. *Schaad v. Alder*, No. A2100517 (Ct. Cmmn. Pleas Hamilton County, June 15, 2021). The court of appeals for the First Appellate District affirmed, finding that HB 197 does not violate the federal Due Process clause. *Schaad v. Alder*, 2022 Ohio 340 ¶ 19 (2022).

ARGUMENT

Amicus Proposition of Law:

The General Assembly Cannot Authorize Extraterritorial Municipal Taxation.

A. Taxing Non-Residents Based on Their Employer’s Location Generates Obvious Due Process Clause Concerns.

The power to tax may be “essential to the very existence of government, but the legitimacy of that power requires drawing a line between taxation and mere unjustified confiscation.” *N. Carolina Dep’t of Revenue v. The Kimberley Rice Kaestner 1992 Family Tr.*, 139 S. Ct. 2213, 2219-20 (2019) (citations omitted). Taxes pay for benefits conferred by the government: the latter has no “right” to confiscate money as “taxes” when it provides no benefit to the payee.

Income taxes, whether state or municipal, “provide for the preservation of peace, good order, and health, and the execution of such measures as conduce to the general good of [their] citizens.” *United States v. City of New Orleans*, 98 U.S. 381, 393 (1878). This reflects a bargain between a government and its citizens: the citizens agree to pay a percentage of their

productivity in exchange for the State's commitment to provide protection and services. Therefore, the government's power to tax an individual's activities is justified only by the "protection, opportunities and benefits' the State confers on those activities." *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777 (1992). (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)). A government's reach beyond its borders to take money from nonresidents "under the pretext of taxation when there is no jurisdiction or power to tax is simple confiscation." *Miller Bros. Co. v. State of Maryland.*, 347 U.S. 340, 342 (1954). By taxing income earned entirely outside of its borders, cities like Cincinnati subjects Ohio citizens to simple but unconstitutional confiscation.

For a government to reach beyond its borders, there must be a reasonable relationship between the tax system and *value* gained in process. *See, e.g., Norfolk & W. Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 325-29 (1968) (finding state's formula for taxing railroad rolling stock not in line with the benefits to the state). For income taxes, states generally attribute income tax based on days spent in the state, and so the rule is here. *See, e.g., Ohio Rev. Code* § 718.011(A)(7). The days a nonresident spends in the jurisdiction correspond with days of use of government services such as fire protection, roads, and water and sewer service. But what happens when an employee never comes into the office, or has not done so in a long time? What services is the municipal government providing that employee? None, of course, as police, water and trash collection are handled by the jurisdiction where the employee lives and works remotely.

Whether temporary or permanent, the Ohio enactment is a sharp change from the Due Process standard that this court and courts around the country have repeatedly upheld: you do not owe tax to a jurisdiction where you have no connection. As far back as *McCullough v. Maryland*,

4 Wheat. (17 U.S.) 316, 429 (1819) courts have held that “[a]ll subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.” The same principle applies to cities within the state. Here, Ohio established taxation not based on physical or economic presence by the individual in the jurisdiction, but by either past presence or the presence of the individual’s employer.⁴ In this way, the contractual theory of taxation breaks down, for the taxpayer is now paying for services they do not receive.

If Ohio’s policy of taxing individuals is justified based on the presence of a separate person, *i.e.*, the person’s employer, this raises the question of whether such “attributional nexus” comports with due process. *See, e.g.*, Joseph Bishop-Henchman, *The History of Internet Sales Taxes from 1789 to the Present Day*, *Cato Supreme Court Review*, 269, 285 (2018) (quoting the U.S. Supreme Court as describing attributional nexus cases as the “furthest extension” of nexus). The decision below indicates that remote workers in Ohio and elsewhere are susceptible to greatly expanded risk of taxation if they may owe tax wherever their *employer* owes tax. That is in error and this Court should reverse to protect taxpayers from confiscation in the guise of taxes.

B. If Taxation is Based on Former Nexus, then that Nexus Eventually Expires—Even During Emergencies.

HB 197, § 29 allowed cities to “deem” that an employee worked in a location in the city simply because the employee once worked from the office. The appellate court below found

⁴ Of course, it may work the other way too. California is playing with the idea of taxing businesses based on the presence of a single remote worker. *See* Andrew Wilford, *California Plans to Expand Tax Jurisdiction, with A Single Remote Worker Triggering Taxability*, NATIONAL TAXPAYERS UNION FOUNDATION (May 31, 2022), <https://www.ntu.org/foundation/detail/california-prepares-to-expand-tax-jurisdiction-with-a-single-remote-worker-triggering-taxability>. A company in Ohio could run the risk of paying California taxes on its whole business, for the sake of a single remote worker. Extraterritorial taxation is a dangerous idea, no matter what entity is attempting it.

“federal due process is satisfied if there is a rational relationship between a statute and its purpose” and that a “public health emergency” satisfied this test. *Schaad v. Alder*, 2022 Ohio 340 ¶ 18 (2022). But it is a bedrock principle in our Constitutional republic that “[e]mergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.” *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 425 (1934).

If Ohio’s policy is justified (explicitly or implicitly) on past presence by the individual in the jurisdiction, then this is a problem because nexus should expire. At the state level, out of concerns for Due Process, an entity cannot *have* nexus merely because they *had* nexus prior to the taxing year. For example, when a business has engaged in a sufficient level of activity to create nexus for corporate income tax purposes, in all but a few states nexus lasts for just that taxable year. *See Bloomberg Tax, 2019 Survey of State Tax Departments* (2019) at 33-37 (reporting that in nearly all states, nexus ends upon the end of the calendar year of the nexus-creating activity; in Mississippi, nexus ends upon the cessation of the nexus-creating activity); Adam B. Thimmesch, *The Tax Hangover: Trailing Nexus*, 33 VA. TAX. REV. 497, 504 (2014) (estimating that 35 states continue business tax nexus past cessation of nexus-creating activity). When state tax officials were asked if nexus continues, or trails, for an additional year, no state acknowledged that to be the case although three states gave equivocal answers. *See Bloomberg Tax* at 33-37 (California, Georgia, Hawaii). Similarly, for sales tax, while half the states enforce nexus for an entire year in the year of a nexus-creating activity, only two states (Missouri and Rhode Island) continue nexus into the subsequent year with five other states including Massachusetts giving equivocal guidance. *See id.* at 358-62.

The indefinite period of the policy when enacted also raises obvious Due Process Clause

concerns. In covering Massachusetts similar law, Professor Richard Pomp was quoted as saying: “Imagine, once you have nexus, you always have nexus. What is this, trailing nexus on steroids?” Paul Williams, *Justices Should Block Mass. Telework Tax Rule, Prof Says*, LAW360 (Dec. 2, 2020).⁵

Ohio set up a system that employees now have nexus because they once *had* nexus prior to the pandemic—an emergency that evidently lasts far longer than the period of initial lockdown orders would suggest. Compare Marshall Cohen and Curt Merrill, *One nation, under Coronavirus: How two weeks changed America*, CNN (Mar. 28, 2020)⁶ (“President Donald Trump announced a 15-day plan on March 16 to ‘slow the spread’ of the coronavirus pandemic that has turned the country upside down. . .”) with Douglas Belkin, *How the Covid Pandemic Will Follow Today’s Kids Into Adulthood*, Wall Street Journal (Aug. 8, 2022)⁷ (“Now that Covid 19 is steaming into its third year . . .). In that time a great number of changes have happened, including many employees’ moves to fully-remote work permanently and a large number of job changes in the “Great Resignation.” Indeed, “[t]he move to remote work and changes in job flexibility may not have occurred for another 30 years if not for the crisis.” Michelle Fox, *The Great Resignation has changed the workplace for good. ‘We’re not going back,’ says the expert who coined the term*, CNBC (May 10, 2022).⁸

⁵ Available at: <https://www.law360.com/tax-authority/articles/1332419/justices-should-block-mass-telework-tax-rule-prof-says>.

⁶ Available at: <https://www.cnn.com/2020/03/28/politics/social-distancing-us-coronavirus-15-days-charts/index.html>.

⁷ Available at: <https://www.wsj.com/articles/how-the-covid-pandemic-will-follow-todays-kids-into-adulthood-11659972345>.

⁸ Available at: <https://www.cnbc.com/2022/05/10/-the-great-resignation-has-changed-the-workplace-for-good-.html>.

Extended and indefinite periods of trailing nexus raise obvious Due Process Clause and Commerce Clause concerns. If the employee is no longer the beneficiary of the government's services, then the taxes they are paying are unjustified. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (“[T]he Due Process Clause ‘does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.’”) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272-73 (1978) (holding that the Due Process Clause requires state taxation of interstate business to (1) involve a minimal connection between activities and the taxing state and (2) that the income attributed to the state be rationally related to the values connected with the taxing state); *Miller Bros.*, 347 U.S. at 342 (“It is a venerable if trite observation that seizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law.”); *J.C. Penney*, 311 U.S. at 444 (“That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.”). At some point, the trailing nexus acts as mere confiscation of income.

And extended nexus definitions take away a key competent of the American system: the ability to vote with one's feet. Ohio already struggles with keeping citizens due to burdensome *property* tax rates. *See, e.g., Andrew Wilford & Evelyn Kilty, Latest Tax Migration Data Shows Tax Rates Play Major Factor In Residency Decisions*, NATIONAL TAXPAYERS UNION

FOUNDATION (July 18, 2022)⁹ (“Among the states losing taxpayers, Ohio and Pennsylvania have lower combined state-local tax burdens . . . but still lost over \$1 billion each in AGI. High property taxes strongly suggest a reason for this loss. . . . Ohio’s property tax averages 1.52 percent, higher than most states.”). Furthermore, Ohio is an outlier in how it funds municipalities through *income* tax and how dependent cities are on this source of revenue.¹⁰ Adding long trailing nexus for the state’s largest cities will only compound the problem, because in the new remote economy, people will move to lower tax jurisdictions. *See, e.g.*, Demian Brady, *Taxpayers Are Fleeing from High-Tax States, Shifting \$43 Billion in Wealth*, NATIONAL TAXPAYERS UNION FOUNDATION (Nov. 17, 2021);¹¹ Joe Bishop-Henchman, *States Considering Tax Cuts to Attract People Moving Out of High-Tax States*, NATIONAL TAXPAYERS UNION FOUNDATION (Jan. 20, 2021).¹² For the sake of an emergency, HB 197 made Cincinnati like Hotel California: Mr. Schaad could “check out any time [he] like[d],” be he “could never leave.” Eagles, *Hotel California* (Red Cloud Music 1976). Employees could not choose to live and remote work from lower-taxing jurisdictions or municipalities that better align with their policy preferences without having to pay for Cincinnati’s government structure.

⁹ Available at: <https://www.ntu.org/foundation/detail/latest-tax-migration-data-shows-tax-rates-play-major-factor-in-residency-decisions>.

¹⁰ Ohio is one of only eleven states that have this system, and only Ohio and Kentucky municipalities depend so much on income taxes. *See, e.g.*, Pew Charitable Trusts, *How Local Governments Raise Their Tax Dollars Property taxes are most common, but some rely more on sales and income levies* (July 27, 2021) available at: <https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2021/how-local-governments-raise-their-tax-dollars#:~:text=Property%20taxes%20are%20the%20largest,total%20tax%20revenue%20from%20them>.

¹¹ Available at: <https://www.ntu.org/foundation/detail/taxpayers-are-fleeing-from-high-tax-states-shifting-43-billion-in-wealth>.

¹² Available at: <https://www.ntu.org/foundation/detail/states-considering-tax-cuts-to-attract-people-moving-out-of-high-tax-states>.

While characterized as a continuation of the status quo, Ohio's enactment was actually a dramatic change in how we think about individual taxation. Instead of the price we pay for the services we receive where we live and work, income taxes are now instead unmoored from their ostensible justification as a contribution towards the services the income earner benefits from. Such a dramatic policy change such as this, with the potential to affect the many Americans who formerly commuted between states but now telecommute from one location, is a matter of grave public concern.

CONCLUSION

For the foregoing reasons, *Amicus* National Taxpayers Union Foundation requests the Court reverse the judgment below and hold that the Ohio General Assembly cannot authorize extraterritorial municipal taxation under the Due Process Clause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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