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IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

THE BUCKEYE INSTITUTE, et al.	)	CASE NO: 20-CV-4301
	)	
Plaintiffs,	)	
	)	JUDGE WILLIAM WOODS
vs.	)	
	)	
KILGORE, Columbus City Auditor; et al.	)	PLAINTIFFS' BRIEF IN
	)	OPPOSITION TO DEFENDANT
	)	KILGORE'S MOTION TO DISMISS
Defendants.	)	(Oral Argument Requested)

> "Local taxation of a nonresident's compensation for services must be based on the location of the taxpayer when the services were performed."

Hillenmeyer v. Cleveland Bd. of Rev. (2015), 144 Ohio St.3d 165, 2015-Ohio-1623, ¶ 43.

I. INTRODUCTION

Plaintiffs The Buckeye Institute, Greg Lawson, Rea Hederman, and Joe Nichols ("the Plaintiffs") respectfully oppose the Motion to Dismiss filed by Defendant Megan Kilgore, in her capacity as City Auditor of Columbus ("the City").

The Due Process Clause allows municipalities to tax two—and only two—types of income: (1) income earned by residents who live in the municipality, and; (2) income earned by non-residents for work done within the municipality. *Hillenmeyer v. Cleveland Bd. of Rev.*, 144 Ohio St.3d 165 (2015), 2015-Ohio-1623, 41 N.E.3d 1164, ¶ 42, *citing Shaffer v. Carter*, 252 U.S. 37, 55, 40 S. Ct. 221, 64 L. Ed. 445 (1920). Neither circumstance is present here, where the City of Columbus, pursuant to the language of H.B. 197, claims the unprecedented and extraordinary power to tax the income of nonresidents for work performed outside of the City.

The City casts the extraordinary language of H.B. 197 "deeming" work performed by employees from their homes outside of the City because of the COVID-19 pandemic as having

been performed within the City's limits as "nothing new." But the establishment of an extraterritorial income tax is as novel as the coronavirus that H.B. 197 was written to address. And like a virus—if left unchecked—the practice of exceeding constitutional limits when they prove inconvenient can spread.

The Plaintiffs appreciate that the challenges faced by the legislature in the late hours of March 28, 2020 were legion. The General Assembly was responding to a massive health emergency and an economic crisis the likes of which had not been seen in Ohio for over a century. Nor do the Plaintiffs dispute that by creating a fiction by simply deeming that work performed at home was actually performed at the employer's principle place of business, Section 29 does, in fact, make tax collection convenient for employers, payroll companies, and municipal governments.

Yet, as the U.S. Supreme Court has observed, "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, 131 S.Ct. 2594, 2599, 180 L.Ed.2d 475 (2011); quoting *I.N.S. v. Chadha*, 462 U.S. 919, 944, 103 S.Ct. 2764, 2781, 77 L.Ed.2d 317 (1983). The Due Process clause and other constitutional limits on government power apply even—perhaps especially—during times of crisis. And in this case, the law is clear that the General Assembly's enactment of Section 29 of H.B. 197, however well intentioned, violates the Due Process Clause and exceeds its authority under the Ohio Constitution.

II. FACTUAL BACKGROUND

In response to the COVID-19 pandemic, on March 22, the State Director of Health issued an Order that required, subject to certain exceptions, "all individuals currently living within the

State of Ohio . . . to stay at home or at their place of residence" ("the Stay-at-Home Order"). The Stay-at-Home Order further required that "[a]ll businesses and operations in the State," except "Essential Business and Operations" as defined in the Order, "cease all activity within the State . . . ." (See Stay-Stay-at Home Order, ¶¶s 1-2)[1]. Plaintiffs Greg Lawson, Rea Hederman, and Joe Nichols ("the Individual Plaintiffs") are employees of Plaintiff The Buckeye Institute, whose principle place of business is located in downtown Columbus. In compliance with the Stay-at-Home Order, the Individual Plaintiffs began working from their homes, which are all located outside the City of Columbus. Plaintiffs Hederman and Nichols worked from home until June 7, 2020, when they returned to The Buckeye Institute's Columbus office; Plaintiff Lawson continues to work from home.

On March 28, 2020, Governor DeWine signed into law H.B. 197, a measure designed to address various aspects of the health crisis and to cushion its economic impact. In that legislation, the General Assembly provided that for municipal income taxation purposes, employees working from home during the health emergency and for thirty days thereafter would be retroactively deemed to be working at their typical work location.

Specifically, Section 29 of H.B. 197 provided that:

> "[D]uring the period of the emergency declared by Executive Order 2020-01D, issued on 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 Am. Sub. H. B. No. 197 133rd G.A. 341 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***."

(H.B. 197 Sec. 29, as enrolled (*emphasis added*)).

[1] https://coronavirus.ohio.gov/static/DirectorsOrderStayAtHome.pdf.

During the period when Plaintiffs Hederman and Nichols were working exclusively from their homes outside the City of Columbus, The Buckeye Institute, pursuant to H.B. 197 and the municipal income tax withholding requirements set forth in Ohio R.C. 718.03 (A)(1), continued its withholding from the Individual Plaintiffs' paychecks for payment of municipal income taxes to the City of Columbus. The Buckeye Institute continues tax withholding for payment of municipal income taxes from Mr. Lawson's paycheck, even though he continues to work exclusively from his home in Westerville.

On June 12, 2020, the Individual Plaintiffs objected to the withholding and any payment of municipal income tax to the City of Columbus during the period when they were working from their homes outside of the City of Columbus. The City declined to refund the taxes withheld and through its Motion to Dismiss have made clear its position that it has the constitutional authority to tax the income of the Individual Plaintiffs, even when the services performed are performed beyond the City's geographic limits.

III. LAW AND ARGUMENT

(A) Standard of Review

The City correctly states that statutes have a strong presumption of constitutionality and that it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible. *Libertarian Party of Ohio v. Husted* (2016), 10th Dist. No. 16AP-496, 2017-Ohio-7737, 97 N.E.3d 1083, ¶ 31. Nevertheless, "where the incompatibility between a statute and a constitutional provision is clear, a court has a duty to declare the statute unconstitutional." *Id.*, citing *Cincinnati City School Dist. Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 383, 390 N.E.2d 813. Here, there is no way to square Section 29 of H.B. 197 and the City's conduct under it with *Hillenmeyer's* holding that "[l]ocal taxation of a nonresident's

compensation for services must be based on the location of the taxpayer when the services were performed." *Hillenmeyer v. Cleveland Bd. of Rev.* (2015), 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164, ¶ 43.

(B) Due Process Prohibits Extraterritorial Municipal Taxation

The statute at issue here purports to allow municipalities to tax nonresidents on income that they earned outside of the municipality. The City has claimed that it is entitled to that revenue. Both the U.S. and Ohio Supreme Courts, however, has spoken clearly and authoritatively on this issue holding that "[b]eyond 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*.'" *Hillenmeyer v. Cleveland Bd. of Rev.* (2015), 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164, ¶ 42, citing *Shafer v. Carter*, 252 U.S. 37, 55, 40 S. Ct. 221, 64 L. Ed. 445 (1920). In other words, a municipal corporation can tax income in only two circumstances, when it exercises *in personam* jurisdiction over a resident earning that income, or when it exercises *in rem* jurisdiction over the income because it is earned for work performed within the municipality's borders.

In *Hillenmeyer*, the Cleveland ordinance in question provided that professional athletes would be taxed on a "games played" basis. Under the "games played" calculation, during a 20-game season in which Hunter Hillenmeyer, linebacker for the Chicago Bears, played one game in Cleveland, 1/20th of his annual salary would be subject to Cleveland's income tax. Hillenmeyer argued that the games played formula was inappropriate because it did not include all the services that he performed as an employee of the Chicago Bears, such as training camp, practices, etc. . . . . Instead, he argued, his income tax paid to the City of Cleveland should be calculated on the basis of the number of "duty days" he spent in the city.

In finding for Hillenmeyer, the court was unanimous and clear. "Local taxation of a nonresident's compensation for services must be based ***on the location of the taxpayer*** when the services were performed." *Hillenmeyer,* 144 Ohio St.3d at ¶ 43 (*emphasis added*), citing *Thompson v. Cincinnati,* 2 Ohio St.2d 292, 208 N.E.2d 747 (1965), paragraphs one and two of the syllabus. Notably, the *Hillenmeyer* court did not break new ground in issuing this pronouncement, but merely restated the well-established due process principle that in order to impose a tax, a governmental entity must have jurisdiction over either the person or the thing—in this case the income—to be taxed. *See Id.*, at ¶ 43 ("Under *Shaffer* 's principle, the income of a nonresident is the "res," or thing, that lies within the taxing jurisdiction by virtue of the activity being performed within that jurisdiction.")

Indeed, in the year following the *Hillenmeyer* decision, the Ohio Supreme Court—again unanimously—emphasized just how deeply embedded this principle is in American law:

> 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).

Corrigan v. Testa (2016), 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶ 15 (*Ellipses in original*)(*internal citations omitted*).

The City never directly addresses the *Hillenmeyer* decision in its Motion. It alludes to it only once, and then only in a footnote. In that brief touch, the City describes *Hillenmeyer* merely as an occasion where "Ohio courts have applied the Due Process Clause when municipalities inappropriately taxed nonresidents of Ohio." Motion to Dismiss at p. 7. But Hunter Hillenmeyer's status as an Illinois resident played no role in the Court's decision. The case turned instead on whether "Cleveland's games-played method imposes an extraterritorial tax

in violation of due process, because it foreseeably imposes Cleveland income tax on compensation earned while Hillenmeyer was working outside Cleveland." *Hillenmeyer*, 144 Ohio St.3d 165, 2015-Ohio-1623, ¶ 49. From a due process standpoint, it made no difference whether Hillenmeyer played for the Chicago Bears or the Cincinnati Bengals. What mattered is that the City of Cleveland was trying to tax him for work performed outside the City of Cleveland.

Rather than address the linebacker in the room, the City instead argues that H.B. 197 must be constitutional because—the City contends—it is "nothing new" and the 20-Day Rule and Small Employer Rule codified at R.C. 718.011[2] require employers to withhold municipal income taxes from non-resident employees and thus, already permit extraterritorial municipal taxation.

But the City is not telling the whole story. While the 20-Day Rule and the Small Employer Rule do, in fact, require employers to *withhold* municipal tax for nonresident employees, neither the 20-Day Rule nor the Small Employer Rule imposes tax liability on income earned by nonresidents working outside of the municipal corporation. On the contrary, in the legislation that enacted both Rules, the General Assembly recognized, like *Hillenmeyer* and the cases that preceded it, that when it comes to municipal taxation, location matters.

Thus Ohio Rev. Code § 718.01 limits "Municipal taxable income" for nonresidents to "income reduced by exempt income to the extent otherwise included in income and then, ***as applicable, apportioned or sitused to the municipal corporation*** under section 718.02 of the

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[2] The 20-Day Rule is actually a limitation on withholding and states that an employer is not required to withhold municipal income tax if the employee works less than 20 days within the municipal corporation limits. The Small Employer Rule requires employers with less than $500,000 in total revenue to withhold municipal income tax based on the municipality in which the employer is located for all employees regardless of where the work is performed. But the Small Employer Rule is a withholding rule, and unlike the deeming rule in HB 197, does not impose extraterritorial tax liability.

Revised Code." See HB 5, 130th General Assembly as enacted, codified at R.C. 718.01 (A)(1)(c). The General Assembly's careful adherence to the Due Process limits of taxation here stands in stark contrast to the novel approach advocated by the City, which seems to contend that it has the authority to tax the income of nonresidents regardless of where they perform the work.

Turning to R.C. 718.02, which governs how municipal income tax on nonresidents is apportioned, the General Assembly has essentially codified *Hillenmeyer* rule that a city can only tax nonresidents for work performed within its borders. Section 718.02 applies to "any taxpayer engaged in a business or profession in a municipal corporation that imposes an income tax in accordance with this chapter, unless the taxpayer is an individual who resides in the municipal corporation . . ."—in other words, any nonresident taxpayer. R.C. 718.02. The section then explains that the municipal income tax owed shall be calculated according to the ratio of the services performed within the municipal corporation to services performed elsewhere. R.C. 718.02 (A)(2), with certain exceptions not relevant here.

Thus, while Chapter 718 (which includes the 20-Day Rule and the Small Employer rule) is less concise than *Hillenmeyer*, its message is the same: "Local taxation of a nonresident's compensation for services must be based on the location of the taxpayer when the services were performed." *Hillenmeyer v. Cleveland Bd. of Rev.* (2015), 144 Ohio St.3d 165, 2015-Ohio-1623, ¶ 43.

Ironically, the City's municipal income tax ordinance—the very ordinance upon which the City relies to impose a tax on the Individual Plaintiffs here—also recognizes the geographic limits that due process places on its ability to tax income. In defining income, the City Income Tax Code recognizes that it may tax only the two types of income set forth in *Hillenmeyer*, to

wit, (1) income earned by City residents, and (2) income earned by nonresidents for work done within city limits:

> (N) **"INCOME"** means the following:
>
> (1) (a) ***For residents***, all income, salaries, qualifying wages, commissions . . .
> (2) ***In the case of nonresidents***, all income, salaries, qualifying wages, commissions, and other compensation ... ***for work done, services performed or rendered, or activities conducted <u>in the Municipality</u>*** . . . .

Columbus Code of Ordinances, 326.03 (N) (*emphasis supplied*).[3]

Consistent with the Ohio Revised Code Chapter 718, and the City's municipal income tax ordinance, the City also publishes official instructions for filing municipal income tax returns that explain that non-residents are taxed only on income from work performed in the City. The City's own form states that "[n]on-residents who work or conduct business in Columbus owe 2.5% tax ***on the income they earn <u>in Columbus</u>***." Columbus Municipal Income Tax Form IR-25, p. 3[4]. The fact that the City's own tax code and forms align exactly with the limits of municipal taxing power outlined in *Hillenmeyer* and in R.C. 718 is telling.

(C)The City's 'State Sovereignty' Argument Fails to Address the Issue in this Case

The City cites no authority that would allow the extraterritorial taxation it seeks to impose under the auspices of H.B. 197. The City therefore builds a strawman, seeking to frame the issue as a challenge to the State's sovereignty to make state tax policy. The City cites a string of cases for the entirely unremarkable and undisputed propositions that the States have sovereign power over *State* tax policy and that States may tax their residents on any income and may tax nonresidents on income which arises within the State.

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[3] Indeed, the plain language of the ordinance suggests that the Auditor should be estopped from enforcing the tax against non-residents working from home outside the City.
[4] https://www.columbus.gov/IncomeTaxDivision/TaxForms/Individuals/

For example, the City cites three U.S Supreme Court cases[5] for the—again—uncontested principle that "[t]he Due Process Clause allows a State to tax 'all of the income of its residents, even income earned outside the taxing jurisdiction." But this case is not about state taxation of its residents. It is about *municipal taxation* of *nonresidents*.

H.B. 197 did not impose a new state tax or create a new mechanism to collect state tax revenue. Instead, it expanded the taxing authority of municipalities to allow them to collect income tax for work performed by nonresidents outside of its taxing jurisdiction. The City seems to argue that because municipal taxes are intrastate taxes on Ohio residents, the General Assembly has plenary authority over them. But this ignores the limitations that the Ohio Constitution imposes on both municipalities and the General Assembly.

First, while section 13 of Article XVIII of the Ohio Constitution specifically grants the Ohio General Assembly the power to "limit the power of municipalities to levy taxes and incur debts for local purposes," it does not grant the General Assembly the power to *expand* municipal taxing authority. Applying the well-established principle of legal interpretation that *expressio unius est exclusio alterius* to Section 13 of Article XVIII,[6] the Ohio Constitution prohibits the General Assembly from authorizing municipal corporations to tax the income of nonresidents for work performed outside of the municipal corporation.

Second, the City paints a State's power to impose state taxes in broad strokes, splashing glittering generalities about state sovereignty. But it skips the finer legal brushwork that would

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[5] *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (imposition of state taxes on income earned for work on tribal lands); *Comptroller of Treas. of Md. v. Wynne*, 575 U.S. 542 (2015)(Dormant Commerce Clause prohibiting discrimination against interstate commerce) and *Murphy v. National Collegiate Athletic Ass'n*, 584 U.S. ___, 138 S. Ct. 1461 (2018)(Congress cannot prohibit state licensing of sports gambling).

[6] *See, e.g. Bd. of Elections for Franklin Cty. v. State ex rel. Schneider*, 128 Ohio St. 273, 292, 191 N.E. 115, 123 (1934)(applying the doctrine of 'expressio unius' to the General Assembly's powers under the Ohio Constitution).

acknowledge the well-established limitations on that state authority, and thus again, fails to tell the whole story. In fact, the City glosses over perhaps the most fundamental current of constitutional jurisprudence over the last 150 years—that State sovereignty must always give way to the rights guaranteed by the Constitution.

For example, the City points to language in *Madden v. Commonwealth of Kentucky* noting the State's "broad latitude in creating classifications and distinctions in [state] tax statutes," but overlooks that same court's qualification that while a State has broad power over its own [state] tax laws, those powers are always subject to federal constitutional limitations. *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*).

Here, the Ohio Supreme Court, citing the U.S. Supreme Court, has held unambiguously that Due Process prohibits the City from taxing nonresident income earned outside the City. Contrary to the suggestion of the City, the Ohio Supreme Court has spoken clearly and plainly that the Due Process clause does apply to "intrastate" municipal income taxes applied to non-residents. Where a Court has issued a specific ruling that is exactly on point regarding an *exception* to state sovereignty (i.e. the due process limits on local taxation), a recitation of generalities about state sovereignty is irrelevant.

(D) The *Wayfair* Case Does Not Apply Here.

The City looks to the U.S. Supreme Court's recent decision in *South Dakota v. Wayfair, Inc.* 585 U.S. __, 2093, 138 S. Ct. 2080 (2018), for the proposition that Due Process does not require a physical presence in the taxing district. Again, the City misunderstands or misapplies a general statement of the law in an attempt to supplant a more specific holding. Indeed, the Ohio

Supreme Court reaffirmed its rule in *Hillenmeyer* after the *Wayfair* decision, demonstrating *Wayfair's* inapplicability to these facts. The *Wayfair* case arose out of the State of South Dakota's efforts to collect sales taxes on online sales. South Dakota enacted a statute requiring out-of-state merchants making online sales into South Dakota to collect and remit sales tax on those sales. Wayfair, an internet furniture seller, challenged the statute as an unconstitutional burden on interstate commerce under the Dormant Commerce Clause.

As the City concedes, the instant case does not implicate the Commerce Clause in any way. But beyond that obvious and dispositive difference, two other important distinctions exist. First, the statute at issue in Wayfair did not impose a direct 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. *Wayfair,* 138 S. Ct. at 2084. Sales tax is paid by the purchaser, but ordinarily is collected by the seller at the point of sale and then remitted to the State.

More importantly, the Ohio Supreme Court—just six months ago and with the benefit of the *Wayfair* decision—adhered to the legal rule in *Hillenmeyer*. *Willacy v. Cleveland Bd. of Income Tax Rev*., 2020-Ohio-314 (Ohio). In *Willacy*, a Sherwin-Williams employee working in Cleveland received some of her compensation in the form of stock options. Several years later, Willacy retired to Florida and cashed-in the stock options that she had earned while working in Cleveland. The City of Cleveland claimed that municipal income tax was due on the proceeds of the stock options because that compensation had been earned from work performed in Cleveland.

The Ohio Supreme Court reaffirmed its decision in *Hillenmeyer* and held that because "what Willacy received was deferred compensation for her Cleveland-based work," she owed municipal income tax on the stock sale proceeds. *See Willacy v. Cleveland Bd. of Income Tax*

Rev., 2020-Ohio-314 at ¶ 29. In reaching its decision, the Ohio Supreme Court again emphasized that due process required that "compensation must be allocated to the place where the employee performed the work" and explained that the extraterritorial ordinance it had struck down in *Hillenmeyer* violated due process because it imposed income tax on "compensation earned while [the taxpayer] was working outside Cleveland." *Id.*, at ¶ 26 (internal citations omitted).

The Ohio Supreme Court had the benefit of the *Wayfair* decision when it decided *Willacy*. If the court had believed that *Wayfair* had somehow loosened the due process requirements relating to municipal income taxation and the taxpayer's physical presence, it could have said so. Its silence on this issue is telling. Even more telling, perhaps, 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. *See id.*, at ¶¶s 45-47, (Fischer, J., dissenting).[7]

(E) *Hillenmeyer* Precludes The City's Argument that the Municipal Income Tax is an Annual Tax.

The City also argues that because the municipal income tax is paid annually, if an employee works within the City for any period of time during the year, her entire salary may be subject to the tax. Motion to Dismiss at pp.9-11. The City contends that any presence within its borders creates a sufficient fiscal relation between the employees work and the City. But R.C. 718.01, 718.02 and the City's own income tax ordinance contradict its position—as they must. While Due Process permits such an annualized determination to regulate a *residential* income

[7] Bizarrely, the City cites *Willacy* to suggest that municipal extraterritorial taxation is simply a policy difference that does not implicate the Due Process Clause. (Mot. 15). Yet again, the City is not telling the whole story. The paragraph the City cites refers to a particular policy argument that Willacy made regarding *when* stock options are taxed, not the due process requirements for extraterritorial municipal taxation, which in Willacy's case were met.

tax, non-residents may only be taxed where there is a sufficient fiscal relation—that is, based upon "the location of the taxpayer when the services were performed." *Hillenmeyer*, 144 Ohio St.3d 165, 2015-Ohio-1623, ¶ 43. Hillenmeyer, *Willacy*, and *Corrigan* have already held—quite specifically—that the City's attempted extraterritorial overreach is not the law.

To uphold the City's position would lead to the risk of duplicative taxation, and chaos. Under the City's theory, an individual who performs any work constituting a minimum connection in a municipality could be taxed on *all* their income for the full year, including work performed outside the City. The City admits of no limiting principle and would allow multiple municipalities to tax an employee's entire annual income. *Hillenmeyer's* proper application of Due Process prevents that fundamentally unfair scenario and is consistent with the Ohio Revised Code's general rule regarding non-resident taxation.

(F)The Actions of Other States are Irrelevant in the Face of Controlling Ohio Precedent.

Finally, the City looks to how other States have taxed income outside of their borders. But this case does not involve the circumstances under which States can tax nonresidents or a State's authority to tax its own residents. Even so, all of the cases and examples that the City cites confirm the fundamental requirement that a State must have either *in personam* or *in rem* jurisdiction in order impose a tax. *Schaffer*, 252 U.S. at 49. And in the case of municipal income tax, "the income of a nonresident is the "res," or thing, that lies within the taxing jurisdiction by virtue of the activity being performed within that jurisdiction." *Hillenmeyer*. 144 Ohio St.3d at ¶43.

IV. CONCLUSION

It is by now an over-worn cliché to call last six months "unprecedented." It is nevertheless true. In ordinary times, Section 29's constitutional infirmities would likely have

come to light through the legislative process and the General Assembly might have found a solution that did not violate the Due Process Clause. Yet, while sympathy for the General Assembly's position may be appropriate, it cannot justify constitutional overreach. *See Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 277, 503 N.E.2d 717, 723 ("While the General Assembly is empowered to respond to circumstances or perceived crises that demand legislative initiative, legislation must comport with the rights and guarantees established in the Ohio Constitution.").

The Ohio Supreme Court has held time and again that municipal corporations can tax only two types of income: (1) income earned by residents who live in the municipality, and; (2) income earned by non-residents for work done within the municipality. Here, the City of Columbus seeks to tax income of nonresidents for work performed outside of its borders. Due Process does not permit it.

The Plaintiffs are aware that enforcing their Due Process rights will result in difficulties for municipalities and the State government. But constitutional rights that are subject to government convenience are no rights at all. As the Ohio Supreme Court explained over 150 years ago, "inconveniences may arise from this determination, but evils of much graver importance will be avoided." *State ex rel. Evans v. Dudley,* 1 Ohio St. 437, 444 (1853). The graver evil here would be to establish the principle that the General Assembly may expand municipal taxing authority beyond its borders and thus beyond the limits of the Due Process Clause, simply because it is convenient to do so during a crisis. Once that power is established, however, it is foreseeable that new "crises" will emerge to justify its use. The Plaintiffs' complaint adequately states a cause of action, and for the all the foregoing reasons, the City's Motion to Dismiss should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing Brief was served on all counsel of record via the Court's electronic filing system this 9th day of September 2020.

/s/ Jay R. Carson

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