

IN THE SUPREME COURT OF OHIO

OHIO GROCERS ASSOCIATION, et al.,

Plaintiffs-Appellees,

v.

RICHARD A. LEVIN, Ohio Tax
Commissioner,

Defendant-Appellant.

Case No. 2008-2018

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

Court of Appeals Case
No. 07AP-813

**BRIEF *AMICUS CURIAE* OF THE OHIO RESTAURANT ASSOCIATION IN SUPPORT
OF APPELLEES**

Richard Cordray (0038034)
Attorney General of Ohio

Benjamin C. Mizer (0083089)

Solicitor General

Stephen P. Carney (0063460)

Elisabeth A. Long (0084128)

Deputy Solicitors

Lawrence D. Pratt (0021870)

Julie Brigner (0066367)

Assistant Attorneys General

30 East Broad Street, 17th Floor

Columbus, OH 43215

Telephone: 614-466-8980

Facsimile: 614-466-5087

benjamin.mizer@ohioattorneygeneral.gov

Counsel For Defendant-Appellant

RICHARD A. LEVIN, OHIO TAX

COMMISSIONER

Stephen E. Chappellear (0012205)

HAHN LOESER + PARKS LLP

65 East State Street, Suite 1400

Columbus, Ohio 43215

Telephone: (614) 221-0240

Facsimile: (614) 221-5909

E-mail: sechappellear@hahnlaw.com

Attorneys for *Amicus Curiae*

OHIO RESTAURANT ASSOCIATION

Charles R. Saxbe (0021952)

Donald C. Brey (0021965)

Gerhardt A. Gosnell II (0064919)

CHESTER, WILCOX & SAXBE LLP

65 E. State Street

Suite 1000

Columbus, OH 43215

Telephone: 614-221-4000

Facsimile: 614-221-4012

Attorneys for Plaintiffs-Appellees

OHIO GROCERS ASSOCIATION, ET
AL.

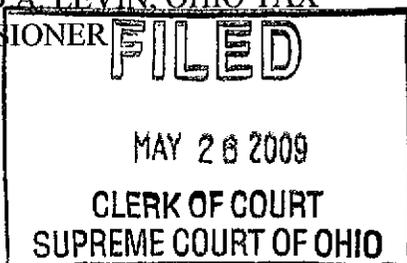


TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i> OHIO RESTAURANT ASSOCIATION	1
INTRODUCTION	1
ARGUMENT	
<i>Proposition of Law: The CAT is an excise tax and is prohibited by Article XII, Section 3(C) and Section 13 of the Ohio Constitution when applied to gross receipts from the sales of food other than for on-premises consumption. Article XII, Section 3(C) and Section 13 of the Ohio Constitution exempt gross receipts from the sale of food other than for on-premises consumption from being included in the calculation of taxable gross receipts used to determine the CAT.</i>	3
I. OHIOANS HAVE LONG OPPOSED ANY TAX ON THE PURCHASE OR SALE OF FOOD	3
II. THE CAT IS AN EXCISE TAX ON THE SALE OF FOOD.....	5
III. THE STATE ERRONEOUSLY READS THE OHIO CONSTITUTION AS PROHIBITING ONLY SALES TAXES	8
IV. THE <i>AMICI CURIAE</i> SUPPORTING THE STATE IMPROPERLY SEEK TO INVOKE PUBLIC POLICY REASONS AS A BASIS FOR OVERRIDING THE CONSTITUTION	11
CONCLUSION.....	16
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

CASES

Arbino v. Johnson & Johnson, 116 Ohio St.3d 468, 2007-Ohio-69483, 12

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)1

District of Columbia v. Heller, 128 S. Ct. 2783 (2008).....12, 14

FEC v Wis. Right to Life, 127 S. Ct. 2652 (2007).....13

Friedlander v. Gorman (1933), 126 Ohio St. 16313

Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008).....10, 11

Henry’s Restaurants of Pomona, Inc. v. State Bd. of Equalization,
30 Cal. App. 3d (Cal. App. 2d Dist. 1973)8

Lindh v. Murphy, 521 U.S. 320 (1997).....11

Norwood v. Horney, 110 Ohio St.3d 353, 2006-Ohio-379913

STATUTES

R.C. 5751.026, 8

OHIO CONSTITUTION

Article XII, Sec. 31, 6, 16

OTHER AUTHORITIES

Andrew Chamberlain & Patrick Fleenor, *Tax Pyramiding:
The Economic Consequences Of Gross Receipts Taxes*,
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by the Constitutional Convention and Approved by the People, in
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of the State of Ohio*, 2135 (E. S. Nichols ed.,
The F.J. Heer Printing Co.) (1912)10

Nicholas Johnson and Iris J. Lav, <i>Should States Tax Food? Examining the Policy Issues and Options</i> , Center on Budget and Policy Priorities, May 1998	14
<i>Sales Tax in Ohio Wins After Fight</i> , N.Y. Times, Dec. 16, 1934	4
<i>Which States Tax the Sale of Food for Home Consumption in 2007?</i> , Center on Budget and Policy Priorities, Nov. 1, 2007	15
<i>Ohio is Expected to End Tax on Food</i> , N.Y. Times, Sept. 18, 1936	5
<i>Takeout Provides Key Growth Vehicle for Restaurants says Technomic</i> , August 13, 2007	7

STATEMENT OF INTEREST OF *AMICUS CURIAE*
OHIO RESTAURANT ASSOCIATION

The Ohio Restaurant Association is the chief promoter, educator and advocate for Ohio's foodservice industry. Founded in 1920, the Association is comprised of 2,400 members at more than 4,000 locations. Its members include both independent and multi-unit restaurant companies, and industry purveyors.

The Association is committed to enhancing Ohio's restaurant industry, an integral part of Ohio's economic future. Indeed, the restaurant industry is one of the State's growing economic engines. Today, foodservice is Ohio's second-largest private sector employer, generating more than \$500 million in sales taxes annually.

While the Association's members appreciate and fulfill their corporate duty to pay those taxes fairly imposed, its members dispute the application of taxes that are patently at odds with the tax limitations articulated in the Ohio Constitution. To that end, because Ohio's Commercial Activities Tax ("CAT") constitutes an excise tax on the "sale . . . of food," Ohio Const. Art. XII, Sec. 3, the Association joins the Ohio Grocers Association and the other appellees in challenging the application of the CAT to sales "of food for human consumption off the premises where sold," *id.*

INTRODUCTION

In enacting the 1936 amendment prohibiting any "excise tax . . . collected upon the sale or purchase of food," Ohio Const. Art. XII, Sec. 3, Ohioans, by an overwhelming vote, made clear that no tax on the sale or purchase of food is permissible in our State. Those voters would no doubt be surprised to learn that their voices, ingrained in the Constitution, are no longer being heard. Despite the plain prohibitions enacted in 1936, and reaffirmed in 1994, the State, by way of the recent CAT, has imposed an excise tax on the sale of food.

Under the CAT, sellers of food are taxed on their “gross receipts” of food sales. Tax liability, in other words, is generated by the sale of food; the more food sold, the more tax paid, generally speaking. By any measure, the tax constitutes an excise tax on the sale of food.

The tax is also “excise” in nature. Even the State concedes that the term excise tax has a “broad[]” meaning, State’s Br. at 5, and includes not only taxes on “the manufacture, sale, or use of goods,” but also on “the enjoyment of a privilege.” *Id.* (quoting *Black’s Law Dictionary*, 563 (6th ed. 1990)). Given the broad and commonly accepted definition of the term “excise”, it is unnecessary for the Court to assign the CAT a more precise label. All that matters is that the CAT is an excise tax.

The State, however, would have the Court believe that Article XII bars only a sales tax on food. *See, e.g.*, State’s Br. at 3 (“[T]he constitutional limits apply only to sales taxes, not franchise taxes.”), 14 (“Sections 3(C) and 13 prohibit only a sales tax on food”). That reading of the Constitution fails in numerous respects. First, the Constitution prohibits a tax not only on the “purchase” of food, which would generally speak to a sales tax paid initially by the purchaser, but also the “sale” of food, in other words, a tax imposed on the seller based upon gross receipts from sales. Second, had the constitutional amenders sought to prohibit sales taxes only, they would have used that phrase in the Constitution. But the constitutional text bars much more than a sales tax; it bars any “excise tax.” And while a sales tax is one form of excise tax, there are many others. *See, e.g., id.* at 5. Notably, the broad range of excise taxes is distinguishable from the other dominant form of tax, namely an income tax. *See* State’s Br. at 5 (noting that excise taxes include “practically every internal revenue tax except the income tax” today) (quoting *Black’s Law Dictionary*, 563 (6th ed. 1990)). While the Constitution permits income-like taxes on food sellers, it does not permit excise taxes like the CAT to be levied on those sellers.

In the end, it makes no difference whether the CAT is labeled a “transactional” tax. Regardless whether the tax is transactional in nature (and all signs point to that conclusion), Ohio’s constitutional prohibition is not limited to transactional taxes. Rather, the Constitution broadly proscribes any “excise” tax, a category that includes, but is not limited to, pure transactional taxes. Because the CAT operates as a tax on sales, not on income, it is fairly described as an excise tax, one that is barred by Article XII, Section 3. This is true, it bears noting, even if, as the State and its *amici* suggest, striking down the CAT’s application to food sellers would create temporary income stream reductions for the State. After all, the Court’s duty is to “simply determine whether [Ohio’s tax laws] comply with the Constitution.” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 482, 2007-Ohio-6948. Invitations to disregard constitutional protections to prevent an allegedly undesirable policy result have little place in this branch of government.

ARGUMENT

Proposition of Law: The CAT is an excise tax and is prohibited by Article XII, Section 3(C) and Section 13 of the Ohio Constitution when applied to gross receipts from the sales of food other than for on-premises consumption. Article XII, Section 3(C) and Section 13 of the Ohio Constitution exempt gross receipts from the sale of food other than for on-premises consumption from being included in the calculation of taxable gross receipts used to determine the CAT.

I. OHIOANS HAVE LONG OPPOSED ANY TAX ON THE PURCHASE OR SALE OF FOOD.

In assessing the constitutionality of Ohio’s CAT, Ohio’s historical opposition to food-related taxes deserves consideration at the outset. Time and again, Ohioans have agreed with the basic principle that food sales and purchases should not be taxed. In 1936, and again in 1994,

Ohioans overwhelmingly approved constitutional amendments that barred food-related taxes.

The 1936 amendment barring an “excise tax on the sale or purchase of food” was approved by a more than 2:1 majority:

CONSTITUTIONAL AMENDMENT PROPOSED BY
INITIATIVE PETITION:

Prohibiting the levy or collection of an excise tax on the sale or purchase of food for human consumption off the premises where sold (Art. XII, Sec. 12):

Yes—1,585,327 (68.8%)

No—719,966¹

Similarly, the 1994 amendment extending that prohibition to wholesale food sales as well as sales of soft drinks and other carbonated non-alcoholic beverages also passed by a 2:1 margin:

CONSTITUTIONAL AMENDMENT PROPOSED BY
INITIATIVE PETITION:

Prohibiting the current wholesale tax on soft drinks and other carbonated, non-alcoholic beverages.

Yes—2,228,874 (66.4%)

No—1,126,728²

Then, as now, Ohioans understood that taxing food represented unsound public policy. Opposition to a sales tax was so strong, it was proposed and defeated five times in the two-year period from 1932–34, before finally being adopted. N. R. Howard, *Sales Tax in Ohio Wins After Fight*, N.Y. Times, Dec. 16, 1934 (attached as Ex. A).

After that adoption, but before enactment of the November 1936 constitutional amendment, public opposition swirled to the then-effective food tax. Ohioans understood the

¹ AMENDMENT AND LEGISLATION PROPOSED CONSTITUTIONAL AMENDMENTS, INITIATED LEGISLATION, AND LAWS CHALLENGED BY REFERENDUM, SUBMITTED TO THE ELECTORS (Compiled through 1954 by Arthur A. Schwartz, Director, Legislative Reference Bureau, and Brought up to date through 2006 by Jennifer Brunner Secretary of State) (updated 1/23/07), available at <http://www.sos.state.oh.us/SOS/elections/IssueProcBallotBd.aspx>.

² *Id.*

inherent unfairness of a food tax, in particular a “gross-receipts tax” on food, similar to today’s CAT. It follows that when Ohioans later that year enacted the constitutional amendment banning “excise taxes” on the purchase or sale of food, they were prohibiting not just pure “sales taxes,” but also a “gross-receipts tax” and any other “excise tax” applicable to food sellers.

News reports at the time made clear the broad scope of the constitutional amendment ultimately passed by the voters. An article describing the soon-to-be-enacted constitutional amendment referred to the “unpopular if productive Ohio sales tax,” which was “expected to be modified” at the November election in the form of a constitutional amendment “designed to exempt from the levy all articles of food except served meals and refreshments.” *Ohio is Expected to End Tax on Food*, N.Y. Times, Sept. 18, 1936 (attached as Ex. B). The amendment, it bears noting, was proposed by Ohio’s Governor after it was rejected as a legislative proposal that summer. The Governor made clear the broad purpose behind his proposed amendment: “he would initiate an amendment to the Constitution making it unlawful *ever to tax food in any way*,” a proposal that “more than 600,000 voters signed petitions to put . . . on the ballot.” *Id.* (emphasis added). When the voters later approved the amendment by an overwhelming margin, it was plainly understood that any “food tax,” whether in the form of a sales tax paid by the consumer, or a gross-receipts tax paid by the seller, would forever be prohibited in Ohio.

II. THE CAT IS AN EXCISE TAX ON THE SALE OF FOOD.

Despite this overwhelming public opposition to any taxes on the sale or purchase of food, and the subsequent enactment of a constitutional prohibition, the State has enacted a tax that does exactly what the voters have opposed and the Constitution forbids. Because the CAT, as the court of appeals unanimously recognized, is in essence a food-related tax, it cannot survive constitutional scrutiny.

Specifically, the CAT is forbidden by the Constitution because it is: an (1) excise tax; (2) on the sale; (3) of food. *See* Ohio Const. Art. XII, Sec. 3. First, the gross receipts tax is undoubtedly an “excise tax.” As the State concedes, the term excise tax has a “broad[]” meaning. State’s Br. at 5. Taxes on “the manufacture, sale, or use of goods,” those “on the carrying on of an occupation or activity,” or “on the transfer of property” are all excise taxes. *Id.* (quoting *Black’s Law Dictionary*, 563 (6th ed. 1990)). Tellingly, taxes “imposed on . . . the enjoyment of a privilege” are also excise taxes. *Id.* (They also, of course, may be labeled franchise taxes, but the State concedes that franchise taxes are a type of excise tax. *See id.*).

Second, there is little doubt that the CAT is a tax on a “sale.” Notably, the Ohio Constitution prohibits not only taxes on the “purchase” of food, *i.e.*, a tax that typically would be paid by the individual “purchaser,” but also on the “sale” of food, *i.e.*, a tax typically paid by the “seller.” Ohio Const. Art. XII, Sec. 3. Here, the CAT is imposed upon a food seller’s “gross receipts.” R.C. 5751.02. And those gross receipts represent the collective sales made by the food seller. This tax scenario is distinguishable from an income tax, where the fact that sales have occurred does not necessarily mean that any tax will be paid, unless those sales generate net “income.” Under the CAT, on the other hand, money received via food sales is taxable, regardless whether those sales generate net income. In other words, the more sales, the higher the tax.

Third, the CAT applies to sales of “food.” After all, without any actual food sales, a purported food seller would not pay the CAT. Put differently, the tax on the “privilege” of doing business in Ohio is not owed until the food seller makes a sale of food. In this sense, the CAT is nothing if not a tax on the sale of food.

And this tax, it bears noting, while initially experienced by the seller, is ultimately paid by consumers, further proving why it is unconstitutional. Numerous studies confirm that taxes paid by corporations, including “gross receipts taxes,” are ultimately passed on to the consumer:

While businesses are legally required to pay gross receipts taxes, in many cases the economic burden of them is passed forward to consumers in the form of higher prices. Yet unlike retail sales taxes, it is not possible for lawmakers to simply require gross receipts taxes to be itemized on printed sales receipts given to consumers, because it is not possible to directly observe the total amount of gross receipts tax that is ‘pyramided’ into the final price of the goods. As a result, consumers routinely bear the burden of gross receipts taxes without any knowledge that the tax is being imposed on them.

Andrew Chamberlain & Patrick Fleenor, *Tax Pyramiding: The Economic Consequences Of Gross Receipts Taxes*, Tax Foundation Special Report, Dec. 2006, at 7 (emphasis added) (attached as Ex. C). That such taxes are passed on to the consumer is particularly true in the grocery industry, and in the foodservice industry, especially for restaurants that offer “fast food” carryout or drive-thru service. And 60% of sales in casual dining chains are takeout. *Takeout Provides Key Growth Vehicle for Restaurants Says Technomic*, August 13, 2007 (copy attached as Ex. D). Because those businesses often incur a high number of sales with profit margins that are typically quite low, the retailers have no choice but to pass on the costs of any additional sales-related taxes.³ While the CAT is unconstitutional because it is an excise tax on the sale of food, it is even more troubling in that its effect—namely, higher food prices—is antithetical to the reasons supporting the enactment of a constitutional ban on food taxes to begin with. *See Ohio Sec’y of State, Certified Ballot Language (Nov. 3, 1936) (copy certified Feb. 27, 2009) (State’s Ex. 11, Appx. at A-110) (advocating the constitutional amendment to “remove this*

³ *See* 2004 Restaurant Industry Operations Report published by Deloitte & Touche LLP (concluding that the average pre-tax profit margins range from 4–7% (4% for Full Service and 7% for Limited Service restaurants)) (excerpts available at: http://rrgconsulting.com/ten_restaurant_financial_red_flags.htm).

unjust food-tax forever” because “[f]ood is the greatest necessity of life,” and “[a] special tax on food is the most unjust and obnoxious that could be levied”).

III. THE STATE ERRONEOUSLY READS THE OHIO CONSTITUTION AS PROHIBITING ONLY SALES TAXES.

In attempting to clear the high constitutional bar in place for food-related taxes, the State reads the Constitution as prohibiting a sales tax only. *See* State’s Br. at 3, 14. Then, the State suggests that the CAT is best characterized as a franchise tax, not a transactional sales tax—citing R.C. 5751.02’s labeling of the tax as “not a transactional tax”—and argues that the CAT in actuality is a tax on the “privilege” of doing business. State’s Br. at 31 (quoting R.C. 5751.02). That argument fails for several reasons.

To begin, Article XII, Section 3 does not prohibit only taxes labeled with certain magic words. So long as a food-tax is “excise” in nature, it is barred. And here, because the CAT is a tax on a food seller’s gross receipts—in other words, on the seller’s total “sale[s] . . . of food”—the tax is an excise tax on food sales. Indeed, as other courts have recognized, in reality, a “sales tax is not a tax on sales but is *an excise tax for the privilege of conducting business measured by gross receipts from sales.*” *Henry’s Restaurants of Pomona, Inc. v. State Bd. of Equalization*, 30 Cal. App. 3d 1009, 1019 (Cal. App. 2d Dist. 1973) (emphasis added).

Reading Article XII, Section 3 as prohibiting sales taxes only is at odds with the language of that amendment. To be sure, the then-applicable 1934 sales tax was part of the debate that preceded the enactment of Article XII, Section 12 (now Section 3). *See* State’s Br. at 24. Unsurprisingly, therefore, much of the discussion surrounding the proposed amendment highlighted its effect on the recently enacted sales tax. Yet while Ohioans could have simply prohibited “sales taxes” on food, they did not. Instead, they protected the “sale and purchase” of

food from “excise taxes,” adding to our constitution a broad term that encompasses more than just a “transactional” tax.

That the State has labeled the CAT as a non-transactional, privilege tax does not remove it from the realm of excise taxes prohibited by the Constitution. For example, suppose the State enacted a tax requiring that in exchange for the privilege of being a seller of food, the food seller must pay .26% of all of its gross receipts in tax to the State. Plainly, this is a tax on the sale of food, and thus barred by the Constitution. Simply because the State has enacted this .26% tax on anyone engaged in commercial activity in the State, including both food sellers and non-food sellers, and has gone out of its way to call the tax non-transactional, does not mean the tax, as applied to food sellers, somehow meets constitutional scrutiny. If the State may pass a “privilege” tax for selling food that is measured by the gross food sales receipts, the Constitution is rendered nearly meaningless.

Nor would it matter if the State had gone so far as to call the CAT a “franchise” tax. After all, franchise taxes can be transactional in nature. Franchise taxes, which generally constitute a tax on the privilege of doing business, *see State’s Br. at 5* (quoting *Black’s Law Dictionary* at 659), can be measured on a transaction-by-transaction basis. As the court of appeals made clear, it is not the label attached by the General Assembly that controls, but rather the incidence of the tax. *See State Appendix at A-13*. If labels *were* the controlling factor, then it bears noting that the tax at issue is a “commercial activity tax,” which, by definition, taxes commercial *activity*. And in the case of restaurateurs and others in the food industry, that commercial *activity* is the *sale of food*.

Next, the State argues that Section 3(C)’s plain text evinces a “contrasting use of ‘excise and franchise,’” in its first clause (providing for “Excise and franchise taxes . . .”) and reasons

that because that clause is “followed by ‘excise’ alone” in the section’s second clause (“except[ing]” any “excise tax” from “be[ing] levied or collected on the sale or purchase of food . . .”), the language “means that ‘excise’ here denotes those excise taxes that are *not* franchise taxes.” State’s Br. at 28. But principles of interpretation demonstrate that such reasoning is unsound here, because Section 3(C)’s two clauses were not enacted together.

By way of background, Ohioans originally enacted the current second clause of Section 3(C) in 1936 as Section 12 of the Constitution’s Article XII. *See* Ohio Sec’y of State, Certified Ballot Language (Nov. 3, 1936) (copy certified Feb. 27, 2009) (State’s Ex. 11, Appx. at A-110). In contrast, the current first clause of Section 3(C) originally appeared in the Constitution as Section 10 of Article XII, following its enactment through a special election in 1912. *See The Constitution of the State of Ohio with Amendments Proposed by the Constitutional Convention of 1912 and Approved By the People, in 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio*, 2135 (E. S. Nichols ed., The F.J. Heer Printing Co.) (1912) (excerpts attached as Ex. E).⁴ Thus, the two clauses were enacted an entire generation—nearly a quarter century—apart. What is more, they remained separated for another 40 years, until 1976, when they were consolidated. And as the State acknowledges, this merger of the previous Sections 10 and 12 into the current Section 3(C) of Article XII “did not alter the substance of either clause,” but instead was simply the result of an effort to “combine and re-number” the clauses. State’s Br. at 7.

Accordingly, the State’s attempt to interpret the word choice in the second clause as a deliberate decision to allow franchise taxes on the sale or purchase of food—merely because franchises taxes are mentioned in the current first clause but not in the second—is unpersuasive. The United States Supreme Court recently rejected a similar argument. In *Gomez-Perez v.*

Available at: <http://www.supremecourt.ohio.gov/LegalResources/LawLibrary/resources/1912Convention.asp>.

Potter, 128 S. Ct. 1931 (2008), the Court noted that “[n]egative implications raised by disparate provisions are strongest’ in those instances in which,” unlike here, “the relevant statutory provisions were considered *simultaneously* when the language raising the implication was inserted.” *Id.* at 1940 (quoting *Lindh v. Murphy*, 521 U.S. 320, 330 (1997)) (emphasis added). By contrast, where, like here, “two relevant provisions were not considered or enacted together,” as, for instance, where one provision of the Age Discrimination in Employment Act was enacted in 1967, but another was not added until 1974, the inclusion of a specific provision in one context and its absence in another did not support an inference that the omission was an intentional and purposeful exclusion of the language. *Id.*

The same logic applies to the State’s effort here to read too much into differences between the two clauses of current Section 3(C). This is especially true considering that the time between their enactment was over three times as long as the seven years the United States Supreme Court saw as too great to allow an inference to be drawn between two provisions in the same act at issue in *Gomez-Perez*.

IV. THE *AMICI CURIAE* SUPPORTING THE STATE IMPROPERLY SEEK TO INVOKE PUBLIC POLICY REASONS AS A BASIS FOR OVERRIDING THE CONSTITUTION.

The State and several *amici* suggest that if this Court affirms the Tenth District’s determination that the CAT violates the Ohio Constitution’s food-tax prohibitions, the State will be left with an unfillable budget shortfall. As a practical matter, *amici* and the State have plainly overplayed their hand. *See, e.g.*, State’s Br. at 45 (suggesting that a holding in favor of appellees would “wreak havoc” on Ohio tax law and tax revenue). Rather, all that is being requested is that any taxes imposed on sales of food simply may not, consistent with the Constitution, be “excise” in nature.

At all events, as a legal matter, invitations like these—to disregard a constitutional protection to prevent an allegedly undesirable policy result—ignore the well-established role of the Court to evaluate only the constitutionality of the statute. *See, e.g., Arbino v. Johnson & Johnson*, 16 Ohio St.3d 468, 482, 2007-Ohio-6948 (noting that this Court does not judge policy decisions; “we must simply determine whether they comply with the Constitution”). If a law is unconstitutional, the Court must strike it. No policy goal, no matter how laudable or necessary it may seem, can salvage a statute that violates the Constitution.

Put differently, potentially hard cases on their facts should not lead to otherwise inappropriate legal rulings. Indeed, as the United States Supreme Court explained in its recent ruling interpreting the Second Amendment, “the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution” to our country’s “problem of handgun violence” could not overcome the federal Constitution’s ban of certain handgun restrictions. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008). Simply put, “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *Id.*

Like the Ohio Constitution’s food-tax prohibitions, the Second Amendment was incorporated into the federal Constitution under social, political, and economic conditions that differ significantly from contemporary circumstances. And just as “[u]ndoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem,” *id.*, the CAT’s supporters may believe that the concerns animating that tax’s revenue-raising goals are more important than the constitutional protections against taxing Ohioans’ food. Nevertheless, just as the United States Supreme Court concluded that “it is not the role of this Court to pronounce the Second Amendment extinct,” *id.*, the State and the *amici*

who support the CAT cannot ask this Court to flout the food-tax prohibitions of our Constitution merely in favor of a short-term benefit to the State's coffers.

This Court too has repeatedly recognized that the state Constitution takes precedence over the potentially fleeting political and policy concerns of the day, including those involving revenue issues. *See Norwood v. Horney*, 110 Ohio St.3d 353, 356–357, 2006-Ohio-3799 (invalidating a municipality's taking of private properties by eminent domain when the appropriation standard was unconstitutional, even though the properties were to be used in a redevelopment project expected to result in nearly \$2,000,000 in annual revenue for a city that was millions of dollars in debt); *Friedlander v. Gorman* (1933), 126 Ohio St. 163, 168 (stating, in invalidating certain features of Ohio's intangible tax law, that “[c]ourts are liberal when the law sought to be questioned effects a transition made necessary by public exigency; but to accomplish such purpose courts will not fly in the face of the constitution”).

Nor do difficulties in implementing constitutionally permissible tax laws allow the State to override the Ohio Constitution's food-tax protections. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (rejecting the principle that protected speech may be banned because it is difficult to distinguish from unprotected speech because an approach that would allow “protected speech [to] be banned as a means to ban unprotected speech . . . turns the First Amendment upside down”); *FEC v Wis. Right to Life*, 127 S. Ct. 2652, 2681 (2007) (“The fact that the line between electoral advocacy and issue advocacy dissolves in practice is an indictment of the statute, not a justification of it.”). Making Ohio businesses contribute to the tax base may be desirable, but the State cannot achieve its goals through impermissible means. Designing a tax program that satisfies its budget ambitions while respecting constitutional constraints may require a more careful construction of the statute. But none of this alters the reality that the Ohio

Constitution has taken “certain policy choices off the table,” *Heller*, 128 S. Ct. at 2822, including the food taxing portions of the CAT.

Finally, to the extent that policy considerations are relevant, amending the CAT to comply with the Constitution seemingly would only benefit Ohio’s poorest citizens, not hurt them. As numerous experts have recognized, taxes on food fall “more heavily on low- and moderate-income families than on better-off families.” Nicholas Johnson and Iris J. Lav, *Should States Tax Food? Examining the Policy Issues and Options*, Center on Budget and Policy Priorities, May 1998, at viii (attached as Ex. F). Because “food remains a large component of the budgets of the poor,” “sales taxes levied on food can impose a surprisingly large burden on poor families.” *Id.* at 6. “As a share of income, food taxes are typically four to five times as high for poorer families as for upper-income families. Although other state taxes are levied heavily on the less-advantaged, few are so regressive—that is, absorb such a greater proportion of income for the poor than for the well-off.” *Id.*

It bears noting that the Center on Budget and Policy Priorities’ conclusion that “states should consider reducing or eliminating sales taxation on food” because, among other reasons, when “food is included in the sales tax base, the sales tax becomes significantly more regressive,” *id.* at 13, was based on a nationwide study of state food-taxes classified as “general sales taxes as defined by the U.S. Bureau of the Census in its Government Finances series,” *id.* at 2 n.2. The Census Bureau’s definition “includes most retail sales and use taxes and taxes on gross income, but it excludes nominal business license taxes as well as taxes that are levied specifically on such items as alcohol, tobacco, insurance products, motor fuels, amusements, and utilities.” *Id.*; see also U.S. Bureau of the Census, Government Finances and Employment Classification Manual, October 2006, at 4-10–11 (Code T09 applies to “General Sales and Gross

Receipts Taxes”) (excerpts attached as Ex. G).⁵ In other words, from a policy perspective, whether known as a “gross receipts tax” as it was at that time in Alabama, Arkansas, and New Mexico, as Hawaii’s “general excise tax,” as Arizona’s “transaction privilege tax,” or more traditionally as a basic “sales tax” in other states, *id.*, any tax that functions to tax receipts from the sale or purchase of food, as Ohio’s CAT now does, results in the same regressive tax on food purchases of the citizens of that state. Perhaps this is why, as of the end of 2007, most of the 45 states that levy general sales taxes had “eliminated, reduced, or offset the tax as applied to food for home consumption.” *Which States Tax the Sale of Food for Home Consumption in 2007?*, Center on Budget and Policy Priorities, Nov. 1, 2007 (attached as Ex. H).⁶

Thus, the CAT’s gross-receipts tax on food sales is proportionally imposed most heavily on Ohio’s poorest citizens. Under a constitutionally permissible scheme, where gross-receipts from food sales are not taxed, the poorest Ohioans will not absorb a tax on food purchases that form a high percentage of their spending. This benefit, targeted to the most essential of social services—food—should be of the highest policy priority.

In addition, the *amici*’s concerns that a loss of the revenue from this unconstitutional tax on food sales would negatively impact Ohio’s social services programs are unfounded. To begin, even despite the recent national economic turbulence, Ohio has continued its rich tradition of protecting social services. *See, e.g.*, Ohio Department of Job and Family Services Annual Report, 2007, at 3 (noting that the department, “a \$16.8 billion agency with almost 4,000 employees statewide,” is “present in every county and touch[es] practically every community in Ohio” and “has more than 120 sister agencies in Ohio’s 88 counties”) (attached as Ex. I).⁷

⁵ Available at: http://www.census.gov/govs/www/06classificationmanual/06_gfe_classmanual_toc.html.

⁶ Available at: <http://www.cbpp.org/cms/index.cfm?fa=view&id=1230>.

⁷ Available at: <http://www.odjfs.state.oh.us/forms/file.asp?id=53482>.

More importantly, the State is not prohibited from using constitutionally permissible means to generate the revenue it currently collects through unconstitutional taxes on food sales. A variety of legislative solutions exist to fund any revenue gap. Should the Court uphold the appellate court's conclusion invalidating the food-tax portions of the CAT, the General Assembly has the power to adjust its tax policy to meet any budget shortfall. While that public policy decision is ultimately in the hand of the General Assembly, it is the Court's responsibility, indeed its duty, to enforce constitutional restraints on the current unconstitutional food-tax portions of the CAT.

CONCLUSION

The CAT is an excise tax collected upon the sale or purchase of foods, and is therefore barred by Art. XII, Sec. 3 of the Ohio Constitution. The judgment of the Tenth District Court of Appeals should be affirmed.

Respectfully submitted,



Stephen E. Chappellear (00122005)
HAHN LOESER + PARKS LLP
65 East State Street, Suite 1400
Columbus, Ohio 43215
Telephone: (614) 221-0240
Facsimile: (614) 221-5909
E-mail: sechappellear@hahnlaw.com

Counsel for Amicus Curiae
Ohio Restaurant Association

CERTIFICATE OF SERVICE

I certify on the 26th day of May, 2009, the foregoing was served by regular U.S. mail,
postage prepaid upon the following:

Richard Cordray
Attorney General of Ohio

Benjamin C. Mizer*
Solicitor General
**Counsel of Record*

Stephen P. Carney
Elisabeth A. Long
Deputy Solicitors
Lawrence D. Pratt
Julie Brigner
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, OH 43215
614-466-8980
614-466-5087 (fax)
*Counsel for Defendant-Appellant
Richard A. Levin,
Ohio Tax Commissioner*

Kurtis A. Tunnell*
**Counsel of Record*
Mark A. Engel
Anne Marie Sferra
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215
614-227-2300
614-227-2390 (fax)
*Counsel for Amici Curiae, The Ohio
Manufacturers' Association, Ohio State
Medical Association, The Ohio Society
of Certified Public Accountants, Ohio
Dental Association, and Ohio Chemistry
Technology Council*

Shirley Sicilian
General Counsel
Sheldon H. Haskin*
**Counsel of Record*
MULTISTATE TAX COMMISSION
444 N. Capitol Street, N.W., Ste. 425
Washington, D.C. 20001-1538
202-624-8699
202-624-8819 (fax)
*Counsel for Amicus Curiae
Multistate Tax Commission*

Richard C. Farrin*
**Counsel of Record*
Thomas M. Zaino
McDONALD HOPKINS LLC
41 S. High Street, Suite 3550
Columbus, OH 43215
614-458-0035
614-458-0028 (fax)

Kathleen M. Trafford*
**Counsel of Record*
PORTER, WRIGHT MORRIS & ARTHUR
LLP
41 S. High Street
Columbus, OH 43215
614-227-1915
614-227-2100 (fax)
*Counsel for Amicus Curiae
Ohio Business Roundtable*

Fred J. Livingstone*
*Counsel of Record
J. Donald Mottley
Judson D. Stelter
TAFT STETTINIUS & HOLLISTER LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302
216-241-2838
216-241-3707 (fax)
Counsel for Amicus Curiae
The Ohio School Board Association

Stephen L. Byron*
*Counsel of Record
Rebecca K. Schaltenbrand
SCHOTTENSTEIN, ZOX & DUNN CO.,
LPA
4230 State Route 306, Suite 240
Willoughby, OH 44090
440-942-7809
216-621-5341 (fax)

John Gotherman*
*Counsel of Record
OHIO MUNICIPAL LEAGUE
175 South Third Street, Suite 510
Columbus, OH 43215-7100
614-221-4349
614-221-4390 (fax)

Stephen J. Smith*
*Counsel of Record
SCHOTTENSTEIN, ZOX & DUNN CO.,
LPA
250 West Street
Columbus, OH 43215
614-462-2700
614-462-5135 (fax)
Counsel for Amicus Curiae
The Ohio Municipal League and
on behalf of the County Commissioners
Association of Ohio, The Ohio Township
Association, the Buckeye State Sheriffs'
Association Amici Curiae

Pierre H. Bergeron*
*Counsel of Record
Thomas D. Amrine
SQUIRE, SANDERS & DEMPSEY LLP
221 E. Fourth Street, Suite 2900
Cincinnati, OH 45202
513-361-1200
513-361-1201 (fax)
Counsel for 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

Robert J. Walter*
*Counsel of Record
James E. Melle
BUCKLEY KING LPA
10 West Broad Street, Suite 1300
Columbus, OH 43215
614-461-5600
614-461-5630 (fax)
Counsel for Amici Curiae
AFL-CIO, American Federation of State,
County Municipal Employees Ohio Council
8, Communications Workers of America
District 4, Fraternal Order of Police of
Ohio, Inc., Ohio Association of Professional
Firefighters, Ohio Association of Public
School
Employees (OAPSE)/AFSCME Local 4,
Ohio Education Association, Ohio
Federation of
Teachers, and Service Employees
International
Union District 1199

Kyle O. Sollie*

**Counsel of Record*

Sara A. Lima

REED SMITH LLP

1650 Market Street, 25th Floor

Philadelphia, PA 19103

215-851-8872

215-851-1420

Counsel for Amicus Curiae,

Tyson Sales and Distribution, Inc.

Charles R. Saxbe*

**Counsel of Record*

Donald C. Brey

Gerhardt A. Gosnell II

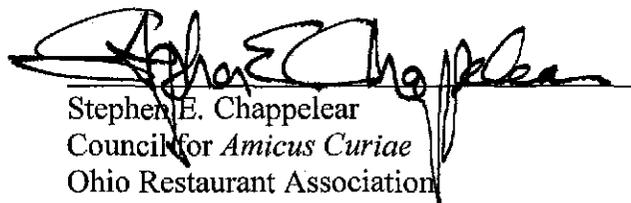
CHESTER, WILCOX & SAXBE LLP

65 East State Street, Suite 1000

Columbus, OH 43215

Counsel for Plaintiffs-Appellees

Ohio Grocers Association, et al.



Stephen E. Chappellear
Council for *Amicus Curiae*
Ohio Restaurant Association