NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - HUDSON COUNTY
DOCKET NO. L-4903-18

MACK-CALI REALTY CORP.; CAL-HARBOR V URBAN RENEWAL ASSOCIATES LP; CAL-HARBOR VII URBAN RENEWAL ASSOCIATES LP; ROSELAND RESIDENTIAL TRUST; GARY WAGNER; IVAN BARON; H.P. ROOSEVELT URBAN RENEWAL COMPANY LLC; CAMBRIDGE CORPORATE SERVICES, INC.; LOCAL 621, UNITED CONSTRUCTION TRADES INDUSTRIAL UNION; LOCAL 365, UNITED EMPLOYEES OF SERVICE WORKERS; SP PLUS CORPORATION; LOS CUERNOS CORP.; EXCHANGE PLACE ALLIANCE DISTRICT MANAGEMENT CORPORATION; SPARTAN SECURITY SERVICES, INC; NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION; and HUDSON COUNTY CHAMBER OF COMMERCE & INDUSTRY,

Plaintiff(s),

v.

STATE OF NEW JERSEY; CITY OF JERSEY CITY; MAYOR AND COUNCIL OF THE CITY OF JERSEY CITY; DONNA MAUER, in her Official Capacity as Director and Chief Financial Officer of the City of Jersey City; and BRIAN PLATT, in his Official Capacity as Business Administrator of the City of Jersey City,

Defendant(s).

CIVIL ACTION

OPINION

Argued: March 8, 2019
Decided: March 15, 2019

Clark E. Alpert, Esq. and Stephen J. Edelstein, Esq., attorneys for plaintiffs (Weiner Law

Group).

Jean P. Reilly, Esq., attorney for defendant State of New Jersey (Office of the Attorney General).

Vito A. Gagliardi, Jr., Esq., attorney for defendants City of Jersey City, Mayor and Council of Jersey City, Donna Mauer, and Brian Platt (Porzio, Bromberg, & Newman, P.C.)

Craig A. Long, Esq., attorney for amici curiae (Zazzali, Fagella, Nowak, Kleinbaum, & Friedman, P.C.)

PETER F. BARISO, JR., A.J.S.C.

This action in lieu of prerogative writs challenges the constitutionality of a recent amendment to the Local Tax Authorization Act (the "LTAA" or the "Statute"), N.J.S.A. 40:48C-1 to -42, as amended by L. 2018, c. 68. As amended, the LTAA empowers cities of the first class with the ability to enact a payroll tax on businesses located within the city. The core issue presented in this action is whether Jersey City has the right to tax the payroll of Jersey City businesses under the LTAA in order to satisfy its school funding obligations. In order to answer that question, three separate questions must be determined: (1) is the Statute constitutional; (2) is the implementing ordinance valid; and (3) does the legislative scheme violate the thorough and efficient education clause of the New Jersey Constitution.

For the reasons that follow, this court concludes that plaintiffs failed to join an indispensable party and, hence, the amended complaint will be dismissed. Substantively, the court further concludes that (1) the Statute is constitutional, (2) the implementing ordinance is valid, and (3) the legislative scheme does not violate the thorough and efficient clause of the New Jersey Constitution. Defendants' motion to dismiss the amended complaint is granted, and plaintiffs' cross-motion for summary judgment is denied.

FACTUAL BACKGROUND

In 1970, the New Jersey Legislature enacted the LTAA, which authorized municipalities to collect local taxes on, among other things, parking, alcoholic beverages, motor fuels, sales of goods, and business payroll. See L. 1970, c. 326 (codified at N.J.S.A. 40:48C-1 to -42). In the nearly fifty years since, the Legislature has amended the LTAA several times, typically to adjust the population level that makes a municipality eligible to impose local taxes. As a result, Jersey City's eligibility to impose a payroll tax has changed. As originally enacted, the LTAA granted the right to enact a payroll tax to municipalities with a population of 350,000[1], making Newark the only qualifying municipality. See L. 1970, c. 326.

In 1975, the Legislature amended the LTAA population threshold so that cities with a population of 225,000 to 350,000 may adopt a payroll tax. This amendment made Jersey City eligible for a substantially similar 2 percent employer payroll tax. See L. 1975, c. 20. As the legislative history explains, "the Mayor and other officials of Jersey City" maintained that a payroll tax was "the only viable solution to their fiscal problems." Assem. Taxation Comm. Statement to A. 3080 (Feb. 13, 1975). Due to "the exigencies of the fiscal situation in Jersey City," the Legislature reluctantly amended the LTAA and allowed Jersey City to impose the tax. Ibid. (noting that solution was "bad" but necessary). However, Jersey City neglected to take advantage of its eligibility under the amended statute, and did not implement a payroll tax.

In 1981, the Legislature again amended the LTAA and set the population threshold to impose a payroll tax at 300,000, again effectively making Newark the only eligible municipality. L. 1981, c. 507. In 1990, the Legislature reduced the qualifying population limit to 200,000, and Jersey City once again was eligible to impose a payroll tax. L. 1990, c. 9. Jersey City did not

[1] The Act separated municipalities into classes based on population. Cities of the "first class" consisted of cities with a population of 350,000 or more. The population threshold for first class municipalities can be, and has been, changed by the Legislature.

enact an implementing ordinance until December 26, 1995. The ordinance, which imposed regulations and implementation mechanisms for a payroll tax on businesses, was to become effective on January 27, 1996.

However, on June 17, 1996, the Legislature amended the LTAA to provide that, regardless of whether a municipality met the threshold requirement, the city could not impose a payroll tax unless it had done so within the two years prior to July 1, 1995. N.J.S.A. 40:48C-19, as amended by L. 1996, c. 33, § 2.. This provision -- known as the "longevity provision" -- was retroactive to January 1, 1996, thus effectively voiding Jersey City's Ordinance, which had been in effect for almost five months prior to the amendment. The Legislature purposely manipulated the dates to preserve Newark's power to impose the payroll tax but eliminate Jersey City. See Sponsors' Statement to A. 1566 (Feb. 15 1996).

Because the retroactive amendment singled out one municipality, Jersey City challenged the longevity provision as special legislation. City of Jersey City v. Farmer, 329 N.J. Super. 27 (App. Div. 2000), certif. denied, 165 N.J. 135 (2000). The Appellate Division, reversing the trial court, upheld the longevity provision, holding that it did not constitute special legislation even though it retroactively nullified Jersey City's ordinance and resulted in Newark being the only municipality eligible to impose the tax. Even though Jersey City properly adopted a payroll tax in December 1995, it was unable to enforce a payroll tax until 2018, when the Legislature again amended the LTAA by removing the longevity provision.

From 1989 until October 2017, the Jersey City School District was under full or partial State supervision. In addition, Jersey City was receiving large amounts of aid to fund its schools, pursuant to the School Funding Reform Act ("SFRA"), N.J.S.A. 18A:7F-1 to -70. Under the SFRA, every school district has an "adequacy budget," which is the budget required to fund the

school district and is calculated by looking at the number of students projected to enroll in the school district, with adjustments for student grade level and at-risk categories like subsidized lunches. To reach the adequacy budget, the municipality must provide its "local fair share," which is funded through property taxes and assessed to school districts based on the property, wealth, and income of their taxpayers. If the local fair share is not enough to cover the adequacy budget, the State must supplement the budget with "equalization aid," that is, the difference between the adequacy budget and the local fair share. The purpose of state equalization aid is to bring the poorest school districts up to par with the wealthiest by forcing the State to fund those poor districts. The goal of the SFRA formula is to guarantee that school districts across the state become equally funded so the poorer districts can increase their staff ratios, procure more experienced teachers, increase course offerings, and maintain facilities. Abbott v. Burke, 119 N.J. 297, 376 (1990) ("Abbott II").

For the 2018-2019 school year, Jersey City's adequacy budget was calculated at $590,163,255. Dehmer Certification ¶ 4. The City's local fair share was calculated at $398,895,043, after accounting for property, wealth, and income of the taxpayers. Id. at ¶ 5. To make up for the deficit between the calculated local fair share and adequacy budget, Jersey City was entitled to receive $191,268,212 as equalization aid from the State. But, because Jersey City did not fully fund its local fair share, the State actually provided $270,661,365, or $79,393,153 more than the SFRA formula required. Id. at ¶ 7.

Recently, the Legislature announced substantial cuts in state aid to New Jersey school districts, leaving municipalities, particularly Jersey City, with large budget deficits. The significant reduction in state aid meant that, if Jersey City did not fund its local fair share, there not only would be significant layoffs of teachers and administrators but also several important

district programs would be eliminated. For that reason, the Legislature stepped in and gave Jersey City the right to impose a payroll tax by amending the LTAA. The amendment, codified in L. 2018, c. 68 ("Chapter 68" or "the Statute") rendered Jersey City eligible to adopt a payroll tax because it eliminated the longevity requirement at issue in Farmer, 329 N.J. Super. 27. Even though Jersey City's unenforceable 1995 payroll tax "remained on the books," it decided to enact a new ordinance to comply with the latest amendments to the LTAA; Jersey City looked to the language of Newark's ordinance for guidance.

In addition to repealing the longevity requirement, the LTAA was amended to include an income sub-classification. Municipalities now may use revenues derived from the payroll tax "for general municipal purposes" unless the municipality "has a median household income of $55,000 or greater." N.J.S.A. 40:48C-15. If a municipality meets both the population requirement and the income threshold, that municipality shall deposit the tax revenues "into a trust fund to be used exclusively for school purposes." Ibid. Because Jersey City has a median household income over $55,000 and Newark does not, this sub-classification allows Newark to meet its general needs while forcing Jersey City to raise enough revenue to properly fund their local fair share. Chapter 68 also permits municipalities to provide in their enacting ordinance that the "payroll tax shall not apply to the remuneration paid by employers to employees who are residents of the municipality." N.J.S.A. 40:48C-15. The rest of the LTAA was left intact, including the definitions of "employer" and "payroll," the prohibition that employers cannot pass the cost of the tax onto their employees, and the provision ensuring that employers will only be liable to one municipality for the payment of any tax on an employee's salary. N.J.S.A. 40:48C-14, -16(e), -18.

Pursuant to the LTAA, the Jersey City Municipal Council adopted City Ordinance 18-133 (the "Ordinance") by unanimous vote on November 7, 2018. The Ordinance provides that Jersey

City may impose a payroll tax on employers conducting business within Jersey City if they have a payroll in excess of two thousand five hundred ($2,500) in any calendar quarter and employ non-resident employees working within Jersey City or supervise employees from within Jersey City. The ordinance was approved on November 20, 2018 and became effective January 1, 2019.

PROCEDURAL HISTORY

On December 11, 2018, plaintiffs filed a verified complaint and order to show cause with temporary restraints against defendants the State of New Jersey, the City of Jersey City, the Mayor and Council of Jersey City, Brian Platt, and Donna Mauer.[2] A hearing was scheduled for December 14, 2018, limited to whether temporary restraints should be entered. On December 13, 2018, the City and the State filed opposition papers.

Following oral argument, the request for temporary restraints was denied and the return date on the order to show cause was set for February 15, 2019. The hearing was adjourned to allow the parties additional time to brief their arguments. Plaintiffs sought, and were granted, leave to amend their complaint; they filed their amended complaint on December 21, 2018. The State and the City moved to dismiss the amended complaint on January 14, 2019. On January 31, 2019, plaintiffs opposed the State's and the City's motions to dismiss, and filed their own cross-motion for summary judgment, which included a twenty-page statement of material facts. On February 14 and 15, 2019, the State and City filed briefs (a) in reply to plaintiffs' opposition to the motions to dismiss, and (b) in opposition to plaintiffs' cross-motion for summary judgment; defendants also filed responses to plaintiffs' statement of material facts. Plaintiffs filed a reply to defendants' opposition to plaintiffs' motion for summary judgment on February 28, 2019. The

[2] "The State" refers to the State of New Jersey. "The City" refers collectively to Jersey City, the Mayor and Council of Jersey City, Brian Platt, and Donna Mauer.

New Jersey Education Association ("NJEA") and Jersey City Education Association ("JCEA") moved to intervene on January 22, 2019. Included in that motion was an amici curiae brief opposing plaintiffs' amended complaint and supporting defendants' motions to dismiss. On February 7, 2019, plaintiffs opposed the motion to intervene, limited to the NJEA's and JCEA's arguments regarding the law and facts of the case. The NJEA and the JCEA filed their reply brief on February 12, 2019. The motion to intervene was granted on February 15, 2019. Oral argument was heard on March 8, 2019. Although defendants had opposed plaintiffs' statement of material facts, during the March 8 hearing, all parties confirmed there are no disputed material facts that would preclude granting the parties' respective motions. The issues were ripe for decision on the merits.

IS NEWARK AN INDISPENSABLE PARTY?

"Whether a party is indispensable depends upon the circumstances of the particular case." Allen B. Du Mont Labs., Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298 (1959). Generally, a party is indispensable if it "has an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interest." Ibid.

Newark's interest is inevitably involved in the subject matter before the court because it has had a payroll tax pursuant to the LTAA for 49 years. There are provisions of the LTAA challenged by plaintiffs (i.e., the definition of "Payroll") that have been in the Statute since its inception in 1970, and subsequently adopted into Newark's ordinance verbatim. Recent amendments to Newark's ordinance include the challenged supervisor and residency provisions of the Statute. Thus, any invalidation of these provisions inevitably would affect Newark and its ability to effectively collect its tax. A review of the Newark and Jersey City ordinances shows that

Jersey City adopted verbatim most of Newark's language, as if Newark's ordinance was a guide for Jersey City. Plaintiffs' failure to join a city with a significantly similar payroll tax ordinance is materially detrimental to their complaint. Additionally, plaintiffs challenge the LTAA as a whole: if the court concludes that the Statue is facially invalid, Newark necessarily would be affected because it would lose all ability to collect a payroll tax without having a voice in the litigation.

Plaintiffs' "slippery slope" argument about potentially having to name hundreds of defendants in suits is not persuasive. There are only two cities eligible to impose a payroll tax under the LTAA: a fact highlighted by and conceded in plaintiffs' own papers. By failing to name Newark as a defendant, plaintiffs have prevented the city with the longest history of a payroll tax from protecting its interest in the LTAA. Also, the court was denied the opportunity to hear Newark's arguments on the constitutional challenges threatening its tax revenues.

Plaintiffs' argument that the payroll tax will negatively impact Jersey City businesses also is not sustainable. If named in this litigation, Newark would have had notice and the opportunity to be heard, permitting a determination -- based on observable facts -- as to whether the payroll tax actually did affect businesses, instead of relying on the speculation and conjecture outlined in plaintiffs' certifications.

Notably, plaintiffs conceded at oral argument on May 8, 2019 that Newark would be directly impacted by the decision in the matter if the Statute's residency provision was deemed unconstitutional: Newark likewise has a residency provision in its ordinance. For all of these reasons, Newark is an indispensable party that should have been named in the complaint. Plaintiffs' amended complaint is dismissed pursuant to Rule 4:28-1.

Although the amended complaint is dismissed on Rule 4:28-1 procedural grounds, the amended complaint likewise is substantively infirm. It is to those infirmities that we now turn.

IS THE STATUTE PROPER UNDER THE NEW JERSEY CONSTITUTION?

A party seeking to invalidate an act of the Legislature must overcome the highest presumption of constitutional validity. "Every statute bears a presumption of validity that is not readily overcome." Farmer, 329 N.J. Super. at 37 (citing Newark Superior Officers Ass'n v. City of Newark, 98 N.J. 212, 222 (1985)). A court will afford every possible presumption in favor of the act of the Legislature. N.J. Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 8 (1972). Plaintiffs can rebut this presumptive constitutionality "only upon a showing that the statute's repugnancy to the Constitution is clear beyond a reasonable doubt." Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 285 (1998), cert. denied, 527 U.S. 1021 (1999). Courts give "deference to any legislative enactment unless it is unmistakably shown to run afoul of the Constitution." Lewis v. Harris, 188 N.J. 415, 459 (2006). See also State v. Buckner, 223 N.J. 1, 15 (2015) (stating that, when "reasonable people might differ about the constitutionality of a law, courts must defer to the will of the lawmakers").

Particularly in the field of taxation, courts will accord great deference to legislative judgments. Secaucus v. Hudson Cty. Bd. of Taxation, 133 N.J. 482, 493 (1993), cert. denied, 510 U.S. 1110 (1994); McKenny v. Byrne, 82 N.J. 304, 314 (1980). "Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality [in tax matters] can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." Salorio v. Glaser, 82 N.J. 482, 515 (1980) (citing Madden v. Kentucky, 309 U.S. 83, 88 (1940)). A court's role in statutory interpretation "is to determine and effectuate the

Legislature's intent." Ryan v. Renny, 203 N.J. 37, 54 (2010) (quoting Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009)).

Plaintiffs argue that the Statute violates the New Jersey Constitution for the following reasons: (a) the Statute constitutes special legislation; (b) the Statute is arbitrary and capricious; (c) the Statute violates the due process and equal protection clauses; (d) the Statute violates the uniformity clause; and (e) the Statute violates the anti-salary clause. Those arguments are addressed in order.

1. IS THE STATUTE SPECIAL LEGISLATION?

The New Jersey Legislature is prohibited from adopting "special legislation." N.J. Const. art. IV, § VII, ¶ 9 (stating that "[t]he Legislature shall not pass any private, special, or local laws . . . [r]elating to taxation or exemption therefrom" but rather "shall pass general laws"); N.J. Const. art. VIII, § I, ¶ 2 (providing that exemption from taxation may be granted only by general laws); and N.J. Const. art. IV, § VII, ¶ 7 (mandating that no general law shall embrace any provision of a private, special, or local character).

The test for determining whether a statute constitutes special legislation is whether the classification excludes entities that it should include.[3] Paul Kimball Hosp., Inc. v. Brick Twp. Hosp., Inc., 86 N.J. 429, 448 (1981). See also Roe v. Kervick, 42 N.J. 191, 233 (1964) ("A law is 'general' (1) if the class of subjects . . . is distinguished by characteristics sufficiently marked and important to make it a class by itself, and (2) if it encompasses all of the subjects which reasonably belong within the classification, and does not exclude any which naturally belong therein"). To

[3] The State argues that plaintiffs do not have standing to raise this challenge as only other municipalities potentially affected by the prioritization of the Legislature have standing. There is no merit to this argument. See N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n, 82 N.J. 57, 69 (1980).

be invalidated, a statute must clearly and irremediably violate the ban on special legislation. Farmer, 329 N.J. Super. at 38 (citing Secaucus, 133 N.J. at 492 (1993)).

New Jersey courts, applying the special legislation analysis, repeatedly have upheld legislation classifying municipalities by population and providing benefits to cities of the first class. See, e.g., Newark Superior Officers, 98 N.J. at 225-26 (holding statute constitutional even though it applied only to Newark and Jersey City because no other similarly-situated municipality was excluded as no other city met population requirement (citing McDonald v. Board of Freeholders, 99 N.J.L. 393 (E & A 1923))); Attorney General v. McKelvey, 78 N.J.L. 621 (E & A 1909); Williams v. Smith, 94 N.J. Super. 341 (App. Div. 1967), aff'd, 51 N.J. 161 (1968); Koons v. Atl. City, 134 N.J.L. 329 (Sup. Ct. 1946)). See also Mahwah v. Bergen Cty. Bd. of Taxation, 98 N.J. 268, 292 (1985); Farmer, 329 N.J. Super. at 46.

Plaintiffs principally argue that Chapter 68 is special legislation and therefore violates the Constitution because the population requirement excludes municipalities that should be included and the household income classification was wrongfully implemented to target one municipality. See N.J.S.A. 40:48C-15(c). They assert that the legislative history confirms that the Statute is special legislation, intended to impact only Jersey City, because the State was reducing its state aid for schools. In the first year of these budget cuts, Jersey City will suffer only a 0.85 percent reduction in state aid, while other towns will experience bigger cuts. For example, Lakewood Township will suffer a 5.36 percent reduction and Asbury Park will see a 2.36 percent reduction despite the fact that both municipalities have a lower median household income than Jersey City. There are municipalities, like Lakewood Township and Asbury Park, in "worse" fiscal shape than Jersey City, but the Legislature determined that only Jersey City could fund its schools through a payroll tax. That, plaintiffs argue, constitutes special legislation.

The LTAA is not special legislation: it already was upheld against that charge. Farmer, 329 N.J. Super. 27. Farmer concluded that the LTAA had a rational basis because Newark was dealing with a crisis after the riots and, by permitting cities with a population of 350,000 or more to institute a payroll tax, the Legislature had created a method for Newark to raise revenue and rebuild the city. Id. at 31, 40-41, 46. The Legislature purposely set the population threshold high enough so that Newark, and only Newark, was eligible to tax the payrolls of Newark businesses. Farmer explained that policy decisions, such as the one at issue here, rightly belong to the Legislature because there is a "long established principle of deference to the will of the lawmakers whenever reasonable men might differ as to whether the means devised to meet the public need conform to the Constitution." Id. at 46. Even though the Legislature intended the LTAA to only impact Newark, the Statute was not special legislation because it was a reasoned and reasonable response to the riots. Ibid.

When amending the LTAA in 2018, the Legislature repealed the longevity provision at issue in Farmer, thereby expanding the current eligible class from one municipality (Newark) to two (Newark and Jersey City). Id. at 31-32. It stands to reason that, if the Statute was constitutional when it excluded every municipality except Newark, the Statute must be constitutional when it excludes every municipality except Newark and Jersey City. This is especially true considering that the population threshold of 200,000 has not changed since 1990, and Jersey City previously was included in the Statute, passing its own ordinance in 1995. Additionally, no city is excluded that should be included because there is no other similarly-situated municipality at this time: no other municipality meets the population threshold of being a city of the first class with a population over 200,000. See Newark Superior Officers, 98 N.J. at

225 ("New Jersey courts . . . recognize that population can form a valid basis for legislative classification.").

Allowing Jersey City to create and enforce a payroll tax is not special legislation as Jersey City faces an equally-horrific monetary crisis as Newark faced decades ago. Farmer upheld the payroll tax in 2000 so Newark's economy could continue to improve after the downturn caused by riots decades earlier. 329 N.J. Super. at 40-41. Jersey City today faces unique financial hardship and is able to enact a payroll tax because its schools and the city as a whole will face drastic consequences without the increased revenue. The Legislature's decision to cut funding to school districts is not the sole basis that supports the constitutionality of the LTAA; its basis also lies in the characteristics of cities of the first class, being distinct and unique because of their size, that allows the Legislature to address Jersey City separately from other municipalities. In addition to Newark and Jersey City having the largest populations of residents, they also have the largest school districts in the State. Newark Superior Officers, 98 N.J. at 224. There is no other similarly-situated city being excluded because there is no other city that meets the population requirement.

Furthermore, with particular regard to population-based classifications of the type challenged here, the Legislature "must be allowed to proceed one step at a time" to address the State's most pressing issues. Bonnet v. State, 141 N.J. Super. 177, 250 (Law Div. 1976) (citing Schilb v. Kuebel, 404 U.S. 357 (1971)). See also Mahwah, 98 N.J. at 289; Abramowitz v. Kimmelman, 200 N.J. Super. 303 (Law Div. 1984), aff'd, 203 N.J. Super. 118 (App. Div. 1985). Though there may be other municipalities that need to re-examine their school funding since the State announced budget cuts, the Legislature must be permitted to address one school district at a time. The Legislature, acting well within its constitutional prerogative, has prioritized school funding in its largest cities. Jersey City is a city of the first class, and the Legislature and courts

routinely conclude that first class cities face unique problems, requiring unique remedies. The Legislature's decision to prioritize Jersey City does not, in and of itself, constitute special legislation.

The Statute, at least to the population requirement that has remained unchanged since 1990, is not special legislation. Farmer, 329 N.J. Super. at 42, 46. See also Newark Superior Officers, 98 N.J. at 230 (rejecting special legislation challenge to statute that classified cities according to population); Abramowitz, 200 N.J. Super. at 314 (upholding classification of municipalities based on population).

Plaintiffs also challenge of the median income sub-classification. Municipalities that meet the population threshold set forth in the Statute may use the revenue collected from the payroll tax for "general municipal purposes," unless the municipality "has a median household income of $55,000 or greater." N.J.S.A. 40:48C-15. If a municipality meets the income threshold, then the municipality shall deposit the revenues "into a trust fund to be used exclusively for school purposes." Ibid.

When analyzing legislative classifications, any class that bears a rational relation to a government objective and is not "wholly irrelevant" to that objective will be upheld. N.J. State Bar Ass'n v. Berman, 11 N.J. Tax 433, 440 (Tax Ct. 1991) (quoting Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 462 (1998) (dismissing special legislation challenge against annual tax on attorneys who practice in New Jersey enacted to defray "automobile insurance crisis" rooted in a $3.3 billion deficit)). As Farmer explained, "[t]he focus of the rational-relationship test is properly upon the imposition of any [class], and not on the specific cut-off date." 329 N.J. Super. at 41 (holding that retroactive amendment to LTAA was not special legislation even though there was a seemingly random cut-off date).

The focus is not on the specific cut-off for median incomes of $55,000, but on the imposition of any median-income requirement in the first place. There is a rational basis to impose a median-income classification because income of the taxpayers is a variable used to calculate a municipality's local fair share under the SFRA. See N.J.S.A. 18A:7F-52 (defining "local share" as determined by district property wealth and district income). Household income is considered when assessing a municipality's local share; it is rational that the income of a municipality likewise would be used to determine when a tax must apply to fund its local fair share.

The income classification is further rationalized by the facts surrounding Jersey City's budget problems, particularly its PILOT programs.[4] Cities with a higher median income may have the funding to take care of the general needs of the city but, at the same time, may struggle to fund their schools as a result of certain tax abatement programs. The tax abatements, usually in the form of PILOT payments, incentivize large businesses to invest in a city and develop a building or property by limiting property taxes, which are the main funding source for school districts. Cities experience an influx of wealthier residents when large companies are given those tax incentives, but the city does not see an increase in general property taxes due to tax abatements on the large developments. Thus, despite the influx of wealthier residents, there is a delay in property tax collection during the effective dates of the PILOT agreements.

These so-called "wealthy" cities, like Jersey City, have trouble meeting their local fair share for school funding because the PILOT programs instituted to encourage development depleted their property tax revenues and leave them struggling to fund their public schools. The PILOT programs, which bring in large businesses, development, and wealthier residents, also may

[4] "PILOT" (payment in lieu of taxes) programs aim to increase development in an area in need of redevelopment by granting developers exemptions from traditional property taxes for a period of time.

create a funding deficit. It is an unintended, but very real, consequence that municipalities with wealthier residents do not necessarily bring in more property tax money to fund public schools.

Plus, not all is as it seems. Despite the higher median income of Jersey City residents, much of the city remains impoverished. Compared to the statewide average of 40 percent, a staggering 74.5 percent of Jersey City students qualify for free or reduced priced lunches. It is the City's responsibility to bear the cost of those lunches, and it is the City that needs to raise revenue to ensure that those students are properly nourished. Moreover, policy decisions of the Legislature should not be disturbed by the courts unless the decision is arbitrary or capricious. See Farmer, 329 N.J. Super. at 46; Quick Check Food Stores v. Township of Springfield, 83 N.J. 438, 447, 449 (1980). As discussed further below, the median-household-income classification is neither arbitrary nor capricious.

There is a rational basis between the income classification and the requirement that a municipality allocate payroll tax revenue toward funding of its public schools; the Statute is not special legislation.[5]

2. IS THE STATUTE ARBITRARY AND CAPRICIOUS?

Although entitled to a presumption of validity, a statute will be overturned if it is "unreasonable, arbitrary, or capricious." Bd. of Educ. v. Caffiero, 86 N.J. 308, 318 (1981) (quoting Robson v. Rodriquez, 26 N.J. 517, 522 (1958)). A classification is not "arbitrary and capricious" if it is based on "reasonable grounds." Horizon Blue Cross Blue Shield v. State, 25 N.J. Tax. 290, 304 (2009). "If the statute does not violate the Constitution but is merely unwise or based on bad

[5] Many arguments were repeated in the parties' presentations and, hence, are repeated throughout this opinion. If there is any point where a specific argument is not discussed under a sub-heading, reliance is had on the entirety of this opinion.

policy, then . . . it is for the Legislature rather than this Court to deliver a finishing blow to it." Caffiero, 86 N.J. at 318.

Plaintiffs argue that the Statute is arbitrary and capricious because (a) it addresses Jersey City's school-funding problems without addressing the school-funding problems of other municipalities that are losing a higher percentage of their budget, and (b) school aid is intended to benefit the poorest districts. However, the Legislature has the right to solve problems "one step at a time." Bonnet, 141 N.J. Super. at 250 (citing Schilb, 404 U.S. 357). Jersey City was not arbitrarily chosen by the Legislature. It was only after thorough discussions and research that the Statute was amended to grant Jersey City the right to impose a payroll tax. Just because many municipalities are facing budget cuts does not mean that every municipality must be granted the right to impose a similar payroll tax. To the contrary, if every municipality was given this power, it would diminish the revenues collected from the tax. Although many municipalities may face similar funding issues, the State is not required to apply the same solution to all municipalities. The "cure" need not be "one-size-fits-all" in order to pass constitutional muster.

Additionally, the Statute's requirement that only cities of the first class (with populations of at least 200,000) may adopt a payroll tax has not been amended. But for the longevity provision, which was upheld in Farmer, Jersey City would have been able to enforce a payroll tax that was enacted in December of 1995, or almost a quarter century ago.

Plaintiffs also allege that the supervisor provision of the statute, which is within the definition of "payroll," is arbitrary because it constitutes impermissible means. That provision has been in the Statute for forty-nine years, since its inception in 1970, and has never been amended. N.J.S.A. 40:48C-14. To say -- as plaintiffs now do -- that this provision is arbitrary, despite being effective for half a century and upheld generally by the Appellate Division, is not credible. There

clearly are rational grounds to tax employees located outside the city. In today's technology-friendly society, businesses are capable of having offices in every city and every state while effectively communicating with each other. A business headquartered in Jersey City may have employees in Arizona who report directly to a supervisor in Jersey City. It may also be that the employees in Arizona work directly on projects in Jersey City without ever stepping foot in the municipality. This provision of the Statute is intended to incorporate employees who may not work within the city limits but still affect its commerce and "do work here," albeit electronically.

As the State explains, the provision is designed to capture "nowhere employees," that is, those who do not work out of a distinct office and whose wages would never be subject to the tax even if every municipality in the country enacted a similar law. Mobile repair technicians, cable repair technicians, and information technology repair experts are examples of such "nowhere employees." These employees work throughout the state on a daily basis but may not have a home base where they report to every morning or return to every night. Consequently, these employees' wages would not be subject to a payroll tax in any municipality, even if regularly and consistently working within a municipality's borders. To ensure these wages are subject to a payroll tax somewhere, the Statute includes as taxable wages where "services are performed outside the municipality and the place from which the services are supervised, is in the municipality." N.J.S.A. 40:48C-14. Cf. Whirlpool Props., Inc. v. Dir., Div. of Taxation, 208 N.J. 141 (2011) ("Whirlpool II") (upholding tax on corporations' sales outside New Jersey under the Corporate Business Tax, N.J.S.A. 54:10A-1 to -41).

The supervisor provision of the "payroll" definition is not arbitrary and capricious as it is founded on a rational basis.[6]

3. DOES THE STATUTE VIOLATE DUE PROCESS OR EQUAL PROTECTION?

The New Jersey Constitution has been interpreted to guarantee the right to due process and equal protection, encompassing and protecting greater rights than those guaranteed by the Federal Constitution. See N.J. Const. art. I, § I. "When a court invalidates a statute on due process grounds, the court is saying, in effect that the statute seeks to promote the state interest by impermissible means." Greenberg v. Kimmelman, 99 N.J. 552, 563 (1985) (citing Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949)). "In contrast, when a court declares a statute invalid on equal protection grounds, it is not saying that the legislative means are forbidden, but that the Legislature must write evenhandedly." Ibid. (citing Railway Express, 336 U.S. at 112-13).

When a substantive due process challenge is made, the burden is on the party challenging the statute to "negate every conceivable basis which may reasonably support the legislative action." Fair Hous. Council, Inc. v. N,J, Real Estate Comm'n, 141 N.J. Super. 334, 338 (App. Div. 1976). The Due Process Clause only requires some definite link, or minimum connection, between a state and the person, property, or transaction it seeks to tax. Whirlpool II, 208 N.J. at 164 (citing Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768, 777 (1992) (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344 (1954)). "The nexus required for Due Process is merely the purposeful direction of activities to the state." Id. at 164.

In examining a violation of equal protection, New Jersey courts do not directly follow the federal "rational basis" or "strict scrutiny" tests. Instead, New Jersey developed an "independent

---

[6] As for any other "arbitrary and capricious" challenges plaintiffs may claim, reliance is had on the entirety of this opinion.

analysis of rights under article 1, paragraph 1." Greenberg, 99 N.J. at 567.[7] New Jersey courts apply a balancing test and consider three factors: (1) the nature of the affected right, (2) the extent to which the governmental restriction intrudes upon it, and (3) the public need for the restriction. Ibid.

Plaintiffs argue that, implied in Article I, Section I, paragraph 1 is the right to be free from economic discrimination in intrastate and inter-municipality commerce. Plaintiffs do not challenge all payroll taxes as a whole, but they allege the implied constitutional right is violated because the Statute puts Jersey City businesses at a disadvantage, compared to businesses located outside the City. Plaintiffs also assert that the distinction between residents and nonresidents leads to discriminatory treatment, benefitting Jersey City residents.

There is no case law or rational argument to support plaintiffs' assertion that Article I, Section I, paragraph 1 of the New Jersey Constitution impliedly asserts the right of freedom from economic discrimination in intrastate and inter-municipality commerce that is somehow violated by a payroll tax. Thus, it is difficult to conclude that such a right exists and is being violated by the LTAA as amended in 2018. It is especially difficult because Newark, which is not a named party, has a payroll tax that was judicially upheld. See Farmer, 329 N.J. Super. 27. It is very unlikely that a New Jersey court would uphold a tax that violated the constitutional rights of New Jersey residents and businesses. Plaintiffs also concede that payroll taxes may be constitutional in some instances, but they have failed to argue how and/or why this payroll tax is different.

Whether there is a "right of freedom from economic discrimination in intrastate and inter-municipality commerce" implied in the New Jersey Constitution is doubtful, if not extremely

[7] Greenberg noted that the New Jersey factors likely are implicit in the federal "rational basis" standard, but that the different constitutional texts require slightly different interpretations.

unlikely, as municipalities compete for businesses all the time. Businesses in Jersey City have benefited from various PILOT programs that other municipalities did not offer. Businesses currently claiming to be "discriminated" against because they are located in Jersey City may well have moved to Jersey City due to PILOT program monetary incentives. Nor have plaintiffs shown they will face a large hit to their profits because the tax paid to Jersey City will be deductible from other taxes paid to the State and Federal governments. In sum, businesses in Jersey City are not at a competitive disadvantage because the deductions equalize any perceived inequalities. Most of the disadvantages listed in plaintiffs' certifications are nothing more than mere speculation. Curiously, the certification of Lena Takvorian, owner and principal of Leaders of Tomorrow Preschool, asserts that her preschool receives funding for its programs from the Jersey City Board of Education, funding that imposes a budget on the preschool and limits the school's profit to $10,000. As calculated in the certification, the payroll tax will cost the preschool $5,000, or half of its yearly profit. Yet, nothing has been provided stating that the Jersey City Board of Education would prevent the preschools from increasing their profit in light of the tax. And, a loss of profit is not proof of a violation of equal protection and due process: it is the businesses that must decide whether it is still worth operating within Jersey City despite the tax. Telebright Corp., Inc. v. Dir., Div. of Taxation, 25 N.J. Tax 333, 351 (Tax 2010), aff'd, 424 N.J. Super. 384 (App. Div. 2012) (holding that "'while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not'" (quoting Gen. Trading Co. v. Dir., Div. of Taxation, 83 N.J. 122, 136 (1980)). The Statute violates neither the Equal Protection Clause nor any alleged constitutional right to freedom from discrimination in intrastate and inter-municipality commerce.

The payroll tax, as implemented in Jersey City, only collects monies with a rational connection to Jersey City. The tax applies only to income earned by employees within Jersey City or who are supervised from Jersey City. Therefore, the Statute taxes activity with a rational connection to Jersey City, and is valid as a matter of law. The Statute also is supported by a rational basis: taxing businesses in a city that needs to make up for a school funding deficit is rational. See White v. North Bergen Township, 77 N.J. 538, 554 (1978) (holding that "wisdom, good sense, policy and prudence (or otherwise) of a statute are matters within the province of the Legislature and not of the Court"). The LTAA was upheld for similar reasons. Farmer, 329 N.J. Super. at 41 (holding that Statute is constitutional where "the underlying purpose of the Act was to enable large cities to meet a fiscal crisis (or hardship) brought by local conditions"). The Statute or Ordinance are not constitutionally infirm.

4. DOES THE STATUTE VIOLATE THE UNIFORMITY CLAUSE?

Article VIII, Section I, paragraph 1(a) of the New Jersey Constitution (the "Uniformity Clause") states:

> [p]roperty shall be assessed for taxation under general laws and by uniform rules. *All real property* assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value, except as otherwise permitted herein, and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.
>
> [N.J. Const. art. VIII, § I, ¶ 1(a) (emphasis added).]

"[C]onstitutional history and judicial precedent adjure a strict application of the tax clauses to real property. 2nd Roc-Jersey Assoc. v. Town of Morristown, 158 N.J. 581, 591 (1999).

Plaintiffs argue that the Statute violates the Uniformity Clause because it creates a mechanism for Jersey City to evade uniform property taxation by substituting the payroll tax for

the local property school tax. Plaintiffs assert that, by circumventing taxes that should be assessed on property owners, the payroll tax is not being assessed under a general law and by uniform rules. Further, plaintiffs claim that, if the tax is examined, uniformity is violated by the exemption from the payroll tax of employers whose employees are Jersey City residents and exemptions of certain insurers.

Plaintiffs' arguments are not persuasive; the State's interpretation that the Uniformity Clause only applies to taxes on real property is far more accurate a statement of the law. There is no authority to suggest that the Uniformity Clause was intended to apply to taxes that "circumvent" or supplement property taxes. Because the employer payroll tax is wholly unrelated to the taxation of real property, the Uniformity Clause does not apply. See GMC v. City of Linden, 293 N.J. Super. 99, 103 (App. Div. 1996), aff'd, 150 N.J. 522 (1997) (holding that, where taxation does not implicate real property, no violation of Uniformity Clause exists). GMC properly distinguished the discretion vested in the Legislature to tax personal property as opposed to real property. Ibid. Here, the income being taxed is in no way related to real property. The Ordinance cannot violate the Uniformity Clause.

It is not within a court's discretion to address the wisdom of a tax plan or its implementing allocation of the tax burden. Id. at 104. That is a matter of public policy to be resolved by the Legislature. Moreover, the Appellate Division already held that a payroll tax is constitutional and valid and thus, not a violation of the Uniformity Clause. Farmer, 329 N.J. Super. 27. The 2018 amendment to the Statute authorizes a tax on the payroll of businesses, and does not implicate a tax on any real property. The Statute does not violate the Uniformity Clause.

5. DOES THE STATUTE VIOLATE ARTICLE VIII, SECTION II, PARAGRAPH 8?

Article VIII, Section II, paragraph 8 of the New Jersey Constitution ("paragraph 8") prohibits the State from collecting contributions from employers for "any purpose other than providing and administering benefits to employees and their families or dependents." Plaintiffs believe Chapter 68 violates paragraph 8 as it constitutes an "assessment" by the State, even though it is implemented by the municipal Ordinance and collected by Jersey City. Defendants argue that Chapter 68 does not fall within the scope of paragraph 8. Defendants are correct.

Paragraph 8 emphasizes that only those contributions from employers "*collected by the State*" are subject to the limitation: that phrase is reiterated six times. See N.J. Const. art. VIII, § II, para. 8 (emphasis added). Plaintiffs assert the payroll tax, collected by and enforced by a municipality, somehow can constitute a collection "by the State." Yet, plaintiffs fail to cite to any authority that holds that such a municipal tax shall be treated as an assessment by the State. Contrary to plaintiffs' point, Chapter 68 specifically authorizes municipalities "to impose and collect" an employer payroll tax and makes no mention at all of the State collecting money for itself. N.J.S.A. 40:48C-15.

The legislative intent makes clear that paragraph 8 was intended solely to impact taxes paid to the State by employers and employees; its purpose was to prevent the State from diverting to the General Fund monies that the State previously collected for other purposes. Here, there is no such threat because (a) the State cannot divert the money because the State does not administer the tax, and (b) the Statute and Ordinance make clear that the money must be "used exclusively for school purposes." N.J.S.A. 40:48C-15.

The Statute and Ordinance do not violate Article VIII, Section II, paragraph 8 of the New Jersey Constitution.

DO THE STATUTE AND ORDINANCE VIOLATE THE UNITED STATES CONSTITUTION?

Plaintiffs further argue that the Statute is unconstitutional under the United States Constitution because it violates not only the privileges and immunities clause but also the dormant commerce clause. Those claims too must fail.

1. DO THE STATUTE AND ORDINANCE VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE?

Article IV, Section 2, clause 1 of the United States Constitution provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." "[I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." Toomer v. Witsell, 334 U.S. 385, 396 (1948). And, as a matter of law, those plaintiffs that are not natural persons may not assert a Privileges and Immunities claim. W. and S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 656 (1981); Hemphill v. Orloff, 277 U.S. 537, 548 (1928).

In respect of the natural person plaintiffs, the payroll tax does not violate the Privileges and Immunities Clause because the tax neither adversely affects the tax liability of non-resident employees nor restricts their right to employment. The Clause protects the right of non-residents to pursue their livelihood free from economic discrimination. Salorio v. Glaser, 82 N.J. 482, 501 (1980). The rule for testing the distribution of tax burdens in the context of the Privileges and Immunities Clause is whether there is "substantial equality of treatment" between residents and non-residents. Id. at 502 (citing Austin v. New Hampshire, 420 U.S. 656, 665 (1975)). This protection includes exemptions from taxes that are higher than those paid by "citizens of the state." Ibid. (citing Austin, 420 U.S. at 661).

Here, the payroll tax is imposed on the employer and not the employee. N.J.S.A. 40:48C-15. The Statute and Ordinance precisely prohibit employers from passing the tax onto the employees, ensuring there is no potential for a greater tax liability for non-residents than for residents. N.J.S.A. 40:48C-16(e). Thus, there is more than "substantial equality": there is complete equality between residents and non-residents.

The payroll tax likewise does not restrict non-residents' right to seek employment in Jersey City. The test for determining whether such a right is violated is whether the statute burdens the non-residents' employment opportunity. Hudson Cty. Bldg. and Constr. Trades Council. v. City of Jersey City, 960 F. Supp. 823, 830 (D.N.J. 1996) ("Hudson Cty.").

Plaintiffs have set forth only speculative facts that the payroll tax may affect hiring decisions. Real world experience tells a different tale. Newark enacted a residency provision to its payroll ordinance in 2017, yet plaintiffs have not provided any evidence that non-residents were discriminated against after that ordinance was amended. This is especially insightful because one plaintiff, the New Jersey Business & Industry Association (NJBIA), represents about 18,000 businesses in New Jersey. Am. Compl. ¶ 40. Among those 18,000 businesses are entities with locations and employees in Newark, subject to the Newark payroll tax. Despite the amended complaint stating that NJBIA "has knowledge that the payroll tax will" unfairly affect Jersey City businesses, nothing was tendered supporting that claim or explaining the provenance of that "knowledge." Am. Compl. ¶ 107. Surprisingly, although "NJBIA's members employ over 1,000,000 people in the State," plaintiffs failed to adduce even a single instance where the

residency provision in Newark's ordinance led to discrimination in hiring practices since it was adopted in 2017.[8] Am. Compl. ¶ 40.

Plaintiffs have not demonstrated there is a lack of "substantial equality of treatment" between residents and non-residents. Salorio, 82 N.J. at 502 (citing Austin, 420 U.S. at 665 (1975)). Further, plaintiffs provided no evidence that the Statute and Ordinance burden the non-residents' employment opportunity. Hudson Cty., 960 F. Supp. at 830. Neither the Statute nor the Ordinance violates the Privileges and Immunities Clause.

2. DO THE STATUTE AND THE ORDINANCE VIOLATE THE DORMANT COMMERCE CLAUSE?

Article I, Section 8, Clause 3 ("Commerce Clause") of the U.S. Constitution invests Congress with power to regulate interstate commerce. Implicit from the Commerce Clause is the "Dormant Commerce Clause," which prohibits state legislation that discriminates against interstate commerce or imposes an undue burden on interstate commerce. A state tax is valid under the Commerce Clause if the tax (1) "is applied to an activity with a substantial nexus to the taxing State," (2) "is fairly apportioned," (3) "does not discriminate against interstate commerce," and (4) "is fairly related to the services provided by the State." Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 279 (1977).

First, the Statute and the Ordinance apply to an activity with a substantial nexus to New Jersey and, particularly, Jersey City. New Jersey courts have held that a single person with a "daily presence in this State for the purpose of carrying out her responsibilities as an employee" suffices to satisfy the first factor. Telebright, 25 N.J. Tax at 351. The New Jersey "Supreme Court explained, 'while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having

[8] Jersey City and Newark implemented different residency clauses. That said, plaintiffs failed to describe any impact whatsoever to Newark employees.

done so, he must accept the tax consequences of his choice, whether contemplated or not.'" Ibid. (quoting Gen. Trading, 83 N.J. at 136). Courts have long held that the taxpayer must make its business decisions in light of any taxing statute. Ibid. Here, the payroll tax applies only to employers that have employees located within Jersey City, the enacting municipality. See N.J.S.A. 40:48C-14. Conversely, employers with no employees in the enacting municipality are not subject to the tax at all. Therefore, the Statute and Ordinance satisfy the substantial nexus test of the Commerce Clause because the tax only applies to businesses with employees in Jersey City. That plaintiffs did not anticipate the tax consequences of moving to Jersey City does not insulate them from tax liability or nullify the Statute. See Telebright, 25 N.J. Tax at 351.

Second, the payroll tax is fairly apportioned. A tax is fairly apportioned if it is both "internally consistent" and "externally consistent." Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983). To be internally consistent, "a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." Goldberg v. Sweet, 488 U.S. 252, 261 (1989). To determine if a tax is externally consistent, courts look "to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reached beyond that portion of value that is fairly attributable to economic activity within the taxing" jurisdiction. Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 185 (1995). See also Goldberg, 488 U.S. at 262.

Jersey City's payroll tax is internally consistent because, even if every State or every New Jersey municipality adopted the same law, interstate commerce would not be at a disadvantage. No matter how many entities adopt the same law, an employer is only obligated to pay the tax liability to a single municipality on a specific employee's wages. See N.J.S.A. 40:48C-18. Plaintiffs' contention that an employer will owe "payroll tax on more than 100% of its payroll" is

foreclosed by the Statute: it plainly provides that "[n]o employer shall be obligated to report and pay an employer payroll tax . . . to more than one municipality with respect to remuneration paid to an employee for services performed." N.J.S.A. 40:48C-18. The Statute further provides the means to resolve a dispute if two governmental entities have similar laws that would tax the same individual: the parties can resolve the liability dispute between them or commence a proceeding in the Tax Court. Ibid. This has proven to be a successful way to resolve disputes arising from Newark's ordinance because, typically, the entity paying taxes to two municipalities looks for a refund from one of the cities. See Everest Reinsurance Co. v. Newark Div. of Tax Abatement & Special Taxes, 18 N.J. Tax 50, (1998) (granting plaintiff attorneys' fees in connection with successful action for refund of payroll taxes paid to Newark); Fairmount Cemetery Ass'n v. City of Newark, 3 N.J. Tax 370 (1981) (granting refund where plaintiff was exempt from Newark's payroll tax). Because the ability of every State and every municipality to impose an identical tax, resulting in multiple taxation, can be interdicted, the payroll tax is internally consistent.

When analyzing the external consistency of taxing statutes, courts "do not require mathematical certainty or exactitude in apportionment." Bank of Am. Consumer Card Holdings, Inc. v. Dir., Div. of Taxation, 29 N.J. Tax 427, 472 (2016). Instead, only a "rough approximation of fairness" is required, which still is "a heavy burden for a taxpayer." Ibid. The taxpayer must prove "by clear and cogent evidence" that the payroll tax in fact is "out of all appropriate proportions" to the business conducted in the taxing jurisdiction or has "led to a grossly distorted result." Container Corp., 463 U.S. at 169.

Plaintiffs have not met their burden of proving that "no set of circumstances exists under which the Act would be valid." Whirlpool Props., Inc. v. Dir., Div. of Taxation, 25 N.J. Tax 519, 528 (2010) ("Whirlpool I") (outlining test for prevailing on facial challenge). An as-applied

challenge to the Statute and Ordinance also is fatally flawed because imposition of Jersey City's payroll tax would not result in taxation "out of all proportion" to the business conducted in Jersey City or lead "to a grossly distorted result." Container Corp., 463 U.S. at 169. Plaintiffs offer no facts regarding a specific business, the number of Jersey City employees of that business, the number of remote employees, the percentage of payroll on which Jersey City's tax would be imposed, etc., to show that the tax would lead to unconstitutional results. By its terms, the tax is limited to those employers with employees doing business in Jersey City or supervised from Jersey City. Thus, employees without sufficient connection to the City are not subject to the tax under the definition of "Payroll" and "Employee." See N.J.S.A. 40:48C-14; Jersey City Mun. Code, Art. IV, § 304-18.[9] See also Square Parking Sys. v. Jersey City Bus. Adm'r, 185 N.J. Super. 468, 471 (Law Div. 1982) (holding that "statutes must be read, as it is said, sensibly, with the purpose and reason which motivate the legislation controlling factors in contrast to a strict, literal construction" (citing Suter v. San Angelo Foundry Mach. Co., 81 N.J. 150, 160 (1979))).

Notably, Farmer already upheld a payroll tax on businesses within Newark where its purpose was to help alleviate "urban problems and financial need" following the riots. 329 N.J. Super. at 42. Although Jersey City is not recovering from riots, the City indisputably is facing "unique financial problems." See ibid. Jersey City, with support from the Legislature, is attempting to proactively cure school-funding deficits and aid Jersey City in fully funding its local fair share. As a city of the first class, Jersey City faces unique problems that require unique solutions, such as the one currently implemented by the Legislature. If a payroll tax is not imposed

[9] If, however, Jersey City improperly attempts to tax employees without sufficient connection to the City, the taxpayer may plead those facts with specificity pursuant to Jersey City Mun. Code, Art. IV, § 304-19.5. That issue has not been sufficiently pled and is not before the court.

to collect revenue and fund the school system, Jersey City will face dire consequences, potentially bringing the school district back into "Abbott" designation. Amicus Br. 17 (Jan. 22, 2019). For example, if Jersey City fails to fully fund its schools, a parade of horribles will ensue: staffing of security officers and safety programs will be affected, teachers will be laid off, classroom sizes will increase, bus routes will be cut, and maintenance problems will be deferred for lack of funding. Because Jersey City faces harsh economic struggles, like Newark did when it was granted the right to enact a payroll tax, the tax is externally consistent. See Farmer, 329 N.J. Super. 27.

Third, the payroll tax does not discriminate against interstate commerce. The Commerce Clause does not "relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938). The payroll tax can be compared to a corporate franchise tax, which was upheld in Container Corp., 463 U.S. 159. See also Barclays Bank Plc v. Franchise Tax Bd., 512 U.S. 298 (1994).

To determine whether a statute fails the third prong of the Complete Auto test, a court first must ask whether the statute "*directly* regulates or discriminates against interstate commerce" or whether "its effect is to favor in-state economic interests over out-of-state interests." Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) (emphasis added). Statutes that directly regulate or discriminate are "generally struck down" as per se unconstitutional. Ibid. See also Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268 (1984) (holding that "cardinal rule of Commerce Clause jurisprudence" is that no State "may impose a tax which discriminates against interstate commerce by providing a *direct* commercial advantage to local business" (emphasis added)). When a statute has no direct effect but "has only indirect effects on interstate commerce and regulates evenhandedly," Pike v. Bruce Church Inc., 397 U.S. 137 (1970),

applies. Under Pike, a statute is upheld unless the burden on interstate commerce is "clearly excessive in relation to the putative local benefits." Id. at 142.

Plaintiffs argue that the tax fails this prong of the Complete Auto test because taxing only non-resident employees is essentially a tariff, making it more expensive to hire people from outside Jersey City. However, there is no *direct* burden or *direct* discrimination against interstate commerce. Nothing in the Statute directly discriminates against interstate commerce nor explicitly provides a commercial advantage to local businesses. Instead, the Statute applies evenly to all businesses with employees in Jersey City, regardless of whether the business is located inside or outside the City limits. The distinction between residents and non-residents applies to all businesses equally and does not directly affect non-resident employees: the tax is applied to employers, not employees themselves. Jersey City Mun. Code, Art. IV, § 304-19. As Whirlpool II explains, if a tax "does not differentiate between in-state and out-of-state business" and "[b]oth are equally subject" to the tax, then the tax is not facially discriminatory. 208 N.J. at 174. Notably, plaintiffs concede that the "rights of the individual plaintiffs are being *indirectly violated* because of the tax on their employers." Pl. Br. at 58 (emphasis added). The Statute is not per se unconstitutional. See Ampro Fisheries, Inc. v. Yaskin, 127 N.J. 602, 613 (1992) (stating that law must "affirmatively discriminate" against interstate commerce to be per se unconstitutional); Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't of Treasury, 490 U.S. 66, 76 (1989) (holding that tax "obviously is not facially discriminatory" if there "is no explicit discriminatory design to the tax"). Because the Statute does not discriminate directly against interstate commerce, the court must follow Pike. See Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (holding that where "there is no patent discrimination against interstate trade, the Court" follows Pike).

Under Pike, a statute will be upheld unless the plaintiff shows the burden on interstate commerce is "clearly excessive in relation to the putative local benefits." Pike, 397 U.S. at 142. See also Crespo v. Stapf, 128 N.J. 351, 361 (1992) (adopting Pike in New Jersey). Pike takes a balancing approach and requires evidence. Baude v. Heath, 538 F.3d 608, 612 (7th Cir. 2008). State "laws frequently survive this Pike scrutiny." Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 339 (2008).

The Statute does not have a discriminatory impact on interstate commerce. Aside from mere assertions, plaintiffs have not provided any evidence that it will, *in fact*, be more expensive to hire someone who does not reside in Jersey City. See Baude, 538 F.3d at 612. Even if it is more expensive to hire non-residents, plaintiffs have not shown how that would be a burden on interstate commerce: if the residency provision is struck from the Statute, costs for employing residents and non-residents would be equal but plaintiffs still would pay a one percent tax on the non-residents' income. In other words, the cost of hiring non-residents in Jersey City remains the same. Invalidating the residency distinction does not help plaintiffs; it has the effect of increasing their tax burden without having any effect on interstate commerce.

Plaintiffs have not provided any proofs detailing a business's costs from the Statute and how much more they would be paying for non-resident versus resident employees. Plaintiffs also failed to make a credible showing that the businesses currently do not take residency into a factor when hiring an employee. Businesses frequently cover the costs of commuting for those employees who travel distances to work. The payroll tax is no different: it is a similar cost that businesses would factor when deciding which employee to hire. If a business is looking to hire an employee but only non-residents apply, there necessarily would not be discrimination in the hiring

process because the business would have no choice but to take on the cost of the non-resident employee.

Plaintiffs did provide the certification of Stephen Goldblatt, legal representative for plaintiff Local 621 United Construction Trades & Industrial Employees Union ("Local 621"). Mr. Goldblatt expressed concern that non-resident employees would be discriminated against because employers could withhold raises or bonuses. This is rank conjecture: not one plaintiff certified that these practices were being considered to lessen any financial burden a tax might have. Additionally, nothing was shown to demonstrate that all raises and bonuses would be withheld to counteract the tax payments, not just the raises and bonuses of non-residents. These are simple business decisions that indirectly affect interstate commerce and do not violate the Commerce Clause, especially because the decision not to give bonuses or promotions can be applied evenhandedly and not just on the non-resident employees. Plaintiffs failed to make a competent showing of their economic loss attributable to the law, as well as a discriminatory effect on interstate commerce as a whole. See Baude, 538 F.3d at 612. See also Kleinsmith v. Shurtliff, 571 F.3d 1033, 1042 (10th Cir. 2009) (upholding Utah law requiring that trust attorneys have offices in Utah).

Further, the monies paid on the payroll tax are deductible from State and Federal corporation taxes. Those deductions may lower that taxpayer's tax bracket, making it possible that the payroll tax actually will reduce costs.

Regardless, any indirect impact on interstate commerce is not "clearly excessive in light of the putative local benefits" of the payroll tax. Pike, 397 U.S. at 142. Applying the tax to non-residents only helps compensate the City for costs associated with the volume of people commuting into Jersey City daily who do not pay property taxes. For example, in Square Parking,

the court upheld a Jersey City parking tax that applied only to non-residents because non-residents do not pay toward maintaining the city even though they "use the city streets and the ancillary services of the city, which include road maintenance, fire protection services, emergency medical services and police protection, among others." 185 N.J. Super. at 476. The same can be said here, where employees commute into Jersey City daily, take advantage of the safety brought by a vibrant police and fire presence and use the City's roads, water, and resources.

There is a necessary backdrop that must be considered. The State is required to maintain and promote a thorough and efficient education system throughout New Jersey, and the Legislature must force a local government to fund its schools. See Robinson, 62 N.J. at 513. This tax aides the State and Jersey City in funding that education system without increasing the burden on Jersey City residents, who already contribute to school funding through property taxes. If Jersey City does not remain fully funded, the school district may fall back into Abbott designation, which would be detrimental to the City, the State, and all other school districts that may affected by adding yet another district, especially one as large as Jersey City, to the list of Abbott schools. See Amicus Br. 17.

In the totality of the circumstances, plaintiffs have failed to show a burden on interstate commerce that is "clearly excessive in relation to the putative local benefit" of a fully-funded school district, which prevents layoffs of teachers, increased class sizes, cutting bus routes, and stopping after-school activities. Pike, 397 U.S. at 142. The payroll tax satisfies the third prong of the Complete Auto test.

Finally, plaintiffs do not contest that the tax satisfies the fourth element, that is, that the tax "is fairly related to the services provided by the State." Complete Auto, 430 U.S. at 279. It is self-evident that a tax on businesses within a City is fairly related to the fire and police protection, use

of public roads and mass transit, and school system that educated the population and keeps children and teenagers out of trouble in that City. See DH Homes Co. v. McNamara, 486 U.S. 24, 32 (1988); Telebright, 25 N.J. Tax at 351. Those who commute into Jersey City for work daily compete with school districts for the attention of police and fire fighters, as well as improvements to the roads, sidewalks, etc. However, those commuters are not contributing toward the City because they do not pay any taxes to the City. The payroll tax indirectly taxes those workers through their employer to make up for the tax money that necessarily is taken away from the schools and spent, among other things, on increasing the police force and the improvements on roads and bridges to get to the City. The payroll tax satisfies the fourth factor of the Complete Auto test.

In sum, the payroll tax does not violate the Dormant Commerce Clause.

VALIDITY OF THE ORDINANCE

Plaintiffs argue that the Ordinance violates the New Jersey Constitution because it is (a) ultra vires; (b) unconstitutionally vague; (c) arbitrary and capricious; and (d) violates existing PILOT agreements. None of these arguments is sustainable.

A municipality has only enumerated powers, acts only by delegated authority, and lacks inherent jurisdiction to make laws or adopt regulations. Giannone v. Carlin, 20 N.J. 511, 517 (1956). Municipal ordinances, like statutes, are afforded a presumption of validity and must be "liberally construed" in favor of such validity. Courts "pay deference to the decision-making of municipal bodies, recognizing that they possess 'peculiar knowledge of local conditions [and] must be allowed wide latitude in the exercise of delegated discretion.'" 388 Route 22 Reading Realty Holdings, LLC v. Township of Readington, 221 N.J. 318, 339-40 (2015) ("Readington") (quoting Framer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965). An ordinance will not be overturned unless

it is arbitrary and capricious or unreasonable, with the burden of proof placed on the plaintiff challenging the action. Grabowsky v. Township of Montclair, 221 N.J. 536, 551 (2015). The presumption of validity can be overcome if the municipal ordinance exceeds its delegated authority under the governing statute. See Readington, 221 N.J. at 339-40.

1. IS THE ORDINANCE ULTRA VIRES?

"Any exercise of a delegated power by a municipality in a manner not within the purview of the governing statute is capricious and *ultra vires* of the delegated powers." Giannone, 20 N.J. at 517. However, "[a]n ultra vires finding is strongly disfavored and is made only in exceptional circumstances." In re I/M/O Route 206 at New Amwell Road, Block 161 (Hillsborogh), 322 N.J. Super. 345, 352 (App. Div. 1999). In deciding whether a particular action is statutorily authorized, a court "may look beyond the specific terms of the enabling act to the statutory policy sought to be achieved by examining the entire statute in light of its surroundings and objectives." N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978) (analyzing administrative regulation). "Express powers as well as those that arise by fair implication are given broad latitude, so long as they are not wielded in contravention of the overarching statutory grant of authority or conflict otherwise with an express statutory limitation or prohibition." Varsolona v. Breen Capital Servs. Corp., 180 N.J. 605, 624-25 (2004). Statutory schemes permit municipalities some latitude in implementing its purposes but the municipality cannot "interpolate or add material conditions in contravention of the legislative grant." Id. at 624-25.

The only two terms the Legislature defined in the Statute -- which have remained unchanged since its enactment in 1970 -- are "employer" and "payroll." In implementing the Ordinance, the City defined the terms "employee," "leased employee," and "services." Plaintiffs argue that the City's definitions of "employee" and "leased employee" are overbroad because the

definitions cause far more people to be considered employees to be taxed than the Legislature intended. The Statute and the Ordinance, which adopts the language verbatim, provide:

> "Payroll" means an amount equal to the total remuneration paid by employers to employees which is subject to withholding by the employer for Federal income tax purposes for services, other than domestic services in a private residence, if
>
> > **(a)** The services are performed within the municipality; or
> >
> > **(b)** The services are performed outside the municipality and the place from which the services are supervised, is in the municipality.
>
> [N.J.S.A. 40:48C-14; Jersey City Mun. Code, Art. IV, § 304-18].

Plaintiffs assert that the Legislature only authorized municipalities to tax the payroll of employees in an amount equal to the total pay subject to withholding. Despite that restraint, the Ordinance's definition of "employees" includes various independent contractors, contract employees, licensed real estate salespersons, and "leased employees," all of whom are not subject to Federal tax withholding. See Jersey City Mun. Code, Art. IV, § 304-18. According to plaintiffs, the expansive definitions create additional burdens for employers in terms of determining what could be covered by the tax, burdens that were neither anticipated nor intended to be covered by the Legislature.

Plaintiffs also argue that the Ordinance creates an overbroad definition of "services." They urge that the core of the Statute is that the only employee payrolls taxed are those subject to federal withholding, so the Ordinance cannot claim to tax any employee beyond that limitation. Plaintiffs claim that the definition of "services," especially when read in conjunction with the definition of "employees," results in more taxation than the Statute intended. As such, plaintiffs conclude, the Ordinance is ultra vires because it expands the scope of the Statute impermissibly.

Plaintiffs have not met their high burden of showing the Ordinance is ultra vires. Plaintiffs only look at the definition of the terms separately to argue that the Ordinance impermissibly expands the scope intended by the Legislature. The Ordinance, however, must be read as a whole, instead of cherry-picking terms without placing them into context. See Am. Fire & Cas. Co. v. N.J. Div. of Taxation, 189 N.J. 65, 80 (2006) (explaining that statutes that "deal with the same matter or subject should be read *in pari materia* and construed together as a unitary and harmonious whole"); Kemble v. City of Millville, 69 N.J.L. 637, 638 (1903) (applying same principles to municipal ordinances). The way the Ordinance reads -- and should be interpreted -- is a two-part determination. As a threshold matter, the business should first determine if the employer is to pay a federal tax on the employee. If yes, then it must determine whether the employees fall under the definition provided by the Ordinance such that a tax must be paid. If the answer to either question is "no," then the employer does not pay a tax on that employee, regardless of whether they fall under the definition of "employee." The ultimate conclusion is unshakeable: an employer should not pay taxes on an employee unintended by the Statute.

Plaintiffs' argument that including independent contractors, contract employees, and real estate salespersons in the definition of employee -- all of whom are not subject to Federal tax withholding -- ignores the rest of the Ordinance. That argument too is unavailing. Ordinance Section 304-19 says the tax will be imposed on every "Employers' Payroll." The definition of "Payroll" is limited to "an amount equal to the total remuneration paid by an Employer to Employees which is subject to Federal income tax withholding by the Employer for Federal income tax purposes for services rendered." Jersey City Mun. Code, Art. IV, § 304-18. Thus, the remuneration paid to independent contractors, contract employees, or real estate salespersons is only considered part of the "Payroll" to be taxed if and only if the Employer is entitled to withhold

monies for Federal income tax purposes. Plaintiffs' fear that the Ordinance will place a tax on employees in a way unintended by the State Legislature is unfounded.

Moreover, the Legislature left it up to the municipalities to define many terms. Plaintiffs ignore the crucial fact that Jersey City adopted the same definitions of "employee," "leased employee," and "services" that Newark implemented by ordinance in 2008. If the Legislature disapproved of the "expansive" definitions of these terms, the Legislature had its chance, while amending the Statute in 2018, to define the terms in their own way. It is not for the courts to second-guess the policy decisions of political entities, and only the Legislature or City Council, respectively, may redefine the Statute or Ordinance according to plaintiffs' wishes.

Also, as argued by Jersey City, the Legislature and City Council intended to create a broad class of taxable employees to prevent gamesmanship by the businesses. Thus, businesses cannot scheme a way out of paying the tax that the Statute and Ordinance intended the business to pay. Plaintiffs' argument that an employer will never pay Federal income tax on the remunerations of an independent contractor, contract employee, or real estate salesperson is far too speculative and fatally flawed. Tax laws are subject to change, and there may come a time when businesses will pay taxes on those classes of employees. If that time comes, the Ordinance already is equipped to tax their remunerations because they are listed under its definition of Employee. See Jersey City Mun. Code, Art. IV, § 304-18. Finally, the definitions of "employee," "leased employee," and "services" do not expand the intent of the Statute because, when read in the context of the Ordinance as a whole, the Ordinance complies with limitations set forth by the Legislature.

Because an ordinance will not be overturned unless it is found to be arbitrary and capricious or unreasonable and because statutory schemes permit municipalities some latitude in implementing its purposes, the Ordinance is not ultra vires as it is not arbitrary and capricious or

unreasonable. See Varsolona, 180 N.J. at 624-25; Grabowsky, 221 N.J. at 551. Jersey City must be allowed some latitude in its implementing purposes, just as Newark was permitted when implementing its ordinance, which was upheld in Farmer. Varsolona, 180 N.J. at 624-25; Farmer, 329 N.J. Super. at 38. The definition of "Payroll" limits the definition of "employee," so that an employer pays the payroll tax for only those employees whose remuneration may be withheld for Federal income tax purposes. The Ordinance must be read as a whole, and interpreted as one document. See Am. Fire & Cas. Co., 189 N.J. at 80. Moreover, though plaintiffs state that certain employees are not eligible for Federal tax withholdings, the tax law changes and may change in the future; employees who are not eligible for Federal tax withholdings may, at a future date, be eligible. At that time, pursuant to the Statute and Ordinance, their income would be taxable by Jersey City, as well. Jersey City rationally took the definitions provided in Newark's Ordinance, which was previously upheld, and incorporated the same language into its own Ordinance. Those choices are entitled to deference and Jersey City's definitions of the terms in the Ordinance should not be disturbed.

Plaintiffs also contend that the Ordinance is ultra vires because it was introduced by the City's Business Administrator. That is factually and legally incorrect. The Ordinance was only "presented" by the Business Administrator, a distinction that is important. The business administrator may properly present an ordinance to the Council. Jersey City Mun. Code, Chapter A350-24-Rule XXII, § C (stating that "[a]ll ordinances and resolutions before *presentation* to the Council by the Mayor or Business Administrator shall have been reduced to writing. Every ordinance and resolution except those requested by members of the City Council shall bear the name and signature of the city official requesting it." (emphasis added)). Section C does not contradict Section D of the same Rule, which states that "[o]rdinances, resolutions, or other matters

requiring action by the Council shall only be *introduced* by a member of the Council." Jersey City Mun. Code, Chapter A350-24-Rule XXII, § D (emphasis added).

Brian Platt, in his capacity as Jersey City Business Administrator, *presented* the Ordinance to the City Council. This process is outside of and prior to the formal Council meetings and must follow Chapter A350-24, Rule XXII, Section C of the Municipal Code, meaning, among other things, that it must be reduced to writing, and bear the name and signature of the city official requesting it. Once at the City Council meeting, the Ordinance shall only be *introduced* by a Councilmember. See Jersey City Mun. Code, Chapter A350-24-Rule XXII, § C. Here, the Ordinance was introduced by the Council as a whole, not by Brian Platt, as argued by plaintiffs. This is highlighted by the fact that Brian Platt signed the Ordinance on November 1, 2018, which is the date it was presented. There was no meeting of the City Council on that date. On November 7, 2018, at the first City Council meeting following the presentation of the Ordinance, the Council introduced the Ordinance as a whole, on a 7-0-1 vote (Robinson abstaining, Watterman absent).

Additionally, the City Council's long-standing practice is to have a "consent agenda" at all meetings. This means that City Council members are prepared to consider together every ordinance that is introduced, which is why the Meeting Minutes from November 7, 2018 state the Ordinance was presented "as a whole". This norm represents the City Council's interpretation of its own ordinance regarding the proper introduction of proposed ordinances, an interpretation that itself is entitled to deference. See Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 561 (App. Div. 2004) (noting that courts give deference to a municipality's interpretation of that municipality's ordinances).

The Jersey City Municipal Code was properly followed; plaintiffs simply misinterpreted the Code. The Ordinance is not ultra vires.

Plaintiffs' contention that the City is estopped from arguing that the Ordinance was properly introduced also is rejected: plaintiffs inaccurately interpret the City's position in Scariati v. City of Jersey City (Docket No. HUD-L-4277-18). Judicial estoppel is an extraordinary remedy that courts invoke "only 'when a party's inconsistent behavior will otherwise result in a miscarriage of justice.'" State v. Jenkins, 178 N.J. 347, 359 (2004) (quoting Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 608 (App. Div. 2000)). "The doctrine prevents litigants from 'playing fast and loose' with, or otherwise manipulating, the judicial process." Jenkins, 178 N.J. at 359 (quoting State, Dep't of Law & Pub. Safety v. Gonzalez, 142 N.J. 618, 632 (1995)). See also Cummings v. Bahr, 295 N.J. Super. 374, 387 (App. Div. 1996) ("'The doctrine of judicial estoppel applies to a party who has successfully and unequivocally asserted a position in a prior proceeding" (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982))).

In Scariati, the plaintiff challenged an ordinance that was introduced by the business administrator, Brian Platt. Jersey City did not take a position on that subject and the court made no findings or judicial determinations regarding the procedural integrity of the ordinance and how it was introduced. Plaintiffs here challenge a different ordinance that was introduced in the same manner. In these circumstances, Jersey City is not judicially estopped from defending the manner in which City Council introduced the Ordinance because the City's actions are not "inconsistent" and did not "manipulat[e] the judicial process." See Jenkins, 178 N.J. at 359. Also, Jersey City never "unequivocally asserted a position" in Scariati, making judicial estoppel inappropriate in this case. See Cummings, 295 N.J. Super. at 387. Jersey City is not barred from challenging the manner in which City Council introduced the Ordinance.

2. IS THE ORDINANCE UNCONSTITUTIONALLY VAGUE?

Vague and ambiguous enactments are unconstitutional and unenforceable under both Article 1, paragraph 1 of the New Jersey Constitution and the Fifth Amendment of the United States Constitution. See State v. Cameron, 100 N.J. 586, 591 (1985). A municipal ordinance is entitled to a presumption of validity when it is attacked as being void for vagueness, just as it is when it is attacked for being arbitrary and capricious. Heyert v. Taddese, 431 N.J. Super. 388, 422 (App. Div. 2013). In determining whether an ordinance is vague, "a common sense approach is appropriate in construing the enactment." Chez Sez VIII, Inc. v. Poritz, 297 N.J. Super. 331, 351 (App. Div.), certif. denied, 149 N.J. 409, cert. denied, 522 U.S. 932 (1997). The language of the ordinance "should be given its ordinary meaning absent specific intent to the contrary." Mortimer v. Bd. of Review, 99 N.J. 393, 398 (1985).

The test for vagueness is whether a person of average intelligence comprehends the meaning of the words. State v. Afanador, 134 N.J. 162, 171 (1993). Penal laws are subjected to sharper scrutiny than enactments with only monetary penalties. Heyert, 431 N.J. Super. at 422 (citing Cameron, 100 N.J. at 592). See also Visiting Homemaker Service of Hudson Cty. v. Bd. of Chosen Freeholders of Cty. of Hudson, 380 N.J. Super. 596, 613 (App. Div. 2005) (noting that "greater imprecision is tolerated" where the provision in question is not penal).

The Ordinance does include a penal provision -- taken verbatim from Newark's ordinance -- stating that a taxpayer may be convicted of a crime, fined up to $2,000, and sent to prison for up to ninety days if the taxpayer shall either (1) "fail, neglect, or refuse to make any return," (2) "refuse to permit an officer or agent of the City to examine its books," or (3) "make any incomplete, false or fraudulent report or attempt to do anything whatever to avoid full disclosure of the amount of payroll tax due." Jersey City Mun. Code, Chapter A350-24-Rule XXII, § C. Because the

Ordinance calls for criminal penalties as well as monetary penalties, it is presumed valid but subject to sharper scrutiny than enactments with only monetary penalties. See Heyert, 431 N.J. Super. at 424 (citing Cameron, 100 N.J. at 592).

Plaintiffs argue that the Ordinance defines "payroll" too broadly and is vague because it may surpass the limits intended by the Statute. In particular, they attack the supervisor sections:

> Payroll shall mean an amount equal to the total renumeration [sic] paid by an Employer to Employers [sic] . . . if:
>
> a. The services are performed within the City of Jersey City; or
>
> b. The services are performed outside of the City of Jersey City, but the place from which the services are supervised is in the City of Jersey City.
>
> Supervision. Services shall be considered to be supervised from the City if an individual who either works in or is based in the City has the right to control and direct the manner of rendition of the Employee's service, has hiring and firing responsibility, and oversees the work of such Employee.
>
> [Jersey City Mun. Code Art IV, § 304-19].

However, the term has the same definition as the Statute, which has been in operation for forty-nine years with no known complaints. Moreover, as noted earlier, the Ordinance must be read as a whole, not by dissecting certain definitions without putting the words into the context of the Ordinance. See Visiting Homemaker, 380 N.J. Super. at 613 (stating that "whether an ordinance is unconstitutionally vague cannot be decided in a vacuum but must be made in light of its context and with a firm understanding of its purpose" (citing Cameron, 100 N.J. at 591)). Additionally, "it is presumed that 'the legislature acted with existing constitutional law in mind and intended the act to function in a constitutional manner.'" Id. at 607 (quoting State v. Profaci, 56 N.J. 346, 349 (1970)).

The definitions cannot be cherry-picked from the Ordinance: they must be placed in context of the rest of the Ordinance and considering the Legislative intent. Taking into account the language of the Ordinance, the language of the Statute, and the Legislature's intent to create a constitutional method of raising revenue in a municipality, it is clear that the payroll tax only applies to the employees whose income is subjected to Federal income tax withholdings. There is no vagueness or ambiguity with the definition of Supervisor in the Ordinance. Jersey City Mun. Code, Chapter A350-24-Rule XXII, § 304-18.

The precedent established with Newark's identical ordinance, which has been running efficiently for many years, provides a practical case study rendering plaintiffs' complaints regarding vagueness as mere speculation and conjecture. Plaintiffs' fear of unproven potential business implications -- like choosing to leave Jersey City because of the increased cost for being located here -- do not give rise to a vagueness argument.

The Ordinance is not unconstitutionally vague or ambiguous. When read as a whole, the Ordinance clearly reflects the intent of the Legislature and the Statute. Even subjecting the Ordinance to sharper scrutiny because it contains criminal penalties for non-compliance, the Ordinance is neither vague nor arbitrary.

3. IS THE ORDINANCE ARBITRARY AND CAPRICIOUS?

Municipal ordinances are presumed valid and will be upheld where "any state of facts may reasonably be considered to justify" them. Quick Check, 83 N.J. at 447. However, an ordinance "will be overturned if it is arbitrary, capricious, or unreasonable" but the presumption imposes a "heavy burden" on the party challenging the ordinance. Bryant v. City of Atlantic City, 309 N.J. Super. 596, 610 (App. Div. 1998). An ordinance will be upheld where its particular requirements

bear a "real, substantial, and obvious relationship to the goals of the ordinance." Hudson Circle Servicenter, Inc. v. Town of Kearny, 70 N.J. 289, 303 (1976).

Plaintiffs argue that the Ordinance is arbitrary because it imposes irrational distinctions for improper purposes. In a laundry list buried in a footnote, plaintiffs state that the Ordinance arbitrarily (1) interferes with the SFRA; (2) discriminates between residents and non-residents; (3) defines "employees" and "services" inconsistently with the Statute; (4) applies to "payrolls" of employees in another municipality who have no relationship to the Ordinance's purpose, via Jersey City "supervisors"; (5) acts extraterritorially in a way inconsistent with established law and recognized municipal powers; and (6) strongly penalizes violations of vague and ambiguous provisions. Although plaintiffs list these distinctions, they fail to explain the reasons these mere statements are legally meaningful and/or adequate claims. These arguments are addressed and rejected elsewhere in this opinion. That said, a focus on the residency provision as adopted by the Ordinance is helpful to the inquiry.

Initially, plaintiffs' statements are insufficient to meet the extraordinary burden of showing that the Ordinance is arbitrary and capricious. The Ordinance bears a "real, substantial, and obvious relationship" to the goals of the Statute and, as explained above, the Statute is not arbitrary and capricious. See Hudson Circle, 70 N.J. at 303. The Statute was implemented to allow Jersey City to fund its local fair share of the school budget pursuant to the SFRA. The Ordinance simply creates the mechanisms to implement the tax consistent with the terms of the Statute. What plaintiffs coin as "irrational distinctions" come directly from the Statute or from Newark's

ordinance, which has been in existence for almost half a century.[10] The terms of the Ordinance are "consistent with both State policy and legislative strictures." Ibid.

Additionally, the Ordinance is a policy decision by Jersey City, authorized by the Statute, and such policy decisions will not be disturbed unless they have no relation to the public interest and cannot be justified by any set of conceivable facts. Quick Check, 83 N.J. at 447, 449. Taxes by a municipality that only apply to non-residents are not per se arbitrary and capricious. See Square Parking, 185 N.J. Super. 468 (upholding Jersey City parking tax that applied only to non-residents). In upholding the parking tax, Square Parking noted that a rational basis existed to exclude residents from the tax because "residents already shoulder a heavy burden in the form of real estate taxes and rents, the exemption from the parking tax will serve to relieve such residents of an additional burden." Id. at 476. Additionally, the tax purposely applied only to non-residents because they "use the city streets and the ancillary services of the city, which include road maintenance, fire protection services, emergency medical services and police protection, among others." Ibid.

The payroll tax is applied to the payrolls of non-residents for the same purposes as in Square Parking. See ibid. There is a rational basis to only tax non-residents who use the roads, police force, and emergency medical services: all sectors of the Jersey City municipal government that compete with the schools for funding. For Jersey City to remain attractive to businesses and employees, it is imperative that the City maintain and continue to construct more roads to ease the existing traffic and congestion on the streets. The safety of employees who commute to the City

[10] Newark has amended the language of its ordinance many times since 1970. However, the challenges brought by plaintiff have been in effect through the Statute or Newark's Ordinance since 1970. The changes made by Newark since its ordinance was upheld in Farmer have been discussed but are irrelevant as to plaintiffs' failure to join Newark as an indispensable party.

is of the utmost importance to the businesses that employ workers as well as the City itself. To impose a tax only on those nonresidents that take advantage of Jersey City's resources is rational, especially because those resources take funding away from the schools.

The City's decision to distinguish between residents and nonresidents is not only justified by conceivable facts, but is justified by a set of facts already upheld by the courts. See id. at 476-477.

Plaintiffs also have failed to make a competent showing of their economic loss attributable to the law, as well as a discriminatory effect on interstate commerce as a whole. See Kleinsmith, 571 F.3d at 1042. In Kleinsmith, the Circuit Court upheld a Utah law that required all attorneys handling trust matters to maintain an office in Utah, rejecting the plaintiff's argument that the law was discriminatory on interstate commerce because the plaintiff had failed to allege sufficient facts. Id. at 1043. In dismissing the plaintiff's appeal, the Circuit Court noted that the plaintiff had failed to show how the "law alters competitive balance between resident and nonresident attorneys" and that the plaintiff "fails to say that he has so much as investigated the costs of complying with the present statute." Id. at 1042.

So too here. Plaintiffs failed to show that the tax on the payroll of non-resident employees will have a discriminatory effect on interstate commerce. They merely rely on speculation and conjecture to state that current non-resident employees potentially will be subject to discrimination. Nowhere in the certifications submitted by plaintiff employers do representatives from businesses actually state that they will hire a resident employee over a non-resident employee simply because of the one-percent tax on payroll. The speculation asserted by plaintiffs is not enough to survive defendants' motions for dismissal; the residency provision is not arbitrary and capricious.

4. DOES THE ORDINANCE VIOLATE PILOT AGREEMENTS?

Plaintiffs argue that the payroll tax violates agreements made between the City and the Urban Renewal Entities ("UREs"). Pursuant to Article VIII, Section 4, paragraph 1 of the New Jersey Constitution, UREs may be formed to assist a city in developing and/or redeveloping blighted areas. As inducement for these entities to make such an investment, the City and UREs may enter into financial agreements that include tax exemptions on the land, buildings, structures, and improvements to same. These unique financial arrangements are authorized by the Long-Term Tax Exemption Law, N.J.S.A. 40A:20-1 to -22 ("LTTE"), and commonly come in the form of payments in lieu of taxes (PILOT).[11]

PILOTs provide for a "single continuing *exemption from local property taxation* for the duration of the financial agreement," N.J.S.A. 40A:20-12, and that payment is made "in lieu of any taxes to be paid on the *buildings and improvements of the project*," N.J.S.A. 40A:20-12(b) (emphasis added).

Plaintiffs argue that the annual PILOTs and administrative fees authorized by the LTTE are intended to be the "exclusive method by which the UREs compensate municipalities for being granted tax exemptions." Jersey City Sewerage Auth. v. Hous. Auth., 40 N.J. 145 (1965), held otherwise: a PILOT agreement does not absolve a developer from paying other taxes, like sewerage charges. A PILOT is not the exclusive payment made to municipalities; UREs also can be charged for additional services rendered by the municipality, like sewerage treatments. See id.

Plaintiffs cite to no authority to support their contention that PILOTs are intended to be the "exclusive method by which the UREs compensate municipalities for being granted tax

[11] For an overview of how PILOTs may operate, see MEPT Journal Square Urban Renewal, LLC v. City of Jersey City, 455 N.J. Super. 608 (App. Div. 2018).

exemptions." The governing statute specifies repeatedly that the UREs would be exempt "from local property taxation" and that a single payment is made in lieu of taxes for "buildings and improvements" made to the property. See N.J.S.A. 40A:20-12 (emphasis added); 40A:20-12(b). There is no correlation between PILOT payments, which only adjust property taxes, and the assessment of this payroll tax. Plaintiffs admit that PILOT payments, as described by the constitutional and statutory provisions listed in the amended complaint, are a matter of property taxation. Plaintiffs have failed to express, and this court has not found, a connection between the property tax abatements via PILOT payments and a payroll tax.

Like the City charging UREs for sewerage treatment, which is constitutional and valid, the payroll tax is equally as valid and not in violation of any PILOT agreement. See Sewerage Auth., 40 N.J. 145. The monies paid by these businesses will indirectly, and likely directly, benefit the employers and their employees: although the monies collected from the payroll tax must be appropriated to fund the school district, it does not mean that the only benefit of the tax is to fund the schools. The stated intent of the payroll tax is to bring Jersey City up to funding its "local fair share" pursuant to the SFRA. However, the City, in general, needs to increase its revenue to continue funding public services like paving and maintaining the streets, supporting fully-staffed police and fire departments, and the like. If the City is unable to implement a payroll tax, it necessarily would be forced to take money away from other public services to help fund the schools. Thus, the money paid directly to the school district through the payroll tax indirectly funds all other municipal services -- the police and fire departments, municipal court systems, and public work projects -- because money is not being taken away from those budgets. Maintaining full budgets for the City's other departments directly benefits the businesses and employees who work in the City.

Additionally, approximately 90,000 people commute into Hudson County from other municipalities and other states. Pl.'s Reply Br. 18. The workers who come into Jersey City do not pay any taxes to the City but are able to benefit from its services. The payroll tax is an equalizer that indirectly and directly benefits those commuters who work in Jersey City but live elsewhere. The money paid toward the school district will allow for continuing full funding of all municipal services, all of which benefit the general public as a whole.

Because the PILOT agreements are only related to property taxes and the Ordinance is only a tax on payroll, the Ordinance is unrelated to any PILOT agreement; the Ordinance does not violate the PILOT agreements.

DOES THE STATUTORY SCHEME VIOLATE THE THOROUGH AND EFFICIENT EDUCATION CLAUSE?

Plaintiffs argue that the Statute and the Ordinance violate the thorough and efficient education clause (the "T&E Clause") of the New Jersey Constitution. See N.J. Const. art. VIII, § IV, ¶ 1 (mandating that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient [education]"). The purpose of the T&E Clause is to ensure that children across the state receive equally rigorous educations, no matter how poor or wealthy their school district may be. There has been a string of judicial decisions addressing whether taxation and funding of school districts comply with the T&E Clause.[12] Robinson v. Cahill, 62 N.J. 473 (1973), made clear that it is the State's obligation to rectify any violation of the T&E Clause. If a local government fails to meet its constitutional obligations, the State must compel the local government to act or the State must itself meet its continuing obligation by providing aid to the local government. See id. at 513. School funding is "authorized and controlled, in term of source,

[12] The case law begins with Robinson v. Cahill, 62 N.J. 473 (1973), and continues through over 20 decisions under the case name Abbott v. Burke.

amount, distribution and use, by the State." Abbott v. Burke, 119 N.J. 287, 375 (1990) ("Abbott II"). See also Abbott v. Burke, 170 N.J. 537, 562 (2002) ("Abbott VIII") (explaining that judicial control arises only when all other remedies fail).

Plaintiffs argue that the payroll tax, as a way to fund the school district, conflicts with the SFRA and the Abbott decisions. According to plaintiffs, funding the Jersey City school district with money collected from sources other than the local property tax only skews the approved formula laid out in the SFRA and approved by the Supreme Court of New Jersey. Plaintiffs also assert the payroll tax is incongruously based solely on money earned by Jersey City non-residents, who purportedly do not benefit from the funding of Jersey City schools. Plaintiffs assert that, contrary to the SFRA, the tax also includes payroll of companies that do not own property in Jersey City yet maintain brick and mortar operations in another town, county, or state.

Plaintiffs further assert that the LTAA violates the T&E Clause because there is no constitutionally permitted reasonable basis for Jersey City to fund its school in a manner different from every other school district. In plaintiffs' view, Jersey City should not be singled out to fund its schools through a payroll tax when there are less wealthy districts that received a larger budget cut.

Plaintiffs' reliance on the SFRA and Abbott decisions is misplaced. The Constitution delegates the power to tax to the Legislature, not the Courts. School funding is "authorized and controlled, in term of source, amount, distribution and use, by the State." Abbott II, 119 N.J. at 375. The role of the courts is to ensure constitutional compliance, and judicial control of school funding arises only when all other remedies fail. Id. at 187; Abbott v. Burke, 199 N.J. 140, 183 (2009) (Abbott XX).

The payroll tax was adopted to assist Jersey City in funding its local fair share; it is not a substitute for the State's required funding. Contrary to plaintiffs assertions, nothing in the case law or in the language in the Constitution requires that school funding come only from property taxes. The emphasis lies elsewhere: municipalities must pay for schools and, when unable to fully fund the school district, the State must step in and supplement the municipalities' budgets. Jersey City has had difficulty funding its schools fully through property taxes alone, and has not properly funded its local fair share pursuant to the SFRA. In 2018-2019, Jersey City was to fund $398,895,043 for its school districts. Dehmer Certification ¶ 5. That number was calculated pursuant to the SFRA formula, as approved by the Supreme Court. See N.J.S.A. 18A:7F-52; Abbott XX, 199 N.J. 140 (2009). Jersey City did not fully fund its local fair share, so the State provided more money than required under the SFRA. Instead of providing Jersey City with $191,268,212 -- the SFRA-calculated equalization aid -- the State supplied the City with $270,661,365, or $79,393,153 more than the SFRA formula required. Dehmer Certification ¶ 6.

To avoid constantly over-funding Jersey City, and amidst budget cuts, the Legislature amended the LTAA as a means to ensure that Jersey City could raise revenue through a payroll tax to meet its local fair share and prevent what should be avoided: layoffs of teachers, cutting programs, cutting transportation and bus routes, and increased classroom side. The State's fiscal situation, including its inability to further fund schools beyond current levels, combined with the particular challenges facing cities of the first class, creates a perfect storm of the "extraordinary circumstances" that merit the remedy of a payroll tax. See Farmer, 329 N.J. Super. at 40. The Legislature may adopt "any remedy, including one that completely revamps the present system, in terms of funding . . . so long as it achieves a thorough and efficient education." Abbott II, 119 N.J. at 388. Plaintiffs' constitutionally untethered claim that a payroll tax is "inherently impermissible"

fails as a matter of law. It is not for the courts to second guess "nuanced and complex funding decisions." Abbott XX, 199 N.J. at 171. Plaintiffs also failed to cite to any authority stating that municipalities are prevented from using tools other than property taxes to fund school districts. There simply is no reason that a payroll tax cannot be used to fund the schools and particularly to help a city of the first class fund its local fair share pursuant to the SFRA.

The Legislature's flexibility and authority to enlist local government in its constitutional mission was properly exercised because nothing prohibits the authorization of a payroll tax. Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 522 n.14 (1937) (observing that, across the United States, school funding has been earmarked from such sources as a tobacco tax, liquor tax, and chain store tax). It is the State's obligation to rectify any violation of the T&E Clause. See Robinson, 62 N.J. at 513. The State is giving Jersey City a tool to raise its local fair share for school funding to the full extent required by the SFRA. Plaintiffs' argument that the State is passing their funding responsibility onto the businesses through the payroll tax because the money collected by the payroll tax will only be used to fund Jersey City's local fair share is, on its face, unconvincing. If the City collects more money than the SFRA formula requires, the excess money will not be used to lessen the State's burden to provide equalization aid. Instead, any surplus must be held in an escrow account for the following years. The State is still required to pay every penny towards Jersey City schools that the SFRA formula requires, but the State will not be required to pay any additional funds over what is required by the SFRA calculation because Jersey City will be able to fund its local fair share completely.

Plaintiffs misinterpret the Statute and its supporting Abbott decision. See Abbott XX, 199 N.J. 332. They fail to appreciate that the SFRA formula calculates a local fair share to be funded by the city, and that it is the city's responsibility to raise that much money through taxes. Whatever

difference remains between the local fair share and adequacy budget will be supplied by the State, which the SFRA refers to as equalization aid. Nowhere in the SFRA nor in subsequent Abbott decisions does anyone state that the local fair share must be funded by the State. In fact, the opposite is true. The SFRA clearly calculates and describes how the local fair share is to be determined and that it should be paid by the local government. If, like here, the municipality is not fully funding its local fair share, the Legislature may "force a local government to act." Robinson, 62 N.J. at 513. Plaintiffs' argument that the state is cutting funding to schools skews the meaning of the budget cuts. The State is cutting only the funding that it should not be paying in the first place: money in excess of what is required pursuant to the SFRA calculation of equalization aid. The only funding that Jersey City is losing is the additional funds that make up for Jersey City's failure to pay the local fair share. In short, plaintiffs' assertion that the State is underfunding education is not supported by any facts. To the contrary, the State was overfunding Jersey City schools by providing more money than required by the calculated equalization aid. Now, Jersey City will be able to meet that requirement and fund its local fair share by taxing the payrolls of Jersey City businesses.

Further, the purpose of the Abbott decisions, and their interpretation of the T&E Clause, is to ensure that underfunded school districts become fully funded and on par with the rest of the State's schools. The Supreme Court of New Jersey does not take lightly to schools being underfunded. Despite the fiscal crises at the onset of the Great Recession, it ordered that, in the Abbott districts,[13] school funding had to remain at existing levels. Abbott XXI, 206 N.J. 332, 464-66 (2011). Striking down the payroll tax would cause Jersey City, a former Abbott district, to

[13] Abbott districts are designated as the poorest and most underfunded school districts in the State.

backslide into an underfunded status. This cannot be permitted. Plaintiffs' claim that the Statute and Ordinance are an "end run" around Abbott are unfounded. The Statute and Ordinance actually preserve the doctrine's fundamental aims and should be sustained; they are entirely in keeping with the mandate that the Legislature is "entitled to take reasoned steps, even if the outcome cannot be assured, to address the pressing social, economic, and educational challenges confronting our State." Abbott XXI, 206 N.J. at 332.

The Statute and Ordinance do not violate the T&E Clause of the New Jersey Constitution.

CONCLUSION

Plaintiffs bear the burden of demonstrating that the Statute and the Ordinance should not be enforced as written; this they have failed to do. As a preliminary matter, although it is obvious that Newark is an indispensable party to these proceedings, plaintiffs did not name Newark as a party defendant. For that reason alone, plaintiffs' amended complaint is dismissed.

Substantively, the objections raised by plaintiffs to the Statute and the Ordinance fail to carry the day and are overruled. As a result, defendants' motions to dismiss are granted, plaintiff's cross-motion for summary judgment is denied, and judgment is entered in favor of defendants and against plaintiffs on the amended complaint.

An appropriate order follows.