

IN THE SUPREME COURT OF OHIO

OHIO GROCERS ASSOCIATION, *et al.*,)
)
 Plaintiffs-Appellees,)
)
 v.)
)
 WILLIAM W. WILKINS [RICHARD A.)
 LEVIN], in his official capacity as Ohio)
 Tax Commissioner,)
)
 Defendant-Appellant.)

Case No. 08-2018

On Appeal from the Franklin
County Court of Appeals,
Tenth Appellate District

Court of Appeals
Case No. 07AP-813

BRIEF OF *AMICI CURIAE*
OHIO LEGAL ASSISTANCE FOUNDATION, COALITION ON
HOMELESSNESS & HOUSING IN OHIO, CORPORATION FOR
OHIO APPALACHIAN DEVELOPMENT, OHIO ASSOCIATION
OF FREE CLINICS, AND OHIO COUNCIL OF BEHAVIORAL
HEALTH & FAMILY SERVICES PROVIDERS
IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| TABLE OF AUTHORITIES | ii |
| INTRODUCTION..... | 1 |
| STATEMENT OF INTEREST OF <i>AMICI CURIAE</i> | 4 |
| STATEMENT OF THE CASE AND FACTS..... | 8 |
| ARGUMENT | 8 |
| Proposition of Law: | |
| By its plain language and operation, the CAT is a franchise tax on the privilege of doing business in Ohio and does not, therefore, violate Section 3(C) or Section 13 of Article XII of the Ohio Constitution. | |
| CONCLUSION | 18 |
| CERTIFICATE OF SERVICE | 19 |

TABLE OF AUTHORITIES

CASES

| | |
|--|-----------|
| <i>Aluminum Co. of Am. v. Evatt</i> (1942), 140 Ohio St. 385 | 9, 16 |
| <i>Am. Home Products Corp. v. Limbach</i> (1990), 49 Ohio St. 3d 158 | 12 |
| <i>Armour & Co. v. Kosydar</i> (1976), 46 Ohio St. 2d 450 | 13, 16 |
| <i>Bank One Dayton, N.A. v. Limbach</i> (1990), 50 Ohio St. 3d 163 | 15, 17 |
| <i>Bowytz v. Tax Comm 'n</i> , 32 N.E. 2d 39 (Ohio Ct. App. 1938)..... | 10 |
| <i>Cameron Coca-Cola Bottling Co. v. Tracy</i> (July 28, 1993), Franklin Co. C.P. 93CVH02-729 | 9, 11, 14 |
| <i>Castleberry v. Evatt</i> (1946), 147 Ohio St. 30..... | 9 |
| <i>Cheap Escape Co. v. Haddox, L.L.C.</i> (2008), 120 Ohio St. 3d 493 | 9 |
| <i>E. Ohio Gas Co. v. Limbach</i> (1986), 26 Ohio St. 3d 63 | 9, 17 |
| <i>Educational Films Corp. of Am. v. Ward</i> (1931), 282 U.S. 379..... | 17 |
| <i>Ilersich v. Schneider</i> (1964), 176 Ohio St. 255..... | 9 |
| <i>LSDHC Corp. v. Zaino</i> , 98 Ohio St. 3d 450, 2003 Ohio 1911 | 17 |
| <i>Mutual Holding Co. v. Limbach</i> (1994), 71 Ohio St. 3d 59 | 9, 16 |
| <i>Richards v. Market Exch. Bank Co.</i> (1910), 81 Ohio St. 348 | 9 |
| <i>S. Gum Co. v. Laylin</i> (1902), 66 Ohio St. 578 | 16 |
| <i>State ex rel. Keller v. Forney</i> (1923), 108 Ohio St. 463 | 10 |
| <i>Valvoline Instant Oil Change, Inc. v. Tracy</i> (1997), 78 Ohio St. 3d 53 | 12 |
| <i>Werner Machine Co. v. Div. of Taxation</i> (1956), 350 U.S. 492 | 17 |
| <i>Wheeling Steel Corp. v. Porterfield</i> (1970), 21 Ohio St. 2d 57 | 9, 16 |

CONSTITUTIONAL PROVISIONS AND STATUTES

| | |
|---------------------------------|--------|
| OHIO CONST. art. XII..... | 9, 11 |
| OHIO REV. CODE § 718.01 | 17 |
| OHIO REV. CODE § 1731.08 | 17 |
| OHIO REV. CODE § 4909.15 | 17 |
| OHIO REV. CODE § 5711.22 | 13 |
| OHIO REV. CODE § 5733.01 | 13 |
| OHIO REV. CODE § 5751.01 | 14 |
| OHIO REV. CODE § 5751.02 | 14, 15 |
| OHIO REV. CODE § 5751.03 | 14 |
| OHIO REV. CODE § 5751.031 | 13 |
| OHIO REV. CODE § 5751.051 | 14 |

OTHER AUTHORITIES

| | |
|---|-------------|
| Bahl, Taxation & Economic Development: A Blueprint for Reform in Ohio (1996) | 12 |
| Center for Women’s Welfare, <i>The Self Sufficiency Standard for Ohio 2008</i> (July 2008) . | 1 |
| Community Research Partners, <i>The Real Bottom Line: The State of Poverty in Ohio 2008, New Obstacles and Opportunities for Low-Income Ohioans</i> (2008)..... | 1, 4, 7, 13 |
| <i>Hearing on H.B. 66 Before the Fin. and Appropriations Commt. of the Ohio House of Representatives</i> , 126th Gen. Assembly (Mar. 8, 2005) | 3, 12 |
| <i>Hearing on H.B. 66 Before the Finance and Financial Inst. Commt. of the Ohio Senate</i> , 126th Gen. Assembly (May 20, 2005) | 2 |
| Ohio Dep’t of Development, <i>Economic Overview: Policy Research and Strategic Planning</i> (Feb. 2009) | 1 |

Ohio Dep't of Job and Family Services, *Ohio Economic Analysis, 2008: Changing Course* (2008)..... 1, 4, 12, 13

Ohio Dep't of Job and Family Services, Office of Workplace Development, *Payroll and Contributions by Commercial Sector as Covered under the Ohio and Federal Unemployment Compensation Laws* (Jan. 25, 2007)..... 12

Picard, Fred. *The Nature & Operation of the Ohio Retail Sales Tax*, *The J. of Finance*, Vol. 11, No. 1 (Mar. 1956), pp. 86-89, www.jstor.org/stable/2976536 10

Ziliak, J.P. (Feb. 1, 2007). *Human capital and the challenge of persistent poverty in Appalachia* [Electronic version]. *Economic Commentary*. <http://www.clevelandfed.org/Research/commentary/2007/020107.cfm> 5

INTRODUCTION

Historically, Ohio's poverty and unemployment rates have been lower than those for the United States as a whole, even during bad economic times.¹ In 2006, however, when 1.5 million Ohioans were living in poverty, Ohio matched the national poverty rate of 13.3 percent.² In January 2009, Ohio's unemployment rate climbed to 8.8 percent, more than a full percentage point higher than the national rate.³ While Ohio's population grew by 10 percent from 1969 to 2006, the number of its residents living in poverty increased by 43 percent.⁴ Almost one-third of Ohio's population does not have sufficient income to maintain a safe and decent standard of living without the threat of serious economic hardship.⁵

The *Amici* are organizations that are committed to working with Ohio's poor to eradicate poverty in the State and to help alleviate the effects of poverty on low-income families. With poverty and unemployment levels on the rise, a large cross-section of Ohio's citizens needs the services and assistance of the *Amici*. The *Amici* are keenly aware that taxes paid by Ohio businesses might, in theory, lead to higher prices on the

¹ Community Research Partners, *The Real Bottom Line: The State of Poverty in Ohio 2008, New Obstacles and Opportunities for Low-Income Ohioans*, at 7, prepared for the Ohio Association of Community Action Agencies (2008).

² *Id.*; Ohio Dep't of Job and Family Services, *Ohio Economic Analysis, 2008: Changing Course*, at 22 (2008).

³ Ohio Dep't of Development, *Economic Overview: Policy Research and Strategic Planning*, 1 (Feb. 2009).

⁴ *Id.* at 7.

⁵ *The Bottom Line*, *supra* note 1, at 4 (In 2006, 30.6 percent of Ohioans had incomes below the self-sufficiency standard – 200 percent above the poverty line. *See also* Center for Women's Welfare, *The Self Sufficiency Standard for Ohio 2008*, prepared for the Ohio Association of Community Action Agencies (July 2008).

necessities its constituents already have difficulty purchasing. But the *Amici* are equally aware that Ohio businesses, including grocers, have long been subject to corporate franchise taxes. The *Amici*'s constituents have a need for lower-priced necessities, but they have an even greater need for government at all levels to have the financial resources needed to maintain society's safety-net programs, which the *Amici* collectively work to maintain and improve. Further, the *Amici*'s constituents, as well as all Ohioans, would benefit from the development of Ohio's beleaguered economy.

Revenue generated by Ohio's business taxes contributes to Ohio's General Revenue Fund. The constituents of all the *Amici* receive direct benefit from various programs, services, and initiatives that are funded in whole or in part from the General Revenue Fund (or from other State revenue streams, the availability of which may be affected by the condition of the General Revenue Fund). From the civil legal services the Ohio Legal Assistance Foundation ("OLAF") provides to indigent clients to the addiction treatment, mental health, and family services provided by the members of the Ohio Council of Behavioral Health & Family Services Providers ("Ohio Council"), the *Amici* rely on the State's financial support to carry out their stated objectives.

To more efficiently and equitably generate revenue, the General Assembly reformed Ohio's business tax structure in 2005. For the first time in 70 years, the Ohio business tax framework, which operated under a collection of outmoded and outdated assumptions, was replaced with a forward-looking, investment-promoting structure.⁶ The

⁶ *H.B. 66 Bicennial Budget: Hearing Before the Finance and Financial Inst. Commt. of the Ohio Senate*, 126th Gen. Assembly (May 20, 2005) (testimony of Edward W. Hill, Professor and

cornerstone of the reform was the Commercial Activity Tax (“CAT”), a broad-based, low-rate tax on all entities conducting business in Ohio. The CAT not only replaced the old business taxes, it also funded a 21 percent income tax cut for Ohio citizens and eliminated the lowest two tax brackets.

The Tenth District Court of Appeals’ decision carves out food producers, wholesalers, and certain retailers (“grocers”) from the CAT’s base of taxpayers and is projected to cost Ohio several hundred million dollars in lost revenue and refunds. If that decision is upheld, grocers will receive a windfall by being permitted to conduct business and make profits in Ohio without having to pay for the privilege. Inevitably, some of the taxpayers the *Amici* represent will be required to pay higher taxes in order to offset the losses. The grocer carve-out will also reduce, directly or indirectly, the funding the State can provide to the *Amici*.

Moreover, exemption of grocers from the CAT will contribute to the current economic crisis in Ohio, which will only exacerbate the harm inflicted on low-income Ohioans. The CAT promotes the investment and technology needed for Ohio workers to become competitive in the global economy.⁷ The majority of Ohio’s poor households were employed in 2006, including about two-thirds of married-couple families and

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⁷ *H.B. 66 Biennial Budget: Before the Fin. and Appropriations Commt. of the Ohio House of Representatives*, 126th Gen. Assembly (Mar. 8, 2005) (testimony of David W. Johnson, President and CEO, Summitville Tiles, Inc. and Chairman of the Ohio Manufacturers’ Association).

female-headed families and nearly half of poor individuals.⁸ With well-paying manufacturing jobs departing the State,⁹ Ohioans have been left with fewer job opportunities that pay a living wage. The CAT was designed to attract these and other businesses back. With the constitutionality of the CAT and its application to other industries uncertain, Ohio will not likely see a surge in living-wage employment opportunities.

The impact of the Tenth District's holding, if allowed to stand, goes far beyond carving out an exception for grocers; it opens up the CAT to challenges based on faulty reasoning, which will cost the State even more in litigation expenses. The CAT is not a transactional or sales tax on food sales that is prohibited by the Ohio Constitution. It is a franchise tax on the privilege of doing business in Ohio that is measured by the gross income from an entity's business activities, including sales, rents, and services rendered. It is fully consistent with the authority and responsibilities granted to the General Assembly by the Ohio Constitution.

STATEMENT OF INTEREST OF AMICI CURIAE

The *Amici* are organizations committed to working with and on behalf of Ohio's poor, which comprise many ages, races, ethnicities, and household types. The *Amici* are also devoted to alleviating the symptoms and effects of poverty and working to eradicate poverty altogether.

⁸ *The Bottom Line*, *supra* note 1, at 7.

⁹ *Ohio Economic Analysis, 2008*, *supra* note 2, at 12.

A. The *Amici*

1. OLAF

Founded in the early 1990s, the Ohio Legal Assistance Foundation is a statutorily created nonprofit organization dedicated to providing equal justice to all. OLAF works to assure that resources, programs, and services exist statewide to serve the unmet legal needs of Ohio's poor. It administers the state funds for all of Ohio's legal aid societies. OLAF was created to remedy an environment where 83 percent of the poor's legal needs were unmet.

2. COHHIO

The Coalition on Homelessness & Housing in Ohio ("COHHIO") works to end homelessness and promote affordable housing. COHHIO is involved in a wide range of housing-assistance services in Ohio, including homelessness prevention, emergency shelters, transitional housing, and permanent affordable housing. COHHIO assists housing organizations and homelessness services providers in Ohio through public-policy advocacy, training and technical assistance, research, and public education.

3. COAD

Persistent poverty has always plagued Appalachian regions in America.¹⁰ Created in 1971, the Corporation for Ohio Appalachian Development ("COAD") is a private, nonprofit, community-based organization serving rural counties in eastern and southern Ohio. It consists of 17 community-action agencies serving a 30-county area. COAD's

¹⁰ Ziliak, J.P. (Feb. 1, 2007). *Human capital and the challenge of persistent poverty in Appalachia* [Electronic version]. *Economic Commentary*. <http://www.clevelandfed.org/Research/commentary/2007/020107.cfm>.

mission is to provide a unified voice and representation for its member agencies and the constituents that they serve, which are primarily low-income families, children, and the elderly.

4. O AFC

The Ohio Association of Free Clinics (“O AFC”) represents 40 member clinics that provide free, high-quality health services to thousands of Ohio’s poor. O AFC mobilizes resources, strengthens its member clinics, and provides a voice for Ohio’s underserved. Because member clinics do not bill Medicaid, Medicare, or third-party payer sources, they are dependent on a variety of sources for operating expenses, including Ohio’s General Revenue Fund. In the current biennium, these clinics have experienced a \$600,000 decline in funding, while the number of patients requesting care has increased by 30 percent. The decline in funding is likely to continue in the current economic climate.

5. Ohio Council

The Ohio Council of Behavioral Health & Family Services Providers is a trade and advocacy association representing 180 private, nonprofit addiction treatment, mental health, and family services provider organizations. These organizations are small businesses throughout Ohio’s communities that employ over 20,000 clinical and administrative professionals and serve over 600,000 people annually. The Ohio Council is concerned that scarce resources are eroding health and human services that are essential to an increasing number of Ohioans.

B. The *Amici*'s interest

The economic malaise that has plagued Ohio in recent years has caused a steady increase in the number of persons living in poverty in Ohio. Based on the U.S. Census Bureau's Decennial Census and American Community Survey, Ohio's poverty rate increased by 2.7 percentage points from 1999 to 2006, with about 316,000 more people living below the poverty line. Worse yet, six percent of the entire populace is living in "extreme poverty," which means they are earning less than 50 percent of the poverty line.¹¹ The unemployment rate in Ohio skyrocketed to 8.8 percent in January 2009, more than a full point above the national average, representing more than a 50 percent increase from 2008. The *Amici* are concerned with and committed to correcting these troubling trends.

"[E]conomic development initiatives need to be sustainable, not merely creating a targeted number of jobs, but providing a diverse range of opportunities for employment, as well as new small business and entrepreneurship."¹² The CAT is an important component to Ohio's economic development, helping to provide the impetus and funding for the Turnaround Ohio Initiatives designed to rebuild Ohio's economy. While efficiently generating revenues for the State, the CAT removes barriers for start-up enterprises, spreads the business tax burden equitably among all entities, and makes the business environment more inviting for new opportunities.

¹¹ *The Bottom Line*, *supra* note 1, at 4.

¹² *Id.* at 19.

Eliminating grocers from the pool of taxpayers will throw the CAT into upheaval. Like grocers, every business looking to reduce its expenses by avoiding taxes will seek out an exemption, and the Tenth District's decision has opened the door to such efforts. Indeed, other businesses have already challenged the CAT using the decision below as a blueprint.

Evisceration of the CAT will stifle Ohio's economy and undermine the State's ability to fund necessary anti-poverty initiatives. Programs of the *Amici* will suffer financial setbacks. Taxes will increase on the *Amici*'s already beleaguered constituents. The tax uncertainties created by the decision below will keep businesses at bay while the hemorrhaging of employment opportunities continues. Economic advancements the *Amici* have worked for will be undone and the *Amici* will be left underfunded to serve an ever larger client base.

STATEMENT OF THE CASE AND FACTS

Amici adopt the Statement of the Case and Facts set forth in the Appellant's Brief.

ARGUMENT

Proposition of Law:

By its plain language and operation, the CAT is a franchise tax on the privilege of doing business in Ohio and does not, therefore, violate Section 3(C) or Section 13 of Article XII of the Ohio Constitution.

- A. Neither Section 3(C) nor Section 13 prohibits the imposition of a franchise tax on the privilege of doing business in Ohio.**
 1. Sections 3(C) and 13 exclude franchise taxes from the reach of their prohibitions.

The prohibitions of Sections 3(C) and 13 extend only to sales taxes on the retail or wholesale sale or purchase of food for consumption – not to corporate franchise taxes.¹³ Sections 3(C) and 13 restrict taxes that are “levied upon” transactions involving “the sale or purchase of food.”¹⁴ Neither section prohibits the legislature from levying a franchise tax measured by the sale or purchase of food.¹⁵ As discussed in more detail below, the constitutionality of a franchise tax does not turn on the method for measuring the taxpayer’s liability.¹⁶

Section 3(C) explicitly authorizes the General Assembly to impose both “excise and franchise” taxes, but it only limits the imposition of “excise tax[es] . . . upon the sale and purchase of food” – not “franchise taxes.”¹⁷ The Tenth District’s decision elides this distinction by equating franchise taxes with excise taxes. But Section 3(C) uses “excise taxes” and “franchise taxes” as distinct terms. They must therefore be given distinct meanings, as it is axiomatic in statutory construction that words are not inserted into an act without some purpose.¹⁸ Moreover, exceptions to the General Assembly’s broad

¹³ See OHIO CONST. art. XII, §§ 3(C) & 13.

¹⁴ *Id.*

¹⁵ See *id.*; *Ilersich v. Schneider* (1964), 176 Ohio St. 255, 257-258; *Castleberry v. Evatt* (1946), 147 Ohio St. 30, 38-39; *Cameron Coca-Cola Bottling Co. v. Tracy* (July 28, 1993), Franklin Co. C.P. 93CVH02-729, at 26.

¹⁶ See *Mutual Holding Co. v. Limbach* (1994), 71 Ohio St. 3d 59, 60 (1994) (“[m]easuring tax liability in terms of net worth does not convert a franchise tax into a property tax”); *E. Ohio Gas Co. v. Limbach* (1986), 26 Ohio St. 3d 63; *Wheeling Steel Corp. v. Porterfield* (1970), 21 Ohio St. 2d 57, 60-61 (finding that an earlier-enacted Ohio franchise tax “is purely a privilege tax and not a tax on income, sales or receipts”); *Aluminum Co. of Am. v. Evatt* (1942), 140 Ohio St. 385, 394-95 (“The employment of various factors in determining the part of the business of a corporation [] done in Ohio is no indication that the subjects of such factors are being taxed. Instead, they are being used merely to compose a measuring stick.”).

¹⁷ OHIO CONST. art. XII, § 3(C).

¹⁸ *Cheap Escape Co. v. Haddox, L.L.C.* (2008), 120 Ohio St. 3d 493, 497; see *Richards v. Market*

power to impose taxes must be strictly construed, meaning that any exception must be “plainly and persuasively” stated.¹⁹ Not only does the decision below violate rules of constitutional and statutory construction, it ignores the history behind the constitutional provisions.

2. The history of Sections 3(C) and 13 demonstrates that those sections do not apply to franchise taxes.

The history of Sections 3(C) and 13 does not support the extension of their prohibitions to franchise taxes. The 1936 Amendment to the Ohio Constitution, which instituted Section 3(C)’s exemption of food sales from taxation, was a reaction to the 1934 sales tax – the State’s first sales tax – which was levied on the right to purchase something for use or consumption. The 1934 sales tax was levied upon the purchaser, not the seller, and was collected by the seller for the benefit of the State.²⁰ Indeed, the seller was treated as a fiduciary of the State, and it was a misdemeanor for the seller “to pay the tax himself or otherwise absorb or rebate the tax.”²¹ The consumer’s liability as a taxpayer was fixed “automatically upon each sale when made.”²²

In 1936, Ohioans voted to exclude food sales from the sales tax because of the heavy burden such a sales tax had on the lower-income members of society.²³ Because the “country was still coming out of the Great Depression . . . the idea of a sales tax on

Exch. Bank Co. (1910), 81 Ohio St. 348.

¹⁹ *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, syllabus 1.

²⁰ *Bowytz v. Tax Comm’n*, 32 N.E. 2d 39 (Ohio Ct. App. 1938) (describing the 1934 sales tax), *aff’d*, 135 Ohio St. 278 (1939); *see also* Picard, Fred. *The Nature & Operation of the Ohio Retail Sales Tax*, *The J. of Finance*, Vol. 11, No. 1 (Mar. 1956), pp. 86-89 at 86, www.jstor.org/stable/2976536.

²¹ *Bowytz*, 32 N.E.2d 39.

²² *Id.*

²³ *See id.*

consumers' groceries was repugnant to the electorate."²⁴ Section 3(C) was therefore drafted and approved by the electorate for the purpose of protecting the lower-income families of Ohio, not the sellers of food. After the amendment, the General Assembly harmonized the sales tax statute with the newly adopted prohibition, but the corporate franchise tax was left undisturbed.

When Section 13 was adopted in 1994, it furthered the consumer-protection intentions of Section 3(C). Section 13 was a reaction to the narrow interpretation of Section 3(C) as applying only to the retail purchase and sale of food, and not to wholesale transactions, thus permitting the State's enactment of a sales tax on wholesale beverages.²⁵ To ensure that Ohio's citizens were not subjected to sales taxes on the sale or purchase of food, whether retail or wholesale, Section 13 prohibited the imposition of a sales tax "upon any wholesale sale or wholesale purchase" of food.²⁶ By its terms, Section 13 extended Section 3(C)'s prohibition but did not otherwise alter it.²⁷ As it did after Section 3(C)'s adoption, the General Assembly amended the sales tax statute to conform with the new constitutional prohibition, but the corporate franchise tax was again left alone. Thus, consumers were again protected while grocers remained accountable for the privilege of doing business in Ohio. The decision below distorts the constitutional protections of Sections 3(C) and 13 by stretching them to protect grocers rather than consumers.

²⁴ *Cameron Coca-Cola Bottling Co.*, Franklin Co. C.P. 93CVH02-729, at 25-26.

²⁵ *See id.*

²⁶ *See* OHIO CONST. art. XII, § 13.

²⁷ *See id.*

B. The CAT is a franchise tax on the privilege of doing business in Ohio.

1. The CAT was designed and intended to replace the corporate franchise tax and personal property taxes, both of which have applied to food producers, wholesalers, and retailers since their enactment.

For over one hundred years, Ohio's business tax framework comprised two taxes: the corporate franchise tax and the personal property tax. These taxes have been imposed on entities, including grocers, for the privilege of doing business or using tangible personal property in business in Ohio.²⁸ This regime stunted Ohio's economic growth and contributed to the State's climbing poverty and unemployment rates.²⁹ The personal property tax component taxed businesses' inventory, machinery, equipment, and furniture and fixtures, thus unduly targeting capital-intensive industries, like manufacturing – Ohio's largest industry sector³⁰ with the most well-paying jobs.³¹ The net worth component of the corporate franchise tax likewise besieged capital-intensive industries as well as start-up businesses.³² Between 2001 and 2005, manufacturing employment decreased in Ohio by more than 137,000 jobs.³³ The loss of manufacturing jobs has been

²⁸ *Am. Home Products Corp. v. Limbach* (1990), 49 Ohio St. 3d 158, 159; *Valvoline Instant Oil Change, Inc. v. Tracy* (1997), 78 Ohio St. 3d 53, 54.

²⁹ *H.B. 66 Biennial Budget: Hearing Before the Fin. and Appropriations Commt. of the Ohio House of Representatives*, 126th Gen. Assembly (Mar. 8, 2005) (testimony of David W. Johnson, President and CEO, Summitville Tiles, Inc. and Chairman of the Ohio Manufacturers' Association).

³⁰ *Ohio Economic Analysis, 2008*, *supra* note 2, at 12.

³¹ See Ohio Dep't of Job and Family Services, Office of Workplace Development, *Payroll and Contributions by Commercial Sector as Covered under the Ohio and Federal Unemployment Compensation Laws* (Jan. 25, 2007).

³² Bahl, *Taxation & Economic Development: A Blueprint for Reform in Ohio* (1996), at 55.

³³ *Id.* at v.

linked to the increased number of Ohio's working poor and uninsured adults.³⁴ As a result, Ohio has not yet fully recovered from the 2001 recession.³⁵

The General Assembly replaced these anachronistic taxes with a broad-based, low-rate tax, the CAT, which was designed to cast a wider net for corporate taxes, thus better distributing the tax burden among all entities conducting business in Ohio. The corporate franchise tax and the personal property tax are being phased out as they are replaced by the CAT.³⁶ Through the CAT, the General Assembly created a more efficient and equitable revenue generator for the State, created a more attractive and inviting business environment, especially for manufacturing businesses, and significantly lowered the income tax burden on individual Ohio citizens.

Food retailers, wholesalers, and producers, including Appellees here, have always been subject to business taxes, notwithstanding the constitutional provision they now invoke.³⁷ Rather than acknowledge that the two taxes previously imposed on the privilege of doing business in Ohio would be replaced by imposition of a single tax, Appellees here seek to gain the benefit of that privilege without being subject to the corresponding burden. In effect, two burdens are being lifted from Appellees and another

³⁴ The 2004 Ohio Family Health Survey found that while the percentage of uninsured children in Ohio decreased from 1998 to 2004 (due to the expansion of Medicaid coverage through CHIP), the percentage of uninsured adults increased from 11.5 percent to 12.5 percent. The erosion of employer-based health insurance and the loss of manufacturing jobs are two factors influencing this trend. <http://www.ohiofreeclinics.org/WhyFreeClinics.htm>.

³⁵ *The Bottom Line*, *supra* note 1, at 8; *Ohio Economic Analysis, 2008*, *supra* note 2, at 8.

³⁶ See, e.g., OHIO REV. CODE § 5733.01(G)(2) (phasing out corporate franchise tax); OHIO REV. CODE §§ 5711.22(E)-(G) (phasing out personal property tax); OHIO REV. CODE § 5751.031 (phasing in CAT).

³⁷ See, e.g., *Armour & Co. v. Kosydar* (1976), 46 Ohio St. 2d 450 (applying franchise tax to business consisting "primarily of the manufacture and sale of food and dairy products").

burden is supposed to have taken its place. Appellees, however, seek to shift that burden off of themselves and onto the State and its citizens.

Tellingly, the CAT does not affect the consumer-directed tax system at which the constitutional prohibition was aimed: Ohio's general sales tax on covered transactions, which originally included the sale of groceries.³⁸ To the contrary, the purchase and sale of groceries remain exempted from the sales tax. Thus, the enactment of the CAT was not an attempt, in operation or intent, to shift a burden onto Ohio's consumers for their purchases of groceries. Rather, it was merely a change in the method Ohio uses to tax the privilege of doing business in the State.

2. The CAT has all the hallmarks of a franchise tax, not a transactional tax.

The CAT operates nothing like the 1934 sales tax. The amount of the CAT does not become fixed at the time of a sales transaction. Rather, the CAT taxes the privilege of doing business as measured by the taxpayer's gross receipts over a period of time.³⁹ The amount of the CAT obligation does not become fixed until the end of the period used to measure the privilege through gross receipts, either quarterly or annually.⁴⁰ Indeed, the CAT is imposed only if a business's gross receipts within any particular year exceed \$150,000.⁴¹ Even then, only a flat rate of \$150 is imposed on the first \$1,000,000 of gross receipts.⁴² Thus, a taxpaying business cannot tie a single transaction to a clear,

³⁸ *Cameron Coca-Cola Bottling Co.*, Franklin Co. C.P. 93CVH02-729, at 26.

³⁹ OHIO REV. CODE § 5751.02.

⁴⁰ *Id.* § 5751.051.

⁴¹ *Id.* § 5751.01(D)-(E).

⁴² *Id.* § 5751.03(B).

fixed amount at the time the transaction is made. Unsurprisingly, therefore, taxpaying businesses are expressly prohibited from billing or invoicing the CAT to any other person.⁴³ Instead, as with other franchise taxes, taxpaying businesses are permitted to include amounts sufficient to recover the taxes imposed by the CAT in their prices.⁴⁴ The CAT is imposed, therefore, on the seller, not the buyer.

The point in time at which the tax obligation becomes fixed is the most clearly stated criterion defining a franchise tax. As this Court has stated:

the annual franchise tax levied on corporations is also a tax on the privilege of doing business in this state. Both the excise tax on public utilities and the franchise tax on corporations are levied on the exercise of a privilege and not on income, sales or receipts. Further, both taxes are based upon the results of an entire year of doing business *and tax liability is not fixed until the end of that annual period.*⁴⁵

There can be no question that the CAT was intended to operate as a franchise tax on the privilege of doing business in Ohio – a form of taxation to which food producers, wholesalers, and retailers have always been subject. It was not intended as a transactional tax on sales of products – a form of taxation from which food producers, wholesalers and retailers continue to be exempt. Indeed, the General Assembly expressly stated this intention: “there is hereby levied a commercial activity tax on each person with taxable gross receipts for the privilege of doing business in this state. . . . *The tax imposed under this section is not a transactional tax.*”⁴⁶

⁴³ *Id.* § 5751.02(B).

⁴⁴ *Id.*

⁴⁵ *Bank One Dayton, N.A. v. Limbach* (1990), 50 Ohio St. 3d 163, 167 (internal quotation marks and citations omitted).

⁴⁶ OHIO REV. CODE § 5751.02 (emphasis added).

3. The CAT does not become a transactional tax simply because it measures the value of the privilege being taxed by gross receipts, even if the gross receipts include receipts for food sales.

Contrary to what the Tenth District concluded, the use of gross receipts as the yardstick to measure the privilege of doing business does not transform the CAT from a franchise tax into a prohibited transactional tax. The lower court's conclusion ignores the long line of cases in which this Court distinguished how a tax is measured from what is being taxed.⁴⁷ Ohio must have some method to measure the value of the privilege of doing business within the State, and it is not tied to any single formula or set of factors in doing so.⁴⁸ Neither Appellees nor the court below have disputed that a measure using gross receipts "bears some real and reasonable relation to the privilege" of doing business within the State.⁴⁹

The Tenth District sought to distinguish these cases on the ground that the former corporate franchise tax was measured by net worth rather than by gross receipts. But this Court has previously rejected a similar argument that an annual privilege tax measured by gross receipts was "a transactional tax comparable in nature to a sales tax, calculable with

⁴⁷ See *Mutual Holding Co.*, 71 Ohio St. 3d at 60 ("[m]easuring tax liability in terms of net worth does not convert a franchise tax into a property tax"); *Wheeling Steel*, 21 Ohio St. 2d at 60-61 ("[t]he statutory Ohio franchise law . . . is purely a privilege tax and not a tax on income, sales or receipts"); *Aluminum Co.*, 140 Ohio St. at 395 ("The employment of various factors in determining the part of the business of a corporation...done in Ohio is no indication that the subjects of such factors are being taxed. Instead, they are being used merely to compose a measuring stick"); *S. Gum Co. v. Laylin* (1902), 66 Ohio St. 578, 596 (franchise tax measured by stock does not make the tax imposed on personal property).

⁴⁸ See *Armour & Co.*, 46 Ohio St. 2d at 453 ("[i]t is a well-settled constitutional principle that franchise taxes 'need not be based solely on the amount of property owned within the state so long as it bears some real and reasonable relation to the privilege granted or to the protection of the interests of the state'").

⁴⁹ *Id.*

certainty as each dollar is received.”⁵⁰ The Court held that “[t]he critical legal distinction which appellant ignores is that the tax is not imposed on gross receipts as they are received. Annual gross receipts are merely the measure of the tax on the privilege.”⁵¹

Further, the drafters of the constitutional prohibition could have easily included language prohibiting any tax “on or measured by” the sale or purchase of food, but they did not – even though the tax code is littered with provisions using the “measured by” language.⁵² This Court has recognized that there is a distinction between taxes measured by net income and taxes imposed on net income, but that distinction is irrelevant where the prohibition explicitly precludes taxes “imposed on, or measured by, net income.”⁵³ This case is not like *LSDHC Corp.*, where the prohibition expressly barred taxes imposed on, or measured by, a particular factor. Where prohibitory language does not distinguish between the imposition and measurement of taxes, courts have repeatedly held it to be permissible to include factors exempt from direct taxation to measure the value of a franchise tax.⁵⁴

⁵⁰ *E. Ohio Gas Co.*, 26 Ohio St. 3d at 66; see also *Bank One Dayton*, 50 Ohio St. 3d at 167 (“Both the excise tax on public utilities and the franchise tax on corporations are levied on the exercise of a privilege and not on income, sales or receipts”).

⁵¹ *Id.* at 67.

⁵² See OHIO REV. CODE §§ 718.01(A)(1)(e), 1731.08, 4909.15(A)(4)(a).

⁵³ *LSDHC Corp. v. Zaino*, 98 Ohio St. 3d 450, 453, 2003 Ohio 1911.

⁵⁴ *Bank One Dayton*, 50 Ohio St. 3d at 167; *Werner Machine Co. v. Div. of Taxation* (1956), 350 U.S. 492, 494; *Educational Films Corp. v. Ward* (1931), 282 U.S. 379.

CONCLUSION

Because the CAT is a constitutionally permitted franchise tax, the judgment of the Tenth District Court of Appeals should be reversed.

Respectfully submitted,



*per authority
JOG*

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Amici Curiae was served by U.S.

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