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IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

THE BUCKEYE INSTITUTE, ET AL.,	:	
PLAINTIFFS,	:	CASE NO. 20CV-4301
V.	:	JUDGE WILLIAM WOODS
MEGAN KILGORE, ET AL.,	:	
DEFENDANTS.	:	

MOTION OF DEFENDANT MEGAN KILGORE, IN HER OFFICIAL CAPACITY AS COLUMBUS CITY AUDITOR, TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER CIVIL RULE 12(B)(6)

Now comes Defendant Megan Kilgore, in her official capacity as Columbus City Auditor, and moves, pursuant to Civ. R. 12(B)(6), to dismiss the claims asserted against her in the Complaint with prejudice for failure to state a claim upon which relief can be granted. The grounds supporting this motion are set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Ohio Revised Code authorizes cities to impose an income tax. R.C. 718. Columbus adopted an income tax and uses the revenue to provide essential government services, many of which are for the indigent and impoverished, the people who have suffered a disproportionate share of COVID-19's impact.

On March 9, 2020, Ohio Governor Mike DeWine signed an Executive Order declaring a state of emergency in Ohio to protect the well-being of Ohioans from the dangerous effects of COVID-19. (Complaint, ¶ 32). Then, on March 27, 2020, the Governor signed into effect House Bill ("H.B.") 197, an emergency bill created by the General Assembly which, in part, provides clarity as to how the taxation rules would apply during the pandemic in order to preserve the status quo and avoid undue compliance burdens and confusion. Relevant here, Section 29 in H.B. 197, provides:

> Notwithstanding section 718.011 of the Revised Code, and for the purposes of Chapter 718 of the Revised Code, during the period of the emergency declared by Executive Order 2020-01D, issued March 9, 2020, and for thirty days after the conclusion of that period, any day on which an employee performs personal services at a location, including the employee's home, to which the employee is required to report for employment duties because of the declaration shall be deemed to be a day performing personal services at the employee's principal place of work.

The municipal tax is an "annual income tax" and imposed based on the "principal place of work" of the employee during that tax year, which is where the employee is required to report for employment duties "on a regular and ordinary basis." R.C. 718.011(T); 718.011(A)(7); 718.04(A)(1).[1] Ohio's regulations have long recognized that an employee may temporarily work outside the employee's principal place of work during that tax year, providing that an employee

[1] R.C. 718 incorporates the Internal Revenue Code ("IRC") by reference, including the taxpayer's taxable year under the IRC.

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working for twenty or fewer days in a calendar year at another location is deemed to still be working at the employee's principal place of work, subject to only specified exceptions (the "20 Day Rule"). R.C. 718.011(D).[2]

H.B. 197 extends that existing concept, and the rationale for doing so is evident: limiting the administrative burdens and uncertainties for both municipalities and businesses suffering due to the pandemic. H.B. 197 avoids employers having to suddenly – and temporarily – determine all locations where its employees are temporarily working remotely on a given day, determine if such locations impose a tax (and at what rate and terms), determine how to reconcile its withholding, remittance and filing obligations with the 20 Day Rule and the Small Employer Rule (discussed below), and registering and remitting tax to each of those jurisdictions, at a time when both the public and private sectors are already facing an unprecedented, and unexpected, amount of hardship and uncertainty due to the coronavirus.[3] H.B. 197 avoids employers and their employees being "caught in the middle" between two municipalities, each claiming jurisdiction, or the risk and exposure of the employer (and employees) making good faith mistakes. H.B 197 also alleviates the burden on both employers and municipalities of the work which would be necessary on the back-end of the virus with discontinuing new filings once employees return to their "regular and ordinary" place of work.

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[2] For example, an employee of a law firm might be at a client's location for a day or part of a day, at a deposition for one or more days, and in a trial for a longer period. Revised Code 718 also includes a "12 Day Rule" for work at a petroleum refinery. R.C. 718.011(G).

[3] These uncertainties were exacerbated by the unavoidable uncertainties created by the various categories in the March 22, 2020 Stay-at-Home Order issued by the Director of the Ohio Department of Health (Complaint, ¶ 33). The Order did not apply to "Essential Activities", "Essential Government Functions", "Essential Businesses and Operations", the Federal Government, "Minimum Basic Operations", and a variety of other exceptions, such as those living in unsafe environments and the homeless, who, in this case, remained in Columbus to seek food and shelter provided by the City. Issues have arisen as to the interpretation and application of these categories. So what happens if an employer determines it is "essential" but one or more Cities disagree? Or the reverse? Or the Order is not followed? The confusion and risk of withholding and remitting to the wrong municipality would have been prevalent. H.B. 197 provides the needed clarity and simplicity.

H.B. 197 reflects a *tax policy determination* by the General Assembly to provide continuity and consistency in order to maintain the status quo given the expected temporary nature of this situation. That policy decision helps businesses as well as local government for compliance purposes and it allows the funding of essential government services in this time of heightened need for those suffering the greatest.

By this lawsuit, the Plaintiffs seek to avoid Columbus income tax on income from their Columbus employer while temporarily working from home, based on two claims. First, the Plaintiffs claim that the General Assembly had no authority to enact H.B. 197 regulating municipal income taxes. Second, the Plaintiffs claim the legislation violates the Due Process Clauses of the U.S. and Ohio Constitutions. Neither claim has merit.

II. ARGUMENT

A. Standard Of Review Under Civ. R. 12 (B)(6)

Civ. R. 12(B)(6) permits a party to file a motion to dismiss a complaint for failure to state a claim for relief. A motion filed pursuant to Civ. R. 12(B)(6) tests the sufficiency of the complaint. *State ex rel. Horwitz v. Cuyahoga Cty. Court of Common Pleas, Probate Div.*, 65 Ohio St.3d 323, 325 (1992).

B. Standard Of Review In Constitutional Challenges

"It is difficult to prove that a statute is unconstitutional. All statutes have a strong presumption of constitutionality." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, ¶ 25 (2007). "Before a court may declare unconstitutional an enactment of the legislative branch, 'it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.'" *Id.* To the extent Plaintiffs are making a facial challenge to the statute, the Plaintiffs must demonstrate that there are no set of circumstances in which the statute would

be valid. *Id.* at ¶ 26.[4] The same principle applies to municipal ordinances. *See State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, ¶ 18 ("legislative enactments are presumed to be constitutional. Ordinances ... are afforded the same presumption.").

Furthermore, the courts do not sit to evaluate the correctness of policy judgments made by the General Assembly.

> The judiciary * * * does not appraise legislative choices. [A] court has nothing to do with the policy or wisdom of a statute. * * * When the validity of a statute is challenged on constitutional grounds, the sole function of the court is to determine whether it transcends the limits of legislative power.

State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn., 111 Ohio St.3d 568, 2006-Ohio-5512, ¶ 20 (internal quotations omitted).

These principles of deference to state legislatures are stressed with tax policy matters. "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden. v. Kentucky*, 309 U.S. 83, 88 (1940).

> And we have repeatedly pointed out that '[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes'... because the classification is presumed constitutional, the 'burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'

Armour v. Indianapolis, 566 U.S. 673, 680 (2012), and the cases quoted and cited therein. *See, also*, *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978) (recognizing that a state statute is constitutional even if not precise).

C. The General Assembly Has The Authority To Establish Municipal Income Tax Allocation Rules Among Ohio Municipal Corporations

Columbus, like every municipal corporation in Ohio, has home rule powers under the Home Rule Amendment to the Ohio Constitution, Ohio Const., Sections 3 and 7, Art.18.

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[4] The Complaint is not clear if Plaintiffs are making a facial challenge or a claim that the statute as applied to them is unconstitutional, or both, but the Complaint fails in both regards.

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Included in those powers is the power to impose municipal taxes, subject to the limits and the control of the General Assembly. *See*, Section 13, Art. 18; Section 6, Art. 13; *Cincinnati Imaging Venture v. City of Cincinnati*, 116 Ohio App. 3d 1, 3-4, 686 N.E.2d 528 (1st Dist. 1996).

Consistent with its authority, the General Assembly has, in Revised Code Chapter 718, passed regulation regarding municipal income taxes. Among other provisions, the General Assembly described what income can be subject to taxation (R.C. 718.01(B)), and described the rules for allocating income among multiple jurisdictions (R.C. 718.011). R.C. 718.011 includes the 20 Day Rule which, just like H.B. 197, authorizes the municipality in which the employee is required to report for employment duties "on a regular and ordinary" basis to retain the power to tax employees working elsewhere, while at the same time limiting the power of the municipality in which the employee is working, by not allowing it to impose tax.[5]

H.B. 197 presents no new legal issues. Just like the 20 Day Rule and the Small Employer Rule, H.B. 197 authorized the employee's "regular and ordinary" principal place of work municipality to impose tax even if the employee isn't physically working in that municipality during those days. The Ohio courts have recognized the State's right to manage the interplay among different municipalities imposing tax, which is a common sense practical necessity in order to avoid double taxation, disputes among municipalities, and overall confusion, uncertainty, and undue burden. The Plaintiffs' claim that the General Assembly lacked this authority has no merit.

[5] Similarly, R.C. 718.011(E) allows small employers to withhold and remit employee municipal taxes based on the location of the employer, not the employee ("Small Employer Rule").

D. The Plaintiffs' Due Process Clause Claims Are Without Merit

The Plaintiffs claim that the Due Process Clause[6] prohibits the application of a municipal income tax to an Ohioan during the time the Ohioan lives and works outside the municipality. The Due Process Clause does no such thing.

1. State sovereignty governs *intra*state tax policy.

As the United States Supreme Court stated a century ago:

> The rights of the several [s]tates to exercise the widest liberty with respect to the imposition of *internal* taxes always has been recognized in the decisions of this Court. In *McCulloch v. Maryland*, 4 Wheat 316, while denying their power to impose a tax upon any of the operations of the federal government, Mr. Chief Justice Marshall, speaking for the Court, conceded (pp. 17 U.S. 428-429) that the states have full power to tax their own people and their own property.... (Emphasis added.)

Shaffer v. Carter, 252 U.S. 37, 51 (1920).[7] "The Due Process Clause allows a State to tax '*all* the income of its residents, even income earned outside the taxing jurisdiction.' *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463 (1995)." *Comptroller of Treas. Of Md. v. Wynne*, 575 U.S. 542, 1798, (2015) (emphasis in original).[8] *See also Murphy v. National Collegiate Athletic Ass'n*, 584 U.S. __, 138 S.Ct. 1461 (2018).

Consistent with the foregoing, the courts of Ohio recognized long ago that the tax policy decisions of the Ohio legislature are purely a matter of state sovereignty, *State ex rel. City of Toledo v. Cooper*, 97 Ohio St. 86, 91, 119 N.E. 253 (1917), and the Ohio Supreme Court stated

[6] Although Plaintiffs assert claims under both the state and federal Constitutions, the Supreme Court of Ohio has equated the Ohio Due Course of Law Clause, Article 1, Section 16, with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Willacy v. Cleveland Bd. Of Income Tax Review*, 2020-Ohio-314, ¶19.

[7] *McCulloch* was decided in 1819, over two centuries ago.

[8] *See also*, *Quill*, 504 U.S. 298, 305 (1992); *Chickasaw Nation*, 515 U.S. 450, 463 *quoting New York ex rel. Cohn v. Graves*, 300 U.S. 308, 312-13 (1937)("That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protections of its laws are inseparable from responsibility for sharing the costs of government...These are rights and privileges which attach to domicil within the State.").

more recently that "[a] state's taxing jurisdiction may be exercised over all of a resident's income based upon the state's *in personam* jurisdiction over that person." *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶ 31 (2016).

To be sure, constitutional issues may arise when a state taxes the activities of a taxpayer domiciled in another state and the activities taxed do not have a rational relationship to the taxing state. "The Due Process and Commerce Clauses forbid the States to tax 'extraterritorial values.'" *MeadWestvaco Corp. v. Illinois Dept. of Revenue*, 553 U.S. 16, 19 (2008) (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983)). Ohio courts have rejected Due Process Clause challenges to Ohio's right to tax nonresidents of Ohio for income tax[9] and gross receipts tax purposes where the rational relationship test is satisfied.[10] Ohio courts have applied the Due Process Clause when municipalities have inappropriately taxed nonresidents of Ohio,[11] and where a city, unauthorized by state statute, imposed tax on work outside the city by workers whose base of employment was outside the city.[12] None of those cases involved a state statute authorizing the city's action over residents of Ohio, employees whose principal place of work was in the city, or the State's need to respond to the burdens and hardships caused by a pandemic.

Here, the Plaintiffs are an Ohio employer and three of its employees who are residents of Ohio. This is a purely "***intra***state" matter governed by a state statute managing municipal taxes among Ohioans and Ohio municipalities. As the United States Supreme Court stated in *Exxon Corp. v. Maryland*, 437 U.S. 117, at 124 (1978):

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[9] *Couchot v. State Lottery Comm'n*, 74 Ohio St.3d 417, 659 N.E.2d 1225, 1996-Ohio-262 (nonresident of Ohio subject to tax in Ohio on lottery winnings paid by Ohio Lottery Comm'n).
[10] *Greenscapes, Home and Garden Products, Inc. v. Testa*, 2019 –Ohio-384.
[11] *See, Hillenmeyer v. Cleveland Bd. Of Rev.*, 144 Ohio St.3d 165, 2015-Ohio-1623.
[12] *Toliver v. City of Middletown*; Butler App. No. CA99-08-147, 2000 WL 895261, at *5 (June 30, 2000); *Miley v. Cambridge*, 5th Dist. Guernsey No. 96 CA 44, 1997 Ohio App. LEXIS 32435 (June 25, 1997) (unpublished). Both cases predate *Wayfair*, fail to apply *Quill* and the current minimum contacts and rationally related tests for Due Process, and neither is precedent in this District.

> Appellants' substantive due process argument requires little discussion. The evidence presented by the refiners may cast some doubt on the wisdom of the statute, but it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary "to sit as a 'superlegislature to weigh the wisdom of legislation'".... *Ferguson v. Skrupa*, 372 U.S. 726, 731 (citation omitted).

Simply put, the Due Process Clause does not limit the ability of the State of Ohio to determine ***intra***state tax policy in taxing an Ohio corporation and Ohio residents.

2. <u>Physical presence is not required under the Due Process Clause</u>.

The legal premise of the Complaint is that the Due Process Clause forbids imposing tax on an individual if that individual is not physically performing the work in the taxing jurisdiction. The United States Supreme Court has repeatedly and explicitly rejected the Plaintiffs' contention. As most recently stated in *South Dakota v. Wayfair, Inc.*, 585 U.S. __, 2093, 138 S.Ct. 2080 (2018):

> It is settled law that a business need not have a physical presence in a State to satisfy the demands of due process. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). Although physical presence "'frequently will enhance'" a business' connection with a State, "'it is an inescapable fact of modern commercial life that a substantial amount of business is transacted…[with no] need for physical presence within a State in which business is conducted.'" *Quill*, 504 U.S., at 308. *Quill* itself recognized that '[t]he requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State. [13]

To be clear, there *was* a physical presence requirement solely for purposes of the Commerce Clause (not the Due Process Clause) until *Wayfair*, when that last vestige of a physical presence requirement was rejected as outdated with current economic reality. But this is not a Commerce Clause case, and in any event the Court in *Wayfair* overruled the physical presence requirement even for Commerce Clause purposes, as it characterized it as "flawed",

[13] The Court in *Quill* details the history of the Due Process Clause, noting that it "centrally concerns the fundamental fairness of government activity." 504 U.S. at 312. *See, Coniston Corp. v. Village of Hoffman Estates*, 844 Fd. 461, 467 (7th Cir. 1988) (holding that the Due Process Clause only requires that State action not be "invidious or irrational").

"arbitrary', "formalistic", "anachronistic", "artificial", "unfair", "unjust", "egregious", "harmful", "unsound", and "incorrect". Hellerstein and Hellerstein, STATE TAXATION, 3rd ed., ¶ 6.03[3], S-6-14 (2020). Since *Quill*, the courts have repeatedly and consistently held that the Due Process Clause does not require a physical presence for state income tax purposes. *See*, *Geoffrey, Inc. v. South Carolina Tax Comm'n*, 313 S.C. 15 (1993), cert. denied, 510 U.S. 992 (1993).[14]

It is also important to note that the due process challenges in both *Quill* and *Wayfair*, both of which failed, were stronger than the due process claim here because, in the sales tax context, the tax created undue compliance burdens, whereas H.B. 197 *alleviates* - rather than creates - compliance burdens.

The Plaintiffs' premise that physical presence is required under the Due Process Clause is wrong and inherently flawed.

3. <u>The Plaintiffs fail to recognize that the municipal tax is an annual tax</u>.

The Plaintiffs' claim that they were not physically present in Columbus during a period of time commencing March 19, 2020 and, for two of them, ending on June 6, 2020, and that the Due Process Clause does not allow them to be subject to the city income tax during their absence. The Plaintiffs fail to recognize that the city income tax, like all income taxes, are "period" taxes not "transactional" taxes, and that period is the entire calendar year.

To illustrate, you determine your income, deductions, and credits on an aggregate basis over the course of the entire tax year for federal and state income tax purposes. A taxpayer establishes income tax nexus in a state for that tax year if that taxpayer has sufficient contacts with the state during that year. The Ohio municipal income taxes, being annual taxes that follow

[14] Since *Geoffrey*, there are numerous cases throughout the country with a similar holding. *See, e.g., MBNA America Bank v. Indiana Dep't of Revenue*, 895 N.E.2d 140 (Ind. Tax Ct. 2008)(and the cases cited therein).

the IRC and the federal tax year, are no different. R.C. 718.011(T); 718.011(A)(7); 718.04(A)(1).

In determining the fiscal relation between a taxpayer and taxing state under the Due Process Clause, the Supreme Court has applied a two-step analysis:

> [t]he Court applies a two-step analysis to decide if a state tax abides by the Due Process Clause. First,…there must be '"some definite link, some minimum connection, between *a state* and the person, property or transaction it seeks to tax."' *Quill*, 504 U.S., at 306. Second, 'the "income attributed *to the State* for tax purposes must be rationally related to the 'values connection with *the taxing State*.'"'

(Emphasis added.) *North Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, 588 U.S. __, 139 S.Ct. 2213, 2220 (2019); *see also*, *MeadWestvaco,* 553 U.S. at 24; *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992) and *South Dakota v. Wayfair, Inc.*, 585 U.S. __, 138 S.Ct. 2080 (2018).[15] "The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on *a State's power to tax out-of-state activities*."[16]

Here, all three of the individual Plaintiffs ***concede*** that they *physically* worked in Columbus, Ohio in January, February and March of 2020, and two of them admit returning to work in Columbus on June 7, 2020 (and there is nothing alleged preventing the third individual Plaintiff from doing so). Columbus was the location the employee Plaintiffs were required to report for employment duties "on a regular and ordinary basis" during the tax year. The employer Plaintiff admits maintaining its place of business in Columbus both before and after the declaration, if not also during it, and it was the source of the income to the individual Plaintiffs.

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[15] Due Process challenges in state income tax cases have generally failed because the minimal connection and rationally related tests are so easily satisfied. *See, e.g., International Shoe v. Washington*, 326 U.S. 310 (1945); *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944); *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, (1978); *Trinova Corp. v. Michigan Dept. of Treas.*, 498 U.S. 358 (1990); *Mobil Oil Corp. v. Comm'r*, 445 U.S. 425 (1980); and *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159 (1983). That is true even with all of these cases involving ***inter***state commerce.

[16] *MeadWestvaco Corp.*, 553 U.S. 16, 24 (2008).

The Plaintiffs had far more than any "minimal connection" the Due Process Clause would require in order to be subject to tax for the 2020 calendar year. The rationally related test is similarly met and surpassed by a wide margin, as illustrated by those facts and by the General Assembly's action alleviating the burdens and hardships which would have otherwise been incurred during this pandemic, by the public and private sectors alike.[17]

4. Taxation of remote workers by other States illustrate the fallacy in the Plaintiffs' claim.

As a matter of tax policy, states may impose an income tax on employees based on the location of the employer ***or*** the location of the employee, with states on both sides of that tax policy decision *before* COVID-19[18], and courts have recognized that such an approach complies with the Due Process Clause. In *Huckaby v. New York State Div. of Tax Appeals*, 4 N.Y.3d 427, 829 N.E.2[d] 276 (2005), New York's highest court rejected a Due Process challenge and upheld the application of New York's state income tax to all wages earned by an individual who worked only part-time in New York during the tax year. The court noted that the State of New York provided a "host of tangible and intangible protections, benefits and values" to the taxpayer and his employer, and further noted that those benefits were provided every day, regardless of whether the employee was in New York on a given day.[19]

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[17] *See, T. Ryan Legg Irrevocable Trust v. Testa*, 149 Ohio St.3d 376, 75 N.E.3d 184, 2016-Ohio-8418, ¶ 69 (with respect to an Ohio resident who was a grantor of a non-resident trust, the Ohio Supreme Court held that "his own contacts with Ohio and with the business *easily* justify the imposition of the tax on the trust from the standpoint of due process." (emphasis added)); *see also, Greenscapes Home & Garden Products, Inc.*, at ¶ 38, (recognizing that imposing the Ohio Commercial Activities Tax on a nonresident of Ohio on sales to customers in Ohio did not violate the Due Process Clause, as it "is well settled that a business need not have a physical presence in a state to satisfy the demands of due process.").

[18] For examples of states imposing tax based on the location of the employer, *see,* 20 CRR-NY 132.18; *Telecommuter COVID-19 Employer and Employee FAQ, New Jersey Division of Taxation, last updated May 6, 2020; Telecommuting and Corporate Nexus, New Jersey Division of Taxation, March 30, 2020*, https://www.state.nj.us/treasury/taxation/covid19-payroll.shtml (Retrieved August 18, 2020); 61 Pa. Code § 109.8; 30 Del. C. § 1121; Neb. Admin. R. & Regs. Tit. 316, Ch. 22, § 003.01(C); 1423 Mass. Reg. 67; TIR 20-10, 830 CMR 62.5A 3; and Conn. Gen. Stat. Ann. § 12-711.

[19] *See also Zelinsky v. Tax App. Trib.*, 1 N.Y.3d 85 (N.Y. 2003) (no due process violation).

Since COVID-19, and consistent with H.B. 197, many states have taken action to maintain the status quo of tax treatment of employees working remotely because of COVID-19. In some cases, that is by not treating an employee working remotely in the state as creating nexus for the employer (as if the employee were still working where they were working pre-COVID-19).[20] Much like Ohio did by statute, the Massachusetts Department of Revenue promulgated an emergency regulation (830 CMR 62.5A.3) which states that an employee working in Massachusetts immediately before the COVID-19 pandemic but working outside Massachusetts due to COVID-19 will be treated as if still working in Massachusetts.

Because this was a matter of state tax policy and state sovereignty, there is inconsistency from state to state, and there have been efforts at federal legislation over the years to create consistency, one way or the other, among the states. The Telecommuters Tax Fairness Acts of 2005, 2007, and 2009 are three examples of bills introduced to require states to only impose tax in the state in which the employee performed services.[21] More recently, there was the Remote and Mobile Worker Relief Act of 2020 (S. 3995) and the Health, Economic Assistance, Liability Protection, and Schools (HEALS) Act, introduced July 27, 2020, which included S. 4318 which would require all states to tax remote workers based on the location of their employer.[22]

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[20] 2020 Survey of State Tax Departments Executive Summary, pp. 8, 15-17, full report at 44-46. *See, e.g.*, Indiana Dep't of Revenue, Coronavirus Information, *COVID-19 FAQ's*, https://www.in.gov/dor/coronavirus-information/ (Retrieved August 24, 2020); South Carolina Information Letter #20-11; Oregon Dep't of Revenue, *COVID-19 tax relief options*, https://www.oregon.gov/dor/Pages/COVID19.aspx (Retrieved August 24, 2020); Georgia Dep't of Revenue, *Coronavirus Tax Relief FAQ's*, https://dor.georgia.gov/coronavirus-tax-relief-faqs; Iowa Dep't of Revenue, *COVID-19 Frequently Asked Questions*, https://tax.iowa.gov/COVID-19 (Retrieved August 24, 2020); and Mississippi Dep't of Revenue, (2020) *Mississippi Department of Revenue Response to Requests for Relief,* [Press Release]. 26 March. Available at:
https://chambermaster.blob.core.windows.net/userfiles/UserFiles/chambers/9630/File/MSDepartmentofRevenueMarhc26thCOVID19ResponsetoRequestforRelief.pdf (Retrieved August 24, 2020).

[21] Since then, similar bills, the Multi-State Worker Tax Fairness Acts of 2014 (S. 2347) and of 2016 (S. 2813), were introduced.

[22] S. 4318 was introduced by Senator Chuck Grassley (R-IA). The bills offer employers using a tracking system the option of opting out of the general rule, which is a tax policy tradeoff (greater flexibility but more complexity).

This extensive body of law and proposed laws across the country, both pre and post COVID-19, reflect the universal understanding that this is a question of tax policy, left to a state's legislature, absent Congressional intervention. If Ohio's approach were unconstitutional, Congressional action to create uniformity would not be necessary.

5. **<u>State level income taxes further evidence the fallacy in the Plaintiffs' claims</u>.**

States generally impose income tax on services on one of two bases: where the services are performed (known as "cost of performance" or "COP"), or where the benefit of the services are received (known as "market based sourcing" or "MBS").[23] Like the choice of where to tax an employee's services, this too is a tax policy choice by a state. In fact, the national trend is to tax on the basis of MBS, and a majority of states now tax on the basis of MBS[24], meaning that the services are taxable in the state in which the benefit of services are received, regardless of where the services are performed and regardless of whether the service provider has a physical presence in that taxing state. Taxing based on the location of an employer is consistent with MBS, and taxing based on the location of the employee is consistent with COP. There is no due process violation under either COP or MBS, just as there is no due process violation under either approach for Ohio municipal income tax purposes.

The Ohio commercial activity tax ("CAT") imposes a gross receipts tax on service providers. That tax is sourced to the location where the benefit of the service is received, much

[23] For a discussion of COP and MBS, *see,* Bloomberg Tax & Accounting, 2020 Survey of State Tax Departments Executive Summary, pp. 18-21, full report 142-144.

[24] Wolters Kluwer, *Market Based Sourcing and Beyond: Lookout for New State Tax Issues in the Corporate Tax World,* October 5, 2017, http://news.cchgroup.com/2017/10/05/corporate-state-income-tax-changes/featured-articles/ (Retrieved August 24, 2020); Kentucky H.B. 366; Indiana S.B. 563; Colorado H.B. 1185; and New Jersey Division of Taxation, (2018) *Changes to the New Jersey Corporation Business Tax*, 10 December. Available at https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb84.pdf (Retrieved August 25, 2020).

like MBS (and H.B. 197).[25] The Ohio courts have recognized that the CAT does not violate the Due Process clause. *See, e.g., Greenscapes Home & Garden Products, Inc.*, 10th Dist. Franklin No. 17AP-593, 2019-Ohio-384, 129 N.E.3d 1060, ¶41. The Court of Appeals in *Greenscapes* also recognized that "[i]t is well-settled that a business need not have a physical presence in a state to satisfy the demands of due process." *Id.* at ¶38.

Finally, Ohio's statute is also consistent from a Due Process standpoint with federal law with respect to nonresidents' U.S. source income. The IRC imposes tax on nonresidents on "the amount received from sources within the United States". IRC 871(a), 881. Because the Internal Revenue Service may not have personal jurisdiction over the nonresident individual, the IRC imposes a withholding obligation on the United States payor. IRC 1441, 1442. Some states have adopted a similar withholding or reporting obligation based on the "source" of the payment to the nonresident being from the state.[26]

In this case, the Plaintiffs performed services for their employer in Columbus, and their employer receives the benefit of those services in Columbus. The "source" of the payment was Columbus. There is no Constitutional difference between a State's ability to determine its state level income tax policy and impose a state income tax on services based on the location of the service recipient or the source of the income, and a State's ability to determine municipal level income tax policy based on the location of the service recipient.

III. CONCLUSION

Finally, it must be remembered that States and their subdivisions act with maximum discretion and authority under the Due Process Clause during times of emergency. *See, e.g.*,

[25] Ohio Department of Taxation, *Commercial Activity Tax (CAT) – General Information*, https://tax.ohio.gov/wps/portal/gov/tax/business/ohio-business-taxes/commercial-activities/cat-general-information (Retrieved August 24, 2020).
[26] Cal. Rev. & Tax Code 18662; Ark. Code Ann. 26-51-811, 812. *See also,* Hellerstein, ¶6.02[3], 6-9, n.11; ¶6.04[2], 6-27.

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426, 444 (1934), which upheld against challenges under the Contracts and Due Process Clauses a mortgage moratorium bill that had been enacted in Minnesota during the Great Depression. The court recognized the emergency situation and the fact that Minnesota had enacted a temporary solution to it. Here, facing a pandemic unlike anything the World has seen in over a century, the General Assembly made a thoughtful and prudent determination to preserve the status quo for municipal taxes and avoid undue compliance burdens, minimize confusion and uncertainty, and avoid local government disagreements and budget shortfalls when funds were needed to help those out of work and suffering from this pandemic. For those fortunate enough to earn income, this tax policy decision simply left them in the same municipal income tax position as if the pandemic had never occurred.

The Plaintiffs have no due process claim for the myriad reasons set forth above. The Plaintiffs' claim is one of tax policy, and the remedy for that lies at the Ohio State House, not this Court. As aptly stated by the Supreme Court of Ohio in *Willacy*, 2020-Ohio-314, ¶33, in upholding a city income tax:

> There may be sensible policy arguments for preferring one of these tax schemes over the other. But that is not for this court to decide. And Willacy has pointed to no authority – and we can find none – that suggests that due process requires a jurisdiction to make one of these policy choices rather than the other. Indeed, courts in other jurisdictions have rejected arguments similar to those Willacy makes here.

The Ohio General Assembly had the authority to make this *intra*state tax policy determination, and that action did not violate the Due Process Clause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing MOTION OF DEFENDANT MEGAN KILGORE, IN HER OFFICIAL CAPACITY AS COLUMBUS CITY AUDITOR, TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER CIVIL RULE 12(B)(6) was served by way of the Clerk's electronic filing system to those registered on August 25, 2020:

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