

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 APPELLANT HUNTER T. HILLENMEYER IN RESPONSE TO THE BRIEF OF *AMICUS CURIAE* STATE OF OHIO

Stephen W. Kidder  
 (Counsel of Record)  
 PHV No. 3032-2014  
 HEMENWAY & BARNES LLP  
 60 State Street  
 Boston, MA 02109  
 Telephone: 617.227.7940  
 Facsimile: 617.227.0781  
 skidder@hembar.com

Barbara A. Langhenry (0038838)  
 Linda L. Bickerstaff (0052101)  
 (Counsel of Record)  
 City of Cleveland Department of Law  
 205 West St. Clair Avenue  
 Cleveland, OH 44113  
 Telephone: 216.664.4406  
 Facsimile: 216.420.8299  
 lbickerstaff@city.cleveland.oh.us

Richard C. Farrin (0022850)  
 ZAINO HALL & FARRIN LLC  
 41 S. High Street, Suite 3600  
 Columbus, OH 43215  
 Telephone: 614.326.1120  
 Facsimile: 614.754.6368  
 rfarrin@zhftaxlaw.com

COUNSEL FOR APPELLEES CITY OF  
 CLEVELAND BOARD OF REVIEW and  
 NASSIM LYNCH, CLEVELAND TAX  
 ADMINISTRATOR

COUNSEL FOR APPELLANT  
 HUNTER T. HILLENMEYER

FILED  
 SEP 24 2014  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

Michael DeWine (0009181)  
Attorney General of Ohio  
Eric E. Murphy (0083284)  
(Counsel of Record)  
State Solicitor  
Michael J. Hendershot (0081842)  
Chief Deputy Solicitor  
Stephen P. Carney (0063460)  
Deputy Solicitor  
Daniel W. Fausey (0079928)  
David D. Ebersole (0087896)  
Assistant Attorneys General  
30 East Broad Street, 17th Floor  
Columbus, OH 43215  
Telephone: 614.466.8980  
Facsimile: 614.466.5087  
[eric.murphy@ohioattorneygeneral.gov](mailto:eric.murphy@ohioattorneygeneral.gov)

COUNSEL FOR *AMICUS CURIAE* STATE  
OF OHIO

**TABLE OF CONTENTS**

Page

INTRODUCTION .....1

ARGUMENT.....2

    Appellant’s Proposition of Law No. 4:

    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.....2

        A. The Administrative Ease Of Collecting Taxes From A Few “High-End Sources Of Revenue” Rather Than From Many Is Not A Legitimate State Interest, Nor Is It Rationally Related To The Classification Made By R.C. 718.011(B)..... 3

            1. Ohio law requires municipalities to tax at a uniform rate..... 4

            2. The administrative ease of collecting taxes from a few rather than from many is not a legitimate government interest..... 5

            3. Even if taxing only high income taxpayers who are easy to find were a legitimate government interest, R.C. 718.011(B) is not rationally related to advancing that interest..... 8

        B. R.C. 718.011(B) Is Not Rationally Related To Any Interest In Imposing A Tax Burden Commensurate With Public Benefits ..... 13

        C. Subparagraph (B) Should Be Severed From R.C. 718.011 And The Remainder Of The Statute Left Intact ..... 16

CONCLUSION.....17

**TABLE OF AUTHORITIES**

Page(s)

Cases

*Allegheny Pittsburgh Coal Co. v. County Comm’n of Webster County*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989)..... 2, 3, 4, 5

*Armour v. City of Indianapolis*, --- U.S. ---, 132 S. Ct. 2073, 182 L.Ed.2d 998 (2012)..... 5, 6, 7

*City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)..... 8, 12, 13, 16

*Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974) ..... 8

*Geiger v. Geiger*, 117 Ohio St. 451, 466, 160 N.E. 28 (1927) ..... 17

*Jiminez v. Weinberger*, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974)..... 8

*Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972)..... 8

*MCI Telecomms. Corp. v. Limbach*, 68 Ohio St.3d 195, 625 N.E.2d 597 (1994)..... 3

*Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985) ..... 7

*Regal Cinemas, Inc. v. Mayfield Heights*, 137 Ohio App.3d 61, 738 N.E.2d 42 (2000)..... 14

*Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 1010 S.Ct. 2070, 68 L.Ed.2d 514 (1981)..... 3, 8

*Williams v. Vermont*, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985)..... 8

*Youngstown Sheet & Tube Co. v. City of Youngstown*, 91 Ohio App. 431, 108 N.E.2d 571 (1951)..... 2

Statutes

R.C. 1.50 ..... 17

R.C. 715.013(B)(1) ..... 14

R.C. 718.01(B)..... 4, 5

R.C. 718.011 ..... 1, 16, 17

R.C. 718.011(B)..... passim

Regulations

17 C.F.R. 229.402..... 11

17 C.F.R. 229.407(b) ..... 11

Other Authorities

I-X Center, Cleveland, Ohio, About Us, [http://www.ixcenter.com/About\\_Us.aspx](http://www.ixcenter.com/About_Us.aspx) (accessed Sept. 9, 2014) ..... 16

Leila Atassi, *FirstEnergy Stadium Lease Dissected – The Costs And Benefits Of Owning The Home Of The Cleveland Browns*, Cleveland.com, (Nov. 23, 2013) [http://www.cleveland.com/cityhall/index.ssf/2013/11/firstenergy\\_stadium\\_lease\\_diss.html](http://www.cleveland.com/cityhall/index.ssf/2013/11/firstenergy_stadium_lease_diss.html) (accessed Sept. 22, 2014) ..... 14

Steven Kutz, *In Tennis, It Pays To Be No. 1*, Wall Street Journal (Aug. 26, 2014) D6 ..... 10

Michael McCann, *In Lawsuit Minor Leaguers Charge They Are Members Of The Working Poor*, SportsIllustrated.com, (Feb. 12, 2014 ) <http://www.si.com/mlb/2014/02/12/minor-league-baseball-players-lawsuit> (accessed Sept. 22, 2014) ..... 10

PBA Rex & Griffin Bigelow Memorial Central Open, PBA.com, <http://www.pba.com/Tournaments/Regional/3419> (accessed Sept. 8, 2014) ..... 10

PBA50 Mel Westrich Memorial Central/Midwest Open presented by Storm, PBA.com, <http://www.pba.com/Tournaments/Regional/3420> (accessed Sept. 8, 2014) .....10

Gary Stoller, *Taxes Add Up For Travelers*, USAToday.com (July 29, 2008), [http://usatoday30.usatoday.com/travel/news/2008-07-28-travel-taxes\\_N.htm?csp=34](http://usatoday30.usatoday.com/travel/news/2008-07-28-travel-taxes_N.htm?csp=34) (accessed Sept. 19, 2014)..... 15

Teams by Geographic Location, MiLB.com, <http://www.milb.com/milb/info/geographical.jsp> (accessed Sept. 8, 2014) ..... 9

## INTRODUCTION

All laws classify, but not all do so constitutionally. Ohio has enacted an unconstitutional classification that arbitrarily singles out professional athletes and entertainers for less advantageous tax treatment than all other nonresidents. Apart from professional athletes and entertainers (and their promoters), nonresidents cannot be subjected to municipal income taxes in a municipality where they work for twelve or fewer days because of Ohio's "occasional entrant" exemption, codified at R.C. 718.011.<sup>1</sup> That exemption applies regardless of income level, regardless of the burdens imposed on municipal resources, and regardless of the administrative ease of collecting the tax. And it applies to everyone – unless they are a professional athlete or entertainer.

Both the U.S. Constitution and the Ohio Constitution prohibit drawing classifications among taxpayers that do not further a legitimate government interest. The State of Ohio (the "State"), in its *amicus* brief, offers two justifications for the classification drawn by R.C. 718.011(B). *First*, the State argues that athletes and entertainers "are simply an easy-to-identify, high-end source of revenue." *Br. of Amicus Curiae State of Ohio* (hereinafter, "AG's Br.") 2; *id.* at 10 (arguing that the State's "interest in revenue-relative-to-red-tape is enough to justify the

---

<sup>1</sup> The statute provides in relevant part:

[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.

law”). *Second*, the State argues that singling out athletes and entertainers is justified by the purported “public benefits” provided to these taxpayers. AG’s Br. 15.

Neither of the State’s justifications holds up under scrutiny. The first does not identify a legitimate government interest, nor demonstrate how R.C. 718.011(B) is rationally related to the interest the State does identify. With respect to the State’s second justification, even if imposing a tax burden commensurate with the benefits realized may be a permissible interest, the State fails to demonstrate how R.C. 718.011(B) advances that interest. Accordingly, R.C. 718.011(B) violates the Equal Protection Clause of the U.S. Constitution and the Ohio Constitution.

### ARGUMENT

#### **Appellant’s Proposition of Law No. 4:**

**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 equal protection clause” of the Fourteenth Amendment “protects the individual from 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, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989) (Rehnquist, C.J., for the unanimous Court) (internal quotation marks omitted). Similarly, under the Ohio Constitution, “[a] classification which undertakes to arbitrarily separate some persons from others upon which the act would operate and thus form a class, not upon any reasonable basis of different characteristics, capriciously, but as a matter of will and not of reason, is invalid.” *Youngstown Sheet & Tube Co. v. City of Youngstown*, 91 Ohio App. 431, 436, 108 N.E.2d 571 (1951). “[A] classification for taxation, to be valid, must be a classification of the subject of taxation – property – and not a classification of taxpayers.” *Id.*

To withstand scrutiny under the Equal Protection Clause of the U.S. Constitution or the Ohio Constitution, a classification among taxpayers must “rationally further a legitimate state interest.” *MCI Telecomms. Corp. v. Limbach*, 68 Ohio St.3d 195, 199, 625 N.E.2d 597 (1994); *see also Allegheny*, 488 U.S. at 344. Specifically, in determining whether R.C. 718.011(B) is constitutional, this Court “must answer two questions: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?” *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668, 1010 S.Ct. 2070, 68 L.Ed.2d 514 (1981).

Because the answer to those questions is “no,” this Court must invalidate R.C. 718.011(B) and grant Hunter Hillenmeyer’s request for a refund. Contrary to the State’s suggestion, Hillenmeyer is not “asking to be exempt *entirely* from taxation.” *See* AG’s Br. 19. He is asking to be treated fairly, and to not be singled out for a special tax burden simply because his status as a professional athlete makes him an easy target. The guarantee of equal protection of the laws entitles him to such treatment.

**A. The Administrative Ease Of Collecting Taxes From A Few “High-End Sources Of Revenue” Rather Than From Many Is Not A Legitimate State Interest, Nor Is It Rationally Related To The Classification Made By R.C. 718.011(B)**

The State argues that singling out professional athletes and entertainers from similarly situated taxpayers is permissible because athletes “are simply an easy-to-identify, high-end source of revenue.” AG’s Br. 2. According to the State, the legislature 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 singling out this group for differential treatment. *See id.* at 10. By singling out professional athletes and entertainers, the State argues, two interests are purportedly served: (1) the government’s interest in “raising

revenue . . . us[ing] ‘progressive taxation’ elements that proportionately tax more those who earn more”; and (2) doing so with “administrative efficiency.” *Id.* at 11.

The State’s analysis fails on multiple levels. First, the interests it identifies are not legitimate. Second, even if they were legitimate, R.C. 718.011(B)’s singling out of professional athletes and entertainers is not rationally related to furthering those interests.

**1. Ohio law requires municipalities to tax at a uniform rate.**

Although progressive elements are an important part of many tax systems, Ohio law requires that municipal income taxes be imposed at a uniform rate. Specifically, R.C. 718.01(B) states that “[n]o municipal corporation shall tax income at other than a uniform rate.” Ohio law thus prohibits municipalities from establishing an income threshold for municipal income taxes. *See* R.C. 718.01(B).

The State acknowledges in its brief that Ohio law prohibits municipalities from setting different rates for different income levels, or from establishing an income threshold for municipal income taxes. *See* AG’s Br. 12 (“city taxes are set at a flat rate, by state law”). And yet the State argues, paradoxically, that establishing a “rough proxy for what would otherwise be an income threshold” is an interest served by excluding athletes from the occasional entrant rule. AG’s Br. 2.

Put simply, establishing an income threshold or progressive tax cannot be deemed a legitimate government interest where Ohio law has elsewhere expressly prohibited these types of municipal income taxes. *See* R.C. 718.01(B); *see also Allegheny*, 488 U.S. at 343–344 (holding that, where state law mandated that property be taxed at a uniform rate, practice of assessing similar properties differently had no rational basis). Whatever the Ohio General Assembly had in mind in excluding athletes from the occasional entrant rule, circumventing another statute (which the legislature could just as easily have amended) was surely not it. Accordingly,

establishing a “rough proxy for what would otherwise be an [illegal] income threshold” is not a legitimate government interest that can justify R.C. 718.011(B).

**2. The administrative ease of collecting taxes from a few rather than from many is not a legitimate government interest.**

Apart from arguing that it establishes an impermissible income threshold for taxing occasional entrants, the State also attempts to justify R.C. 718.011(B) based on notions of administrative efficiency. AG’s Br. 12. Because “professional athletes are typically highly paid and their work is easy to find,” so argues the State, “a city could earn significant revenue with administrative ease by taxing out-of-city professional athletes rather than all other occasional entrants.” *Id.* at 12. Once again, this argument fails to identify a legitimate government interest that could sustain the singling out of professional athletes and entertainers for unequal treatment.

The administrative ease of collecting taxes from a few sources rather than from many has never alone been held sufficient to justify classifications among taxpayers. That a group of taxpayers is – through no fault of their own – “easy to find,” AG’s Br. 10, does not justify imposing tax burdens on those taxpayers alone. Notably, the classification at issue here appears on the face of the statute; it does not arise merely as a result of taxing authorities’ enforcement priorities. Whether or not taxing authorities may be constitutionally justified in focusing their limited resources on the easiest targets, a statutory classification cannot be justified simply because the taxpayers targeted for less advantageous tax treatment are “easy to find.” That is particularly so where state law demands that municipal income taxes be imposed at a uniform rate. *See* R.C. 718.01(B); *Allegheny*, 488 U.S. at 343–344.

In arguing that administrative efficiency is a legitimate government interest, the State relies on the U.S. Supreme Court’s decision in *Armour v. City of Indianapolis*, --- U.S. ---, 132 S. Ct. 2073, 182 L.Ed.2d 998 (2012). The facts in *Armour*, however, are readily distinguishable. In

*Armour*, a divided Court sustained the City of Indianapolis' decision to change the method by which it funded municipal sewer projects. The result of that change was that some taxpayers who had paid sewer assessments up front as lump sum did not receive the benefit of a change in law that forgave the remaining portion of the assessment owed by taxpayers who paid by installments. *Id.* at 2079. Notably, in sustaining Indianapolis' decision, the majority emphasized that it was "consistent with the distinction the law often makes between actions previously taken and those yet to come." *Id.* at 2082 (noting that such a distinction is "well known to the law"). The majority cited a number of other examples where a prospective change in law results in a permissible line being drawn between those who benefit from the new law and those who do not. *Id.* ("Sometimes such a line takes the form of an amnesty program, involving, say, mortgage payments, taxes, or parking tickets."). The administrative difficulty (if not impossibility) of applying a change in law retroactively to all taxpayers who may have been disadvantaged under the old regime is self-apparent.

Here, by contrast, R.C. 718.011(B) does not simply draw a distinction "between actions previously taken and those yet to come." *See id.* The administrative efficiency served by R.C. 718.011(B) is qualitatively different than the efficiency at issue in *Armour*. Excluding professional athletes from Ohio's occasional entrant rule is efficient simply because it is easier to collect taxes from a few than from many. *See* AG's Br. 10. Not only is that type of administrative efficiency not supported by the Court's decision in *Armour*, it was in fact explicitly rejected. The majority in *Armour* declared that "administrative considerations could not justify . . . an unfair system" where "a city arbitrarily allocate[s] taxes among a few citizens while forgiving many similarly situated citizens on the ground that it is cheaper and easier to collect taxes from a few people than from many." 132 S.Ct. at 2083. Yet that is precisely the

justification the State offers here: “[A]thletes are typically highly paid and their work is easy to find, and thus . . . a city could earn significant revenue with administrative ease by taxing out-of-city professional athletes rather than other occasional entrants.” AG’s Br. at 10. Far from endorsing that justification, *Armour* if anything suggests that the Supreme Court would strike down R.C. 718.011(B) as an arbitrary allocation of taxes to a few citizens supported only by the observation that it is “cheaper and easier to collect taxes from a few people than from many.” *Armour*, 132 S.Ct. at 2083; *see also id.* at 2086 (Roberts, C.J., dissenting, joined by Scalia, J., and Alito, J.) (“The Equal Protection Clause does not provide that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws, unless it’s too much of a bother.’”); *id.* at 2087 (“But every generation or so a case comes along when this Court needs to say enough is enough, if the Equal Protection Clause is to retain any force in this context.”).

While the U.S. Supreme Court has sustained legislative classifications based on income thresholds or prospective versus retrospective applications because of administrative convenience, the Court has never sustained legislation that singles out a limited group of specific professions or occupations for taxation based on administrative convenience alone. The *Armour* majority agreed that this would not be permissible. *Id.* at 2083. R.C. 718.011(B) does not exclude from the favorable treatment of the occasional entrant rule all individuals over a specific income threshold. It excludes only two groups of individuals – professional athletes and entertainers. Acceptance of the State’s position that administrative convenience is always a legitimate state purpose under equal protection analysis, allowing the state to carve out narrow groups for unfavorable tax treatment, “would eviscerate the equal protection clause.” *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985).

In sum, the administrative ease of collecting taxes from professional athletes and entertainers, relative to other occasional entrants, is not a legitimate government interest sufficient to sustain R.C. 718.011(B).

**3. Even if taxing only high income taxpayers who are easy to find were a legitimate government interest, R.C. 718.011(B) is not rationally related to advancing that interest.**

To withstand scrutiny under the Equal Protection Clause of the U.S. Constitution and the Ohio Constitution, a classification among taxpayers must not only be supported by a legitimate government purpose, but it must also have been “reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose.” *Western & S. Life Ins. Co.*, 451 U.S. at 668. “The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). As a result, the Supreme Court has repeatedly struck down classifications that are significantly “overinclusive” or “underinclusive” in relation to the proffered government interest. *See, e.g., Jiminez v. Weinberger*, 417 U.S. 628, 637, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974) (applying rational-basis review and striking down classification that was both “overinclusive” and “underinclusive”); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 653, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974) (Powell, J., concurring in the result) (asserting that regulations applicable to pregnant teachers that were “irrationally overinclusive” were “invalid under rational-basis standards of equal protection review”); *Lindsey v. Normet*, 405 U.S. 56, 78, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972); (striking down law that required some appellants to post greater appeal bonds because the “claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond”); *see also Williams v.*

*Vermont*, 472 U.S. 14, 23, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985), fn. 8 (acknowledging that “[u]nder rational-basis scrutiny, legislative classifications are of course allowed some play in the joints” but holding that “the choice of a proxy criterion . . . cannot be so casual as [was drawn in this case], particularly when a more precise and direct classification is easily drawn”). Excluding athletes and entertainers from Ohio’s occasional entrant rule is not rationally related to the State’s purported interest in collecting taxes from individuals who are “typically highly paid” and who are “easy to find.”

As an initial matter, the State’s argument that R.C. 718.011(B) essentially establishes an income threshold is inaccurate. *See* AG’s Br. 2, 14. R.C. 718.011(B) does not impose any income threshold. It excludes from the protection of the occasional entrant rule individuals engaged in two specific occupations – professional athletes and entertainers. And it excludes such individuals regardless of their income level. Conversely, it does not exclude from protection other individuals who are over a specific income threshold. Even individuals who earn more income than professional athletes and entertainers are not excluded from the protection of the occasional entrant rule.

The State’s justification also rests on the false premise that all athletes and entertainers subject to R.C. 718.011(B) are “typically highly paid.” In its *amicus* brief, the State points only to the salaries of professional football players who play in the National Football League (“NFL”) in support of this assumption. *See* AG’s Br. 13. But, of course, NFL players – or players in the other major professional sports leagues (Major League Baseball, the National Basketball Association, and the National Hockey League) – are not the only professional athletes who compete in Ohio. Ohio is home to no fewer than six minor league baseball teams. *See* Teams by Geographic Location, MiLB.com, <http://www.milb.com/milb/info/geographical.jsp> (accessed

Sept. 8, 2014). Minor league players are typically paid barely a fraction of their MLB counterparts, and could hardly be considered “highly paid” professionals. *See, e.g.,* Michael McCann, *In Lawsuit Minor Leaguers Charge They Are Members Of The Working Poor*, SportsIllustrated.com (Feb. 12, 2014) <http://www.si.com/mlb/2014/02/12/minor-league-baseball-players-lawsuit> (accessed Sept. 12, 2014) (“[M]any minor league players earn less than the federal poverty level, which is \$11,490 for a single person and \$23,550 for a family of four.”). Moreover, even with respect to NFL players, the State wildly overstates the compensation earned for a single day of work in an Ohio municipality. For example, under the duty days method, a player earning \$580,000 annually does not have a one-day income of “about \$12,000” as the State incorrectly asserts. AG’s Br. 13. Such player’s one-day income would be approximately \$3,500.<sup>2</sup>

Nor are athletes in the four major sports the only ones singled out for less advantageous tax treatment by R.C. 718.011(B), which applies to *all* professional athletes. Cincinnati, for example, is the home of the Western & Southern Open, an annual tennis tournament whose participants earn far less than athletes in the four major professional sports leagues. *See, e.g.,* Steven Kutz, *In Tennis, It Pays To Be No. 1*, Wall Street Journal (Aug. 26, 2014) D6 (noting wide disparities in pay in professional tennis compared to other sports). Ohio is also the home to several professional bowling tournaments, with purses that are at best modest. *See, PBA Rex & Griffin Bigelow Memorial Central Open*, PBA.com, <http://www.pba.com/Tournaments/Regional/3419> (accessed Sept. 8, 2014) (1st place projected to pay \$2,500, 16th place projected to pay \$600); *PBA50 Mel Westrich Memorial Central/Midwest Open presented by Storm*,

---

<sup>2</sup> The appropriate calculation is as follows:  $\$580,000 \div 165 \text{ duty days} = \$3,515.16$ . It is unclear what the State means when it refers to a purported “2% maximum cited by Hillenmeyer in his brief.” AG’s Br. 13; *cf.* Appellant’s Br. 27 (stating only that less than 2% of Hillenmeyer’s income should have been allocated to Cleveland under the duty days method).

PBA.com, <http://www.pba.com/Tournaments/Regional/3420> (accessed Sept. 8, 2014) (1st place projected to pay \$1,500, 16th place projected to pay \$500).

Nor is R.C. 718.011(B)'s exclusion limited to professional athletes. Professional entertainers of any sort are also categorically singled out for less advantageous tax treatment. The statute applies not only to "musical stars," AG's Br. 13, who perform at large venues and are highly compensated, but also to countless individuals who eke out a living performing at private shows in front of small audiences. As a result, a wedding singer, magician, or puppeteer is subjected to municipal taxes in each jurisdiction where he works, yet a traveling salesman inexplicably is not.

Unlike the professional athletes in the major professional sports leagues, none of the above-referenced taxpayers can be considered "typically highly paid," nor are they necessarily "easy to find." Yet each is excluded from Ohio's occasional entrant rule. These taxpayers far outnumber the highly-paid professional athletes on which the State's justification rests. As a result, R.C. 718.011(B) is irrationally "overinclusive" insofar as it is intended to advance the State's purported interest in collecting taxes from highly-paid individuals who are easy to find.

At the same time, R.C. 718.011(B) is grossly "underinclusive" insofar as it does not apply to other professionals who are typically just as highly paid and just as easy to find as professional athletes, if not more so. For example, highly paid executives and directors of public companies are not subject to municipal taxes when they spend twelve or fewer days in an Ohio municipality. Yet federal law requires the disclosure of these individuals' compensation, *see* 17 C.F.R. 229.402, and likewise requires the disclosure of director attendance at board meetings, *see* 17 C.F.R. 229.407(b). If the purpose of R.C. 718.011(B) were truly to collect taxes from highly-paid individuals who are easy to find, there would no rational reason for it to apply only

to professional athletes, some of whom have salary information and travel schedules that are publicly accessible, but not to highly-paid executives and directors of public companies, for whom disclosure of that same information is *mandated by federal law*.

The supposed administrative burdens that the State emphasizes do not justify excluding all other occasional entrants, regardless of their pay, from the municipal tax burden imposed on professional athletes and entertainers. As an initial matter, any administrative burden arising from taxing occasional entrants would not fall on the municipal taxing authorities because the vast majority of municipal income taxes are voluntarily paid through employer withholding. Nor would such withholding impose a significant administrative burden on employers or taxpayers. Multi-state employers are already accustomed to withholding in multiple jurisdictions where their employees work. And because the occasional entrant rule applies only to municipal income taxes, those employers already withhold Ohio income taxes when their employees work for a limited number of days in the State of Ohio. The additional administrative burden of withholding municipal income taxes is marginal. At the very least, such a burden does not bear a rational relationship to State's decision to single out *only* professional athletes and entertainers from the occasional entrant rule.

In sum, even assuming that collecting taxes from highly-paid individuals who are easy to find is a legitimate government interest (which it is not), Ohio's decision to exclude only professional athletes and entertainers from its occasional entrant rule creates a "classification whose relationship to [its] asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446.

**B. R.C. 718.011(B) Is Not Rationally Related To Any Interest In Imposing A Tax Burden Commensurate With Public Benefits**

In addition to arguing that R.C. 718.011(B)'s singling out of professional athletes and entertainers is justified by the government's purported interest in collecting taxes from highly-paid individuals with administrative ease, the State also argues that it is justified "by the high likelihood that the public would have to provide special benefits for professional sporting events." AG's Br. at 15. Once again, this justification does not withstand scrutiny, as it would again result in a "classification whose relationship to [its] asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446.

The State speculates that certain athletic events could require "potentially higher police protection and traffic and crowd control," and that those municipal services justify singling out professional athletes for a tax burden not imposed on others. AG's Br. 15. Again, however, the State's argument ignores the vast majority of professional athletes and entertainers who work in Ohio but who do not compete in one of the major professional sports leagues (the NFL, MLB, NBA, or NHL). Professional bowlers, magicians, wedding singers, and puppeteers do not require any elevated police protection or traffic and crowd control to perform their jobs, and thus they derive no greater benefit from municipal services than other professionals. Yet they are forced to shoulder a greater tax burden.

Even with respect to athletes who compete in the major professional sports leagues, R.C. 718.011(B) does not subject them to taxation only for participating in a major athletic event that might require greater municipal services. Hunter Hillenmeyer, for example, was compensated by the Chicago Bears not only for playing in games, but also for participating in training camp, practices, team meetings, and promotional events. (Supp. 55.) Accordingly, as Hillenmeyer observed in his opening brief, a professional athlete could be taxed for participating in a one-day

photo shoot in an Ohio municipality. Appellant's Br. 37. A professional photographer participating in the same photo shoot could not be taxed. Although the State criticizes that example in its brief, it tellingly does not dispute that the law's distinction between the athlete and the photographer bears no rational relationship to any difference in municipal benefits bestowed on each. *See* AG's Br. 18.

Even if R.C. 718.011(B) applied only to athletes who participate in the major professional sports leagues (which it does not), and only to major athletic events in which those athletes compete (which it also does not), the statute's classification would still bear only an attenuated connection to the interest identified by the State. Notably, Ohio law explicitly authorizes municipalities to charge an "admission tax" for admission into events or performances, in recognition that such events or performances might require additional municipal services. R.C. 715.013(B)(1); *see Regal Cinemas, Inc. v. Mayfield Heights*, 137 Ohio App.3d 61, 70, 738 N.E.2d 42 (2000) ("The cities' admissions taxes further an important government interest as they raise valuable revenue for traffic, crowd control, and security at venues that attract a large number of people in a congested area at the same time."). The City of Cleveland, for example, charges an 8% admission tax on each ticket sold for Browns' games, which generates approximately \$4 million in annual revenue from which the City can fund any additional municipal services required for games. *See* Leila Atassi, *FirstEnergy Stadium Lease Dissected – The Costs And Benefits Of Owning The Home Of The Cleveland Browns* (Nov. 23, 2013) Cleveland.com, [http://www.cleveland.com/cityhall/index.ssf/2013/11/firstenergy\\_stadium\\_lease\\_diss.html](http://www.cleveland.com/cityhall/index.ssf/2013/11/firstenergy_stadium_lease_diss.html) (accessed Sept. 22, 2014) (noting that while Cleveland commits additional police officers on game days, it was expected to collect \$3.5 to \$4 million in revenue from the admission tax on Browns' tickets, and another \$570,000 from game-day parking). That

does not even account for lodging and other taxes that provide substantial additional revenue to municipalities that host athletic events. See, e.g., Gary Stoller, *Taxes Add Up For Travelers*, USA Today.com (July 29, 2008), [http://usatoday30.usatoday.com/travel/news/2008-07-28-travel-taxes\\_N.htm?csp=34](http://usatoday30.usatoday.com/travel/news/2008-07-28-travel-taxes_N.htm?csp=34) (accessed Sept. 19, 2014) (“At a hotel in Cleveland, for example, taxes include a 3% city bed tax, a 3% Cuyahoga County bed tax, a 1.5% tax to pay off the bonds for building the Rock and Roll Hall of Fame and a 7.75% sales tax.”). In light of the municipal revenue generated by admission and other taxes, it is unclear how imposing an *additional* tax on occasional-entrant-athletes is rationally related to paying for additional municipal services.

The State’s purported justification for the disparate treatment of professional athletes also fails to recognize that any services the cities provide for games played in the city primarily support the professional teams, and in particular the home team, that play their teams’ games in the city. Both the home team and the visiting team pay municipal income tax (based on their net profits) to the cities in which they play their games. Additionally, the services provided by the cities are primarily for the safety and control of the city’s own citizens who may travel to and attend the games or are in the vicinity of the games. The cities perform such services regarding any event occurring in the city, such as parades, festivals, political rallies, and similar events.

Perhaps recognizing the failings of its “municipal services” justification, the State emphasizes that visiting players benefit from being able to play games in the Cleveland Browns’ stadium, which was financed with public money. AG’s Br. 16. Yet the State acknowledges, as it must, that the Browns’ stadium was financed not by municipal income tax revenue (including tax revenue from professional athletes), but by a *county* tax on alcohol and tobacco products. The connection between imposing *municipal* income taxes on occasional-entrant-athletes and the construction of the Browns’ stadium is therefore not merely attenuated, it is nonexistent.

Finally, R.C. 718.011(B) is irrationally “underinclusive” in relation to the goal of collecting additional taxes from those who benefit from additional municipal resources. Athletes and entertainers are not the only taxpayers who utilize large venues requiring increased police and traffic and crowd control. Ohio is home to a number of convention and exhibition centers that place similar burdens on municipal resources. *See, e.g.,* I-X Center, Cleveland, Ohio, About Us, [http://www.ixcenter.com/About\\_Us.aspx](http://www.ixcenter.com/About_Us.aspx) (accessed Sept. 9, 2014) (“With 2.2 million square feet, the I-X Center is one of the top 10 largest convention centers in the world . . .”). Yet, unlike athletes and entertainers, attendees of exhibitions and trade shows at those convention centers are not subjected to municipal income taxes. Even with respect to athletic events, members of visiting teams are hardly the only taxpayers who benefit from municipal services related to the game. Coaches, trainers, team executives, scouts, and media members benefit equally from the same services, yet none are subjected to municipal income taxes when they travel to Cleveland or other municipalities for a few days of work.

In sum, to the extent that R.C. 718.011(B)’s singling out of professional athletes is intended to “match the public taxation burden with the public benefits provided at athletic events,” AG’s Br. 15, it results in a “classification whose relationship to [its] asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *City of Cleburne*, 473 U.S. at 446.

**C. Subparagraph (B) Should Be Severed From R.C. 718.011 And The Remainder Of The Statute Left Intact**

For the reasons set forth above, this Court should find that R.C. 718.011(B) is unconstitutional because it violates the Equal Protection Clause of the U.S. Constitution and the Ohio Constitution. The conclusion that R.C. 718.011(B) is unconstitutional requires a further determination of the appropriate remedy, as this Court recognized in requesting that the Attorney

General of Ohio submit a brief regarding the constitutionality of R.C. 718.011(B) and “any issue of severability that would arise should an equal protection violation be found.”

On the question of severability, Hillenmeyer agrees with the State that if R.C. 718.011(B) is determined to be unconstitutional, that subparagraph alone should be stricken from R.C. 718.011 and the remainder of the statute left intact. *See* AG’s Br. 19 (“The State concludes that any invalidation should be as narrow as possible.”). Ohio law explicitly provides that:

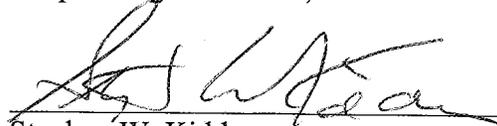
If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to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

R.C. 1.50; *see also Geiger v. Geiger*, 117 Ohio St. 451, 466, 160 N.E. 28 (1927) (establishing three-prong severability test similar to R.C. 1.50). Here, removal of the offensive subparagraph that singles out professional athletes and entertainers for less advantageous tax treatment would not otherwise disrupt the operation of R.C. 718.011 and the exemption from municipal taxes that it provides to occasional entrants. Striking subparagraph (B) would simply put athletes and entertainers on equal footing with members of all other occupations. Accordingly, Hillenmeyer agrees with the State that the narrow approach of invalidating only that portion of R.C. 718.011 that is unconstitutional – specifically, subparagraph (B) – is the correct approach.

### CONCLUSION

For the foregoing reasons, and for the reasons set forth in his opening brief and his reply brief, Appellant Hunter T. Hillenmeyer requests that this Court reverse the decision of the Ohio Board of Tax Appeals and order that the City of Cleveland grant Hillenmeyer’s request for a refund of income taxes paid to Cleveland for the tax years 2004 through 2006.

Respectfully submitted,



Stephen W. Kidder  
(Counsel of Record)  
PHV No. 3032-2014  
HEMENWAY & BARNES LLP  
60 State Street  
Boston, MA 02109  
Telephone: 617.227.7940  
Facsimile: 617.227.0781  
skidder@hembar.com

Richard C. Farrin (0022850)  
ZAINO HALL & FARRIN LLC  
41 S. High Street, Suite 3600  
Columbus, OH 43215  
Telephone: 614.326.1120  
Facsimile: 614.754.6368  
rfarrin@zhftaxlaw.com

COUNSEL FOR APPELLANT  
HUNTER T. HILLENMEYER

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Brief of Appellant Hunter T. Hillenmeyer in Response to the Brief of *Amicus Curiae* State of Ohio was served on Linda L. Bickerstaff, Assistant Director of Law, City of Cleveland Department of Law, 205 West St. Clair Avenue, Cleveland, Ohio 41133, Counsel of Record for Appellees, and Eric E. Murphy, State Solicitor, 30 East Broad Street, 17th Floor, Columbus, Ohio 23215, counsel of record for *Amicus Curiae* State of Ohio, by regular U.S. Mail, postage prepaid, on this 24th day of September, 2014.

  
Richard C. Farrin (0022850)