

ORIGINAL

IN THE SUPREME COURT OF OHIO

HUNTER T. HILLENMEYER)
)
 Plaintiff-Appellant,)
)
 vs.)
)
 CITY OF CLEVELAND BOARD)
 OF REVIEW,)
)
 and)
)
 NASSIM M. LYNCH)
)
 Defendants-Appellees.)

Case No: 2014-0235

 On Appeal from the
 Ohio Board of Tax Appeals

 Ohio Board of Tax Appeals
 Case No. 2009-3688

APPELLEES' MOTION TO STRIKE NEW ISSUE RAISED
 FOR THE FIRST TIME IN APPELLANT'S REPLY BRIEF

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APPELLEES' MOTION TO STRIKE NEW ISSUE RAISED FOR THE FIRST TIME IN REPLY BRIEF

Pursuant to S.Ct.Prac.R. 4.01(A), Appellees request that a new issue—a “facial” constitutional challenge—raised for the first time by Appellant’s in his reply brief be stricken. This proposition was not raised in Appellant’s Merit Brief and Appellees do not have any opportunity to file additional briefs to respond to said new issue raised for the first time at the last level of briefing.

In his merit brief before this Court, Taxpayer raised an as-applied constitutional challenge to the games-played method. He does so by claiming that:

[a]s applied to [him], the games-played method results in Cleveland allocating to itself 400% of the income that would be allocated to Cleveland if the duty days method were applied;

the games-played method, at least as applied to [him] results in an allocation that is ‘out of all appropriate proportion to the business transacted by [him] in Cleveland;

[he] is entitled to a refund [] because the games-played method used by Cleveland is contrary to Ohio law and unconstitutional as applied to him[.]

Merit Brief of Appellant at 13; 26; 34. Yet for the first time in his reply brief turns right around and now claims a facial constitutional challenge asserting that:

Cleveland’s taxation of professional athletes is facially discriminatory against out-of-state interests;

because Cleveland’s taxation of professional athletes discriminates against interstate commerce on its face [], Cleveland’s use of the games-played method violates the Commerce Clause[.]

Reply Brief of Appellant at 13; 14. Appellant is precluded from raising his new facial challenge for the first time in his reply brief preventing *any* response from Appellees.

For the reasons herein, Appellees request that Appellant's new facial constitutional challenge be stricken from his reply brief and not considered by this Court, Appellant having raised the issue for the first time in his reply brief.

Respectfully submitted,
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CERTIFICATE OF SERVICE

A copy of the foregoing Appellees' Motion To Strike New Issue Raised For The First Time In Appellant's Reply Brief was served by regular U.S. mail on Appellants' counsel, Stephen W. Kidder, Esq., Hemenway & Barnes LLP, 60 State Street, Boston, MA 02109-1899 and Richard C. Farrin, Esq., Zaino Hall & Farrin LLC, 41 South High Street – Suite 3600, Columbus, Ohio 43215 on this 18th day of July 2014.



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