

**IN THE SUPREME COURT OF OHIO**

DOUGLAS P. LABORDE, ET AL., :  
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 : Case No. 15-1138  
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 PLAINTIFFS-APPELLEES, :  
 :  
 : On Appeal from the Franklin County Court  
 vs. : of Appeals, Tenth Appellate District  
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 CITY OF GAHANNA, ET AL., :  
 : Court of Appeals  
 :  
 : Case No. 14-AP-764  
 :  
 DEFENDANTS-APPELLANTS. : Case No. 14-AP-806  
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**PLAINTIFFS-APPELLEES DOUGLAS & KARLA LABORDE'S MEMORANDUM IN  
RESPONSE TO MEMORANDA IN SUPPORT OF JURISDICTION OF DEFENDANTS-  
APPELLANTS REGIONAL INCOME TAX AGENCY, THE CITY OF GAHANNA,  
AND JENNIFER TEAL**

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## **THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

This discretionary appeal falls well short of the “public or great general interest” standard of this Court. The Defendants<sup>1</sup>—who admit to uniformly applying their incorrect interpretation of Gahanna City Code § 161.18(a) (“Tax Credit”)<sup>2</sup>—request review of a unanimous Tenth District decision upholding the Trial Court’s determination that Gahanna taxpayers affected by that uniform misapplication may pursue redress through a class action. Yet, in support of their petitions, neither the Gahanna Defendants nor RITA point to a split among the appellate courts in this state or to any question of law on which this Court has not already developed well-established principles. Moreover, the Defendants have not cited another case in which a municipality has disregarded the text of its own tax ordinance and systematically deprived its taxpayers of a tax credit. Thus, only one municipality—Gahanna—is impacted by this case. And because Gahanna has recently modified City Code § 161.18(a) in the wake of the Trial Court’s rejection of the Defendants’ application of the provision, there is even less of a reason to believe that the decisions below have any application beyond the specific facts of this case. Although this case is “undoubtedly important to the parties involved, this case is about this case only[.]” *Hayward v.*

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<sup>1</sup> As used herein, the term “Defendants” refers collectively to Defendants-Appellants City of Gahanna (“Gahanna”), Regional Income Tax Agency (“RITA”), and Jennifer Teal (“Teal”); the term “Gahanna Defendants” refers collectively to Gahanna and Teal; the term “LaBordes” refers to Plaintiffs-Appellees Douglas & Karla LaBorde; the term “Class” refers to the class certified by the Trial Court, as modified by the decision of the Tenth District; the term “RITA’s Brief” refers to Appellant Regional Income Tax Agency’s Jurisdictional Brief; and the term “Gahanna’s Brief” refers to the Memorandum in Support of Jurisdiction Of Defendants-Appellants City of Gahanna and Jennifer Teal.

<sup>2</sup> Under City Code § 161.18(a), taxpayers such as the LaBordes who resided in Gahanna and worked in a municipality with an income tax rate greater than Gahanna’s should have received a dollar-for-dollar credit against their Gahanna income tax liability for every dollar they paid to the municipality of their employment. However, the Defendants limited such a taxpayer’s credit to 83.33% of the amount the taxpayer would otherwise have owed Gahanna, so taxpayers never received a full credit. The Trial Court emphatically rejected the Defendants’ interpretation.

*Summa Health Sys./Akron City Hosp.*, 139 Ohio St. 3d 238, 2014-Ohio-1913, 11 N.E.3d 243, ¶ 34 (Pfeifer, J., dissenting).

On the record below, the Trial Court and the Tenth District held that both the Gahanna City Code and the Ohio Revised Code unequivocally permit the LaBordes and the Class to seek monetary relief for overpayments of taxes through a class action. The problems with the Defendants' attempt to call upon the resources of this Court appear from the face of their respective petitions: The Defendants cannot agree as to what exactly this Court should be reviewing; they have constructed propositions of law based on their imaginative view of the causes of action pled by the LaBordes; they request review of an interlocutory order rejecting their affirmative defenses; and they challenge the straightforward application of the well-established standard for class-certification.

For example, the Gahanna Defendants—without even referencing the applicable abuse-of-discretion standard—argue that the Trial Court erred in certifying the Class and finding that common issues predominated over individualized issues. The Defendants' witnesses, however, repeatedly testified that all Class members calculated the Tax Credit in precisely the same manner, and the Gahanna Defendants have already conceded that all the Class members' claims "rise or fall" based on the correct interpretation of City Code § 161.18(a). Merit Brief of LaBordes in Response to RITA at 19 (filed in Tenth District on November 26, 2014).

Similarly, the Gahanna Defendants argue that the Trial Court erred in finding that a class action would be superior to countless individual lawsuits. On this issue, as on the predominance issue, the Gahanna Defendants do not even reference the abuse-of-discretion standard. Instead, the Gahanna Defendants argue that a class action is unnecessary because "[a] decision on the merits of LaBorde's individual claim would necessarily result in the City of Gahanna applying the

same municipal income tax credit formula to all residents.” Gahanna’s Brief at 11. The Gahanna Defendants neglect to mention that they have vowed to fight this case until the bitter end and that they have refused to even acknowledge that all Class members are similarly situated. The Gahanna Defendants also fail to explain how, absent class certification, Class members will receive notice of their rights and obtain recovery.

The Defendants also take issue with the lower courts’ application of the three-year statutes of limitation in R.C. § 718.12 and City Code 161.12(d). The Defendants primarily argue, on policy grounds, that taxpayers should not be permitted to recover for taxes paid three years before the filing of a lawsuit. *See* Gahanna Brief at 1-2; RITA’s Brief at 1-3. These arguments should be directed to the legislature, not to this Court, as the relevant statutes clearly provide a three-year period for recovery of municipal income tax payments.

Ultimately, the Defendants seek to invoke this Court’s jurisdiction to further delay recovery by the Class. The Defendants, knowing that members of the Class will receive notice of the Defendants’ misconduct if the lower courts’ decisions stand, have appealed to this Court and requested that this Court provide another layer of appellate review on the class-certification issue. But “it is abundantly clear that in this jurisdiction a party to litigation has a right to but one appellate review of his cause.” *Williamson v. Rubich*, 171 Ohio St. 253, 253, 168 N.E.2d 876 (1960).

Though the Defendants claim the Tenth District’s decision has far-reaching implications, the Defendants are yet to identify another instance of a municipality blatantly misapplying its own tax-credit provision and systematically depriving its residents of their money. Because of the “fact-specific nature” of this case, the case is “unlikely to provide meaningful guidance to the bench and bar.” *Blue Ash v. Kavanagh*, 113 Ohio St. 3d 67, 2007-Ohio-1103, 862 N.E.2d 810, ¶ 31 (Pfeifer, J., dissenting); *accord Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St. 3d

480, 492, 727 N.E.2d 1265 (2000) (“[T]his court sits to settle the law, not to settle cases.”) (Cook, J., concurring). As a result, the Defendants cannot show that this case merits the Court’s discretionary review.

### **STATEMENT OF RELEVANT FACTS & PROCEDURAL HISTORY**

This case began when the LaBordes filed their Verified Complaint on July 3, 2012. The gravamen of the Verified Complaint is that the Defendants have incorrectly applied Gahanna City Code §161.18(a) and consistently deprived the LaBordes and the Class members of the full Tax Credit provided by that provision. Under City Code § 161.18(a), taxpayers such as the LaBordes that resided in Gahanna and worked in a municipality with a tax rate greater than Gahanna’s should have received a full dollar-for-dollar Tax Credit. The Defendants, for years, inexplicably limited such a taxpayer’s credit to 83.33% of the amount the taxpayer would otherwise have owed Gahanna (i.e., without the Tax Credit). After extensive briefing by the parties, the Trial Court found that “upon a plain reading of the relevant code sections, the plaintiffs’ interpretation of GCC §161.18 is correct.” Trial Court’s September 11, 2014 Decision & Entry at 14 (“Trial Court’s Decision & Entry”). Gahanna has since amended City Code § 161.18, so that, on a prospective basis (i.e., for returns filed for 2015 and beyond), the text of the provision is consistent with the Defendants’ historical misapplication.

The Trial Court also certified the Class, which consists of current and former residents of Gahanna who, during the relevant time period, lived in Gahanna and worked in a municipality with a tax rate greater than Gahanna’s. Although the Gahanna Defendants now claim (without citation) that members of the Class may have calculated the Tax Credit differently, the Trial Court found, based on the undisputed evidence, that all members of the Class were required to calculate

the Tax Credit in accordance with the Defendants’ shared incorrect interpretation of City Code § 161.18(a):

[T]he defendants’ witnesses acknowledged any return that was submitted, whether using Form 37 or whether prepared by a professional, would be denied, if the calculation did not match up with the defendants’ interpretation of §161.18. (Teal Depo., pp. 42-43, 53, 68-77; Gischel Depo., pp.53-57; Depo. of Mark Taranto, p.26).

*Id.* at 9-10<sup>3</sup>. The Trial Court also brushed aside the Gahanna Defendants’ “need” argument and found that a class action would be far superior to thousands of individual actions:

[C]ommon questions of law predominate over any questions affecting individual class members because the primary issue is the correct interpretation of GCC §161.18. Furthermore, because the class size is so large, a single class action to resolve a common question of application of the GCC is superior to several thousand actions by those who could be included in the class. Accordingly, this Court finds that the plaintiffs have satisfied the requirements of Civ. R. 23(B)(3).

*Id.* at 10-11. The Tenth District, in a unanimous decision, affirmed the Trial Court’s grant of class certification, though the Tenth District did modify the Class definition based on the three-year statutes of limitations in R.C. § 718.12 and City Code § 161.12(d).

### **ARGUMENTS IN RESPONSE TO PROPOSITIONS OF LAW**

Because there is little overlap in the Defendants’ propositions of law, the LaBordes are, for the sake of clarity, addressing them sequentially based on the following subject matters: Class Certification, Standing, and Statutes of Limitations.

### **CLASS CERTIFICATION**

Even the most cursory reading of the Gahanna Defendants’ class-certification propositions of law demonstrates that they provide no justification for review by this Court. The Gahanna

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<sup>3</sup> In light of this uncontroverted evidence, the Gahanna Defendants’ continued assertion that a “determination of how a municipal income tax statute operates for each tax return requires evidentiary proof of how each taxpayer utilized the statute[,]” Gahanna’s Brief at 3, is alarmingly disingenuous.

Defendants do not identify any confusion among the Courts of Appeals or any unresolved question of law. This can only be because the Tenth District's decision in this case implicates no novel legal issues. The mere allegation of an error applying established law is not a sufficient basis for wasting the resources of this Court. *State v. Bartrum*, 121 Ohio St. 3d 148, 2009-Ohio-355, 902 N.E.2d 961, ¶ 31 (“[O]ur role as a court of last resort is not to serve as an additional court of appeals on review, but rather to *clarify rules of law arising in courts of appeals* that are matters of public or great general interest.”) (O’Donnell, J., dissenting) (Emphasis added.) In any case, the Gahanna Defendants’ allegations of error are unsupported by the facts.

**Response To The Gahanna Defendants’ Proposition Of Law No. 2: A Trial Court Does Not Abuse Its Discretion In Finding The Predominance Requirement For Class Certification Is Met When All Of The Claims Of Class Members “Rise Or Fall” Based On A Single Legal Determination**

The Trial Court correctly concluded that “common questions of law predominate over any questions affecting individual class members because the primary issue is the correct interpretation of GCC § 161.18.” Trial Court’s Decision & Entry at 10-11. The Tenth District, in its unanimous decision, concluded that the Trial Court had not abused its discretion in finding predominance was met because “all the claims arise from the standardized application of [the Defendants’] interpretation of GCC Section 161.18.” Tenth District’s May 28, 2015 Decision at 13 (“Tenth District’s Decision,” attached to RITA’s Brief as Exhibit A). Although the Gahanna Defendants claim that the lower courts erred in approving class certification, Gahanna Brief’s is missing three critical words: “abuse of discretion.”

Under Ohio law, “[a] trial judge has broad discretion in determining whether a class action may be maintained and that determination will not be disturbed absent a showing of an abuse of discretion.” *Marks v. C.P. Chem. Co.*, 31 Ohio St. 3d 200, 201, 509 N.E.2d 1249 (1987). Abuse of discretion “implies an attitude on the part of the trial court that is unreasonable, arbitrary, or

unconscionable.” *Id.* As this Court has recognized, “[a] trial court which routinely handles case-management problems is in the best position to analyze the difficulties which can be anticipated in litigation of class actions.” *Id.*

The Trial Court’s finding that the predominance requirement is met was not unreasonable, arbitrary, or unconscionable. The Gahanna Defendants’ have admitted that “[a]ll of the LaBordes’ remaining claims, as well as those of the class, rise or fall” based on the correct interpretation of City Code § 161.18(a), Merit Brief of LaBordes in Response to RITA at 19, so the Gahanna Defendants cannot credibly argue that the Trial Court abused its discretion in finding that common issues predominate over individualized issues. Still, the Gahanna Defendants contend that each Class member’s recovery depends on whether the member’s return was prepared by an accountant or by the taxpayer, whether the preparer reviewed City Code § 161.18, how the member’s Tax Credit was calculated, and whether the Defendants’ joint interpretation affected the member’s Tax Credit. Gahanna’s Brief at 10. But the LaBordes have already obtained admissions from the Defendants that every single taxpayer, in order to have a tax return accepted by the Defendants, was required to calculate the Tax Credit in accordance with the Defendants’ joint incorrect interpretation. Trial Court’s Decision & Entry at 9-10. Given that the Defendants are unable to identify any individualized issues, the Trial Court did not abuse its discretion in concluding that the common issue regarding the application of City Code §161.18 predominates.

**Response To The Gahanna Defendants’ Proposition Of Law No. 3: A Trial Court Does Not Abuse Its Discretion In Finding The Superiority Requirement For Class Certification Is Met When A Class Action Is Necessary For Members Of The Class To Efficiently Obtain Relief**

The Trial Court found that the superiority requirement of Rule 23(B)(3) was met because common questions predominate and “because the class size is so large, a single class action to resolve a common question of application of the GCC is superior to several thousand actions by

those who could be included in the class.” Trial Court’s Decision & Entry at 11. The Tenth District similarly found that “[i]ndividually, the members of the class lack the strength to litigate their claims” and that “[i]t is unlikely that the class members would file new suits given the relatively small amounts involved in individual recoveries, the cost of adequate representation, not to mention the massive drain on judicial and administrative resources.” Tenth District’s Decision at 13. These findings are unassailable.

The Gahanna Defendants, however, argue that a class action is unnecessary because “a decision in LaBorde’s favor [will accrue] to the benefit of others similarly situated.” Gahanna’s Brief at 3. For support, the Gahanna Defendants cite a number of cases in which the defendants had agreed to be bound by a court’s ruling with regard to an individual plaintiff. *Id.* at 11. These cases are inapposite, as the Defendants have not agreed to apply a favorable ruling for the LaBordes to all Class members. In fact, even after the Trial Court and the Tenth District found that all members of the Class are similarly situated, the Gahanna Defendants are still pretending that “each particular class member’s municipal income tax return is dependent on a variety of factors, including how the tax payer (sic) interpreted and applied GCC Section 161.18(a).” *Id.* at 6. Gahanna is truly speaking out of both sides of its mouth on this issue.

Additionally, the Gahanna Defendants’ “need” argument is effectively an argument that the Class’ available administrative remedies are superior to a class action. On the issue of superiority, this Court’s analysis in *Herrick v. Kosydar*, 44 Ohio St. 2d 128, 339 N.E.2d 626 (1975) is instructive:

[T]he present action is a class action, brought on behalf of an estimated 40,000 claimants. Administrative remedies would require each of those claimants to file a separate refund application, a requirement which can hardly be considered an equally serviceable alternative to a single declaratory judgment action. ***A class action provides various other procedural benefits and safeguards, as set out in Civ. R. 23, and offers clear advantages***

*for large groups of litigants with similar interests.* None of these advantages would be available in an administrative hearing, or in an appeal therefrom to the courts.

(Emphasis added.) *Id.* at 130; *see also State ex rel. Columbus Southern Power Co. v. Sheward*, 63 Ohio St. 3d 78, 81-82, 585 N.E.2d 380 (1992) (applying *Herrick* and finding that declaratory judgment was superior to administrative remedies in a class action). As to this issue, the Gahanna Defendants fail to explain how Class members will receive notice of their right to recovery, how Class members will actually receive compensation for their overpayments, or how many years of overpayments the Gahanna Defendants will refund. As the facts of this case demonstrate, the Tenth District did not err in concluding that the Trial Court did not abuse its discretion in certifying the Class.

## **STANDING**

### **Response To RITA's Proposition Of Law No. 1: The LaBordes Unquestionably Have Standing To Prosecute Their Claims**

To have standing, a plaintiff must show: “(1) ‘injury in fact’ to the plaintiff that is concrete and particularized; (2) a causal connection between the injury and the conduct complained of; and (3) redressability, *i.e.* that it is likely that the injury will be redressed by a favorable decision granting the relief requested.” *Woods v. Oak Hill Community Med. Ctr.*, 134 Ohio App. 3d 261, 268-269, 730 N.E.2d 1037 (4th Dist. 1999) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). RITA cannot seriously dispute that the systematic diminution of the LaBordes’ Tax Credit is sufficiently concrete and particularized; that there is a causal connection between the Defendants’ refusal to permit a full Tax Credit and the LaBordes’ damages; or that a favorable decision ordering the Defendants to repay the LaBordes would redress the injury. After reciting the elements for standing discussed in *Lujan*, the Tenth District concluded that “[t]he LaBordes

easily meet these requirements.” Tenth District’s Decision at 15. RITA makes no attempt to explain the error in the Tenth District’s reasoning.

Instead, RITA relies heavily on two cases for its argument that the LaBordes lack “standing”; but neither of these cases holds that a class action plaintiff must overcome a defendant’s affirmative defenses to have standing. The first case, *Hamilton v. Ohio Sav. Bank*, 82 Ohio St. 3d 67, 74, 694 N.E.2d 442 (1998), only states that to have standing, a plaintiff must “possess the same interest and suffer the same injury shared by all members of the class that he or she seeks to represent.” Both the Trial Court and the Tenth District found that the LaBordes’ claims were typical of those of the Class, and RITA has not challenged these uncontroversial factual determinations in its brief. The second case, *Woods*, simply analyzed whether the plaintiff had met the elements for standing established in the U.S. Supreme Court’s landmark case *Lujan*. *Woods*, 134 Ohio App. 3d at 268-269. Again, RITA did not address the elements for standing found in *Lujan*.

This Court should see RITA’s standing argument for what it actually is: a veiled attempt to prematurely appeal the Trial Court’s denial of RITA’s summary judgment motion as it relates to RITA’s affirmative defenses. Ohio courts have repeatedly found that “[d]enial of a motion for summary judgment is not a final, appealable order.” *Welsh v. Estate of Cavin*, 10th Dist. No. 02AP-1328, 2004-Ohio-62, ¶ 41. In RITA’s June 13, 2014 Motion for Summary Judgment, RITA argued that (1) the LaBordes’ claims were barred by R.C. Chapter 2723, which RITA contends is an exclusive remedy; and (2) the LaBordes’ claims failed because the LaBordes had not exhausted administrative remedies. The Trial Court rejected both of these affirmative defenses. Trial Court’s Decision & Entry at 5-6. Because RITA cannot (prior to a final judgment) appeal the Trial Court’s rejection of RITA’s affirmative defenses, RITA has dressed up both of these affirmative defenses

as objections to the LaBordes’ “standing” to pursue this action. This Court, like the Tenth District, should swiftly disregard RITA’s “standing” argument. RITA’s affirmative defenses also fail on the merits, as addressed below.

A. The LaBordes Were Not Required To Comply With The Protest Provisions Of R.C. § 2723.03 Because The LaBordes Did Not Sue Under R.C. Chapter 2723

Throughout this litigation, the LaBordes have made clear that they are not seeking to have City Code §161.18 declared illegal; on the contrary, the LaBordes are asking that this section of the City Code be correctly administered according to its plain terms. Since the LaBordes are not challenging the legality of City Code § 161.18, the LaBordes did not include a claim under R.C. Chapter 2723 in their Verified Complaint. Nevertheless, the Defendants persist in contending that the LaBordes’ claims arise under R.C. Chapter 2723. This chapter, though, only relates to the “*illegal* levy or collection of taxes and assessments....” (Emphasis added.) R.C. § 2723.01. The Trial Court found R.C. Chapter 2723 inapplicable because the LaBordes “are not challenging the tax as illegal, but are merely seeking a determination as to how the code should be applied.” Trial Court’s Decision & Entry at 6. The Tenth District also rejected the Defendants’ argument based on R.C. Chapter 2723:

The LaBordes are not contending that it is illegal to collect taxes pursuant to GCC Section 161.18(a). Rather, they argue that the City is interpreting the statute incorrectly. Therefore, R.C. Chapter 2723 has no application.

Tenth District’s Decision at 9.

RITA has not given up on its dogged attempt to rewrite the LaBordes’ Verified Complaint to include a claim under R.C. § 2723.01 *et seq.* In its brief, RITA continues to argue that the lower courts erred in refusing to apply R.C. Chapter 2723, but this argument fails for another reason. Under the longstanding maxim *generalia specialibus non derogant*, when a general provision and a specific provision conflict, the specific prevails. *See* R.C. § 1.51. Here, two specific code

provisions—one in the City Code (§161.12) and one in the Revised Code (§ 718.12)—govern municipal income tax claims and refunds. Both provide a three-year period for recovery of municipal income taxes and do not contain a protest requirement. Thus, City Code §161.12 and R.C. § 718.12, rather than R.C. Chapter 2723, apply to the LaBordes’ claims. Not surprisingly, the Tenth District found that “[t]hese statutes specifically apply to overpayments of municipal income taxes, and these specific provisions should prevail over the more general provisions cited by the [Defendants].” Tenth District’s Decision at 9.

RITA cites no case law that supports its contrary position. Though RITA does cite cases applying R.C. Chapter 2723, RITA’s Brief at 7, none of the cases cited by RITA suggest that the Tenth District erred in applying City Code § 161.12 and R.C. § 718.12, or that R.C. Chapter 2723 applies to municipal income taxes, *see* Merit Brief of LaBordes in Response to RITA at 36-37.

Even if the Defendants were correct, and R.C. Chapter 2723 applied to municipal income taxes, the Court should still decline to exercise jurisdiction in this case. The Defendants did not assert failure to protest under R.C. § 2723.03 as an affirmative defense in their Answers or in an amendment thereto. “If a party fails to raise an affirmative defense in its responsive pleading, courts will deem the affirmative defense waived.” *Olentangy Condo. Ass’n v. Lusk*, 10th Dist. Franklin No. 09AP-568, 2010-Ohio-1023, ¶ 34. Therefore, the Defendants waived the right to assert a defense based on the protest requirements of R.C. § 2723.03.

B. The Issue Of Whether The LaBordes Need To Exhaust Administrative Remedies Is Not Before The Court:

The Trial Court found that the LaBordes did not need to exhaust administrative remedies because (1) the LaBordes have brought declaratory judgment claims, and a declaratory judgment claim can be maintained even when an alternative remedy exists; and (2) another member of the

Class had already exhausted administrative remedies<sup>4</sup>. Trial Court’s Decision & Entry at 6. The Tenth District found the portion of the Trial Court’s Decision & Entry denying RITA’s exhaustion defense was not final and appealable:

The failure to exhaust argument is in actuality an affirmative defense to the underlying declaratory judgment action and not a standing argument. The argument is not subject to appeal at this time as it relates to the merits of the trial court’s ruling on the declaratory judgment action. Because it is not within the scope of the present appeal in this case, and we will not address the issue at this time.

Tenth District’s Decision at 14. Notably, RITA does not take issue with the Tenth District’s finding that the Trial Court’s decision on exhaustion was not appealable. For this reason alone, this Court should decline to hear RITA’s exhaustion argument. *See, e.g., Smith v. Chen*, 142 Ohio St. 3d 411, 2015-Ohio-1480, 31 N.E.3d 633, ¶ 1 (“[N]either this court nor the court of appeals has jurisdiction to consider the merits of an interlocutory order that is not final and appealable.”).

### **STATUTES OF LIMITATIONS**

#### **Response To RITA’s Proposition Of Law No. 2 & The Gahanna Defendants’ Proposition Of Law No. 1: The Claims Of The LaBordes And The Class Are Governed By The Three-Year Statutes Of Limitations In R.C. § 718.12 And City Code § 161.12(d), And The Class Definition Only Includes Claims That Arose Within Three Years Of The Filing Of The Complaint**

The version of R.C. § 718.12<sup>5</sup> applicable to this case states:

*Civil actions* to recover *municipal income taxes* and penalties and interest on municipal income taxes shall be brought within *three years after the tax was due or the return was filed*, whichever is later.

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<sup>4</sup> RITA’s exhaustion argument also fails because (1) RITA waived the right to assert the exhaustion defense by failing to timely file a motion asserting the defense and (2) the exhaustion doctrine does not apply when the facts of the case are not in dispute and the only relevant issue is a pure legal issue. Merit Brief of LaBordes in Response to RITA at 41-47.

<sup>5</sup> The prior version of § 718.12 governs the claims of the LaBordes and the Class. Both the current and former versions contain the same three-year statute of limitations, though. *See* § 718.12 (“Civil actions to recover municipal income taxes and penalties and interest on municipal income taxes shall be brought within the later of:(i) Three years after the tax was due or the return was filed, whichever is later....”); Tenth District’s Decision at 9.

(Emphasis added.) R.C. § 718.12. Similarly, at all relevant times, City Code § 161.12(d) stated “[t]axes erroneously paid shall not be refunded unless a claim for refund is made within three (3) years from the date on which such payment was made or the return was due, or within three (3) months after final determination of the federal tax liability, whichever is later.” The Tenth District sensibly found that “[t]hese statutes specifically apply to overpayments of municipal income taxes, and these specific provisions should prevail over the more general provisions cited by the [Defendants].” Tenth District’s Decision at 9.

Astonishingly, RITA does not even mention R.C. § 718.12 in its brief. Without even addressing R.C. § 718.12, RITA can hardly argue that the Tenth District erred in applying the specific statute of limitations in R.C. § 718.12. The Gahanna Defendants at least reference R.C. § 718.12, but only in arguing that the three-year limitations period of § 718.12 governs “claims for municipal income tax refunds made only to the Gahanna Board of Tax Appeals.” Gahanna’s Brief at 7. Apparently, the Gahanna Defendants would have this Court replace the phrase “civil actions” in R.C. § 718.12 with the phrase “administrative actions.” This Court, like the Trial Court and Tenth District, should decline the Gahanna Defendants’ invitation to redraft the unambiguous language of R.C. § 718.12.

The Defendants also argue that the lower courts erred in applying the statute of limitations from City Code § 161.12(d) because that provision supposedly only applies to administrative actions. Because the text of City Code § 161.12(d) does not reference administrative claims, the Defendants’ argument is misplaced. By filing suit to recover erroneously paid taxes, the LaBordes are making “a claim for refund” within the meaning of City Code § 161.12(d). And even if the Defendants were correct in their interpretation of City Code § 161.12(d), the Defendants’ statute

of limitations argument would still fail because R.C. § 718.12 undeniably provides a three-year statute of limitations that applies to “civil actions” for the recovery of municipal income taxes.

Finally, the Defendants question the wisdom of allowing taxpayers to recover for taxes that were paid three years before the filing of a lawsuit. *See* Gahanna Brief at 1-2; RITA’s Brief at 1-3. But this Court is not free to rewrite R.C. § 718.12 and City Code § 161.12(d) merely because the Court disagrees with the policy of those provisions:

All arguments going to the soundness of legislative policy choices...are directed to their proper place, which is outside the door to this courthouse. This court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of the government.

(Citations and quotation marks omitted.) *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 455-456, 715 N.E.2d 1062 (1999).

Simply put, the three-year statutes of limitations in R.C. § 718.12 and City Code § 161.12(d) govern the claims of the LaBordes and the Class. Since the Class definition only includes claims that arose on or after July 3, 2009 (three years before the filing of the Verified Complaint), the claims of the LaBordes and the Class are not barred by the applicable statute of limitations.

### **CONCLUSION**

For the foregoing reasons, the Court should decline to exercise jurisdiction over this appeal.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following by electronic mail and First Class U.S. Mail, postage prepaid, this 12th day of August, 2015:

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