**IN THE SUPREME COURT OF OHIO**

| | | |
|---|---|---|
| OHIO GROCERS ASSOCIATION, et al., | : | Case No. 2008-2018 |
| Appellees, | : | On Appeal from the Franklin County Court of Appeals, Tenth Appellate District |
| v. | : | |
| WILLIAM W. WILKINS [RICHARD A. LEVIN], in his official capacity as Ohio Tax Commissioner, | : | Court of Appeals Case No. 07AP-813 |
| Appellant. | : | |

# MERIT BRIEF OF AMICUS CURIAE OHIO BUSINESS ROUNDTABLE IN SUPPORT OF APPELLANT WILLIAM W. WILKINS


RICHARD C. FARRIN (0022850)
(Counsel of Record)
THOMAS M. ZAINO (0041945)
McDonald Hopkins LLC
41 S. High Street
Suite 3550
Columbus, OH 43215
(614) 458-0035
(614) 458-0028 (Fax)
rfarrin@mcdonaldhopkins.com

KATHLEEN M. TRAFFORD (0021753)
Porter Wright Morris & Arthur LLP
41 S. High Street
Columbus, OH 43215
(614) 227-1915
(614) 227-2100 (Fax)
ktrafford@porterwright.com

COUNSEL FOR AMICUS CURIAE
OHIO BUSINESS ROUNDTABLE

RICHARD CORDRAY (0038034)
Attorney General of Ohio

BENJAMIN C. MIZER (0083089)
Solicitor General
(Counsel of Record)
STEPHEN P. CARNEY (0063460)
ELISABETH A. LONG (0084128)
Deputy Solicitors
LAWRENCE D. PRATT (0021870)
Assistant Attorney General
Chief, Taxation Section
JULIE BRIGNER (0066367)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, OH 43215
(614) 466-8980
(614) 466-5087 (Fax)
benjamin.mizer@ohioattorneygeneral.gov

COUNSEL FOR APPELLANT
RICHARD A. LEVIN, OHIO TAX
COMMISSIONER



FILED
APR 06 2009
CLERK OF COURT
SUPREME COURT OF OHIO

CHARLES R. SAXBE (0021952)
DONALD C. BREY (0021965)
GERHARDT A. GOSNELL, II (0064919)
Chester, Wilcox & Saxbe LLP
75 E. State Street
Suite 1000
Columbus, OH 43215
(614) 221-4000
(614) 221-4012 (Fax)

COUNSEL FOR APPELLEES
OHIO GROCERS ASSOCIATION, ET AL.

## TABLE OF CONTENTS

Page

Table of Authorities ..... iii

Introductory Statement ..... 1

Statement of Interest of Amicus Curiae ..... 4

Statement of Facts ..... 6

Argument ..... 6

Proposition of Law ..... 6

The Ohio Commercial Activity Tax is an Excise Tax Imposed on Persons for the Privilege of Doing Business in the State, Measured by Gross Receipts for the Annual Period for Which the Privilege is Granted. It is not an Excise Tax Levied or Collected Upon the Sale or Purchase of Food for Human Consumption Off the Premises Where Sold or Upon the Wholesale Sale or Purchase of Food for Human Consumption. Therefore, the Inclusion of Gross Receipts From Sales of Food for Human Consumption in the Base by Which the Ohio Commercial Activity Tax is Measured does not Violate Sections 3 (C) or 13 of Article XII of the Ohio Constitution.

A. The Proscriptions of Sections 3 (C) and 13 of Article XII of the Ohio Constitution Apply to Excise Taxes on Sales of Food; they do not Apply to Excise Taxes on the Privilege of Doing Business ..... 8

1. The language of the two constitutional amendments is clear and unambiguous and must be enforced as written ..... 8

2. The history of the adoption of the constitutional amendments confirms that the drafters and adopters intended what the language clearly states: to prohibit the imposition of transactional excise taxes on sales of food for human consumption ..... 9

a. The history of Section 3(C) ..... 10

b. The history of Section 13 ..... 12

c. At the time both constitutional amendments were adopted the existing jurisprudence distinguished between a tax on the privilege of doing business that used a factor to measure the tax and a tax on the factor itself ..... 14

3. The exceptions in Sections 3(C) and 13 of Article XII to the general authority of the General Assembly to enact excise taxes must be strictly construed and the CAT statutes must be afforded a strong presumption of constitutionally ..... 14

B. The CAT is not an Excise Tax on Sales or Purchases; it is an Excise Tax on the Privilege of Doing Business in Ohio ..... 16

C. The Fact that the CAT is Measured by Gross Receipts from Sales (as well as from Other Business Activities) does not Convert the CAT into a Tax on Sales ..... 17

D. By its Operation, the CAT is a Tax on the Privilege of Doing Business, not a Transactional Tax on Sales ..... 26

Conclusion ..... 29

Appendix

Ballot language of proposed constitutional amendment printed on the ballot for the election held on November 3, 1936 (former Section 12, Article XII) ..... Appx. 1

Ballot language of proposed constitutional amendments printed on the ballot for the election held on November 8, 1994 (including Issue 4, the proposed constitutional amendment adding Section 13 to Article XII .... Appx. 3

Excerpt of November 8, 1994 ballot language (part relating to Issue 4, enlarged for better legibility) ..... Appx. 8

Am. Sub. H.B. No. 904 (portion enacting former R.C. Chapter 5753) ..... Appx. 9

## TABLE OF AUTHORITIES

**Cases** Page(s)

*Aluminum Co. of America v. Evatt* (1942), 140 Ohio St. 385 ..... 19

*Bank One Dayton, N.A. v. Limbach* (1990), 50 Ohio St.3d 163 ..... 20, 22, 23, 26

*Bellemar Parts Industries, Inc. v. Tracy* (2000), 88 Ohio St.3d 351 ..... 8

*Cameron Coca-Cola Bottling Co. v. Tracy* (July 28, 1993),
Franklin C.P. No. 93CVH02-729 ..... 12, 13

*Castleberry v. Evatt* (1946), 147 Ohio St. 30 ..... 11

*Celina Mutual Ins. Co. v. Bowers* (1965), 5 Ohio St.2d 12 ..... 18

*Cleveland v. Bd. of Tax Appeals* (1950), 153 Ohio St. 97 ..... 9

*East Ohio Gas Co. v. Limbach* (1986), 26 Ohio St.3d 63 ..... 3, 18, 24

*Express Co. v. State* (1896), 55 Ohio St. 69 ..... 14, 17, 24

*Fifth Third Union Trust Co. v. Peck* (1954), 161 Ohio St. 169 ..... 20, 24

*Ford Motor Company v. Seattle* (2007), 160 Wn.2d 32, 156 P.3d 185 ..... 22

*Kelleys Island Caddy Shack, Inc. v. Zaino*, 96 Ohio St.3d 375,
2002-Ohio-4930 ..... 15

*Key Serv. Corp. v. Zaino* (2002), 95 Ohio St.3d 11 ..... 8

*Maine v. Grand Trunk Ry. Co. of Canada* (1891), 142 U.S. 217 ..... 14, 21

*Mut. Holding Co. v. Limbach* (1994), 71 Ohio St.3d 59 ..... 17, 19

*Rio Indal v. Lindley* (1980), 62 Ohio St.2d 283 ..... 19, 24, 27

*Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1 ..... 8

*Saviers v. Smith* (1920), 101 Ohio St. 132 ..... 16

*Short Brothers (USA), Inc. v. Arlington County* (1992), 244 Va. 520,
423 S.E.2d 172 ..... 21

*State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723 .....14, 15

*State v. Forney* (1923), 108 Ohio St. 463 .....15

*State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142.....15, 16

*State ex rel. Engle v. Indus. Comm.* (1944), 142 Ohio St. 425 .....14

*State ex rel. Maurer v. Sheward* (1974), 71 Ohio St.3d 513.....8

*State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567.....15

*The Raymond Bag Co. v. Bowers* (1955), 163 Ohio St. 275.....20

*Village of Brewster v. Hill* (1934), 128 Ohio St. 354 .....10

*Werner Machine Co. v. Dir. of Div. of Taxation* (1956),
350 U.S. 492 .....9, 20, 23

*Western Union Telegraph Co. v. Mayer* (1876), 28 Ohio St. 521 .....17

**Ohio Constitutional Provisions**

Section 3(C), Article XII..... passim

Section 13, Article XII..... passim

Section 12, Article XII (former) .....10

**Statutes**

**Ohio**

R.C. 5725.18 .....18, 19

R.C. 5725.25 .....18

R.C. 5733.05(B)(2)(d).....28

R.C. 5733.06 .....7

R.C. 5733.24 .....28

R.C. 5751.01(E)(1) .....6, 26

R.C. 5751.01(E)(2) ..... 26

R.C. 5751.01(E)(3) ..... 26

R.C. 5751.01(E)(9) ..... 26

R.C. 5751.01(F) ..... 23

R.C. 5751.01(G) ..... 6

R.C. 5751.02 ..... 1, 6, 7, 16

R.C. 5751.02(A) ..... 26

R.C. 5751.03(A) ..... 7, 26

R.C. 5751.03(B) ..... 6, 27

R.C. 5751.033(J) ..... 27

R.C. 5751.11 ..... 28

R.C. 5751.50 ..... 7, 27

R.C. 5751.52 ..... 27

R.C. 5751.53 ..... 7, 27

R.C. Chapter 5753 ..... 12

R.C. 5753.02 ..... 10, 12

R.C. 5753.04 ..... 12

G.C. 5546-2 ..... 10

**Federal**

Public Law 86-272, Section 383, Title 15, U.S. Code ..... 9

Section 3124(a), Title 31, U.S. Code ..... 9

**Other Authorities**

Am.Sub.H.B. No. 66 ..... 1, 5

Am.Sub.H.B. No. 904, 144 Ohio Laws, Part IV, 6598 ..... 12

H.B. 134, 115 Ohio Laws, Part II, 306 ..... 10

116 Ohio Laws, Part II, 69 ..... 10

## Introductory Statement

The Tenth District Court of Appeals below declared that the Ohio Commercial Activity Tax ("CAT"), levied by R.C. 5751.02 "on each person with taxable gross receipts for the privilege of doing business in this state[,]" is unconstitutional to the extent it includes taxable gross receipts from wholesale sales of food and retail sales of food for human consumption off the premises where sold in the base by which the tax is measured. Specifically, the court held that the tax violates Sections 3(C) and 13 of Article XII of the Ohio Constitution, which prohibit excise taxes upon such sales of food. This holding is based on an erroneous interpretation of Sections 3(C) and 13, and on an erroneous characterization of the CAT as a transactional tax. If left standing, this holding will have a severe impact on the CAT and on Ohio's future economic development.

The CAT is the cornerstone of major business tax reform enacted by the Ohio General Assembly in Am.Sub.H.B. No. 66 ("H.B. 66"), the biennial budget bill for 2006-2007, which became effective June 30, 2005. This tax reform resulted from a collaboration of the Governor, the General Assembly, and the business community. Its goal was to modernize Ohio's tax system to make it less onerous and more conducive to capital investment and entrepreneurial activity in Ohio, thereby fueling economic growth and reversing the state's steady economic decline.

The new reforms achieved this goal by eliminating two taxes that had long imposed an unfair burden on Ohio businesses and discouraged capital investment in Ohio: the corporation franchise tax and the tangible personal property tax on property used in business. In their place, H.B. 66 adopted the CAT, a broad-based, low-rate tax, which applies more evenly to a much wider range of business entities. Unlike the old system, the new business tax system does not discourage capital investment in Ohio

because businesses are no longer subjected to a heavy tax burden for making capital investments in the state. By eliminating that burden, the tax system now fosters new capital investment in Ohio by both existing businesses and new businesses looking for a tax climate that allows them to be competitive. The new business tax system substantially lowered the overall tax burden on business. The 2005 tax reform also significantly reduced personal income tax rates.

The CAT is an annual excise tax imposed on Ohio businesses for the privilege of doing business in this state and is measured by taxable gross receipts from the annual period. The base includes gross receipts from a broad range of business activities. The inclusion of this broad range of activities in the measure is a critical element of the CAT; it ensures that the CAT is broadly based, which, in turn, allows the use of a very low tax rate. It also results in a business tax system that more fairly taxes businesses based on the value of their privilege of doing business in Ohio.

If one business segment is allowed to exclude gross receipts from a significant portion of its business from the base by which the CAT is measured, those businesses will be taxed on only a portion of the value of their privilege to do business, while all other businesses will be taxed on the full value of their privilege to do business. That is inimical to the purpose of a business privilege tax, which is to tax the fair value of the business done in the state. Moreover, any significant reduction of the base will increase pressure to raise the tax rate, which would only exacerbate the unfair burden placed on those businesses that are taxed on the full value of their business done in Ohio and undermine Ohio's long-term competitiveness. The alternative is a return to the previous,

antiquated business tax scheme that had adversely impacted Ohio's ability to keep existing businesses and attract new investment.

In addition to putting the vitality of the 2005 business tax reforms in jeopardy and threatening Ohio's economic development, the decision below is fundamentally flawed because it fails to apply the clear and unambiguous language of Sections 3(C) and 13 of Article XII and the intent of the adopters. It also conflicts with a long line of decisions of this Court, as well as decisions of the United States Supreme Court, that recognize the critical legal distinction between a tax **imposed on** receipts, sales, income, or property, and a business privilege tax **measured by** receipts, sales, income, or property. See, e.g., *East Ohio Gas Co. v. Limbach* (1986), 26 Ohio St.3d 63, 66-67 (holding that the public utilities excise tax, although measured by gross receipts, was not a tax on the daily transactions that generated the gross receipts; rather the "gross receipts are merely the measure of the tax on the privilege"). Like the losing utility in *East Ohio Gas*, the court of appeals mischaracterized the nature of a business privilege tax measured by gross receipts as a tax on the sales that generated the gross receipts.

It is this basic mischaracterization of the CAT that led the court of appeals to its erroneous conclusion that the CAT is imposed on sales of food at wholesale and at retail for off-premises consumption and therefore violates Sections 3(C) and 13 of Article XII of the Ohio Constitution. The court's mischaracterization of the CAT was based in large part on its errant conclusion that the CAT is, in its operation, a transactional tax on sales. But the court did not actually analyze the actual operation of the CAT. Rather, the court based its conclusion solely on the fact that the privilege tax was measured by gross

receipts. A review of the actual operation of the CAT reveals that the court was plainly wrong.

The CAT is an annual tax, measured by the results of the business (gross receipts) from that annual period. A person's CAT liability cannot be determined based on a specific transaction that generates a gross receipt. In fact, it cannot be determined until the end of the annual period. The fact that persons with no more than $150,000 of taxable gross receipts in a tax year are not even subject to the CAT and that persons with between $150,001 and $1 million of taxable gross receipts in a tax year pay the same tax of $150 establishes that the CAT is not in its operation a tax on transactions. The fact that various business activity-type credits, such as jobs credits, research expense credits, and credits for net operating losses, are available further evidences that the CAT is an excise tax on the privilege of doing business, not an excise tax on transactions. These and other provisions in the CAT law that are discussed later in the argument demonstrate that the CAT operates like the franchise tax that it replaced, not like a transactional tax.

**Statement of Interest of Amicus Curiae**

The Ohio Business Roundtable ("BRT") is a nonprofit, nonpartisan organization comprised of the chief executive officers of Ohio's major business enterprises, representing a wide range of industries throughout Ohio. Its mission is to apply the knowledge and experience of its CEO members, in collaboration with public leaders, to address and solve complex problems affecting Ohio's social and economic vitality. BRT is highly selective in the issues it undertakes to solve; its CEO members focus on advocating public policies that will foster economic growth in Ohio and improve the standard of living for all Ohioans.

In 2004, concerned by Ohio's steady economic decline, BRT launched a major initiative to modernize Ohio's tax system. The initiative sought to create a new tax system that would foster capital investment and stimulate entrepreneurial activity in a broad-based, fair, equitable, and simple manner. The initiative – which entailed significant research, benchmarking, design work, and the development of models to evaluate the revenue and economic impact of various options – culminated in a comprehensive tax reform proposal that, among other things, would eliminate the tangible personal property tax and the corporation franchise tax, and replace those business taxes with the CAT, a broad-based, low-rate business privilege tax measured by gross receipts. The reform proposal also reduced the rates of the state's personal income tax across the board by 21 percent.

The core components of this tax reform proposal were incorporated into the Governor's tax reform package included in H.B. 66. BRT led the business community's efforts in working with the Governor's administration and the General Assembly to assure the successful enactment of the tax reform package and its central innovation: the CAT.

Because of its substantial involvement in the creation and adoption of the tax reform proposal, BRT and its CEO members have a strong interest in seeing that all elements of the tax reform package remain intact. The entire reform package, including the significant reduction of the personal income tax, was a carefully-crafted balance that involved removing elements of the old system that discouraged economic growth in Ohio, reducing the tax burden on individuals, and adding a more equitable broad-based, and low-rate business privilege tax to partially replace revenue losses from eliminating

the tangible personal property and corporation franchise taxes and reducing personal income tax rates. The significant reduction of the CAT base that would result from the court of appeals' decision would substantially alter this delicate balance that is so critical to Ohio's future economic success.

## Statement of Facts

BRT adopts the statement of facts in appellant's merit brief.

## Argument

**Proposition of Law:**

**The Ohio Commercial Activity Tax is an Excise Tax Imposed on Persons for the Privilege of Doing Business in the State, Measured by Gross Receipts for the Annual Period for Which the Privilege is Granted. It is not an Excise Tax Levied or Collected Upon the Sale or Purchase of Food for Human Consumption Off the Premises Where Sold or Upon the Wholesale Sale or Purchase of Food for Human Consumption. Therefore, the Inclusion of Gross Receipts From Sales of Food for Human Consumption in the Base by Which the Ohio Commercial Activity Tax is Measured does not Violate Sections 3(C) or 13 of Article XII of the Ohio Constitution.**

Because the court of appeals' decision is based principally on a fundamental mischaracterization of the CAT as a tax on transactions, it is important to examine the nature of the tax, its incidence, and its operation. As R.C. 5751.02 explicitly states, the CAT is a tax levied "on each person with taxable gross receipts for the privilege of doing business in this state[,]" and is "an annual privilege tax for the calendar year[.]" Generally, persons with taxable gross receipts of $150,000 or less during a calendar year are not subject to the CAT. R.C. 5751.01(E)(1).

The value of the privilege taxed by the CAT is measured by the person's taxable gross receipts for the annual tax period. Taxable gross receipts are defined as the gross receipts sitused to Ohio. R.C. 5751.01(G). The measurement contains two components. R.C. 5751.03(B) provides that the tax on persons with taxable gross receipts of up to $1

million is $150. This is in the nature of a minimum tax, similar to the minimum franchise tax imposed by R.C. 5733.06. For persons with taxable gross receipts of more than $1 million, R.C. 5751.03(A) provides a second component: the privilege tax is measured by applying the tax rate (.0026 when the CAT is fully phased in) to the taxable gross receipts in excess of $1 million for the tax period. The product of this calculation is then added to the minimum tax of $150 to arrive at the CAT liability for the tax period.

Various credits are available to be applied against the CAT liability, such as the job creation and job retention tax credits, the qualified research expense credit, and the qualified research and development loan credit. Some unused franchise tax credits can be converted to CAT credits, including a credit for net operating losses that could not be used because of the phase-out of the franchise tax. R.C. 5751.50 through 5751.53. These credits are all related to the operation of the business of the taxpayer; most are based on the operation of the taxpayer during the entire annual period. None of the credits are related to or based on specific transactions.

Notwithstanding the unambiguous language of R.C. 5751.02 and the established precedent of this Court recognizing the fundamental difference between an excise tax on the privilege of doing business in this state measured by sales, receipts, income, or property and a tax imposed on sales, receipts, income, or property, the court of appeals held that the CAT is an excise tax levied or collected on sales and therefore implicates the proscriptions of Sections 3(C) and 13 of Article XII of the Ohio Constitution. That holding is based on several basic misconceptions of the operation of the CAT and flawed readings of this Court's decisions.

### A. The Proscriptions of Sections 3(C) and 13 of Article XII of the Ohio Constitution Apply to Excise Taxes on Sales of Food; they do not Apply to Excise Taxes on the Privilege of Doing Business.

#### 1. The language of the two constitutional amendments is clear and unambiguous and must be enforced as written.

It is a fundamental canon of construction that the first step in determining the meaning of a constitutional provision is to look at the language of the provision. *State ex rel. Maurer v. Sheward* (1994), 71 Ohio St.3d 513, 520. Where the language is clear and unambiguous, it must be enforced as written. *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1.

Section 3(C), Article XII of the Ohio Constitution prohibits the levy or collection of excise taxes "upon the sale or purchase of food for human consumption off the premises where sold." Section 13, Article XII of the Ohio Constitution provides in relevant part that "[n]o sales or other excise tax shall be levied or collected (1) upon any wholesale sale or wholesale purchase of food for human consumption[.]" By their clear language, these provisions proscribe only excise taxes **upon the sale of food for human consumption**. Just as clearly, neither of these constitutional provisions prohibits the levy of an excise tax on the privilege of doing business that includes gross receipts from such sales in the base by which the tax is measured. Had that been the intent, it would have been easy to include language that stated as much. See *Bellemar Parts Industries, Inc. v. Tracy* (2000), 88 Ohio St. 3d 351, 355; *Key Serv. Corp. v. Zaino* (2002), 95 Ohio St.3d 11, 15.

For example, language similar to that used by Congress in Public Law 86-272, which was enacted to prohibit a state from imposing a net income tax if the foreign taxpayer's only activity in the state was the solicitation of orders, could have been used

was passed, to the attending circumstances at the time of its adoption, to the cause, occasion or necessity therefore * * * ." Accord *Village of Brewster v. Hill* (1934), 128 Ohio St. 354. A consideration of the history of the adoption of Sections 3(C) and 13 of Article XII leads to the inescapable conclusion that both constitutional amendments were intended solely to prohibit sales or other transactional excise taxes on sales of food.

Both Section 3(C) and Section 13 of Article XII were adopted shortly after the enactment of transactional excise taxes levied on sales of food. The predecessor to current Section 3(C) (former Section 12, Article XII) was a reaction to the fact that the sales tax enacted in 1934 applied to the purchase of groceries. Section 13 was a reaction to the enactment in 1992 of the excise tax levied by former R.C. 5753.02 "on the sale of beverage in containers" and "on the sale of each container of post-mix syrup[.]"

**a. The history of Section 3(C).**

The sales tax was first enacted in 1934, as G.C. 5546-2, by H.B. 134, 115 Ohio Laws, Part II, 306. At the time, the country was still in the midst of the Great Depression. That Code section provided that "an excise tax is hereby levied on each retail sale in this state of tangible personal property * * *." The only food items excepted from the sales tax at that time were produce purchased directly from farmers, fluid milk for consumption off the premises of the vendor, and loaf bread. The sales tax was initially to be in effect during 1935; in December 1935, it was extended through March 1937. 116 Ohio Laws, Part II, 69. Former Section 12, Article XII was adopted by the voters at the general election in November 1936. The language of that constitutional amendment closely tracks the language of the sales tax statute. It provided that "* * * no excise tax shall be levied or collected upon the sale of food for human consumption off

the premises where sold." Both the timing of the adoption of Section 12, Article XII and the language used compels the conclusion that the amendment was in response to and intended to prohibit the imposition of the sales tax on the purchase of food from groceries and similar establishments to be consumed off the premises of the vendor.

This Court discussed the purpose of the constitutional amendment in *Castleberry v. Evatt* (1946), 147 Ohio St. 30. After stating the well-settled rule that in interpreting an amendment to the Constitution the polestar is the intention of the makers and adopters, the Court reviewed the argument advanced by the committee appointed to sponsor the amendment to ascertain that intention. The language quoted from that argument states, in part, that the purpose of the proposed amendment was to "repeal the sales tax on food." Id. at 33. While the issue before the Court was the meaning of the term "premises where sold" contained in the amendment, the above-quoted language from the argument of the committee and the discussion in both the majority and dissenting opinions regarding the history of the amendment support the position that the purpose of the amendment was to prohibit the imposition of the newly-enacted sales tax on sales of food for consumption off the premises.

A review of both the argument in favor of and the argument in opposition to the proposed amendment dispels any question as to the intent of the makers and adopters. Appx. 2. The first sentence of the argument in favor begins, "[l]et us repeal the sales tax on food for human consumption." The short five-paragraph argument in support repeats the language "repeal the sales tax on food" or "repeal of the sales tax on food" three more times. The argument in opposition also begins with the language, "[t]he repeal of the sales tax on food." The argument in opposition refers to the sales tax throughout, and to

the removal of the sales tax on food. It refers to the proposed amendment as "the proposal to exempt food for human consumption from the sales tax."

Nothing in the history of the adoption of the amendment or its language indicates any intent to prohibit excise taxes on the privilege of doing business from including receipts or income from retail sales of food in the base upon which the privilege tax is measured. Indeed, the fact that Section 3(C) authorizes the imposition of "excise and franchise taxes," but the exception in that provision is limited to excise taxes upon the sale or purchase of food for human consumption off the premises, plainly establishes that the exception was not intended to prohibit franchise-type excise taxes from considering such sales in the measure of the tax. It also demonstrates that the drafters recognized the distinct nature of franchise taxes.

**b. The history of Section 13.**

In 1992, the General Assembly enacted the "carbonated beverage tax," which was effective February 1, 1993. This new tax was enacted as part of Am.Sub.H.B. No. 904, 144 Ohio Laws, Part IV, 6598; it was contained in newly-created R.C. Chapter 5753. Id. at 6726-6733 (Appx. 9-16). R.C. 5753.02 levied an excise tax on the sale of carbonated beverages in containers and on the sale of containers of post-mix syrup. The tax was imposed at the wholesale level. Former R.C. 5753.04. The new tax was immediately challenged on several constitutional grounds, including a claim that the tax violated Section 3(C), Article XII. The tax was upheld against those challenges in *Cameron Coca-Cola Bottling Co. v. Tracy* (July 28, 1993), Franklin C.P. No. 93CVH02-729. The court rejected the Section 3(C), Article XII challenge, holding that that constitutional provision only prohibited excise taxes on sales of food at the retail level. Shortly

thereafter, a referendum drive was undertaken to amend the Constitution to extend the prohibition to wholesale sales of food for human consumption. At the November 8, 1994 election, the voters approved the amendment, thereby adopting Section 13, Article XII.

The timing and language of Section 13, Article XII evidence that the voters undoubtedly intended to extend the proscription against transactional excise taxes on retail sales of food for human consumption to such sales at the wholesale level. The General Assembly had just recently enacted a new excise tax on the sale of carbonated beverages at the wholesale level. *Cameron* had just held that the proscription of Section 3(C), Article XII did not apply to sales of food at the wholesale level. The language of Section 13, Article XII states, in pertinent part, that "[n]o sales or other excise taxes shall be levied or collected (1) upon any wholesale sale or wholesale purchase of food for human consumption * * *."

A review of the argument in support of the proposed amendment confirms that the intent was to extend the proscription of Section 3(C) to excise taxes on sales of food at the wholesale level. Appx. 7, 8. The second and third paragraphs of the argument refer to the *Cameron* ruling that Section 3(C) prohibited only excise taxes on sales of food at the retail level. The fourth paragraph states that a "yes" vote will restore the constitutional prohibition on taxing food.

Nothing in the history of the adoption of the amendment or its language indicates any intent to prohibit excise taxes on the privilege of doing business from including receipts or income from wholesale sales of food in the base upon which the privilege tax is measured.

**c. At the time both constitutional amendments were adopted the existing jurisprudence distinguished between a tax on the privilege of doing business that used a factor to measure the tax and a tax on the factor itself.**

In construing constitutional provisions, it must be presumed that those adopting a constitutional amendment had in mind the existing statutory provisions and their judicial construction. *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, ¶6; *State ex rel. Engle v. Indus. Comm.* (1944), 142 Ohio St. 425, 432. At the time both amendments at issue were proposed and adopted, the corporation franchise tax included income from sales of food for human consumption in the calculation of the base upon which the franchise tax was measured. And sales of food were included in the sales factor of the apportionment formula used to determine the extent of business in the state.

Long before the adoption of Section 3(C), the case law of both this Court and the United States Supreme Court was well-established that an excise tax on the privilege of doing business that used gross receipts as the measurement for the tax did not constitute a tax on those gross receipts. See, e.g., *Express Co. v. State* (1896), 55 Ohio St. 69; *Maine v. Grand Trunk Ry. Co. of Canada* (1891), 142 U.S. 217. Given this existing statutory and case law, the absence of any reference to privilege taxes measured by gross receipts or income from sales of food evidences that the drafters and adopters did not intend the proscriptions of Sections 3(C) and 13 of Article XII to extend to such privilege taxes.

**3. The exceptions in Sections 3(C) and 13 of Article XII to the general authority of the General Assembly to enact excise taxes must be strictly construed and the CAT statutes must be afforded a strong presumption of constitutionally.**

Section 3(C), Article XII authorizes the General Assembly to enact excise and franchise taxes, but contains an exception for excise taxes on the sale of food for human

consumption off the premises where sold. Section 13, Article XII provides an additional exception to the general authority of the General Assembly to enact excise taxes. As exceptions to the general operation of Section 3(C), these two provisions must be strictly construed. *State v. Forney* (1923), 108 Ohio St. 463, paragraph one of the syllabus. As *Forney* explains, "[t]he rule is well and wisely settled that exceptions to a general law [statutory or constitutional] must be strictly construed. They are not favored in law, and the presumption is that what is not clearly excluded from the operation of the law is clearly included in the operation of the law." Id. at 467.

An even more fundamental rule is applicable when the validity of a statute is attacked on constitutional grounds. Enactments of the General Assembly are entitled to a strong presumption of constitutionality. *Carswell* at ¶6-7; *Kelleys Island Caddy Shack, Inc. v. Zaino*, 96 Ohio St.3d 375, 2002-Ohio-4930, ¶10; *State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567, 573-575. As *Swetland* notes, this tenet was exhaustively reviewed in *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142. *Kelleys Island Caddy Shack* summarized the rule as follows: "[w]e presume it [the statute] to be constitutional and will not declare it to be unconstitutional unless it 'appear[s] beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.'" 96 Ohio St.3d at ¶10, quoting from *Dickman*, paragraph one of the syllabus.

Even if the language of Section 3(C) and Section 13 of Article XII was not clear and unambiguous in prohibiting only transactional excise taxes on retail and wholesale sales of food for human consumption, application of these two basic tenets would require a determination in favor of constitutionality. Only by the most liberal construction of the

language in the two provisions could they even arguably be read as prohibiting the consideration of receipts from sales of food in the base by which business privilege taxes are measured. And even a liberal reading of the language of the two constitutional amendments would not support a conclusion that the CAT statutes and the amendments are clearly incompatible beyond a reasonable doubt. At best, a liberal reading might raise some doubt. As *Dickman* cautions, however, a legislative enactment should not be held repugnant to the constitution in a doubtful case. 164 Ohio St. at 147.

**B. The CAT is not an Excise Tax on Sales or Purchases; it is an Excise Tax on the Privilege of Doing Business in Ohio.**

R.C. 5751.02 does not levy an excise tax on sales or purchases of food; in fact, it does not levy an excise tax **on** any sales or purchases. It levies a tax on persons for the privilege of doing business in the state. This is a classic form of a business privilege tax, commonly referred to as a franchise tax. The ultimate flaw in the decision of the court of appeals was the failure to recognize the fundamental difference between an excise tax on transactions and an excise tax on the privilege of doing business in a state.

This failure is manifested by the focus in the court's decision on whether a franchise tax is an excise tax. Of course a franchise tax is an excise tax. But that is not the issue. The issue is whether the CAT is the type of excise tax that is proscribed by the Ohio Constitution. The various types of excise taxes include taxes imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege. *Saviers v. Smith* (1920), 101 Ohio St. 132, paragraph four of the syllabus. The type of excise taxes prohibited by Sections 3(C) and 13 of Article XII are excise taxes on sales or purchases, sometimes referred to as transactional excise taxes. This type of excise tax is one imposed on the performance of an act, i.e., the sale or purchase of property or a

service. Because a franchise tax is an excise tax on the privilege of doing business, not an excise tax on sales or purchases, it does not come within the proscription of those constitutional provisions.

The CAT is an excise tax on the privilege of doing business in Ohio; it is the business privilege tax that replaced the Ohio franchise tax. The CAT is not the type of excise tax covered by Sections 3(C) and 13 of Article XII. It is not an excise tax on sales or purchases. The CAT did not replace the Ohio sales and use taxes; those taxes are still in operation and sales and purchases of food for human consumption are still not subject to those transactional excise taxes.

### C. The Fact that the CAT is Measured by Gross Receipts from Sales (as well as from Other Business Activities) does not Convert the CAT into a Tax on Sales.

The court of appeals concluded that by its operation the CAT is a transactional tax on sales of food. Dec. at ¶26. The court appears to have based this conclusion on the fact that the CAT is measured solely by gross receipts, including those from sales of food. This conclusion reveals a failure to appreciate the critical distinction between the legal incidence of a tax and the measure of a tax. This failure is difficult to understand given the long line of decisions of this Court explaining and applying this distinction, beginning with *Western Union Telegraph Co. v. Mayer* (1876), 28 Ohio St. 521, and reaffirmed most recently in *Mut. Holding Co. v. Limbach* (1994), 71 Ohio St.3d 59.

*Western Union*, like *Express Co. v. State*, involved the excise tax imposed on public utilities for the privilege of doing business; like the CAT, it was measured by gross receipts. In addressing the nature of the public utility excise tax, *Express Co.* succinctly explained: "[t]he tax is not laid on the gross receipts * * * but those receipts are taken as

the standard by which to determine the amount of the tax to be paid for the privilege of doing business in the state * * *." 55 Ohio St. at 81.

Ninety years later, in *East Ohio Gas Co. v. Limbach* (1986), 26 Ohio St.3d 63, this Court again rejected an attempt to mischaracterize the public utility excise tax as a tax on daily transactions. The Court noted that the linchpin of the utility's argument was its claim that the excise tax based on its gross receipts was a transactional tax comparable in nature to a sales tax. 26 Ohio St.3d at 66. After finding that the utility mischaracterized the nature of the excise tax, the Court explained the critical legal distinction that the utility ignored in its argument: the tax is not imposed on the transactions that generated the gross receipts; rather, "[a]nnual gross receipts are merely the measure of the tax on the privilege." Id. at 66-67. The Court also observed the similarity of the excise tax on public utilities and the franchise tax, stating that both taxes "are levied on the exercise of a privilege and not on income, sales or receipts." Id. at 67.

In *Celina Mutual Ins. Co. v. Bowers* (1965), 5 Ohio St.2d 12, the Court addressed the "in lieu of" exception from taxation for domestic insurance companies. R.C. 5725.18 levies an annual franchise tax on domestic insurance companies; the tax is measured by gross premiums. R.C. 5725.25 states, in part, that the franchise tax provided for by R.C. 5725.18 is in lieu of "all other taxes, charges, or excises on such domestic insurance companies * * *." Celina Mutual argued that this provision excepted domestic insurance companies from the Ohio sales and use tax. In rejecting this argument, the Court noted that the Ohio sales and use taxes are on transactions and that they apply only to transactions by which tangible personal property is acquired and used. Id. at 16. The excise taxes that the domestic insurance tax is in lieu of are excise taxes "on such

domestic insurance companies * * *." The Court plainly recognized the distinction between an excise tax on transactions and an excise tax on a business for the privilege of doing business in the state and that an exemption from excise taxes on the business did not exempt that business from an excise tax on sales transacted by that business.

This Court has rejected this same attempted mischaracterization of excise taxes on the privilege of doing business in numerous decisions regarding the Ohio corporation franchise tax, the business privilege tax that the CAT replaced. In *Aluminum Co. of America v. Evatt* (1942), 140 Ohio St. 385, 394-395, this Court held that although the sales of goods manufactured in Ohio were used in the formula by which the franchise tax was measured, the tax was levied on the privilege of doing business in the state, not on the sales employed in the measure. Similarly, in *Rio Indal v. Lindley* (1980), 62 Ohio St.2d 283, 285, this Court reaffirmed that "[t]he corporate franchise tax is a privilege tax. It is not a tax on corporate income, sales, or receipts, but rather is a tax on the privilege of doing business in Ohio."

*Mut. Holding Co.* involved a claim that the company was exempt from the corporation franchise tax because its parent paid the franchise tax levied on domestic insurance companies by R.C. 5725.18 for the privilege of doing business as an insurance company in Ohio. That excise tax was measured by net worth or premium value. One of the arguments made by the company was based on the characterization of the domestic insurance tax as a tax on property. Responding to that argument, the Court stated that measuring tax liability by net worth does not convert the tax to a property tax. The Court held that the tax "is a franchise tax measured by net worth, not a tax on net worth." 71 Ohio St.3d at 60.

In *Fifth Third Union Trust Co. v. Peck* (1954), 161 Ohio St. 169, and *The Raymond Bag Co. v. Bowers* (1955), 163 Ohio St. 275, the taxpayers challenged the inclusion of federal securities in the franchise tax base. Specifically, the taxpayers contended that by such inclusion the state was taxing those securities, which was prohibited by federal statute and thus violated the Supremacy Clause of the United States Constitution. The Court held that the tax was a franchise tax on the corporations based on the value of their capital stock, not a tax on the securities included in the value of the capital stock, and thus did not run afoul of the federal statute.

This Court rejected a similar challenge in *Bank One Dayton, N.A. v. Limbach* (1990), 50 Ohio St.3d 163. The banks contended that inclusion of federal obligations in the net worth base of the franchise tax on financial institutions violated a federal statute prohibiting state taxation of federal obligations and the Borrowing and Supremacy Clauses of the United States Constitution. This argument was based on the assertion that the tax was actually a property tax on those obligations. Focusing on the operation of the franchise tax, this Court held that the franchise tax was a tax levied on the exercise of the privilege of doing business and not on the property that comprised the yardstick by which the tax was measured.

Among the many cases upon which the *Bank One* Court relied was *Werner Machine Co. v. Dir. of Div. of Taxation*, which rejected a similar challenge to the inclusion of federal obligations in the net worth base of New Jersey's franchise tax. The Supreme Court noted that it "has consistently upheld franchise taxes measured by a yardstick that includes tax-exempt income or property, even though a part of the

economic impact of the tax may be said to bear indirectly upon such income or property." Id., 350 U.S. at 494.

The United States Supreme Court had long ago recognized the fundamental distinction between an excise tax imposed by a state on a corporation for the privilege of doing business measured by gross receipts and a tax imposed on the gross receipts in upholding Maine's railroad excise tax against a Commerce Clause challenge. In *Maine v. Grand Trunk Ry. Co. of Canada*, the railroad contended that the tax was a tax on interstate and foreign commerce, in violation of the Commerce Clause. The theory advanced was that by using the receipts derived from interstate and international transportation in measuring the privilege tax, the state was imposing a tax on those receipts. The Court exposed the critical flaw in that theory: "[t]here is no levy by the statute on the receipts themselves, either in form or fact. They constitute, as said above, simply the means of ascertaining the value of the privilege conferred." Id., 142 U.S. at 229.

Similar attempts to characterize an excise tax on the privilege of doing business in the state measured by gross receipts from sales in the state as a tax on the sales that generated the gross receipts have been rejected by other states' courts. In *Short Brothers (USA), Inc. v. Arlington County* (1992), 244 Va. 520, 423 S.E.2d 172, the taxpayer attacked the validity of the county's business license tax on the ground that it was actually a tax on the sales of property. The tax was imposed for the privilege of doing business in the county and was measured by receipts from the sale and lease of property. The Supreme Court of Virginia turned back the attack, stating that Short erroneously presumed that when a tax is measured by revenue generated by sales of property, the tax

is transformed into a tax on the sale of that property. 244 Va. at 523, 423 S.E.2d at 174. Noting that revenue from the sales is merely an element used to determine the tax, the Court held that the business license tax "is a business activity tax measured by gross receipts, not a tax on the sale or lease of goods, just as an income tax based on those receipts does not tax those transactions themselves." Id.

The Supreme Court of Washington reached the same conclusion in considering a challenge to the imposition of the business and occupation ("B&O") tax by Seattle and Tacoma in *Ford Motor Company v. Seattle* (2007), 160 Wn.2d 32, 156 P.3d 185, certiorari denied (2008), __ U.S. __, 128 S.Ct. 1224, 170 L.Ed.2d 61. The B&O tax is an excise tax imposed for the privilege of doing business in a particular jurisdiction (it may be imposed by the state and cities). Id. at ¶7. The value of the privilege is measured by gross receipts of the business. Id. Ford argued that the taxable incident of the B&O tax was the sale of products in the taxing jurisdiction. In addressing Ford's argument, the Court first explained the distinction between the incident of the tax -- the activity that the legislature has designated as taxable -- and the measure of the tax. Id. at ¶8. The Court then found that the incident of the B&O tax is the privilege of engaging in business in the taxing jurisdiction. Id. at ¶9. After distinguishing the B&O tax from a sales tax, which the Court noted is imposed on a specific sale of a good or service, id., the Court concluded that "[t]he B&O tax levied by the Cities is neither a sales tax nor a tax on the passage of title to property. Rather, the target of the tax in this instance is the privilege of engaging in the wholesale business in the Cities." Id. at ¶22.

As this Court noted in *Bank One*, the courts of other states also have recognized the distinction between an excise tax on the privilege of doing business measured by

income or property and a tax imposed on income or property. 50 Ohio St.3d at 167-168 (citing case law from other states). The decisions cited therein all stand for the proposition that the use of the income or property as a yardstick to measure a business privilege tax does not convert the tax into a tax on that income or property.

The decision of the court of appeals failed to understand and, therefore, failed to follow these decisions that have uniformly rejected attempts to mischaracterize business privilege taxes that are measured by income, sales, receipts, or property as taxes on the income, sales, receipts, or property that comprise the measure. While the court did recognize a few of these decisions, it attempted to distinguish only two: *Bank One* and *Werner Machine*. Its attempt is unavailing.

The court attempted to distinguish *Bank One* and *Werner Machine* by stating that in those cases the tax exempt property or income was not the only measure of the tax liability, whereas here a tax exempt transaction is not just a factor being considered, but is the only factor being used to determine tax liability. Dec. at ¶25. That is simply not correct. The privilege taxes at issue in *Bank One* and *Werner Machine* included exempt federal obligations in the base by which the taxes were measured, along with all other property of the corporation. Likewise, the CAT includes gross receipts from sales of food in the base by which the tax is measured, but those gross receipts are plainly not the only gross receipts used in the measurement of the tax.

The CAT statutes do not list specific sources of gross receipts that are included in the base by which the tax is measured. For example, they do not contain any language stating that gross receipts from sales of food are included. Rather, "gross receipts" is broadly defined in R.C. 5751.01(F) as "the total amount realized by a person * * * that

contributes to the production of gross income of the person * * *." Gross receipts from a broad spectrum of sales are used in the base by which the tax is measured. The base also includes gross receipts from other business activity, such as the performance of various personal and professional services. This is consistent with the fundamental concept of the CAT as a broad-based tax. It is this broad base that allows the use of a low tax rate.

The fact that the CAT base is comprised solely of gross receipts is not a valid basis for distinguishing this Court's decisions. No such distinction has ever been recognized in this Court's precedents. In fact, the public utility excise tax at issue in *Express Co.* and *East Ohio Gas* was also based solely on gross receipts. Gross receipts are used as the measure of the CAT because the amount of gross receipts received by a business related to activities in the state is an accurate gauge of the fair value of business done in the state. This is in accord with the purpose of a tax on the privilege of doing business - to tax the fair value of the exercise of that privilege. *Rio Indal*, 62 Ohio St.2d at 285.

If receipts from a significant portion of an entity's business are excluded from the measure, the fair value of that entity's exercise of its privilege of doing business in Ohio will not be taxed. As this Court stated in *Fifth Third Union Trust Co.*, 161 Ohio St. at 174-175, the exclusion of a major portion of a corporation's assets from the base upon which the value of its franchise is measured, because of the character of those assets, whereas all the assets of other corporations are included, would not be fair or just. The same is true regarding the CAT. As discussed earlier, the CAT was enacted to replace the corporation franchise tax. It was structured to more fairly tax businesses on their privilege of doing business in Ohio. To accomplish this goal, the CAT uses a broad base

for measuring the value of the privilege. Use of this broad base assures that the tax is fairly applied to a broad range of businesses and also allows the use of a low rate. If a significant portion the gross receipts of an entity whose business involves the sale of food are excluded from the base by which the value of its privilege is measured for purposes of the CAT, while other CAT taxpayers include their entire gross receipts in the base, that would not be fair or just.

For example, if a grocery business with seventy-five percent of its gross receipts from sales of food for human consumption off the premises excludes those gross receipts from the CAT measurement base, it would pay a business privilege tax on only twenty-five percent of the value of its business, while other businesses would be required to include all of their gross receipts in the measurement and thus pay the CAT on one hundred percent of the value of their business.

This result is particularly unjust considering the fact that the CAT replaced two onerous taxes on business, the franchise tax and the personal property tax. Grocers were subject to both of those taxes and sales of food were considered in the measure of the franchise tax used to determine the fair value of the business done in this state and grocers' inventory of food was subject to the personal property tax. If the decision of the court of appeals stands, not only will the grocers no longer be subject to the franchise tax on the full value of their privilege to do business and the personal property tax, but they will also be subject to the CAT on only a portion of the value of their privilege to do business in this state.

### D. By its Operation, the CAT is a Tax on the Privilege of Doing Business, not a Transactional Tax on Sales.

The court of appeals correctly states that the nature of a tax is to be determined by its operation, not simply by the label affixed to the tax. See, e.g., *Bank One*, 50 Ohio St.3d at 168. However, in concluding that the CAT is in its operation a transactional tax on sales, the court of appeals again relied solely on the fact that the measure of the tax included gross receipts from sales and failed to analyze the actual operation of the CAT (other than to state, erroneously, that a tax exempt transaction is the only factor used to determine tax liability). A review of the CAT demonstrates that it is in operation a business privilege tax, not a transactional tax.

The CAT replaced the corporation franchise tax as Ohio's tax on businesses for the privilege of doing business in the state. As R.C 5751.02(A) states, the CAT is an annual privilege tax on businesses and any person that does business in this state during a portion of the calendar year is subject to the tax. The tax is measured by the taxpayer's taxable gross receipts from the tax year, less specific exclusions. R.C. 5751.03(A). Because it is an annual tax, the tax liability cannot be determined until the end of that annual period. It is because the CAT is a business privilege tax that entities that are subject to industry-specific business privilege taxes, such as public utilities and insurance companies, and entities which are still subject to the franchise tax, such as financial institutions, are not subject to the CAT. R.C. 5751.01(E)(2), (3), and (9).

A review of the specifics of the CAT confirms that it is in operation a business privilege tax, not a transactional tax. Generally, persons with taxable gross receipts of not more than $150,000 in a tax year are not subject to the CAT. R.C. 5751.01(E)(1). Thus, the gross receipts from sales by those persons are not even included in the measure

of the CAT; this precludes any suggestion that the CAT is a transactional tax on the sales that generate these gross receipts. Additionally, the tax on persons with taxable gross receipts between $150,001 and $1 million is $150. R.C. 5751.03(B). Thus, the tax on a person with taxable gross receipts of $150,001 and a person with taxable gross receipts of $1 million is the same. This unequivocally rebuts the contention that the CAT is a transactional tax levied on sales.

The existence of various credits that a taxpayer may apply against its CAT liability further demonstrates that the CAT is a business privilege tax, not a transactional tax on sales. The jobs creation and jobs retention credits, the credit for qualified research expenses, and the credit for a borrower's qualified research and development loan payments can be claimed against the taxpayer's annual CAT liability. R.C. 5751.50 through 5751.52. None of these credits are related to specific transactions; they relate to or are based on the business's general business operations. The credit that most clearly demonstrates that the CAT is a business privilege tax is the credit for unused franchise tax net operating loss deductions ("NOLs"). R.C. 5751.53. NOLs are uniquely franchise tax-type deductions. The deduction is based on the results of the business's operations over a full tax year. NOLs by their nature could not be applied to a transactional tax. The existence of this credit for NOLs also confirms that the CAT is a business privilege tax that replaced the corporation franchise tax.

The fact that the CAT contains a provision allowing a taxpayer to request an alternative method to the standard situsing provisions if those provisions do not fairly represent the extent of the taxpayer's activity in the state, R.C. 5751.033(J), further evidences that the CAT is a business privilege tax. As *Rio Indal* states, the purpose of an

excise tax on the privilege of doing business in a state is to tax the fair value of the exercise of that privilege. 62 Ohio St.2d at 285. The purpose of providing alternate methods for valuing the privilege is to assure that only the fair value of the privilege is taxed. Such a provision is uniquely applicable to a business privilege tax. The franchise tax contains a similar alternative method provision. R.C. 5733.05(B)(2)(d).

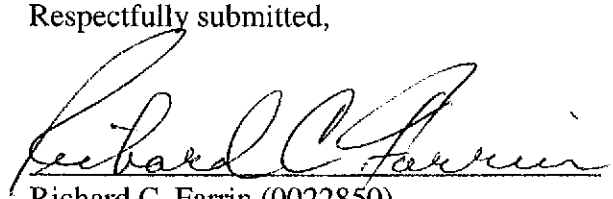
Another provision of the CAT that demonstrates that the CAT is an excise tax on the privilege of doing business in the state is R.C. 5751.11. That section authorizes the state to commence an action in quo warranto to revoke a person's privilege or franchise to do business in this state if the person fails to report or pay the CAT. This section also has a counterpart in the franchise tax, R.C. 5733.24.

The CAT has all of the attributes of a franchise tax. It is not just declared by the General Assembly to be an excise tax on the privilege of doing business. By its operation, that is plainly what the CAT is.

## Conclusion

For the reasons discussed above, the Court should reverse the judgment of the court of appeals and hold that the inclusion of gross receipts from retail sales of food for human consumption off the premises where sold and from wholesale sales of food for human consumption in the base by which the CAT is measured does not violate Sections 3(C) or 13 of Article XII of the Ohio Constitution.

Respectfully submitted,



Richard C. Farrin (0022850)
(Counsel of Record)
Thomas M. Zaino (0041945)
McDonald Hopkins LLC
41 S. High Street
Suite 3550
Columbus, OH 43215

Kathleen M. Trafford (0021753)
Porter Wright Morris & Arthur LLP
41 S. High Street
Columbus, OH 43215

COUNSEL FOR AMICUS CURIAE
OHIO BUSINESS ROUNDTABLE

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF OF AMICUS CURIAE OHIO BUSINESS ROUNDTABLE was sent via regular U.S. Mail, postage prepaid, this 6th day of April, 2009 to Charles R. Saxbe, Donald C. Brey and Gerhardt A. Gosnell, Chester, Wilcox & Saxbe, Counsel for Appellees, at 65 East State Street, Suite 1000, Columbus, OH 43215; and to Benjamin C. Mizer, Solicitor General, Counsel of Record for Appellant, at 30 East Broad Street, 17th Floor, Columbus, OH 43215.

Richard C. Farrin

**United States of America**

**State of Ohio**

**Office of the Secretary of State**

*I, JENNIFER BRUNNER, Secretary of State, do hereby certify that I am the duly elected, qualified and acting Secretary of State of the State of Ohio, and I further certify that*

I am the custodian of certain records pertaining to constitutional amendments proposed by the General Assembly, constitutional amendments proposed by initiative petition, laws proposed by initiative petition, and referendums of laws enacted by the General Assembly, in accordance with the provisions of Sections 1-1g of Article II, Ohio Constitution, section 1 of Article XVI, Ohio Constitution, and Title XXXV of the Revised Code of Ohio, including but not limited to the ballot language for each proposed constitutional amendment, law and referendum that was printed on the ballot for the election at which such proposed constitutional amendment, law or referendum was submitted to the electors of the State of Ohio for their approval or rejection;

And I further certify that attached hereto is a true and accurate copy of the ballot language that was printed on the ballot submitted to electors throughout the State of Ohio for the election held on November 3, 1936, on an amendment to the Ohio Constitution, proposed by initiative petition, to adopt a new section to be known as Section 12 of Article XII, prohibiting the levy or collection of an excise tax on the sale or purchase of food for human consumption off the premises where sold.

*IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the official Seal of the Secretary of State of Ohio, at Columbus, Ohio, this* 27th *day of* February, 2009

**Jennifer Brunner**
*Secretary of State*

SEC4000 (Rev. 1/07)

C 183350

11-3-1936

# PROPOSAL SUBMITTED BY INITIATIVE PETITION Proposing Amendment to the Constitution of Ohio by Adopting a New Section to Be Known as Section 12 of Article XII.

**To be submitted to the Electors of the State for their approval or rejection at the election to be held November 3, 1936.**

## PROPOSAL PROHIBITING TAX LEVY ON SALE OR PURCHASE OF FOOD.

(Title)

An amendment to the Constitution of the State of Ohio proposing the adoption of a new section to be known as Section 12 of Article XII, prohibiting the levy or collection of an excise tax on the sale or purchase of food for human consumption off the premises where sold.

## TEXT OF PROPOSED AMENDMENT

BE IT RESOLVED by the people of the State of Ohio:

That the Constitution of the State of Ohio be amended by the adoption of a new section to be known as Section 12 of Article XII, which section shall read as follows:

Section 12. On and after November 11, 1936, no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold.

Schedule: If the votes for the foregoing proposed amendment shall exceed in number those against it, the amendment shall go into effect on November 11, 1936.

## FORM OF OFFICIAL BALLOT

**PROPOSED AMENDMENT TO THE CONSTITUTION OF OHIO**
**(Proposed by Initiative Petition)**
**VOTE BALLOT WITH AN X**

Amendment adopting a new section to be known as Section 12 of Article XII of the Constitution of Ohio, prohibiting the levy of an excise tax on the sale or purchase of food for human consumption off the premises where sold.

**ARTICLE XII, SECTION 12**

On and after November 11, 1936, no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold.

**SCHEDULE**

If the votes for the foregoing proposed amendment shall exceed in number those against it, the amendment shall go into effect November 11, 1936.

| | | |
|---|---|---|
| | YES | SHALL THE AMENDMENT PROPOSING THE ADOPTION OF SECTION 12 OF ARTICLE XII, PROHIBITING THE LEVY AND COLLECTION OF AN EXCISE TAX ON THE SALE OR PURCHASE OF FOOD FOR HUMAN CONSUMPTION OFF THE PREMISES WHERE SOLD, BE ADOPTED. |
| | NO | |

## ARGUMENT IN FAVOR OF THE INITIATED PROPOSED AMENDMENT TO ARTICLE XII OF THE CONSTITUTION OF OHIO BY ADOPTING SECTION 12.

Let us repeal the sales tax on food for home consumption by voting "yes" on the constitutional amendment at the election, November 3rd, 1936. Food is the greatest necessity of life. A special tax on food is the most unjust and obnoxious that could be levied. It certainly is not needed now.

Prosperity is returning steadily, and with it all local revenues are increasing. Likewise all state revenues are gradually on the increase. The repeal of the sales tax on food will save the people of Ohio twelve million dollars per year. But according to present estimates, the increase in other local and state revenues will make up for this loss.

The schools of Ohio are safe, because of our new Public School Foundation Law, and because of other state money that has been provided for them. If this is not quite enough, we will guarantee to change the present system of distribution of state funds, so that our schools will be fully provided for. We are committed, without reservation, to a strong and financially secure school system.

The repeal of the sales tax on food will not affect our real estate tax. The state has no power under the constitution to tax real estate. Moreover, the state has bound itself by law and by moral commitment to provide the additional money, above local revenues, needed to keep our schools operating full time, so that all the boys and girls of Ohio may have a good education.

In our effort to repeal the sales tax on food, we are being opposed by certain unfriendly interests by secret and underground methods. This includes our political opponents and their co-conspirators. Let us roll up a smashing victory on November third and remove this unjust food-tax forever! Answer our opponents with votes.

Committee for the Amendment { MARTIN L. DAVEY, MYRNA Y. SMITH, CHARLES S. LEASURE, T. GERTRUDE FORTUNE, JOHN CAREN.

## ARGUMENT IN OPPOSITION TO THE INITIATED PROPOSED AMENDMENT TO ARTICLE XII OF THE CONSTITUTION OF OHIO BY ADOPTING SECTION 12.

The repeal of the sales tax on food will reduce the revenue from the sales tax by about twenty per cent, or nearly $12,000,000.00. If the sales tax on food is removed, many citizens in the lower income brackets will cease to make any direct substantial contribution for the support of schools, government and poor relief. It is as much the obligation of every citizen to pay taxes as it is his right to enjoy the protection and freedom that is guaranteed by government. If the amendment carries, your schools will lose $7,200,000.00 and your local governments $4,800,000.00. These amounts are needed by your schools and your local governments.

The present sales tax law represents emergency legislation designed to meet financial problems up to March 31, 1937, when it will expire by its own limitation. Why not leave the Legislature free in its unfettered discretion to work out a permanent solution of your tax problem. The Legislature chosen by you in November at the popular election can best express your will through legislation creating the type of tax system that you desire.

Tax exemptions should not be written into the Constitution. They are properly the subject for consideration by legislative bodies and have no place in the organic law of the state.

The exemption of food will increase the difficulty of administration, reduce the revenue, raise serious problems in connection with fair enforcement of the sales tax law and will increase the cost of administration by a substantial amount.

Every citizen, regardless of his income, should bear some portion of the cost of his government. The passage of the amendment will relieve many of that responsibility. Every citizen favoring a broad base for the tax system of this state and the adequate financing of local government and schools should vote "no" on the proposal to exempt food for human consumption from the sales tax.

Committee Against the Amendment { W. H. PATTON, T. T. FRANKENBERG, MOSES ROBERT.

**United States of America**

**State of Ohio**

**Office of the Secretary of State**

*I, JENNIFER BRUNNER, Secretary of State, do hereby certify that I am the duly elected, qualified and acting Secretary of State of the State of Ohio, and I further certify that*

I am the custodian of certain records pertaining to constitutional amendments proposed by the General Assembly, constitutional amendments proposed by initiative petition, laws proposed by initiative petition, and referendums of laws enacted by the General Assembly, in accordance with the provisions of Sections 1-1g of Article II, Ohio Constitution, section 1 of Article XVI, Ohio Constitution, and Title XXXV of the Revised Code of Ohio, including but not limited to the ballot language for each proposed constitutional amendment, law and referendum that was printed on the ballot for the election at which such proposed constitutional amendment, law or referendum was submitted to the electors of the State of Ohio for their approval or rejection;

And I further certify that attached hereto is a true and accurate copy of the ballot language that was printed on the Official Questions and Issues Ballot submitted to electors throughout the State of Ohio for the election held on November 8, 1994, on four proposed amendments to the Ohio Constitution, including an amendment proposed by initiative petition, designated on the ballot as Issue 4, to amend Article XII by the addition of Section 13, expanding the prohibitions of taxes on the sale or purchase of food for human consumption off the premises where sold.

*IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the official Seal of the Secretary of State of Ohio, at Columbus, Ohio, this* 27th *day of* February, 2009

**Jennifer Brunner**
*Secretary of State*

SEC4000 (Rev. 1/07)

C 183326

(Perforate)

11-8-94

# OFFICIAL QUESTIONS AND ISSUES BALLOT

Vote ballot with an "X"

PROPOSED CONSTITUTIONAL AMENDMENT

**1**

(Proposed by Resolution of the General Assembly of Ohio)

To amend Sections 2 and 3 of Article IV of the Constitution of the State of Ohio.

TO CHANGE THE PROCEDURE FOR APPEALS OF CASES IN WHICH THE DEATH PENALTY IS IMPOSED, THIS AMENDMENT WILL:

1. REMOVE JURISDICTION FROM THE COURTS OF APPEALS TO REVIEW DEATH PENALTY CASES ON DIRECT APPEAL.

2. PROVIDE FOR DIRECT APPEALS OF DEATH PENALTY CASES TO THE OHIO SUPREME COURT FROM THE COURTS OF COMMON PLEAS OR OTHER COURTS OF RECORD INFERIOR TO THE COURT OF APPEALS.

3. APPLY TO CASES IN WHICH THE DEATH PENALTY IS IMPOSED FOR OFFENSES COMMITTED ON OR AFTER JANUARY 1, 1995.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE JANUARY 1, 1995.

A majority yes vote is necessary for passage.

| | | |
|---|---|---|
| | YES | SHALL THE PROPOSED AMENDMENT BE ADOPTED? |
| | NO | |

PROPOSED CONSTITUTIONAL AMENDMENT

**2**

(Proposed by Resolution of the General Assembly of Ohio)

To amend Article I of the Ohio Constitution by the addition of Section 10a.

TO AFFORD VICTIMS OF CRIMINAL OFFENSES CONSTITUTIONAL RIGHTS, THIS AMENDMENT WILL:

1. REQUIRE THAT VICTIMS OF CRIME BE ACCORDED FAIRNESS, DIGNITY AND RESPECT IN THE CRIMINAL JUSTICE SYSTEM.

2. AS PROVIDED BY LAW, REQUIRE THAT VICTIMS OF CRIME BE GIVEN REASONABLE AND APPROPRIATE NOTICE, INFORMATION, ACCESS, AND PROTECTION AND A MEANINGFUL ROLE IN THE CRIMINAL JUSTICE PROCESS.

IF ADOPTED, THIS AMENDMENT WILL NOT GIVE ANY PERSON NEW OR ADDITIONAL RIGHTS TO APPEAL OR MODIFY A COURT DECISION, ABRIDGE ANY OTHER RIGHT GUARANTEED BY THE U.S. OR OHIO CONSTITUTIONS, OR CREATE A LEGAL CLAIM FOR COMPENSATION OR DAMAGES AGAINST THE STATE OF OHIO, ITS POLITICAL SUBDIVISIONS OR ANY PUBLIC OFFICER OR EMPLOYEE.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE IMMEDIATELY.

A majority yes vote is necessary for passage.

| | | |
|---|---|---|
| | YES | SHALL THE PROPOSED AMENDMENT BE ADOPTED? |
| | NO | |

PROPOSED CONSTITUTIONAL AMENDMENT

**3** (Proposed by Resolution of the General Assembly of Ohio)

To amend Article VI of the Ohio Constitution by the addition of Section 6.

TO INCREASE OPPORTUNITIES TO THE RESIDENTS OF THE STATE OF OHIO FOR HIGHER EDUCATION AND TO ENCOURAGE OHIO FAMILIES TO SAVE AHEAD TO BETTER AFFORD HIGHER EDUCATION, THIS AMENDMENT WILL:

1. ALLOW THE STATE TO MAINTAIN A PROGRAM FOR THE SALE OF TUITION CREDITS WHEREBY THE PROCEEDS OF SUCH CREDITS PURCHASED FOR THE BENEFIT OF STATE RESIDENTS ARE GUARANTEED BY THE STATE TO COVER A SPECIFIED AMOUNT WHEN APPLIED TO THE COST OF TUITION AT ANY STATE INSTITUTION OF HIGHER EDUCATION AND THE SAME OR A DIFFERENT AMOUNT WHEN APPLIED TO THE COST OF TUITION AT ANY OTHER HIGHER EDUCATION INSTITUTION AS MAY BE PROVIDED BY LAW.

2. TO REQUIRE THAT TUITION CREDITS PAID FROM THE TUITION CREDITS PROGRAM AND THE OHIO TUITION TRUST FUND BE SUPPORTED BY THE FULL FAITH AND CREDIT OF THE STATE OF OHIO AND REQUIRE THE PASSAGE OF LAWS FOR THE CONDUCT OF THE TUITION CREDITS PROGRAM CONSISTENT WITH THIS AMENDMENT.

3. REQUIRE THE GENERAL ASSEMBLY TO APPROPRIATE MONEY TO OFFSET ANY DEFICIENCY IN THE OHIO TUITION TRUST FUND TO GUARANTEE THE PAYMENT OF THE FULL AMOUNT OF ANY TUITION PAYMENT OR REFUND REQUIRED BY A TUITION PAYMENT CONTRACT, AND ALLOW A MAJORITY OF THE MEMBERS OF EACH HOUSE OF THE GENERAL ASSEMBLY TO APPROPRIATE FUNDS FOR THE PAYMENT OF ANY TUITION PAYMENT CONTRACT PREVIOUSLY ENTERED INTO.

4. REQUIRE THAT ALL OHIO TUITION TRUST FUND ASSETS BE USED FOR THE PURPOSE OF THE FUND AND, IF THE FUND IS LIQUIDATED, REQUIRE THAT ANY REMAINING ASSETS BE TRANSFERRED TO THE GENERAL REVENUE FUND OF THE STATE.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE IMMEDIATELY.

A majority yes vote is necessary for passage.

| | | |
|---|---|---|
| | YES | SHALL THE PROPOSED AMENDMENT BE ADOPTED? |
| | NO | |

PROPOSED CONSTITUTIONAL AMENDMENT

(Proposed by Initiative Petition)

**4** To amend Article XII of the Ohio Constitution by the addition of Section 13.

CURRENT SECTION 3(C) OF ARTICLE XII PROHIBITS TAXES ON THE SALE OR PURCHASE OF FOOD FOR HUMAN CONSUMPTION OFF THE PREMISES WHERE SOLD. THE AMENDMENT WOULD EXPAND THE CURRENT RESTRICTIONS BY:

1. PROHIBITING THE CURRENT WHOLESALE TAX ON SOFT DRINKS AND OTHER CARBONATED, NON-ALCOHOLIC BEVERAGES.

2. PROHIBITING ENACTMENT OF A WHOLESALE TAX ON THE SALE OR PURCHASE OF SOFT DRINKS, CARBONATED, NON-ALCOHOLIC BEVERAGES, OR FOOD FOR HUMAN CONSUMPTION, OR THEIR INGREDIENTS OR PACKAGING.

3. PROHIBITING ENACTMENT OF A TAX ON THE SALE TO OR PURCHASE BY A MANUFACTURER, PROCESSOR, PACKAGER, OR RESELLER OF SOFT DRINKS, CARBONATED, NON-ALCOHOLIC BEVERAGES, OR FOOD FOR HUMAN CONSUMPTION, OR THEIR INGREDIENTS OR PACKAGING.

4. PROHIBITING ENACTMENT OF RETAIL TAXES ON PACKAGING THAT CONTAINS SOFT DRINKS, OTHER CARBONATED, NON-ALCOHOLIC BEVERAGES, OR FOOD FOR HUMAN CONSUMPTION.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE 30 DAYS AFTER ADOPTION.

A majority yes vote is necessary for passage.

| | | |
|---|---|---|
| | YES | SHALL THE PROPOSED AMENDMENT BE ADOPTED? |
| | NO | |

United States of America
State of Ohio } ss.
Office of the Secretary of State

I, Bob Taft, Secretary of State of the State of Ohio, do hereby certify that the ballot as shown above is the prescribed form for the General Election to be held on November 8, 1994.

Witness my hand and official seal at Columbus, Ohio this 9th day of September, 1994.

BALLOT LANGUAGE, EXPLANATIONS, ARGUMENTS AND RESOLUTIONS FOR AMENDMENTS TO THE OHIO CONSTITUTION PROPOSED BY THE GENERAL ASSEMBLY AND BALLOT LANGUAGE, ARGUMENTS AND THE FULL TEXT OF AN AMENDMENT TO THE OHIO CONSTITUTION PROPOSED BY INITIATIVE PETITION TO BE SUBMITTED TO THE VOTERS AT THE GENERAL ELECTION, NOVEMBER 8, 1994.

# PROPOSED AMENDMENT TO THE OHIO CONSTITUTION

PROPOSED CONSTITUTIONAL AMENDMENT

**1** (Proposed by Resolution of the General Assembly of Ohio)

To amend Sections 2 and 3 of Article IV of the Constitution of the State of Ohio.

TO CHANGE THE PROCEDURE FOR APPEALS OF CASES IN WHICH THE DEATH PENALTY IS IMPOSED, THIS AMENDMENT WILL:

1. REMOVE JURISDICTION FROM THE COURTS OF APPEALS TO REVIEW DEATH PENALTY CASES ON DIRECT APPEAL.

2. PROVIDE FOR DIRECT APPEALS OF DEATH PENALTY CASES TO THE OHIO SUPREME COURT FROM THE COURTS OF COMMON PLEAS OR OTHER COURTS OF RECORD INFERIOR TO THE COURT OF APPEALS.

3. APPLY TO CASES IN WHICH THE DEATH PENALTY IS IMPOSED FOR OFFENSES COMMITTED ON OR AFTER JANUARY 1, 1995.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE JANUARY 1, 1995.

A majority yes vote is necessary for passage.

| | | |
|---|---|---|
| | YES | SHALL THE PROPOSED AMENDMENT BE ADOPTED? |
| | NO | |

## EXPLANATION FOR STATE ISSUE 1
(as prepared by the Ohio Ballot Board)

Currently, a case in which the death penalty is imposed is reviewed for legal sufficiency by a district court of appeals consisting of at least three judges. This portion of the appeals process takes on the average from one to two years. If the death penalty is upheld, the case is then reviewed by the Ohio Supreme Court. If the death penalty is overturned by the Court of Appeals, appeal to the Ohio Supreme Court is discretionary.

If adopted, the amendment will eliminate the review of death penalty cases by a district court of appeals and provide that these cases be reviewed directly by the Ohio Supreme Court. This may increase the Ohio Supreme Court's burden and caseload in these transferred appeals. The adoption of the amendment would not affect review of death penalty cases by federal courts.

## ARGUMENT FOR STATE ISSUE 1

VOTE FOR ISSUE 1
SUPPORT SWIFT JUSTICE IN OHIO

According to the current law, a person sentenced to death in Ohio has the right to an appeals process that contains two steps on the state level: The Court of Appeals and The Ohio Supreme Court. Issue 1 seeks to delete the Court of Appeals step in an effort to streamline the process and make the system more efficient. Issue 1 will give persons convicted and sentenced to death in Ohio a direct appeal to the Ohio Supreme Court.

By eliminating the Courts of Appeal in this process, duplication of efforts and many years will be saved. According to present law, the court of appeals must review the entire record, that is all evidence that was presented at the original hearing. If this decision is appealed, the case travels to the Ohio Supreme Court. This court gives the case the same review as was given by the court of appeals and makes a decision. In total, from the day that the death sentence was imposed, to the day that the Supreme Court gives its decision, an average of five years may have passed.

Ohioans should vote in favor of Issue 1 because it is a reasonable step toward reforming our current judicial system. Too often criminals are allowed to manipulate and exploit our judicial process through endless appeals that take years to review. Meanwhile, the families of victims wait for God justice to be administered. Unfortunately, many families are still waiting. Support for Issue 1 is support for these families.

SUPPORTERS OF ISSUE 1
Governor George Voinovich
Attorney General Lee Fisher
Ohio Prosecuting Attorneys Association

COMMITTEE TO PREPARE ARGUMENT FOR ISSUE 1
State Representative Johnnie Maier
State Representative Barbara Pringle
State Representative Mike Fox
Senator Nancy Chiles Dix
Senator Anthony Sinagra

## ARGUMENT AGAINST STATE ISSUE 1

THIS ISSUE SIMPLY WILL NOT DO WHAT IT CLAIMS. This proposal should be defeated because:

1. It will not significantly shorten the time between a sentence of death and execution.

2. It increases the risk that an innocent person will be executed.

Ohio's death penalty cases are now reviewed by one of the 12 district courts of appeal. Without this lower court review, Supreme Court Justices will have to assemble and review the records of the case at much greater length, cutting into alleged time-saving. Individuals on both sides of the issue agree that these mandated appeals may increase the Ohio Supreme Court's burden and caseload.

This proposal should be defeated because it selectively denies a right of appeal only to those subject to the state's most extreme penalty, death.

This proposal should be defeated because it opens our death penalty law to a lengthy and expensive constitutional challenge. The U.S. Supreme Court has never upheld a death penalty statute allowing fewer levels of appeal in capital cases than in other cases.

This proposal should be defeated because it increases the risk that an innocent person will be executed. There have been several instances where people convicted and awaiting the death penalty have been falsely convicted. This measure should be defeated so we can solve the problem in ways that carry less risk of executing the wrong person.

VOTE NO ON ISSUE 1.

COMMITTEE TO PREPARE ARGUMENT AGAINST ISSUE 1
Representative Mary Abel
Representative J. Donald Mottley
Representative Vernon Sykes
Senator Ben E. Espy
Senator Merle Kearns

ISSUE 1
TEXT OF PROPOSED
CONSTITUTIONAL AMENDMENT

(Substitute House Joint Resolution No. 18)

[illegible]

ARTICLE IV

[illegible]

## PROPOSED AMENDMENT TO THE OHIO CONSTITUTION

PROPOSED CONSTITUTIONAL AMENDMENT

**2** (Proposed by Resolution of the General Assembly of Ohio)

To amend Article I of the Ohio Constitution by the addition of Section 10a.

TO AFFORD VICTIMS OF CRIMINAL OFFENSES CONSTITUTIONAL RIGHTS, THIS AMENDMENT WILL:

1. REQUIRE THAT VICTIMS OF CRIME BE ACCORDED FAIRNESS, DIGNITY AND RESPECT IN THE CRIMINAL JUSTICE SYSTEM.

2. AS PROVIDED BY LAW, REQUIRE THAT VICTIMS OF CRIME BE GIVEN REASONABLE AND APPROPRIATE NOTICE, INFORMATION, ACCESS, AND PROTECTION AND A MEANINGFUL ROLE IN THE CRIMINAL JUSTICE PROCESS.

IF ADOPTED, THIS AMENDMENT WILL NOT GIVE ANY PERSON NEW OR ADDITIONAL RIGHTS TO APPEAL OR MODIFY A COURT DECISION, ABRIDGE ANY OTHER RIGHT GUARANTEED BY THE U.S. OR OHIO CONSTITUTIONS, OR CREATE A LEGAL CLAIM FOR COMPENSATION OR DAMAGES AGAINST THE STATE OF OHIO, ITS POLITICAL SUBDIVISIONS OR ANY PUBLIC OFFICER OR EMPLOYEE.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE IMMEDIATELY.

A majority yes vote is necessary for passage.

| | | |
|---|---|---|
| | YES | SHALL THE PROPOSED AMENDMENT BE ADOPTED? |
| | NO | |

## EXPLANATION FOR STATE ISSUE 2
(as prepared by the Ohio Ballot Board)

The amendment would give crime victims a constitutional right to fairness, dignity, and respect in the criminal justice system. The amendment would also require the General Assembly to pass laws giving crime victims reasonable notice and information about, and access to, criminal proceedings, and a meaningful role in the criminal justice process.

The amendment does not give any person new or additional rights to appeal or modify decisions in criminal cases or change or limit rights currently guaranteed by the U.S. or Ohio Constitution. Finally, the amendment does not create any new legal claims against the State of Ohio, its political subdivisions, or public officers or employees.

## ARGUMENT FOR STATE ISSUE 2

1. Currently, there are laws regarding crime victims, but there are constitutional rights that protect the accused. In a judicial setting, when a judge must weigh the laws of the victim against the constitutional rights of the accused, the constitutional rights will prevail. The proposed amendment will ensure that when judges make decisions, they will weigh the constitutional rights of both the victim and the accused. The amendment will not take away any rights of the accused. It will, however, give the rights of victims of criminal offenses equal standing and protection in our state constitution. Issue 2 is a question of balance.

2. The constitutional amendment will serve as a guide to our state lawmakers in passing victim rights legislation. Our constitution serves as our highest authority and statement of public policy. Lawmakers will know it is the will of its citizens that victims of crime should have a right to reasonable and appropriate notice, information, access, and protection, and a meaningful role in the criminal justice process.

3. The Constitution protects certain fundamental rights that every person has and that no other person, institution, or government can take away or deny. The Bill of Rights to the Constitution of the United States and Article I, Section 10 of the Ohio Constitution were adopted so that no one, who is accused of committing a crime, can be denied the rights that are enumerated there. However, there is no corresponding section in either Constitution to protect the fundamental rights of victims of crime. The fundamental rights of victims to be treated with fairness, dignity, and respect need to be in the fundamental law of our state, the Ohio Constitution.

COMMITTEE TO PREPARE ARGUMENT FOR ISSUE 2
Representative Katherine H. Walsh
Representative Sean Logan
Representative Tim Greenwood

## ARGUMENT AGAINST STATE ISSUE 2

No argument was submitted against the proposed constitutional amendment. No member of the General Assembly voted against the amendment.

ISSUE 2
TEXT OF PROPOSED
CONSTITUTIONAL AMENDMENT

(Amended Substitute House Joint Resolution No. 7)

Proposing to enact Section 10a of Article I of the Constitution of the State of Ohio relative to rights of victims of crime.

Be it resolved by the General Assembly of the State of Ohio, three-fifths of the members elected to each house concurring herein, that there shall be submitted to the electors of the state in the manner prescribed by law at the general election to be held on the first Tuesday after the first Monday in November 1994, a proposal to enact Section 10a of Article I of the Constitution of Ohio to read as follows:

ARTICLE I

Section 10a. VICTIMS OF CRIMINAL OFFENSES SHALL BE ACCORDED FAIRNESS, DIGNITY, AND RESPECT IN THE CRIMINAL JUSTICE PROCESS, AND, AS THE GENERAL ASSEMBLY SHALL DEFINE AND PROVIDE BY LAW, SHALL BE ACCORDED RIGHTS TO REASONABLE AND APPROPRIATE NOTICE, INFORMATION, ACCESS, AND PROTECTION AND TO A MEANINGFUL ROLE IN THE CRIMINAL JUSTICE PROCESS. THIS SECTION DOES NOT CONFER UPON ANY PERSON A RIGHT TO APPEAL OR MODIFY ANY DECISION IN A CRIMINAL PROCEEDING, DOES NOT ABRIDGE ANY OTHER RIGHT GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES OR THIS CONSTITUTION, AND DOES NOT CREATE ANY CAUSE OF ACTION FOR COMPENSATION OR DAMAGES AGAINST THE STATE, ANY POLITICAL SUBDIVISION OF THE STATE, ANY OFFICER, EMPLOYEE, OR AGENT OF THE STATE OR OF ANY POLITICAL SUBDIVISION, OR ANY OFFICER OF THE COURT.

EFFECTIVE DATE

If adopted by a majority of the electors voting on the proposal, Section 10a of Article I of the Constitution of Ohio shall take effect immediately.

[illegible]

EFFECTIVE DATE AND REPEAL

If adopted by a majority of the electors voting on this amendment, the amendment shall take effect on January 1, 1995, and existing Sections 2 and 3 of Article IV of the Constitution of the State of Ohio shall be repealed on that effective date.

SCHEDULE

Upon the adoption of the amendment to Sections 2 and 3 of Article IV of the Constitution of the State of Ohio, the General Assembly shall amend the Revised Code of Ohio to implement the direct appeals of death sentences to the Ohio Supreme Court.

The amendments to Sections 2 and 3 of Article IV of the Constitution of Ohio regarding the direct appeal of a sentence of death apply only to cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995. A direct appeal of a sentence of death imposed for an offense committed prior to January 1, 1995, shall be taken in the same manner as if the amendment had not been adopted.

ISSUE 3
TEXT OF PROPOSED
CONSTITUTIONAL AMENDMENT

(Amended Senate Joint Resolution No. 9)

Proposing to enact Section 6 of Article VI of the Constitution of the State of Ohio [illegible]

Be it resolved by the General Assembly of the State of Ohio, three-fifths of the members elected to each house concurring herein, that there shall be submitted to the electors of the state in the manner prescribed by law at the general election to be held on the first Tuesday after the first Monday in November 1994, a proposal to enact a new section hereinafter by following Section 6 of Article VI of the Constitution of Ohio to read as follows:

ARTICLE VI

Section 6. (A) TO INCREASE OPPORTUNITIES TO THE RESIDENTS OF THIS STATE FOR HIGHER EDUCATION, IT IS HEREBY DETERMINED TO BE IN THE PUBLIC INTEREST AND A PROPER PUBLIC PURPOSE FOR THE STATE TO MAINTAIN A PROGRAM FOR THE SALE OF TUITION CREDITS SUCH THAT THE PROCEEDS OF SUCH CREDITS PURCHASED FOR THE BENEFIT OF A PERSON THEN A RESIDENT OF THIS STATE SHALL BE GUARANTEED TO COVER A SPECIFIED AMOUNT WHEN APPLIED TO THE COST OF TUITION AT ANY STATE INSTITUTION OF HIGHER EDUCATION, AND THE SAME OR A DIFFERENT AMOUNT WHEN APPLIED TO THE COST OF TUITION AT ANY OTHER INSTITUTION OF HIGHER EDUCATION, AS MAY BE PROVIDED BY LAW.

(B) THE TUITION CREDITS PROGRAM AND THE OHIO TUITION TRUST FUND PREVIOUSLY CREATED BY LAW, WHICH TERMS INCLUDE ANY SUCCESSOR TO THAT PROGRAM OR FUND, SHALL BE CONTINUED SUBJECT TO THE SAME LAWS, EXCEPT AS MAY HEREAFTER BE AMENDED. TO SECURE THE GUARANTEES REQUIRED BY DIVISION (A) OF THIS SECTION, THE GENERAL ASSEMBLY SHALL APPROPRIATE MONEY SUFFICIENT TO OFFSET ANY DEFICIENCY THAT OCCURS IN THE OHIO TUITION TRUST FUND, AT ANY TIME NECESSARY TO MAKE PAYMENT OF THE FULL AMOUNT OF ANY TUITION PAYMENT OR REFUND THAT WOULD HAVE BEEN REQUIRED BY A TUITION PAYMENT CONTRACT, EXCEPT FOR THE CONTRACT'S LIMIT OF PAYMENT TO MONEY AVAILABLE IN THE TRUST FUND. NOTWITHSTANDING SECTION 29 OF ARTICLE II OF THIS CONSTITUTION, OR THE LIMITATION OF A TUITION PAYMENT CONTRACT EXECUTED BEFORE THE EFFECTIVE DATE OF THIS SECTION, SUCH APPROPRIATIONS MAY BE MADE BY A MAJORITY OF THE MEMBERS ELECTED TO EACH HOUSE OF THE GENERAL ASSEMBLY, AND THE FULL AMOUNT OF ANY SUCH ENHANCED TUITION PAYMENT OR REFUND MAY BE DISBURSED TO AND ACCEPTED BY THE BENEFICIARY OR PURCHASER. TO THESE ENDS THERE IS HEREBY PLEDGED THE FULL FAITH AND CREDIT AND TAXING POWER OF THE STATE.

ALL ASSETS THAT ARE MAINTAINED IN THE OHIO TUITION TRUST FUND SHALL BE USED SOLELY FOR THE PURPOSES OF THAT FUND. HOWEVER, IF THE PROGRAM IS TERMINATED OR THE FUND IS LIQUIDATED, THE REMAINING ASSETS AFTER THE OBLIGATIONS OF THE FUND HAVE BEEN SATISFIED IN ACCORDANCE WITH LAW SHALL BE TRANSFERRED TO THE GENERAL REVENUE FUND OF THE STATE.

LAWS SHALL BE PASSED, WHICH MAY PRECEDE AND BE MADE CONTINGENT UPON THE ADOPTION OF THIS AMENDMENT BY THE ELECTORS, TO PROVIDE THAT FUTURE CONDUCT OF THE TUITION CREDITS PROGRAM SHALL BE CONSISTENT WITH THIS AMENDMENT. NOTHING IN THIS AMENDMENT SHALL BE CONSTRUED TO PROHIBIT OR RESTRICT ANY AMENDMENTS TO THE LAWS GOVERNING THE TUITION CREDITS PROGRAM OR THE OHIO TUITION TRUST FUND THAT ARE NOT INCONSISTENT WITH THIS AMENDMENT.

EFFECTIVE DATE

If adopted by a majority of the electors voting on the proposal, Section 6 of Article VI of the Constitution of Ohio shall take effect immediately.

# PROPOSED AMENDMENT TO THE OHIO CONSTITUTION

PROPOSED CONSTITUTIONAL AMENDMENT

**3** (Proposed by Resolution of the General Assembly of Ohio)

To amend Article VI of the Ohio Constitution by the addition of Section 6.

TO INCREASE OPPORTUNITIES TO THE RESIDENTS OF THE STATE OF OHIO FOR HIGHER EDUCATION AND TO ENCOURAGE OHIO FAMILIES TO SAVE AHEAD TO BETTER AFFORD HIGHER EDUCATION, THIS AMENDMENT WILL:

1. ALLOW THE STATE TO MAINTAIN A PROGRAM FOR THE SALE OF TUITION CREDITS WHEREBY THE PROCEEDS OF SUCH CREDITS PURCHASED FOR THE BENEFIT OF STATE RESIDENTS ARE GUARANTEED BY THE STATE TO COVER A SPECIFIED AMOUNT WHEN APPLIED TO THE COST OF TUITION AT ANY STATE INSTITUTION OF HIGHER EDUCATION AND THE SAME OR A DIFFERENT AMOUNT WHEN APPLIED TO THE COST OF TUITION AT ANY OTHER HIGHER EDUCATION INSTITUTION AS MAY BE PROVIDED BY LAW.

2. TO REQUIRE THAT TUITION CREDITS PAID FROM THE TUITION CREDITS PROGRAM AND THE OHIO TUITION TRUST FUND BE SUPPORTED BY THE FULL FAITH AND CREDIT OF THE STATE OF OHIO AND REQUIRE THE PASSAGE OF LAWS FOR THE CONDUCT OF THE TUITION CREDITS PROGRAM CONSISTENT WITH THIS AMENDMENT.

3. REQUIRE THE GENERAL ASSEMBLY TO APPROPRIATE MONEY TO OFFSET ANY DEFICIENCY IN THE OHIO TUITION TRUST FUND TO GUARANTEE THE PAYMENT OF THE FULL AMOUNT OF ANY TUITION PAYMENT OR REFUND REQUIRED BY A TUITION PAYMENT CONTRACT, AND ALLOW A MAJORITY OF THE MEMBERS OF EACH HOUSE OF THE GENERAL ASSEMBLY TO APPROPRIATE FUNDS FOR THE PAYMENT OF ANY TUITION PAYMENT CONTRACT PREVIOUSLY ENTERED INTO.

4. REQUIRE THAT ALL OHIO TUITION TRUST FUND ASSETS BE USED FOR THE PURPOSE OF THE FUND AND, IF THE FUND IS LIQUIDATED, REQUIRE THAT ANY REMAINING ASSETS BE TRANSFERRED TO THE GENERAL REVENUE FUND OF THE STATE.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE IMMEDIATELY.

A majority yes vote is necessary for passage.

| | | |
|---|---|---|
| | YES | SHALL THE PROPOSED AMENDMENT BE ADOPTED? |
| | NO | |

## EXPLANATION FOR STATE ISSUE 3
(as prepared by the Ohio Ballot Board)

The amendment would require that tuition credits paid from the tuition credits program and the Ohio Tuition Trust Fund be supported by the full faith and credit of the State of Ohio. The amendment would also require the passage of laws to provide that future conduct of the tuition credits program be consistent with the amendment.

The amendment would allow the State of Ohio to maintain a program for the sale of tuition credits and to guarantee the proceeds of the credits sold. The guarantee would cover a specified amount of the cost of tuition at any state institution of higher education and the same or a different amount of the cost of tuition at any other higher education institution as may be provided by law.

The amendment would also require the General Assembly to appropriate money to offset any deficiency in the Ohio Tuition Trust Fund to guarantee the payment of the full amount of any tuition payment or refund required by a tuition payment contract, and allow a majority of the members of each house of the General Assembly to appropriate funds for the payment of any tuition payment contract previously entered into.

Finally, the amendment would require that all assets maintained in the Ohio Tuition Trust Fund be used solely for the purposes of the fund. If the fund is liquidated, any remaining assets would be transferred to the general revenue fund of the state.

## ARGUMENT FOR STATE ISSUE 3

Passage of Issue 3 will not raise taxes or cost Ohio taxpayers money. It is needed to demonstrate to the Internal Revenue Service that the Prepaid Tuition Program qualifies for federal tax exemption. This "stamp of approval" will enable the program to continue providing an affordable means for families to prepay future higher education at competitive prices.

As a state agency, the Authority has many checks and balances to safeguard a fiscally-sound program for its participants. The funds are sufficient to meet future obligations. Passage of Issue 3 will officially back the Authority with the State's endorsement, satisfying federal guidelines.

The Ohio Tuition Trust Authority was created in 1989 as a state agency to provide Ohio families with a safe, simple and affordable way to prepay the cost of higher education in small increments. Also, scholarships can now be created by corporations or other organizations to prepay tuition for children from families who cannot afford advanced savings.

Since inception, the agency's Prepaid Tuition Program has more than 31,500 children enrolled, has been safely and prudently invested by Public Employees Retirement System money managers and has more than $113 million in assets.

Recent legislation passed by the General Assembly has improved the program's value, equity and affordability. To ensure its continued affordability and enable more Ohio children to access higher education, the State's formal, constitutionally-mandated "full faith and credit" is needed.

The proposed amendment has broad-based, bi-partisan support: state leadership supports its passage. Financial aid administrators endorse Issue 3 because advance family savings decreases reliance on scarce financial aid and burdensome student loans, opening greater access to education.

COMMITTEE TO PREPARE ARGUMENT FOR ISSUE 3

Senator Richard H. Finan
Senator Robert R. Cupp
Representative Michael G. Verich
Representative Barbara H. Boyd
Representative Doug White

## ARGUMENT AGAINST STATE ISSUE 3

THE OHIO CONSTITUTION SHOULD NOT BE AMENDED TO PLEDGE STATE TAXES TO GUARANTEE PERSONAL COLLEGE TUITION SAVINGS!

REASONS TO VOTE NO:

—INSURES PERSONAL SAVINGS PLANS: the investor would be assured of a fixed return when college tuition credits are purchased regardless of earnings on Trust Fund investments.

—COMMITS STATE TAXING POWER: should the investment of college tuition funds be insufficient to cover future tuition, tax-payers will have to pay the difference. In a time of difficult budget choices, where raising taxes or reducing spending are options, guaranteeing personal savings is wrong.

—GUARANTEES PAYMENT: an absolute constitutional guarantee is made only for long-term debt for state buildings. Guaranteeing payment for personal college savings accounts is BAD PUBLIC POLICY!

—IRS QUESTIONS: Internal Revenue Service will tax Trust Fund earnings unless the program is state backed. In reality these are private savings and should remain so.

—TRUST FUND NOT SELF-SUPPORTING: when this legislation was passed six years ago, it was to be independent of state government and investors had no claim on the General Revenue Fund. Now they will have first claim on the GRF!

—STATE COMPETES WITH PRIVATE INVESTMENTS: people who can afford to prepay tuition can do so without state help.

—REMOVES PRESSURE TO KEEP TUITION LOW: the leverage which the Trust Fund might have used to control tuition costs is eliminated.

—DISCRIMINATES: low income families cannot afford to contribute to a college savings account.

VOTE NO ON ISSUE 3!

COMMITTEE TO PREPARE ARGUMENT AGAINST ISSUE 3

State Representative Edward P. Kasputis
State Representative Joan W. Lawrence
State Senator Charles F. Horn

# PROPOSED AMENDMENT TO THE OHIO CONSTITUTION

PROPOSED CONSTITUTIONAL AMENDMENT

(Proposed by Initiative Petition)

**4** To amend Article XII of the Ohio Constitution by the addition of Section 13.

CURRENT SECTION 3(C) OF ARTICLE XII PROHIBITS TAXES ON THE SALE OR PURCHASE OF FOOD FOR HUMAN CONSUMPTION OFF THE PREMISES WHERE SOLD. THE AMENDMENT WOULD EXPAND THE CURRENT RESTRICTIONS BY:

1. PROHIBITING THE CURRENT WHOLESALE TAX ON SOFT DRINKS AND OTHER CARBONATED, NON-ALCOHOLIC BEVERAGES.

2. PROHIBITING ENACTMENT OF A WHOLESALE TAX ON THE SALE OR PURCHASE OF SOFT DRINKS, CARBONATED, NON-ALCOHOLIC BEVERAGES, OR FOOD FOR HUMAN CONSUMPTION, OR THEIR INGREDIENTS OR PACKAGING.

3. PROHIBITING ENACTMENT OF A TAX ON THE SALE TO OR PURCHASE BY A MANUFACTURER, PROCESSOR, PACKAGER, OR RESELLER OF SOFT DRINKS, CARBONATED, NON-ALCOHOLIC BEVERAGES, OR FOOD FOR HUMAN CONSUMPTION, OR THEIR INGREDIENTS OR PACKAGING.

4. PROHIBITING ENACTMENT OF RETAIL TAXES ON PACKAGING THAT CONTAINS SOFT DRINKS, OTHER CARBONATED, NON-ALCOHOLIC BEVERAGES, OR FOOD FOR HUMAN CONSUMPTION.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE 30 DAYS AFTER ADOPTION.

A majority yes vote is necessary for passage.

| | | |
|---|---|---|
| | YES | SHALL THE PROPOSED AMENDMENT BE ADOPTED? |
| | NO | |

## ARGUMENT FOR STATE ISSUE 4

VOTE "YES" ON ISSUE 4 — TO STOP TAXES ON FOOD

A YES vote on Issue 4 will restore Ohio's tradition of protecting consumers from paying taxes on food.

When the constitutionality of a new wholesale soft drink tax was challenged in 1992, the court ruling opened a gaping hole in Ohio's constitution, which had been thought to prohibit food taxes.

The court ruled that retail food taxes are indeed illegal. But, it concluded that wholesale taxes on food are legal!

A YES vote on Issue 4 will close this loophole, and restore Ohio's constitutional prohibition on taxing food.

Specifically, Issue 4 will prohibit wholesale taxes on food and other hidden taxes on food ingredients and food packaging. It also will repeal the 1992 soft drink tax.

Repealing the soft drink tax will not affect existing state programs. The revenues go into the General Fund, and are not dedicated to any specific uses.

We urge you to support Issue 4 because:

1. Taxing food is wrong. Food taxes especially hurt those who can least afford to pay, such as families with children and seniors on fixed incomes.

2. Allowing state government to enact hidden taxes on food will set a dangerous precedent. The state is already looking at new food taxes to raise revenues.

3. Hidden, wholesale taxes on food are ultimately passed on to consumers. The soft drink tax already costs consumers $70 million annually. Future wholesale food taxes could cost us hundreds of millions of dollars more per year.

Let's restore our constitutional tradition of prohibiting food taxes — before state government goes any further.

Join our broad-based committee of thousands of Ohioans in voting YES on Issue 4.

COMMITTEE TO PREPARE ARGUMENT FOR ISSUE 4

Diane Winterhalter
Dan Schoenhoft
STOP TAXES ON FOOD COMMITTEE

## EXPLANATION AND ARGUMENT AGAINST STATE ISSUE 4

STATE ISSUE 4 is a constitutional amendment to repeal a state tax on soda pop. Don't be misled into believing it eliminates taxes on food. Since 1936 Ohio's Constitution has prohibited state taxes on food off the premises where sold.

This amendment is being proposed primarily by out-of-state soda pop vendors which seek to use the Ohio Constitution to promote their limited special interests. Here are five reasons why every Ohio voter — and taxpayer — should vote NO on ISSUE 4.

(1) Contrary to its supporters' misleading claims, ISSUE 4 is not a reaction to a tax on food. Its purpose is to prohibit the current wholesale tax on soft drinks and other carbonated, non-alcoholic beverages. The tax amounts to a penny a can, which is modest and fair.

(2) State law has never defined soft drinks as food. They are NOT a nutrition source for children or adults. So they should be subject to taxation just like other non-food products. It's only fair.

(3) If passed, ISSUE 4 will reduce state funds available for education and childrens programs in Ohio. The soda pop tax generates $130 million per budget period, which is needed to support education and other vital programs for children.

(4) Consumers don't pay Ohio's pop tax. The soda pop companies do. Marketplace competition continues to hold down pop prices at the store.

(5) To balance the state budget and prevent cuts in school funding, the wholesale pop tax was approved in 1992 by a bipartisan majority in the state legislature and Governor George Voinovich. Passage of ISSUE 4 could result in harmful cuts in education and other state programs — or it will necessitate the adoption of another tax hike more objectionable to consumers.

On November 8th, vote NO on ISSUE 4!

COMMITTEE TO PREPARE ARGUMENT AGAINST ISSUE 4

R. Gregory Browning
Stephen A. Perry
Gayle S. Channing
Mack Real
I. John Reimers

ISSUE 4
TEXT OF PROPOSED CONSTITUTIONAL AMENDMENT
(Proposed by Initiative Petition)

Be it resolved by the people of the State of Ohio:
Article XII of the Ohio Constitution is amended by the addition of a new section, Section 13, to read:

NO SALES OR OTHER EXCISE TAXES SHALL BE LEVIED OR COLLECTED (1) UPON ANY WHOLESALE SALE OR WHOLESALE PURCHASE OF FOOD FOR HUMAN CONSUMPTION, ITS INGREDIENTS OR ITS PACKAGING; (2) UPON ANY SALE OR PURCHASE OF SUCH ITEMS SOLD TO OR PURCHASED BY A MANUFACTURER, PROCESSOR, PACKAGER, DISTRIBUTOR OR RESELLER OF FOOD FOR HUMAN CONSUMPTION, OR ITS INGREDIENTS, FOR USE IN ITS TRADE OR BUSINESS; OR (3) IN ANY RETAIL TRANSACTION, ON ANY PACKAGING THAT CONTAINS FOOD FOR HUMAN CONSUMPTION ON OR OFF THE PREMISES WHERE SOLD. FOR PURPOSES OF THIS SECTION, FOOD FOR HUMAN CONSUMPTION SHALL INCLUDE NON-ALCOHOLIC BEVERAGES. THIS SECTION SHALL NOT AFFECT THE EXTENT TO WHICH THE LEVY OR COLLECTION OF SALES OR OTHER EXCISE TAXES ON THE RETAIL SALE OR RETAIL PURCHASE OF FOOD FOR HUMAN CONSUMPTION IS PERMITTED OR PROHIBITED BY SECTION 3(C) OF THIS ARTICLE.

OFFICE OF THE SECRETARY OF STATE OF OHIO

I, Bob Taft, Secretary of State, do hereby certify that the foregoing are the full text of certain constitutional amendments proposed by the General Assembly and filed in the office of the Secretary of State pursuant to Article XVI, Section 1 of the Constitution of the State of Ohio and a certain constitutional amendment proposed by initiative petition filed in the office of the Secretary of State pursuant to Article II, Section 1a of the Constitution of the State of Ohio, together with the ballot language and explanations certified to me by the Ohio Ballot Board and arguments submitted to me by the proponents and opponents of the issues, as prescribed by law.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal at Columbus, Ohio this [illegible] day of September, 1994.

Bob Taft
SECRETARY OF STATE

# PROPOSED AMENDMENT TO THE OHIO CONSTITUTION

**PROPOSED CONSTITUTIONAL AMENDMENT**

**(Proposed by Initiative Petition)**

**4** To amend Article XII of the Ohio Constitution by the addition of Section 13.

CURRENT SECTION 3(C) OF ARTICLE XII PROHIBITS TAXES ON THE SALE OR PURCHASE OF FOOD FOR HUMAN CONSUMPTION OFF THE PREMISES WHERE SOLD. THE AMENDMENT WOULD EXPAND THE CURRENT RESTRICTIONS BY:

1. PROHIBITING THE CURRENT WHOLESALE TAX ON SOFT DRINKS AND OTHER CARBONATED, NON-ALCOHOLIC BEVERAGES.

2. PROHIBITING ENACTMENT OF A WHOLESALE TAX ON THE SALE OR PURCHASE OF SOFT DRINKS, CARBONATED, NON-ALCOHOLIC BEVERAGES, OR FOOD FOR HUMAN CONSUMPTION, OR THEIR INGREDIENTS OR PACKAGING.

3. PROHIBITING ENACTMENT OF A TAX ON THE SALE TO OR PURCHASE BY A MANUFACTURER, PROCESSOR, PACKAGER, OR RESELLER OF SOFT DRINKS, CARBONATED, NON-ALCOHOLIC BEVERAGES, OR FOOD FOR HUMAN CONSUMPTION, OR THEIR INGREDIENTS OR PACKAGING.

4. PROHIBITING ENACTMENT OF RETAIL TAXES ON PACKAGING THAT CONTAINS SOFT DRINKS, OTHER CARBONATED, NON-ALCOHOLIC BEVERAGES, OR FOOD FOR HUMAN CONSUMPTION.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE 30 DAYS AFTER ADOPTION.

A majority yes vote is necessary for passage.

| | | |
|---|---|---|
| | YES | SHALL THE PROPOSED AMENDMENT BE ADOPTED? |
| | NO | |

## ARGUMENT FOR STATE ISSUE 4

**VOTE "YES" ON ISSUE 4 — TO STOP TAXES ON FOOD**

A YES vote on Issue 4 will restore Ohio's tradition of protecting consumers from paying taxes on food.

When the constitutionality of a new wholesale soft drink tax was challenged in 1992, the court ruling opened a gaping hole in Ohio's constitution, which had been thought to prohibit food taxes.

The court ruled that retail food taxes are indeed illegal. But, it concluded that wholesale taxes on food are legal!

A YES vote on Issue 4 will close this loophole, and restore Ohio's constitutional prohibition on taxing food.

Specifically, Issue 4 will prohibit wholesale taxes on food and other hidden taxes on food ingredients and food packaging. It also will repeal the 1992 soft drink tax.

Repealing the soft drink tax will not affect existing state programs. The revenues go into the General Fund, and are not dedicated to any specific area.

We urge you to support Issue 4 because:

1. Taxing food is wrong. Food taxes especially hurt those who can least afford to pay, such as families with children and seniors on fixed incomes.

2. Allowing state government to enact hidden taxes on food will set a dangerous precedent. The state is already looking at new food taxes to raise revenues.

3. Hidden, wholesale taxes on food are ultimately passed on to consumers. The soft drink tax already costs consumers $70 million annually. Future wholesale food taxes could cost us hundreds of millions of dollars more per year.

Let's restore our constitutional tradition of prohibiting food taxes — before state government goes any further.

Join our broad-based committee of thousands of Ohioans in voting YES on Issue 4.

**COMMITTEE TO PREPARE ARGUMENT FOR ISSUE 4**
Diane Winterhalter
Don Schoenhoff
STOP TAXES ON FOOD COMMITTEE

## EXPLANATION AND ARGUMENT AGAINST STATE ISSUE 4

STATE ISSUE 4 is a constitutional amendment to repeal a state tax on soda pop. Don't be misled into believing it eliminates taxes on food. Since 1936 Ohio's Constitution has prohibited state taxes on food off the premises where sold.

This amendment is being proposed primarily by out-of-state soda pop vendors which seek to use the Ohio Constitution to promote their limited special interests. Here are five reasons why every Ohio voter — and taxpayer — should vote NO on ISSUE 4.

(1) Contrary to its supporters' misleading claims, ISSUE 4 is not a reaction to a tax on food. Its purpose is to prohibit the current wholesale tax on soft drinks and other carbonated, non-alcoholic beverages. The tax amounts to a penny a can, which is modest and fair.

(2) State law has never defined soft drinks as food. They are NOT a nutrition source for children or adults. So they should be subject to taxation just like other non-food products. It's only fair.

(3) If passed, ISSUE 4 will reduce state funds available for education and childrens programs in Ohio. The soda pop tax generates $130 million per budget period, which is needed to support education and other vital programs for children.

(4) Consumers don't pay Ohio's pop tax. The soda pop companies do. Marketplace competition continues to hold down pop prices at the store.

(5) To balance the state budget and prevent cuts in school funding, the wholesale pop tax was approved in 1992 by a bipartisan majority in the state legislature and Governor George Voinovich. Passage of ISSUE 4 could result in harmful cuts in education and other state programs — or it will necessitate the adoption of another tax hike more objectionable to consumers.

On November 8th, vote NO on ISSUE 4!

**COMMITTEE TO PREPARE ARGUMENT AGAINST ISSUE 4**
R. Gregory Browning
Stephen A. Perry
Gayle S. Chansing
Mark Real
I. John Reimers

**ISSUE 4**
**TEXT OF PROPOSED CONSTITUTIONAL AMENDMENT**
**(Proposed by Initiative Petition)**

Be it resolved by the people of the State of Ohio:

Article XII of the Ohio Constitution is amended by the addition of a new section, Section 13, to read:

NO SALES OR OTHER EXCISE TAXES SHALL BE LEVIED OR COLLECTED (1) UPON ANY WHOLESALE SALE OR WHOLESALE PURCHASE OF FOOD FOR HUMAN CONSUMPTION, ITS INGREDIENTS OR ITS PACKAGING; (2) UPON ANY SALE OR PURCHASE OF SUCH ITEMS SOLD TO OR PURCHASED BY A MANUFACTURER, PROCESSOR, PACKAGER, DISTRIBUTOR OR RESELLER OF FOOD FOR HUMAN CONSUMPTION, OR ITS INGREDIENTS, FOR USE IN ITS TRADE OR BUSINESS; OR (3) IN ANY RETAIL TRANSACTION, ON ANY PACKAGING THAT CONTAINS FOOD FOR HUMAN CONSUMPTION ON OR OFF THE PREMISES WHERE SOLD. FOR PURPOSES OF THIS SECTION, FOOD FOR HUMAN CONSUMPTION SHALL INCLUDE NON-ALCOHOLIC BEVERAGES. THIS SECTION SHALL NOT AFFECT THE EXTENT TO WHICH THE LEVY OR COLLECTION OF SALES OR OTHER EXCISE TAXES ON THE RETAIL SALE OR RETAIL PURCHASE OF FOOD FOR HUMAN CONSUMPTION IS PERMITTED OR PROHIBITED BY SECTION 3(C) OF THIS ARTICLE.

**OFFICE OF THE SECRETARY OF STATE OF OHIO**

I, Bob Taft, Secretary of State, do hereby certify that the foregoing are the full text of certain constitutional amendments proposed by the General Assembly and filed in the office of the Secretary of State pursuant to Article XVI, Section 1 of the Constitution of the State of Ohio and a certain constitutional amendment proposed by initiative petition filed in the office of the Secretary of State pursuant to Article II, Section 1g of the Constitution of the State of Ohio, together with the ballot language and explanations certified to me by the Ohio Ballot Board and arguments submitted to me by the proponents and opponents of the issues, as prescribed by law.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal at Columbus, Ohio this 7th day of September, 1994.

Bob Taft
SECRETARY OF STATE

Sec. 5747.02. ~~(A)~~ For the purpose of providing revenue for the support of schools and local government functions, to provide relief to property taxpayers, to provide revenue for the general revenue fund, and to meet the expenses of administering the tax levied by this chapter, there is hereby levied on every individual and every estate residing in or earning or receiving income in this state, and on every individual and estate earning or receiving lottery winnings, prizes, or awards pursuant to Chapter 3770. of the Revised Code, an annual tax measured in the case of individuals by adjusted gross income less an exemption of six hundred fifty dollars each for the taxpayer, his spouse, and each dependent, and measured in the case of estates by taxable income. The tax imposed by this section on the balance thus obtained is hereby levied as follows:

| **ADJUSTED GROSS INCOME LESS EXEMPTIONS (INDIVIDUALS) OR TAXABLE INCOME (ESTATES)** | **TAX** |
|---|---|
| $5,000 or less | .743% |
| More than $5,000 but not more than $10,000 | $37.15 plus 1.486% of the amount in excess of $5,000 |
| More than $10,000 but not more than $15,000 | $111.45 plus 2.972% of the amount in excess of $10,000 |
| More than $15,000 but not more than $20,000 | $260.05 plus 3.715% of the amount in excess of $15,000 |
| More than $20,000 but not more than $40,000 | $445.80 plus 4.457% of the amount in excess of $20,000 |
| More than $40,000 but not more than $80,000 | $1,337.20 plus 5.201% of the amount in excess of $40,000 |
| More than $80,000 but not more than $100,000 | $3,417.60 plus 5.943% of the amount in excess of $80,000 |
| More than $100,000 BUT NOT MORE THAN $200,000 | $4,606.20 plus 6.9% of the amount in excess of $100,000 |
| MORE THAN $200,000 | $11,506.20 PLUS 7.5% OF THE AMOUNT IN EXCESS OF $200,000 |

The levy of this tax on income does not prevent a municipal corporation or joint economic development district created under section 715.70 of the Revised Code from levying a tax on income.

Sec. 5753.01. AS USED IN THIS CHAPTER:

(A) "BEVERAGE" MEANS ANY NONALCOHOLIC, CARBONATED LIQUID INTENDED FOR HUMAN CONSUMPTION AND BEER AND MALT BEVERAGES CONTAINING LESS THAN ONE-HALF OF ONE PER CENT ALCOHOL BY VOLUME, BUT DOES NOT INCLUDE FOOD AS DEFINED IN DIVISION (B) OF SECTION 5739.02 OF THE REVISED CODE.

(B) "POST-MIX SYRUP" MEANS A CONCENTRATED LIQUID MIXTURE OF BASIC INGREDIENTS USED IN MAKING, MIXING, OR COMPOUNDING A BEVERAGE BY THE ADDITION OF WATER AT THE POINT OF DELIVERY TO THE CONSUMER.

(C) "WHOLESALE DISTRIBUTOR" MEANS A PERSON WHO DISTRIBUTES BEVERAGES OR POST-MIX SYRUP TO RETAIL DEALERS IN THIS STATE.

(D) "RETAIL DEALER" MEANS A PERSON ENGAGED IN THE BUSINESS OF SELLING BEVERAGES AT RETAIL IN THIS STATE.

(E) "SALE" AND "SELLING" INCLUDE EXCHANGE, BARTER, GIFT, OFFER FOR SALE, DISPENSE, AND DISTRIBUTION.

Sec. 5753.02. (A) FOR THE PURPOSE OF PROVIDING REVENUE FOR THE USE OF THE GENERAL FUND, AN EXCISE TAX IS HEREBY LEVIED AS FOLLOWS:

(1) ON THE SALE OF BEVERAGE IN CONTAINERS, ONE-TWELFTH CENT PER OUNCE OF LIQUID CONTENT, OR FRACTIONAL PART THEREOF;

(2) ON THE SALE OF EACH CONTAINER OF POST-MIX SYRUP, SIXTY-FOUR CENTS PER GALLON, OR FRACTIONAL PART THEREOF.

(B) ONLY ONE SALE OF THE SAME ARTICLE SHALL BE USED IN COMPUTING THE AMOUNT OF TAX DUE.

Sec. 5753.03. THE TAX COMMISSIONER SHALL ADMINISTER THIS CHAPTER AND MAY ADOPT SUCH RULES AS HE FINDS NECESSARY FOR THE ADMINISTRATION AND ENFORCEMENT OF THE TAX.

Sec. 5753.04. (A) EACH WHOLESALE DISTRIBUTOR IS LIABLE FOR THE TAX IMPOSED BY SECTION 5753.02 OF THE REVISED CODE ON ALL BEVERAGE AND POST-MIX SYRUP SOLD BY HIM TO RETAIL DEALERS IN THIS STATE.

(B) EACH WHOLESALE DISTRIBUTOR WHO USES ANY BEVERAGE OR POST-MIX SYRUP IN HIS OWN OPERATION IN THIS STATE AS A RETAIL DEALER IS LIABLE FOR THE TAX ON SUCH BEVERAGE OR POST-MIX SYRUP TRANSPORTED BY HIM TO THE SITE OF THE RETAIL SALE.

(C) EACH RETAIL DEALER WHO ACQUIRES BEVERAGE OR POST-MIX SYRUP FROM A PERSON WHO IS NOT REGISTERED WITH THE TAX COMMISSIONER AS A WHOLESALE DISTRIBUTOR PURSUANT TO SECTION 5753.12 OF THE REVISED CODE IS LIABLE FOR THE TAX IMPOSED BY SECTION 5753.02 OF THE REVISED CODE ON SUCH BEVERAGE OR SYRUP AC-

QUIRED FOR RETAIL SALE IN THIS STATE TO THE SAME EXTENT AND IN THE SAME AMOUNT AS THE TAX IMPOSED ON WHOLESALE DISTRIBUTORS.

Sec. 5753.05. (A) BY THE TWENTIETH DAY OF EACH MONTH, EACH PERSON REQUIRED TO PAY THE TAX IMPOSED BY SECTION 5753.02 OF THE REVISED CODE SHALL FILE WITH THE TREASURER OF STATE A RETURN AS PRESCRIBED BY THE TAX COMMISSIONER AND SHALL MAKE PAYMENT OF THE FULL AMOUNT OF THE TAX DUE FOR THE NEXT PRECEDING MONTH. THE RETURN SHALL BE SIGNED BY THE PERSON REQUIRED TO FILE IT, OR AN AUTHORIZED EMPLOYEE, OFFICER, OR AGENT. THE TREASURER SHALL MARK ON THE RETURN THE DATE IT WAS RECEIVED AND INDICATE PAYMENT OR NONPAYMENT OF THE TAX SHOWN TO BE DUE ON THE RETURN. THE TREASURER SHALL TRANSMIT IMMEDIATELY ALL RETURNS TO THE TAX COMMISSIONER. THE RETURN SHALL BE DEEMED FILED WHEN RECEIVED BY THE TREASURER OF STATE.

(B) ANY PERSON REQUIRED BY THIS SECTION TO FILE A RETURN WHO FAILS TO FILE SUCH A RETURN WITHIN THE PERIOD PRESCRIBED SHALL PAY AN ADDITIONAL CHARGE OF FIFTY DOLLARS OR TEN PER CENT OF THE TAX REQUIRED TO BE PAID FOR THE REPORTING PERIOD, WHICHEVER IS GREATER. THE COMMISSIONER MAY COLLECT SUCH ADDITIONAL CHARGE BY ASSESSMENT PURSUANT TO SECTION 5753.08 OF THE REVISED CODE. THE COMMISSIONER MAY REMIT ALL OR A PORTION OF THE ADDITIONAL CHARGE AND MAY ADOPT RULES RELATING THERETO.

(C) IF ANY TAX DUE IS NOT PAID TIMELY IN ACCORDANCE WITH THIS SECTION, THE PERSON LIABLE FOR THE TAX SHALL PAY INTEREST, CALCULATED AT THE RATE PER ANNUM AS PRESCRIBED BY SECTION 5703.47 OF THE REVISED CODE, FROM THE DATE THE TAX PAYMENT WAS DUE TO THE DATE OF PAYMENT. THE COMMISSIONER MAY COLLECT SUCH INTEREST BY ASSESSMENT PURSUANT TO SECTION 5753.08 OF THE REVISED CODE.

(D) IF, IN THE ESTIMATION OF THE TAX COMMISSIONER, THE AVERAGE LIABILITY OF THE PERSON LIABLE FOR THE TAX IS SUCH AS NOT TO MERIT MONTHLY FILING, THE COMMISSIONER MAY AUTHORIZE THE PERSON TO FILE AND PAY AT LESS FREQUENT INTERVALS.

Sec. 5753.06. (A) THE TREASURER OF STATE SHALL REFUND THE TAX IMPOSED PURSUANT TO SECTION 5753.02 OF THE REVISED CODE PAID ILLEGALLY OR ERRONEOUSLY, OR PAID ON AN ILLEGAL OR ERRONEOUS ASSESSMENT. APPLICATIONS FOR REFUND SHALL BE FILED WITH THE TAX COMMISSIONER ON A FORM PRESCRIBED BY HIM, WITHIN FOUR YEARS OF THE ILLEGAL OR ERRONEOUS PAYMENT OF THE

TAX. UPON THE FILING OF SUCH APPLICATION, THE COMMISSIONER SHALL DETERMINE THE AMOUNT OF REFUND DUE AND CERTIFY THAT AMOUNT TO THE DIRECTOR OF BUDGET AND MANAGEMENT AND TREASURER OF STATE FOR PAYMENT FROM THE TAX REFUND FUND CREATED BY SECTION 5703.052 OF THE REVISED CODE. IF THE APPLICATION FOR REFUND IS FOR TAX PAID ON AN ILLEGAL OR ERRONEOUS ASSESSMENT, THE CERTIFIED AMOUNT SHALL INCLUDE INTEREST CALCULATED AT THE RATE PER ANNUM PURSUANT TO SECTION 5703.47 OF THE REVISED CODE FROM THE DATE OF OVERPAYMENT TO THE DATE OF THE COMMISSIONER'S CERTIFICATION.

(B) IF ANY PERSON ENTITLED TO A REFUND OF TAX UNDER THIS SECTION IS INDEBTED TO THE STATE FOR ANY TAX ADMINISTERED BY THE TAX COMMISSIONER, OR ANY CHARGE, PENALTIES, OR INTEREST ARISING FROM SUCH TAX, THE AMOUNT ALLOWABLE ON THE APPLICATION FOR REFUND FIRST SHALL BE APPLIED IN SATISFACTION OF THE DEBT.

Sec. 5753.07. EVERY PERSON LIABLE FOR THE TAX IMPOSED BY SECTION 5753.02 OF THE REVISED CODE SHALL KEEP COMPLETE AND ACCURATE RECORDS OF ALL SALES AND PURCHASES OF BEVERAGE AND POST-MIX SYRUP AS REQUIRED BY THE TAX COMMISSIONER. SUCH RECORDS SHALL BE AVAILABLE FOR INSPECTION BY THE COMMISSIONER OR HIS AUTHORIZED AGENT AND SHALL BE PRESERVED FOR FOUR YEARS AFTER THE RETURN WAS DUE OR FILED, WHICHEVER IS LATER.

Sec. 5753.08. (A) ANY PERSON REQUIRED TO PAY THE TAX IMPOSED BY SECTION 5753.02 OF THE REVISED CODE IS PERSONALLY LIABLE FOR THE TAX. THE TAX COMMISSIONER MAY MAKE AN ASSESSMENT, BASED UPON ANY INFORMATION IN THE COMMISSIONER'S POSSESSION, AGAINST ANY PERSON WHO FAILS TO FILE A RETURN OR PAY ANY TAX, INTEREST, OR ADDITIONAL CHARGE AS REQUIRED BY THIS CHAPTER. THE COMMISSIONER SHALL GIVE THE PERSON ASSESSED WRITTEN NOTICE OF SUCH ASSESSMENT BY PERSONAL SERVICE OR CERTIFIED MAIL. ANY TAX ASSESSED SHALL CONTINUE TO ACCRUE INTEREST AS PRESCRIBED IN DIVISION (C) OF SECTION 5753.05 OF THE REVISED CODE.

(B) WHEN THE INFORMATION IN THE POSSESSION OF THE TAX COMMISSIONER INDICATES THAT A PERSON LIABLE FOR THE TAX IMPOSED BY SECTION 5753.02 OF THE REVISED CODE HAS NOT PAID THE FULL AMOUNT OF TAX DUE, THE COMMISSIONER MAY AUDIT A REPRESENTATIVE SAMPLE OF THE PERSON'S BUSINESS AND MAY ISSUE AN ASSESSMENT BASED ON SUCH AUDIT.

(C) A PENALTY OF FIFTEEN PER CENT SHALL BE ADDED TO ALL AMOUNTS ASSESSED UNDER THIS SECTION. THE COMMISSIONER MAY ADOPT RULES PROVIDING FOR THE REMISSION OF SUCH PENALTIES.

(D) UNLESS THE PERSON ASSESSED FILES WITH THE TAX COMMISSIONER WITHIN THIRTY DAYS AFTER SERVICE OF THE NOTICE OF ASSESSMENT, EITHER PERSONALLY OR BY CERTIFIED MAIL, A PETITION FOR REASSESSMENT IN WRITING BY THE PERSON ASSESSED OR HIS AUTHORIZED AGENT HAVING KNOWLEDGE OF THE FACTS, THE ASSESSMENT BECOMES CONCLUSIVE AND THE AMOUNT OF THE ASSESSMENT IS DUE AND PAYABLE FROM THE PERSON ASSESSED TO THE TREASURER OF STATE. A PETITION SHALL INDICATE THE OBJECTIONS TO THE ASSESSMENT OF THE PERSON ASSESSED, BUT ADDITIONAL OBJECTIONS MAY BE RAISED IN WRITING PRIOR TO THE DATE SHOWN ON THE FINAL DETERMINATION OF THE TAX COMMISSIONER. THE COMMISSIONER SHALL GRANT THE PETITIONER A HEARING ON THE PETITION, UNLESS WAIVED BY THE PETITIONER.

THE COMMISSIONER MAY MAKE SUCH CORRECTION TO THE ASSESSMENT AS HE FINDS PROPER AND SHALL ISSUE HIS FINAL DETERMINATION THEREON. THE COMMISSIONER SHALL SERVE A COPY OF HIS FINAL DETERMINATION ON THE PETITIONER EITHER BY PERSONAL SERVICE OR BY CERTIFIED MAIL, AND HIS DECISION IN THE MATTER IS FINAL, SUBJECT TO APPEAL UNDER SECTION 5717.02 OF THE REVISED CODE.

(E) AFTER AN ASSESSMENT BECOMES FINAL, IF ANY PORTION OF THE ASSESSMENT, INCLUDING ACCRUED INTEREST, REMAINS UNPAID, A CERTIFIED COPY OF THE COMMISSIONER'S ENTRY MAKING THE ASSESSMENT FINAL MAY BE FILED IN THE OFFICE OF THE CLERK OF THE COURT OF COMMON PLEAS IN THE COUNTY IN WHICH THE PERSON ASSESSED RESIDES OR IN WHICH HIS BUSINESS IS CONDUCTED. IF THE PERSON ASSESSED MAINTAINS NO PLACE OF BUSINESS IN THIS STATE AND IS NOT A RESIDENT OF THIS STATE, THE CERTIFIED COPY OF THE ENTRY MAY BE FILED IN THE OFFICE OF THE CLERK OF THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY.

THE CLERK, IMMEDIATELY UPON THE FILING OF THE ENTRY, SHALL ENTER A JUDGMENT FOR THE STATE AGAINST THE PERSON ASSESSED IN THE AMOUNT SHOWN TO BE DUE. THE JUDGMENT MAY BE FILED BY THE CLERK IN A LOOSE-LEAF BOOK ENTITLED "SPECIAL JUDGMENTS FOR STATE BEVERAGE TAX."

FROM THE DATE OF THE FILING OF THE ENTRY IN THE CLERK'S OFFICE, THE UNPAID PORTION OF THE ASSESSMENT SHALL BEAR INTEREST AT THE RATE PER ANNUM PRESCRIBED BY SECTION 5703.47 OF THE REVISED CODE AND

SHALL HAVE THE SAME EFFECT AS OTHER JUDGMENTS. EXECUTION SHALL ISSUE UPON THE JUDGMENT UPON REQUEST OF THE COMMISSIONER AND ALL LAWS APPLICABLE TO SALES ON EXECUTION ARE APPLICABLE TO SALES MADE UNDER THE JUDGMENT.

(F) IF THE COMMISSIONER BELIEVES THAT COLLECTION OF THE TAX WILL BE JEOPARDIZED UNLESS PROCEEDINGS TO COLLECT OR SECURE COLLECTION OF THE TAX ARE INSTITUTED WITHOUT DELAY, THE COMMISSIONER MAY ISSUE A JEOPARDY ASSESSMENT AGAINST THE PERSON LIABLE FOR THE TAX. UPON ISSUANCE OF THE JEOPARDY ASSESSMENT, THE COMMISSIONER IMMEDIATELY SHALL FILE AN ENTRY WITH THE CLERK OF THE COURT OF COMMON PLEAS IN THE MANNER PRESCRIBED BY DIVISION (E) OF THIS SECTION. NOTICE OF THE JEOPARDY ASSESSMENT SHALL BE SERVED ON THE PERSON ASSESSED OR HIS LEGAL REPRESENTATIVE WITHIN FIVE DAYS OF THE FILING OF THE ENTRY WITH THE CLERK. THE TOTAL AMOUNT ASSESSED IS IMMEDIATELY DUE AND PAYABLE, UNLESS THE PERSON ASSESSED FILES A PETITION FOR REASSESSMENT IN ACCORDANCE WITH DIVISION (D) OF THIS SECTION AND PROVIDES SECURITY IN A FORM SATISFACTORY TO THE COMMISSIONER AND IN AN AMOUNT SUFFICIENT TO SATISFY THE UNPAID BALANCE OF THE ASSESSMENT. FULL OR PARTIAL PAYMENT OF THE ASSESSMENT DOES NOT PREJUDICE THE COMMISSIONER'S CONSIDERATION OF THE PETITION FOR REASSESSMENT.

(G) ALL MONEY COLLECTED BY THE COMMISSIONER UNDER THIS SECTION SHALL BE PAID TO THE TREASURER OF STATE AS REVENUE ARISING FROM THE TAX IMPOSED BY SECTION 5753.02 OF THE REVISED CODE.

Sec. 5753.09. IF ANY CORPORATION OR BUSINESS TRUST REQUIRED TO FILE RETURNS PURSUANT TO SECTION 5753.05 OF THE REVISED CODE FAILS TO REMIT TO THE STATE ANY TAX DUE UNDER THIS CHAPTER, ANY OF ITS EMPLOYEES HAVING CONTROL OR SUPERVISION OF OR CHARGED WITH THE RESPONSIBILITY OF FILING RETURNS AND MAKING PAYMENTS, AND ANY OF ITS OFFICERS, TRUSTEES, OR OTHER PERSONS WHO ARE RESPONSIBLE FOR THE EXECUTION OF THE CORPORATION'S OR BUSINESS TRUST'S FISCAL RESPONSIBILITIES, IS PERSONALLY LIABLE FOR THE FAILURE TO REMIT SUCH TAX. THE DISSOLUTION, TERMINATION, OR BANKRUPTCY OF THE CORPORATION OR BUSINESS TRUST DOES NOT DISCHARGE A RESPONSIBLE PERSON'S LIABILITY FOR THE CORPORATION'S OR BUSINESS TRUST'S FAILURE TO REMIT THE TAX DUE. THE TAX COMMISSIONER MAY ASSESS A RESPONSIBLE PERSON UNDER SECTION 5753.08 OF THE REVISED CODE.

Sec. 5753.10. EXCEPT FOR ASSESSMENTS AGAINST RESPONSIBLE PERSONS UNDER SECTION 5753.09 OF THE REVISED CODE, NO ASSESSMENT OF THE TAX IMPOSED BY THIS CHAPTER SHALL BE MADE BY THE TAX COMMISSIONER MORE THAN FOUR YEARS AFTER THE DATE ON WHICH THE RETURN FOR THE PERIOD ASSESSED WAS DUE OR WAS FILED, WHICHEVER DATE IS LATER. THIS SECTION DOES NOT BAR AN ASSESSMENT WHEN ANY OF THE FOLLOWING OCCUR:

(A) THE PERSON ASSESSED FAILED TO FILE A RETURN REQUIRED BY SECTION 5753.05 OF THE REVISED CODE;

(B) THE PERSON ASSESSED KNOWINGLY FILED A FALSE OR FRAUDULENT RETURN;

(C) THE PERSON ASSESSED AND THE TAX COMMISSIONER HAVE WAIVED IN WRITING THE TIME LIMITATION.

Sec. 5753.11. ONE PER CENT OF ALL AMOUNTS PAID TO THE TREASURER OF STATE PURSUANT TO THIS CHAPTER SHALL BE CERTIFIED DIRECTLY TO THE CREDIT OF THE BEVERAGE TAX ADMINISTRATIVE FUND, WHICH IS HEREBY CREATED IN THE STATE TREASURY, FOR APPROPRIATION TO THE DEPARTMENT OF TAXATION FOR USE IN ADMINISTERING THIS CHAPTER. THE REMAINDER OF THE AMOUNTS PAID TO THE TREASURER SHALL BE DEPOSITED TO THE CREDIT OF THE GENERAL REVENUE FUND.

Sec. 5753.12. (A) NO WHOLESALE DISTRIBUTOR OR OTHER PERSON SHALL SELL BEVERAGE OR POST-MIX SYRUP TO A RETAIL DEALER WITHIN THIS STATE, AND NO RETAIL DEALER OR OTHER PERSON SHALL IMPORT OR OTHERWISE ACQUIRE BEVERAGE OR POST-MIX SYRUP FOR SALE AT RETAIL WITHIN THIS STATE FROM A PERSON WHO IS NOT A REGISTERED WHOLESALE DISTRIBUTOR, WITHOUT HAVING A REGISTRATION THEREFOR.

(B) EACH WHOLESALE DISTRIBUTOR AND EACH RETAIL DEALER REQUIRED TO BE REGISTERED UNDER THIS CHAPTER SHALL APPLY FOR SUCH REGISTRATION ON OR BEFORE JANUARY 29, 1993, OR ON OR BEFORE THE FIRST DAY OF DOING BUSINESS THAT REQUIRED SUCH REGISTRATION. THE APPLICATION SHALL BE FILED WITH THE TAX COMMISSIONER, IN A FORM AND PROVIDING SUCH INFORMATION AS PRESCRIBED BY THE COMMISSIONER. THE COMMISSIONER SHALL ASSIGN AN ACCOUNT NUMBER TO EACH REGISTRATION AND SHALL SO NOTIFY THE REGISTRANT. SUCH REGISTRATION SHALL REMAIN IN EFFECT UNTIL CANCELED BY THE WHOLESALE DISTRIBUTOR OR RETAIL DEALER UPON THE CESSATION OF BUSINESS.

Sec. 5753.13. EVERY BILL OR INVOICE ISSUED BY A REGISTERED WHOLESALE DISTRIBUTOR TO A RETAIL DEALER ON THE SALE OF BEVERAGE OR POST-MIX SYRUP SHALL STATE

THAT THE OHIO BEVERAGE TAX HAS BEEN PAID AND SHALL ALSO INDICATE THE WHOLESALE DISTRIBUTOR'S ACCOUNT NUMBER AS ASSIGNED BY THE TAX COMMISSIONER.

Sec. 5753.14. (A) NO PERSON SHALL FAIL TO FILE ANY RETURN OR REPORT REQUIRED TO BE FILED BY SECTION 5753.05 OF THE REVISED CODE, OR FILE OR CAUSE TO BE FILED ANY INCOMPLETE, FALSE, OR FRAUDULENT RETURN, REPORT, OR STATEMENT, OR AID OR ABET ANOTHER IN THE FILING OF ANY FALSE OR FRAUDULENT RETURN, REPORT, OR STATEMENT.

(B) NO PERSON SHALL SELL AT RETAIL ANY BEVERAGE UNLESS SUCH BEVERAGE OR THE POST-MIX SYRUP USED IN MAKING SUCH BEVERAGE WAS OBTAINED FROM A WHOLESALE DEALER HOLDING A CURRENT, VALID REGISTRATION OR OBTAINED UNDER HIS OWN CURRENT, VALID REGISTRATION ISSUED PURSUANT TO SECTION 5753.12 OF THE REVISED CODE.

Sec. 5753.99. WHOEVER VIOLATES ANY PROVISION OF THIS CHAPTER, OR ANY LAWFUL RULE ADOPTED BY THE TAX COMMISSIONER UNDER AUTHORITY OF THIS CHAPTER, FOR THE VIOLATION OF WHICH NO PENALTY IS PRESCRIBED ELSEWHERE, IS GUILTY OF A MISDEMEANOR OF THE FIRST DEGREE FOR THE FIRST SUCH OFFENSE. FOR EACH SUBSEQUENT OFFENSE, SUCH PERSON IS GUILTY OF A FELONY OF THE FOURTH DEGREE.

SECTION 2. That existing sections 121.15, 129.55, 129.63, 129.73, 1555.12, 3383.01, 3383.07, 3721.02, 4301.12, 4301.42, 4301.43, 4305.01, 4905.79, 5111.02, 5111.021, 5111.03, 5111.20, 5111.22, 5111.25, 5111.26, 5111.27, 5111.28, 5528.36, 5703.052, 5703.053, 5703.19, 5709.84, 5711.01, 5727.01, 5727.30, 5727.31, 5727.32, 5727.33, 5727.47, 5727.73, 5733.09, 5735.01, 5735.011, 5735.142, 5739.01, 5739.011, 5739.02, 5739.12, 5743.01, 5743.02, 5743.32, 5743.41, 5743.42, 5743.44, 5743.99, and 5747.02 and sections 5111.222, 5111.23, 5111.24, 5111.29, 5727.34, 5727.40, 5911.13, 5911.14, 5911.15, 5911.16, and 5911.18 of the Revised Code are hereby repealed.

SECTION 3. All items set forth in Sections 4 and 5 of this act are hereby appropriated out of any moneys in the General Revenue Fund (Fund GRF) which are not otherwise appropriated.

Appropriations

SECTION 4. OHS OHIO HISTORICAL SOCIETY

| | | | |
|---|---|---|---|
| CAP-738 | Historical Center HVAC Improvements - Phase III | $ | 650,980 |
| CAP-745 | Emergency Repairs of Historic Sites and Museums | $ | 172,500 |
| Total Ohio Historical Society | | $ | 823,480 |