Supreme Court of Ohio Clerk of Court - Filed October 04, 2022 - Case No. 2022-0316

IN THE SUPREME COURT OF OHIO

JOSH SCHAAD,	:	Case 2022-0316
	:	
Plaintiff-Appellant,	:	
	:	On Appeal from the Hamilton
v.	:	County Court of Appeals,
	:	First Appellate District
KAREN ALDER, as Director of	:	
Finance of the City of Cincinnati,	:	Court of Appeals
	:	Case No. C-2100349
Defendant-Appellee.	:	

MERIT BRIEF OF APPELLEE KAREN ALDER, AS DIRECTOR OF FINANCE OF THE CITY OF CINCINNATI

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

Counsel for Plaintiff-Appellant

Diane M. 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 Defendant-Appellee Karen Alder, As Finance Director of the City of Cincinnati

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INTRODUCTION

The Ohio General Assembly ("General Assembly") properly exercised its authority to set tax policy for Ohio citizens, businesses, and municipalities when it passed Section 29 ("Section 29") of House Bill 197 ("H.B. 197"), which temporarily determined the location of work for employees who pivoted from reporting to their ordinary place of business to reporting remotely because of the COVID-19 pandemic. These emergency actions in the face of unprecedented change to all facets of ordinary life brought certainty and stability to Ohio's municipal-income-tax system at a critical stage of the pandemic.

The First District Court of Appeals ("Court of Appeals") correctly affirmed the trial court's determinations that the General Assembly possessed the authority to pass Section 29, that Section 29 did not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, and that dismissal of the Complaint with prejudice was therefore appropriate.

Appellant Josh Schaad ("Schaad") is an Ohio resident who worked over half of his working days in 2020 at his office in Cincinnati, Ohio. Given his substantial physical and remote connections to Cincinnati throughout 2020, it did not violate due process for Section 29 to subject him to Cincinnati's income tax in 2020.

This Court should affirm the Court of Appeals and confirm that Section 29 was a valid enactment of the General Assembly that properly determined the location of work for remote employees.

STATEMENT OF FACTS AND OF THE CASE[1]

A. Section 29 Is Passed To Govern Municipal Income Tax Allocation For Workers Displaced During The Pandemic.

In March 2020, Ohio's executive and legislative branches took numerous steps to address the emergency health and economic crisis that was brought on by the COVID-19 pandemic. Specifically, on March 9, 2020, Ohio Governor Mike DeWine signed Executive Order 2020-01D.[2] This Order declared a state of emergency in Ohio to protect the well-being of Ohioans from the dangerous effects of COVID-19 ("Governor's Emergency Order"). (Complaint, ¶ 25). On March 22, 2020, the Director of Health issued a Stay-at-Home Order ("Stay-at-Home Order") directing most Ohioans to stay at home and for most businesses to cease operations, except for those designated as essential or which could be performed by employees working remotely. (Complaint, ¶ 26-7). On March 27, 2020, the Governor signed into effect H.B.197, which, in Section 29, provided clarity as to how the municipal taxation rules would apply during the pandemic in order to preserve the status quo and avoid undue compliance burdens and confusion. (Complaint, ¶ 32). Section 29 stated in full:

> 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.

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[1] Because the Trial Court granted Appellee's Civ. R. 12(B)(6) Motion to Dismiss, the facts set forth herein are taken from Schaad's Complaint. Both parties appended certain factual material to their briefs on the Motion to Dismiss in the trial court; neither side lodged any objection to the Trial Court's consideration of that material, so in certain instances Appellee here cites to those as well.

[2] The Complaint asserts that the Governor's Emergency Order was signed on March 14, 2020, but it was in fact signed on March 9, 2020, as set forth in Section 29.

Section 29 relieved employers from having to suddenly determine: 1) all locations where their employees were temporarily working remotely on any given day; 2) whether such remote locations imposed a tax (and if so, at what rate and terms); and 3) how to reconcile their withholding, remittance and filing obligations with the various allocation rules set forth in Chapter 718. Absent Section 29, employers would have to do all this at a time when many of their administrative employees charged with these tasks were themselves having to deal with the disruptions imposed by pivoting to work from home – and at a time when the municipal finance employees in those cities who could provide guidance were themselves confronting the same disruptions.

Further, Section 29 allowed employers to avoid registering and remitting tax to each city from which their employees were virtually reporting to work, at a time when both the public and private sectors were already facing an unprecedented – and unexpected – amount of hardship and uncertainty due to the pandemic. It also allowed employers to avoid being subject to net-profits tax in every municipality where they suddenly had an employee working from home. Finally, Section 29 ensured that more than 900 municipal corporations in Ohio would have greater predictability in their municipal budgets at a time when the pandemic had, without warning, created increased demand for their services.[3]

[3] As a result of subsequent legislative changes, the issues raised here by Schaad only relate to the 2020 tax year. On June 30, 2021, the General Assembly passed H.B. 110, the biennial budget bill. Section 610.115 of H.B. 110 amended Section 29. Effective January 1, 2021, Section 29 no longer determined income tax liability but only determined the city to which an employer had to withhold taxes. See H.B. 110, Section 610.115 and Section 757.40. Section 610.115 also provided that Section 29 would be repealed entirely as of December 31, 2021. As a result of these changes, for any work performed on or after January 1, 2021, Cincinnati is no longer taxing work performed remotely outside Cincinnati. As a result, this case only impacts the 2020 tax year.

B. Schaad's Work in Cincinnati, Ohio and Blue Ash, Ohio.

Schaad is an Ohio citizen who resides in the City of Blue Ash, Ohio. (Complaint, ¶ 9). Before the pandemic, he primarily worked in the City of Cincinnati but also worked from home or elsewhere on certain days. (Complaint, ¶ 10, 30). Since he was deemed an essential worker under the Stay-at-Home Order, Schaad alleges that he continued to come into the office in Cincinnati from March through May in 2020 (Complaint, ¶ 28), but that in June of 2020 his employer directed him to work full-time from his home in Blue Ash due to the pandemic. (Complaint, ¶ 29-30). Schaad alleges that he resumed working in Cincinnati in December 2020. (Complaint, ¶ 11, 30). Schaad's 2020 tax return indicates that he worked 223 days in 2020, 114 of which were in Cincinnati and 109 of which were outside of Cincinnati. (Motion to Dismiss, Ex. 1).

Schaad asserts that he applied for an income-tax refund from the City of Cincinnati in January 2021 seeking the return of tax withholdings for days in 2020 that he reported to work from outside of Cincinnati. (Complaint, ¶ 11, 35). Although he asserts that this refund was denied (Complaint, ¶ 11, 36), Cincinnati in fact granted Schaad a partial refund. Cincinnati recognized that, based upon his historical work schedule, Schaad would have worked 83.87% of his days in Cincinnati and 16.13% outside of Cincinnati in 2020 but for the pandemic. Accordingly, Cincinnati refunded 16.13% of his 2020 wage withholdings. (Motion to Dismiss, Exhibit 2). Schaad agreed in the Trial Court that this refund mooted Count 2 of his Complaint. (May 4, 2021, Hearing Transcript, p. 49).

C. Case History.

On February 9, 2021, Schaad filed his Complaint in the Hamilton County Court of Common Pleas. The Complaint asserts three counts. Count One seeks declaratory relief that Section 29 violates the Due Process Clause of the U.S. Constitution. Count Two sought a

declaratory judgment that Section 29 was not applicable to Schaad because there were days he would have worked outside Cincinnati despite the pandemic. Count Three seeks relief under R.C. 2723.01 to enjoin and recover an allegedly illegal tax. The Complaint named as defendants both Appellee Karen Alder, as Finance Director of the City of Cincinnati ("Alder"), and Ohio Attorney General Dave Yost.

Alder filed a Motion to Dismiss under Civ. R. 12(B)(6). Attorney General Yost also filed a Motion to Dismiss that asserted that he was not a proper party defendant under R.C. 2721.12, and on the merits, adopted the substantive arguments made in Alder's Motion to Dismiss as his own.[4] On April 29, 2021, the trial court *sua sponte* dismissed the Attorney General as a party under R.C. 2721.12(A).

On May 4, 2021, the trial court held a hearing on the Motion to Dismiss.[5] At the hearing, the trial court dismissed Count Two as moot (with Plaintiff's concurrence) because Cincinnati had granted a partial refund for days that Schaad would have worked from home had the pandemic not happened. *See* Transcript of Oral Argument held on May 4, 2021, p. 49. On June 16, 2021, the Trial Court dismissed the remaining Counts One and Three of the Complaint with prejudice and entered judgment in favor of Alder.

Schaad filed a timely Notice of Appeal to the Court of Appeals. After the matter was briefed and argued, the Court of Appeals issued a unanimous opinion affirming the trial court's

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[4] Although Attorney General Yost is not participating in this appeal, he has consistently defended Section 29 and the municipal taxes imposed under it as constitutional. He defended it in the Trial Court here in his Motion to Dismiss, and also in the *Kilgore* case in the Franklin County Court of Common Pleas, Court of Appeals, and in the jurisdictional briefing in *Kilgore* in this Court. *See, e.g.*, Memorandum Opposing Jurisdiction of Appellee Ohio Attorney General Dave Yost, Filed Feb. 14, 2022, *The Buckeye Institute, Inc. v. Kilgore*, Supreme Court of Ohio Case No. 2022-0052.

[5] The Transcript of the hearing was filed in the Trial Court on August 10, 2021.

dismissal of the two remaining counts in the Complaint. *Schaad v. Alder*, 1st Dist. Hamilton No. C-210349, 2022-Ohio-340.

Schaad thereafter filed a timely Notice of Appeal and a Memorandum in Support of Jurisdiction in this Court, which Appellee opposed. This Court granted review, with three Justices dissenting.

This case is not the only case to challenge the constitutionality of Section 29. Every Ohio court to have considered the issue has found Section 29 constitutional as applied to those who, like Schaad, lived or worked in Ohio when it was in effect. *See The Buckeye Institute, Inc., v. Kilgore*, 10th Dist. Franklin No. 20AP193, 2021-Ohio-4196, 181 N.E.3d 1272, *review denied*, 166 Ohio St.3d 1449, 2022-Ohio-994 (affirming dismissal of complaint challenging constitutionality of Section 29); *Curcio v. Hufford*, Lucas C.P. No. CI-2021-1522, Entry dated Dec. 16, 2021 (granting motion to dismiss complaint challenging constitutionality of Section 29).[6] One case, *Morsy v. Gentile*, Cuyahoga C.P. No. CV-21-946057, Entry dated Sept. 26, 2022, ruled that Section 29 is facially constitutional as applied to Ohio residents but unconstitutional as applied to a nonresident of Ohio who had not worked in Ohio after the Governor's Emergency Order.

ARGUMENT

I. Introduction.

The courts below correctly upheld Section 29 because the General Assembly appropriately exercised its authority to set income-tax policy for Ohio workers, businesses, and municipalities. The state's adoption of this limited remote-work tax policy ensured that local taxing authorities,

[6] *Curcio* was appealed to the Sixth District Court of Appeals (Case No. CL-22-1009) and oral argument was held in that Court on August 25, 2022. As of this date, the appeal remains pending.

employers, and employees had greater certainty during the state of emergency the state faced at the outset of the pandemic.

In adopting this policy, the General Assembly recognized that the pandemic would cause massive displacements for Ohio workers and disruptions for Ohio employers. Section 29 minimized these impacts at a time when employers were working with reduced resources and focused on daily operations, not on administrative functions such as recalculating tax withholdings. Section 29 also clarified how municipalities should tax work from home performed by workers displaced from their offices providing clarity and budget stability for the hundreds of municipal corporations in Ohio at a time when they were subject to a rapid increase in demand for their services.

Section 29 was well within the General Assembly's plenary power to legislate under Article II, Section 1 of the Ohio Constitution, its power to pass laws providing for income taxes under Article XII, Section 3 of the Ohio Constitution, and the General Assembly's powers to "limit" municipal taxation granted by Article XVIII, Section 13 of the Ohio Constitution.

Further, because the U.S. Due Process Clause is not implicated when the General Assembly establishes Ohio tax policies for Ohio municipalities, workers, and businesses, Section 29 does not violate the Due Process Clause. There was a rational basis to conclude that workers who had pivoted to remote work because of the pandemic retained a connection to the cities where they had been working before the start of the pandemic to sufficient enough to direct that their remote work be subject to those cities' income taxes.

The Court of Appeals correctly held that Section 29 is constitutional and correctly affirmed the dismissal of Schaad's Complaint. This Court should affirm the judgment of the Court of Appeals.

II. Standard of Review.

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

An order granting a Civ.R. 12(B)(6) motion to dismiss is subject to de novo review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

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, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 25. "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*. (quotations omitted). Reasonable doubt is the highest burden in our judicial system.

In a due process challenge, the rational basis test is applied unless the law in question restricts the exercise of a fundamental right. *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 18. Schaad has not asserted that the Court of Appeals' use of the rational basis test was error.

Rational basis review requires that Section 29 be upheld if there is any conceivable state of facts to support the rationale on which it was established. *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 509, 57 S.Ct. 868, 81 L.Ed. 1245 (1937); *Banc One Dayton, N.A. v. Limbach*, 50 Ohio St.3d 163, 170, 553 N.E.2d 624 (1990). Due process is satisfied under the rational-basis test, if the statute bears a real and substantial relation to the public health, safety, morals, or general welfare of the public and is not unreasonable or arbitrary. *Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 545, 706 N.E.2d 323 (1999). The burden is on Schaad "to negative every conceivable basis which might support it," even if the General Assembly in adopting Section 29 has not "actually articulate[d] at any time the purpose or rationale supporting its classification." *Armour v. City of*

Indianapolis, 566 U.S. 673, 685, 132 S.Ct. 2073, 182 L.Ed.2d 998 (2012), quoting *Nordlinger v. Hahn*, 505 U.S. 1, 15, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) and *Madden v. Kentucky*, 309 U.S. 83, 88, 60 S.Ct. 406, 84 L.Ed. 590 (1939).

Under the rational basis test, the role of courts is not to evaluate the correctness of policy judgments made by the General Assembly. "A court has nothing to do with the policy or wisdom of a statute." *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 20 (internal quotations omitted). These principles of deference to state legislatures are heightened with tax policy matters. "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Park Corp. v. Brook Park*, 102 Ohio St.3d 166, 2004-Ohio-2237, 807 N.E.2d 913, ¶ 23 ("in structuring internal taxation schemes the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation."). As the Tenth District Court of Appeals noted in 1994:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way…To overcome this presumption of constitutionality, the person challenging the statutory scheme must prove that there is no rational relationship between a legitimate government purpose and the means by which the government has sought to further those goals.

Columbus Div. of Income Tax v. Reckless, 100 Ohio App.3d 654, 659, 654 N.E.2d 1013 (10th Dist. 1994) (internal quotations omitted).

III. Response to Proposition of Law No. 2:[7] The General Assembly Possessed The Authority To Pass Section 29 Under Its Plenary Powers To Legislate For The General Welfare Of Ohio, Its Power To Pass Laws Providing For The Taxation Of Incomes, And Under Its Power To Limit Municipal Taxation.

The holding of the Court of Appeals that the General Assembly had the authority under the Ohio Constitution to pass Section 29 was correct for three independent reasons. First, this Court has consistently ruled that the General Assembly has the power to authorize municipalities to exercise their home-rule powers beyond their borders. Second, Article II, Section 1 of the Ohio Constitution grants the General Assembly plenary power to legislate on any subject absent a clear prohibition in the state or federal constitutions, and the Ohio Constitution contains no provision that clearly prohibits the General Assembly from legislating regarding municipal income tax policy. Accordingly, the General Assembly had the authority to pass Section 29.

Finally, even if the authority to pass Section 29 has to be linked to a specific authorization in the Ohio Constitution, there are two such authorizations here. First, Article XII, Section 3 authorizes the General Assembly to pass laws providing for the taxation of incomes. Second, the power to limit taxation found in Article XVIII, Section 13 is broadly construed, and includes the power to regulate administration of municipal income taxes as the General Assembly did here under this Court's decision in *Athens v. McClain*, 163 Ohio St.3d 61, 2020-Ohio-5146, 168 N.E.3d 411. Therefore, Section 29, which regulated the administration of municipal income taxation by setting forth mandatory rules to determine where an employee was working for municipal tax purposes on any given day while the Governor's Emergency Order was in effect, was an act of limitation as that term is used in Article XVIII, Section 13.

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[7] The question of the Assembly's power to pass Section 29 under the Ohio Constitution logically should be resolved before considering Schaad's due process challenge under the U.S. Constitution. Therefore, this Brief addresses that issue first.

As such, the Court of Appeals correctly held that the General Assembly had the authority to pass Section 29 under the Ohio Constitution.

A. The General Assembly Has Plenary Power To Legislate, Including The Area Of Tax Policy.

This Court has long recognized that the General Assembly "has *plenary power* to enact legislation" under Article II, Section 1 of the Ohio Constitution. *See, e.g., City of Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, ¶ 17 (emphasis in original). Therefore, the General Assembly "may enact *any law* that does not conflict with the Ohio or United States Constitution." *Id*. (emphasis in original). "The legislative power of the state, which is here called in question, is limited only by the Constitution of the state and the Constitution of the nation; and before any legislative power, as expressed in a statute, can be held invalid, it must appear that such power is **clearly denied** by some constitutional provision." *Williams v. Scudder*, 102 Ohio St. 305, 307, 131 N.E. 481 (1921) (emphasis added). *See also State ex rel. Poe v. Jones*, 51 Ohio St. 492, 504, 37 N.E. 945 (1894) ("whatever limitation is placed upon the exercise of that plenary grant of [legislative] power must be found in a **clear prohibition** by the constitution") (emphasis added). The Ohio Constitution contains no clear prohibition that would prohibit Section 29. Therefore, the General Assembly had the authority to pass Section 29 under its plenary powers set forth in Article II, Section 1.

B. Section 29 Was Authorized By Article XII, Section 3 Of The Ohio Constitution.

Furthermore, the Ohio Constitution contains a specific grant of power that authorizes the General Assembly to pass laws providing for "taxation of incomes, and the rates of such taxation may be either uniform or graduated, and may be applied to such incomes and with such exemptions as may be provided by law." Ohio Const., Article XII, Section 3. Section 29 amended Chapter 718, which, taken together is a set of laws providing for the taxation of incomes. This Court has

held that the General Assembly may, under its taxing power, authorize political subdivisions to impose taxes. *Desenco*, 84 Ohio St.3d at 538-539.

C. The General Assembly Has The Power To Grant Municipal Powers Beyond Those Granted By The Home Rule Clause In The Ohio Constitution.

Municipal home-rule powers, including the power of taxation, generally may not be exercised outside the limits of the municipality. *Prudential Co-op. Realty Co. v. City of Youngstown*,118 Ohio St. 204, 160 N.E. 695 (1928). However, the General Assembly may by statute grant municipalities powers over and above their home-rule powers. In particular, the General Assembly may override the territorial limitations of the home-rule powers and authorize a municipal ordinance to apply outside municipal borders. *Prudential*, 118 Ohio St. at 207 ("Municipalities in Ohio have only such powers as are conferred upon them, either directly by the Constitution, or by the Legislature under authority of the Constitution.").[8]

In *Prudential*, the City of Youngstown had passed an ordinance that required the city planning commission's approval (subject to a fee) before a plat involving any property within 3 miles outside the city's borders could be recorded. This Court upheld the ordinance, because it was expressly authorized by a statute passed by the General Assembly. The Court also upheld the fee as implicitly authorized by the statute. However, it noted that the fee could become so excessive that it could become a tax, which had not been authorized to apply outside the city borders by the statute. Schaad, using a distorted reading of the *Prudential* court's discussion of the reasonableness of the fee, suggests that the case holds that extraterritorial taxation is never permitted. Schaad's Brief, p. 21-22. **Yet the statute in *Prudential* said nothing about fees or**

[8] Given that the Home Rule Clause was passed to provide a base of municipal authority that is independent of any statute, thereby protecting municipalities from overreach by the state, *see Village of Perrysburg v. Ridgway*, 108 Ohio St. 245, 255, 140 N.E. 595 (1923) (recounting history in Ohio that led to the adoption of home rule in 1912), it would be an odd conclusion indeed that its passage resulted in the Assembly having *less* ability to grant municipal powers.

taxes. There is nothing in *Prudential* or any other Ohio case to suggest that the General Assembly's power to authorize municipalities to act extraterritorially excludes the subject of taxation.

More recently, in 2020, in *Time Warner Cable, Inc. v. City of Cincinnati*, 1st Dist. Hamilton No. C-190375, 2020-Ohio-4207, 157 N.E.3d 941, the court considered whether the City could require the filing of a consolidated tax return that only included affiliated entities doing business within the City, or whether the taxpayer could file a consolidated return that included entities not doing business in Cincinnati. The court held that former R.C. 718.06 required Cincinnati to permit Time Warner to include in its consolidated tax filing other affiliates not doing business in Cincinnati. Cincinnati argued that such a requirement would require it to apply its income tax ordinance outside of its city limits in violation of the limits on its home-rule power of taxation. The Court of Appeals, citing to *Prudential*, ruled that any extraterritorial application of Cincinnati's ordinance was permissible because it had been authorized (and in fact, mandated) by the General Assembly. *Id*., ¶ 17 ("a municipality may act extraterritorially where granted such authority by statute…the statute requires the City to accept a consolidated filing from an affiliated group that filed as such for federal purposes, negating any concerns that the City might transgress the limits of its authority.").

It is thus well-settled that the General Assembly can supplement municipal home-rule powers, by authorizing municipalities to act outside their borders. There is no reason in logic or precedent why the General Assembly lacks this power with regard to municipal taxation.

D. This Court Has Consistently Refused To Find Limitations On The General Assembly's Plenary Powers From Specific Grants Of Affirmative Powers In The Ohio Constitution.

Section 29 provided a clear rule to determine where certain employees working remotely during the pandemic were working on any given day for municipal income tax purposes. There is nothing in the Ohio Constitution that provides a "clear limitation" or a "clear prohibition" against Section 29.

The only potential provision in the Ohio Constitution that could provide such a limitation is Article XVIII, Section 13, which provides that "Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes…." But this section is a grant of authority, not a denial of it. As such, this specific grant of authority supplements the General Assembly's plenary powers. It does not limit them.

The Court has consistently refused to imply any restriction from specific affirmative grants of authority to the General Assembly in the Ohio Constitution. For example, it held that Article I, Section 10 of the Ohio Constitution, which states that "provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial…" could not be read to implicitly deny the General Assembly the power to authorize discovery depositions in criminal cases. *State ex rel. Jackman v. Court of Common Pleas of Cuyahoga County*, 9 Ohio St.2d 159, 224 N.E.2d 906 (1967).

Although Article I, Section 10 of the Ohio Constitution grants authority to the General Assembly and contains no restrictive language, the court of appeals in *Jackman* had relied upon the maxim "*expressio unius est exclusio alterius*" to imply that the General Assembly could not authorize discovery deposition in criminal cases because that type of deposition was not listed in Article I, Section 10. *Id.* at 163. This Court unanimously reversed, stating that "since the

legislative power of the General Assembly is plenary, the judiciary must proceed with much caution in applying the above maxim to invalidate legislation." *Id.*[9] In other words, because the General Assembly may legislate on any subject, the grant of a specific power cannot be read to imply a restriction: "Thus, when the General Assembly has full power under Section 1, Article II, to legislate on the taking of depositions, and Section 10, Article I, says that depositions may be taken to perpetuate testimony with the restriction that they may be used at trial only if the accused is afforded the right of confrontation, that does not mean that the General Assembly no longer has the constitutional power to provide for some other kind of depositions."[10] *Id.* at 164.

In *Jackman*, this Court noted that it previously had erred a few years earlier in striking down a different statute when it improperly found a grant of power to imply a limitation. *Id*. at 163-164 (citing *Karrick v. Bd. Of Education*, 174 Ohio St. 73, 186 N.E.2d 855, *reversed on rehearing*, 174 Ohio St. 467, 190 N.E.2d 256 (1963)). *Jackman* noted that the Karrick Court had originally interpreted Article XV, Section 10 of the Ohio Constitution, which creates restrictions for civil service of the state, counties, and cities in Ohio, to invalidate laws passed to provide for civil service jurisdiction for school districts, on the reasoning that the General Assembly was not authorized to extend civil service rules to school districts because they are not mentioned in Article XV, Section 10. "But in the second opinion the court rectified its decision and held that, in view

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[9] Schaad cites to *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 39 for the proposition that this Court has applied the *expressio unius* principle to the Ohio Constitution. While that is true, *Brunner* was deciding what laws were exempt from referendum. *Brunner* did not mention *Jackman*, nor did it involve a question of the authority of the General Assembly. Likewise, in *Bd. Of Elections for Franklin Cty. v. State ex rel. Schneider*, 128 Ohio St. 273, 292, 191 N.E. 115 (1937), the Court was motivated by the concern that the General Assembly could destroy the elective character of state and county offices by perpetually extending their terms.

[10] Courts in other states have adopted this reasoning and cited this Court's opinions with approval. *See Lyons v. Secretary of Commonwealth*, 490 Mass. 560, 576, 192 N.E.3d 1078 (2022) (collecting cases from Ohio and other jurisdictions).

of the General Assembly's plenary power to legislate, it could extend the civil service to school districts; and, in fact, it could do so without the restrictions mentioned in Section 10, Article XV. The *Karrick* lesson is invaluable in deciding the case at bar." *Jackman*, 9 Ohio St.2d at 164. Schaad's argument asks this Court to ignore the *Karrick* lesson and repeat the same mistake.

More recently, the Court held that the employer intentional-tort statute, R.C. 2745.01, was not invalidated by Article II, Section 34 of the Ohio Constitution.[11] *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066. Upholding the statute, the Court noted that Section 34 was phrased as a broad grant of authority to the General Assembly, not a limitation of authority. Therefore, the Court held that Section 34 did not limit the General Assembly's plenary powers to legislate under Article II, Section 1 of the Ohio Constitution. 125 Ohio St.3d 250, ¶ 60-67. The Court pointedly refused to interpret the language of Section 34 ("laws may be passed…") to read as though it instead stated that "no law shall be passed…unless…" *Id.*, ¶ 66.

Here, we deal with Article XVIII, Section 13, which is phrased in the same manner as Article II, Section 34 in *Kaminski*: "**Laws may be passed** to limit the power of municipalities to levy taxes and incur debts for local purposes…" (emphasis added). This is a grant of authority to the General Assembly, phrased in the same terms as Article II, Section 34. There is nothing in Section 13 that suggests any limitation on the General Assembly's authority to legislate.

Finally, Schaad's argument would disrupt this Court's settled understanding of the authority of the General Assembly. *Jackman* based its holding, in part, on the fundamental difference between the General Assembly and the United States Congress. Congress, of course,

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[11] That provision provides that "[l]aws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power…"

is a body of limited powers, and federal legislation must be derived from one of its powers enumerated in the U.S. Constitution. 9 Ohio St.2d at 162. The General Assembly, in contrast, having plenary power to legislate, is only constrained by those provisions of the Ohio Constitution that specifically deny it the power to legislate. *Id.*

Schaad's argument here explicitly treats the General Assembly as though it were the United States Congress, having only the specific powers enumerated for it in the Ohio Constitution. Schaad Brief, p. 30. This Court in *Jackman* and in many other cases have held that the exact opposite is true. *Id.*; *see also Toledo*, 154 Ohio St.3d 41, ¶ 17, *Kaminski*, 125 Ohio St.3d 250, ¶ 60, and *Tobacco Use Prevention & Control Found. Bd. Of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, 941 N.E.2d 745, ¶ 10.

Indeed, this interpretation of the General Assembly's powers dates back to this Court's earliest cases interpreting the Ohio Constitution after it was adopted in 1851:

> The first section of the second article of the constitution declares that 'the legislative power of this State shall be vested in a general assembly, which shall consist of a senate and house of representatives.' The same provision, in very nearly the same words, is found in the former constitution. It will be observed, that the provision is not, that the legislative power, *as conferred in the constitution*, shall be vested in the general assembly, but that THE LEGISLATIVE POWER OF THIS STATE shall be vested. That includes all legislative power which the object and purposes of the State government may require, and we must look to other provisions of the constitution to see how far, and to what extent, legislative discretion is qualified or restricted. Hence the difference between the constitution of the United States and a State constitution such as ours. In the former, we look to see if a power is expressly given; in the latter to see if it is denied or limited.

Baker v. City of Cincinnati, 11 Ohio St. 534, 542 (1860) (emphasis in original). Schaad's argument would undo this settled understanding, dating back to before the Civil War, and would fundamentally alter the basic structure of the Ohio General Assembly's powers. It must be rejected.

E. Section 29 Is Also A Valid "Limitation" Under Article XVIII, Section 13

Even if Article XVIII, Section 13 were the only source of authority for the General Assembly, its grant of power was enough to authorize the passage of Section 29 as a "limitation" on municipal taxing powers.

In 2020, this Court held that any legislation adopted by the General Assembly to regulate the administration of municipal taxation must be viewed as a limitation and rejected the argument that "limitation" should be interpreted narrowly. *Athens*, 163 Ohio St.3d 61, ¶ 49-51.

The *Athens* Court considered the validity of certain provisions of H.B. 5, passed in 2014, and H.B. 49, passed in 2017. The Court noted that H.B. 5 had dramatically altered the calculus of municipal taxation in Ohio. H.B. 5 mandated a uniform municipal income tax code by requiring that every municipal tax ordinance contain numerous provisions specified in R.C. 718.04(A) and prohibiting any provision in a municipal tax ordinance that conflicts with anything in Chapter 718. R.C. 718.04(F). *Id.* at ¶ 47. This Court held that these provisions had to be viewed as "limitations" on municipal tax authority because the General Assembly had first entirely forbidden any municipal income tax by adopting R.C. 715.03(A), and then conditioning the exception to that prohibition upon strict compliance with the requirements of Chapter 718.

> The enactment of H.B. 5 and H.B. 49 converted the affirmative requirements of R.C. Chapter 718 into adjuncts of the broader preemption of municipal income taxes. After H.B. 5, a municipality that is able to enforce its ordinance at all has incorporated the prescribed provisions of state law. And once R.C. Chapter 718 has been explicitly incorporated into a municipality's tax code, any other provision of the municipality's ordinance at odds with it would be an internal conflict within municipal law. Had the provisions of H.B. 5 and H.B. 49 been in effect during the relevant period in *Gesler* [*v. City of Worthington*], 138 Ohio St.3d 76, 2013-Ohio-4986, 3 N.E.3d 1177, the outcome of that case would likely have been different. [12]

[12] Schaad relies upon *Gesler*, (Schaad Brief, p. 31) but completely ignores that *Athens* called it into question under H.B. 5 and H.B. 49.

Id. at ¶ 49. Based upon this reasoning, the Court held that the General Assembly's authority to limit the power of municipalities to tax allows it to broadly preempt municipal income taxes and to require that such taxes be imposed in strict accordance with the terms dictated by legislation passed by the General Assembly. *Id*. at ¶ 51.

Here, Section 29 provided a mandatory rule "for purposes of Chapter 718" to determine where an employee who had pivoted to remote work because of the pandemic was working on any given day. Because Section 29, by its terms, applies "for purposes of Chapter 718," it became one of the terms in Chapter 718 which commanded "strict accordance" for Cincinnati to be able to impose an income tax *at all*. *Athens* at ¶ 49.

Questioning the General Assembly's authority to pass Section 29 would require this Court to question the General Assembly's preemptive authority over municipal taxation in a way that this Court resoundingly rejected in *Athens* ("It is clear that we cannot question the General Assembly's authority to impose a uniform municipal income-tax code through H.B. 5, and by extension to impose centralized administration of the tax under H.B. 49, without calling into question the preemptive authority on which it is logically based."). *Id*. at ¶ 50. *Athens* thus dictates that Section 29 must be viewed, as with all the other provisions in Chapter 718 regarding municipal income-tax administration, as an act of limitation. As such, the General Assembly had the authority to "limit" municipal taxation by passing Section 29 to govern the location of remote work for tax purposes the Governor's Emergency Order was in effect.

IV. Response To Schaad's Proposition Of Law No. 1: As A Law Governing Intrastate Taxation Of Work Within The State Of Ohio, Section 29 Does Not Implicate The Due Process Clause Of The United States Constitution, And Even If It Did, The General Assembly Had A Rational Basis To Permit Ohio Cities To Tax Remote Work Under The Limited Circumstances To Which Section 29 Applied

A. The Due Process Clause Of The Fourteenth Amendment[13] Permits The General Assembly To Set Tax Policy For Ohio Citizens, Businesses, And Municipalities.

The U.S. Supreme Court has made it abundantly clear that the Due Process Clause of the U.S. Constitution has nothing to say about a state's taxation of its own citizens. "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…the states have full power to tax their own people and their own property…." *Shaffer v. Carter*, 252 U.S. 37, 51, 40 S.Ct. 221, 64 L.Ed. 445 (1920). "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, 115 S.C. 2214, 132 L.Ed.2d 400 (1995)." *Comptroller of Treas. Of Md. v. Wynne*, 575 U.S. 542, 556 1798, 135 S.Ct. 1787, 191 L.E.2d 813 (2015) (emphasis in original).[14]

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[13] Although Schaad asserts his due process claim under both the Ohio and U.S. Constitutions, this Court has since 1887 equated the Ohio Due Course of Law Clause, Article I, Section 16, with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Willacy v. Cleveland Bd. Of Income Tax Review*, 159 Ohio St.3d 383, 2020-Ohio-314, ¶ 19. Schaad did not argue in the courts below or in his Merit Brief here that this Court should depart from this principle.

[14] *See also Quill Corp. v. North Dakota*, 504 U.S. 298, 305, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992); *Chickasaw Nation*, 515 U.S. 450, 463, *quoting New York ex rel. Cohn v. Graves*, 300 U.S. 308, 312-13, 57 S.Ct. 466, 81 L.Ed. 666 (1937) ("That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil [sic] 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 [sic] within the State.").

It does not matter that this case involves a tax imposed by the City of Cincinnati and not by the State of Ohio. This Court has recognized that when an Ohio municipality imposes an income tax, it is exercising a portion of Ohio's sovereignty that has been delegated to the municipality by the state and its people. *Athens*, 163 Ohio St.3d 61, ¶ 23. It follows that Cincinnati's exercise of that sovereignty pursuant to the Ohio Constitution and Revised Code as well as its own charter and municipal code is purely governed by Ohio law and the federal Due Process Clause has nothing to say on the matter.

The U.S. Supreme Court has confirmed that, as far as the U.S. Constitution is concerned, the "principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 433, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). And as such, the way any state determines to allocate powers to municipal corporations is entirely a matter of state, not federal, law:

> **The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state**. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. **All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest**. **In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States**.

Hunter v. City of Pittsburgh, 207 U.S. 161, 178-179, 28 S.Ct. 40, 52 L.Ed. 151 (1907) (emphasis added).[15]

In *Hunter*, the U.S. Supreme Court considered whether Pennsylvania statutes authorizing the annexation of the city of Allegheny into the city of Pittsburgh violated the Due Process Clause by subjecting the residents of Allegheny (the smaller city) and their property to increased taxation in a consolidated vote where the residents of Pittsburgh could ratify the annexation even if every single citizen of Allegheny voted against annexation. The court found that issues surrounding the creation of subdivisions such as cities, adjustment of their borders, the granting or modification of their powers, and similar issues were purely matters of state law such that the Due Process Clause and other provisions of the U.S. Constitution had nothing to say on the subject, even if certain persons found themselves aggrieved as a result:

> Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.

207 U.S. at 178-179. *See also Ross v. Adams Mills Rural School Dist.*, 113 Ohio St. 466, 477, 149 N.E. 634 (1925); *Trustees of Bazetta Tp. v. City of Warren*, 46 Ohio App.2d 147, 149, 349 N.E.2d 318 (11th Dist. 1975).

The Due Process Clause thus permits annexation under state law of a smaller city into a larger city with higher tax burdens even if it is done against the will of the residents of the smaller city. Given that this is true, the Due Process Clause likewise permits the General Assembly's

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[15] In Ohio, as in many other states, there are state constitutional provisions such as the Home Rule Clause that constrain this discretion. The point is that federal law, including the Due Process Clause, does not.

decision in Section 29 to treat remote work during the pandemic as though the worker were still going into his principal place of work – even if it subjected some, such as Schaad, to a higher tax burden.

This Court recently stated 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. The state clearly has *in personam* jurisdiction over Schaad, who works in Cincinnati and lives in Blue Ash. As such, the General Assembly's resolution of the "work from home" issue during the pendency of the pandemic with respect to Schaad is entirely consistent with due process. When the General Assembly legislates regarding Ohio citizens' municipal tax liabilities to Ohio municipalities, there is no due process violation. It makes no difference whether the General Assembly legislates regarding state taxes or municipal taxes. Because Schaad is an Ohioan, subject like all Ohioans to the legislative authority of the General Assembly, due process was fully satisfied here. Schaad's arguments to the contrary are simply a policy disagreement dressed up as a constitutional challenge.

B. There Was A Rational Basis For Section 29.

The General Assembly made a public policy determination that was well within its plenary power to legislate for the general welfare of Ohio and made rational choices to limit the scope of Section 29 to ensure that it only applied to those who had a connection to the municipalities where they had been working. These choices were neither arbitrary nor unreasonable and must be upheld.

1. Section 29 Was Passed To Provide Stability And Certainty In Municipal Income Taxation At A Time Of Emergency And Uncertainty

Section 29 was passed to address the widespread disruptions created by the sudden pivot to work from home resulting from the pandemic, the Governor's Emergency Order, and the Stay-At-Home Order. It provided stability and certainty in the municipal income tax field at a time of

great instability and uncertainty. But Section 29 also ensured that it applied only to those workers with a meaningful connection to the municipalities where they would be taxed, in two ways. First, Section 29 provided that those workers would only be subject to tax in the municipality where their principal place of work had been located immediately prior to the Governor's Emergency Order. Second, it only applied to workers whose work location had changed as a result of that Order.

2. The General Assembly Had A Rational Basis To Determine That Displaced Employees Retained Sufficient Connection To Their Principal Places Of Work To Direct That They Be Taxed There

There is a rational basis to conclude that displaced employees working remotely retained sufficient connection to the cities where they had been working to permit them to be taxed there. Section 29 only applied to people who, as of the issuance of the Governor's Emergency Order, had a principal place of work in the taxing municipality. By definition, such people had been working in those municipalities prior to the Governor's Emergency Order, so that they had been physically working in those municipalities during 2020 and therefore had a connection to them. Furthermore, it was rational for the General Assembly to conclude that these employees would, while working from home, be using technological tools to virtually maintain those preexisting connections and deliver their work product to their employers' offices. Thus, there was a rational basis to conclude that these employees maintained both a connection to the municipalities where their principal places of work were located and that they continued to derive benefits from those municipalities such that it was appropriate for them to be taxed there.

"To determine whether a State has the requisite "minimum connection" with the object of its tax, this Court borrows from the familiar test of *International Shoe*..." *North Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, 588 U.S. __, 139 S.Ct. 2213, 2220,

204 L.Ed.2d 621 (2019). *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), of course, is one of the seminal cases developing the modern minimum contacts test for personal jurisdiction.[16]

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 connected with *the taxing State*.'"' (Emphasis added.)

Kimberley Rice Kaestner 1992 Family Trust, 588 U.S. __, 139 S.Ct. at 2220.

There was a rational basis to conclude that Schaad and other Ohio workers in his situation satisfied this test. Those who pivoted to remote telework had a connection to the cities where they had been working because those cities were where their principal places of work were located – by definition they had been physically working there before the pandemic. The General Assembly further rationally found that employees subject to Section 29 continued to be virtually connected to those cities after the pivot to remote work and continued to benefit by receiving services from those cities even during the times when their link was virtual.

Taking Schaad as an example, his employer's offices continued to be located in Cincinnati, and his employer continued to receive the benefit of his remote services in Cincinnati. His employer received the benefit of ongoing police and fire protection, along with other infrastructure

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[16] Numerous Ohio courts have upheld the exercise of personal jurisdiction over nonresidents who have never been physically present in Ohio based solely upon internet activity directed into Ohio. *See, e.g., Goddard v. Goddard*, 11th Dist. Geauga No. 2021-G-0015, 2022-Ohio-3113, ___ N.E.3d ___, ¶ 24-27 (upholding jurisdiction of Ohio courts under the Due Process Clause to grant civil protection stalking order over a nonresident whose only connection with Ohio was that he had sent threatening electronic communications to an Ohio resident).

services, provided by the City of Cincinnati without which he would not have been able to work remotely from home. It was rational to conclude that people such as Schaad needed to access email servers, file servers, and voicemail systems maintained in those offices, just to name a few.[17] All of those things were protected by the social services provided by Cincinnati, such as police and fire. The connections from Schaad's home to his office were also protected by Cincinnati's Public Works Department's management of Cincinnati's rights of way. It is rational to conclude that Schaad did not cease to enjoy these Cincinnati benefits when temporarily teleworking from the safety of home.

These conclusions amply pass the rational basis test. This Court decided long ago in *Angell v. City of Toledo*, 153 Ohio St. 179, 185, 91 N.E.2d 250 (1950), that the benefits that justify an income tax upon a nonresident can relate to the nonresident's ability to continue to have a job:

> The municipality certainly does afford protection against fire, theft, et cetera, to the place of business of plaintiff's employer and the operation thereof without which plaintiff's employer could not as readily run its business and employ help. In other words, the city of Toledo does afford to plaintiff not only a place to work but a place to work protected by the municipal government of Toledo.[18]

These principles do not lose their force, as Schaad would have it, just because an employee is remotely connected to the office by technology. Again, tax legislation is upheld under the rational basis test so long as it is not arbitrary or unreasonable, and the General Assembly's

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[17] Under the rational basis test, there is no requirement to produce admissible evidence to sustain rationality. *Pickaway Cty. Skilled Gaming, LLC v. Cordray*, 127 Ohio St.3d 104, 2010-Ohio-4908, 936 N.E.2d 944, ¶ 20. "'[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.*, ¶ 32.

[18] In *McConnell v. City of Columbus*, 172 Ohio St. 95, 100, 173 N.E.2d 760 (1961), this principle was extended to sustain application of a Columbus tax on the incomes of those employed at The Ohio State University – even though the state had provided for a separate university police force, and authorized the university to contract for fire protection, the court held that the university still received police and fire protection and benefits from Columbus sufficient to support taxing the income of nonresidents earned working at Ohio State.

conclusion that workers displaced to work from home continued to have a meaningful connection to the cities they had just been displaced from was neither.[19]

3. Virtual Connections Cannot Be Discounted When Evaluating Whether A "Minimum Connection" Exists For Tax Purposes – Physical Presence Alone Is Not Required Under The Due Process Clause.

Even if the minimum contacts analysis were applicable here, it is satisfied. The U.S. Supreme Court has repeatedly and explicitly rejected the contention that the Due Process Clause forbids imposing tax on an individual absent a physical presence in the taxing jurisdiction. As most recently stated in *South Dakota v. Wayfair, Inc.*, 585 U.S. __, 138 S.Ct. 2080, 2093, 201 L.Ed.2d 403 (2018):

> It is settled law that a business need not have a physical presence in a State to satisfy the demands of due process if they are subjected to jurisdiction there. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (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. 298, 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.[20]

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*, *e.g.*, *Geoffrey, Inc. v.*

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[19] Section 29, after all, did not authorize Columbus, Cleveland, or Toledo to tax Schaad, only Cincinnati – the city where his principal place of work was located when Section 29 took effect.

[20] The Court in *Quill* detailed 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 F.2d 461, 467 (7th Cir. 1988) (holding that a state law violates the rational basis test under the Due Process Clause only if it is "arbitrary and unreasonable" or "invidious or irrational").

South Carolina Tax Comm'n, 313 S.C. 15, 437 S.E.2d 13 (1993), *cert. denied*, 510 U.S. 992, 114 S.Ct. 550, 126 L.Ed.2d 451 (1993).[21]

The development of technology has driven the evolution of the U.S. Supreme Court's due process jurisprudence over the course of the last century. At one point, the *sine qua non* for a state's exercise of personal jurisdiction over a nonresident was that he had been physically present in the state at the time process was served. *See, e.g., Pennoyer v. Neff*, 95 U.S. 714, 722, 24 L.Ed. 565 (1877) ("no State can exercise direct jurisdiction and authority over persons or property without its territory."). But with the passage of time and the evolution of technology, the U.S. Supreme Court ultimately adopted a test based upon whether a defendant had sufficient minimum contacts with a state to make it reasonable for them to be subject to jurisdiction there. *International Shoe Corp.*, 326 U.S. at 316. The Supreme Court would later make clear that, when evaluating minimum contacts, it no longer mattered whether the defendant had a physical presence in the jurisdiction, based upon the recognition that technological developments such as the telephone and the fax machine had rendered physical presence much less relevant. *Burger King*, 471 U.S. at 476 ("it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.").

Likewise, until 1992, the U.S. Supreme Court had held that, as far as taxation was concerned, the Due Process Clause required a physical presence in state before that state could impose a tax. *National Bellas Hess, Inc. v. Department of Rev. of State of Ill.*, 386 U.S. 753, 758, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967). However, in 1992, the court recognized that in "modern

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[21] 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.

commercial life" such a restriction no longer made sense, because business could be transacted as effectively by a "deluge of catalogs" sent into a state by mail as it could by a "phalanx of drummers" physically soliciting business into a state. *Quill*, 504 U.S. at 308. And then in 2018 when the court revisited the issue for purposes of the Commerce Clause, it recognized that the Internet had again transformed business so that a "deluge of catalogs" was no longer necessary:

> The "dramatic technological and social changes" of our "increasingly interconnected economy" mean that buyers are "closer to most major retailers" than ever before— "regardless of how close or far the nearest storefront." *Direct Marketing Assn. v. Brohl*, 575 U.S. 1, 18, 135 S.Ct. 1124, 1135, 191 L.Ed.2d 97 (2015) (KENNEDY, J., concurring). Between targeted advertising and instant access to most consumers via any internet-enabled device, "a business may be present in a State in a meaningful way without" that presence "being physical in the traditional sense of the term." *Id*., at 18, 135 S.Ct., at 1135. A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores. Yet the continuous and pervasive virtual presence of retailers today is, under *Quill*, simply irrelevant. This Court should not maintain a rule that ignores these substantial virtual connections to the State.

Wayfair, 138 S.Ct. at 2096.

Just as virtual connections to a state were found to be dispositive in *Wayfair*, the same is true of the ability of an employee working from home to use the internet and related technology to project their presence into their normal office location. Virtual desktop technology such as Citrix and virtual private networks make it possible for employees to perform functions from home while delivering their work product to their employer's office as though they were present in the office. The General Assembly had a rational basis for its conclusion that such virtual work delivered to the same employer in the same location as when the employee was physically located there, warranted a rule permitting the cities that housed those offices to continue taxing those incomes during the first months of the pandemic, because those cities were still continuing to provide something to those taxpayers for which it could fairly ask a return.

Schaad's argument here effectively asks this Court to create a special rule that resurrects the long-rejected principles of *Pennoyer v. Neff* solely for municipal income taxation, in the face of decades of U.S. Supreme Court precedent moving in the other direction.

It was eminently rational for the General Assembly to conclude that the offices many Ohioans had temporarily vacated continued to require protection, and that in most cases the information employees working from home needed to access was located on file servers, email servers, and other systems housed in those offices. The disruptions and protests that came to many Ohio cities in the summer of 2020, indeed, made those services all the more important. Schaad does not contend that these conclusions are irrational. He merely argues that he could only be taxed in Cincinnati for days he physically worked there.

C. Minimum Contacts Should Be Measured With The State, Not The City.

Schaad's argument seeking to convert the state-to-state analysis that the U.S. Supreme Court Due process cases have always followed into a city-to-city analysis within Ohio is flawed. As Judge Nelson of the Tenth District pointed out in his concurring opinion in *Kilgore*, he was unconvinced that the federal Constitution controls "that level of legislative detail" at the state level. 2021-Ohio-4196, ¶ 53. Further, he refused to accept the analogy attempted to be drawn by Schaad's counsel between the various states on the federal level, and the various cities in Ohio on the state level: [22]

> As presented to us, appellants' argument hinges on authorities informed by principles involving taxation of interstate businesses and citizens of different states: it seems to me to depend on drawing a virtually exact analogy between the federal system as involving the separate states that formed and make up the union, on the one hand, and a state governmental structure providing for various municipalities, on the other…. I wouldn't buy such a one-to-one analogy for these purposes; I do not believe, for example, that it would be an appropriate reading of precedent to replace the word "State" wherever it appears in the relevant case law with "municipality" and then simply say that the same outcome must obtain with regard

[22] Schaad's counsel here also represented the appellants in *Kilgore*.

> to non-residents. But to my eye, that is essentially what appellants do when they fail to reckon with the State-enacted authorization here other than through generalized and unsupported statements to the effect that the State cannot authorize the sort of municipal taxation at issue.

Id. ¶ 54. The Ohio and Federal Constitutions are structured differently because they are motivated by different concerns, and as a result, Schaad's attempt to apply a Due process analysis that properly only applies to interstate taxation is unpersuasive. *Id.*, ¶ 55 ("By simply citing to what I view as largely inapposite case law, appellants do not convince me the federal due process clause limits in the way they suggest how Ohio's legislature chooses to define the State's relationship to and among its municipalities with regard to taxation of income from an employee's principal place of work.").

Even this Court's decision in *Hillenmeyer v. Cleveland Board Of Review*, 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164, upon which Schaad relies so heavily, recognized that the Due Process Clause analysis is a state level - not a municipal level - analysis:

> ***In guarding against extraterritorial taxation***, "[t]he Due Process Clause places two restrictions on ***a State's*** power to tax income generated by the activities ***of an interstate business***…The first is to require "'some definite link, some minimal connection, between ***a state*** and the person, property or transaction it seeks to tax.'"…The second restriction is that "the income attributed ***to the State*** for tax purposes must be rationally related to 'values connected ***with the taxing State***.'"… (citations omitted; emphasis added)

Hillenmeyer, ¶ 40 (emphasis added). The Court recognized that the Due Process Clause limitations apply to limit a state's power to tax ***inter***state business and transactions. The extensive body of U.S. Supreme Court case law addressing the Due Process Clause applies to ***inter***state, not ***intra***state, state taxation. This Court could not, expand the limitations of the Federal Due Process Clause, as established by the U.S. Supreme Court, to restrict the State of Ohio's authority to govern the taxation of its own citizens.

Schaad is an Ohio resident who was working in Ohio throughout 2020, and measuring his contacts with Ohio, due process was not violated.

D. Schaad Has The Required "Minimum Connection" To Cincinnati To Permit Subjecting Him To Cincinnati's Income Tax.

As noted above, the Due Process Clause analysis is to be done on a state, and not municipal level. But even assuming that it requires a "minimum connection" to be demonstrated on a municipal level, Schaad worked in Cincinnati for 51% of his working days in 2020. When he was not working in Cincinnati, he was using modern technology to deliver his work to his employer in Cincinnati. This is far more than any "minimal connection" with Cincinnati that the Due Process Clause requires in order to be subject to the Cincinnati income tax. All that is required here is a rational basis to conclude that workers who had just been displaced from their offices continued to have this minimal connection to those cities while they were performing their jobs from home using modern technology.

In this regard, the Court should consider that the income tax is based upon a tax year. There is nothing in the Due Process Clause that supports dividing that year up into individual days, as Schaad would have the Court do here.[23] He would naturally like to focus on the period from June through November of 2020, where he claims he did not come into Cincinnati at all, but taking the year as a whole, he worked in Cincinnati more than he worked anywhere else.

E. Schaad Ignores Substantial Distinctions Between This Case And The Cases He Relies Upon.

Hillenmeyer and the other cases relied upon by Schaad are factually dissimilar to this case in critical ways. Most notably, none of those cases involved an act of the General Assembly

[23] Given that the already deferential rational basis test is "especially deferential" in the context of classifications arising out of complex taxation law (*see Park Brook*, 102 Ohio St.3d 166, ¶ 23), it makes little sense to hold that the Due Process Clause mandates that income tax be measured on a day-by-day basis limited to physical presence.

specifically directing how the municipal tax was to be applied. Where the General Assembly legislates regarding Ohio tax policy for Ohio citizens, there is no denial of due process, because each of us who live in Ohio has received all the process that they are due, in the form of consideration of the legislation and tax policy in the General Assembly. *See Desenco*, 84 Ohio St.3d at 545 (noting that the power of taxation does not rest upon the consent of the taxed but rather upon the enactment of laws by the representatives of the people in the General Assembly). Another critical distinction is that none of the cases Schaad relies upon considered the impact of modern technology, which has enabled many jobs to be performed remotely in much the same manner as they would in an office. It is one thing to say that a football player who spent all but two days a year working outside Ohio would have no impact inside Ohio the rest of the year. It is quite another to say that a worker who is connected via technology to the employer's office and in many cases is doing work on servers located in that office through a virtual connection has no impact in that city where the employer is located.[24] Furthermore, *Hillenmeyer* involved a non-Ohio resident working for a non-Ohio employer who happened to have been in Cleveland for two days a year and had no other connections to Cleveland or Ohio during the rest of the year in question. This case involves an Ohio resident who worked in Cincinnati in 2020 more than he worked anywhere else.

Unlike the appellant in *Hillenmeyer*, Schaad is an Ohio citizen who, like all Ohioans, is subject to the jurisdiction of the General Assembly. The courts below correctly determined that *Hillenmeyer* and the other cases cited in it were distinguishable. Schaad's suggestion that

[24] And, of course, Schaad was working within Ohio, so if it is contacts with Ohio that matter, Section 29 must be sustained.

Hillenmeyer conclusively rejected arguments that were not made in that case takes the concept of *stare decisis* beyond its proper application.

In the latter case the employee may be physically located in one locality but directly connected to the employer's most vital equipment across the internet. Certainly the U.S. Supreme Court caselaw discussed above traced the development of due process principles as technology evolved. It was entirely rational and reasonable for the General Assembly to conclude that a similar evolution should take place, on a limited basis, where employees displaced from their offices by the pandemic were nevertheless continuing to connect to their offices virtually and directing their work activities into the cities where their offices were located.

The Court in *Hillenmeyer,* in addressing the constitutionality of the City of Cleveland taxing an Illinois resident, referred to work performed within and outside of Cleveland, as would be natural to do. *See, e.g.*, 144 Ohio St.3d 165, ¶ 16. There was no indication in *Hillenmeyer* that the taxpayer had any other connections to Ohio. Schaad seizes on that language in an effort to expand the holding beyond the facts at issue in that case and beyond established Due Process Clause case law.

Willacy, 159 Ohio St.3d 383, is likewise distinguishable. *Willacy* holds that the City of Cleveland could tax income of a Florida resident from the exercise of stock options granted while working in Cleveland because what mattered for tax purposes was that she was working in Cleveland when the options were granted. Like *Hillenmeyer*, *Willacy* did not address the constitutionality of an Ohio state statute governing municipal taxation, nor the State of Ohio's power to govern taxation its own citizens. Rather *Willacy* held that the taxable event arose when the taxpayer was granted stock options during her employment in Cleveland and not years later, when as a Florida resident, she exercised those options. Accordingly, she was subject to tax in

Cleveland when she exercised her stock options even though she had not worked there for a decade.

V. Response To Proposition of Law No. 3: The Courts Below Properly Considered The Emergency Nature Of Section 29 As Relevant Context In Their Analysis.

In the course of evaluating Section 29, the Court of Appeals naturally referenced the emergency situation confronted by the General Assembly. When evaluating whether Section 29 has a rational basis *of course* the emergency situation provides important context to demonstrate the rational basis of the statute. As the U.S. Supreme Court recognized during the Great Depression, "While emergency does not create power, emergency may furnish the occasion for the exercise of power. Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426, 54 S.Ct. 231, 78 L.Ed. 413 (1934).

The Court of Appeals in this case mentioned that Section 29 was adopted in response to a public health crisis as an emergency measure to provide context for Section 29's passage as part of a larger bill addressing the pandemic, and to make the point that there was no public health crisis at issue in the cases relied upon by Schaad. That context is very relevant to the rational basis underlying Section 29. The Court of Appeals was not adopting any kind of a rule that the General Assembly's powers grow during a pandemic or that the pandemic alone justified Section 29. The General Assembly's powers are inherently very broad and did not require any expansion.[25]

[25] Schaad's reliance upon a First Amendment case for a colorful quote about the law not sleeping during the pandemic overlooks the vast difference between the strict scrutiny applied in cases involving the free exercise of religion and the especially lenient version of the rational basis test that applies to tax legislation. *Brook Park*, 102 Ohio St.3d 166, ¶ 23 (stating that the General Assembly has "large leeway" and the "greatest freedom" in tax laws).

VI. The Amicus Briefs In Support Of Schaad Miss The Mark

None of the *amicus* briefs offered in support of Schaad contribute meaningfully to his argument.

The *amicus* brief of the Ohio Association of Certified Public Accountants, et al., asserts that the General Assembly had the authority to pass Section 29 under the Ohio Constitution. It then asserts that the parties and the courts below *all* misapprehended the meaning of Section 29. These *amici* argue that, because "principal place of work" is a concept used in R.C. 718.011 to determine withholding for employees who do not have a fixed work location throughout the year, Section 29's reference to "principal place of work" meant that it only addressed tax withholding and did not address tax liability. For two reasons, this argument should be disregarded. First, this is an issue that was not asserted in Schaad's Complaint or in any of the briefing in the Trial Court, the Court of Appeals, or in Schaad's Merit Brief in this Court. Second, Section 29 provides that it applies "for purposes of Chapter 718" and therefore the General Assembly has already determined, in plain terms, the scope of Section 29.

Amici curiae are not parties to a case and may not interject issues or claims not made by any party. *Wellington v. Mahoning Cty. Bd. Of Elections*, 117 Ohio St.3d 143, 2008-Ohio-554, 882 N.E.2d 420, ¶ 53; *State ex rel. Grendell v. Walder*, 166 Ohio St.3d 533, 2022-Ohio-204, 188 N.E.3d 152, ¶ 31, n. 1; *Lorain Cty. Bar Assn. v. Zubaldah*, 140 Ohio St.3d 496, 2014-Ohio-4060, 20 N.E.3d 687, ¶ 49. At no point in this case did Schaad ever argue that Section 29 is only a withholding statute; the only argument he made concerning the scope of Section 29 was that, based upon his pre-pandemic practice, he was taxed for some days that he would have worked outside Cincinnati in 2020 even without the pandemic. He agreed in the Trial Court that this claim was mooted by payment of a partial refund to him. The only live issues remaining in this case turn on Section 29's validity under the Ohio and U.S. Constitutions, not its interpretation.

Moreover, Section 29, in plain terms, governs its own scope: it applies "for the purposes of Chapter 718. of the Revised Code." Chapter 718 is, of course, the chapter that governs municipal income and net-profits tax in Ohio – in all its aspects, not simply withholding. *Amici* would have this Court read into Section 29 a restriction that is not there in violation of the longstanding rule of this Court that statutes are to be given their plain meaning. *Stewart v. Vivian*, 151 Ohio St.3d 574, 2017-Ohio-7526, 91 N.E.3d 716, ¶ 24. Indeed, this Court has said that "we do not have the authority to dig deeper than the plaint meaning of an unambiguous statute." *Id.*, ¶ 30.

In the Ohio Chamber of Commerce's *amicus* brief, there are two statements of particular note. First, it states that under Section 29, an employee can be subject to taxation despite having no connection to the taxing municipality. But Section 29 only applied to workers whose principal place of work was in the taxing city at the start of the pandemic. It treated a displaced employee as continuing to work in the municipality where his principal place of work had been located. By definition, such an employee has a connection to the taxing municipality, as amply demonstrated by the facts in this case. Schaad's principal place of work at the start of the pandemic was in Cincinnati. He had worked over 80% of his time there from 2017 to 2019. In 2020, despite allegedly not working in Cincinnati from June through November, he still worked in Cincinnati 51% of his working days, from January through May and in December.

Second, the Chamber states that the income tax was based "solely upon their employer having an office there." Again, not so. Schaad was subject to Cincinnati's tax in 2020 not because his employer's headquarters is in Cincinnati, but because Schaad himself had his principal place of work at that headquarters.

Let us assume that Schaad's employer had hired another employee doing similar work to Schaad in 2015, but that it had permitted this employee to work remotely from her home in, say, Lorain County, and that this employee worked from home 100% of the time and had never maintained an office in Cincinnati or ever physically came to Cincinnati for work. Such an employee would not have had a principal place of work in Cincinnati in March 2020 and Section 29 would be entirely irrelevant to them.

Amicus the Independent Women's Law Center likewise distorts the impact of Section 29 when it states that the General Assembly "wrongly declared all employees working from home to be onsite employees operating from their employers' place of business. It did so regardless of whether the employee had previously worked remotely." Once again, Section 29 did no such thing. It only applied to those whose principal place of work was in a municipality at the start of the pandemic, and who changed their work location as a result of the pandemic at the direction of their employer. Section 29 said that, for these employees, they were deemed to be working at their pre-pandemic principal place of work. If they were displaced from their principal place of work for some other reason, or if their employer changed their work assignment so that their principal place of work had moved out of the city, Section 29 had no application. And if they had already been working remotely full-time outside of Cincinnati at the start of the pandemic, Section 29 had no application – in that case the principal place of work would not have been in Cincinnati.[26]

VII. Conclusion.

The General Assembly adopted Section 29 to minimize municipal income tax burdens on Ohio's workers, businesses, and municipalities and to protect municipal budgets during an

[26] Even if Section 29 could have been interpreted as *amicus* suggests, that application is not at issue here. It is undisputed that Schaad's principal place of work was in Cincinnati when the pandemic started so that Section 29 applied to him when he pivoted to remote work at the direction of his employer.

unprecedented and unforeseen emergency. When the General Assembly passed Section 29, it was acting to minimize disruption and uncertainty at a time when Ohio workers were undergoing a massive pivot to working from home. Section 29 was well within the General Assembly's plenary powers under the Ohio Constitution. Further, the General Assembly did not violate the Due Process Clause when it acted to set municipal income tax policy for Ohio's citizens, businesses, and municipalities. Accordingly, the judgment of the Court of Appeals sustaining Section 29 against Schaad's attacks must be affirmed.

Respectfully submitted,

/s/ Diane M. Menashe
Diane M. 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 Defendant-Appellee Karen Alder,
As Finance Director of the City of Cincinnati

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by electronic mail on October 4, 2022, upon the following counsel:

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

Counsel for Plaintiff-Appellant

Mark S. Yurick
City Attorney
The City of Lebanon, Ohio
50 South Broadway
Lebanon, Ohio 45036
lyurick@lebanonohio.gov

Counsel for Amicus Curiae
City of Lebanon, Ohio

THOMAS M. ZAINO (0041945) (Counsel of Record)
STEPHEN K. HALL (0069009)
Zaino Hall & Farrin LLC
3600 Huntington Center
41 S. High Street
Columbus, Ohio 43215
tzaino@zhftaxlaw.com
shall@zhftaxlaw.com

Counsel for Amicus Curiae, The Ohio Society of CPAs, et al.

Joseph D. Henchman (PHV 2022-25681) Counsel of Record
NATIONAL TAXPAYERS UNION FOUNDATION
122 C Street NW, Suite 650
Washington, DC 20001
jbh@ntu.org
Counsel for Amicus Curiae National Taxpayers Union Foundation

Emmett E. Robinson (0088537)
Counsel of Record
ROBINSON LAW FIRM LLC
6600 Lorain Avenue, #731
Cleveland, OH 44102
(216) 505-6900
erobinson@robinsonlegal.org

Gene C. Schaerr* (PHV-26153-2022)
Kathryn Tarbert* (PHV-26140-2022)
SCHAERR |JAFFE LLP 1717 K Street NW, Suite 900 Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com
ktarbert@schaerr-jaffe.com

Counsel for Amicus Curiae Independent Women's Law Center

Mark A. Loyd (Ohio Bar No. 0086129) (COUNSEL OF RECORD)
Bailey Roese (Ohio pro hac No. 4626-2022; Ohio Bar admission pending)
Stephanie Bruns (Ohio pro hac No. 26157- 2022)
Dentons Bingham Greenebaum LLP
101 South Fifth Street, Suite 3500
Louisville, Kentucky 40202
(502) 587-3552
mark.loyd@dentons.com
bailey.roese@dentons.com stephanie.bruns@dentons.com

Tony Long (Ohio Bar No. 0037784)
34 S. Third St., Suite 100
Columbus, Ohio 43215
(614) 228-4201
tlong@ohiochamber.com

COUNSEL FOR AMICUS CURIAE OHIO CHAMBER OF COMMERCE