IN THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

CITY OF ATHENS, *et al.*,	:	Case No. 18AP000189
	:	
Plaintiffs-Appellants,	:	Trial Court Case No. 17CV10258
	:	
v.	:	Regular Calendar
	:	
THE STATE OF OHIO, *et al.*,	:	
	:	
Defendants-Appellees.	:	

AMICUS CURIAE BRIEF OF THE OHIO SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS, THE OHIO CHAMBER OF COMMERCE, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN OHIO, THE OHIO REALTORS, THE MANUFACTURING POLICY ALLIANCE, THE ASSOCIATED GENERAL CONTRATORS OF OHIO, THE OHIO CONTRACTORS ASSOCIATION, THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION AND THE MECHANICAL CONTRACTORS ASSOCIATION OF OHIO IN SUPPORT OF APPELLEES

Darrell A. Clay (Reg. No. 0067598)
Direct Dial: 216-928-2896
Email: dclay@walterhav.com
Brendan D. Healy (Reg. No. 0081225)
Direct Dial: 216-619-7851
Email: bhealy@walterhav.com

Jeffrey C. Miller
Jacob Bruner
Brennan, Manna & Diamond, LLC
200 Public Square, Suite 3270
Cleveland, Ohio 44114
Telephone: 216-658-2155
Facsimile: 216-658-2156

WALTER | HAVERFIELD LLP
The Tower at Erieview
1301 East Ninth Street, Suite 3500
Cleveland, Ohio 44114-1821
Facsimile: 216-575-0911

Attorneys for Plaintiffs-Appellants

Victoria L. Ferrise
Bryan E. Meek
Brennan, Manna & Diamond, LLC
75 E. Market Street
Akron, Ohio 44308
Telephone: 330-253-5060
Facsimile: 330-253-1977

Attorneys for Defendants-Appellees

Richard C. Farrin (0022850)
Thomas M Zaino (0041945)
Zaino Hall & Farrin LLC
41 S. High Street, Suite 3600
Columbus, Ohio 43215
Telephone: 614-326-1120
Facsimile: 614-754-6368
Email: rfarrin@zhftaxlaw.com
Email: tzaino@zhftaxlaw.com

Attorneys for Amici

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INTRODUCTION

The Ohio Society of Certified Public Accountants ("OSCPA"), the Ohio Chamber of Commerce ("Chamber"), the National Federation of Independent Business in Ohio ("NFIB"), the Ohio REALTORS ("REALTORS"), the Manufacturing Policy Alliance ("MPA") and the Associated General Contractors of Ohio, the Ohio Contractors Association, the National Electrical Contractors Association, and the Mechanical Contractors Association of Ohio (collectively, the "Contractors"), collectively referred to as "Amici" or the "Associations," submit this brief in support of Appellees to offer perspective to the Court regarding how the pre-Amended Substitute House Bill 49 of the 132d General Assembly ("H.B. 49") municipal net profit tax, under which businesses were subject to filing, audits, assessments, and local administrative appeals for each of the potentially more than 600 municipal taxing jurisdictions in which they do business, no matter how small, for the same tax year, imposed extremely burdensome compliance costs, resulted in inconsistent application of the law by the tax administrators and inconsistent decisions by the local

income tax boards of review, and exposed companies to the costly burden of defending themselves in multiple jurisdictions against audits, assessments, and administrative appeals regarding a single tax year. Amici will also counter Appellant's arguments that the municipal income tax provisions in H.B. 49, which was enacted to eliminate the excessive costs to businesses of complying with multiple filings, audits, assessments, and appeals for the same tax year, are in violation of the Home Rule Amendment to the Ohio Constitution, Article XVIII, Section 3.

STATEMENT OF INTEREST OF AMICI CURIAE

The OSCPA was established in 1908 and represents the diverse interests of approximately 27,000 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's advocating for a simpler, uniform municipal income tax system in Ohio. Every year, the OSCPA's members face tremendous municipal income tax compliance burdens,

including, for example, potentially filing tens, if not hundreds, of Ohio municipal net profit tax returns for one client. The OSCPA attempts to achieve a business-friendly municipal tax policy in Ohio, and the OSCPA is uniquely qualified due to its members' expertise in complex tax issues. The OSCPA's members are familiar with the significant municipal net profit tax administration issues and burdens under the pre-H.B. 49 structure.

Founded in 1893, the Chamber is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. The advocacy efforts of the Chamber are dedicated to the creation of a strong pro-jobs environment – an Ohio business climate responsive to expansion and growth.

NFIB represents nearly 23,000 small businesses in Ohio. Its members typically employ twenty-five or fewer people and do less than $2 million in annual sales. They are engaged in every industry type and come from all eighty-eight counties in Ohio. Even though they are small

businesses, many of the members make sales into or have other 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 they made sales, regardless how small. The members also were subject to differing and inconsistent applications of the law and different rules of the taxing authorities. The result could often be compliance costs that exceeded the tax liability to the particular taxing jurisdiction.

The REALTORS was formed in 1910 and now counts as the state's largest professional trade organization, with more than 30,000 members. Composed of real estate professionals (REALTORS) who have joined the local, state and national associations of REALTORS, its members often operate in multiple Ohio municipalities. Further, the association advocates for a strong Ohio economy that remains a competitive attraction to business and investment. Being competitive creates a strong real estate market, which benefits its members and all Ohioans. Ohio's municipal income tax system is so different from other

states that it hampers Ohio's competitiveness. Further, because REALTORS generally operate in more than one municipality, the association's members are subject to multiple filing and differing application of net profit taxes among Ohio municipalities.

The Contractors are commercial construction trade associations located in Ohio that represent more than 1,000 businesses in the construction industry that employ tens of thousands of tradespeople. Their members are primarily small, closely held companies that work across geographic areas spanning many municipal jurisdictions. They construct schools, roads, bridges, office and medical complexes, pipelines, wastewater treatment plants, mechanical and electrical systems, industrial facilities, and many other types of vertical and horizontal structures.

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, and operate in all 88 of Ohio's counties. 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.

MUNICIPAL INCOME TAX REFORM

The Associations have been working for years to reform the municipal income tax system in Ohio to eliminate the excessive burdens caused by the fact that there are over 600 taxing jurisdictions in the state, many of which have different rules, or interpretations of the statutes, ordinances, and rules, which added to the costs of compliance and the uncertainty of filing requirements. As stated above, under prior law

businesses incurred excessive compliance burdens, which adversely affected their competitiveness. While it is difficult to verify the actual total cost incurred by taxpayers to comply with Ohio's municipal income tax system, OSCPA's tax committee determined that the average fee its members charge to prepare a single municipal net profit tax return ranges between $200.00 and $300.00. Complex returns could cost even more. Ohio Department of Taxation ("ODT") Deputy Tax Commissioner estimated that taxpayers could save as much as $800 million per year if the net profit portion of the municipal income tax was centrally administered for all business taxpayers. (R. 737, Dfdt's Brief. in Opp., at Ex. E). The Associations believe that ODT's calculations reasonably estimate the potential cost-savings from centralizing administration of the net profit portion of the municipal income tax. The municipal income tax raises approximately $5 billion in annual revenue. (https://www.tax.ohio.gov/Portals/0/communications/publications/annual_reports/2017AnnualReport/AR2017.pdf#page=114.)

Although it varies municipality to municipality, the net profit portion of municipal income tax revenue is approximately fifteen per

cent. (Based on the testimony of Kent M. Scarrett, Executive Director, Ohio Municipal League, before Senate Finance General Government & Agency Review subcommittee, May 23, 2017, p. 2, in regard to H.B. 49. http://search-prod.list.state.oh.us/cm_pub_api/api/unwrap/chamber/132nd_ga/ready_for_publication/committee_docs/cmte_s_fin_gen_gov_sub_1/testimony/cmte_s_fin_gen_gov_sub_1_2017-05-23-0900_515/ohiomunicipalleaguetestimony.pdf.) As a result, the net profit portion of the municipal tax raises approximately $750 million of annual revenue. That means that the overall compliance costs incurred by net profit taxpayers exceeds the amount of actual tax due. This conclusion is supported by actual examples provided by Association members, as described below. When the cost of compliance is nearly equal to or exceeds the actual amount of tax due, the tax system is overly burdensome and abusive, and limitations are properly imposed by the General Assembly.

The Associations' efforts to reform the municipal income tax system culminated in Amended Substitute House Bill 5 of the 130th General Assembly ("H.B. 5"), which was the first step toward at least

some uniformity in municipal income tax, and H.B. 49. These enactments did not reduce the businesses' ultimate tax liability to the taxing jurisdictions, it simply alleviated the excessive compliance burdens under the old system.[1]

H.B. 49 brought on important new features to Ohio's municipal income tax system. For taxable years beginning on or after January 1, 2018, the Bill created an elective method of centralized collection and administration for municipal net profit taxpayers that are business entities (the elective provisions do not apply to individuals, including sole proprietors and disregarded entities such as single-member LLCs, that are net profit taxpayers). The bill also eliminated the anti-competitive throwback rule and modified the fourth quarter due date for estimated tax payments for individuals. In addition, the Bill required the Ohio Department of Taxation ("ODT") to complete a feasibility study of allowing municipal taxpayers to file individual municipal tax returns through the joint federal and state modernized e-file program and

[1] H.B. 5 also included provisions aimed at uniformity in the application of the municipal income tax to individuals.

clarified the late payment penalty. These changes are on top of the uniformity provisions adopted in H.B. 5, which were effective for taxable years beginning on or after January 1, 2016.

Effective for taxable years beginning on or after January 1, 2018, taxpayers subject to a municipal net profit tax may elect to file on a centralized basis with the Ohio Tax Commissioner, rather than file separate returns in each municipal taxing jurisdiction in which they do business, which for some businesses would require filing hundreds of returns. If a taxpayer elects to file on a centralized basis, the net profit tax will be administered and collected by the Ohio Tax Commissioner. The Tax Commissioner will administer the net profit tax for those taxpayers who so elect under R.C. 718.80 to 718.95, which were added by H.B. 49. The Tax Commissioner will promulgate the rules that will be applicable to electing taxpayers. Businesses that make the election will be subject to centralized audits and assessments by the Tax Commissioner, rather than to multiple audits and assessments by the various taxing jurisdictions. They will also be able to pursue a single appeal at the Tax Commissioner's appeals level, which would result in a

single final determination that could be appealed through the Ohio Board of Tax Appeals ("BTA") and, if necessary, the appellate courts, rather than appealing each assessment issued by the municipal taxing jurisdictions separately through the particular appeal process of each municipal corporation, including appealing through each municipal corporation's board of tax review, which would involve presenting evidence at a hearing and presenting legal arguments. Each ruling by the various municipal corporations' boards of tax review, if adverse, would have to be separately appealed to either the common pleas court for the appropriate county or the BTA. Pursuing multiple appeals would be extremely costly and burdensome for the business. It could also result in inconsistent decisions on the business's net profit tax liability for the same tax year.

The alternative filing option also benefits local governments. Because the Tax Commissioner is authorized to administer the tax on behalf of all taxing municipalities for participating business taxpayers, audit results will apply to all municipalities. As a result, assessments that increase the net profit of a taxpayer will increase the tax base for all

municipalities. Under the non-centralized filing system, when one municipality performs an audit and increases a taxpayer's net profits, other municipalities must perform their own independent audits, which they may or may not do. Further, the Tax Commissioner has access to Internal Revenue Service information that can be leveraged to identify underpayments to municipalities; many municipalities do not have access to Internal Revenue Service information. In addition to increasing net profit tax for municipalities through Tax Commissioner's auditing efforts, the service fee charged by the Tax Commissioner to the municipalities (0.5%), is less than the average net fee charged by RITA to provide its services (1.68%). H.B. 49 results in a net benefit for municipalities, as well as participating businesses.

It should be noted that the centralized filing, administration, and appeal provisions of H.B. 49 apply only to the net profit tax on business entities. The provisions do not apply to individuals that generate net profits, nor to electric companies and telephone companies, none of which are eligible to elect to file on a centralized basis under this section (electric and telephone companies already file on a centralized basis

with the Tax Commissioner using different rules, contained in Chapter 5745). Moreover, H.B. 49 is elective. H.B. 49 does not require businesses to file centrally, it simply gives them the option. Finally, H.B. 49's centralized collection provisions do not impact the amount of tax that electing taxpayers owe individual municipalities.

Many of the Associations and their members testified in support of H.B. 49. Both practitioners and businesses have experienced the excessive burdens of having to file in multiple taxing jurisdictions and complying with the different rules and interpretations of the various taxing jurisdictions. Numerous members of the Associations have experienced the excessive burden of filing returns in each of the multiple taxing jurisdictions in which they do business, however small their liability. One member reported that it filed in 27 taxing jurisdictions at a cost of approximately $3,800 for a total liability of less than $700. Another filed in 11 taxing jurisdictions at a return preparation cost of $8,250. It owed over $500 to one city, $0 to eight cities, and was due a refund from the other two. Other members had similar experiences. One filed in 43 cities at a cost of $100 per filing. Of those 43 returns, 8 had

$0 due, 14 had less than $10 due, and 9 had less than $100 due. For 31 of the 43 returns, the cost of preparation exceeded the tax due. Another filed 23 returns at a cost of $5,250, of which 11 had $0 due and all but one of the others had less than $100 due. Yet another filed 125 returns with a total liability of $405, which cost almost $3,500 to prepare. And another filed 10 returns for a total amount due of $20, at a cost of almost $1,500. These are just a few of the examples of businesses that incurred significantly more in preparation costs than the taxes due.

The excessive burden on businesses prior to the challenged H.B. 49 provisions allowing centralized filing was even more extreme for business entities that did business in multiple taxing jurisdiction and were subjected to audits by those jurisdictions for the same tax year. An entity that did business in 20 cities could be subjected to audit by each of the cities for the same tax year. The business would have to deal with the different rules and interpretations by each city. If the audits led to assessments, the business would have to appeal each city's assessment separately, making sure it followed each city's procedural rules for appealing an assessment, which were often vague. If it received adverse

decisions by the cities, the business would have to file separate appeals from each decision with the respective city's board of tax review, again making sure it followed the procedural rules for each city.

The taxpayer would have to prepare for and attend a hearing before each municipality's board of tax review. If the taxpayer intended to present evidence or legal arguments before the board of review, it would have to hire an attorney. Even if the appeals for each of the cities involved the same issues, the taxpayer would have to present its evidence and legal arguments at each board of review. At both levels, there was the potential for receiving inconsistent or conflicting rulings by the city tax administrators or the city boards of tax review on the same issue.

The taxpayer would have to file or defend separate appeals from each board of review to either the Ohio Board of Tax Appeals ("BTA") or the court of common pleas for the county in which the city was located. If the cities were in different counties, the taxpayer would have to pursue or defend appeals in multiple courts of common pleas. There could also be situations where some appeals were filed in common pleas

courts and others in the BTA. Again, this was susceptible to inconsistent or conflicting rulings. The taxpayer would then have to pursue or defend a separate appeal from each of the various courts of common pleas to the courts of appeals for the districts in which the common pleas courts were located. If any of the appeals involved a decision of the BTA, the appeal would be filed in the court of appeals in which venue was proper under R.C. 5717.04.

The extreme burden on a taxpayer that had to defend audits, appeal assessments, and appeal or defend decisions through the multiple levels for 20 different cities is patently obvious. It would be excessively burdensome even if only a few cities were involved. And the number of cities could be greatly in excess of twenty. The cost could easily exceed the tax at issue, which would effectively thwart the taxpayer's ability to appeal. Seeking refund claims suffered from the same multiple filing and appeals burdens.

These excessive burdens on taxpayers who under prior law had no option but to file and be subject to audit in numerous municipal taxing jurisdictions was the driving force behind the push for reform that led to

H.B. 49. H.B. 49 removes the burdens of multiple filings with the cities, multiple audits, assessments, and appeals for the same tax year, making multiple payments, and filing multiple refund claims. H.B. 49 does so by providing that municipal corporations that levy a net profit tax on businesses must allow taxpayers to elect to file centrally with the tax commissioner, and to be subject to audit and assessment by the tax commissioner. The tax commissioner will promulgate the rules (three already became effective on January 12, 2018) for those who opt to file centrally with the tax commissioner, which will avoid the burden of the taxpayer being subject to differing rules and interpretations by each municipal taxing jurisdiction. Centralized administration by the tax commissioner of taxpayers who make the election will also result in a single appeal process through the tax commissioner, the BTA, and the court of appeals, with a discretionary appeal to the Ohio Supreme Court. In the example of the business entity that does business in 20 cities, the business would be subject to only one audit, one assessment, and one appeal to the tax commissioner, the BTA, and the court of appeals, rather than potentially twenty. The burden on taxpayers who do

business in multiple taxing municipalities will be greatly reduced. It will also eliminate the very real possibility of inconsistent or conflicting decisions.

While some municipalities utilize a common tax administrator such as the Regional Income Tax Agency ("RITA") to administer its tax system, a taxpayer that is audited by RITA must still file separate appeals with each separate municipality. Further, since RITA only operates in about half of the municipalities, taxpayers are still required to file in multiple locations. For example, a business operating in 40 locations may still need to file 21 returns (one for RITA's 20 municipalities and 20 separate returns in the self-collecting municipalities. Therefore, even municipalities that utilize a common administrator under pre or post H.B. 49 continue to impose unreasonable burdens on taxpayers.

STATEMENT OF CASE AND FACTS

Amici adopt the Statement of Case and Facts in Appellees' brief.

ARGUMENT

I. Arguments in Support of Appellees

A. The General Assembly's enactment of the Municipal Income Tax Reform Provisions of H.B. 49 does not violate the Home Rule Amendment to the Ohio Constitution. The enactment is expressly authorized by Article XVIII, Section 13 of the Ohio Constitution.

Appellants argue that the municipal tax reform provisions enacted by H.B. 49, R.C. 718.80 through 718.95 and Section 803.100 of H.B. 49, violate the Home Rule Amendment to the Ohio Constitution, Article XVIII, Section 3. Appellants correctly state that the Home Rule Amendment confers upon municipal corporations the power of taxation. However, that power is not absolute. As this Court held in an opinion issued shortly after Article XVIII, Section 13 was adopted, that power of taxation may be limited or restricted by general laws enacted by the General Assembly, pursuant to Article XIII, Section 6 and Article XVIII, Section 13 of the Ohio Constitution. *State ex. rel. City of Toledo v. Cooper*, 97 Ohio St. 86, 119 N.E. 253 (1917), paragraph two of the syllabus. Contrary to Appellants' assertions, the municipal tax reform provisions in H.B. 49 fall squarely within the power conferred upon the

General Assembly by Article XVIII, Section 13, and by Article XIII, Section 6.[2]

In *Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St.3d 599, 605, 693 N.E.2d 212 (1998), the Ohio Supreme Court reaffirmed that "[t]hese provisions [Article XVIII, Section 13, and Article XIII, Section 6] clearly delegate power to the General Assembly to limit exercise of the municipal taxing power." Appellants attempt to bolster their argument by misstating what the Court said in *Cincinnati Bell*. They wrongly paraphrase the Court as stating that "municipalities have a plenary power to tax, with the General Assembly having highly circumscribed authority to limit the exercise of this power." Appellants' merit brief at 22, citing to *Cincinnati Bell* at 602. A reading of the Court's discussion of the municipal taxing power and the authority of the General Assembly to limit that power at the cited portion of the opinion, or elsewhere in the opinion, fails to find any support for Appellants'

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[2] Because the trial court held that the challenged provisions of H.B. 49 were valid limitations on the municipal taxing power under Article XVIII, Section 13, it did not address their validity under Article XIII, Section 6.

statement. *Cincinnati Bell* addressed a single issue, whether the doctrine of implied preemption of municipal taxation should be abandoned. The Court held that it should and that the taxing power of a municipality can be preempted only by an express act of the General Assembly. *Id.* at the syllabus, 603.

Nor does language in the other authority cited by Appellants, *Gesler v. Worthington Income Tax Bd. of Appeals*, 138 Ohio St.3d 76, 2013-Ohio-4986, 3 N.E.3d 1177, ¶ 17, even remotely support this statement. It simply states the general power of taxation conferred to municipal corporations by the Home Rule Amendment. The opinion never refers to that power as plenary. Any such suggestion is rebutted by the statement in *Gesler* that "the Constitution grants the General Assembly the power to limit or restrict the municipal power to tax." *Id.* at ¶ 21. The opinion made the narrow holding that this power to limit the municipal power to tax did not include the authority to require a municipality to impose a tax. *Id.*

Neither *Cincinnati Bell* nor *Gesler* stated or even implied that the power of taxation of municipalities was plenary, and for good reason.

Any such assertion ignores Article XVIII, Section 13, and Article XIII, Section 6, both of which expressly provide that the General Assembly has the power to limit or restrict the municipalities' taxing power. "Plenary" means unlimited. Thus, these provisions on their face reject any concept that the municipal power of taxation is plenary. Any debate on this question was removed by an opinion of the Ohio Supreme Court issued shortly after the adoption of the Home Rule Amendment and Article XVIII, Section 13. In *State ex rel. City of Toledo*, 97 Ohio St. 86 at paragraph two of the syllabus, the Court held:

> The power of all municipalities to levy taxes may be limited or restricted by general laws. Such limitations or restrictions are warranted by Section 6, Article XIII, adopted in 1851, and by Section 13, Article XIII of the Amendments adopted September 3, 1912.

Nor do either of the opinions state or even imply that the power conferred upon the General Assembly by Article XVIII, Section 13, and by Article XIII, Section 6 to limit or restrict the municipal power of taxation is highly circumscribed. There is no authority supporting this assertion. To the contrary, this assertion is directly rejected by the opinion in *State ex rel. City of Toledo* at paragraph three of the syllabus:

> Taxation is a sovereign function. The rule of liberal construction will not apply in cases where it is claimed a part of the state sovereignty is yielded to a community therein. It must appear that the people of the state have parted therewith by the adoption of a constitutional provision that is clear and unambiguous.

It cannot genuinely be argued that the challenged provisions of H.B. 49, along with R.C. 715.013, do not expressly limit the exercise of the municipal taxing power. R.C. 715.013(A) expressly states: "Except as otherwise expressly authorized by the Revised Code, no municipal corporation shall levy a tax that is the same as or similar to a tax levied under Chapter * * * 5747 of the Revised Code." R.C. 715.013(B) allows a municipal corporation to levy an income tax, but expressly limits that authority to an income tax levied in accordance with R.C. Chapter 718. The provisions of H.B. 49 challenged by Appellants are sections of R.C. Chapter 718. Therefore, those provisions are part of the limitations the General Assembly expressly placed on the municipal corporations' power to levy an income tax.

Appellants attempt to avoid the clear application of Article XVIII, Section 13 by asserting that it only authorizes the General Assembly to

prohibit the levy of income taxes by municipalities. Appellants' brief at 24. This assertion reveals the fundamental flaw in Appellants' argument. Article XVIII, Section 13 does not use the term "prohibit." It uses the more flexible term "limit." That term includes the power to place conditions upon the power of taxation. The Ohio Supreme Court recognized this in *New York Frozen Foods, Inc. v. Bedford Hts. Income Tax Bd. of Review*, 150 Ohio St.3d 386, 2016-Ohio-7582, 82 N.E.3d 1105. In addressing whether former R.C. 718.06 limited the authority of the city to bar a change of an accounting or apportionment method by a taxpayer when filing an amended return, the Court recognized that such a limitation would be within the General Assembly's authority under Article XVIII, Section 13. The Court noted that former R.C. 718.06, which required the city to accept consolidated income tax returns, was a proper exercise of the General Assembly's power under Article XVIII, Section 13 to limit the city's taxing power. *Id.* at ¶¶ 29-30. However, the Court found that former R.C. 718.06 did not expressly require cities to change from a separate return to a consolidated return on an amended return and therefore prohibiting the city from refusing to accept the

amended return would impose "*an additional limit on the city's taxing authority* that was not explicitly stated in R.C. 718.06." (Emphasis sic.) *Id.* at ¶ 31. The Court recognized that the General Assembly had the power to impose such a limitation on the city's taxing authority under Article XVIII, Section 13, but that it had to do so explicitly. *Id.*

In *Thompson v. City of Cincinnati*, 2 Ohio St. 2d 292, 294-295, 208 N.E.2d 747 (1965), the Ohio Supreme Court confirmed the General Assembly's power over municipal taxation:

> The above constitutional provisions and judicial precedents clearly indicate that a municipality has the power to tax incomes subject to all lawful restraints imposed by the General Assembly.
>
> In 1957, the General Assembly exercised its constitutional authority to regulate municipal income taxes. See Chapter 718, Revised Code. Therein certain restrictions were placed upon the power of a municipality to tax incomes.

Appellants argue for a narrow construction of the term "levy" used in Article XVIII, Section 13, asserting that it means imposition of the tax and does not include administration or collection of the tax. Initially, the Ohio Supreme Court addressed the meaning of the term "levy" as used in the Ohio Constitution in *Grabler Mfg. Co. v. Kosydar*, 35 Ohio St.2d

23, 33, 298 N.E.2d 23 (1973): "The definition of 'levy,' in Webster's Third New International Dictionary, is 'the imposition or collection of an assessment, tax * * *.'"

The First District Court of Appeals addressed this issue in *Cincinnati Imaging Venture v. City of Cincinnati*, 116 Ohio App.3d 1, 686 N.E.2d 528 (1996). The city argued that the requirement in R.C. 718.06 that interest be paid on a municipal income tax refund exceeded the authority of the General Assembly granted by Article XVIII, Section 13, asserting that provision did not allow the General Assembly to interfere with the administration and regulation of lawfully levied taxes. The court rejected that argument, stating:

> It is difficult to interpret this language, granting to the General Assembly the absolute right to limit the power of municipalities to impose taxes, as allowing these same municipalities the unfettered right to regulate the levy and collection of those taxes.

Id. at 4. The court noted that under the city's narrow construction numerous sections of R.C. Chapter 718 that had never been challenged would be unconstitutional. *Id.* Similarly, R.C. Chapter 5745, which both authorizes and limits the power of municipalities to tax electric

light companies and telephone companies by, among other things, centralizing the administration and collection of the tax under the state tax commissioner and has gone unchallenged since its inception in 2000, would also be vulnerable to the same fate.

Such a result would not be in accord with the intent of the drafters of the Home Rule Amendment. In an opinion issued a few years after the adoption of that provision, *The Cleveland Tel. Co. v. Cleveland*, 98 Ohio St. 358, 367, 121 N.E. 701 (1918), the Ohio Supreme Court considered the intent of the drafters regarding respective powers of municipalities and the state, quoting from the Constitutional Debates: "'If you will read this proposal [the Home Rule Amendment] carefully you will see that the state is dominant. The great powers of taxation, the great police power, and the great powers of education and of health, all are held with a firm hand by the state.'"

Moreover, even if there is some question as to the meaning of the language in Article XVIII, Section 13, it is a fundamental rule that "[a]ny doubt as to the constitutionality of a statute will be resolved in favor of its validity" and that "[e]very reasonable presumption will be

made in favor of the validity of a statute. *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 149, 128 N.E.2d 59 (1955). Following numerous opinions of the Court, as well as those of the United States Supreme Court, *Defenbacher* held in its syllabus: "An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." This fundamental rule has been uniformly followed up to the present. *See, e.g., Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, 916 N.E.2d 303, ¶ 11. It also applies to Home Rule challenges to enactments of the General Assembly. *Cleveland v. State*, 128 Ohio St. 3d 135, 2010-Ohio-6318, 942 N.E.2d 370, ¶ 6.

In any event, as discussed above, the General Assembly's enactments do limit the levy of municipal income taxes even under Appellants' overly narrow construction. R.C. 715.013 limits the authority of municipal corporations to levy an income tax to one levied in accordance with R.C. Chapter 718. The municipal tax reform

provisions of H.B. 49 clearly fall within the power of the General Assembly granted by Article XVIII, Section 13 of the Ohio Constitution.

B. R.C. 718.85(B), which expressly authorizes the payment of one-half percent of municipal net profit tax collected by the Tax Commissioner into the municipal income tax administrative fund, does not violate any provision of the Ohio Constitution, including the Home Rule Amendment.

R.C. 718.85(B) provides that the tax commissioner shall forward all of the municipal net profit tax that official receives pursuant to R.C. 718.80 to 718.95 to the treasurer of state and that one-half percent of the amounts received is to be paid into the municipal income tax administrative fund established under R.C 5745.03. That fund was established to receive one and one-half percent (1.5%) of the municipal income tax on electric light and telephone companies, which was to pay for the administration and collection of that tax by the Tax Commissioner. The one-half percent (0.5%) paid into the fund from the municipal net profit tax received by the Tax Commissioner is for payment of that official's cost of administering and collecting the municipal net profit tax for only those businesses who elect to file with the Tax Commissioner.

Appellants argue that R.C. 718.85(B) is unconstitutional because nothing in Article XVIII, Section 3 or Article XII, Section 5 authorizes the General Assembly to impose a fee for administering and collecting the municipal net profit tax. This argument is essentially a repeat of Appellants' argument that Article XVIII, Section 13 only empowers the General Assembly to prohibit the levy of a tax by a municipal corporation. For the reasons set forth in the preceding argument, that is an incorrect reading of that constitutional provision. As discussed in detail in the preceding argument, Article XVIII, Section 13 grants power to the General Assembly to limit the municipal power of taxation. The General Assembly did so in R.C. 715.013 by limiting the authority of municipalities to levy an income tax to one levied in accordance with R.C. Chapter 718. Contrary to Appellants' bald statement, providing for a payment out of the tax received by the Tax Commissioner into a fund to pay for the administration and collection of the tax by the tax commissioner is integrally related to that limitation.

Appellants' argument that nothing in Article XVIII, Section 3, Article XII, Section 5, or Article XVIII, Section 13 authorizes the

General Assembly to impose the fee has it backwards. The question is whether anything in those provisions, or elsewhere in the Ohio Constitution prohibits the General Assembly from imposing the fee. The clear answer is no.

Appellants' argument that the state has taken the fee from the municipalities is essentially a Due Process Clause takings claim. However, the Ohio Supreme Court has repeatedly held that political subdivisions of the state, which would include municipal corporations, do not have due process protection against their creating state. *See, e.g. Avon Lake City School Dist. v. Limbach*, 35 Ohio St.3d 118, 122, 518 N.E.2d 1190 (1988). Municipal corporations are political subdivisions of the state. R.C. 2744.01(F); *Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950, ¶ 35. They are instrumentalities of the state. *Id.* Therefore, Appellants may not assert a due process of law claim against the state.

CONCLUSION

For the reasons set forth in the foregoing amicus curiae brief and the brief of appellees, the Court should affirm the decision of the trial court.

Respectfully submitted,

Richard C. Farrin (0022850)
Thomas M. Zaino (0041945)
Zaino Hall & Farrin LLC
41 South High Street, Suite 3600
Columbus, Ohio 43215
Phone: (614) 326-1120
Fax: (614) 458-0028
rfarrin@zhftaxlaw.com

Attorneys for Amici

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Amicus Curiae Brief was served by regular U. S. Mail and by electronic mail on this 29th day of May, 2018 upon the following:

Darrell A. Clay
Brendan D. Healy
WALTER | HAVERFIELD LLP
The Tower at Erieview
1301 East Ninth Street, Suite 3500
Cleveland, Ohio 44114-1821

Attorneys for Plaintiffs-Appellants

Jeffrey C. Miller
Jacob Bruner
Brennan, Manna & Diamond, LLC
200 Public Square, Suite 3270
Cleveland, Ohio 44114

Victoria L. Ferrise
Bryan E. Meek
Brennan, Manna & Diamond, LLC
75 E. Market Street
Akron, Ohio 44308

Attorneys for Defendants-Appellees

Richard C. Farrin (0022850)
Attorney for Amici