

IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO

THE BUCKEYE INSTITUTE )  
88 East Broad Street, Suite 1300 )  
Columbus, Ohio 43215 )

and )

GREG R. LAWSON )  
161 Fawn Court )  
Westerville, Ohio 43081 )

CASE NO

and )

REA S. HEDERMAN )  
931 Vauxhill Lane )  
Powell, Ohio 43065 )

and )

JOE NICHOLS )  
274 Myrtle Avenue )  
Newark Township, Ohio 43055 )

Plaintiffs, )

JUDGE:

vs. )

Megan Kilgore, in her official )  
capacity as Columbus City Auditor )  
373 South Hight St., 21<sup>st</sup> Floor )  
Columbus, Ohio 43215 )

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

and )

DAVE YOST, in his official capacity as )  
Ohio Attorney General )  
80 East Broad St. )  
Columbus, Ohio 43215 )

Defendants. )

Plaintiffs The Buckeye Institute, Greg R. Lawson, Rea S. Hederman, Joe Nichols, and  
(collectively, "Plaintiffs") and through counsel, for their Complaint hereby state as follows:

**NATURE OF THE SUIT**

1. The novel coronavirus and the State of Ohio’s efforts to limit its spread forced Ohioans to make significant changes to how they live and work. Though these changes were sudden and unexpected, by and large Ohioans responded by finding ways to continue to live and work safely.

2. Perhaps the most ubiquitous adaptation across Ohio workplaces was the shift to working from home. Indeed, in many cases, the health orders issued by the State of Ohio made working from home the only option for some workplaces. In many cases, those workplaces discovered that—subject to some minor inconveniences—employees could still successfully perform their jobs remotely, without physically setting foot in their offices.

3. It is well-established, however, that where an employee performs his or her work has tax consequences. Specifically, courts have allowed municipalities to impose income taxes on nonresidents’ income that was earned for work performed within the municipality’s limits. The rationale for this tax liability was that while performing work within the city limits, the employee enjoyed the benefits of the city’s infrastructure and public safety services. There was a direct fiscal relation between the work performed within the city’s limits and the city’s public expenditures, which contributed to the employee’s ability to work within the city.

4. But when employees are required to work outside of the city, that fiscal link is severed. In an attempt to ease the collection of municipal income taxes during the health crisis, the Ohio General Assembly enacted a provision in uncodified law requiring that work performed by an employee at his or her home as a result of the health crisis would be deemed to have been performed, for municipal tax purposes, at the employee’s regular place of business.

5. Although the General Assembly's stated motive in enacting this provision was to clarify and simplify municipal income tax collection during the health crisis, allowing a municipality to tax employees without some fiscal relation between the municipality and the work performed violates the due process rights of those employees under the Fifth and Fourteenth Amendments to the U.S. Constitution. Further, the Ohio Constitution is specific in the powers granted to the General Assembly and municipal corporations. The Ohio Constitution does not authorize the General Assembly to expand the taxing power of municipalities beyond established limits.

6. The Plaintiffs bring this suit to challenge the constitutionality of the "deemed to have been performed" provision of H.B. 197 and the imposition of municipal income tax under that provision by the City of Columbus.

7. The Plaintiffs were ordered by the State of Ohio to stay out of their offices in the City of Columbus and instead to work from their non-Columbus homes. The State then in H.B. 197 "deemed" the work to have been performed in the City of Columbus for tax purposes, thereby subjecting the Plaintiffs to higher municipal income taxes, while at the same time depriving the municipalities in which they actually performed the work of tax revenues for services provided to the Plaintiffs while they were working. The Orwellian operation of these two State requirements—the first prohibiting the Plaintiffs from working from their City of Columbus office, and the other deeming a fiction that the Plaintiffs did in fact work in the City of Columbus for the purpose of taxation—offends the basic principles of equity, and the Due Process requirements of the United States and Ohio Constitutions.

**PARTIES**

**The Buckeye Institute**

8. The Buckeye Institute is an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The Buckeye Institute is a nonpartisan, nonprofit, and tax-exempt organization, as defined by section 501(c)(3) of the Internal Revenue code. The Buckeye Institute’s office is located in downtown Columbus, Ohio.

9. The Buckeye Institute assists legislative and executive branch policymakers, in Ohio and throughout the United States by providing ideas, research, and data to enable lawmakers’ effectiveness in advocating for free-market public policy solutions.

10. The Buckeye Institute advocates individual liberty, free enterprise, personal responsibility, and—most relevant here—limited government. As such, a commitment to constitutional limits on government power lies at the core of The Buckeye Institute’s mission.

11. For example, The Buckeye Institute—through its employees, research fellows, and scholars—publishes articles, studies, opinion editorial pieces and position papers to influence the public debate on policy issues related to economic liberty.

12. The Buckeye Institute’s office is located in downtown Columbus, Ohio; but its work, and the work of its employees, does not depend on its employees being present in that office.

13. For example, the bulk of work performed by The Buckeye Institute’s employees is policy research and writing, which is not tied to any physical location and can be conducted remotely. The Buckeye Institute uses a cloud-based computing system for all of its email and document sharing needs. Similarly, The Buckeye Institute’s employees who are engaged in

fundraising and external relations conduct most of their work over the phone, via the internet, or through in-person meetings outside of the City of Columbus. The Buckeye Institute's payroll and withholding is processed by a contracted, third-party vendor, which is located outside of the City of Columbus.

### **The Individual Plaintiffs**

#### **Greg R. Lawson**

14. Greg R. Lawson is employed by The Buckeye Institute as a Research Fellow, where he focuses on budget and tax policy, as well as education and education funding, transportation, and occupational licensing issues. His writings on those public policy issues have appeared in *The Cincinnati Enquirer*, *The Plain Dealer*, and *The Columbus Dispatch*, as well as national publications including *Forbes*. Mr. Lawson has also authored numerous reports dealing with local government funding and reform.

15. Mr. Lawson lives in Westerville, Ohio, where he has resided since 2014. He is able to conduct his research and writing through a personal computer with a home internet connection.

#### **Rea S. Hederman**

16. Rea S. Hederman is the Executive Director of The Buckeye Institute's Economic Research Center and Vice President of Policy. Mr. Hederman is a nationally-recognized expert in health care policy and tax policy and has published numerous reports and papers relating to health care reform, labor markets, and how to reform tax systems to spur economic growth. Mr. Hederman's work has been published in national media outlets including *The Washington Post*, *The Washington Times*, *National Affairs*, and *The Hill*. He is regularly quoted on public policy

issues by major newspapers and wire services, and has appeared on CNN, CNBC, Fox News Channel, and MSNBC.

17. Mr. Hederman lives in Powell, Ohio, where he has resided since 2014. He is able to conduct his research, writing, and management responsibilities through a personal computer with a home internet connection.

**Joe Nichols**

18. Joe Nichols is the Director of External Relations at The Buckeye Institute. In this role, Nichols develops relationships with existing and prospective allies and supporters by sharing Buckeye’s accomplishments and strategic vision.

19. Mr. Nichols lives in Newark Township, Ohio, where he has resided since 2016. He is able to conduct his job duties through a personal computer with a home internet connection.

**Defendants and Related Parties**

20. Defendant Megan Kilgore is the Auditor of the City of Columbus, and in her official capacity is responsible for implementation of the City of Columbus’s tax ordinances and collection of municipal income tax.

21. The City of Columbus, Ohio (“Columbus” or “the City”) is a chartered municipal corporation pursuant to Art. XVIII, Sec. 7 of the Ohio Constitution.

22. Defendant Dave Yost is the Attorney General of the State of Ohio, and in his official capacity is a necessary nominal party to this action pursuant to R.C. § 2721.12 (A).

**Historical and Legal Background of Municipal Income Tax in Ohio**

23. The Ohio Constitution does not explicitly grant municipalities the power to tax. Rather, Sec. 3, Article XVIII of the Ohio Constitution broadly authorizes municipalities “to

adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”

24. During the early decades of the twentieth century, the Ohio Supreme Court held that Sec. 3, Article XVIII gave municipalities the power to levy certain types of taxes, but in dicta, expressed doubt whether that power extended to a municipal income tax. *State ex rel. Zielonka v. Carrel* (1918), 99 Ohio St. 220, 228 (“It may be said in this connection that it is clearly to be implied from the Constitution that municipalities are without power to levy an income or inheritance tax.”)

25. Subsequent courts, however, took a more expansive view of Sec. 3, Article XVIII, holding that “unless and until the State of Ohio enacts laws providing for an income tax, a municipality may do so<sup>1</sup>.” *Stockwell v. City of Columbus*, 55 Ohio Law Abs. 168, 86 N.E.2d 822, 825 (Ohio Com.Pl.1949).

26. In 1950, the Ohio Supreme Court spoke authoritatively on the issue of both the constitutionality of municipal income taxes, and their application to nonresidents who worked within the municipality. In *Angell v. City of Toledo* (1950), 153 Ohio St. 179, the Court held that Section 3 of Article XVIII, along with Section 7 of XVIII (allowing a municipality to adopt a charter and exercise “all powers of local self-government”) invested municipalities with the authority to levy an income tax and that such a tax does not violate the due process clause when such tax is levied on a nonresident for work performed within the municipalities borders.

27. Section 13 of Article XVIII of the Ohio Constitution specifically grants the Ohio General Assembly the power to “limit the power of municipalities to levy taxes and incur debts

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<sup>1</sup> The State of Ohio did, in fact, enact a statewide income tax in 1971, but did not preempt municipal income taxes.

for local purposes.” But the power to limit is not the power to *expand*, and the Ohio Constitution is notably silent regarding the General Assembly’s ability to *expand* municipal tax authority. Applying the well-established principle of legal interpretation that *expressio unius est exclusio alterius* to Section 13 of Article XVIII, the General Assembly would exceed its constitutional limitations were it to attempt to expand a municipality’s taxing power.

28. In 1956, the City of Columbus enacted its income tax ordinance, which provided that “a tax at the rate of one per cent per annum is levied upon personal service compensation earned by nonresidents for work done in the city of Columbus.” Ordinance No. 1073-56, Sec. 2, 1956. The ordinance recognized the fundamental due process and commonsense limitation found in Sec 3. Art. XVIII—that a municipality’s power to adopt and enforce regulations applied only “within [the municipality’s] limits.”

29. Seven years later, in *McDonnell v. City of Columbus* (1961), 172 Ohio St. 95, the Ohio Supreme Court again relied upon the fiscal connection between the City’s constitutional authority to tax income and the physical location where the employee earned that income. In *McDonnell*, the Court upheld the City’s income tax on an employee of The Ohio State University reasoning that even though the employee worked for an arm of the State and on property owned by the State, he nevertheless performed his work and thus earned his income within the City of Columbus.

30. Although amended since 1956, the City’s income tax ordinance as it currently exists respects this limitation: “The tax is an annual tax levied on the income of every person residing in or earning or receiving income in the municipal corporation . . . .” Columbus Code of Ordinances, Title 3, Ch. 362.01 (B).

31. The City of Columbus currently imposes a 2 ½ percent income tax.



**The State’s Response to COVID-19 and H.B. 197**

32. On March 14, 2020, in response to the public health threat posed to Ohio residents by the COVID-19 virus, Ohio Governor Mike DeWine issued Executive Order 2020-01D (“the Emergency Declaration”), which declared a state of emergency, authorized the Ohio Department of Health to issue “guidelines for private businesses regarding appropriate work and travel restrictions, if necessary” and urged “[a]ll citizens . . . to heed the advice of the Department of Health and other emergency officials regarding this public health emergency in order to protect their health and safety.” (See Emergency Declaration, ¶¶s 1,4,7).

33. On March 22, the State Director of Health issued an Order that required, subject to certain exceptions, “all individuals currently living within the State of Ohio . . . to stay at home or at their place of residence” (“the Stay-at-Home Order”). The Stay-at-Home Order further required that “[a]ll businesses and operations in the State,” except “Essential Business and Operations” as defined in the Order, “cease all activity within the State . . . .” (See Stay-at Home Order, ¶¶s 1-2).

34. The Stay-at-Home Order, however, allowed nonessential businesses to continue operating to the extent that the continued operation consisted “exclusively of employees or contractors performing activities at their own residences (i.e., working from home).” (Stay-at-Home Order, ¶2).

35. In light of the Governor’s Emergency Declaration and the advice provided by public health officials, The Buckeye Institute’s management decided that to protect its employees’ health and slow the spread of COVID-19, Buckeye employees should work from home. Accordingly, on March 18, 2020, The Buckeye Institute advised all of its employees, including plaintiffs Lawson, Hederman, and Nichols, to work from home.

36. Four days later, in compliance with the Stay-at-Home Order, The Buckeye Institute, as a nonessential business, required all of its employees to work from home until further notice. In other words, following the issuance of the Stay-at-Home Order, plaintiffs Lawson, Hederman, and Nichols were no longer merely *advised* to work from home by their employer, they were *required* by the State to do so as a matter of law.

37. To heed their employer's request, and to comply with the Stay-at-Home Order, plaintiffs Hederman and Nichols began working from their homes on March 18, 2020, returning to work at the office on June 7, 2020, after new health orders permitted office environments to reopen with certain restrictions.

38. Plaintiff Lawson, however, began working from home on March 18, 2020, continues to work from home, and anticipates that he will do so for the foreseeable future.

39. While working from home, none of the individual plaintiffs performed their duties at The Buckeye Institute's downtown Columbus office. All of the individual plaintiffs worked from their homes in Westerville, Powell, and Newark Township, respectively.

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

41. Specifically, H.B. 197 provided that:

“[D]uring the period of the emergency declared by Executive Order 2020-01D, issued on March 9, 2020, and for thirty days after the conclusion of that period, ***any day on which an employee performs personal services at a location, including the employee's home***, to Am. Sub. H. B. No. 197 133rd G.A. 341 which the employee is required to report for employment duties because of the declaration ***shall be deemed to be a day performing personal services at the employee's principal place of work.***”

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

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

43. On June 12, 2020, by letters sent to City Auditor Kilgore and City of Columbus Finance Director Joe Lombardi, Plaintiffs Lawson, Hederman, and Nichols formally objected to the withholding and any payment of municipal income tax during the period when they were working from their homes outside of the City of Columbus. Further, the Individual Plaintiffs requested that the City Auditor return any amounts withheld or refund any amounts from that withholding that the City had deemed to have been paid.

44. The City Auditor's Office confirmed receipt of the requests on June 15, 2020, and indicated that it would review the materials. On June 21, 2020, in an attempt to expedite the Individual Plaintiffs' requests, Plaintiffs' counsel again contacted the City Auditor's Office by email asking for a status update on the requests and offering to provide any additional information. Plaintiffs' counsel reached out a third time to the City Auditor's Office the following week to check on status of the requests, but—as of date of this filing—has received no response to Plaintiffs' requests. Based on the plain language of Sec. 29 of H.B. 197 and its obvious applicability to the City Auditor, the City Auditor's failure to respond to the Individual

Plaintiffs' objections operates as a *de facto* denial of these protests based on the requirements of H.B. 197.

COUNT ONE: ACTION FOR DECLARATORY JUDGMENT  
(As to All Plaintiffs)

45. The Plaintiffs restate the allegations of Paragraphs 1 through 43 and incorporate them as if fully rewritten here.

46. Ohio R.C. §2721.03 provides that “any person whose rights, status, or other legal relations are affected by a constitutional provision, statute . . . may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.”

47. Here, the Plaintiffs seek a declaration that Sec. 29 of H.B. 197, which for municipal income tax purposes deems income earned by persons working from home due to the health crisis to have been earned at the employee's principal place of work, is an unconstitutional violation of their Due Process rights as secured by the Fifth and Fourteenth Amendments to the U.S. Constitution, as well as Art. I, Sec. 1 of the Ohio Constitution.

48. Specifically, Sec. 29 of H.B 197 purports to remove the well-established requirement that a government entity must have either in personem jurisdiction over the person to be taxed or in rem jurisdiction over the property to be taxed. Or, as the *Angell* Court put it, there must be some “fiscal relation” between the municipality, the taxpayer, and the income being taxed. In this case, the City of Columbus, pursuant to authority purportedly arising under Sec. 29 seeks to tax income of nonresidents that was earned outside the City limits, where there is neither nexus nor fiscal relation between the City and the income being taxed.

49. By virtue of the withholding requirement found in Ohio R.C. 718.03 (A)(1), The Buckeye Institute is required to participate in this constitutional violation by collecting the City of Columbus municipal income tax from nonresident employees whose income has been earned for work performed outside of the City of Columbus due to the Stay-at-Home Order.

50. The City of Columbus necessarily seeks to compel The Buckeye Institute to assist it in this exercise in extraterritorial jurisdiction by requiring The Buckeye Institute to withhold from its nonresident employees' wages money to pay the municipal income tax for work that these nonresident employees were ordered by the State of Ohio to perform from their homes outside of the City of Columbus.

51. The Buckeye Institute advocates for free-market public policy solutions, which often involve the reformation or removal of onerous or counterproductive government regulations. Much of The Buckeye Institute's research and educational work is rooted in respect for the constitutional limits on government power and respect for the checks and balances at the federal, state, and local levels. The Buckeye Institute would appear to betray—or at the very least—give short shrift to those principles if it voluntarily assisted in collecting an illegal and unconstitutional tax from its employees.

52. In addition, voluntarily collecting the tax undercuts The Buckeye Institute's ability to advocate credibly for limited government and respect for constitutional boundaries, which contradicts and undermines The Buckeye Institute's mission.

53. The Individual Plaintiffs have already had money withheld from their wages over their objections, and likewise seek a declaration that the City of Columbus's taxing of nonresidents on income earned outside of the City of Columbus is unconstitutional.

54. Plaintiffs Lawson, Hederman, and Nichols began working from home initially because of guidance—later elevated into an order—issued by the State of Ohio. The municipal income taxes in the cities or townships in which the Individual Plaintiffs reside are lower than the 2 ½ % income tax rate imposed by the City of Columbus. Simply put, the Individual Plaintiffs first were ordered by the State of Ohio to perform their professional duties from their homes outside of the City of Columbus, and then were deemed to have worked in the City of Columbus for tax purposes, thereby financially penalizing them with higher taxes charged by a municipality in which they did not work and do not reside.

55. Moreover, while Mr. Hederman and Mr. Nichols recently have returned to work in Columbus, the Emergency Declaration is still in effect, and a future spike in COVID-19 cases may lead to further state orders that require them once again to work exclusively from home.

56. Accordingly, Plaintiffs respectfully request that this Court declare Sec. 29 of R.C. 197, and all actions taken by the City of Columbus in reliance upon it to be unconstitutional and therefore void.

COUNT TWO: ACTION UNDER R.C. 2723.01  
TO ENJOIN AND RECOVER ILLEGAL TAX  
(As to Plaintiffs Lawson, Hederman, and Nichols)

57. The Plaintiffs restate the allegations of Paragraphs 1 through 54 and incorporate them as if fully rewritten here.

58. Pursuant to Ohio R.C. 2723.01, et seq., “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, but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected.”

59. As set forth above, The City of Columbus's levy of an income tax on income earned by nonresidents outside City limits and with no fiscal relation to the City, as defined by governing Ohio Supreme Court authority, is unconstitutional and thus illegal.

60. Plaintiffs Lawson, Hederman, and Nichols have timely objected to the collection and withholding of the tax, have requested refunds, and notified the City Auditor of Columbus of their intent to sue.

61. Plaintiffs Lawson, Hederman, and Nichols have not paid municipal income tax voluntarily for the periods while they have been working exclusively from their homes outside of the City.

62. Accordingly, Plaintiffs Lawson, Hederman, and Nichols are entitled to an order enjoining the City of Columbus from collecting or requiring their employer to withhold wages for the payment of municipal income tax on income earned outside the City of Columbus, and requiring the City of Columbus to remit or otherwise refund any withholding of municipal income taxes for income earned while they were working exclusively from home.

WHEREFORE, Plaintiffs pray for the following relief:

- (1) As to Count One, an Order holding that Sec. 29 of H.B. 197 of the 133<sup>rd</sup> Ohio General Assembly is unconstitutional and void;
- (2) An Order enjoining the collection of municipal income taxes from nonresidents on income earned outside of the City of Columbus and a refund of all withholding or payments already collected on such income; and
- (3) All costs and fees, including attorneys' fees, and any additional relief the Court deems equitable; and

(4) Because this Complaint seeks declaratory judgment on a purely legal issue of pressing public importance, the Plaintiffs respectfully request that the Court set an expedited briefing and hearing schedule.

Respectfully submitted,

*/s/ Jay R. Carson*

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