In the

Supreme Court of Ohio

JOSH SCHAAD, Plaintiff-Appellant, v. KAREN ALDER, ET AL., Defendants-Appellees.	:	Case No. 2022-0316 On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case No. C-210349

BRIEF OF AMICI CURIAE THE OHIO SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NORTH CENTRAL OHIO CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, THE GREATER CLEVELAND CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, AND THE MANUFACTURING POLICY ALLIANCE, IN SUPPORT OF APPELLANT

DIANE MENASHE (0070305)
DANIEL ANDERSON (0067041)
Ice Miller LLP
250 West Street, Suite 700
Columbus, Ohio 43215
OR
One American Square, Suite 2900
Indianapolis, IN 46282-0200
(614) 462-2700
Diane.Menashe@icemiller.com
Daniel.Anderson@icemiller.com

Counsel for Defendants-Appellees, Karen Alder, et al.

JAY R. CARSON (0068526)
(Counsel of Record)
Wegman Hessler
6055 Rockside Woods Boulevard,
Suite 200
Cleveland, Ohio 44131 (216) 642-3342
jrcarson@wegmanlaw.com

ROBERT ALT (0091753)
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, Ohio 43215 (614) 224-4422
robert@buckeyeinstitute.org

Counsel for Appellant, Josh Schaad

ZACHARY M. HOLSCHER (0098039)
ALLISON DANIEL (0096186)
JULIE M. PFEIFFER (0069762)
Ohio Assistant Attorney General
30 East Broad Street, 14th Floor
Columbus, OH 43215
(t) 614-466-2872
(f) 866-422-9192
Zachary.Holscher@OhioAGO.gov
Allison.Daniel@OhioAGO.gov
Julie.Pfeiffer@OhioAGO.gov

Counsel for Attorney General, David Yost

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
(t) 614-326-1120
(f) 614-754-6368
tzaino@zhftaxlaw.com
shall@zhftaxlaw.com

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Supreme Court of Ohio

Ohio Courts of Appeals

Ohio Board of Tax Appeals

Ohio Statutes and Constitutional Provisions

Other Authorities

INTRODUCTION

A. Position of the amici

This jurisdictional appeal involves a municipal income taxpayer's constitutional challenge to an uncodified provision ("Section 29") of Amended Substitute House Bill Number 197 as enacted by the 133rd General Assembly ("H.B. 197"). The General Assembly enacted that provision, Section 29, as an emergency measure in order to clarify—and simplify—the municipal income-tax withholding duties of Ohio businesses during the COVID-19 Pandemic ("Pandemic"). The present case comes before this court as an appeal from the denial of a declaratory judgment. Accordingly, this appeal does not present the taxpayer's ordinary statutory claim for a refund of municipal income taxes, but instead advances the claim for refund as a constitutional challenge.

For purposes of this brief, the Amici adopt the First District's conclusions that Schaad is a resident of Blue Ash, not Cincinnati, and that he has proved that he worked outside Cincinnati during the period of time at issue. *Schaad v. Alder*, 1st Dist. Hamilton No. C-210349, 2022-Ohio-40, ¶ 3. Amici also understand that Cincinnati has defended the denial of Schaad's refund claim on the ground that Section 29 shifted Schaad's municipal income tax liability to Cincinnati even though he was not working in the city at the time. As explained below, for reasons of statutory interpretation Section 29 provides Cincinnati no defense against Schaad's refund claim once Schaad has shown he worked outside the city. That is so because Section 29 does not determine the taxability of Schaad's income, but only the propriety of his employer's having originally withheld and remitted a portion of Schaad's income to Cincinnati. Therefore, the decision below should be reversed and judgment entered for the taxpayer.

In the alternative, if this court disagrees with the statutory interpretation advanced in this brief, the court should determine that imposing the tax violated due process and reverse the judgment below for that reason.

B. The COVID-19 emergency and the enactment of Section 29

When the Pandemic hit the United States in March 2020, Ohio government authorities reacted swiftly to take steps intended to control and limit the spread of the COVID-19 contagion. On March 9, 2020, Governor Mike DeWine issued Executive Order 2020-01D declaring a state of emergency due to the Pandemic. In response to this declaration, beginning on March 22, 2020, Dr. Amy Acton, Director of the Ohio Department of Health issued the first in a series of Director Stay-at-Home Orders, which ordered all persons to stay at home unless engaged in essential work or activity. At the time, it was generally expected the Orders would last only a couple of months.

Ohioans and Ohio businesses strove to comply with the Director's Orders. Although excepted from the Stay-at-Home Order, many businesses that were engaged in essential work (such as employees of insurance companies, financial institutions, and law and accounting firms) voluntarily asked employees to work at home when possible.

Businesses that sent their employees to work from home (whether in compliance with the Stay-at-Home Order or as a voluntary action) faced a daunting challenge due to the unique nature of Ohio's municipal income tax system. While the municipal income tax system in Ohio is fraught with complications, as a general concept, employers must withhold municipal income tax for the municipality (or municipalities) in which their employees work on more than twenty days in a calendar year. Without legislative relief, employers that sent workers home faced the difficult task of identifying in which municipality their employees would "work from home" during the pandemic, registering for withholding accounts with each such home municipality,

adjusting their payroll withholding systems to reflect those changes, and then withholding tax for each such home municipality. The complexity of these required tasks would have been exacerbated because the employer's payroll or tax department personnel were working remotely to avoid spreading the COVID-19 virus. Further, many municipal income tax officials were also not working at their offices, thereby making it difficult to begin withholding for those other municipalities.

Fortunately, the Ohio General Assembly provided immediate relief for employers on the municipal income tax withholding dilemma. Specifically, Section 29 provided employers immediate relief from the municipal income tax withholding problems described above by providing that a "day" worked at an employee's home during the Pandemic could be treated as a "day" worked at the employee's principal place of work for municipal income tax withholding issues. Therefore, twenty-one days into the Pandemic, employers would not need to begin withholding municipal income tax to the work from home location and could simply continue to withhold tax and remit tax to the principal place of work municipality. The General Assembly's choice to use the word "day" in Section 29 is significant, because "day" has a technical meaning that is relevant in only one area of municipal taxation: withholding. Specifically, the word "day"—and the counting of "days"—only matters with respect to an employer's determination whether he should withhold municipal income tax and which municipality should receive the withholding. In particular, counting the "days" an employee works in a municipality determines whether an employer may use a "safe harbor" provision rather than withholding tax to municipalities in which the employee is an "occasional entrant."

Unfortunately, Cincinnati and many other municipalities have expanded their interpretation and application of Section 29 beyond its actual purpose, but perhaps more importantly, beyond its actual language. As a result, Ohio taxpayers are being subjected to tax

on income not earned in principal place of work municipalities, and bedroom/home communities are being denied appropriately due municipal income tax for worked performed at home.

The purpose of Section 29 was to protect employers from registering for withholding in the multitude of municipalities in which their employees live amidst the Pandemic, as well as protect the short-term cash flow of municipalities to ensure their ability to continue funding important municipal services, such as police, fire and rescue. This legislative purpose is further evidenced by the most recent biennial budget bill, Am. Sub. H.B. 110. In that bill, the General Assembly explicitly stated for the then open Tax Year 2021 that Section 29 was only intended to apply to municipal income tax withholding provisions and was not relevant in deciding where the income was ultimately taxable to the wage-earning employees.[1] This court has recognized that legislative amendments often have the purpose of clarifying rather than substantively changing the meaning of previously enacted legislation. *See New York Frozen Foods Inc v. Bedford Hts. Income Tax Bd. of Rev*., 150 Ohio St.3d 386, 2016-Ohio-7582, ¶ 24.

In addition to measures passed by the General Assembly to protect the short-term cash flow needs of municipalities by enacting Section 29, the federal government also enacted significant legislation that also aided state and local governments navigate funding issues amidst the Pandemic. The American Rescue Plan Act ("ARP") granted approximately $11.0 billion to Ohio and its municipalities. Of this $11.0 billion, metropolitan cities will receive $2.24 billion in direct assistance, other cities and villages will receive $810 million, and counties will receive

[1] In Am. H.B. No. 110, Sections 610.115 and 757.40 stated that Section 29 of Am. Sub. H.B. 197, as amended by Am. H.B. No. 110, applied only for withholding purposes and the 20-Day Occasional Entrant Withholding Exception with respect to Tax Year 2021, and that Section 29 did not apply for purposes of determining the employee's ultimate tax liability. The General Assembly specifically chose not to address Tax Year 2020's taxability issue in Am. H.B. No. 110 because Tax Year 2020 was a closed Tax Year and because actions had already been commenced in the judicial system, thereby deferring such decision to the judiciary.

$2.27 billion. The following chart highlights the ARP allocation to major Ohio cities compared to those cities' 2018 net income tax collections.[2]

Major Ohio City	**ARP Allocation Available**	**Percentage of 2018 Net Income Tax Collections**
Akron	$153 million	96.8%
Cincinnati	$292 million	77%
Cleveland	$541 million	113%
Columbus	$186 million	22%
Dayton	$147 million	115%
Toledo	$189 million	103%
Youngstown	$89 million	200%

The CY2020 revenue of Ohio municipalities has not been diminished by the Pandemic.

STATEMENT OF INTEREST OF AMICI CURIAE

The Ohio Society of Certified Public Accountants, the National Federation of Independent Business, the North Central Ohio Chapter of the National Electrical Contractors Association, the Greater Cleveland Chapter of the National Electrical Contractors Association, and the Manufacturing Policy Alliance, collectively referred to as "Amici" or the "Associations," submit this brief in order to clarify for the court that this and similar cases have been decided on the false premise that uncodified Section 29 of H.B. 197 establishes the municipal income tax

[2] Sources: Greater Ohio Policy Center, The American Rescue Plan Act of 2021, https://www.greaterohio.org/arpa2021 and https://www.greaterohio.org/arpa2021#state&localaid; also, Ohio Department of Taxation website MUNICIPAL INCOME TAX: Tax Rates and Net Collections, by Municipality, Calendar Year 2018 at https://tax.ohio.gov/wps/portal/gov/tax/researcher/tax-analysis/tax-data-series/local-government-funds/lg11/lg11cy18

liability of wage earners when, in truth, the plain language of Section 29, considered in the context of R.C. Chapter 718 and against the backdrop of the history and development of the municipal income tax, addresses nothing more than the employer's withholding responsibilities.

The Ohio Society of Certified Public Accountants ("OSCPA") was established in 1908 and represents the diverse interests of approximately 21,000 CPAs and accounting professionals working in business, education, government and public accounting. The OSCPA promotes greater awareness for CPAs through public financial literacy campaigns and other initiatives that benefit businesses and all Ohioans, including the OSCPA advocating for a simpler, uniform municipal income tax system in Ohio. Every year, OSCPA members face tremendous municipal income tax compliance burdens, including, for example, potentially filing tens, if not hundreds, of Ohio municipal income tax returns for one client. The OSCPA is uniquely qualified, due to its members' expertise and experience with the municipal tax system, to describe the misapplication of Section 29 by municipalities amidst the COVID-19 Pandemic, as well as stress the importance of consistent and uniform application of the municipal income tax.

The National Federation of Independent Businesses ("NFIB") is the nation's leading small business association, representing members nationwide, including nearly 22,000 small businesses in Ohio. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB members typically employ twenty-five or fewer people and do less than $2 million in annual sales. They are engaged in every industry and operate in all eighty-eight counties in Ohio. Even though they are small businesses, many NFIB members make sales into or have activity in multiple municipal taxing jurisdictions. Under the pre-H.B. 49 structure, these businesses had to file in and were subject to audits, assessments, and local appeals in each of the taxing jurisdictions in which the

businesses made sales, regardless how small. NFIB members also were subject to inconsistent applications of the law and different taxing authority rules. As a result, a business's tax compliance costs might exceed the tax liability to the particular taxing jurisdiction.

The North Central Ohio Chapter of the National Electrical Contractors Association ("NECA") was chartered in 1948 to represent, promote, and enhance the management interests of the electrical contracting industry in the greater Akron, Canton, and Steubenville area. Today, NECA represents 28 local electrical contracting businesses and works with over 75 employers who employ over 1,500 electricians throughout its jurisdiction. NECA's mission is to manage its local area benefit funds, strengthen its labor-management relationship, provide cutting-edge technical training, and to advocate on legislative issues that affect its industry, its employers, and their employees.

The Greater Cleveland Chapter of the National Electrical Contractors Association was Chartered in 1945. Today, it represents and supports 42 electrical contracting businesses who employ over 2,000 electricians in multiple municipalities in Ohio. It is the Greater Cleveland Chapter of the National Electrical Contractors Association's mission to promote ethical business practices among its member firms, provide them both business and cutting edge technical training, support and manage healthcare funds, pension funds and apprenticeship programs, as well as advocate on their behalf in a number of areas.

The Manufacturing Policy Alliance ("MPA") is an organization comprised of large manufacturers who have high brand recognition and strong reputations for ethics and integrity in conducting business. The member companies maintain a significant presence in the state of Ohio. MPA members share a commitment to preserving a competitive manufacturing environment. Because of the diversity and significance of its members, MPA is able to uniquely

represent all manufacturers and speak with authority on issues facing manufacturers. In total, MPA member companies employ 39,000 Ohioans, have a total Ohio payroll of $2.5 billion, have invested over $5 billion in hard assets in Ohio, utilize 9,200 Ohio suppliers for its Ohio operations, spend approximately $11 billion with Ohio-based suppliers. Because its members and their suppliers operate in nearly all states and across the globe, they know Ohio's municipal income tax is particularly burdensome when compared to the local income tax systems of other states, especially with regard to the administrative costs associated with compliance and administration.

Historically, the Amici have been aligned on the need for Ohio to maintain a competitive tax system, one that mitigates the cost of compliance and administration for taxpayers and the government, provides a stable revenue source, and is not adverse to new investment and job creation. Of particular concern for the amici is the municipal tax system, which is a sore thumb for Ohio when compared to every other state and local tax system in the United States. Ohio's system of local income tax is unique and is widely recognized as being the most complicated and worst local tax system in the United States. In the early 2000s, the amici actively supported efforts to legislate a more uniform municipal tax system. While those efforts made some important improvements, the need for change continues in order to make Ohio competitive. For instance, during the mid-2010s, OSCPA led the Municipal Tax Reform Coalition, a coalition of over thirty business associations, in an effort to require further simplicity and uniformity in Ohio's municipal income tax system to ensure that Ohio remains competitive to attract business investment and job growth.

The issue on which the Court has granted review is critically important to the Amici Curiae and their members, as well as to the State of Ohio at large, because taxpayers expect and have a right to a fair application of the tax law, even amidst a pandemic. The fundamental due

process rights of all taxpayers subject to municipal income taxes in Ohio are at issue, not merely the rights of the Appellees in this particular controversy.

ARGUMENT

Proposition of Law No. 1:

While the First District Court of Appeals properly determined that the General Assembly had authority under the Ohio Constitution to enact Section 29 of Am. Sub. H.B. 197, the Court of Appeals failed to properly interpret and apply the technical language of Section 29, which applies only to the withholding obligations of employers and not to where an employee's wages are taxable.

1. Ohio's General Municipal Income Tax Withholding Rule – R.C. 718.03.

Under Ohio's Home Rule provision and R.C. 715.013, Ohio municipalities have broad authority to impose an income tax, so long as that tax is done in accordance with the provisions and limitations provided in Chapter 718 of the Ohio Revised Code. The General Assembly has authority to limit municipal taxation, but not to expand it. Ohio Constitution Art. XIII, Sec. 6; Art. XVIII, Sec. 13., *Athens v. McClain,* 163 Ohio St.3d 61, 2020-Ohio-5146.

If a municipality imposes an income tax, the tax generally applies to a nonresident employee's wages "for work done" or "services performed and rendered in" the taxing municipality. See R.C. 718.01(B)(2); Cincinnati Municipal Code 311-9-I1. As a result, employers are generally required (unless an exception applies, such as the 20-Day Occasional Entrant Withholding Exception) to withhold tax on all qualifying wages earned for services performed in such municipality, whether for one day, one hour or one minute. It is the actual amount of wages earned while **in** the municipality that is generally taxable. This is often referred to as the "General Withholding Rule." R.C. 718.03.

2. 20-Day Occasional Entrant Withholding Exception – R.C. 718.011.

Employees may occasionally work in multiple municipalities throughout the year. To alleviate the burden of withholding taxes in all "occasionally entered" municipalities as required under the General

Withholding Rule in R.C. 718.03, employers may instead choose to withhold to the employee's "principal place of work" for time worked in other municipalities as long as the employee has not spent more than twenty days working within the "occasionally entered" municipality. This exception to the General Withholding Rule is contained in R.C. 718.011 and is referred to as the 20-Day Occasional Entrant Withholding Exception (hereinafter "20-Day Withholding Exception"). In its current form, the 20-Day Withholding Exception has been part of the law since Tax Year 2016. See Sub. H.B. 5 from the 130th General Assembly.

R.C. 718.011's entire purpose is to establish an employer withholding convenience and de minimis rule, whereby employers are relieved from withholding tax for a particular municipality unless their employees spend at least twenty-one days performing services within that municipality. In "counting to twenty-one days," the law provides that certain tasks are deemed to occur at the employee's "principal place of work" for purposes of counting any particular "day" as having been within a particular municipality (or not). However, those enumerated activities are deemed to occur at the principal place of work only for purposes of the twenty-day safe harbor. Nowhere in the entirety of Chapter 718 is there any provision that states that those "deemed" activities are where the income was **earned** by the employee for purposes of imposing municipal income tax. *Tammy Aul Jones v. City of Massillon*, BTA No. 2018-2173 (Mar. 29, 2021), 2021 WL 1270305.

3. Withholding Does not Determine Where the Income is Taxed.

It is longstanding policy that withholding responsibilities of an employer are distinct from the taxability of the income for the employee. The Ohio Board of Tax Appeals recognized this difference in *Tammy Aul Jones v. City of Massillon*. In *Jones*, the taxpayer was a non-resident of Massillon, Ohio, and reported to work at the United States Postal Service ("USPS") office located within Massillon each calendar day, would perform some work there, and then drive a postal vehicle that was loaded at the Massillon office

along a designated route to deliver letters and packages to addresses outside of Massillon's boundaries. Of the Taxpayer's time working for the USPS, 40% was performed within Massillon and 60% was performed outside of Massillon consistently on each calendar day.

Massillon claimed that it was entitled to tax the entirety of Jones's wages because the Massillon office was her principal place of work under R.C. 718.011(A)(7). In deciding against the City of Massillon and finding that only 40%, not 100%, of Jones' wages could be taxed by Massillon, the Board of Tax Appeals also observed that:

> R.C. 718.04 allows the municipality to levy an income tax and a withholding tax, and while the two are related, they are distinct, and each has its own set of requirements. For instance, the statute relied on by Massillon, commonly referred to as the "occasional entrant rule," provides a safe harbor for employers from the withholding requirement when the employee performs work in more than one location and spends twenty or fewer days in the taxing municipality. These rules do not define the employee's income tax liability and only reference the employer's duty (or lack thereof) to withhold. *Jones*, at 4.

The Board of Tax Appeals, Ohio's quasi-judicial body that hears most Ohio tax appeals, recognized that the 20-Day Withholding Exception provided in R.C. 718.011 applies only to withholding responsibilities of the employer and does not determine ultimate taxability of the wages of the employee. Since R.C. 718.011 solely addresses employer withholding issues, the City of Cincinnati view on the meaning of Section 29, which addressed R.C. 718.011 and employer withholding, is misplaced.

4. R.C. 718.011(B)(2), sometimes referred to as the "preponderance of the day" test, highlights that the term "day" only applies in the context of withholding because without it one minute spent working in a municipality could count for being one "day" for purposes of the 20-Day Withholding Exception.

To determine whether an employee who has worked in an "occasionally entered" municipality on a portion of any given calendar day should be treated as working for a "day" there (for purposes of counting to twenty-one days), R.C. 718.011(B)(2) provides a "preponderance of the day" test. R.C. 718.011(B)(2) was enacted as part of the 20-Day Withholding Exception to determine when a "day" is counted against the 20-day threshold for a particular municipality. It provides, "For the purposes of division (B)(1) of this

section, an employee shall be considered to have spent a day performing services in a municipal corporation only if the employee spent more time performing services for or on behalf of the employer in that municipal corporation than in any other municipal corporation on that day." Note that it states, "For the purposes of division (B)(1), ***," which is the 20-Day Withholding Exception. The City of Cincinnati is effectively interpreting R.C. 718.011 and Section 29 as a taxing provision, or in the alternative, as a situsing of where income was earned provision, but that is not what R.C. 718.011 or Section 29 says or means. R.C. 718.011 is not a taxing provision, nor does R.C. 718.011 situs where income is earned for purposes of imposing tax. It is a safe harbor to simplify employer withholding. It clearly states that the deemed location is "for purposes of division (B)(1)" - (where the 20-Day Withholding Exception is codified) and does not determine the ultimate taxability of the wages in the hands of the employee.

5. Language of Section 29 of Am. Sub. H.B. 197 Has Been Ignored

Although not required to use the protections provided by the 20-Day Withholding Exception, many employers could initially use the 20-Day Withholding Exception to properly avoid collecting municipal income tax for the home municipalities for the first twenty days of employees working at home during the Pandemic. However, twenty-one days into the Pandemic, R.C. 718.03 (the General Withholding Rule) would require employers to begin withholding municipal income tax for the home municipalities because the protections of the 20-Day Withholding Exception would have been exceeded in the work from home municipality. This would have imposed a massive burden on employers because of the vast number of employees who began working at home during the Pandemic and because the employer's payroll and tax department personnel were not in the office and did not have the resources necessary to begin the withholding of tax in the work from home municipality that would otherwise have been required if not for Section 29.

The General Assembly addressed this practical problem of the Pandemic by expanding the 20-Day Withholding Exception to deem any "day" worked from home because of the Pandemic as a "day" worked in the employee's principal place of work. This is illustrated by the first phrase of Section 29, which provides, "Notwithstanding R.C. 718.011," i.e., notwithstanding that the employee worked more than twenty days in the home city.

Following that phrase, Section 29 continues, "and for purposes of Chapter 718." The reason this language is necessary is that wages withheld to the principal place of work impact other provisions of the municipal income tax that relate to R.C. 718.011. For example, R.C. 718.02(A)(2), dealing with the apportionment of wages for net profit tax purposes, directly refers to R.C. 718.011.

Section 29 of Am. Sub. H.B. 197 provides in part that:

> * * * [a]ny "day" on which an employee performs personal services at a location, including the employee's home, to which the employee is required to report for employment duties because of the declaration shall be deemed to be a "day"' performing personal services at the employee's principal place of work.

The effect was to ensure that the twenty-day threshold in R.C. 718.011 would not be exceeded in the home municipalities amidst the Pandemic, thereby allowing employers to continue to simply withhold to the principal place of work municipality.

6. Cincinnati and the Court of Appeals have ignored the technical meaning of the words used in Section 29 of Am. Sub. H.B. 197.

Municipalities assert Section 29 applies to determine the taxability of the wages earned by employees. However, that interpretation is clearly not justified. The term "principal place of work" only has meaning in the context of the 20-Day Withholding Exception (i.e., withholding) provided in R.C. 718.011. Nowhere else in Chapter 718 is "principal place of work" relevant, nor is the use of the word "day" relevant.

If the General Assembly had intended to deem taxability to be in the principal place of work municipality for non-residents of that municipality, it would have used language from Chapter 718 that provides the determination of what is the "income" of a non-resident that is taxable by a municipality. R.C. 718.01(A) defines "municipal taxable income" to mean "income reduced by exempt income to the extent otherwise included in income and then, as applicable, apportioned or situsedto the municipal corporation under section 718.02 of the Revised Code." Then, R.C. 718.01(B)(2) defines "income" to be "all income, salaries, qualifying wages, commissions, and other compensation from whatever source earned or received by the nonresident for work done, services performed or rendered, or activities conducted **in** the municipal corporation." In short, a non-resident under R.C. Chapter 718 is only taxed on income earned by work performed in the municipality, regardless of whether the employer properly paid withholding to that municipality—and nothing in Section 29 changes that result.

If the General Assembly had intended to deem an employee's wages as "taxable" in the municipality (in the hands of the employee), it would have stated something more akin to the "wages are deemed earned in the principal place of work." The General Assembly did not do that. Instead, it used a technical tax term referred to in Chapter 718 and merely characterized a "day" worked in the home municipality as a "day" worked in the principal place of work. This language is technical and only has context in Chapter 718 regarding employer withholding responsibilities and the 20-Day Withholding Exception. The term "day" cannot have both a technical meaning, as is clearly the case here, and be used by municipalities as applying its general meaning.

7. Cincinnati's and the First District's Interpretation and Application of Section 29 of Am. Sub. H.B. 197 Would Have Unintended Consequences Amidst the Pandemic.

If the municipalities are correct--if Section 29 refers to the place taxes are owed when it deems a "day" on which an employee performs personal services remotely to be "a day performing personal services at the employee's principal place of work--that interpretation would create more problems than solutions,

which the General Assembly did not intend. Examples of such complications that follow from Cincinnati's and the First District's application of Section 29 include:

- Employers that followed the General Withholding Rule prior to the Pandemic and withheld tax for each municipality in which their employees worked would have needed to change their payroll systems and begin withholding tax on all wages to the employee's principal place of work. The 20-Day Withholding Exception is elective, not required, and Cincinnati's interpretation flips it on its head by asserting that it is a mandatory provision that determines where the employee's income must be taxed.
- To simplify withholding, employers and municipalities often have withholding agreements that deem how much of each employees' wages are earned among various municipalities. In this way, employers simply withhold that percentage of each pay period, regardless of where the employee works. If the language of Section 29 is as broad as Cincinnati maintains, employers would have been required to cancel those agreements amidst the Pandemic, increase withholding to the principal place of work municipality, and decrease it to other municipalities.
- Under continuing law, the 20-Day Withholding Exception does not apply to professional athletes, and the professional teams must withhold tax, beginning on day one, for each municipality in which the professional athletes work, regardless of the 20-Day Withholding Exception described above. However, under Cincinnati's and the First District's application of Section 29 as being a taxing provision, the athletes of the professional sports teams would owe tax on 100% of their salaries to their principal place of work municipalities, as opposed to where they performed services (playing games and practicing, for example). For example, when the Cincinnati Reds visited the Cleveland Indians (now Guardians) for two games in August of 2020 at the Indians ballpark in Cleveland, Ohio, the City of Cincinnati's and the First District's application of Section 29 would have the Reds

ballplayers owing the City of Cincinnati tax for services performed in Cleveland, even though Cleveland should be able to tax that income of the Reds ballplayers in Cleveland. Furthermore, both the Reds and the Indians ballplayers would owe all their municipal income tax to Cincinnati and Cleveland, respectively, for all their income for the entire period of 2020 after March 10, 2020, even income for services performed in different states, let alone not being performed at their home ballparks.

8. R.C. 718.01(B)(2) states that no Ohio municipality may tax a non-resident on income earned outside the municipality's borders.

R.C. 718.01 provides, in part, that "(B) 'Income means * * * (2) In the case of nonresidents, all income, salaries, qualifying wages, * * * earned or received by the nonresident for work done, services performed or rendered, or activities conducted **in** the municipal corporation." A bedrock principle of taxing non-residents in a multi-jurisdictional context is that the income must be earned by the non-resident ***within*** the taxing municipality that seeks to tax that income. R.C. 718.01(B)(2) states that in no uncertain terms. It uses the phrase "conducted in the municipal corporation" to limit the tax base for the imposition of a municipal tax to income derived within the municipal corporation.

R.C. 718.01(B)(2) does not state that wages earned on any "day" of performing personal services are subject to tax. Further, Section 29 only deems that a "day" spent working at the employee's home is a "day" of performing personal services at that location for purposes of the 20-Day Withholding Exception. Section 29 clearly does not amend R.C. 718.01(B)(2) to provide that a nonresident's qualifying wages are deemed "earned or received by the nonresident for work done, services performed or rendered, or activities conducted in the municipal corporation," to parrot the words of R.C. 718.01(B)(2).

9. Section 29 of Am. Sub. H.B. 197 was an express act of limitation, under the Ohio Constitution Art. XIII, Sec. 6 and Art. XVIII, Sec. 13, limiting the ability of the home/bedroom communities to require employers to withhold tax to the home/bedroom communities after working from home during the Pandemic for greater than twenty days.

The City of Cincinnati and the Court of Appeals' interpretation of Section 29 misunderstands the words the General Assembly used. The General Assembly did not expand the reach of Cincinnati's tax ordinance by imposing Cincinnati's income tax on nonresident wages earned outside Cincinnati merely because Cincinnati constituted the "principal place of work." Instead, the General Assembly imposed a limitation for withholding purposes, with respect to the home/bedroom communities. As mentioned above, "day" only affects the 20-Day Withholding Exception. The limitation enacted was very simple – the home/bedroom communities could not force employers to withhold tax for those home/bedroom communities because the General Assembly made that 20-Day Withholding Exception broader. The 20-Day Withholding Exception was the only provision of law that was affected by Section 29. Any assertion that Section 29 expands the ability of Cincinnati or any other municipality to tax income not earned inside the municipality would not be a limitation and instead would mean the General Assembly was "requiring" municipalities to tax income not supported by statute or ordinance. *Gesler v. Worthington Income Tax Bd. of Appeals,* 138 Ohio St.3d 76, 2013-Ohio-4986, ¶ 22. Even if the General Assembly were constitutionally permitted to require municipalities to tax income pursuant to Section 29, due process must be followed. Cincinnati did not amend its tax ordinance to authorize the taxation of the income it purports to tax pursuant to Section 29.

For the foregoing reasons, the amici request that the court hold that Section 29 provided Cincinnati no defense against the taxpayer's refund claim, and reverse the judgment below.

Proposition of Law No. 2

> *As applied to the appellant, Cincinnati's imposition of municipal income tax violates due process because Cincinnati has not enacted an ordinance extending its tax to nonresidents earning wages by working outside the city, and doing so would constitute extraterritorial taxation.*

If the court disagrees with the first proposition of law and holds that Section 29 was intended to address the wage earner's municipal income tax liability, the amici agree with appellant that the judgment below should be reversed because Section 29 violates due process of law as applied to Schaad under both the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law Clause in the Ohio Constitution, Article I, Section 16. That is so for two related reasons.

First, although the General Assembly enacted Section 29 in March 2020, the City of Cincinnati did not pass an ordinance extending its income tax to the income of nonresidents based on work performed outside the city. Instead, Cincinnati retained its usual provisions that define "income" of a nonresident of the city as "[a]ll qualifying wages earned or received by the nonresident for work done, services performed or rendered in the Municipality * * *." Cincinnati Municipal Code 311-9-I1(b). This court has held that the General Assembly's power to limit municipal income taxation under Article XVIII, Section 13 and Article XIII, Section 6 does not empower the General Assembly to impose municipal income tax when the municipal ordinance itself does not impose the tax. *Gesler*, 138 Ohio St.3d 76, 2013-Ohio-4986, ¶ 19, 22. Given the holding of *Gesler* and the absence of any city ordinance extending the municipal tax to a nonresident working outside the city, Schaad was never placed on notice that he incurred a tax liability to Cincinnati for work he performed in Blue Ash. Indeed, the requirement that the law give a taxpayer adequate notice of his being subjected to taxation is implicit in the long line of cases in which this court has held that a statute that imposes a tax requires strict construction

against the government. *See Saturday v. Cleveland Bd. of Rev.*, 142 Ohio St.3d 528, 2015-Ohio-1625, ¶ 21 (citing cases).

Second, even if Cincinnati had enacted such an ordinance, doing so would have amounted to extraterritorial taxation that lies beyond the home-rule powers of a municipality. *See Saturday*, ¶ 21 (noting the "'implied condition of all statutes relating to taxation that they have no extraterritorial effect'"), quoting *Schneider v. Laffoon*, 4 Ohio St.2d 89, 96, (1965). In this context, this court's decision in *Hillenmeyer v. Cleveland Bd. of Rev.*, 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164 is most closely in point. The court held that as applied to out-of-state NFL players, Cleveland's "games played" allocation method constituted "extraterritorial taxation" in violation of due process "because it foreseeably imposes Cleveland income tax on compensation earned while [the nonresident taxpayer] was working outside Cleveland." *Id*. at ¶ 49. Although *Hillenmeyer* addressed the situation of taxpayer resident outside Ohio, which is not at issue here, the court's reasoning regarding extraterritorial taxation should be understood to limit an Ohio municipality's home-rule power to tax Ohioans who neither reside nor work in the taxing municipality.

Three decisions of the Ohio courts of appeals support that reasoning. In *VonKaenel v. New Philadelphia*, 5th Dist. Tuscarawas No. 2000AP 04 0041, 2001 Ohio App LEXIS 285 (Jan. 23, 2001), Ohio residents who were did not reside in New Philadelphia contested that city's imposition of tax on compensation they earned while they were working outside the city's limits. The Fifth District held that imposing the tax on wages of nonresidents working outside the taxing municipality violated due process. Similarly, in *Toliver* truck drivers who were residents of Ohio but not residents of Middletown contested that city's imposition of tax on salaries earned in part by work performed outside the city's limits—and like the Fifth District in *VonKaenel*, the Twelfth

District in *Toliver* held that imposing the tax on compensation for work performed outside the city violated due process. *Toliver v. Middletown*, 12th Dist. Butler No. CA99-08-147, 2000 Ohio App. LEXIS 2970 (June 30, 2000).

Finally, in *Wardrop v. Middletown Income Tax Rev. Bd.*, 12th Dist. Butler No. CA2007-09-235, 2008-Ohio-5298, ¶ 17-23, the Twelfth District followed the reasoning of its decision in *Toliver* to hold that under the amended version of Middletown's ordinance—which, like Cincinnati's, only taxes the nonresident's wages for work performed in the city—the taxpayers were not subject to the city's tax for work performed beyond the city limits.

CONCLUSION

For the foregoing reasons, the amici urge the court to reverse the judgment below. First and foremost, the court should reverse because Section 29 does not address the appellant's tax liability but only his employer's obligation to withhold. As a result, Section 29 provided no basis for Cincinnati to deny Schaad's refund. Second, if this court disagrees and concludes that Section 29 was intended to impose tax liability on appellant, then the provision violates due process and Schaad is entitled to a refund.

For the foregoing reasons, the Court should overrule the decision of the First District Court of Appeals and require the City of Cincinnati to pay the full amount of the refund claimed by Schaad.

Respectfully submitted,
/s/ Thomas M. Zaino

THOMAS M. ZAINO (0041945)
STEPHEN K. HALL (0069009)
Zaino Hall & Farrin LLC
Suite 3600, 41 South High Street
Columbus, OH 43215
(614) 326-1120
tzaino@zhftaxlaw.com
shall&zhftaxlaw.com

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amici Curiae, The Ohio Society of Certified Public Accountants, et al. in Support of Appellants was served this 10th day of August 2022, by e-mail on:

DIANE MENASHE (0070305)
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 Appellees,
Karen Alder, et. al.

JAY R. CARSON (0068526)
(Counsel of Record)
Wegman Hessler
6055 Rockside Woods Boulevard, Suite 200
Cleveland, Ohio 44131 (216) 642-3342
jrcarson@wegmanlaw.com

ROBERT ALT (0091753)
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, Ohio 43215 (614) 224-4422
robert@buckeyeinstitute.org
Counsel for Appellant, Josh Schaad

ZACHARY M. HOLSCHER (0098039)
ALLISON DANIEL (0096186)
JULIE M. PFEIFFER (0069762)
Ohio Assistant Attorney General
30 East Broad Street, 14th Floor
Columbus, OH 43215
(t) 614-466-2872
(f) 866-422-9192
Zachary.Holscher@OhioAGO.gov
Allison.Daniel@OhioAGO.gov
Julie.Pfeiffer@OhioAGO.gov
Counsel for Attorney General, David Yost

/s/ Thomas M. Zaino
THOMAS M. ZAINO (0041945)