IN THE SUPREME COURT OF OHIO

CASE NO. 2019-0696

CITY OF ATHENS, *et al.*
Plaintiff-Appellants,

-vs-

JOSEPH A. TESTA, *et al.*,
Defendant-Appellees.

ON APPEAL FROM THE FRANKLIN COUNTY COURT OF APPEALS
TENTH APPELLATE DISTRICT
Case Nos. 18AP-144 and 18AP-189

BRIEF OF *AMICUS CURIAE*, OHIO MUNICIPAL LEAGUE IN SUPPORT OF PLAINTIFF-APPELLANTS

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AMICUS CURIAE'S **STATEMENT OF INTEREST**

The Ohio Municipal League ("OML") was incorporated in 1952 as an Ohio non-profit corporation by city and village officials who saw the need for a statewide association to serve the interests of Ohio's municipal governments. Currently, the OML represents 730 of Ohio's 931 cities and villages. Collectively, more than nine million Ohioans live in an urban setting. The OML has six affiliated organizations: the Ohio Municipal Attorneys Association, the Municipal Finance Officers Association, the Ohio Mayors Association, the Ohio Association of Public Safety Directors, the Ohio City/County Management Association, and the Ohio Municipal Clerks Association. On a national basis, the OML is affiliated with the National League of Cities, the International Municipal Lawyers Association, the United States Conference of Mayors, and the International City/County Managers Association. The OML represents the collective interest of Ohio cities and villages before the Ohio General Assembly and the state's elected and administrative offices. In 1984, the OML established a Legal Advocacy Program funded by its members' voluntary contributions. This program allows the League to serve as the voice of cities and villages before the Ohio Supreme Court, the United States Courts of Appeals, and the United States Supreme Court by filing briefs of *amicus curiae* on cases of special concern to municipal governments. The Ohio Municipal League has been accredited by this Court as a sponsor of both Continuing Legal Education programs for attorneys and the required Mayors Court training for mayors hearing all types of cases.

The following municipalities and agencies have adopted resolutions supporting this Brief of Amicus Curiae: Alliance, Barberton, Canfield, Fairlawn, Harrison, Jackson Center, Jeffersonville, Lancaster, Leipsic, Maumee, Middletown, New Boston, Reynoldsburg, Sidney, South Russell, Troy, Valley View, and Waverly.

STATEMENT OF THE CASE AND FACTS

The OML adopts and incorporates the statement of the case and facts offered in the Briefs submitted by the Plaintiff-Appellant municipalities.

ARGUMENT

This Court has accepted a single proposition of law for consideration:

> **PROPOSITION OF LAW: THE HOME RULE AMENDMENT GRANTS MUNICIPAL CORPORATIONS A GENERAL POWER OF MUNICIPAL TAXATION, AND WHERE A STATE LAW ENGULFS MUNICIPAL CORPORATIONS' GENERAL POWER OF TAXATION, THAT STATE LAW IS UNCONSTITUTIONAL**

The OML stands in support of the positions taken and the arguments made in the Briefs submitted by the Plaintiff-Appellant municipalities. A few additional points should not be lost on this Court.

I. AUTHORITY TO LIMIT THE MUNICIPAL POWER OF TAXATION IS NOT AUTHORITY TO SUBSUME THE ADMINISTRATION OF MUNICIPAL TAXATION

The authority granted to municipalities under Article XVIII, Section 3 of the Ohio Constitution, commonly called the Home Rule Amendment, is no doubt limited by other provisions of the Ohio Constitution. *Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St.3d 599, 602, 693 N.E.2d 212 (1998). With regard to taxation by municipalities, this Court has explained:

> [T]he Constitution also gives to the General Assembly the power to limit municipal taxing authority. Section 6, Article XIII provides that "[t]he General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation * * * so as to prevent the abuse of such power." Section 13, Article XVIII provides that "[l]aws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes * * *."

Id. Starting in the year 1925, a "doctrine of implied preemption" had permitted the courts to hold that the municipal power to tax did not extend into "fields" that had "already been

occupied by the state." *Id.* at 602-603, quoting *Cincinnati v. Am. Tel. & Tel. Co.*, 112 Ohio St. 493, 147 N.E. 806 (1925), paragraph two of the syllabus. In *Cincinnati Bell Tel. Co.*, this Court rejected the doctrine because it had been difficult to apply, and it lacked a textual foundation in the Ohio Constitution. *Cincinnati Bell Tel. Co.* at 603-607.

In deciding *Cincinnati Bell Tel. Co.*, this Court did not just declare that the Home Rule Amendment was limited by Article XIII, Section 6 and Article XVIII, Section 13 of the Ohio Constitution. The relationship between these provisions was more clearly defined:

> Given this general, broad grant of power that municipalities enjoy under Article XVIII, the Constitution requires that the provisions allowing the General Assembly to limit municipal taxing power be interpreted in a manner consistent with the purpose of home rule.

Cincinnati Bell Tel. Co., 81 Ohio St.3d at 605, 693 N.E.2d 212. It was because the powers within Article XIII, Section 6 and Article XVIII, Section 13 of the Ohio Constitution are suborned to the purpose of the Home Rule Amendment that "a proper exercise of this limiting power requires an express act of restriction by the General Assembly." *Id.* The profound weight of "the principle underlying Article XVIII—that municipal powers are derived from the Constitution and not from the General Assembly"—compelled this Court to reject seventy-three years of legal history and case law. *Id.* at 606.

For these reasons, this Court should again interpret Article XIII, Section 6 and Article XVIII, Section 13 of the Ohio Constitution "in a manner consistent with the purpose of home rule." *Cincinnati Bell Tel. Co.*, 81 Ohio St.3d at 605, 693 N.E.2d 212. It is beyond challenge that the enactments at issue in this appeal[1] entirely subsume the local powers of municipal taxation. Although taxation has been recognized as a

[1] Sub.H.B. 5 passed by the 130th General Assembly and Am.Sub.H.B. No. 49 passed by the 132d General Assembly

constitutionally granted municipal power, R.C. 715.013(A) comes out swinging with a flat prohibition on any "tax that is the same as or similar to a tax levied" under numerous chapters of the Revised Code, including Chapter 5747 (authorizing the state income tax), Chapter 5707 (authorizing a county property tax), and Chapter 5731 (imposing the estate tax). Thereafter, R.C. 715.013(B) permits municipalities to tax a wildly constrained subset of transactions, including a tax on income so long as it is levied or withheld "in accordance with Chapter 718. of the Revised Code." And Chapter 718 entirely co-opts the mechanism of municipal taxation by regulating the manner by which a municipality must administer local taxation and entirely replacing local administration and collection of business taxes with a monolithic state system. In these ways, municipal taxation is hardly municipal at all anymore. Centralizing municipal taxation in this way is wholly contrary to "the purpose of home rule" authority, a power that is "derived from the Constitution and not from the General Assembly." *See Cincinnati Bell Tel. Co.,* 81 Ohio St.3d at 605-606, 693 N.E.2d 212..

This is an extreme case. This Court has not been asked to draw a fine line in the grey area between state tax regulations that do or do not respect the balance between state and local governing authority; the Court has been asked to permit the elimination of local taxation. It is sufficient to declare that the municipal powers constitutionally granted by the Home Rule Amendment may not be entirely overruled by a catch-all statute like R.C. 715.013(A) and then tightly constrained to a very limited set of exceptions to the general prohibition as in R.C. 715.013(B) and Chapter 718. *Cincinnati Bell Tel. Co.* at 606-607 ("This balance" between "municipalities and the General Assembly with respect to municipal taxing power" is "best maintained by interpreting the specific limiting power of the General Assembly so that it does not engulf the general power of taxation delegated to municipalities."). Such a structure simply imposes state control; it does not respect

local governing authority at all.

II. THE TEXT OF THE CONSTITUTIONAL PROVISIONS SHOULD CONTROL

As is often the case, there is a textual reason to reject the enactments challenged in this appeal. Under Article XVIII, Section 13 of the Ohio Constitution, the General assembly may "limit" municipal authority to "levy taxes." And under Article XIII, Section 6 of the Ohio Constitution, the General assembly's authority to "provide for the organization of cities" includes the power to "restrict their power of taxation * * * so as to prevent the abuse of such power." Thus *some* limitations or restrictions to prevent abuses of the taxation power are clearly permitted. But structurally, municipalities' authority to "exercise" the "powers of local self-government" is only explicitly "subject to the provisions of section 3 of this article," which only places "local police, sanitary and other similar regulations" in an inferior position to the General Assembly's "general laws." *Ohio Constitution, Article XVIII, Sections 3 and 7*; *In re Complaint of Reynoldsburg*, 134 Ohio St.3d 29, 2012-Ohio-5270, 979 N.E.2d 1229, ¶ 21; *Ohio Assn. of Private Detective Agencies, Inc. v. N. Olmsted*, 65 Ohio St.3d 242, 244, 602 N.E.2d 1147 (1992). This Court should breathe life into the Ohio Constitution's distinction between permitting the General Assembly to limit the power of local taxation or restrict it to prevent abuse and permitting the General Assembly to *exercise* the power itself. The enactments challenged in this appeal are not mere limitations, nor do they impose restrictions aimed at preventing abuse. These provisions actually exercise the powers of local self-government by virtue of their breadth and completeness.

In deciding one of the early Home Rule Amendment cases, this Court observed:

> 'All political power is inherent in the people.' This is the genesis of all American government. This identical language is in the Ohio Bill of Rights (section 2, art. 1), and in syllable or spirit it is found in all the state Constitutions. That 'political power' not only resides in the people, but remains with them until they have delegated it to some department of their state

> government, or some subdivision thereof. The delegation of political power is either expressed or implied; but it must always be remembered that implied powers delegated must be such as are naturally or necessarily incidental or auxiliary to the express power, and, as such, the implied power cannot be in any wise destructive of, or in conflict with, an express delegation of power.
>
> Express delegations of political power are made through constitutional provisions, and are necessarily exclusive delegations of power, unless it be expressly provided otherwise. (Emphasis added.)

Village of Perrysburg v. Ridgeway, 108 Ohio St. 245, 253-254, 140 N.E. 595 (1923). The Court was of course referencing the Tenth Amendment to the United States Constitution, which states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

In our system of constitutional government by multiple sovereigns—one in which the people create the hierarchy of governments—no result is necessarily preordained. Indeed, our nation started off with a different system set out within the Articles of Confederation, which the people rejected in favor of a stronger, supreme federal government. Likewise, Ohioans rejected a governmental structure in which the municipalities had to go to the legislature to get business done locally:

> Prior to 1912 there was no express delegation of power to municipalities in the Ohio Constitution. Under the decisions of our courts, it had been held again and again * * * that municipal power was delegated only by virtue of a statute. Therefore municipalities of the state, especially the larger ones, were continually at the door of Ohio's General Assembly asking for additional political power for municipalities, or modifications in some form of previous delegations of such power. Such power, being legislative only, could be withdrawn from the municipalities, or amended, at any session of the Legislature.
>
> Municipalities were, therefore, largely a political football for each succeeding Legislature, and there was neither stability of law, touching municipal power, nor sufficient elasticity of law

> to meet changed and changing municipal conditions. To the sovereign people of Ohio the municipalities appealed in the constitutional convention of 1912, and the Eighteenth Amendment, then known as the 'Home Rule' Amendment, was for the first time adopted as a part of the Constitution of Ohio, wherein the sovereign people of the state expressly delegated to the sovereign people of the municipalities of the state full and complete political power in all matters of 'local self-government.'

Village of Perrysburg, 108 Ohio St. at 255, 140 N.E. 595. Given the context of the passage of the Home Rule Amendment, a sharp focus on the Amendment's text is paramount.

Ultimately, there must be a reasoned distinction between the meaning of the word "exercise" on the one hand and the words "limit" and "restrict" on the other, for these are the words that were used by the people. In light of the history of the passage of the Home Rule Amendment, it cannot be said that the General Assembly may "limit" or "restrict" local taxation to the point that municipalities are no longer exercising that power. But that is exactly the state of affairs put into effect by the enactments at issue in this appeal. Therefore, this Court should hold that those enactments are unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Tenth District Court of Appeals.

Respectfully Submitted,

s/ Garry E. Hunter

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Brief** has been served by e-mail on this 23rd day of September 2019 upon:

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