

ORIGINAL

IN THE SUPREME COURT OF OHIO

HUNTER T. HILLENMEYER	)	
	)	CASE NO. 14-0235
Appellant,	)	
v.	)	
	)	On Appeal from the Ohio Board of Tax
CITY OF CLEVELAND BOARD OF	)	Appeals
REVIEW and NASSIM LYNCH,	)	
CLEVELAND TAX ADMINISTRATOR	)	Board of Tax Appeals Case No. 2009-3688
	)	
Appellees.	)	

**BRIEF OF *AMICI CURIAE* NATIONAL FOOTBALL LEAGUE PLAYERS  
ASSOCIATION, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,  
NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION, AND NATIONAL  
BASKETBALL LEAGUE PLAYERS ASSOCIATION IN SUPPORT OF APPELLANT  
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## **INTEREST OF *AMICI***

*Amici* (hereinafter the “Players Associations”) are the unions that represent the professional athletes in each of the four major professional sports leagues, the National Football League (“NFL”), Major League Baseball (“MLB”), the National Hockey League (“NHL”), and the National Basketball Association (“NBA”).

The NFL Players Association is the union for professional football players in the NFL and serves as NFL players’ collective bargaining agent. Established in 1956, the NFL Players Association has a long history of assuring proper recognition and representation of players’ interests, and it acts whenever necessary to assure that the rights of players are protected. The NFL Players Association represents all players in matters concerning wages, hours, and working conditions, and protects their rights as professional football players.

The MLB Players Association is the union for professional baseball players in MLB and serves as MLB players’ collective bargaining agent. The MLB Players Association was established in 1966, and is devoted to ensuring that MLB players are afforded the same basic employment rights that people in all other professions enjoy. In addition to collective bargaining, the MLB Players Association protects players’ interests by assisting with grievances and salary arbitrations, and ensuring that playing conditions meet proper safety requirements.

The NHL Players Association is the union for professional hockey players in the NHL and serves as NHL players’ collective bargaining agent. The NHL Players Association was established in 1967 and is devoted to protecting the interests of its members.

The NBA Players Association is the union for professional basketball players in the NBA and serves as NBA players’ collective bargaining agent. Established in 1954, the NBA Players Association’s mission is to ensure that the rights of NBA players are protected and that every

conceivable measure is taken to assist players in maximizing their opportunities and achieving their goals. The NBA Players Association routinely advocates on behalf of the best interest of all NBA players in a variety of contexts.

All of the Players Associations have an interest in laws that specifically target their members as professional athletes. Accordingly, the Players Associations have an interest in Ohio's so-called "occasional entrant" exception, which explicitly provides that professional athletes can be subject to municipal income taxes in Ohio in circumstances where other, similarly-situated professionals cannot.

## ARGUMENT

### Proposition of Law:

**R.C. 718.011(B) violates the Ohio Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it singles out professional athletes for less advantageous tax treatment than similarly situated taxpayers without any permissible justification.**

The Players Associations do not object to their members being subject to fair taxation. Although athletes are often required to file returns, and pay taxes, in dozens of jurisdictions, the Players Associations and the professional athletes they represent have accepted that burden for years. The Players Associations do not seek any special treatment for their members. What they seek is fair taxation that treats their members in the same manner that all other taxpayers are treated.

The Players Associations object to taxes that specifically target professional athletes for differential tax treatment solely because of their status as professional athletes. Accordingly, they have consistently resisted and opposed tax regimes that target professional athletes and impose special tax burdens on them that are not shared by similarly-situated taxpayers in other occupations. In recent years there have been several examples of these so-called "jock taxes."

*See, e.g., Pogroszewski & Smoker, Is Tennessee's Version of the Jock Tax Unconstitutional?*, 23 Marq. Sports L. Rev. 415, 416 (2013) (discussing Tennessee's since-repealed "privilege" tax on NHL and NBA plyers and noting that "[w]ith states looking for ways to increase their revenues, non-resident professional athletes are attractive targets for state tax collectors"); Krasney, *State Income Taxation of Nonresident Professional Athletes*, 2 Sports Law. J. 127, 129–30, 131 (1995) (explaining that "[t]he increasingly high salaries paid to professional athletes have attracted not only enormous publicity, but also the attention of cash-strapped states and municipalities" and that this "has resulted in both an inconsistent and inequitable process of taxation of professional athletes"); Gottshalk, Jr., *Welcome, Traveler*, Wall Street Journal (Apr. 15, 1993) A1 (noting that professional athletes are "Easy Marks" for states and cities looking to boost tax revenue).

Ohio's occasional-entrant rule, codified at R.C. 718.011, is a textbook example of a tax law that specifically targets professional athletes for unfair and unequal treatment. R.C. 718.011 quite sensibly provides that "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." R.C. 718.011. The statute goes on, however, to declare that this exception *shall not apply* if 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." R.C. 718.011(B). The result is that professional athletes are subjected to a tax burden from which nearly all other taxpayers are exempt. R.C. 718.011(B) is thus an example of professional athletes being targeted for unequal treatment and being forced to shoulder a tax burden not imposed on similarly-situated taxpayers.

In its *amicus* brief, the State of Ohio (the "State") confirms that R.C. 718.011(B) targets professional athletes for an unequal tax burden. The primary justification it offers for such

targeting is simply that “athletes are typically highly paid and their work is easy to find.” Br. of *Amicus Curiae* State of Ohio (“State Br.”) 10. While perhaps refreshingly candid, the State’s brief only confirms that Ohio’s decision to target professional athletes is not the product of reasoned policy considerations or any other rational choice. Instead, Ohio has apparently chosen to treat professional athletes differently from other taxpayers because they are easy targets.

The Players Associations fully agree with Appellant Hunter H. Hillenmeyer (“Hillenmeyer”) that R.C. 718.011(B) is unconstitutional insofar as it targets professional athletes for less advantageous tax treatment. *See* Merit Br. of Appellant Hunter T. Hillenmeyer (“Hillenmeyer Br.”) 34–37. The guarantee of equal protection of the laws is intended to “protect the individual” from just this sort of “state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.” *Allegheny Pittsburgh Coal Co. v. County Comm’n of Webster County*, 488 U.S. 336, 345 (1989) (internal quotation marks omitted); *see* Fourteenth Amendment to the U.S. Constitution, Section 1 (“nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws”); Ohio Constitution, Article I, Section 2 (“Government is instituted for [the people’s] equal protection and benefit”). In addition to endorsing fully Hillenmeyer’s positions, the Players Associations submit this *amicus* brief for the purpose of rebutting the flawed reasoning contained in the State’s *amicus* brief, and highlighting additional considerations that are particularly relevant to the Court’s determination of whether R.C. 718.011(B)’s targeting of professional athletes is constitutional.

**A. Professional Athletes’ Careers Are Far Shorter Than Almost Any Other Profession.**

Although some professional athletes are highly paid for their services, almost all have a career that is far shorter than that of almost any other profession. The high level of performance

required to sustain a career at the professional level, coupled with the ever-present risk of injury, results in an average career of only three to six years for many leagues. In the NFL, for example, the average length of a player's career is about three and one-half years. See NFL Players Association, NFL Hopeful FAQs, <https://www.nflplayers.com/About-us/FAQs/NFL-Hopeful-FAQs/> (accessed Sept. 15, 2014); see also Larry Coon, *Lockout: What Will The Players Do Next?*, ESPN.com (Dec. 3, 2011) [http://espn.go.com/nba/story/\\_/page/nextforplayers-111114/nba-players-do-next](http://espn.go.com/nba/story/_/page/nextforplayers-111114/nba-players-do-next) (accessed Sept 22, 2014) (noting that average length of an NBA career is 4.8 years); Sam Roberts, *Just How Long Does The Average Career Last?*, New York Times (July 15, 2007) SP6 (noting that the average length of an MLB career is 5.6 years); Average Length Of An NHL Player Career, Quanthockey.com, <http://www.quanthockey.com/Distributions/CareerLengthGP.php> (accessed Sept. 15, 2014) (“On average, NHL players play between 5–6 seasons in the league.”). Compared to the average NFL player, Hunter Hillenmeyer’s seven-year NFL career could be considered lengthy. But compared to most professions where a career can be expected to span thirty years or more, the length of professional athletes’ careers is startlingly short.

Because professional athletes’ careers are so short relative to other professions, their high salaries can be misleading. Using the same example that the State uses in its brief of an NFL player earning \$580,000 per year, assuming that player has an average career of three and one-half years, he stands to earn \$2,030,000 over the course of his career. Although that is certainly a large sum of money, if it were spread over a more typical thirty-year career it would amount to less than \$68,000 per year. And while an annual salary of \$68,000 may, depending on one’s circumstances, allow for comfortable living, salaries at that level are hardly limited to athletes alone. Accordingly, there is no rational relationship between Ohio’s purported desire to establish

a “rough proxy” for an “income threshold for taxation on nonresidents” and its decision to target professional athletes under R.C. 718.011(B). *See MCI Telecomms. Corp. v. Limbach*, 68 Ohio St.3d 195, 199, 625 N.E.2d 597 (1994) (equal protection requires that a “classification rationally further a legitimate state interest” (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439–41 (1985))).

In any event, the State’s assertion that R.C. 718.011(B) is a “rough proxy” for an income threshold is refuted by the language of the statute. R.C. 718.011(B) does not contain any income threshold. Under the plain language of R.C. 718.011(B), a nonresident professional athlete earning \$500,000 is subject to income tax in Ohio municipalities that he visits but, as discussed below, another individual earning \$10 million a year is not.

**B. Other Highly Paid Professionals Are Irrationally Exempt From Municipal Income Taxes On Nonresidents.**

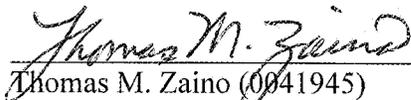
Ohio’s targeting of professional athletes as “typically highly paid” is even less rational in light of the fact that other similarly-situated, highly paid professionals are *not* similarly subjected to municipal income taxes. Business executives, money managers, doctors, and lawyers are all “typically highly paid” and yet, unlike professional athletes, all benefit from Ohio’s occasional entrant rule that exempts them from municipal income taxes in any jurisdiction where they work for twelve or fewer days. Even within professional sports, coaches, team executives, and team owners are “typically highly paid,” and yet Ohio subjects none to the same municipal tax burden that it imposes on athletes. The same is true with respect to many college coaches whose teams play games in Ohio cities. Ohio’s failure to exclude these highly paid individuals from its occasional entrant rule demonstrates that R.C. 718.011(B) is not rationally related to the State’s purported interest in collecting revenue from highly paid individuals, but instead an irrational

attempt to impose an unequal tax burden on a category of taxpayers who are perceived as “easy marks.”

### CONCLUSION

Because R.C. 718.011(B) targets professional athletes by singling them out from similarly-situated taxpayers for an unequal tax burden, it violates equal protection. The Players Associations accordingly urge this Court to declare R.C. 718.011(B) unconstitutional.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing brief was served by regular U.S. Mail, postage prepaid, on this 24<sup>th</sup> day of September, 2014, on the following:

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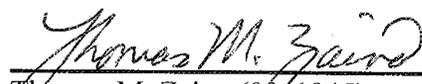
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