IN THE SUPREME COURT OF OHIO

CITY OF ATHENS, *et al.*,	:	Case No. 2019-0696
	:	
Appellants,	:	
	:	Appeal from the Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
JEFF McCLAIN, TAX	:	
COMMISSIONER OF OHIO, *et al.*,	:	
	:	
Appellees.	:	

BRIEF OF AMICI CURIAE THE OHIO SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS, THE OHIO CHAMBER OF COMMERCE, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN OHIO, THE OHIO REALTORS, THE MANUFACTURING POLICY ALLIANCE, THE ASSOCIATED GENERAL CONTRACTORS OF OHIO, THE OHIO CONTRACTORS ASSOCIATION, THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, THE MECHANICAL CONTRACTORS ASSOCIATION OF OHIO, THE OHIO BUSINESS ROUNDTABLE, THE OHIO MANUFACTURERS' ASSOCIATION, THE OHIO FARM BUREAU FEDERATION, THE OHIO COUNCIL OF RETAIL MERCHANTS, ABC OF OHIO, AND THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION IN SUPPORT OF APPELLEES

Eugene L. Hollins (0040355)
(COUNSEL OF RECORD)
Stephen J. Smith (0001344)
Frank J. Reed, Jr. (0055234)
Yazan S. Ashrawi (0089565)
Thaddeus M. Boggs (0089231)
Frost Brown Todd LLC
One Columbus, Suite 2300
Columbus, Ohio 43215
Telephone: 614-464-1211
Facsimile: 614-464-1737
ghollins@fbtlaw.com
ssmith@fbtlaw.com
freed@fbtlaw.com
yashrawi@fbtlaw.com
tboggs@fbtlaw.com

David A. Yost (0056290)
Ohio Attorney General

Benjamin M. Flowers (0095284)
State Solicitor
(COUNSEL OF RECORD)
Samuel C. Peterson (0081432)
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Telephone: 614-466-8980
bflowers@ohioattorneygeneral.gov
speterson@ohioattorneygeneral.gov

Attorneys for Appellees
Jeff McClain, Tax Commissioner of the State of Ohio, et al.

Matthew C. Blickensderfer (0073019)
Frost Brown Todd LLC
3300 Great American Tower
301 East Fourth Street
Cincinnati, Ohio 45202
Telephone: 513-651-6800
Facsimile: 513-651-6981
mblickensderfer@fbtlaw.com

Attorneys for Appellants

Stephen W. Funk (0058506)
(COUNSEL OF RECORD)
Roetzel & Andress, LPA
222 South Main Street, Suite 400
Akron, Ohio 44308
Telephone: 330-376-2700
Facsimile: 330-376-4577
sfunk@ralaw.com

Eve Belfance (0046787)
Brian D. Bremer (0087363)
City of Akron
161 South High Street, Suite 202
Akron, Ohio 44308
Telephone: 330-375-2030
ebelfance@akronohio.gov
bbremer@akronohio.gov

Attorneys for Appellant
City of Akron

Garry E. Hunter (0005018)
Ohio Municipal Attorneys Association
175 South Third Street, Suite 150
Columbus, Ohio 43215
Telephone: 614-221-4349
ghunter@omaaohio.org

John A. Scavelli, Jr. (0078307)
Director of Law
538 North Market Street
PO Box 1128
Wooster, Ohio 44691
Telephone: 330-263-5248
jscavelli@woosteroh.com
Attorney for Amicus Curiae
The City of Wooster

J. Donald Mottley (0055164)
Taft Stettinius & Hollister LLP
65 East State Street, Suite 1100
Columbus, Ohio 43215
Telephone: 614-220-0255
Facsimile: 614-221-2007
mottley@taftlaw.com

Attorney for Amicus Curiae
Greater Dayton Mayors and
Managers Association

Dale R. Emch (0080004)
John E. Bibish, IV (0087589)
City of Toledo
Department of Law
One Government Center, Suite 2250
Toledo, Ohio 43604
Telephone: 419-245-1020
John.bibishiv@toledo.oh.gov

Attorneys for Amicus Curiae
City of Toledo

Richard C. Farrin (0022850)
Thomas M Zaino (0041945)
Zaino Hall & Farrin LLC
41 S. High Street, Suite 3600
Columbus, Ohio 43215
Telephone: 614-326-1120
Facsimile: 614-754-6368
rfarrin@zhftaxlaw.com
tzaino@zhftaxlaw.com

Attorneys for Amici Curiae Associations

Paul W. Flowers (0046625)
Louis E. Grube (0091337)
Paul W. Flowers Co., LPA
50 Public Square, Suite 1910
Cleveland, Ohio 44113
Telephone: (216) 298-1152
pwf@pwfco.com
leg@pwfco.com

Attorneys for Amicus Curiae
Ohio Municipal League

Mitchell H. Banchefsky (0023642)
99 West Main Street
PO Box 188
New Albany, Ohio 43054
Telephone: 614-939-2232
mbanchefsky@newalbanyohio.org

Attorney for Amicus Curiae
Local Government Law Professors
International Municipal Lawyers Association
International City/County Management Association

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INTRODUCTION

The Ohio Society of Certified Public Accountants ("OSCPA"), the Ohio Chamber of Commerce ("Chamber"), the National Federation of Independent Business in Ohio ("NFIB"), the Ohio REALTORS ("REALTORS"), the Manufacturing Policy Alliance ("MPA"), the Associated General Contractors of Ohio, the Ohio Contractors Association, the National Electrical Contractors Association, the Mechanical Contractors Association of Ohio (collectively, the "Contractors"), the Ohio Business Roundtable ("OBRT"), the Ohio Manufacturers' Association (the "OMA"), the Ohio Farm Bureau Federation ("OFBF"), the Ohio Council of Retail Merchants, ABC of Ohio, and the Ohio Cable Telecommunications Association ("OCTA"), collectively referred to as "Amici" or the "Associations," submit this brief in support of Appellees to offer perspective to the Court regarding how the pre-Amended Substitute House Bill No. 49 of the 132d General Assembly ("H.B. 49") municipal income tax on net profit ("net profit tax"), under which businesses were subject to filing, audits, assessments, and local administrative appeals for each of the potentially more than 600 municipal taxing jurisdictions in which they do business, no matter how small, for the same tax year, imposed extremely burdensome compliance costs, resulted in inconsistent application of the law by the tax administrators and inconsistent decisions by the local income tax boards of review, and exposed companies to the costly burden of defending themselves in multiple jurisdictions against audits, assessments, and administrative appeals regarding a single tax year. Amici will also counter Appellants' constitutional challenges to the municipal income tax provisions in Amended Substitute House Bill No. 5 of the 130th General Assembly ("H.B. 5") and H.B. 49, which were enacted pursuant to the authority conferred upon the General Assembly by Article XIII, Section 6 and Article XVIII, Section 13 of the Ohio Constitution to bring more

uniformity to municipal income taxes and eliminate the excessive costs to businesses of complying with multiple filings, audits, assessments, and appeals for the same tax year.

STATEMENT OF INTEREST OF AMICI CURIAE

The OSCPA was established in 1908 and represents the diverse interests of approximately 27,000 CPAs and accounting professionals working in business, education, government and public accounting. The OSCPA promotes greater awareness for CPAs through public financial literacy campaigns and other initiatives that benefit businesses and all Ohioans, including the OSCPA's advocating for a simpler, uniform municipal income tax system in Ohio. Every year, the OSCPA's members face tremendous municipal income tax compliance burdens, including, for example, potentially filing tens, if not hundreds, of Ohio municipal net profit tax returns for one client. The OSCPA attempts to achieve a business-friendly municipal tax policy in Ohio, and the OSCPA is uniquely qualified due to its members' expertise in complex tax issues. The OSCPA's members are familiar with the significant municipal net profit tax administration issues and burdens under the pre-H.B. 49 structure.

Founded in 1893, the Chamber is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. The advocacy efforts of the Chamber are dedicated to the creation of a strong pro-jobs environment – an Ohio business climate responsive to expansion and growth.

NFIB represents nearly 23,000 small businesses in Ohio. Its members typically employ twenty-five or fewer people and do less than $2 million in annual sales. They are engaged in every industry type and come from all eighty-eight counties in Ohio. Even though they are small

businesses, many of the members make sales into or have other activity in multiple municipal taxing jurisdictions. Under the pre-H.B. 49 structure, these businesses had to file in and were subject to audits, assessments, and local appeals in each of the taxing jurisdictions in which they made sales, regardless how small. The members also were subject to differing and inconsistent applications of the law and different rules of the taxing authorities. The result could often be compliance costs that exceeded the tax liability to the particular taxing jurisdiction.

The REALTORS was formed in 1910 and now counts as the state's largest professional trade organization, with more than 30,000 members. Composed of real estate professionals (REALTORS) who have joined the local, state and national associations of REALTORS, its members often operate in multiple Ohio municipalities. Further, the association advocates for a strong Ohio economy that remains a competitive attraction to business and investment. Being competitive creates a strong real estate market, which benefits its members and all Ohioans. Ohio's municipal income tax system is so different from other states that it hampers Ohio's competitiveness. Further, because REALTORS generally operate in more than one municipality, the association's members are subject to multiple filing and differing application of net profit taxes among Ohio municipalities.

The Contractors are commercial construction trade associations located in Ohio that represent more than 1,000 businesses in the construction industry that employ tens of thousands of tradespeople. Their members are primarily small, closely held companies that work across geographic areas spanning many municipal jurisdictions. They construct schools, roads, bridges, office and medical complexes, pipelines, wastewater treatment plants, mechanical and electrical systems, industrial facilities, and many other types of vertical and horizontal structures.

MPA is an organization comprised of large manufacturers who have high brand recognition and strong reputations for ethics and integrity in conducting business. The member companies maintain a significant presence in the state of Ohio. MPA members share a commitment to preserving a competitive manufacturing environment. Because of the diversity and significance of its members, MPA is able to uniquely represent all manufacturers and speak with authority on issues facing manufacturers. In total, MPA member companies employ 39,000 Ohioans, have a total Ohio payroll of $2.5 billion, have invested over $5 billion in hard assets in Ohio, utilize 9,200 Ohio suppliers for its Ohio operations, spend approximately $11 billion with Ohio-based suppliers, and operate in all 88 of Ohio's counties. Because its members and their suppliers operate in nearly all states and across the globe, they know Ohio's municipal income tax is particularly burdensome when compared to the local income tax systems of other states, especially with regard to the administrative costs associated with compliance and administration.

Established in 1992, OBRT was founded for one sole purpose: to improve Ohio's business climate. Since its inception, the OBRT has worked with Ohio's governors and legislative leaders to make Ohio more business-friendly and more competitive both nationally and internationally. OBRT members – the Chief Executive Officers of many of our state's largest, most successful businesses – have helped bring about momentous change in Ohio's economic landscape. Our executives identify vexing, intractable issues facing Ohio's job creators, and through their expertise, experience and resources, pursue policies that make Ohio stronger. To that end, OBRT members rely on certainty and consistency in Ohio's municipal income tax system, and centralized filing and administration of the net profit tax would enhance their competitiveness.

The OMA was created in 1910 to advocate for Ohio's manufacturers; today it has nearly 1,300 members. Its mission is to protect and grow Ohio manufacturing. For more than 100 years, the OMA has supported the efficient administration and collection of taxes to promote investment and sustained growth within Ohio's manufacturing sector; the largest of the state's 20 primary industry sectors. The OMA strongly supports efforts that promote simplicity in tax administration and reduce compliance costs for Ohio's manufacturers.

The OFBF is Ohio's largest general farm organization, representing members in all of Ohio's 88 counties. OFBF's grassroots structure places its members at the helm of developing policy to advance agriculture and strengthen communities at the local, state and national level. OFBF members run the gamut from large to small businesses, from crop production to energy development, from livestock production to food processing, and everything in between. OFBF advocates for these members to ensure a strong economy and better future for all of Ohio.

The Ohio Council of Retail Merchants was founded in 1922 and represents more than 7,500 retailers, wholesalers and distributors, ranging from local enterprises to influential regional businesses and large enterprise organizations. The Council is dedicated to protecting its members' interests on important statewide issues and to promoting business in Ohio. The Council believes this case is of significant importance in that the administrative and financial burdens that result from Ohio's complex municipal income tax structure impose a hardship upon our members. The changes imposed by H.B. 49 provide some relief from those burdens and should be upheld.

ABC of Ohio is a statewide trade association consisting of construction industry employers, suppliers and associates adhering to the merit shop, free enterprise philosophy that construction projects should be awarded based upon merit to the lowest responsible

bidder. ABC of Ohio is part of Associated Builders & Contractors Inc., the largest association of construction contractors and subcontractors in America. Its membership includes nearly twenty-four thousand (24,000) construction and construction related firms in eighty-four (84) chapters across the United States. The goal of ABC is "to provide the best educational and entrepreneurial activities and ensure all of its members the right to work in a free and competitive business climate, regardless of union or non-union affiliation." ABC supports the centralized collection and administration of the municipal net profit tax on behalf of its member companies to eliminate needless and burdensome compliance burdens, different laws, and different interpretations of the law.

OCTA, founded in 1966, is a trade association representing Ohio's cable television and telecommunications industry in the Ohio General Assembly, the Public Utilities Commission of Ohio, and the United States Congress on issues of importance to the cable television and telecommunications industry. The OCTA also works to foster a positive image of the cable industry in Ohio. OCTA members operate throughout Ohio, and they contribute significantly to employment, taxes, high-tech infrastructure and entertainment of millions of Ohioans. The OCTA members operate in numerous municipalities, which, prior to HB 49, subjected them to multiple net profit tax filings, audits, and appeals for the same tax year, which was costly and time-consuming.

MUNICIPAL INCOME TAX REFORM

Contrary to the statement by Appellants (Brief at 6), the municipal income tax system has not "worked for decades." The Associations have been working for years toward a reform of the municipal income tax system in Ohio to eliminate the excessive burdens caused by the fact that there are over 600 taxing jurisdictions in the state, many of which have different rules, or

interpretations of the statutes, ordinances, and rules, which added to the costs of compliance and the uncertainty of filing requirements. The members of the Associations, whom Appellants' derogatorily referred to as "special interests" in their brief filed in the court of appeals, include tens of thousands of businesses of all sizes and types and practitioners who are engaged to perform services related to the businesses' municipal tax obligations.

As stated above, under prior law businesses incurred excessive compliance burdens, which adversely affected their competitiveness. While it is difficult to verify the actual total cost incurred by taxpayers to comply with Ohio's municipal income tax system, OSCPA's tax committee determined that the average fee its members charge to prepare a single municipal net profit tax return ranges between $200.00 and $300.00. Complex returns could cost even more. Ohio Department of Taxation ("ODT") Deputy Tax Commissioner Marjorie Kruse estimated that taxpayers could save as much as $800 million per year if the net profit portion of the municipal income tax was centrally administered for all business taxpayers. (R. 737, Dfdt's Brief. in Opp., at Ex. E). The Associations believe that ODT's calculations reasonably estimate the potential cost-savings from centralizing administration of the net profit portion of the municipal income tax. The municipal income tax raises approximately $5 billion in annual revenue.

(https://www.tax.ohio.gov/Portals/0/communications/publications/annual_reports/2017AnnualReport/AR2017.pdf#page=114.)

Although it varies municipality to municipality, the net profit portion of municipal income tax revenue is approximately fifteen per cent. (Based on the testimony of Kent M. Scarrett, Executive Director, Ohio Municipal League, before Senate Finance General Government & Agency Review subcommittee, May 23, 2017, p. 2, in regard to H.B. 49.

http://search-prod.list.state.oh.us/cm_pub_api/api/unwrap/chamber/132nd_ga/ready_for_publication/committee_docs/cmte_s_fin_gen_gov_sub_1/testimony/cmte_s_fin_gen_gov_sub_1_2017-05-23-0900_515/ohio municipalleaguetestimony.pdf.) As a result, the net profit portion of the municipal tax raises approximately $750 million of annual revenue. Based on these estimates, the overall compliance costs incurred by net profit taxpayers exceeds the amount of actual tax due. This conclusion is supported by actual examples provided by Association members, as described below. When the cost of compliance is nearly equal to or exceeds the actual amount of tax due, the tax system is overly burdensome and abusive, and limitations and limitations are properly imposed by the General Assembly.

H.B. 5 and H.B. 49 are not the first enactments by the General Assembly to bring some uniformity to the municipal income tax system. The first step toward uniformity took place in 1957 with the passage of the Uniform Municipal Income Tax Act, Amended Substitute Senate Bill No. 133 of the 102nd General Assembly ("S.B. 133") enacting R.C. 718.01, 718.02, and 718.03. S.B. 133 was enacted in response to concerns raised in a report of the Committee on Taxation of the Ohio State Bar Association about the lack of uniformity in the rates, methods of apportioning net profits of businesses among the municipalities, and the types of income subject to the tax. Glander, *The Uniform Municipal Income Tax Act*, 18 Ohio St. L.J. 489, 491 (1957). R.C. 718.01 contained numerous restrictions and limitations, including the requirement that municipal income taxes be levied at a uniform rate, the types of income that municipalities may and may not tax, and a one percent limit on the rate without a vote of the electors. R.C. 718.02 prescribed a uniform method of apportionment of a business's net profit.

Many amendments and additions to R.C. Chapter 718 have been enacted by the General Assembly since the enactment of the Uniform Municipal Income Tax Act. Among those is

Substitute House Bill No. 477 of the 123rd General Assembly ("H.B. 477"), which, among other things, required municipalities to accept generic forms of returns and consolidated returns, make electronic versions of its rules and ordinances available, establish a board of review to hear appeals from determinations of the tax administrator, and prescribed the treatment of pass-through entities and a uniform statute of limitations for assessments and refund claims. Another is Substitute House Bill No. 483 of the 123rd General Assembly ("H.B. 483"), which prescribed a uniform set of procedures for municipalities' taxation of electric light companies. H.B. 483 provided for the administration and collection of the municipal income tax on electric light companies by the Tax Commissioner, and for a one and one-half percent fee paid to the Tax Commissioner for administering and collecting the tax. This was expanded to cover telephone companies in Amended Substitute House Bill No. 95 of the 125th General Assembly ("H.B. 95").[1] H.B. 95 also made significant other changes to R.C. Chapter 718, including uniform definitions, requiring a uniform tax base, and prohibiting municipalities from requiring taxpayers who have received a federal extension to file requests for extensions to file returns with the municipalities (the federal extension automatically operates as an extension of the municipal return).

The Associations' efforts to reform the municipal income tax system culminated in H. B. 5 and H.B. 49. These enactments did not reduce the businesses' ultimate tax liability to the taxing jurisdictions, they simply alleviated the excessive compliance burdens under the old system.[2]

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[1] This rebuts Appellants' (Brief at 20) and Appellant Akron's (Brief at 2) statements that H.B. 49 is an unprecedented and novel attempt by the state to take over administrative functions from municipal taxing authorities and to charge a fee for performing those functions.

[2] H.B. 5 also included provisions aimed at uniformity in the application of the municipal income tax to individuals.

H.B. 49 added important new features to Ohio's municipal income tax system to make it more uniform and less oppressive on businesses. For taxable years beginning on or after January 1, 2018, the Bill created an option of centralized filing, collection and administration that can be elected by municipal net profit taxpayers that are business entities (the elective provisions do not apply to individuals, including sole proprietors and disregarded entities such as single-member LLCs that are net profit taxpayers). The bill also eliminated the anti-competitive throwback rule and modified the fourth quarter due date for estimated tax payments for individuals. In addition, the Bill required ODT to complete a feasibility study of allowing municipal taxpayers to file individual municipal tax returns through the joint federal and state modernized e-file program and clarified the late payment penalty. These changes are on top of the uniformity provisions adopted in H.B. 5, which were effective for taxable years beginning on or after January 1, 2016.

Effective for taxable years beginning on or after January 1, 2018, taxpayers subject to a municipal net profit tax may elect to file on a centralized basis with the Ohio Tax Commissioner ("Tax Commissioner") rather than file separate returns in each municipal taxing jurisdiction in which they do business, which for some businesses would require filing hundreds of returns. If a taxpayer elects to file on a centralized basis, the net profit tax will be administered and collected by the Tax Commissioner. The Tax Commissioner will administer the net profit tax for those taxpayers who so elect under R.C. 718.80 to 718.95, which were added by H.B. 49. The Tax Commissioner will promulgate the rules that will be applicable to electing taxpayers, which will result in those taxpayers having to comply with one set of rules rather than potentially dozens or even hundreds. Businesses that make the election will be subject to centralized audits and assessments by the Tax Commissioner, rather than to multiple audits and assessments by the various taxing jurisdictions. They will also be able to pursue a single appeal at the Tax

Commissioner's appeals level, which would result in a single final determination that could be appealed through the Ohio Board of Tax Appeals ("BTA") and, if necessary, the appellate courts, rather than appealing each assessment issued by the municipal taxing jurisdictions separately through the particular appeal process of each municipal corporation, including appealing through each municipal corporation's board of tax review, which would involve presenting evidence at a hearing and presenting legal arguments. Each ruling by the various municipal corporations' boards of tax review, if adverse, would have to be separately appealed to either the common pleas court for the appropriate county or the BTA. Pursuing multiple appeals would be extremely costly and burdensome for the business. It could also result in inconsistent decisions on the business's net profit tax liability for the same tax year.

The central filing option also benefits local governments. Because the Tax Commissioner is authorized to administer the tax on behalf of all taxing municipalities for participating business taxpayers, audit results will apply to all municipalities. As a result, assessments that increase the net profit of a taxpayer will increase the tax base for all municipalities. Under the non-centralized filing system, when one municipality performs an audit and increases a taxpayer's net profit, other municipalities must perform their own independent audits, which they may or may not do. Further, the Tax Commissioner has access to Internal Revenue Service information that can be leveraged to identify underpayments to municipalities; many municipalities do not have access to Internal Revenue Service information. In addition to increasing net profit tax for municipalities through ODT's auditing efforts, the amount to be credited to the municipal income tax administrative fund of the state treasury as a fee for administering the tax for those businesses who opt in (0.5%), is much lower than the

average net fee charged by the Regional Income Tax Agency ("RITA") to provide its services (1.68%). H.B. 49 results in a net benefit for municipalities, as well as participating businesses.

It should be noted that the centralized filing, administration, and appeal provisions of H.B. 49 apply only to the net profit tax on business entities. The provisions do not apply to individuals that generate net profits, including disregarded entities such as LLCs. They also do not apply to electric companies and telephone companies because those companies already file on a centralized basis with the Tax Commissioner under R.C. Chapter 5745. Moreover, H.B. 49 is elective. H.B. 49 does not require businesses to file centrally, it simply gives them the option. Finally, H.B. 49's centralized filing, administration, and collection provisions do not impact the amount of tax that electing taxpayers owe individual municipalities.

Many of the Associations and their members testified in support of H.B. 49. These were not "hand-picked groups of aggrieved special interest constituents" as Appellants depicted them in their court of appeals brief. They are associations and businesses who had for a long time sought a legislative remedy for the excessive burdens suffered under the prior system. Both practitioners and businesses have experienced the excessive burdens of having to file in multiple taxing jurisdictions and complying with the different rules and interpretations of the various taxing jurisdictions. Numerous members of the Associations have experienced the excessive burden of filing returns in each of the multiple taxing jurisdictions in which they do business, however small their liability.

One member reported that it filed in 27 taxing jurisdictions at a cost of approximately $3,800 for a total liability of less than $700. Another filed in 11 taxing jurisdictions at a return preparation cost of $8,250. It owed over $500 to one city, $0 to eight cities, and was due a refund from the other two. Other members had similar experiences. One filed in 43 cities at a

cost of $100 per filing. Of those 43 returns, 8 had $0 due, 14 had less than $10 due, and 9 had less than $100 due. For 31 of the 43 returns, the cost of preparation exceeded the tax due. Another filed 23 returns at a cost of $5,250, of which 11 had $0 due and all but one of the others had less than $100 due. Yet another filed 125 returns with a total liability of $405, which cost almost $3,500 to prepare. And another filed 10 returns for a total amount due of $20, at a cost of almost $1,500. These are just a few of the examples of businesses that incurred significantly more in preparation costs than the taxes due.

The excessive burden on businesses prior to the challenged H.B. 49 provisions allowing centralized filing, administration, and collection was even more extreme for business entities that did business in multiple taxing jurisdictions and were subjected to audits by those jurisdictions for the same tax year. An entity that did business in twenty municipalities could be subjected to audit by each of the municipalities for the same tax year. The business would have to deal with the different rules and interpretations by each municipality. If the audits led to assessments, the business would have to appeal each municipality's assessment separately, making sure it followed each municipality's procedural rules for appealing an assessment, which were often vague. If it received adverse decisions by the municipalities, the business would have to file separate appeals from each decision with the respective municipality's board of tax review, again making sure it followed the procedural rules for each municipality.

The taxpayer would have to prepare for and attend a hearing before each municipality's board of tax review. If the taxpayer intended to present evidence or legal arguments before the board of review, it would have to hire an attorney. Even if the appeals for each of the municipalities involved the same issues, the taxpayer would have to present its evidence and legal arguments at each board of review. At both levels, there was the potential for receiving

inconsistent or conflicting rulings by the municipal tax administrators or the municipal boards of tax review on the same issue.

The taxpayer would have to file or defend separate appeals from each board of review to either the Ohio Board of Tax Appeals ("BTA") or the court of common pleas for the county in which the municipality was located. If the municipalities were in different counties, the taxpayer would have to pursue or defend appeals in multiple courts of common pleas. There could also be situations where some appeals were filed in common pleas courts and others in the BTA. Again, this was susceptible to inconsistent or conflicting rulings. The taxpayer would then have to pursue or defend a separate appeal from each of the various courts of common pleas to the courts of appeals for the districts in which the common pleas courts were located. If any of the appeals involved a decision of the BTA, the appeal would be filed in the court of appeals in which venue was proper or this Court under R.C. 5717.04.

The extreme burden on a taxpayer that had to defend audits, appeal assessments, and appeal or defend decisions through the multiple levels for twenty different municipalities is patently obvious. It would be excessively burdensome even if only a few municipalities were involved. And the number of municipalities could be greatly in excess of twenty. Some net profit taxpayers have to file in hundreds of municipalities. The cost could easily exceed the tax at issue, which would effectively thwart the taxpayer's ability to appeal. Seeking refund claims suffered from the same multiple filing and appeals burdens.

These excessive burdens on taxpayers who under prior law had no option but to file and be subject to audit in numerous municipal taxing jurisdictions was the driving force behind the push for reform that led to H.B. 49. H.B. 49 removes the burdens of multiple filings with the municipalities, multiple audits, assessments, and appeals for the same tax year, making multiple

payments, and filing multiple refund claims. H.B. 49 does so by providing that municipal corporations that levy a net profit tax on businesses must allow businesses to elect to file centrally with the Tax Commissioner, and to be subject to audit and assessment by the Tax Commissioner. Those businesses who opt to file centrally with the Tax Commissioner will also be subject to one set of uniform rules promulgated by the Tax Commissioner, which will avoid the burden of the taxpayer being subject to differing rules and interpretations by each municipal taxing jurisdiction. Centralized administration by the Tax Commissioner of businesses who make the election will also result in a single appeal process through the Tax Commissioner, the BTA, and the court of appeals or this Court. In the example of the business entity that does business in 20 cities, the business would be subject to only one audit, one assessment, and one appeal to the tax commissioner, the BTA, and the court of appeals or this Court, rather than potentially twenty. The burden on taxpayers who do business in multiple taxing municipalities will be greatly reduced. It will also eliminate the very real possibility of inconsistent or conflicting decisions.

While some municipalities utilize a common tax administrator such as RITA to administer its tax system, a taxpayer that is audited by RITA must still file separate appeals with each separate municipality. Further, since RITA only operates in about half of the municipalities, taxpayers are still required to file in multiple locations. For example, a business operating in forty locations may still need to file twenty-one returns (one for RITA's twenty municipalities and twenty separate returns in the self-collecting municipalities). Therefore, even municipalities that utilize a common administrator under pre or post H.B. 49 continue to impose unreasonable burdens on taxpayers.

Appellants' complaint that H.B. 49 takes away the municipal tax administrators' authority to approve of an alternative apportionment formula for calculating the portion of a business's net profit attributable to the various cities in which it does business and gives that authority to the Tax Commissioner for those businesses that opt centralized filing actually reveals another example of the excessive burdens and potential abuse that H.B. 49 was intended to cure. Under prior law, a business that did business in multiple municipalities would have to request an alternative apportionment formula from each municipality. Each individual municipality would decide whether to approve or deny the request. There was no requirement that the municipalities agree to a uniform formula. As a result, the business could be subjected to different methods for apportioning the same net profit to the various municipalities. That would result in not only excessive compliance burdens, but also potentially more than one hundred percent of its net profit being taxed.

STATEMENT OF CASE AND FACTS

Amici adopt the Statement of Case and Facts in Appellees' brief.

ARGUMENT

I. Proposition of Law:

The General Assembly's Enactment of the Municipal Income Tax Reform Provisions of H.B. 5 and H.B. 49 does not Violate the Home Rule Amendment to the Ohio Constitution. The Enactments Fall Squarely within the Power Conferred upon the General Assembly by Article XIII, Section 6 and Article XVIII, Section 13 of the Ohio Constitution.

A. The Challenged Provisions of H.B. 5 and H.B. 49 are Laws Limiting or Restricting the Municipal Power of Taxation, which the General Assembly is Authorized to Enact under Article XIII, Section 6 and Article XVIII, Section 13.

Appellants argue that the municipal tax reform provisions enacted by H.B. 5 and H.B. 49 violate the Home Rule Amendment to the Ohio Constitution, Article XVIII, Section 3.

Appellants correctly state that the Home Rule Amendment confers upon municipal corporations the power of taxation. However, that power is not absolute. As this Court held in an opinion issued shortly after Article XVIII, Section 13 was adopted, that power of taxation may be limited or restricted by general laws enacted by the General Assembly pursuant to Article XIII, Section 6 and Article XVIII, Section 13 of the Ohio Constitution. *State ex rel. City of Toledo v. Cooper*, 97 Ohio St. 86, 119 N.E. 253 (1917), paragraph two of the syllabus. *Accord Cincinnati v. Roettinger*, 105 Ohio St. 145, 156, 137 N.E. 6 (1922) ("Referring to Section 3, Article XVIII * * * it must be conceded that the authority granted to municipalities to exercise powers of self-government does not operate to take away from the legislature the power to place limitations upon taxation.) Contrary to Appellants' assertions, the municipal tax reform provisions in H.B. 5 and H.B. 49 fall squarely within the power conferred upon the General Assembly by Article XIII, Section 6 and Article XVIII, Section 13.

In *Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St.3d 599, 605, 693 N.E.2d 212 (1998), this Court reaffirmed that "[t]hese provisions [Article XIII, Section 6 and Article XVIII, Section 13] clearly delegate power to the General Assembly to limit exercise of the municipal taxing power." Throughout their brief, Appellants consistently ignore this broad power conferred upon the General Assembly. Appellants attempt to avoid this broad power by misstating what the Court said in *Cincinnati Bell* and *Panther II Transp., Inc. v. Seville Bd. of Income Tax Rev*., 138 Ohio St.3d 495, 2014-Ohio-1011, 8 N.E.3d 904. They wrongly paraphrase *Cincinnati Bell* and *Panther* as stating that the General Assembly's power regarding municipal taxation is specific and limited, in contrast to the municipalities' plenary power of taxation. (Appellants' brief at 23-24). A reading of the Court's discussion of the municipal taxing power and the authority of the General Assembly to limit that power in those opinions fails to find any support for Appellants'

statement. What the Court stated in *Panther* was that "municipal governments have a plenary power to tax, but the General Assembly has authority to impose specific limits on that power." The question in *Panther* was whether the General Assembly had expressly preempted the municipal power of taxation over motor transportation companies that paid the fees and charges under R.C. 4921.18. The Court held that it did, clearly recognizing the power of the General Assembly to prohibit a municipality from exercising its taxing power.

Nor does *Cincinnati Bell* lend support to Appellants' assertion that the General Assembly's power to limit or restrict municipal taxation is narrow. *Cincinnati Bell* addressed a single issue, whether the doctrine of implied preemption of municipal taxation should be abandoned. Contrary to Appellants repeated statements, the Court never held that the General Assembly's power over the municipal taxing authority was narrow. Rather, the Court held in its syllabus, which Appellants consistently ignore in their citations to the opinion: "The taxing authority of a municipality may be preempted or otherwise prohibited only by an express act of the General Assembly. Section 13, Article XVIII, and Section 6, Article XIII, Ohio Constitution." This Court confirmed the General Assembly's power to preempt or prohibit the taxing authority of municipalities. It simply held that such power had to be exercised by an express act. Appellants state that the General Assembly has been resisting the decision in *Cincinnati Bell* since that opinion was announced (Appellants' Brief at 1), citing to Am. Sub. H.B. No. 770 of the 122nd General Assembly, which enacted R.C. 715.031, which expressly preempted municipalities from imposing numerous types of taxes. To the contrary, the General Assembly was following the Court's holding that the General Assembly's power to preempt municipal taxing authority had to be exercised by an express act.

As discussed above, *Cincinnati Bell* states that the Constitution clearly delegates power to the General Assembly to limit the municipal taxing power. *Id*. at 605. A reading of the opinion also indicates that the reference to the municipal taxing power as plenary in *Panther*, citing to *Cincinnati Bell*, was loose language. *Cincinnati Bell* never refers to that power as plenary. Nor does *State ex rel. Zielonka v. Carrel*, 99 Ohio St. 220, 124 N.E. 134 (1919), state that municipalities have a plenary power of taxation. Nowhere in the opinion does the Court refer to that power as plenary. To the contrary, the Court expressly notes that the municipal power of taxation is subject to limitation by the General Assembly. *Id*. at 227.

Neither *Cincinnati Bell* nor *Zielonka* state or even imply that the power of taxation of municipalities is plenary, and for good reason. Any such assertion ignores Article XIII, Section 6 and Article XVIII, Section 13, both of which expressly provide that the General Assembly has the power to limit or restrict the municipalities' taxing power. "Plenary" means unlimited. Thus, these provisions on their face reject any concept that the municipal power of taxation is plenary. Any debate on this question was removed by an opinion of this Court issued shortly after the adoption of the Home Rule Amendment and Article XVIII, Section 13. In *State ex rel. City of Toledo*, 97 Ohio St. 86, at paragraph two of the syllabus, the Court held:

> The power of all municipalities to levy taxes may be limited or restricted by general laws. Such limitations or restrictions are warranted by Section 6, Article XIII, adopted in 1851, and by Section 13, Article XIII of the Amendments adopted September 3, 1912.

Nor do *Panther, Cincinnati Bell,* or *Zielonka* state or even imply that the power conferred upon the General Assembly by Article XIII, Section 6 and Article XVIII, Section 13 to limit or restrict the municipal power of taxation is constrained to specific limitations as suggested by Appellants. There is no authority supporting this assertion. This assertion is directly rejected by the opinion in *State ex rel. City of Toledo* at paragraph three of the syllabus:

> Taxation is a sovereign function. The rule of liberal construction will not apply in cases where it is claimed a part of the state sovereignty is yielded to a community therein. It must appear that the people of the state have parted therewith by the adoption of a constitutional provision that is clear and unambiguous.

It cannot genuinely be argued that the challenged provisions of H.B. 5 and H.B. 49, along with R.C. 715.013, as amended by H.B. 5, do not expressly limit or restrict the exercise of the municipal taxing power. R.C. 715.013(A) expressly states: "Except as otherwise expressly authorized by the Revised Code, no municipal corporation shall levy a tax that is the same as or similar to a tax levied under Chapter * * * 5747 of the Revised Code." R.C. 715.013(B) allows a municipal corporation to levy an income tax, but expressly limits that authority to an income tax levied in accordance with R.C. Chapter 718. R.C. 718.04 provides that "a municipal corporation may levy a tax on income and a withholding tax if such taxes are levied in accordance with the provisions and limitations specified in this chapter." The provisions of H.B. 5 and H.B. 49 challenged by Appellants are sections of R.C. Chapter 718. Therefore, those provisions are part of the limitations the General Assembly expressly placed on municipal corporations' power to levy an income tax.

Appellant Akron attempts to avoid the clear application of Article XVIII, Section 13 by asserting that it only authorizes the General Assembly to *prohibit* the levy of income taxes by municipalities. Appellant Akron's brief at 22. This assertion reveals a fundamental flaw in Appellant Akron's argument. Article XVIII, Section 13 does not use the term "prohibit." It uses the more flexible term "limit." That term includes the power to either pre-empt or place conditions upon the power of taxation. This Court recognized this in *New York Frozen Foods, Inc. v. Bedford Hts. Income Tax Bd. of Review*, 150 Ohio St.3d 386, 2016-Ohio-7582, 82 N.E.3d 1105. In addressing whether former R.C. 718.06 limited the authority of the city to bar a change of an accounting or apportionment method by a taxpayer when filing an amended return, the

Court recognized that such a limitation would be within the General Assembly's authority under Article XVIII, Section 13. The Court noted that former R.C. 718.06, which required the city to accept consolidated income tax returns, was a proper exercise of the General Assembly's power under Article XVIII, Section 13 to limit the city's taxing power. *Id*. at ¶¶ 29-30. However, the Court found that former R.C. 718.06 did not expressly require cities to allow businesses to change from a separate return to a consolidated return on an amended return and therefore prohibiting the city from refusing to accept the amended return would impose "*an additional limit on the city's taxing authority* that was not explicitly stated in R.C. 718.06." (Emphasis sic.) *Id*. at ¶ 31. The Court recognized that the General Assembly had the power to impose such a limitation on the city's taxing authority under Article XVIII, Section 13, but that it had to do so explicitly. *Id*.

In *Thompson v. City of Cincinnati,* 2 Ohio St. 2d 292, 294-295, 208 N.E.2d 747 (1965), the Court confirmed the General Assembly's power over municipal taxation under Article XIII, Section 6 and Article XVIII, Section 13:

> The above constitutional provisions and judicial precedents clearly indicate that a municipality has the power to tax incomes subject to all lawful restraints imposed by the General Assembly.
>
> In 1957, the General Assembly exercised its constitutional authority to regulate municipal income taxes. See Chapter 718, Revised Code. Therein certain restrictions were placed upon the power of a municipality to tax incomes.

As the Court notes, the General Assembly has placed limitations and restrictions on municipalities' income tax authority since 1957, when it first enacted R.C. Chapter 718 to infuse some uniformity into the municipal income tax system. The General Assembly added many additional limitations and restrictions in R.C. Chapter 718 since that time[3], including the requirement that municipalities accept consolidated income tax returns, which was the

[3] These are detailed above at pages 8-9.

requirement sanctioned in *New York Frozen Foods*. These additional provisions furthered the goal of uniformity and the reduction of excessive burdens on taxpayers, both individuals and businesses. Consistent with its constitutional authority, the General Assembly enacted H.B. 5 and H.B. 49, imposing additional limitations and restrictions in R.C. Chapter 718 to make Ohio's municipal income tax system more uniform and less oppressive on businesses.

Appellants argue for a narrow construction of the term "levy" used in Article XVIII, Section 13, asserting that it means imposition of the tax and does not include administration or collection of the tax. Initially, this Court addressed the meaning of the term "levy" as used in the Ohio Constitution in *Grabler Mfg. Co. v. Kosydar*, 35 Ohio St.2d 23, 33, 298 N.E.2d 23 (1973): "The definition of 'levy,' in Webster's Third New International Dictionary, is 'the imposition or collection of an assessment, tax * * *.'"

The First District Court of Appeals addressed this issue in *Cincinnati Imaging Venture v. City of Cincinnati*, 116 Ohio App.3d 1, 686 N.E.2d 528 (1996). The city argued that the requirement in R.C. 718.06 that interest be paid on a municipal income tax refund exceeded the authority of the General Assembly granted by Article XVIII, Section 13, asserting that provision did not allow the General Assembly to interfere with the administration and regulation of lawfully levied taxes. The court rejected that argument, stating:

> It is difficult to interpret this language, granting to the General Assembly the absolute right to limit the power of municipalities to impose taxes, as allowing these same municipalities the unfettered right to regulate the levy and collection of those taxes.

Id. at 4. The court noted that under the city's narrow construction numerous sections of R.C. Chapter 718 that have been in existence for as much as sixty years and had never been challenged would be unconstitutional. *Id.* Similarly, R.C. Chapter 5745, which both authorizes and limits the power of municipalities to tax electric light companies and telephone companies

by, among other things, centralizing the administration and collection of the tax under the state tax commissioner and has gone unchallenged since its inception in 2000, would also be vulnerable to the same fate. The substantial progress to eliminate many of the hardships that resulted from a lack of uniformity in the administration of the municipal tax system and the excessive burdens that had been suffered by businesses that operated in multiple taxing jurisdictions would be completely undone.

Appellants' argument is also rebutted by this Court's discussion in *New York Frozen Foods*, which recognized that the General Assembly had the constitutional authority to require municipalities to accept consolidated tax returns from businesses and to require municipalities to allow businesses to change from a separate return to a consolidated return, as long as it did so by explicit act. Similarly, in overturning the implied preemption doctrine in *Cincinnati Bell*, the Court pointed to the provisions in R.C. Chapter 718 as evidence that the General Assembly knew how to expressly limit the municipal taxing power. 81 Ohio St.3d at 606.

Such a result would not be in accord with the intent of the drafters of the Home Rule Amendment. In an opinion issued a few years after the adoption of that provision, this Court considered the intent of the drafters regarding respective powers of municipalities and the state, quoting from the Constitutional Debates: "'If you will read this proposal [the Home Rule Amendment] carefully you will see that the state is dominant. The great powers of taxation, the great police power, and the great powers of education and of health, all are held with a firm hand by the state.'" *The Cleveland Tel. Co. v. Cleveland*, 98 Ohio St. 358, 367, 121 N.E. 701 (1918).

Appellants' repeated statements that the limitations placed on the municipal taxing power by the General Assembly by the enactment of H.B. 5 and H.B. 49 take away the broad powers granted to municipal corporations by the adoption of the Home Rule Amendment by the people

conveniently ignore the fact that Article XVIII, Section 13 was part of the Home Rule Amendment adopted by the people in 1912. With respect to the power of taxation, the inclusion of Article XVIII, Section 13 in the Home Rule Amendment adopted by the people clearly establishes that the people did not intend to give municipal corporations an unbridled power of taxation. *State ex rel. City of Toledo,* 97 Ohio St. at 93.

In any event, as discussed above, the General Assembly's enactments do limit the levy of municipal income taxes even under Appellants' overly narrow construction. R.C. 715.013 limits the authority of municipal corporations to levy an income tax to one levied in accordance with R.C. Chapter 718. The municipal income tax reform provisions of H.B. 5 and H.B. 49 clearly fall within the power of the General Assembly granted by Article XVIII, Section 13 of the Ohio Constitution.

Those challenged provisions would also clearly fall within the power granted to the General Assembly by Article XIII, Section 6 of the Ohio Constitution to restrict the municipal power of taxation to prevent the abuse of such power. After listening to substantial testimony on both H.B. 5 and H.B. 49 regarding the excessive burdens and inconsistent and conflicting administration of the municipal income tax, the General Assembly determined that the old system was abusive with respect to businesses doing business in multiple municipalities. In fact, the General Assembly expressly stated in Section 6 of H.B. 5 that it was enacted pursuant to the authority of Article XIII, Section 6 and Article XVIII, Section 13 "to ensure a fair, stable, and efficient system of local taxation, and to prevent any abuse of power by municipal corporations." The provisions added to R.C. Chapter 718 by H.B. 49 were enacted to further this goal. This determination by the General Assembly is entitled to substantial deference. *State ex rel. Ohio*

Congress of Parents & Teachers v. State Bd. of Edn., 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 20.

Appellants' argument that the challenged provisions of H.B. 49 violate the Home Rule Amendment because the enactment of those provisions is erroneously premised on the notion that the state can preempt the municipal taxing power (Appellants' Brief at 29) fails for a simple reason. Numerous and uniform rulings of this Court have held that Article XIII, Section 6 and Article XVIII, Section 13 grant to the General Assembly the power to preempt the municipal taxing power. *E*.g., *Fisher v. Neusser*, 74 Ohio St. 3d 506, 507, 660 N.E.2d 435 (1996) ("That power [the municipal taxing power], however, is subject to 'pre-emption by the General Assembly of the field of income taxation and subject to the power of the General Assembly to limit the power of municipalities to levy taxes under Section 13 of Article XVIII or Section 6 of Article XIII of the Ohio Constitution.' *Angell v. Toledo* (1950), 153 Ohio St. 179, 41 O.O. 217, 91 N.E.2d 250, paragraph one of the syllabus."); *Cincinnati Bell*, syllabus (General Assembly has the authority to preempt or prohibit the municipal taxing power by an express act).

In any event, despite its undisputable right to do so, the General Assembly did not preempt or eliminate the municipalities' power to impose an income tax in H.B. 5 or H.B. 49. While R. C 715.013 does preempt municipal corporations from imposing a wide range of taxes, the General Assembly has simply limited their power to levy an income tax by requiring that any municipality that does levy an income tax on businesses must conform its tax to the provisions in R.C. Chapter 718.

Appellant Akron's reliance on *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, and *Dayton v. State*, 151 Ohio St.3d 168, 2017-Ohio-6909, 87 N.E.3d 176 (Appellant Akron's Brief at 8) and Appellants' reliance on *Canton v. State, State Personnel Bd.*

of Rev. v. Bay Civ. Serv. Comm., 28 Ohio St.3d 214, 503 N.E.2d 518 (1986), *Canton v. Whitman*, 44 Ohio St.2d 62, 337 N.E.2d 766 (1975), and *Vill. of West Jefferson v. Robinson*, 1 Ohio St.2d 113, 205 N.E.2d 382 (1965) (Appellants' Brief at 14), is misplaced. None of those cases involve the municipal income tax power and the power granted the General Assembly by Article XIII, Section 6 and Article XVIII, Section 13 to limit or restrict that power. *Canton v. State*, *Dayton*, *Canton v. Whitman*, and *Village of West Jefferson* involved the police powers of municipalities conferred by Article XVIII, Section 3, which provides: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." The only limitation on the municipal police power is that they not be in conflict with general laws. The test for determining whether an act of the General Assembly is valid under this provision is stated in *Dayton*: "a municipal ordinance must yield to a state statute if '(1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute.' *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶ 17." 151 Ohio St.3d at ¶ 13. The restriction that a municipal law not be in conflict with a general law applies only to the police power. *Ohio Assn. of Pub. School Emp., Chapter No. 471 v. Twinsburg*, 36 Ohio St.3d 180, 182, 522 N.E.2d 532 (1988).

Bay Village Civ. Serv. Comm. involved the power of self-government but not the power of taxation. Therefore, the power of self-government at issue was not subject to the authority of the General Assembly to limit or restrict. While the power of taxation is a power of self-government, not a police power, *Cincinnati Bell* at 602, unlike other powers of self-government, that power is subject to limitation or restriction by the General Assembly under the express language in Article XIII, Section 6 and Article XVIII, Section 13.

Appellant Akron's warning that if the Court upholds the challenged provisions of H.B. 5 and H.B. 49 the state would be permitted to take over the operation of local government (Brief at 21) is pure hyperbole. This case involves solely the taxing power of municipalities, which is expressly subject to the authority of the General Assembly to limit or restrict. No other powers of local self-government are subject to such limitations or restrictions and would therefore not be in any way affected by the holding in this case.

Moreover, even if there is some question as to the meaning of the language in Article XVIII, Section 6 or Article XVIII, Section 13, it is a fundamental rule that "[a]ny doubt as to the constitutionality of a statute will be resolved in favor of its validity" and that "[e]very reasonable presumption will be made in favor of the validity of a statute. *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 149, 128 N.E.2d 59 (1955). Following numerous opinions of this Court, as well as those of the United States Supreme Court, *Defenbacher* held in its syllabus: "An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." This fundamental rule has been uniformly followed up to the present. *E.g., Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, 916 N.E.2d 303, ¶ 11. It also applies to Home Rule challenges to enactments of the General Assembly. *Cleveland v. State*, 128 Ohio St. 3d 135, 2010-Ohio-6318, 942 N.E.2d 370, ¶ 6.

Much of the briefs of the amici in support of Appellants focus on irrelevant actions of the General Assembly that they claim have resulted in a reduction of revenue of municipalities. Those actions complained of do not relate to the challenged provisions of H.B. 5 or H.B. 49. They complain about various policy decisions of the General Assembly that they allege reduced

the revenue of municipalities. Not only are those actions irrelevant, but they are also policy decisions that this Court has uniformly held are not within the Court's province:

> It is a fundamental precept of our tripartite form of state government that the General Assembly is the ultimate arbiter of public policy. * * * Questioning the wisdom of the legislature's public-policy decisions does not fall within the scope of that [the Court's] review.

The City of Cleveland v. State, 2019-Ohio-3820, ¶ 40.

B. R.C. 718.85(B), which expressly requires one-half percent of municipal net profit tax collected by the Tax Commissioner and forwarded to the Treasurer of State to be credited to the municipal income tax administrative fund in the state treasury, does not violate any provision of the Ohio Constitution, including the Home Rule Amendment.

R.C. 718.85(B) provides that the Tax Commissioner shall forward all of the municipal net profit tax that official receives pursuant to R.C. 718.80 to 718.95 to the Treasurer of State and that one-half percent of the amounts received are to be credited to the municipal income tax administrative fund established under R.C. 5745.03. That fund was established to receive one and one-half percent (1.5%) of the municipal income tax on electric light and telephone companies, which was to pay for the administration and collection of that tax by the Tax Commissioner. The one-half percent (0.5%) paid into the fund from the municipal net profit tax received by the Tax Commissioner is for payment of that official's cost of administering and collecting the municipal net profit tax for only those businesses who elect to file with the Tax Commissioner. Contrary to Appellants' unsubstantiated statements, the one-half percent (0.5%) paid into the fund is a fee, not a tax.

Appellants argue that R.C. 718.85(B) is unconstitutional because nothing in Article XVIII, Section 3 or Article XII, Section 5 authorizes the General Assembly to impose a fee for administering and collecting the municipal net profit tax. This argument is essentially a repeat of Appellants' argument that Article XVIII, Section 13 only empowers the General Assembly to

prohibit the levy of a tax by a municipal corporation. For the reasons set forth in the preceding argument, that is an incorrect reading of that constitutional provision. As discussed in detail in the preceding argument, Article XVIII, Section 13 grants power to the General Assembly to limit the municipal power of taxation. The General Assembly did so in R.C. 715.013 by limiting the authority of municipalities to levy an income tax to one levied in accordance with R.C. Chapter 718. Contrary to Appellants' bald statement, providing for a payment out of the tax received by the Tax Commissioner into a fund to pay for the administration and collection of the tax by the tax commissioner is integrally related to that limitation.

Appellants' argument that nothing in Article XVIII, Section 3, Article XII, Section 5, or Article XVIII, Section 13 authorizes the General Assembly to impose the fee has it backwards. The question is whether anything in those provisions or elsewhere in the Ohio Constitution prohibits the General Assembly from imposing the fee. The clear answer is no.

Appellants' argument that the state has taken the fee from the municipalities is essentially a Due Process Clause takings claim. However, the Ohio Supreme Court has repeatedly held that political subdivisions of the state, which would include municipal corporations, do not have due process protection against their creating state. *E.g. Avon Lake City School Dist. v. Limbach*, 35 Ohio St.3d 118, 122, 518 N.E.2d 1190 (1988). Municipal corporations are political subdivisions of the state. R.C. 2744.01(F); *Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950, ¶ 35. They are instrumentalities of the state. *Id*. Therefore, Appellants may not assert a due process of law claim against the state.

Providing for payment of a fee to the Tax Commissioner for administering a local tax is not unique to the municipal income tax. The duty to administer other local taxes has been placed on the Tax Commissioner and the General Assembly has appropriated a portion of the local taxes

to the Department of Taxation for administration of the taxes. For example, the Tax Commissioner administers the county and regional transit authority sales and use taxes (R.C. 5739.21 and 5741.03; Sections 409.10 and 409.20 of H.B. 49), the school district income tax (R.C. 5747.03; Section 409.10 of H.B. 49), the public utility property tax and real property tax equalization (R.C. 5703.80; Section 409.10 of H.B. 49). A portion of the amounts collected for each of these taxes is appropriated to the Department of Taxation to administer the taxes.

The suggestion by Appellants that the state could dispose of all the collections of the net profit tax by the Tax Commissioner however it pleased is pure folly. Those collection are required to be forwarded to the state treasurer who is required to credit all but the .5 percent administrative fee to the municipal income tax fund, a fiduciary fund created in the state treasury. R.C. 718.85. Those funds must be distributed to the respective municipalities. There is nothing in either H.B. 5 or H.B. 49 that authorizes the state to keep the net profit tax levied by the municipalities for its own general revenue purposes. Even though the concerns voiced by municipalities that by initially putting the municipal tax uniformity provisions into a new R.C. Chapter 5718 the state could at some point keep the revenue for itself were unfounded and unsupported by the language of the H.B. 49 prior to the change, the Bill was amended to put those provisions in R.C. Chapter 718 rather than into a new R.C. Chapter 5718 to alleviate those concerns.

Appellants' assertion that the Tax Commissioner may impose a penalty on and withhold fifty percent of the net profit tax from a municipality that does not provide the statutorily required information to the Tax Commissioner (Appellants' Brief at 26) is incorrect. There is no provision in R.C. 718.80, or elsewhere, that authorizes the Tax Commissioner to impose a penalty for such failure. While that section does require the director of budget and management

to withhold fifty percent of the net profit tax from a municipality that does not provide the statutorily required information to the Tax Commissioner, it is withheld only until the municipality complies. The state is never entitled to keep the tax for its own purposes.

CONCLUSION

For the reasons set forth in the foregoing brief of amici curiae and the brief of appellees, the Court should affirm the decision of the court of appeals.

Respectfully submitted,

/s/ Richard C. Farrin
Richard C. Farrin (0022850)
Thomas M. Zaino (0041945)
Zaino Hall & Farrin LLC
41 South High Street, Suite 3600
Columbus, Ohio 43215
Phone: (614) 326-1120
Fax: (614) 458-0028
rfarrin@zhftaxlaw.com

Attorneys for Amici Curiae Associations

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of Amici Curiae was served by electronic mail on this 18th day of November, 2019 upon the following:

Eugene L. Hollins (0040355)
(COUNSEL OF RECORD)
Frost Brown Todd LLC
One Columbus, Suite 2300
Columbus, Ohio 43215
ghollins@fbtlaw.com

Matthew C. Blickensderfer (0073019)
Frost Brown Todd LLC
3300 Great American Tower
301 East Fourth Street
Cincinnati, Ohio 45202
mblickensderfer@fbtlaw.com

Attorneys for Appellants

Stephen W. Funk (0058506)
(COUNSEL OF RECORD)
Roetzel & Andress, LPA
222 South Main Street, Suite 400
Akron, Ohio 44308
sfunk@ralaw.com

Eve Belfance (0046787)
City of Akron
161 South High Street, Suite 202
Akron, Ohio 44308
ebelfance@akronohio.gov

Attorneys for Appellant
City of Akron

David A. Yost (0056290)
Ohio Attorney General

Benjamin M. Flowers (0095284)
State Solicitor
(COUNSEL OF RECORD)
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
bflowers@ohioattorneygeneral.gov

Attorneys for Appellees
Jeff McClain, Tax Commissioner of the State of Ohio, et al.

John A. Scavelli, Jr. (0078307)
Director of Law
538 North Market Street
PO Box 1128
Wooster, Ohio 44691
jscavelli@woosteroh.com

Attorney for Amicus Curiae
The City of Wooster

J. Donald Mottley (0055164)
Taft Stettinius & Hollister LLP
65 East State Street, Suite 1100
Columbus, Ohio 43215
mottley@taftlaw.com

Attorney for Amicus Curiae
Greater Dayton Mayors and Managers Association

Garry E. Hunter (0005018)
Ohio Municipal Attorneys Association
175 South Third Street, Suite 150
Columbus, Ohio 43215
ghunter@omaaohio.org

Paul W. Flowers (0046625)
Paul W. Flowers Co., LPA
50 Public Square, Suite 1910
Cleveland, Ohio 44113
Telephone: (216) 298-1152
pwf@pwfco.com

Attorney for Amicus Curiae
Ohio Municipal League

Mitchell H. Banchefsky (0023642)
99 West Main Street
PO Box 188
New Albany, Ohio 43054
Telephone: 614-939-2232
mbanchefsky@newalbanyohio.org

Attorney for Amicus Curiae
Local Government Law Professors
International Municipal Lawyers Association
International City/County Management Association

John E. Bibish, IV (0087589)
City of Toledo
Department of Law
One Government Center, Suite 2250
Toledo, Ohio 43604
John.bibishiv@toledo.oh.gov

Attorneys for Amicus Curiae
City of Toledo

/s/ Richard C. Farrin
Richard C. Farrin (0022850)
Attorney for Amici Curiae Associations