

ORIGINAL

In the
Supreme Court of Ohio

HUNTER T. HILLENMEYER,

Appellant,

v.

CITY OF CLEVELAND BOARD OF
REVIEW, *et al.*,

Appellee.

: Case No. 2014-0235
:
:
: On Appeal from the
:
: Ohio Board of Tax
:
: Appeals
:
:
: Board of Tax Appeals
:
: Case No. 2009-3688
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BRIEF OF AMICUS CURIAE STATE OF OHIO

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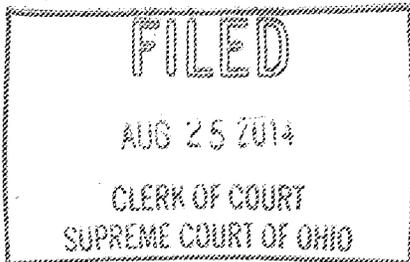


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INTRODUCTION

All laws classify. And perhaps none more than tax laws. The rich pay a higher percentage of their income in taxes than do the poor, who often pay no income tax at all. Healthcare expenses are deductible, but commuting expenses are not. And seniors can receive a property-tax discount unavailable to the young. Whether any particular tax law or exemption like these qualifies as a sound public policy or a mistaken allocation of resources can and should be debated in the legislative arena. But that debate is not for the courts. None of these standard tax classifications offends the Equal Protection Clause of the U.S. or Ohio Constitution. And the statute the Attorney General was invited to address in this appeal is no different. Nothing in the U.S. or Ohio Constitution bars the State from treating high-paid athletes differently from others—by allowing a city to tax such athletes when they work in the city briefly but barring the city from taxing others who work in that city for the same amount of time.

Former Chicago Bears linebacker Hunter Hillenmeyer seeks income tax refunds from the City of Cleveland because, among other claims, he believes that he and other professional athletes have been singled out for unfavorable tax treatment in violation of equal-protection guarantees. An Ohio statute, R.C. 718.011, generally bars cities from taxing income earned in the city by nonresidents, if those nonresidents earn that income in the taxing city on twelve or fewer days in a year. But that bar, often called the “occasional entrant rule,” has a statutory “performers’ exception,” which *authorizes* cities to tax visiting professional athletes and entertainers, even if they visit for one day. Hillenmeyer attacks that allowance for taxing performers, but his attack fails. The exception satisfies equal-protection review because it rationally furthers legitimate State interests.

First, the State has a rational interest in allowing cities to collect from significant revenue sources with administrative efficiency. Raising revenue is of course a legitimate interest, and so, too, is doing so in a way that is the least costly. *See Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2081 (2012). Here, professional athletes, or other entertainers or performers, are simply an easy-to-identify, high-end source of revenue that arises from a short visit to the city. Taxing only those types of nonresidents is a permissible rough proxy for what otherwise could be an income threshold for taxation on nonresidents who earn a sufficient amount of money during their short trips to the city. It is perfectly rational for the General Assembly to allow a municipality to tax those who perform these types of services within the municipality without also taking on the administrative task of requiring *every* other occasional entrant to file paperwork illustrating whether they earned enough income during their short sojourn for that income to be worth taxing. And notably, any such paperwork burden would fall upon those other employees and their employers, not just upon the city. It makes sense *not* to impose that burden, while still collecting the easier-to-assess amounts. The Constitution does not demand nonresidents to file paperwork for paperwork's sake.

Second, the State has a legitimate interest in matching public benefits and burdens. The General Assembly could rationally conclude that fairness calls for imposing a taxing burden commensurate with the public goods and services that one receives in return. *Angell v. City of Toledo*, 153 Ohio St. 179, 185 (1950) (citing *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1941)). Here, while other occasional entrants might receive the benefits of basic public safety, the General Assembly could rationally find that professional athletes and their events incur much *larger* public burdens relating to police protection and traffic and crowd control, among other

public services. Indeed, in this case, the public even built Hillenmeyer's workplace—the stadium—that made his income earned in Cleveland possible.

For all these reasons, no matter how the Court rules on Hillenmeyer's other claims, it should reject his claim that R.C. 718.011 violates equal-protection principles and hold that it is a reasonable way to allow municipalities to raise revenue without burdening others unnecessarily.

STATEMENT OF THE CASE AND FACTS

A. An Ohio statute, R.C. 718.011, bars cities from taxing occasional entrants, but authorizes taxation if the entrants are professional athletes or entertainers.

Ohio's Constitution directly grants municipalities the power to tax, as part of the cities' inherent power of self-government. Ohio Const. art. XVIII § 3; *Gesler v. Worthington Income Tax Bd. of Appeals*, 138 Ohio St. 3d 76, 2013-Ohio-4986 ¶¶ 17-18. Ohio's statutory law follows this constitutional grant by providing that Ohio municipalities may levy an income tax on residents who live in the municipality, nonresidents who work in the municipality, and businesses that earn net profits within the municipality. R.C. 718.01; *Angell v. City of Toledo*, 153 Ohio St. 179, 185 (1950).

Ohio's Constitution also allows the General Assembly to limit the municipal taxing power, as long as such limitations are *expressly* provided by law. Ohio Const. art. XVIII § 13; Ohio Const. art. XIII § 6; *Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St. 3d 599, 605 (1998) (requiring express, not implied, acts of the General Assembly to preempt municipal taxing authority). The General Assembly has enacted several tax provisions that limit municipal taxing power, often to promote uniformity and to treat taxpayers fairly.

One such provision, R.C. 718.011, limits the municipal power to tax a nonresident individual's compensation for personal services. That limit, known as the "occasional entrant rule," says a municipality shall not tax "the compensation paid to a nonresident individual for

personal services performed by the individual in the municipal corporation on twelve or fewer days in a calendar year.” R.C. 718.011. The limit has two express exceptions. One, not at issue here, allows cities to tax nonresidents if their employers are in a city that otherwise taxes income but does not tax the nonresidents on the particular income earned in the visited city. R.C. 718.011(A).

The second exception at issue here—the “performers’ exception”—provides that a municipality *may* tax nonresident compensation of “professional entertainers or professional athletes” performing in the municipality for twelve days or fewer in a calendar year. R.C. 718.011(B). The provision also authorizes taxation of promoters and their employees, and requires that any definitions under the exception be “reasonable.” Together, the barrier to taxing occasional entrants, and the performers’ exception, provide:

On and after January 1, 2001, a municipal corporation shall not tax the compensation paid to a nonresident individual for personal services performed by the individual in the municipal corporation on twelve or fewer days in a calendar year unless one of the following applies:

(B) The individual is a professional entertainer or professional athlete, the promoter of a professional entertainment or sports event, or an employee of such a promoter, all as may be reasonably defined by the municipal corporation.

R.C. 718.011. While the statute requires “reasonable” definitions of “athlete” and other terms, it does not require any specific methodology for calculating the income attributable to services performed in the city, and thus the tax due to the city.

B. The City of Cleveland taxes visiting performers, and Chicago football player Hillenmeyer objected to taxation and to the method used to calculate his liability.

The City of Cleveland, acting under the Ohio Constitution and R.C. 718.011, imposes an income tax on professional athletes and entertainers regardless of the number of days they

perform within the city. Cleveland Codified Ordinance 191.0501(B)(1) imposes an income tax on “all net profits earned and/or received by a nonresident from the operation or conduct of any business or profession within” Cleveland, including “all other taxable income earned and/or received by a nonresident derived from or attributable to sources, events or transactions within” the city. In addition, administrative regulations provide the methodology for determining the amount of the nonresident’s total income that should be allocated to the Cleveland-based services under this ordinance. The Cleveland tax is administered through the Central Collection Agency (“CCA”), an agency that administers income taxes and collects tax revenue on behalf of Ohio local government taxing authorities. *See* Cleveland Codified Ordinances 191.2311 and 191.2303. Echoing Cleveland Codified Ordinance 191.0501(B)(1), CCA Regulation § 3.02(A) imposes an income tax upon all nonresident employees for “all salaries, wages, commissions and other compensation earned and received . . . for work done or services rendered or performed within said taxing community.”

Cleveland uses a specific methodology, called the “games played” or “performance” method, for allocating the compensation of nonresident professional athletes to Cleveland. *See* CCA Regulation § 8:02(E)(6). That regulation defines a fraction with a numerator of “the number of exhibition, regular season, and post-season games the athlete played” in the city and a denominator of “the total number of . . . games which the athlete was obligated to play under contract or otherwise during the taxable year.” The resulting figure is the amount of income subject to the Cleveland municipal income tax.

Other taxing jurisdictions tax nonresident athletes through a “duty days” system. A duty day is any team workday and includes not only games, but also practices, team meetings, and other required training sessions. Under the duty days method, all duty days, not just game days,

are included in a denominator, while game days in a visited jurisdiction are still used as the numerator. That larger denominator results, of course, in a smaller resulting fraction, that is, a smaller amount of income subject to the jurisdiction's tax.

Appellant Hunter T. Hillenmeyer, a linebacker for the Chicago Bears, objected to Cleveland's taxation of him for tax years 2004, 2005, and 2006. Hillenmeyer Br. at 5. During those years, Hillenmeyer was a non-Ohio resident who, as a member of the Bears, traveled to Cleveland once per year to play a football game against the Cleveland Browns. In 2005, Hillenmeyer played in one regular season game in Cleveland. *Id.* at 8. In both 2004 and 2006, Hillenmeyer played in one exhibition game in Cleveland. Hillenmeyer was in Cleveland for two days each year to play in the games. *Id.*

Most of Hillenmeyer's objections center on the particular municipal method used to tax him. He claims that the city's own law, and state and federal law, including constitutional requirements, allow only a duty-days method, not a games-played apportionment method. Hillenmeyer Br. at 12-13, 13-34. In the alternative, however, Hillenmeyer presents a more far-reaching claim—that he may not be taxed *at all*, because, he says, Ohio's statute violates equal protection by authorizing the taxation of only performers and not all other occasional entrants. *Id.* at 34-37. Hillenmeyer sought refunds from Cleveland, and appealed the City's denial. *Id.* at 10.

C. In proceedings below, the City of Cleveland Board of Review and the Ohio Board of Tax Appeals rejected Hillenmeyer's refund claims, but did not address Hillenmeyer's constitutional claims.

Upon review of Hillenmeyer's refund claims, the City of Cleveland Board of Review denied the claims in full. *Id.* at 11. In turn, Hillenmeyer appealed to the Ohio Board of Tax Appeals, which likewise held that the City of Cleveland properly applied the games-played

apportionment methodology. *Id.*; BTA Case Nos. 2009-3688 and 2011-4027. The BTA further held that, as a statutory body with statutorily limited powers, it lacked the jurisdiction to determine whether R.C. 718.011 is constitutional. Hillenmeyer Br. at 11. Hillenmeyer then exercised his right to appeal as of right to this Court pursuant to R.C. 5717.04. *Id.* at 12.

D. The Court invited the Attorney General to address Hillenmeyer's equal-protection challenge to R.C. 718.011.

After the parties briefed the case, the Court invited an *amicus* brief from the Attorney General on behalf of the State of Ohio. The Court asked the State to address Hillenmeyer's fourth proposition of law, in which he claims that R.C. 718.011 violates equal protection by authorizing taxation of professional athletes but not other occasional entrants. Specifically, the Court's invitation specified:

It is ordered by the court, sua sponte, that the Attorney General of Ohio is requested to file an *amicus* brief addressing appellant's fourth proposition of law, and specifically to address the validity of R.C. 718.011 under the Equal Protection Clause, along with any issue of severability that would arise should an equal-protection violation be found.

Order of July 24, 2014, Case No. 2014-0235.

The State now submits this *amicus* pursuant to the Court's invitation. The State follows the scope of the invitation, and addresses only the equal-protection challenge to the state statute. It does not address the apportionment dispute, as that arises under the city's taxing practices, not under R.C. 718.011, so the State does not have an interest in how it is resolved.

ARGUMENT

Proposition of Law:

R.C. 718.011 does not violate equal protection because the State has rational reasons to allow cities to tax those who earn income for performing as athletes and entertainers, while barring taxation of other “occasional entrants” who earn income for other personal services.

A. Laws are presumed constitutional, and under rational-basis review challengers bear a heavy burden to negate every conceivable basis that might sustain the law.

The state and federal Equal Protection Clauses provide “identical” protection. *See Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St. 3d 55, 60 (1999); Ohio Const. art. I § 2; U.S. Const. Fourteenth Amendment. These clauses do “not impose an iron rule of equality.” *Ohio Apt. Assn. v. Levin*, 127 Ohio St. 3d 76, 86, 2010-Ohio-4414 ¶ 51 (internal quotation marks omitted). To the contrary, they “embod[y] a general rule that States must treat like cases alike but may treat unlike cases accordingly.” *Vacco v. Quill*, 521 U.S. 793, 799 (1997); *see Plyler v. Doe*, 457 U.S. 202, 216 (1982). In other words, equal protection ““does not require things which are different in fact . . . to be treated in law as though they were the same.”” *GTE N., Inc. v. Zaino*, 96 Ohio St. 3d 9, 11, 2002-Ohio-2984 ¶ 22 (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)); *see Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 2010-Ohio-4908 ¶ 16 (the Clause prevents “governmental decision makers from treating differently persons who are in all relevant respects alike”) (internal citations omitted).

Thus, neither clause “forbid[s] classifications”; instead, they merely keep government “from treating differently persons who are in all relevant respects alike.” *Park Corp.*, 2004-Ohio-2237 ¶ 19 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). And “[u]nless a classification warrants some form of heightened review because it jeopardizes exercise of a

fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.” *Nordlinger*, 505 U.S. at 2. In other words, judicial review asks only whether the State has rational reasons for treating separate groups differently.

Under this “rational-basis review,” courts defer greatly to legislatively enacted laws. *Park Corp. v. Brook Park*, 102 Ohio St. 3d 166, 2004-Ohio-2237 ¶ 19. “As a general rule ‘legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.’” *Huntington Nat’l Bank. v. Limbach*, 71 Ohio St. 3d 261, 262 (1994) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961)); *GTE N., Inc.*, 2002-Ohio-2984 ¶ 22. Given this strong presumption of constitutionality, this rational-basis test has rightly been described as the “paradigm of judicial restraint.” *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314 (1993).

Several rational-basis rules illustrate why the Supreme Court described it in this way. Under the rational-basis test, for example, “[a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” *Am. Assn. of Univ. Professors*, 87 Ohio St. 3d at 58 (quoting *Beach Commc’ns*, 508 U.S. at 315); see *Pickaway Cnty.*, 2010-Ohio-4908 ¶ 20. In addition, the legislature does not need to show the rationality of any particular classification “with mathematical nicety.” *Pickaway Cnty.*, 2010-Ohio-4908 ¶ 32 (citation omitted). Generalizations suffice. See *id.* What is more, the burden to show that a law is unconstitutional falls squarely on the challenger. *Ohio Grocers Assn. v. Levin*, 123 Ohio St. 3d 303, 2009-Ohio-4872 ¶ 11. “A taxpayer challenging the constitutionality of a taxation statute ‘must negate every conceivable basis which might support it.’” *GTE N., Inc.*, 2002-Ohio-2984 ¶ 22 (quoting *Lyons v. Limbach*, 40 Ohio St. 3d 92, 94,

(1988)). If the challenger fails to sustain this burden, the court must uphold the law as constitutional.

Finally, courts are particularly deferential to the legislative process where the challenge relates to the taxing power of the State, which is “fundamentally a legislative responsibility.” *GTE N., Inc.*, 2002-Ohio-2984 ¶ 21. In *Nordlinger*, for example, the United States Supreme Court upheld a California property-tax law against an equal-protection challenge even though the taxpayer, a homeowner, paid roughly five times as much property tax as neighbors owning comparable homes. 505 U.S. at 7. There, the Court held that the property-tax statutes that protected long-term homeowners from increases in valuation could rationally further the state interest in “local neighborhood preservation, continuity, and stability.” *Id.* at 12. The law also advanced the state interest in protecting the expectations and reliance interests of long-term property owners. *Id.* at 12-13.

B. R.C. 718.011’s performers’ exception, by authorizing taxation of performers but not other occasional entrants, comports with the Equal Protection Clause because the State has rational bases for that distinction.

Here, Hillenmeyer has not invoked any fundamental right or identified any protected class, so his claim does not trigger any form of heightened review. Instead, the highly deferential rational-basis test applies. Hillenmeyer cannot meet his heavy burden of showing the law’s unconstitutionality under that test, because the General Assembly could rationally conclude that professional athletes are not similarly situated to other occasional entrants. *First*, the General Assembly could rationally find that professional athletes are typically highly paid and their work is easy to find, and thus that a city could earn significant revenue with administrative ease by taxing out-of-city professional athletes rather than other occasional entrants. *Second*, the General Assembly could rationally conclude that municipalities must

provide significant services for professional sporting events, such as providing safety forces, beyond what the municipalities provide for ordinary occasional entrants. Those reasons and more justify the law, and Hillenmeyer’s contrary claims fail.

1. The State has a legitimate interest in allowing cities to collect significant revenue from high-income performers with relative administrative ease, while not using resources pursuing harder-to-track lower-income workers.

Virtually every city in America taxes visiting athletes, for good reason: They are high earners who are easy to identify. While some might attack that as a “bad reason,” this Court and others have repeatedly affirmed that this is a perfectly legitimately basis for taxation. Both the performers’ exception, and the occasional entrants rule barring taxation of most others, reflect the intersection of two interests. A government has an interest in raising revenue, and as part of that interest, governments often use “progressive taxation” elements that proportionately tax more those who earn more. A government also has a recognized interest in administrative efficiency—that is, in minimizing the costs of revenue generation required by tracking taxpayers, processing forms, and so on. Those interests, taken together, result in a net interest in maximizing revenue relative to administrative cost—and that is achieved by focusing on revenue sources with a high yield relative to the red tape needed to tap that source.

First, no one disputes that raising revenue by progressive measures that tax only higher incomes—whatever their merits as a policy matter—is a legitimate state interest under equal-protection principles. *Angell v. City of Toledo*, 153 Ohio St. 179, 182 (1950) (describing “power to raise revenue” as a “fundamental power of government”); *Menefee v. Queen City Metro*, 49 Ohio St. 3d 27, 29 (1990) (noting state’s “valid interest in preserving the financial soundness of its political subdivisions”). Progressive measures take several forms. Sometimes, tax systems set different rates for different income levels. Other times, taxes are set with a threshold, so that

no one pays until they reach a certain level. State and federal income taxes use both methods. While such progressive mechanisms are often debated as a matter of policy, they are constitutional, and policy makers may choose them. But city taxes are set at a flat rate, by state law. R.C. 718.01. Thus, as returned to below, other mechanisms are needed to roughly follow the same principle.

Second, administrative efficiency for municipal taxing authorities has long been recognized as a legitimate state interest. The U.S. Supreme Court recently identified administrative efficiency as a valid basis for upholding a “tax-related” measure against an equal-protection challenge. In *Armour*, the Court held that special assessments imposed on landowners at a rate roughly 30 times greater than similarly situated neighboring landowners did not violate the Equal Protection Clause. 132 S. Ct. at 2078-79. There, the Court held that the administrative difficulty of providing refunds to taxpayers was enough to justify vastly different assessment amounts for what would otherwise be similarly situated landowners. *Id.* at 2081 (citing *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 511-12 (1937)). Thus, the Equal Protection Clause does not prohibit even large disparities in tax burdens when that difference rests only on the legitimate state interests in administrative convenience.

Applying these principles here, the State has a strong interest in authorizing cities to focus on high-revenue sources that are administratively easy to assess. No one doubts that professional athletes such as Hillenmeyer are highly paid compared to the average income earner, nor that taxing them is administratively easy—or at least easier than taxing other occasional entrants.

Hillenmeyer and other professional athletes are highly paid generally, and especially so when measured by the time spent working. Multimillion dollar salaries are common in pro

sports, and even minimum salaries are high. In the National Football League, for example, the *minimum* salaries in 2012 began at the \$355,000 guaranteed for rookies. From there, one-year veterans were guaranteed \$430,000; two-year veterans \$505,000; three-year veterans \$580,000; four-to-six-year veterans \$665,000; seven-to-nine-year veterans \$790,000; and veterans with ten or more years received at least \$890,000. NFL Collective Bargaining Agreement 2006-2012, Hillenmeyer Ex. A in BTA Record, at 179. Using the middle figure of \$580,000, one-day incomes range from \$29,000 (using a game-day method with 20 games, including exhibition) to about \$12,000 (using a duty-day method with the 2% maximum cited by Hillenmeyer in his brief at 27). Multiplying that by many players, from many sports—as well as musical stars and other entertainers included in the performers' exception—yields significant revenue.

Then consider the administrative efficiency to the city in finding high-profile (as well as high-income) performers, as well as the ease of compliance for the affected taxpayers. Municipal taxing authorities can easily identify professional athletes subject to the tax. Team schedules and salary information for athletes in major sports leagues are readily available. Moreover, the convenience here is not just from the government side. An athlete-taxpayer can track his schedule to comply with various jurisdictions' taxes. Indeed, he must already do so to cover many cities and States' comparable taxes.

Now compare both the revenue side and the administrative burden for other, typical occasional entrants, and the basis for the *different* treatment becomes plain. First, most other occasional entrants earn nowhere near \$10,000 *per day*. Second, the administrative burden on both cities and taxpayers, to assess income, fill out forms, etc., would be enormous if it extended to everyone who ever visits another city for work. Comparing other options for addressing occasional entrants—especially in light of the likely goal of a threshold before taxation, and in

light of the mechanics of city taxation—confirms why Ohio’s approach is rational. Surely no one can dispute that any system for addressing occasional entrants would likely have a minimum threshold, as chasing every visitor for nickels and dimes, with massive reporting and tracking, would be inefficient. But city taxes, for reasons broader than the occasional-entrant context, are typically charged as flat rates for most workers, and Ohio law requires that. R.C. 718.01(B). And while most workers typically file state and federal income tax returns, many workers need not file city returns (though some cities mandate filing), as the withheld amount equals their liability.

Thus, implementing a threshold for taxation would require cumbersome changes and massive burdens on most employees and employers. Visiting workers would perhaps need to file a return to prove that they were under the threshold, or submit payment; or perhaps they would have to file returns to claim a refund for small amounts withheld. And employer withholding might have to be individualized for all employees by their personal travel schedule, submitting small amounts to dozens of jurisdictions. In sharp contrast, a sports team typically has identical schedule for all employees, with all visiting the same jurisdictions, so compliance is easier.

All this shows that the General Assembly could rationally conclude that taxation of all occasional entrants would be inefficient, and any threshold-based taxation of all other entrants would also be inefficient. Classifying professional athletes and other entertainers is a good proxy for an income threshold, but without the red tape, and without burdening others unnecessarily. Indeed, this administrative-efficiency factor is further shown by the fact that the statute also encompasses promoters and their employees, who are easy to process when they accompany the athletes or entertainers. R.C. 718.011(B).

2. The State has a legitimate interest in allowing cities to match the public taxation burden with the public benefits provided at athletic events.

While the potential interest in revenue-relative-to-red-tape is enough to justify the law, the taxation here is equally justified by the high likelihood that the public would have to provide special benefits for professional sporting events—benefits that could be essential to enabling professional athletes to earn their relatively higher incomes. The General Assembly could rationally conclude that taxing athletes assists in matching the public taxation burden with public benefits provided for athletic events, such as potentially higher police protection and traffic and crowd control, as well as the stadium itself to provide a workplace for athletes.

This Court has recognized that cities have a legitimate interest in matching burdens to benefits. In *Angell v. City of Toledo*, this Court upheld a municipal income tax against a due-process challenge. The *Angell* Court held that the City of Toledo could tax the income of nonresidents who worked within the city because the validity of the tax turns upon “the protections, opportunities, and benefits given by the state, or, in other words, whether the state have given anything for which it can ask a return.” 153 Ohio St. at 185 (citing *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1941)). There, as here, the City of Toledo provided police and fire protection to the nonresident plaintiff’s employer, and that justified the tax. *Id.*

In *Thompson v. City of Cincinnati*, the Court echoed its earlier reasoning in *Angell* in holding that individuals may be subject to municipal income taxation both in their place of residence and in the place where they work. 2 Ohio St. 2d 292 (1965). Both taxing municipalities provided the taxpayers with public benefits: one city provided them, as residents, the benefits of living in a safe community; the other provided them, as nonresident workers, the benefit of a place for employment. Again, Ohio municipalities have jurisdiction to tax where the

tax is imposed on individuals receiving public benefits in return. *McConnell v. City of Columbus*, 172 Ohio St. 95, 100 (1961).

And just as providing some benefits justifies some taxation, the General Assembly could rationally conclude that the potential need for *special* public expenditures for sporting events justifies special treatment for those who earn incomes during those events. The General Assembly could rationally conclude that on a typical game day, additional municipal services, including police protection, traffic control, crowd control, and fire protection, are necessary to manage heavy traffic flow and the potential for fan violence, theft, or other bad behavior. It could also rationally conclude that away teams visiting an Ohio city (such as the Chicago Bears) benefit from the additional public services provided on game day as well. Only with the assistance of public services are professional sporting teams able to host games. A nonresident lawyer working in Cleveland for a few days, by contrast, usually will not require the level of public services as professional sporting events on game days. *Cf. Thompson*, 2 Ohio St. 2d at 297-98 (“The municipality certainly does afford protection against fire, theft, *et cetera*, to the place of business of plaintiff’s employer and the operation thereof without which plaintiff’s employer could not as readily run its business and employ help.”).

Not only that, the General Assembly could also rationally find that professional athletes are a special case because taxpayers often pay to provide them a workplace, by building a stadium. Here, Cleveland’s football stadium is tax-supported (albeit by the county, not the city, as the government unit). In 1995, Cuyahoga County approved a special excise tax on alcohol and tobacco products to fund Cleveland Browns stadium. In other words, the county’s residents built Hillenmeyer’s game-day workplace. If city taxation of other nonresident workers is

justified by providing general safety services, as in *Angell* and *Thompson*, then surely athlete taxation could be justified by the potential need for extra safety and a stadium.

3. Hillenmeyer's contrary claims do not undermine these rational bases.

Hillenmeyer's counterarguments cannot undercut the above rational bases. He admits that taxation is legitimate, but charges that the *differential* treatment is unfair. Yet even he candidly admits that "the public services required for major athletic events might conceivably justify *some differential treatment*." Hillenmeyer Br. at 37. But, he says, even if differential treatment is justified, it is unfair to impose it on athletes who have no choice in where they are sent to play. And he says that it is unfair to tax him for a hypothetical one-day team photo shoot in Cleveland, as Hillenmeyer would be taxed, but the photographer would not. None of these arguments is persuasive.

First, Hillenmeyer attempts to identify other categories of professionals who might generate high volumes of income during the very short time that they visit a city—citing highly paid lawyers as an example. *See* Hillenmeyer Reply at 16. But most lawyers do not come near the NFL scale of \$430,000 *minimum* for rookies and \$790,000 after seven years. Even those few who earn \$800,000 divide that over 240 days of work or more, much more than the "duty days" that Hillenmeyer claims he works. Hillenmeyer Br. at 9. Regardless, as noted, the General Assembly does not need to prove the rationality of this classification "with mathematical nicety." *Pickaway Cnty.*, 2010-Ohio-4908 ¶ 32 (citation omitted). Its classifications can be both over and under inclusive—so long as they are rational as a general matter. *See id.* Thus, Hillenmeyer cannot invalidate this law simply by suggesting that it is underinclusive—*i.e.*, it does not cover other job categories who might also satisfy the State's potential reasons for

allowing municipalities to tax athletes—both their high-level salaries and the need for administrative efficiency.

Second, Hillenmeyer's additional hypothetical about a freelance photographer also misses the mark. Such photographers also likely will not, on average, involve the revenue-to-red-tape ratio discussed above. Taxing *every* such photographer, including all those unconnected to professional athletes, would involve massive red tape, with little payoff. So, if the administrative-ease concern means that a photographer contracted by the Bears also escapes taxation, along with other photographers, that is rational. And if the photographer is hired as an employee by the Bears' promoter, then he might be taxed, depending on the facts and on a city's practice, under the part of the exception that encompasses promoters' employees. R.C. 718.011(B). That shows that the State is consistent in allowing taxation of other easily ascertained and easily administered scenarios. A typical photographer also does not trigger the type of special public costs that an athletic event involves, as Hillenmeyer admits.

Third, Hillenmeyer's objection about his lack of choice is irrelevant. Many employees have little choice in being sent on travel to specific locations, other than the broader choice to keep or leave the job. Many other employees might be sent to Cleveland for more than twelve days, despite their preferences, and they, too, are subject to tax. That is an unavoidable consequence of line-drawing and of taxing employees based on their employers' choices.

Fourth, and finally, although the State does not directly address Hillenmeyer's attacks on the method of calculating his income tax liability, as opposed to the fact of taxing him at all, it is useful to keep in mind the distinction between those claims. While Hillenmeyer claims that Cleveland is an outlier on methodology, he cannot deny that Ohio and Cleveland are part of a national consensus on the threshold question of whether visiting athletes can be taxed at all.

Hillenmeyer Br. at 19-20 (discussing how other jurisdictions tax athletes); Cleveland Br. at 14-15; Kevin Koresky, *Tax Considerations for U.S. Athletes Performing in Multinational Team Sport Leagues or "You Mean I Don't Get All of My Contract Money?!"* 8 Sports Law. J. 101, 107 (2001) (describing "taxation of professional athletes" as now common "because of the increasingly high salaries paid to athletes, and the ease in determining their scheduled performances within each state"). Virtually every major city in America taxes visiting athletes. The Browns players pay in Chicago, just as the Bears players pay in Cleveland. What Hillenmeyer seeks, in asking to be exempt *entirely* from taxation, is unprecedented as well as mistaken.

For all these reasons, the Court should reject Hillenmeyer's equal-protection challenge to R.C. 718.011(B), and it should uphold the statute as a rational measure for raising revenue while minimizing unnecessary burdens on others.

C. The hypothetical severability question, which need not be reached, should lead to preserving as much of the statute as possible.

The State addresses the severability question that the Court highlighted in its order, but it notes first that this issue need not and should not be reached. For all the reasons above, the statute should not be invalidated to any degree, so the Court need not wrestle with the question of how broad any invalidation would extend. The severability factors in this case are unclear, and might even cut in different directions. The State concludes that any invalidation should be as narrow as possible.

The severability question here is whether the Court, if it finds an equal-protection violation, should strike down *only* the performers' exception, R.C. 718.011(B), or *all* of R.C. 718.011, the occasional entrant's rule. The first option would leave R.C. 718.011's broader ban against taxing occasional entrants (as well as R.C. 718.011(A)'s allowance for taxation in the

specified circumstances), thus granting Hillenmeyer the tax relief he seeks. The second option, by striking the entire law, would expose all occasional entrants to taxation, so that Hillenmeyer would not gain tax relief, but would gain equality by ensuring that others could be taxed as well.

Here, the severability question turns on multiple overlapping legal principles: R.C. 1.50, which focuses on the practical workability of a statute after severance of part; the *Geiger* test, which also looks to legislative intent along with workability; and a special doctrine of municipal taxation in Ohio, which forbids “implied prohibitions” by the State of municipal taxes. Each of these has different implications, and the balance tips in favor of severing the performers’ exception.

The Court’s usual severability analysis combines the statutory command regarding severability, R.C. 1.50, and the three-part *Geiger* test. *See State ex rel. Whitehead v. Sandusky Cty. Bd. of Commrs.*, 133 Ohio St. 3d 561, 2012-Ohio-4837 ¶ 28 (citing R.C. 1.50 and *Geiger v. Geiger*, 117 Ohio St. 451, 466 (1927)). R.C. 1.50 is the General Assembly’s own instruction on severability, focusing on whether remaining provisions “can be given effect” without the offending one:

If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, *the invalidity does not affect other provisions* or applications of the section or related sections *which can be given effect without the invalid provision* or application, and to this end the provisions are severable.

R.C. 1.50 (emphases added). The Court’s *Geiger* test tracks that statutory command, but is arguably broader, depending on how one looks at the General Assembly’s overall *intent* as part of workability. The *Geiger* test asks:

(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself?

(2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out?

(3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

Geiger, 117 Ohio St. at 466. The first and third prong track R.C. 1.50, by looking to workability once a court simply severs the offending provisions, without inserting other terms. The second prong tracks R.C. 1.50 to the extent it looks to “give effect” to the remainder, but it might diverge in looking at the General Assembly’s “apparent intention.” This case is a good example of that possible divergence.

As a matter of pure administrative workability, the performers’ exception can easily be severed, and the rest of the statute—the bar to taxing occasional entrants—can easily be given effect. That is, it is simple enough to *stop* taxing professional athletes and performers, and it is simple enough to continue not taxing others. No other words need to be inserted; striking division (B) leaves everything easily in place. The introductory “unless” clause would even still have meaning, applying to division (A) to allow taxation in those circumstances.

But the legislative intent is a harder question, as it is possible that the General Assembly intended something different. The General Assembly’s competing intents are clear: to simultaneously *allow* taxation of athletes (and other performers) and to *forbid* taxation of most occasional entrants. But it is impossible to tell which option the Assembly would have preferred if it had to treat both groups the same. Perhaps it was so devoted to relieving most occasional entrants of the burden of city taxation—and the attendant administrative burden—that it would have been willing to live without allowing cities to capture the revenue from high-income performers. But it is also possible that the General Assembly wanted to allow cities to collect

that revenue, to meet city needs, and it would have been willing to allow other taxation as a tradeoff. The State cannot definitively discern that intent, as both purposes are clearly expressed in the statute as written.

On top of all that, another doctrine adds to the equation—the rule against finding an implied barrier, by the State, against municipal income taxation. This Court has held that State limits on city taxes require an express legislative statement; the Court will not find by mere implication that the General Assembly exercised its power to limit municipal taxation. *Gesler v. Worthington Income Tax Bd. of Appeals*, 138 Ohio St. 3d 76, 2013-Ohio-4986, ¶ 20; *Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St. 3d 599, 605 (1998). But that clear-statement requirement might be violated if the Court struck down only the performers’ exception here. That is because the limit on city taxation would be extended *by implication*—that is, from the new court-created “absence” of athlete-specific instructions—to include athletes as well as other occasional entrants. And here, the Court would not be truly unsure about General the Assembly’s specific intent regarding athletes; it enacted an express statement in favor of taxation. Thus, if the Court already has a rule against acting to bar taxes based merely on implication, it should not do so in the face of a *contrary* express statement. But that leads to the result of striking all of R.C. 718.011, invalidating the entire occasional entrant rule, and opening everyone to municipal taxation. And that contradicts R.C. 1.50’s mandate in favor of preserving other provisions.

While those competing doctrines point in different directions, the State urges that the narrower course would be to follow R.C. 1.50’s command and strike only the performers’ exceptions. To be sure, that might be contrary to the Assembly’s true intent, and it might be contrary to the “no implied prohibitions” doctrine. But if those other principles are in equipoise, the Court should err in favor of acting narrowly rather than broadly.

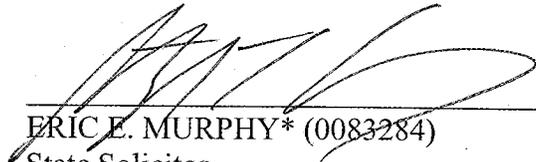
More important, the Court need not face this dilemma at all, as it should reject Hillenmeyer's equal-protection challenge on the merits, for all the reasons above, so the severability question does not arise.

CONCLUSION

For the above reasons, the Court should hold that R.C. 718.011 does not violate the Equal Protection Clauses of the U.S. Constitution and the Ohio Constitution.

Respectfully submitted,

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I certify that a copy of the foregoing Brief of *Amicus Curiae* State of Ohio was served by U.S. mail this 25th day of August, 2014, upon the following:

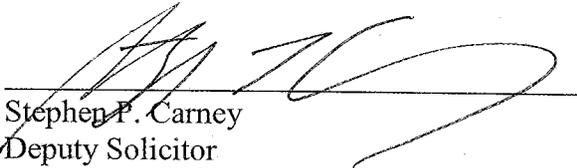
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