IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel. JAMES PALM., et al	:	
Relators,	:	**Case No. 2021-0960**
v.	:	
JEFF MCCLAIN TAX COMMISSIONER, et. al	:	**Original Action in Mandamus**
Respondents	:	

RELATORS' MEMORANDUM IN OPPOSITION TO RESPONDENT JEFF MCCLAIN'S MOTION TO DISMISS

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I. INTRODUCTION

Every year, thousands of Ohio taxpayers are denied refunds that they are owed and many are even required to pay their individual income tax obligation twice due to faulty accounting by Ohio's Tax Commissioner and Treasurer. Most taxpayers do not even realize this is happening. But, the State of Ohio has long known about it. State law requires that the Tax Commissioner and Treasurer work together to create policies and procedures to ensure that all taxpayers are given credit for all payments made toward their tax liability. R.C. 5703.058. Both Respondents have failed to fulfill that statutory duty in regard to withholding payments received from employers. State law further requires the Tax Commissioner to notify the taxpayer if/when there is a refund awaiting them in the State's accounts before the refund is forfeited and absorbed by the Treasurer into the State's funds. R.C. 5703.77. The Tax Commissioner continually fails to fulfill this statutory duty that is owed to all Ohio's taxpayers because his faulty accounting means that he lacks the data he would need to rely upon to make those determinations.

These failures have created a system where the State collects payments on individual income tax liabilities from employers through the withholding of wages, but has no policies and procedures in place to ensure that individual income tax accounts are properly credited with those payments. The State's failure to maintain the withholding information in a way that credits individual taxpayer accounts puts employee taxpayers who do not have their Form W-2 information in an impossible position when they file taxes. If a taxpayer cannot produce a Form W-2 showing the amount of tax withheld and paid to the State by an employer, the Tax Commissioner simply processes the tax return as though zero dollars had been paid on that account. This causes refunds to go unpaid and often forces taxpayers (such as Relator James Palm) to pay the same liability twice: once through wages withheld by their employer(s) and again when they

file a tax return. Since the State has no system to keep track of the withheld wages it accepts from employers, it is entirely reliant on the taxpayer producing a W-2. In fact, the Tax Commissioner cannot even protect the State from underpayment because it has no process or procedure to cross-check information in its possession from employers unless the W-2 is produced by the employee taxpayer. Relators seek a writ of mandamus to address this pervasive and systemic problem. A writ of mandamus is their only means of recourse precisely because there is no other adequate remedy available when one lacks the data that should have been kept by the State. This issue continues to repeat itself every year for countless Ohio taxpayers, yet it continually evades review due to the evidentiary burden in the Board of Tax Appeals.

In his Motion to Dismiss, Respondent McClain argues that Relators' Complaint should be dismissed due to failure to sufficiently plead the elements of mandamus. Respondent's arguments are misguided, overreaching, and contrary to the General Assembly's clear, statutory obligations created by R.C. 5703.058 and R.C. 5703.77.

I. STATEMENT OF FACTS

Relators generally agree with the Respondent's recitation of the facts in his Motion to Dismiss except that Respondent's statement of facts section overly dwelled on the individual circumstances of each Relator and ignored several, critical allegations which demonstrate why the Relators bring this action *in the name of the State of Ohio* for the benefit of all similarly-situated taxpayers. This action details the experiences of employee taxpayers, *such as the Relators*, as they attempt to navigate Ohio's income tax system if/when they are unable to access their income tax

withholding information on their own[1] and forced to rely on the Treasurer and Tax Commissioner's accounting practices and transparency. In his recitation of the facts, Respondent failed to discuss, for example, Relators' allegations that the Treasurer and Tax Commissioner have been on notice of their statutory obligations and their basic accounting problems for years. For example, the Complaint details how in addition to the Relators, advocates from every Legal Aid services organization in Ohio raised the alarm on this double taxation issue in early 2019 through a letter to the Tax Commissioner. *See* Compl. at ¶ 73 and Exhibit M (letter to Ohio Tax Commissioner from seven Low Income Taxpayer Clinics, including all six Ohio legal aid programs). Legal Aid advocates have also pursued other avenues on behalf of Relators and other low income taxpayers without success. *See* Compl. at ¶¶ 71-75; Exhibit L (protest letters to the Ohio Tax Commissioner for each Relator); Exhibit N (request for a taxpayer opinion letter to Ohio Tax Commissioner for a different taxpayer). Indeed, as alleged in Relators' Complaint, even the Office of the Inspector General discovered this accounting and crediting problem in 2013 finding that *millions* of corporate franchise, employer, and school district tax dollars had been overpaid, but improperly forfeited to the State. Compl. at ¶ 20 (citing the Office of the Inspector General's (OIG) 2013 annual finding the Commissioner failed to credit and notify corporate, employer, and school district taxpayers before their overpayments forfeited to the State); ¶ 25 fn. 3 (citing Legislative Service Commission, Fiscal Note &Local Impact Statement. Am.Sub.S.B. No. 263 (describing OIG's investigation of the Commissioner)).

[1] This situation arises often and for a multitude of reasons, including when an employer fails to generate and/or provide a W-2 to the employee, or when the employee's W-2 is lost or destroyed. For example, Relator Palm lost his W-2 and his employer has since gone out of business leaving him unable to obtain a new W-2 from the employer, while Relator Pearson's abusive ex-partner destroyed her W-2 prior to her attempting to file for a tax refund. Compl. at ¶ 25-55.

The accounting problem has existed for years and directly impacts *all* taxpayers, not just corporations, employers, and school districts. Relators James Palm and Sara Pearson are just two examples of taxpayers who have faced this situation as *employee* taxpayers. Each has lived and worked in the State of Ohio for many years. *Id.* at ¶¶ 10-11. They were unable to obtain a copy of their W-2 forms through no fault of their own. *See id*. at ¶¶ 25-55. However, they, like all other employees subject to Ohio's income tax, have reason to believe their employers followed the law and withheld from their wages and paid to the State of Ohio amounts to satisfy their state income tax liability. *Id.* at ¶¶ 34, 48, Exs. D and I. After all, their employers followed federal law and withheld from their wages and paid to the federal government amounts to satisfy their federal income tax obligation. *Id. at* ¶¶ 28-29, 50 and Exs. E and J (IRS wage and income transcripts for each Relator). But, when each Relator attempted to claim the money they believed they were owed from the State of Ohio, respectively, they quickly learned that the Tax Commissioner and Treasurer had not credited, and had no intention to credit, their taxpayer accounts with the state income tax payments of their employers despite R.C. 5703.058 and R.C. 5703.77. *Id*. The Tax Commissioner imputed zero withholding to each Relator simply because they could not access their W-2 or the withholding information on their own, and demanded they pay the tax again. *See id*. at ¶ 35-38, 52, Ex. F (Palm's state income tax returns in which he listed "unknown" for the amount of Ohio income tax withheld); Exs. G and H (tax assessments showing $0.00 in "Payment(s) Applied" and "Less Payments"); and Ex. K (Pearson's tax returns in which she listed "unknown" for the amount of Ohio income tax withheld).

When employee taxpayers attempt to challenge the Tax Commissioner, they lose time and again because the taxpayer is assigned the burden of proof and required to produce a W-2 form to rebut the billing assessment. This forces the taxpayer to pay the tax again or face a collection action

from the State of Ohio. Many taxpayers face this impossible situation year after year because the Tax Commissioner and Treasurer fail to comply with their accounting obligations under R.C. 5703.058 and R.C. 5703.77. Employee taxpayers are robbed of their refunds and face double taxation all because they are unable to produce a single piece of paper (their Form W-2) on their own. This mandamus action seeks to remedy that for the benefit of all taxpayers and the State of Ohio.

II. LAW AND ARGUMENT

A. Standard of Review

Respondent Ohio Tax Commissioner Jeff McClain moved this Court to dismiss Relators' Complaint pursuant to Civ.R. 12(B)(6). A court may only dismiss a mandamus action under Civ.R. 12(B)(6) for failure to state a claim upon which relief may be granted "if, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in the relator's favor, it appears beyond doubt that he can prove no set of facts entitling him to the requested writ of mandamus." *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 9. To that end, "a Civ.R. 12(B)(6) dismissal of a mandamus action based upon the merits is unusual and should be granted with caution." *State Ex Rel. Washington, v. D'apolito, Judge,* 156 Ohio St.3d 77, 2018-Ohio-5135, ¶ 7. The court cannot rely on evidence or allegations outside of the complaint. *State ex rel. Fuqua v. Alexander,* 79 Ohio St.3d 206, 207, 680 N.E.2d 985 (1997). However, "[d]ocuments attached to or incorporated into the complaint may be considered on a motion to dismiss pursuant to Civ.R. 12(B)(6)." *NCS Healthcare, Inc. v. Candlewood Partners, L.L.C.*, 160 Ohio App.3d 421, 2005-Ohio-1669, 827 N.E.2d 797, ¶ 20 (8th Dist.).

B. Relators Have Sufficiently Pled Each Element of Mandamus.

"To be entitled to a writ of mandamus, a party must establish by clear and convincing evidence (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondent to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law." *State ex rel. Adams v. Winkler*, 166 Ohio St.3d 412, 2022-Ohio-271, 186 N.E.3d 796, ¶ 9. Respondent's Motion to Dismiss should be denied because Relators have offered sufficient factual allegations supporting each element of mandamus.

As a preliminary matter, it is important to understand Ohio's statutory framework with regard to individual income taxation. Under Ohio law, every Ohio resident and every part-year resident is subject to Ohio's individual income tax. R.C. 5747.02. To collect this tax, employers have a mandatory duty to deduct and withhold from their employees' compensation each payroll period "an amount substantially equivalent to the tax reasonably estimated to be due." R.C. 5747.06(A). Employers are not only required to deduct and withhold the tax from each employees' wages, but they are also required to periodically pay the amount of state tax withheld from each employee directly to the Ohio Treasurer through the Ohio Business Gateway (OBG) or electronic funds transfers as required by R.C. 5747.02, R.C. 113.067, R.C. 113.067, R.C. 113.061, OAC 5703-7-19, and OAC 5703-7-19 (Code sections regulations governing the treasurer's handling of individual income tax withholding payments received by him via Ohio Business Gateway), and R.C. 131.02. When making each payment to the state, the employer must provide to the state the "(1) full name of each employee, the employee' s address . . . (2) the social security number of each employee; (3) the total amount of compensation paid . . . [and] (4) the amount of the tax imposed by section 5747.02 of the Revised Code," among other requirements. R.C. 5747.07(F).

Once an employee signals to his employer his desired tax exemptions (using the State's Form IT 4), the employee is no longer involved in the process. Rather, it is up to his employer to withhold the estimated payments from his wages and periodically forward those tax payments directly to the State of Ohio. And it is up to the Tax Commissioner and Treasurer to receive those payments and give credit where credit is due (i.e., to the employee taxpayer) before the payment amount is subject to forfeiture to the state by operation of law. *See* R.C. 5747.07, R.C. 113.061, and OAC 5703-7-19 (each describing withholding payments by employers); *see also* R.C. 5749.08 (unclaimed tax amounts forfeit to the State of Ohio after four years); and Compl. at Exs. A and B (Form IT 4 and instructions); R.C. 5703.058 and R.C. 5703.77. After all, it is the employee's own tax obligation and prospective income tax refund. It is not the employer's money.[2] The employer is a mere conduit for the payment.[3]

Ohio's General Assembly has enacted a statutory framework intended to ensure that *all* tax dollars paid to the State are properly accounted for so that the appropriate tax accounts are promptly credited with each payment. There are two primary statutes involved in this framework: R.C. 5703.058 and R.C. 5703.77. The first of these, R.C. 5703.058, is titled, "Joint Policies of Tax Commissioner and State Treasurer." It provides:

> Before January 1, 2008, the tax commissioner and the treasurer of state **shall consult and jointly adopt policies and procedures** for the processing of payments of taxes administered by the tax commissioner **such that payments are deposited in or credited to the appropriate account or fund within thirty days after receipt by the commissioner or treasurer**. The policies and procedures **shall**

[2] Employers (not employees) are generally entitled to the refund only when there is a math or processing error with their payment such as when an employer mistakenly paid the tax liability twice, the employer posted the payment to the wrong tax period, or the employer included incorrect figures on the return.

[3] In this regard, Ohio's income tax is no different than federal income taxation. Once federal income and social security taxes are withheld from employees' wages, the United States via the Internal Revenue Services (IRS) is required to credit the amount withheld against the employees' individual income tax liabilities, regardless of whether such taxes are actually paid to the United States and even though the credits may result in refunds to the employees. 26 U.S.C. § 31(a)(1); 26 C.F.R. 1.31-1(a).

> **apply to all such payments** received on or after January 1, 2008. The policies and procedures are supplemental to rules adopted by the treasurer of state under section 113.08 of the Revised Code.

(Emphasis added). This statute requires the Respondents to work together to "jointly adopt policies and procedures" designed to ensure that **"all" tax "payments** are deposited in or credited to the appropriate account or fund within thirty days after receipt by the commissioner or treasurer." *Id*. The second statute, R.C. 5703.77, is titled "Resolution of taxpayer credit account balances." It provides, in part, in subsection (B):

> (B) As soon as practicable, but not later than sixty days before the expiration of the period of time during which a taxpayer may file a refund application for a tax or fee, the tax commissioner **shall review the taxpayer's accounts** for the tax or fee **and notify the taxpayer of any credit account balance** for which the commissioner is required to issue a refund if the taxpayer were to file a refund application for that balance, regardless of whether the taxpayer files a refund application or amended return with respect to that tax or fee. The notice shall be made using contact information for the taxpayer on file with the commissioner.

(Emphasis added). Via this statute, the General Assembly has required that the Tax Commissioner "review the taxpayer's accounts . . . and notify the taxpayer of any credit account balance for which the commissioner is required to issue a refund . . . ." *Id*. The term, "credit account balance" is defined in the statute as the "amount of a tax or fee that a taxpayer remits to the state in excess of the amount required to be remitted . . . ." R.C. 5703.77(A)(3). Importantly, the review and notification are to be done at least 60 days before each deadline for a taxpayer to file a refund application for the tax or fee "regardless of whether the taxpayer files a refund application or amended return with respect to that tax or fee." R.C. 5703.77(B). In conducting his review, the Tax Commissioner cannot disregard information in his possession. *See* R.C. 5747.13(A) ("If the Tax Commissioner finds that a taxpayer has failed to timely file an income tax return, files an incorrect return, or fails to pay the full amount of the taxes due, he may make an assessment against the taxpayer for any deficiency based upon any information in the Commissioner's possession.").

These statutes are designed to work together to ensure, among other things, that wages withheld by employers and paid to the State on behalf of their employees will be credited to those individual employees' taxpayer accounts. Only then will the Tax Commissioner have the information he needs to be able to "review" those accounts and "notify the taxpayer of any credit account balance" as required by R.C. 5703.77(B). This statutory framework applies to all tax payments and all taxpayers to increase the likelihood that any credit account balance that exists in the tax accounts will be resolved before the balance is forfeited to the Treasurer and State of Ohio and to ensure the State of Ohio is able to identify underpayments by taxpayers. The Respondents have not even suggested that certain taxpayers have been exempted from this statutory framework. Instead, Respondent McClain has seemingly argued that the statutes do not apply to any taxpayers at all. The Respondents apparently wish this Court to construe this crediting requirement as being limited to ensuring that all tax dollars paid into the state treasury are deposited into one massive account marked, "taxes."

To the contrary, based on the plain language of the two statutes, the General Assembly intended to require the prompt and accurate accounting of *all* tax payments made to the State in a way that will allow for the Tax Commissioner to alert *all* taxpayers when refunds are due and to assess taxpayers when additional taxes are owed. This necessarily includes taxpayers such as the Relators who are liable for individual income taxes. In fact, the General Assembly included a specific definition of the word "taxpayer" as used in R.C. 5703.77 (which requires the tax commissioner to review accounts and notify taxpayers of refunds due). The General Assembly defined the word "taxpayer" there to include any "person subject to or previously subject to a tax or fee . . . ." R.C. 5703.77(A)(1). The words "tax or fee" were further defined to mean any "tax

or fee administered by the tax commissioner" which necessarily includes individual income taxes R.C. 5703.77(A)(2).

The Commissioner and Treasurer are jointly vested with this duty to credit and properly account for the tax payments because the Tax Commissioner, under R.C. 5703.05 and R.C. 5747.18, has the power and authority to determine the tax liability, and the Treasurer is responsible for the fidelity and safekeeping of tax payments as they are kept in the state treasury or in state depositories. The tax payments flow through the Treasurer from the very beginning to the end; hence why the General Assembly "supplemented" his accounting duties via R.C. 5703.058 and required him to collaborate with the Tax Commissioner. *See* R.C. 5747.02, R.C. 113.067, R.C. 113.067, R.C. 113.061, OAC 5703-7-19, and OAC 5703-7-19 (Code sections regulations governing the treasurer's handling of individual income tax withholding payments received by him via Ohio Business Gateway), and R.C. 131.02.

1. Relators have a clear legal right to the requested relief.

Relators are entitled to compel the requested relief based on the plain language of R.C. 5703.058 and R.C. 5703.77. The plain language of R.C. 5703.058 provides that "the tax commissioner and the treasurer of state shall consult and jointly adopt policies and procedures for the processing of payments of taxes . . . ." These policies and procedures relate to "*the processing of payments."* R.C. 5703.058. They are accounting procedures for tax dollars flowing into the state treasury, which must of course involve the treasurer of state. And the policies and procedures "shall apply to all such payments received" after a certain date. R.C. 5703.058.

When interpreting a statute, courts start with the text of the statute to ascertain and effectuate legislative intent. *State v. Faggs*, 159 Ohio St.3d 420, 2020-Ohio-523, 151 N.E.3d 593 (2020), ¶ 15. The court must consider the plain language of the statutes and "read words and

phrases in context and construe them in accordance with rules of grammar and common usage." *State ex re. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 11. In the absence of a specific, peculiar, or technical meaning as a result of a statutory definition, the language must be construed based on its plain, natural, and commonly understood meaning because the wording itself is the best and most reliable index of the statute's meaning. *Rockies Express Pipeline, L.L.C. v. McClain*, 159 Ohio St.3d 302, 2020-Ohio-410, 150 N.E.3d 895 (2020), ¶ 12. If the statutory wording is clear, a court cannot add to or alter it to accomplish a purpose that does not appear on the face of the statute. *HIN, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 124 Ohio St.3d 481, 2010-Ohio-687, 923 N.E.2d 1144 (2010), ¶ 15.

By its plain language, R.C. 5703.058, provides that all Ohio taxpayers have a clear legal right to have their accounts promptly credited by the Tax Commissioner and Treasurer. R.C. 5703.058. This crediting obligation extends to employees whose state income taxes are withheld from their paychecks and paid in trust by their employers to the State of Ohio. In their Complaint, Relators sufficiently alleged how they fall within the statute's protections and have a clear right to the requested relief under R.C. 5703.058. *See* Compl. at ¶¶ 23, 26-27, 30-36, 48-53, 56, 61-62. They are taxpayers from whom individual income tax was levied under R.C. 5747.02. *Id*. They believe their employers withheld from their wages amounts to satisfy their state income tax liability pursuant to their IT 4 form in compliance with R.C. 5747.06 and Ohio Administrative Code 5703-7-06. *Id.* at ¶¶ 34, 48, Exs. D. and. I. Per the statutes they wish to enforce, the Respondents should have the information about exactly how much of Relators' tax debt has been pre-paid through their withheld wages. Therefore, each Relator, and every similarly-situated employee taxpayer, and their tax payments, fall within the group of "taxpayers" and "tax payments" included in R.C. 5703.058 giving them a clear right to request this relief.

To permit the Treasurer and Commissioner to deposit all employer-withheld tax dollars into the state treasury in one massive account marked, "taxes," without any underlying accounting needed to verify an employee's eligibility for a refund is an absurd result that wholly undermines the intent of the legislature to demand transparency and accurate accounting with every taxpayer dollar. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 93 Ohio St.3d 558, 563 2001-Ohio-1608, 757 N.E.2d 339 (2001) (explaining that Courts avoid any construction of statutory language which leads to an absurd result); *see also* R.C. 1.47. It would also undermine R.C. 5703.77 because, until he credits the employee taxpayer's account, the Tax Commissioner does not have the information he needs to be able to "review" the account and "notify the taxpayer of any credit account balance" as required by R.C. 5703.77(B).

As to the second statute, R.C. 5703.77, its statutory definitions clearly include the Relators and similarly situated employee taxpayers. The word "taxpayer" is defined in R.C. 5703.77(A)(1) as "a person subject to or previously subject to a tax or fee, a person that remits a tax or fee, or a person required to or previously required to withhold or collect and remit a tax or fee on behalf of another person." All employees in the State of Ohio are "subject to" individual income tax. R.C. 5747.02. In their Complaint, Relators offered sufficient facts to show how they fall within the statute's protections under R.C. 5703.77 and can demand performance of its duties. *Eg.*, Compl. at ¶¶ 23, 26-27, 30-36, 48-53, 61-62.

2. Respondent McClain has clear legal duties to work with the Treasurer to jointly adopt policies and procedures to ensure that individual taxpayers' accounts are promptly credited as payments are received per R.C. 5703.058, and to review the accounts and notify taxpayers when they may be owed a refund based on their credit account balance per R.C. 5703.77.

The General Assembly used mandatory language in describing Respondent McClain's duty under R.C. 5703.058. The state tax commissioner "shall consult" with the treasurer and they "shall . . . jointly adopt policies and procedures for the processing of payments of taxes . . . such that payments are deposited in or credited to the appropriate account or fund within thirty days after receipt by the commissioner or treasurer." R.C. 5703.058. The General Assembly knows how to use discretionary language in a statute, but made a choice to make this duty mandatory. *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶ 23 (the word "shall" requires a mandatory construction).

Respondent McClain does not have discretion to ignore his clear legal duties and requirements created by R.C. 5703.058. He may have some discretion as to how his duty to "consult and jointly adopt policies and procedures for the processing of payments of taxes" is carried out, but the intent of the statute is clear. The Respondents' policies and procedures must accomplish a certain accounting goal which they do not currently accomplish. That is, they must ensure that "all" tax "payments are deposited in or credited to the appropriate account or fund within thirty days after receipt by the commissioner or treasurer." R.C. 5703.058. The current policies he developed with the Treasurer have failed to do the one thing required by R.C. 5703.058. *See* Compl. at ¶ 21; Ex. C. The General Assembly intended for these two statutes to work together to ensure that the Tax Commissioner would be able to later "review taxpayer's accounts . . . and notify the taxpayer of any credit account balance." R.C. 5703.77. To not read these statutes together wholly undermines what is otherwise a harmonious statutory scheme.

The Tax Commissioner argues that Relators' claim must fail because of the word "supplemental" and cross-reference to R.C. 113.08 in R.C. 5703.058 eliminate any duty owed to individual taxpayers. He contends that these items restrict the statute such that R.C. 5703.058 "does not impose any duty on the Tax Commissioner and Treasurer to develop policies and procedures with respect to accounting for tax payments made by individuals." McClain Motion, p. 12. He says the General Assembly was only concerned with the proper procedures for depositing payments "collected by the agencies from taxes, licenses, premiums, and other activities," and "deposits made by state entities or agents thereof," not accounting for individuals' tax payments as they are received by the State. McClain Motion, pp. 12-13. The plain language of both R.C. 5703.058 and R.C. 113.08 belies this argument.

The word "supplemental" is an adjective defined as "serving to supplement." *Merriam-Webster Online*, available at https://www.merriam-webster.com/dictionary/supplemental (accessed June 6, 2022). "Supplement" is defined as "to add or serve as a supplement to" something. *Merriam-Webster Online*, available at https://www.merriam-webster.com/dictionary/supplement (accessed June 2, 2022). So, the General Assembly intended for the policies and procedures mandated by R.C. 5703.058 to *add to* the Treasurer's existing policies and procedures described in R.C. 113.08, which require the Treasurer to account for and keep track of payments from state agents and agencies. The General Assembly decided that, *in addition to* being responsible for accounting for payments received from other agencies, the treasurer i*s also responsible for* accounting for tax payments he may receive directly (and those received via the Tax Commissioner).

Further, to limit the statute's application to agency transfers based on the statute's cross-reference to R.C. 113.08 would render other statutes within the same statutory framework

meaningless. This includes R.C. 5747.07(F), which requires employers, when making their withholding payment to the State, to provide to the State the "(1) full name of each employee, the employee's address . . . (2) the social security number of each employee; (3) the total amount of compensation paid . . . [and] (4) the amount of the tax imposed by section 5747.02 of the Revised Code . . . ." R.C. 5747.07(F). The General Assembly provided this third statute in the framework to ensure the State would have the necessary information about each individual taxpayer to promptly credit each individual taxpayer account per R.C. 5703.058.

As to the second statute, R.C. 5703.77, Respondent Tax Commissioner's Motion does not raise a single argument to suggest his duties under R.C. 5703.77 are unclear and inapplicable to the Relators. That is probably because the General Assembly was very clear with its intentions based on the plain text of the statute. The General Assembly used mandatory language of "shall" to require the Tax Commissioner to review "taxpayer" accounts for "credit account balances" "not later than sixty days before the expiration of the period of time during which a taxpayer may file a refund application" for such a balance. R.C. 5703.77(B). If the Tax Commissioner identifies a balance, he must "notify the taxpayer" "using contact information for the taxpayer on file with the Commissioner." *Id*. These duties apply "regardless of whether the taxpayer files a refund application or amended return with respect to that tax or fee." *Id*. All of these statutes work together to serve a useful and consistent purpose: to ensure the state has information at its disposal to accurately determine tax liability. R.C. 5747.13(A) ("If the Tax Commissioner finds that a taxpayer has failed to timely file an income tax return, files an incorrect return, or fails to pay the full amount of the taxes due, he may make an assessment against the taxpayer for any deficiency **based upon any information in the Commissioner's possession**.") (Emphasis added).

3. There is no adequate remedy available to the Relators in the ordinary course of law.

This mandamus action is the Relators' only avenue to address the Tax Commissioner and Treasurer's failure to comply with R.C. 5703.058 and R.C. 5703.77. Respondent alleges that the Relators' Complaint must fail because they did not avail themselves of administrative remedies supposedly available to, and adequate for, them to address their individual tax situations. Respondent suggests that Relators should have petitioned for reassessment under R.C. 5747.13(B), followed by the inevitable appeal to the Board of Tax Appeals under R.C. 5717.02, and an appeal to the Supreme Court or a lower appellate court under R.C. 5717.04 after that. Sprague Motion, p. 9. It appears that Respondent is misguided regarding the availability and adequacy of the administrative process in this context and misunderstands the relief sought by Relators.

a) *A Petition for Reassessment with Subsequent Appeal is not an Adequate Remedy at Law for Relators.*

Relators concede that R.C. 5747 outlines various administrative procedures, including a petition for reassessment and appeals. With that said, none of the procedures lend relief to the Relators nor similarly situated employee taxpayers in ways which are adequate. To be an adequate remedy in the ordinary course of the law, a remedy must be "complete, beneficial, and speedy." *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶ 41. "[T]he mere existence of the remedy of appeal does not necessarily bar the issuance of a writ of mandamus." *State ex rel. Liberty Mills, Inc. v. Locker*, 22 Ohio St.3d 102, 104, 488 N.E.2d 883 (1986), *citing to State, ex rel. Emmich, v. Indus. Comm.*, 148 Ohio St. 658, 664, 76 N.E.2d 710 (1947). The Court must examine the appeals remedy "under the circumstances" of each case to determine whether its existence should bar a writ of mandamus. *State ex rel. Ohio State Racing Com'n v. Walton*, 37 Ohio St.3d 246, 248, 525 N.E.2d 756 (1988).

Neither a petition for reassessment nor any appeal could afford complete, beneficial, and speedy relief to employee taxpayers who are unable to access their income tax withholding information. It is their lack of information about how much money was withheld from their wages and paid to the state on their behalf that leaves the employees unable to dispute the arbitrary "finding" made by the Tax Commissioner (that zero dollars had been withheld). Relators here have no evidence to dispute that arbitrary finding because they are unable to obtain their W-2. Compl. at ¶¶ 31-35, 41, 51-54, 56-59, 64-67. In assessment cases and appeals, the taxpayer is assigned the burden of proof and the Commissioner's initial findings are presumed valid. *Belgrade Gardens v. Kosydar*, 38 Ohio St.2d 135, 311 N.E.2d 1, 6 *(1974)*; *see also, Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 216, 450 N.E.2d 687 (1983). This standard applies to any appeal, as well, as "[t]he Tax Commissioner's findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful." *Hatchadorian v. Lindley*, 21 Ohio St.3d 66, 488 N.E.2d 145 (1986), syllabus paragraph one. "[I]t is error for the board to reverse [a] determination" absent some "competent and probative evidence . . . to show that the Tax Commissioner's determination . . . is factually incorrect." *Id*. at syllabus paragraph two.

Indeed, this impossible position is well-documented on the Board of Tax Appeals' docket. While decisions of the BTA cannot serve as precedent per R.C. 5703.021, they are demonstrative of the procedural quagmire into which Respondents wish to discard this claim. *Compl.* at ¶¶ 65-67. For example, the case of *McCoy vs. Zaino*, BTA No. 2003-A-371, 2003 WL 21998392 (Aug. 15, 2003), is directly on point. There, Mr. McCoy appealed an individual income tax assessment and offered testimony and evidence all too similar to that of Relator James Palm's. Specifically, he contended that he could not obtain his 1996 W-2 from his employer because his employer had gone out of business. *Id*. at 2. His original W-2 form was lost. *Id*. He asked the Ohio Department

of Taxation to help him obtain a copy of the 1996 W-2 withholding information so that he could verify how much of his wages had been paid to the State of Ohio on his behalf. The Department refused. On appeal, the Board of Tax Appeals upheld the Tax Commissioner's assessment because Mr. McCoy could not meet his burden of proof without the W-2. *Id.*

Nearly two decades later, this problem still exists because the two Ohio departments that handle tax payments have never followed the laws the General Assembly enacted to ensure that taxpayers are credited and notified of any credit account balances. Just last year, the Board of Tax Appeals faced a similar situation in *Baillargeon et al. vs. McClain, et al.*, BTA No. 2021-310, 2021 WL 2930322 (July 6, 2021). There, as here, the Tax Commissioner had denied an individual income taxpayer credit for all of the withholding payments his employer had paid to the State on his behalf.[4] The taxpayer argued that he should receive credit for the payments made despite being unable to produce a W-2 form. In presenting his appeal to the Board of Tax Appeals, Baillargeon "again asserted that the taxes due should be reduced to account for withholding." *Id.* at 1. The Board of Tax Appeals affirmed the Commissioner's determination because, by failing to produce the W-2, Mr. Baillargeon had "failed to submit documentation to demonstrate that such payments were in fact made or to confirm the amounts for [the relevant] tax year." *Id.* Similar to the cases identified above, if Relator Palm had tried to appeal his assessments based on the false entry by

[4] It is important to note that *Baillargeon* started as a small claims division case. Respondent McClain argued the small claims division "could" have resolved the individual tax refunds for each Relator. *See* McClain Motion at p. 11. (McClain contending that "Relators do not know that they would not prevail through an appeal to the Board of Tax Appeals. The Board has a small claims division where the standards of proof are not as stringent, and the taxpayer does not need to incur the expense of hiring an attorney. [Relators] might have been successful in convincing the Board that they should receive credit for an appropriate amount of withholding.") This contention is disingenuous considering *Baillargeon* and decades worth of other demonstrative BTA cases even at the small claims level. Taxpayers lose time and again at every stage when they cannot produce their W-2.

the Tax Commissioner claiming that "zero" dollars had been paid via withholding, Mr. Palm could not have produced the W-2 to shoulder his evidentiary burden in that forum. Compl. at ¶¶ 56-59, 64-67 Ex. G and H (Palm's assessments for 2016 and 2018 tax years).

Both Respondents rely on the Relators' lack of evidence of the amount of money the State has already received on their behalf as proof that Relators' claims should fail. But, exactly the opposite is true. This shows why the writ is the only way to provide full relief. If the Respondents simply fulfilled their duties as laid out by the General Assembly, Ohio's taxpayers would *never* find themselves in this catch-22 that Relators describe. If the Respondents adopted policies and procedures that ensured that all withholding tax payments accepted by the state were promptly credited to the correct account, then the Tax Commissioner could review those accounts and notify taxpayers who are entitled to a refund. If that accounting was done, then when an individual income tax return is filed without a W-2 form attached, the Tax Commissioner would not be tempted to artificially inflate the taxes due by "finding" zero dollars had been paid through withholding. *See* Compl. at ¶¶ 4, 32, 35, 52 (facts regarding the Department's arbitrary decision-making). Instead, he would have the data and cross-referencing capability described in the statutory framework to know exactly how much of that income tax obligation had already been paid through wages withheld by employers. That is the harmonious system the General Assembly created - one which does not rely on the employee having access to his W-2 at the end of the year when filing his return. The statutory scheme calls for prompt and accurate accounting throughout the year as the payments are periodically made for each employee via their employers. It is really quite outrageous for the State of Ohio to argue that it is permissible for it to accept payments toward a certain taxpayer's obligation without having to credit that particular taxpayer's account when the money is accepted into the State's coffers. How could that be true? It's nonsensical.

What Relators seek is a remedy that requires these state actors to follow the law. That is precisely what a writ of mandamus is designed to do. If the Respondents were forced to follow this statutory framework in regard to individual income tax withholding payments, it would benefit not just these two Relators for these six tax years currently at issue. It would prevent this same situation from recurring for them in future years and for all other similarly situated Ohio citizens. It would also enhance the state's ability to assess tax underpayments and to identify inaccurate tax refund applications.

b) *The Respondents' Tipped Their Hand in their Motion to Dismiss by Demonstrating the Futility of "Available" Administrative Remedies.*

The Respondents each argued a "clear and convincing" standard applies to Relators in this matter, and that Relators lack the withholding information required to meet that standard. In doing so, they unintentionally supported Relators' argument that any administrative remedy "available" to Relators would be futile and not "adequate." In his Motion, Respondent contends:

> Nor can Relators establish by clear and convincing evidence that they are entitled to a writ crediting them with money allegedly withheld by their employers. Compl. at ¶ 17. Relators have not claimed to have any such evidence, but instead aver that the amount of tax that may have been withheld is unknown. Comp. at ¶¶ 40, 51. Because Relators cannot establish that an amount of tax was withheld from their pay for state withholding, they cannot meet the mandamus burden of clear and convincing evidence of their entitlement to the writ..

(Emphasis added.) McClain Motion, p. 13. The above argument is analogous to what the respondent argued in *State ex rel. Board of County Com'rs of Lucas County v. Austin*, 158 Ohio St. 476, 110 N.E.2d 134 (1953). There, the relator filed for mandamus against a local budget commission after the commission had refused to include in the budget a tax levy passed by popular vote. The commissioner argued that the "relator had no right to levy such tax." *Id.* at 479. In doing so, according to this Court, the respondent had "clearly indicat[ed] their own **attitude in the**

matter-their refusal to include the tax in the budget." *Id*. (Emphasis added). Therefore, the relator had no reason to pursue other remedies because the respondent effectively tipped their hand as to the anticipated outcome of an administrative remedy. *Id*. This situation was ripe for mandamus even though the general rule is that mandamus will not lie to prevent the prospective or anticipatory breach of a duty. *Id*. ("A situation of this kind comes within the exception to the above-stated rule.").

Respondent McClain's argument above is similar to the argument in *Austin.* Here, the Respondent's argument clearly demonstrates the State's attitude and position on the matter (*i.e.*, that Relators cannot meet their evidentiary burden in any BTA appeal). The Respondent has already made it clear that it will not check its coffers to credit Relators with a withholding payment; instead, it will require them to "establish that an amount of tax was withheld from their pay for state withholding" (which they cannot do without the W-2). Sprague Motion, p. 13. Relators sufficiently alleged this impossible dilemma in their Complaint. *E.g.*, Compl. at ¶ 40, Exs. D. and I. Respondent's allegation on page 13 of its Motion demonstrates the futility and inadequacy of any process under R.C. 5747 in these circumstances.

c) *There is No Administrative Remedy Available to Relators to Contest the Tax Commissioner and Treasurer's Lack of Policies to Credit Individual Employee Tax Accounts.*

Relators must rely on this original action in mandamus because there is no administrative remedy available to them or similarly situated employee taxpayers to challenge the Tax Commissioner and Treasurer's lack of policies to credit individual employee tax accounts. This relief is totally unavailable through any administrative avenue. Under Ohio law, "[a] remedy at law is adequate only where it is available when needed." *State ex rel. Board of County Com'rs of Lucas County v. Austin*, 158 Ohio St. 476, 478, 110 N.E.2d 134 (1953). Further, it "must be a

remedy which itself enforces . . . the performance of the particular duty . . . upon [the respondent] in some other legal proceeding, and not merely a remedy which in the end saves the party to whom the duty is owed from the wrongful loss of his money." *State ex rel. Paul Stutler, Inc. v. Yacobucci*, 108 Ohio App. 41, 45 160 N.E.2d 300, 303 (9th Dist.1958), *judgment aff'd*, 169 Ohio St. 20, 157 N.E.2d 357 (1959).

The Board of Tax Appeals typically has the authority to review policies and procedures promulgated by the Tax Commissioner. *See* R.C. 5703.02(A)(5). However, as alleged in their Complaint, since no applicable policy or procedure has been promulgated, there is nothing to appeal or review by the Board of Tax Appeals. Compl. at ¶¶ 21-22. Therefore, this remedy is not available. The same problem exists with injunctions under R.C. Chapter 2723. Generally, R.C. Chapter 2723 details a procedural mechanism to enjoin the illegal levy or collection of taxes and assessments. As alleged in their Complaint, this avenue for relief is not available to either of the Relators or similarly situated employee taxpayers for the same reason that a petition for reassessment or appeal under R.C. Chapter 2723 is not - they are unable to dispute the arbitrary "finding" made by the Tax Commissioner. Compl. at ¶¶ 59, 71.

Respondent relies on Relators' statement that employees cannot "prevail" in any administrative process in his argument, insinuating (incorrectly) that what Relators meant by "prevail" was limited to their receipt of individual tax refunds - nothing more. McClain Motion, pp. 2, 10-11. This is not the case. *See* Compl. at ¶ 72 and pp. 16-17 (Prayer for Relief). Again, Relators wish to compel the Treasurer and Commissioner to *issue policies* under R.C. 5703.058, and to compel the Commissioner to review employee taxpayer accounts for balances under R.C. 5703.77. *Id*. The Relators seek more than individual damages making their case analogous to *State ex rel. Paul Stutler, Inc. v. Yacobucci*, 108 Ohio App. 41, 160 N.E.2d 300 (9th Dist.1958),

judgment aff'd, 169 Ohio St. 20, 157 N.E.2d 357 (1959). In *Yacobucci*, relator petitioned for a writ relating to how his local clerk of courts required payment of taxes for vehicle titles. The clerk argued the Relator had an alternative remedy at law: he could simply pay the tax and then apply to the Tax Commissioner for a refund under the provisions of R.C. 5741.10. The Ninth District Court of Appeals disagreed and found this as inviting an inadequate, "circuitous and laborious" procedure. *Id*. The Court held that to be adequate, the remedy must be more than merely available; rather, it "must be a remedy which itself enforces . . . the performance of the particular duty . . . upon [the respondent] in some other legal proceeding, and not merely a remedy which in the end saves the party to whom the duty is owed from the wrongful loss of his money." *Id*. at 45-46.

Similar to *Yacobucci*, a writ compelling the Respondents to comply with their statutory obligations in this case does more than credit each Relator and address their individual damages. Even if Relators could somehow prevail with a petition for reassessment or an appeal to obtain individual multi-year tax refunds, such individual relief would not change the state's accounting practices in regard to the receipt of withholding tax payments as required by R.C. 5703.058. Such individual relief would further fail to require the Tax Commissioner to notify taxpayers of their potential refund before the payments forfeit to the State of Ohio. R.C. 5703.77. This systemic relief is what Relators seek and is what makes this case fit for mandamus. *See* Compl. at ¶ 72 and pp. 16-17.

d) *Respondent's Logic Demonstrates Why No Petition for Reassessment or Appeal Could Afford Relators "Speedy" Relief.*

Using the administrative remedies identified by Respondent would not be "speedy" as required by Ohio law to be "adequate." *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶ 41. The practical reality is that Relators face this

accounting problem for six separate tax years, which under Respondent's logic, would require six petitions for reassessment and six administrative appeals all destined to fail as evidenced by decisions in BTA cases which span decades. Compl. at ¶ 33 (Relator Palm faces this problem for 2016 through 2018); and ¶ 52 (Relator Pearson faces this problem for tax years 2017 through 2019); *See Baillargeon et al. vs. McClain, et al.*, BTA No. 2021-310, 2021 WL 2930322 (July 6, 2021).

There is nothing "speedy" about requiring taxpayers to participate in such a laborious and complex process, year-after-year, that will inevitably fail at each step of the way when the taxpayer cannot produce the W-2 form. Further, just as taxpayers are missing out on their refunds (or double taxed), the State is missing out on tax dollars it may be owed year after year. In either case, the problem has a significant effect on the Treasurer's depositories and accounting of public funds, which demands immediate, speedy resolution by way of a writ of mandamus. *See State ex rel. Corrigan v. Voinovich*, 41 Ohio St.2d 157, 158, 324 N.E.2d 285 (1975) (granting relators' writ and explaining "where . . . the public interest makes it necessary that an issue involving the expenditure and possible loss of large sums of public money be resolved without delay, an action in mandamus will be entertained by this court."). This problem occurs for an untold number of taxpayers each and every year, yet continually evades review due to the burden of proof requirements in BTA appeals. The Relators sufficiently pled that this case is not limited to their individual refunds, it is brought in the name of the State of Ohio to address widespread relief. *E.g.*, Compl. at ¶¶ 2, 58. By requiring these state actors to jointly create such policies via a writ of mandamus, this Court would effectively eliminate the catch-22 position that thousands of employees have found themselves trapped in for decades. For the Relators, it would eliminate the

catch-22 for six different tax years, which is demonstrative of the speediness of the requested relief compared to the Respondent's suggested "remedies." Compl. at ¶¶ 33, 52.

e) *Relators have Gone Above and Beyond to Attempt to Address the Policy Problem, but their Attempts have Gone Unanswered.*

In his recitation of the facts, Respondent failed to discuss Relators' allegations that the Treasurer and Tax Commissioner have been on notice of their statutory obligations and their basic accounting problems for years. Compl. at ¶¶ 72-77. Advocates from every Legal Aid services organization in Ohio raised the alarm on this double taxation issue in early 2019 through a letter to the Tax Commissioner. *See* Compl. at ¶ 73 and Exhibit M (letter to Ohio Tax Commissioner from seven Low Income Taxpayer Clinics, including all six Ohio legal aid programs). Legal Aid advocates have also pursued other avenues on behalf of Relators and other low income taxpayers without success. *See* Compl. at ¶¶ 71-75; Exhibit L (protest letters to the Ohio Tax Commissioner for each Relator); Exhibit N (request for a taxpayer opinion letter to Ohio Tax Commissioner for a different taxpayer). Each of these unsuccessful efforts combined with the burden of proof requirements in BTA appeals demonstrate why Relators have no other recourse to address their impossible situation other than this mandamus action.

C. The BTA Does Not Have Exclusive Jurisdiction Over All Cases Against the Tax Commissioner

The Tax Commissioner has erroneously argued that this Court is barred from exercising jurisdiction in this mandamus action because the BTA has been vested with exclusive jurisdiction over this type of dispute. McClain Motion at pp. 1, 7, and 9. The Tax Commissioner cites *State ex rel. Geauga Cty. Comm. v. Court of Appeals for Geauga Cty*, 1 Ohio St.3d 110, 438 N.E.2d 428 (1982), for the proposition that courts "lack jurisdiction over mandamus claims concerning matters

that are vested in the exclusive original jurisdiction of another tribunal." McClain's Motion, p. 7, quoting *Geauga Cty*. The Tax Commissioner has not, however, cited any Ohio Supreme Court cases holding that the BTA has, in fact, been vested with the exclusive original jurisdiction over the type of dispute brought by Relators in this action. The Tax Commissioner claims that this case is "an attempt to bypass the exclusive special statutory tribunal for the adjudication of certain disputes." McClain's Motion, p. 1. He further asserts that the BTA "is the appointed tribunal for litigation of tax disputes with the Tax Commissioner . . . ." *Id*. For this he cites R.C. 5717.02 and *State, ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246, 250-251, 257, 855 N.E.2d 1188 (2006).

In *Ohio Democratic Party*, this Court held that it lacked subject-matter jurisdiction to consider a political party's mandamus claim alleging violations of two campaign-finance laws because those violations "are within the exclusive, original jurisdiction of the elections commission." *Id*. at ¶ 39. Both of the statutes at issue in that case used mandatory language broadly requiring that all such complaints "*shall* be filed with the Ohio elections commission." *Id*. at ¶ 10, quoting R.C. 3517.151(A). There is no such mandatory language in the statute cited by the Tax Commissioner. Section 5717.02 of the Ohio Revised Code provides that appeals from certain decisions of the tax commissioner "*may* be taken to the board of tax appeals by the taxpayer . . . ." R.C. 5717.02(A) (Emphasis added). The General Assembly chose to use discretionary rather than mandatory language in the relevant statute. Discretionary language does not lend itself to exclusivity.

The BTA does not have exclusive jurisdiction over this action so as to deprive this Court of jurisdiction. First, as noted above, the statute cited by the Tax Commissioner does not use mandatory language to describe appeals being taken to the BTA. Second, even if this case actually

were capable of being described as merely a dispute over a tax assessment, not all such disputes must be taken to the BTA. Under R.C. 2723.01, for example, "Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof . . . ." The existence of a second pathway to dispute an assessment proves the BTA's jurisdiction would not be exclusive even if this were merely a dispute over a tax assessment.

Further, Respondent McClain over-sells that Relator's Complaint asks this Court to weigh in on some specialized tax question or tax determination which the BTA should have jurisdiction for based on its expertise. Aside from *Ohio Democratic Party,* discussed above, he cites to five cases, none of which support his position. Two of the cited cases did not even deal with mandamus relief. *See* McClain Motion at p. 2 citing *Hakim v. Kosydar*, 49 Ohio St.2d 161 (1977) (injunction claim not a mandamus action); and McClain Motion at p. 7 citing *Westbrook v. Prudential Ins. Co.*, 37 Ohio St.3d 166 (1988) (injunction claim not a mandamus action). The other cited cases involve mandamus or declaratory judgment claims, but are easily distinguished from the case at bar. *State ex rel. Iris Sales v. Voinovich*, 43 Ohio App.2d 18 (8th Dist.1975), involved the valuation and assessment of real property for tax purposes. McClain Motion at p. 7. The Court recognized that real property valuation is a specialized process clearly set out in Chapters 5715 and 5717. Therefore, *Iris* involved a complex tax analysis more suited for a special tax tribunal. This was also true in *Zupancic v. Wilkins,* 10th Dist. Franklin No. 08AP-472, 2009-Ohio-3688, cited by McClain's Motion on page 8. That case involved a declaratory judgment challenge to how the Commissioner apportioned taxes to public utility providers based on how certain nuclear power plant materials were capitalized on their books and records during valuation. *Zupanic*, like *Iris*, did not involve basic accounting duties, but a complex, specialized tax analysis. The final case

cited by the Tax Commissioner was *Withintime, Inc. v. Cuyahoga Cty. Fiscal Officer,* 8th Dist. Cuyahoga No. 103482, 2016-Ohio-2944. McClain Motion, pp. 7-8. In that case, relator sought mandamus to compel the county to conduct a second tax valuation for his property. Due to the complexity of real estate valuations under R.C. Chapters 5715 or 5717, the court denied the writ. *Withintime*'s holding is limited to finding that mandamus is "inappropriate *to obtain a reduction of taxable value of real property.*" (Emphasis added.) *Id.* at ¶ 15. These complicated tax cases are distinguishable from this case, where Relators do not ask this Court to entertain a specialized tax question or to even scrutinize in a technical sense the amount of money that changed hands among Relators' employers and each state agency. This is an action intended to force state actors to *properly account for individual income tax payments as they receive them* from Ohio's employers. This happens long before any assessment could be issued. It happens long before any taxpayer files a tax return without a W-2 attached.

The BTA does not have jurisdiction (exclusive or otherwise) to force the Tax Commissioner and Treasurer to jointly fulfill their statutory duty to create the required policies. This Court plainly has subject matter jurisdiction over this original action in mandamus via the Ohio Constitution. Article IV, Section 2(B)(1)(b), Ohio Constitution.

III. CONCLUSION

For all of the foregoing reasons, a writ of mandamus is not only appropriate, but vital, in this situation. The Relators have sufficiently pled the elements of the claim. They have further shown that this extraordinary relief is the only available option that will provide complete and speedy relief to Relators and all similarly situated Ohio taxpayers, most of whom do not even realize they are being harmed. Granting this writ is the only way to ensure that Ohio's individual

income taxpayers will stop being deprived of their refunds any time that they do not have access to their W-2 forms when they file a tax return. Granting the writ is the only way to require that the State Tax Commissioner and State Treasurer fulfill their mandatory duties under the statutory scheme designed to ensure that all taxpayers are notified when they have overpaid through withholding of wages and have a refund available. On the other hand, dismissal of this claim will allow this issue to continue to evade review. It would mean that the State of Ohio can continue to profit from taxpayer forfeitures - especially from low-income taxpayers who are the least able to shoulder this burden of double taxation and the least likely to be represented by counsel in their struggle for justice. The General Assembly identified this problem years ago and enacted statutes to stop it. It is time to require the State Tax Commissioner and State Treasurer to follow the law. This Court should deny the Respondents' Motions to Dismiss Relators' Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing *Memorandum* was served this 3rd day of June, 2022 via electronic mail to the following:

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