In the

Supreme Court of Ohio

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

REPLY BRIEF OF PLAINTIFF-APPELLANT JOSH SCHAAD

Robert Alt* (0091753)
*Counsel of Record
David C. Tryon (0028954)
Jay R. Carson (0068526)
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
robert@buckeyeinstitute.org
d.tryon@buckeyeinstitute.org
j.carson@buckeyeinstitute.org

Counsel for Plaintiff-Appellant

Diane Menashe* (0070305)
*Counsel of Record
Daniel Anderson (0067041)
Ice Miller LLP
250 West Street, Suite 700
Columbus, Ohio 43215
(614) 462-2700
Diane.Menashe@icemiller.com
Daniel.Anderson@icemiller.com

Counsel for Defendants-Appellees

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I. INTRODUCTION

Appellee Karen Alder, in her official capacity as Fiscal Officer of the City of Cincinnati ("The City'") chooses to address Mr. Schaad's Second Proposition of Law—that *"The General Assembly cannot authorize municipalities to engage in extraterritorial taxation"*—before addressing his First Proposition of Law—that "*Section 29 of H.B. 197 is incompatible with Due Process and this Court's Angell-Hillenmeyer line of decisions interpreting the Due Process requirements for municipal taxation.*" (Appellee's Merit Br. at ii). This choice demonstrates the City's category mistake. The fundamental question before the Court is not whether there is a rational basis for Section 29, whether Section 29 of H.B. 197 was a limitation or expansion of the City's taxing power, whether the General Assembly can authorize extraterritorial municipal taxation, or whether the General Assembly can expand the municipal taxing power. The City's focus on these issues places the cart before the jurisdictional horse.

The question is instead whether the City has jurisdiction to tax work that Mr. Schaad performed outside of its borders. If the City lacks jurisdiction to tax Mr. Schaad, then the Due Process Clause, as this Court has consistently interpreted it, renders that tax void, regardless of whether the General Assembly had a rational basis or state constitutional authority to enact Section 29. This Court first articulated the appropriate test to determine whether the City has jurisdiction to tax in *Angell v. City of Toledo,* 153 Ohio St. 179, 91 N.E. 2d 950 (1950). This Court provided a clear and unanimous reiteration of that test in *Hillenmeyer,* expressly holding that the jurisdictional requirement arose out of the Fourteenth Amendment's guarantee that "no State [shall] deprive any person of life, liberty, or property, without due process of law." *Hillenmeyer v. Cleveland Bd. of Rev,* 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164, ¶39. This Court

reaffirmed that holding as recently as 2020 in *Willacy v. Cleveland Bd. of Income Tax Rev.*, 159 Ohio St.3d 383, 2020-Ohio-314,151 N.E.3d, ¶ 21-27.

The City's Merit Brief also devotes page upon page to arguing an issue that is not in dispute: The General Assembly has broad authority to enact *State* taxes and to tax *State* residents. (Appellee's Merit Br. at 10-19). Undoubtedly, the General Assembly has *in personam* jurisdiction to tax Mr. Schaad or any anyone else living in the State of Ohio. But Mr. Schaad is not challenging a *State* tax. He is challenging the extraterritorial application of the City's municipal income tax.

The Second Proposition of Law asks whether the General Assembly can supersede or satisfy the jurisdictional requirements established in the *Angell-Hillenmeyer* line of cases by authorizing extraterritorial municipal taxation of an Ohio resident. But the General Assembly cannot legislate around Due Process requirements or "deem" them to have been satisfied in the context of municipal taxation any more than it could deem that a property owner had been compensated for a taking or deem that a criminal suspect has been read his *Miranda* rights when it is not so. Further, municipal taxation is inherently a Home Rule power constitutionally reserved to municipalities. While the Ohio Constitution makes an exception to that general reservation in Article XVIII, Section 13, that exception allows the General Assembly to limit, not expand municipal taxation. The interpretive cannon of *expressio unius* therefore governs. To read Article XVIII, Section 13 otherwise would defeat the Home Rule Amendment's general reservation of power. And while this Court has recognized the General Assembly's power to allow municipalities to operate beyond their territorial boundaries in certain circumstances, it has never applied that principle to taxation or in instances where there is a countervailing constitutional right present.

Finally, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Stern v. Marshall*, 564 U.S. 462, 501,131 S. Ct. 2594, 180 L. Ed.2d 475 (2011), (quoting *I.N.S. v. Chadha*, 462 U.S. 919, 944, 103 S. Ct. 2764, 77 L. Ed.2d 317 (1983)). This is not, as the City argues, merely a dispute over the legislature's tax policy. Section 29 was an understandable—albeit unconstitutional—legislative response to keep tax revenues flowing to certain cities during the rapidly changing events of March 2020. It was unconstitutional because it conflicted with this Court's well-established precedent interpreting the Fourteenth Amendment. This Court should therefore reverse the First District's decision and re-affirm the black letter rule it set forth in *t*he *Angell-Willacy* line of cases.

II. ARGUMENT

A. The Rational Basis Standard Does Not Apply to Questions of Legislative Jurisdiction

The City argues that the Court should apply the rational basis standard of review to Section 29. By the City's reasoning, so long as there is a "rationale relationship between a legitimate government purpose and the means" to accomplish it, (Appellant's Merit Brief at 9), then it satisfies Due Process. But Mr. Schaad has not challenged whether the statute is reasonable or rational in a theoretical legal vacuum devoid of the Constitution. Rather he has challenged through his First Proposition of Law whether the City has jurisdiction to tax him—as a nonresident--on work performed outside of City limits. If the City lacks jurisdiction, the collection and retention of the tax is unconstitutional. Because Section 29 is incompatible with the Due Process requirements governing municipal taxation articulated by this Court, it too is unconstitutional.

The correct standard of review, as set forth in Mr. Schaad's Merit Brief is therefore whether there is a clear incompatibility between the City's collection of the extraterritorial tax and the

Fourteenth Amendment, as this Court has interpreted it. *Libertarian Party of Ohio v. Husted*, 2017-7737, 97 N.E.3d 1083, ¶31, (citing *Cincinnati City School Dist. Bd. Of Edn. v. Walter*, 58 Ohio St. 2d 368, 383, 390 N.E. 2d 813 (1979). As this Court has held, the seizure of property "'under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law.' * * * 'Jurisdiction is as necessary to valid legislative as to valid judicial action.'" *Corrigan v. Testa*, 2016-Ohio-2805, ¶ 15, 149 Ohio St. 3d 18, 21, 73 N.E.3d 381, 386 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342, 74 S.Ct. 535, 98 L.Ed. 744 (1954).

B. This Court has Long Recognized a Constitutional Right to Be Free from Extraterritorial Taxation.

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

The City's choice to argue Mr. Schaad's Second Proposition of Law first is an attempt at sleight of hand. The City asks the Court to look away from the constitutional right repeatedly recognized by this Court for over 70 years and focus first on whether Section 29 of H.B. 197 is a limitation on municipal taxation, whether the Ohio Constitution prohibits the General Assembly from expanding municipal taxation, whether there was a rational basis for Section 29, and whether the General Assembly's jurisdiction over Ohio residents can cure the City's lack of jurisdiction over Mr. Schaad.

This Court need not address these issues until it first assures that the taxing entity (in this case, the City of Cincinnati) has jurisdiction to tax Mr. Schaad. It does not. Because Mr. Schaad has a fundamental constitutional right to be free from taxation by a political entity in which he neither lives nor works, the inquiry ends here. Ohio courts have held that the Fourteenth Amendment's Due Process Clause and the Ohio Constitution's co-extensive protections guarantee that an individual cannot be taxed by a government entity that lacks jurisdiction over him. *Angell*,

153 Ohio St. at 182-185, 91 N.E.2d 250; *Hillenmeyer* at ¶39-43. This freedom from taxation without representation was an animating principle of the American Revolution.

The *Angell-Hillenmeyer* line of cases makes clear that the Fourteenth Amendment's Due Process Clause will not allow a municipality to impose a tax on persons over whom it lacks jurisdiction. And Ohio courts have recognized two—and only two—types of jurisdiction under which municipal taxation is permissible: *in personam* jurisdiction of residents of the municipality or *in rem* jurisdiction over the work that nonresidents perform while in the taxing municipality. This is an absolute constitutional limitation.

The City points repeatedly to the General Assembly's power to legislate, describing that power as "plenary." (Appellee's Merit Br. at 10-17). The City is correct, but woefully incomplete. In ratifying the Ohio Constitution, the people of Ohio, undoubtedly vested vast governmental power in the legislature over intrastate policy. *See, e.g.*, *State ex rel Jackman v. Court of Common Pleas of Cuyahoga County*, 9 Ohio St.2d 159, 162, 224 N.E. 906 (1967). Likewise, the Framers of the United States Constitution created a federal system under which the States enjoy significant autonomy over their internal affairs and can exercise their state police powers to legislate for the health, safety, and welfare of their citizens largely without interference from the federal government. But to stop there arguably leaves out the most important part of the American story and perhaps the most significant development of American law: A State's power to legislate must always yield to the individual rights guaranteed by the federal and state constitution. *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 City's reliance on the State's sovereign power over intrastate taxation is thus misplaced. No statute or municipal ordinance—on its face or in its application—no matter how rational or convenient it might be—may violate the Due Process Clause. Ever. Even during a pandemic. *Marysville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615 (6th Cir. 2020) ("While the law may take periodic naps during a pandemic, we will not let it sleep through one."). In *Hillenmeyer*, this Court made clear that a municipal tax imposed without municipal jurisdiction is unconstitutional:

> The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution states that "[no] State [shall] deprive any person of life, liberty, or property, without due process of law." ***Cleveland's power to tax reaches only that portion of a nonresident's compensation that was earned by work performed in Cleveland***. The games-played method reaches income that was performed outside of Cleveland, and thus Cleveland's income tax as applied is extraterritorial.

(Emphasis added.) *Hillenmeye*r, 144 Ohio St.3d at 165, 2015-Ohio-1623, 41 N.E.3d 1164, at ¶ 39.

The City's suggestion that a State can statutorily authorize what the Due Process Clause forbids violates one of the most basic principle of our legal system. See *Bd. of Ed. of City School Dist. of City of Cincinnati v. Walter*, 58 Ohio St.2d 368, 383, 390 N.E.2d 813, 823 (1979), quoting *State ex rel. Scott v. Masterson*, 173 Ohio St. 402, 405, 183 N.E.2d 376 (1962) ("[W]here enactments violate the basic law, . . . it was determined early in our judicial history that the courts have not only the power but the duty to declare such enactments invalid.") This is particularly true when this Court has held—twice within the last six years—that a municipality lacks jurisdiction to tax a nonresident on work performed outside of its border. A tax imposed without jurisdiction, whether authorized by state statute or not, violates Due Process. *Corrigan*, at ¶15.

Here, the City has taxed Mr. Schaad's income on compensation that was earned by work performed outside of Cincinnati. That the State of Ohio purports to authorize this taxation by

asking Mr. Schaad and the City to pretend that he was working in the City of Cincinnati when he was in reality working in Blue Ash is of no moment. The City of Cincinnati, just like the City of Cleveland in *Hillenmeyer* ¶ 19, has engaged in extraterritorial taxation. Extraterritorial taxation violates the Due Process Clause. *Id*. at ¶40. Because the State cannot authorize what the Constitution prohibits, the analysis properly ends there.

2. The Municipal Taxes that Mr. Schaad Challenges are *Municipal*, not *State* Taxes and The Burden to Satisfy Due Process Lies with the Taxing Entity.

Rather than address the black-letter law of *Angell-Hillenmeyer*, the City argues that the U.S. Constitution "has nothing to say about a State's taxation of its own citizens." (Appellee's Merit Br. at 20). The City's reliance on the proposition that the State has plenary authority to tax its own citizens misses the mark. The City conflates and confuses *State* taxes with the *municipal* income taxes collected here. *See, e.g.*, (Appellant Merit Br. at 25). Mr. Schaad has been clear throughout his filings that the State of Ohio has the constitutional authority to impose a State tax on him and anyone else living in Ohio. However, Mr. Schaad is not contesting the legality of a *State* tax. Rather he is seeking a refund of taxes that were imposed by the City of Cincinnati, collected by the City of Cincinnati, and retained by the City of Cincinnati. The rate of taxation was determined by the Cincinnati City Council and codified in Cincinnati's Codified Ordinances. The State of Ohio neither imposed nor collected the taxes that Mr. Schaad seeks to recover. The invocation of the State's taxing power, when the City's taxing power is at issue, is a red herring. And, of relevance to the proper question of municipal taxing authority, the unanimous *Hillenmeyer* Court did, in fact, expressly apply the Fourteenth Amendment to a local government's power to tax income,

3. The Court Does Not Reach Questions of Whether There is Rational Basis for Section 29.

The City again mixes constitutional tests and applies them out of context when it claims that there is "a rational basis to determine that displaced employees working remotely retained sufficient connection to the cities where they had been working to permit them to be taxed there." (Appellee's Merit Br. at 24). Due Process and the rational basis test often ride as companions, and courts tend to speak in broad terms that a Due Process challenges not based on fundamental right are subject to rational basis review. But the Due Process issue here goes not to the substance of the legislation, but to whether the City has jurisdiction over Mr. Schaad to enforce it. Again, the City is not collecting a State tax. Rather, it is enforcing its own tax ordinance on an expanded, extraterritorial basis. As this Court emphasized in *Corrigan:*

> 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. ' * * * Jurisdiction is as necessary to valid legislative as to valid judicial action.' And "[g]overnmental jurisdiction in matters of taxation * * * depends upon the power to enforce the mandate of the state by action taken within its borders, either *in personam* or *in rem.*" *Shaffer v. Carter,* 252 U.S. 37, 49, 40 S. Ct. 221, 64 L. Ed. 445 (1920).

(Citations omitted.) *Corrigan v. Testa,* 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶ 15 (Ellipses in original); *accord Miller Bros. Co. v. State of Maryland,* 347 U.S. 340, 342, 74 S. Ct. 535, 98 L. Ed 744 (1954); *City of St. Louis v. Wiggins Ferry Co*., 78 U.S. 423, 430, 20 L.Ed. 192 (1870) ("Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void."); *see also, Gloucester Ferry Co. v. Com. Of Pennsylvania,* 114 U.S. 196, 209, 5 S. Ct. 826, 29 L.Ed. 158 (1885). Or, applying the U.S. Supreme Court's decision in *Shaffer* at the municipal level, "[t]he power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the [taxing entity]." *Shaffer,* at 52. The jurisdictional question must therefore precede any other analysis. If the City lacks jurisdiction to impose municipal income tax on the work that Mr. Schaad performed outside of the

City, then the tax and the statute purporting to authorize it violate his Due Process rights and are thus unconstitutional. All the plenary power of the legislature cannot cure that defect.

Second, to the extent that the City implies in its brief that the right to be free from extraterritorial taxation (or any extraterritorial application of a municipal ordinance) does not implicate a fundamental right, the holdings of the *Angell-Hillenmeyer* line of cases makes clear that it does. A fundamental right is one that is "objectively, 'deeply rooted in this Nation's history and tradition' * * * and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 16 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-721, 117 S. Ct. 2258, 138 L.Ed.2d 772 (1997); *Moore v. E. Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion); *Palko v. Connecticut*, 302 U.S. 319, 326, 58 S.Ct. 149, 82 L.Ed. 288 (1937)).

To be sure, the *Angell-Hillenmeyer* line of cases framed their holdings as a limitation on the power of political subdivisions rather than an affirmative right of nonresidents to be free from extraterritorial taxation. But the notion that one cannot be subject to taxation by one political entity without the requisite fiscal connection, even if another political entity decrees it, is essential to Due Process, and is implicit in the concept of ordered liberty. The idea that a nonresident can be subject to taxation by a political entity in which he does not reside, is unable to vote, unable to run for office, and which provides no direct benefit to him is anathema to basic notions of self-government and fair play. Moreover, that Due Process requires the taxing entity to provide a taxpayer with something of value in exchange for its right to tax has been well established in the federal case law on which *Angell* and *Hillenmeyer* relied when applying the principle to municipal taxation. *E.g.*, *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444, 61 S.Ct. 246, 85 L.Ed.

267 (1940) ("The simple but controlling question is whether the [taxing entity] has given anything for which it can ask return."); *see also, Shaffer,* 252 U.S. at 49, 40 S.Ct. 221, 64 L.Ed. 445 ("Governmental jurisdiction in matters of taxation, as in the exercise of the judicial function, depends upon the power to enforce the mandate of the state by action taken within its borders, either *in personam* or *in rem* . . . by arrest of the person, seizure of goods or lands, garnishment of credits, sequestration of rents and profits, forfeiture of franchise, or the like * * * ").

4. Neither *Wayfair,* Minimum Contacts Nor the City's Proposed Doctrine of Virtual Jurisdiction Alters this Court's Established Jurisdictional Test.

In the *Angell-Hillenmeyer* cases, this Court articulated the jurisdiction to tax as a binary proposition. The taxing entity either has jurisdiction—*in personam* by virtue of the taxpayer's residence in the jurisdiction or *in rem* based on the taxpayer's work in the jurisdiction—or it doesn't. The City proposes several alternative theories by which it might claim jurisdiction over Mr. Schaad. The problem with these theories, however, is that embracing any of them would require the Court to abandon its long-held precedent in the *Angell-Hillenmeyer* cases. This Court has had the opportunity to revisit its jurisprudence on a municipality's taxing jurisdiction numerous times in the digital age but has seen no reason to change course from the *Hillenmeyer* rule.

For example, no Ohio court has ever held that an employee can be subject to *in personam* jurisdiction and thus the income tax of a foreign city simply because her employer was located there. On the contrary, *Angell*, *Corrigan*, *Hillenmeyer*, and *Willacy*—as well as appellate decisions like *Vonkaenel v. City of New Philadelphia*, 5th Dist. Tuscarawas No. 2000AP-04-0041, 2001 WL 81700, *3 (Jan. 23, 2001), and *Czubaj v. Tallmadge*, 9th Dist. Summit No. 21389, 2003-Ohio-5466, ¶ 15—all premised municipal taxation on the worker's physical location when the work was performed. If the *Corrigan*, *Hillenmeyer*, and *Willacy* courts (as well as the federal courts they relied upon for the fiscal relation standard) had understood *in personam* jurisdiction to apply to

anyone with minimum contacts to the taxing jurisdiction, there would have been no reason for them to have drawn the *in personam-in rem* distinctions that they did. *See, e.g., Hillenmeyer,* 144 Ohio St. 3d at 165, 2015-Ohio-1623, N.E.3d 1164, at ¶ 41, quoting *citing Shafer,* 225 U.S. at 55 40 S.Ct. 221, 64 L.Ed. 445 ("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*.'"). Indeed, there is no question that all of the taxpayers in the entire *Angell* line of cases would have satisfied the minimum contacts test. Were this standard correct, *Hillenmeyer* would have been resolved in favor of the city—but it was not. That is because for taxation purposes, a local government has *in personam* jurisdiction only over its residents. *Id.* at ¶ 41-42; *see also, Vonkaenel at* *3 (City did not have *in personam* jurisdiction of UPS drivers headquartered in the city). These cases were all decided in the internet age and none of them hint that technology has somehow altered a city's jurisdiction to impose taxes.

In that same vein, the City's reliance on *South Dakota v. Wayfair, Inc.*, 585 U.S. __, 138 S. Ct. 2080, 201 L.Ed.2d 403 (2018) is misplaced. The City conflates the power to regulate *corporate* activity with the jurisdiction to tax an individual's income. The *Wayfair* case arose out of the State of South Dakota's efforts to collect sales taxes on online sales. *Id.* at 2087. South Dakota enacted a statute requiring out-of-state merchants making online sales into South Dakota to collect and remit sales tax on those sales. *Id.* at 2088. Wayfair, an internet furniture seller, challenged the statute as an unconstitutional burden on interstate commerce under the dormant Commerce Clause. *Id.* at 2089.

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 2088. Sales tax is paid by the

purchaser based on the State's *in personam* jurisdiction over him as a resident or *in rem* jurisdiction if a nonresident shipped goods into the State, but ordinarily is collected by the seller at the point of sale and then remitted to the State. *See id.* This is entirely consistent the *Angell, et al*. and does not even hint at the judicial expansion of *in rem* jurisdiction over nonresident taxpayers.

More importantly—in 2020 and with the benefit of the *Wayfair* decision—the Ohio Supreme Court in *Willacy* reaffirmed the *Angell-Hillenmeyer* test. . *Willacy*, 159 Ohio St.3d 383, 2020-Ohio-314, 151 N.E.3d, at ¶ 21-27. The Court held that because "what Willacy received was deferred compensation for her Cleveland-based work," she owed municipal income tax on the stock sale proceeds. *Id.* 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." (Citations omitted.) *Id.*, at ¶ 26.

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 the taxpayer's physical presence, it could have said so. Its silence on this issue is telling. Even more telling is 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. *Id.*, at ¶ 45-47, (Fischer, J., dissenting). The City's focus on federal cases relating to businesses selling into other State—where there are recent Ohio Supreme Court cases directly on point speaking to the Due Process limits on municipalities vis-à-vis employees—is telling.

Similarly, the City argues against a strawman to the extent it argues that Mr. Schaad's suit rests on the premise that the Due Process Clause requires a physical presence in the taxing jurisdiction. Mr. Schaad has made no such claim. Rather, he argues consistent with *Corrigan, Hillenmeyer, Willacy, Shaffer, Allied-Signal, 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. (Appellant's Merit Br. at 16-21). Further, *Wayfair* and the physical presence cases that proceeded it dealt with businesses making remote sales into another state, not employees. *Wayfair*, 585 U.S. __, 138 S. Ct. 2080 at 2088-2089, 201 L.Ed.2d 403. Plainly, if the *Wayfair* Court had intended to overturn the rule articulated in. *J.C. Penney Co.*, 311 U.S. 435, 61 S. Ct. 246, 85 L. Ed. 267—the rule adopted and applied to municipal corporations in *Angell*, 153 Ohio St. at 185, 91 N.E. 2d 950—it would have said so directly.

C. The General Assembly Lacks the Authority Under the Ohio Constitution to Authorize Municipalities to Engage in Extraterritorial Taxation.

As noted above, since this Court has recognized a limit on municipalities' power to tax grounded in the Fourteenth Amendment's Due Process Clause and Mr. Schaad is challenging the constitutionality of that municipal tax, the Court does not need to reach the question of whether the General Assembly can authorize the City's collection of taxes for work Mr. Schaad performed while outside of the City's jurisdiction.

But even if the Due Process problem did not present an outright bar, the Ohio Constitution does not authorize the General Assembly to expand a municipality's taxing power. The Ohio Constitution provides that the General Assembly may "limit" the levying of municipal taxes but is silent regarding the General Assembly's authority to expand that reserved Home Rule power.

The City proposes two contradictory paths to circumvent Art. XVIII, Section 13. The first would apply an Orwellian reading to Section 29 to conclude that even though it *expanded* municipal taxing beyond the municipality's jurisdiction, it was actually a *limitation* on municipal taxing power. The second asks the Court to set aside the "*expressio unius est exclusion alterius*" canon of statutory construction to expand the reach of municipal ordinances to any Ohio resident, regardless of their connection to the municipality. Neither approach is persuasive.

1. Section 29 is an Expansion Limit on Municipal Taxing Authority, Not a Limitation.

Setting aside the Due Process rights of nonresidents recognized in the *Angell-Hillenmeyer* line of cases, the City argues that Section 29 fits within Article XVIII, Section 13 of the Ohio Constitution, which grants the General Assembly the power to pass laws "to limit the power of municipalities to levy taxes * * * " But Section 29 plainly expands the City's taxing footprint, levying taxes on nonresidents who would otherwise not be required to pay them.

The City's own municipal income tax ordinance—the very ordinance upon which the City has relied to impose a tax and collect municipal income tax on Mr. Schaad during 2020 makes this clear. The City's ordinance explicitly recognizes the geographic limits that Due Process places on its ability to tax income. First, in its authorizing language, the City's ordinance states that the income tax is "is an annual tax levied on the municipal taxable income of every person ***residing in or earning or receiving income in the City of Cincinnati***." (Emphasis added.) Cincinnati Municipal Code § 311-1 (b). During 2020, Mr. Schaad neither resided not earned or received income in the City of Cincinnati. Similarly, in defining "income" the City's income tax ordinance makes clear that to the extent that the tax applies to nonresidents, it applies only to income earned within the City:

> For tax years beginning on or after January 1, 2016, all income, salaries, qualifying wages, commissions, and other compensation from whatever source earned or received

> by the nonresident ***for work done, services performed or rendered, or activities conducted in the Municipality***, including any net profit of the nonresident, but excluding the nonresident's distributive share of the net profit or loss of only pass-through entities owned directly or indirectly by the nonresident;

(Emphasis added.) Cincinnati Municipal Code § 311-9-I1(b)(ii). Before Section 29, the City of Cincinnati was limited to taxing its residents or work actually performed within its borders. After Section 29, it taxed nonresident work performed outside of those borders because Section 29 contra-factually "deemed" that the work had actually been performed within the City. The statute thereby expanded the taxing power of the City—it did not limit it.

If any doubt remained, however, regarding whether Section 29 expanded or limited the City's purported authority to levy taxes on nonresidents, the City removed it through its own publications. Consistent with Ohio R.C. Chapter 718, and the City's municipal income tax ordinance, the City also publishes on its website a "Nonresident Refund Tax Return" form, by which nonresidents can seek a refund for days worked outside of the City. The instructions for that form make clear that non-residents are taxed only on income from work performed in the City. City of Cincinnati, *2020 Nonresident Refund Tax Return*, https://www.cincinnati-oh.gov/finance/income-taxes/2020-tax-forms/2020-non-resident- refund-tax-return-packet/ (accessed Oct. 24, 2022). Indeed, the instructions that the City provides with its "Nonresident Refund Tax Return" succinctly sums up *Hillenmeyer* and the existing law and practice of municipal taxation in a single sentence: "***Nonresidents are only subject to Cincinnati tax on the income earned in the City of Cincinnati.***" (Emphasis added.) *Id*. The addition of tax for income based upon work deemed to have been performed in the City that was actually performed elsewhere is just that—an addition and expansion of the taxing authority of the City. The City's refusal to issue a refund to Mr. Schaad and other similarly situated nonresidents—where a refund would have been otherwise due—shows that Section 29 expanded its taxing authority.

Nor is it clear how Section 29 has limited the ability of the City, or any other municipality, to impose or collect municipal taxes. The City of Blue Ash, or any other city where an employee is worked from home, retains *in personam* jurisdiction over its own residents to impose an income tax regardless of where that resident is "deemed" to be working. *See Corrigan*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, at ¶ 31. That some municipalities have chosen to provide offsetting tax credits for income tax that residents paid to another city is not a statutory limitation on the resident city's taxing power. Similarly, Section 29 did not compel municipalities to retain income tax it collected from nonresidents. The City was free under its Home Rule authority to offer refunds to nonresidents who were not working in the City and thus taking advantage of City services. This would have been consistent with the City's own tax ordinance and refund forms.

2. *Athens* Does Not Recognize a Power to "Re-Assign" Income to Municipalities.

Mr. Schaad discussed this Court's decision in *Athens v. McClain*, 163 Ohio St.3d 61, 2020-Ohio-5146, 168 N.E.3d 441 at length in his Merit Brief and little more need be said. (Appellant's Merit Br. at 27-31). The requirements imposed by the legislation at issue in *Athens* were plainly limitations on local taxation. *Athens* at ¶ 3. They placed restrictions on the way cities could tax income. *Id.* at ¶ 1. Nowhere in the decision did the Court even imply that the General Assembly had the power to assign income from one municipality to another. Moreover, because *Athens* did not involve extraterritorial taxation but how municipalities processed "tax on income earned within their borders," it does not speak to whether the General Assembly can allow a city to tax income earned beyond its borders or substitute the State's *in personam* jurisdiction for that of the municipality. *Id*, at ¶1.

Relying on Athens and the State's sovereign power to tax its citizens, the City asks this Court to bless a heretofore unknown practice of "intrastate municipal taxation." As the City

argues, 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, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995); *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381 at ¶ 15-18. 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*, 153 Ohio St. at 185, 91 N.E. 2d 950; *McConnell v. City of Columbus*, 172 Ohio St. 95, 99, 173 N.E.2d 760 (1961); *Hillenmeyer*, 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164, at ¶ 43; *Willacy*, 159 Ohio St.3d 383, 2020-Ohio-314, 151 N.E.3d 561, at ¶ 21-25. But no court has ever recognized State power to simply "reassign" municipal tax burdens.

3. The *Expressio Unius* Maxim Governs Here Where the Drafters Created An Exception to the General Rule.

The City argues, for the first time, that the "*expressio unius*" cannon should not apply the Art. XVII, Section 13 of the Ohio Constitution. Because this argument was not made in the trial court or the court of appeals, it has been waived. *See, e.g., State ex rel. Gibson v. Industrial Com'n of Ohio*, 39 Ohio St.3d 319, 530 N.E.2d 916 (1988). Notwithstanding the City's waiver, the *expressio unius* doctrine should be given particular weight here, where the drafters of Ohio's Constitution sought to carve out an exception to the Home Rule Amendment.

The municipal power to tax income arises from the Home Rule Amendment to Ohio's Constitution, rather than from any statutory grant from the Ohio General Assembly. *Gesler v. Worthington Income Tax Bd. of Appeals*, 138 Ohio St.3d 76, 2013-Ohio-4986, 3 N.E.3d 1177, ¶ 17. The Home Rule Amendment broadly authorizes municipalities "to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws" to the exclusion of the State. Ohio Constitution., Article XVIII, Section 13. These

general laws include municipal taxation. *Gessler*, at ¶ 17. Several sections later, however, the Ohio Constitution places a check "on the municipal taxing power. Article XVIII, Section 13 provides that "Laws may be passed to limit the power of municipalities to levy taxes." The Ohio Constitution thus first carves out an area where the General Assembly cannot legislate, and then provides an exception. The *expressio unius* principle carries significant weight in this context, where the grant of authority is an exception to a more general rule.

The City points to *Jackman* for the proposition that the *expressio unius* maxim should be applied with caution when interpreting constitutional grants of authority. (Appellee's Merit Br. at 14-17). *Jackman*, the relator challenged a statute that allowed pre-trial discovery deposition in criminal cases. *Jackman*, 9 Ohio St.3d at 161, 224 N.E.2d 906. The relator argued that because these depositions were not listed among the trial rights set forth in Article I, Section 10 of the Ohio Constitution, the legislature lacked authority to provide for them by statute. *Id.* The court declined to apply the *expressio unius* maxim in that case. *Id.* at 164.

But the specific legislative carve-out here is much different than the provision at issue in *Jackman*. There, the constitutional provision was not an assignment of legislative authority, but a positive grant of rights to criminal defendants. *Id.* at 167. Nothing in Article I, Section 10 clearly prohibited the legislature from providing for additional rights. *Id.* at 165. In contrast, the assignment of legislative power to limit municipal taxing powers appears in the context of a prohibition on state legislative power. It should therefore be construed narrowly, lest the exception swallow the rule.

The *Jackman* court also relied on the history of the Constitutional provision and the practices of prior legislatures. *Id.* at 165-166. It noted that even though Article I, Section 10 did not specifically include pre-trial discovery depositions in its list of guaranteed trial rights, the General

Assembly had long provided for them by a statute, which was in effect when the revised 1912 Ohio Constitution was adopted. *Id.* The power that the City relies on to tax Mr. Schaad, in contrast, is entirely novel. The City can point to no precedent that would allow the General Assembly to expand a municipality's taxing jurisdiction to tax nonresidents on work performed outside of the City.

4. *Prudential Co-Op* Does Not Allow the General Assembly to Authorize Extraterritorial Taxation.

Finally, the trial court seemed to reason that because the General Assembly has limited authority to permit municipalities to act extraterritorially, it can authorize extraterritorial municipal taxation. (Appellee's Merit Br. at 12). The City charges Mr. Schaad with misreading *Prudential* to preclude extraterritorial taxation. Yet the *Prudential* Court made clear that extraterritorial taxation is different in kind. *Prudential Co-op. Realty Co. v. City of Youngstown*, 118 Ohio St. 204, 221-216, 160 N.E. 695 (1928). In *Prudential*, the Court drew a bright line between taxation and other extraterritorial actions that might be authorized by statute:

> This ordinance must be treated as an inspection ordinance *and is invalid if it operates as a revenue ordinance*. It is not necessary that the statute should specifically give to the municipality power to charge and collect a fee to cover the cost of inspection and regulation. Where the authority is lodged in the municipality to inspect and regulate, the further authority to charge a reasonable fee to cover the cost of inspection and regulation will be implied. The fee charged must not, however, be grossly out of proportion to the cost of inspection and regulation; *otherwise it will operate as an excise tax, which is clearly beyond the power of a municipality to impose.*

(Emphasis added.) *Id.* at 214. The question in *Prudential* was whether the fees charged were actually disguised taxes. *Id.* Later courts recognized *Prudential*'s distinction between fees for services and taxes. For example, a Cincinnati ordinance placing an assessment on alarm companies and their clients "where the city has not given anything to them for which it can ask for the assessments in return" was not a service fee, but an unconstitutional municipal tax. *White v.*

Cincinnati, 2021-Ohio-4003, 181 N.E.3d 583, ¶ 42-44, *appeal not accepted*, 166 Ohio St.3d 1428, 2022-Ohio-743, 184 N.E.3d 103; s*ee, also. City of Portsmouth v. Kinker*, 4th Dist. Scioto No. 1450, 1984 WL 5648, *1 (Sept. 11, 1984)(Municipal garbage pick-up assessment charged to residents who did not use the service was illegal tax).

Similarly, *Time Warner Cable, Inc. v. City of Cincinnati*, 2020-Ohio-4207, 157 N.E.3d. 941 which cites *Prudential Co-op*. in dicta, cannot be read to allow the General Assembly to authorize extraterritorial taxation by municipalities. *Time Warner* did not deal with extraterritorial taxation. It dealt with whether the General Assembly could—as it did in *Athens*—reduce the burden on taxpayers by requiring cities to adopt standardized and simplified tax procedures. The statute at issue at issue in *Time Warner* required cities to accept consolidated tax return from companies that were an "affiliated group" under federal tax law. *Id*. at ¶2-3. The City of Cincinnati challenged the statute, claiming that it would require it to engage in extraterritorial taxation, which would be plainly unconstitutional. *Id.* at ¶ 17. The *Time Warner* court described the City of Cincinnati's concerns as a "dubious proposition" and 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. *Id.* at ¶ 16-17. In other words, there was no extraterritorial taxation issue because Cincinnati already had *in personam* jurisdiction over Time Warner because Time Warner was located in Cincinnati. Since 1928 this Court has never reneged on that view—a municipality may not impose taxes extraterritorially. Yet that is exactly what Section 29 does.

III. CONCLUSION

For all the foregoing reasons, this Court should reverse the Court below.

Respectfully submitted,

/s/ Jay R. Carson
Robert Alt* (0091753)
**Counsel of Record*
David C. Tryon (0028954)
Jay R. Carson (0068526)
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
robert@buckeyeinstitute.org
d.tryon@buckeyeinstitute.org
j.carson@buckeyeinstitute.org

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Plaintiff-Appellant's Reply Brief* was served by e-mail this 24th day of October 2022, upon the following counsel:

Diane Menashe
Daniel Anderson
Ice Miller LLP
250 West Street, Suite 700
Columbus, Ohio 43215
(614) 462-2700
Diane.Menashe@icemiller.com Daniel.Anderson@icemiller.com

Counsel for Defendants-Appellees

/s/ Jay R. Carson
Jay R. Carson (0068526)
Counsel for Plaintiff-Appellant
The Buckeye Institute