

IN THE SUPREME COURT OF OHIO

BEAVER EXCAVATING COMPANY,
ET AL.,

Plaintiffs-Appellants,

v.

RICHARD A. LEVIN,
TAX COMMISSIONER OF OHIO,

Defendant-Appellee.

Supreme Court Case No. **11-1536**

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

Court of Appeals
Case No. 10-AP-581

**MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE
COUNTY ENGINEERS ASSOCIATION OF OHIO**

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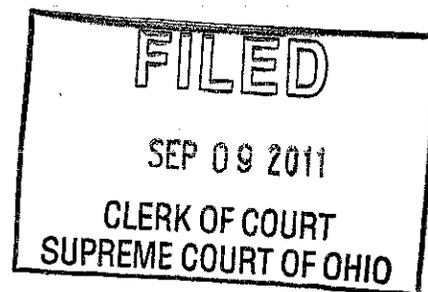


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fuel” must be read to include taxes of general applicability like the Ohio
commercial activity tax and the Ohio sales tax to the extent such taxes
directly or indirectly burden sales of motor vehicle fuel, thereby directly
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STATEMENT OF INTEREST OF AMICUS CURIAE

87 of Ohio's 88 counties elect a county engineer.¹ County engineers have general charge of (1) the construction, reconstruction, improvement, maintenance, and repair of all bridges and highways within the engineer's county, under the jurisdiction of the board of county commissioners, (2) construction, reconstruction, resurfacing, or improvement of roads by boards of township trustees, and (3) construction, reconstruction, resurfacing, or improvement of the roads of a road district. *See* R.C. 5543.01. Thus, County Engineers are the county officials tasked with ensuring that Ohio roads and bridges within their jurisdiction are properly maintained, and safe for travel by the general public.

The County Engineers Association of Ohio (CEAO) is comprised of Ohio's county engineers. CEAO works with the public sector, legislators, and state, county, municipal, township and other public officials to secure the necessary funding to create and maintain Ohio's system of roads and bridges. Sometimes when there are attempts to wrongly divert highway funds intended to help provide that system, CEAO will file an amicus curiae statement or provide briefing on relevant legal issues. CEAO does so in this case.

Article XII, Section 5a of the Ohio Constitution ("Section 5a") requires that all moneys derived from fees, excise taxes, and license taxes relating to the registration, operation, or use of motor vehicles used on public roads or relating to motor vehicle fuel used to propel such vehicles be expended solely on the purposes set forth in the amendment. Namely, such tax revenue must be devoted to maintaining Ohio roads and similar "highway purposes." Ohio motor fuel tax revenue and other Section 5a funds are the traditional sources of revenue for County Engineers to perform their statutory duties. Prior to the advent of the CAT, the Ohio motor fuel tax had

¹ In Cuyahoga County, the County Engineer is now appointed.

been the sole business excise tax applied to sellers of motor fuel for nearly one-hundred years. Importantly, after 1947, all of that revenue was designated for use in furtherance of road and highway purposes.

Since July 2007, however, gasoline sellers in Ohio now pay two competing “privilege-of-doing-business-measuring-stick” excise taxes from their business of selling motor vehicle fuel. The Ohio motor fuel tax is a privilege of doing business tax measured in business done. *Hickok Oil Corp. v. Evatt* (1943), 141 Ohio St. 644; *Cincinnati v. Cincinnati Oil Works Co.* (1931), 123 Ohio St. 448.² The CAT also is a privilege-of-doing-business-tax measured-in-business done. R.C. 5751.02(A); *Ohio Grocers Ass’n v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, at ¶14. The Ohio motor fuel tax is measured by gallons sold, and the CAT is measured by gross receipts from sales. These measuring sticks for business done correspond on a one-to-one basis on any given day. In other words, the measuring stick employed simply equates to a different rate of tax.

The subject of the notice of the appeal to which this amicus curiae statement pertains is the decision of the 10th District Court of Appeals (“10th District”) in *Beaver Excavating Co. v. Levin*, No. 10-AP-581 (July 26, 2011). Therein the court reached the anomalous conclusion that although gasoline sellers now pay *two* privilege of doing business taxes that differ only with regard to the measuring stick employed to measure “business done,” only one tax “relates to” motor vehicle fuel. The CAT revenue was held to fall outside Section 5a spending restrictions.

² Years later, the Supreme Court of the United States defined the similar federal fuel excise tax as a business tax on the dealer. *See Gurley v. Rhoden*, 421 U.S. 200, 206 (1975)(refusing to afford the refund rights of non-highway users of the gasoline determinative weight and reasoning that the non-highway-using consumer refund right merely reflected congressional acknowledgment that the burden of the tax may be passed along to the consumer in the form of increased pump prices; nonetheless, the tax was a business tax levied on the dealer). Thus, the Ohio Supreme Court’s analysis in *Hickok* decades earlier was legally correct.

The CAT is now directly competing with and displacing the Ohio motor fuel tax. If the 10th District is correct that CAT revenue obtained from the business of selling fuel falls outside Section 5a expenditure restrictions, revenue received both now and in the future from the Ohio motor fuel tax will be catastrophically reduced. It is easy to see why this is true. Approximately \$140 million per year of CAT revenue is currently generated solely from the business of selling motor vehicle fuel. If the 10th District decision determining that this sizable revenue stream falls outside the expenditure restrictions of Section 5a is allowed to stand, it is logical to ask the question, “why would the General Assembly ever again raise the rate of the Ohio motor fuel tax?” In other words, why would it be inclined to raise additional revenue under the Ohio motor vehicle fuel tax, which is subject to a constitutional expenditure restriction, when an identical business privilege tax can be used that is outside such spending restrictions?

The General Assembly can simply increase the rate of CAT on fuel sellers rather than raising the rate of motor vehicle fuel tax if it desires to obtain additional revenue from the business of selling fuel. After all, taxes are classified based upon their characteristics and subject matter, not their rates. This sort of manipulation of CAT rates on an industry by industry basis is not farfetched speculation. Different rates for different industries have been a common way historically that gross receipts taxes have been administrated. Such differentiation allows for consideration of differing profit margins. Delaware, Washington, and West Virginia have employed multiple differentiated rates.

Similarly, per the majority holding of the 10th District, Section 5a does not extend to generally applicable taxes. Like the CAT, the Ohio sales tax is also a generally applicable tax in that it applies to sales of a wide variety of goods and services. It follows then that the General Assembly can repeal the exemption from Ohio sales tax that sales of motor vehicle fuel have

always been afforded, and use this additional sales tax revenue for general revenue purposes. Such a maneuver would instantly generate general tax revenue of nearly \$1 billion annually. Accordingly, the 10th District's decision has eviscerated Section 5a and forced the Ohio motor fuel tax to the back of the bus. Section 5a's protection of tax revenue for the roads cannot be so transparently defeated.

Thus, County Engineers have a vested interest in protecting their traditional revenue stream. The question in this case is whether taxes virtually identical to the Ohio motor fuel tax can be applied to the same subject matter (the business of selling fuel), and thereby directly compete with the Ohio motor fuel tax, but somehow fall outside the spending mandates of Section 5a. The Court should act to restore Section 5a to its rightful place as the safeguard of traditional highway revenue from such encroachment.

STATEMENT OF THE CASE AND FACTS

The CEAO adopts the Statement of Case and Facts set forth in the Plaintiffs-Appellants' Memorandum in Support of Jurisdiction.

EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The quality of Ohio's highway infrastructure is important to all Ohioans. The health of Ohio business and the safety of Ohio's citizenry depends upon it. Everyone remembers the catastrophic bridge collapse in Minnesota a few years ago with major loss of life and property. One need only read the news (or drive over one of numerous potholes) to understand that Ohio's roads and bridges are not in the shape they need to be. *See, e.g., Report: 1 In 10 Ohio Bridges Not Structurally Sound.*, (April 1, 2011) (citing studies reflecting Ohio is in the bottom half of

the country with regard to the state of its highway infrastructure);³ Kortran, *Nearly 10 percent of Ohio bridges termed 'structurally deficient'*, (March 31, 2011).⁴ A national transportation research group recently issued a report finding that in 2008, more than a quarter of major roads in Ohio were in poor or mediocre condition providing motorists with a rough ride. *See* TRIP, *Future Mobility in Ohio: Meeting the State's Need for Safe and Efficient Mobility*, (April 2011).⁵

Similarly, the fact that revenue for road repair is far short of prior years is well known.

The TRIP report stated:

Insufficient roads cost the state's drivers a total of \$6.5 billion every year in the form of traffic crashes, additional vehicle operating costs and congestion-related delays. Without a substantial increase in transportation funding at the local, state and federal levels, Ohio will see deteriorated road and bridge conditions, increased urban congestion and lost opportunities for economic growth.

Id. at 1. The public officials tasked with repairing Ohio roads are asked to keep Ohioans safe with an ever shrinking budget. *See, e.g.,* Vitale, *ODOT funds tighter than in director's '90s tenure*, Columbus Dispatch, (Feb. 13, 2011), ("The state will have as much as \$700 million less to spend in the next fiscal year. Gas taxes, which pay to build and maintain roads, are stagnant. Construction costs are up").⁶ The fact that revenues for maintaining the roads from traditional "gas tax" sources are "stagnant" and falling far short highlights the critical importance of this case. If taxes of general applicability like the CAT and the Ohio sales tax are permissibly applied to motor vehicle fuel sales outside the spending restrictions of Section 5a, gas tax revenue will continue to shrink as these general revenue competitors shove it aside. There is a

³ <http://www.10tv.com/content/stories/2011/04/01/story-columbus-ohio-bridges.html>

⁴ http://www.newsnet5.com/dpp/news/local_news/cleveland_metro/Nearly-10-percent-of-Ohio-bridges-termed-structurally-deficient

⁵ <http://trid.trb.org/view.aspx?id=1102645>

⁶ <http://www.dispatch.com/content/stories/local/2011/02/14/odot-funds-tighter-than-in-directors-90s-tenure.html>

real danger that Ohio's motor fuel tax will be completely marginalized by its subject matter clone, the CAT.

The Court should note that the General Assembly was not averse to this Court reaching the Section 5a issue with regard to the CAT. It enacted R.C. 5751.31 making that point clear. In R.C. 5751.31 the General Assembly expressly acknowledged the importance of the Section 5a issue, and its expectation that the Court would reach the issue. *Id.* Where the General Assembly has expressly acknowledged the existence of a constitutional issue, and evidenced an expectation that this Court will speak to the issue, the Court should not allow a lower court's decision to be the final word on the subject. That is particularly true when the decision eviscerates a protective provision of the Ohio Constitution.

The question of whether \$140 million per year of tax revenue has been diverted away from constitutionally mandated expenditure intended to protect both public safety and Ohio's economic well being is one of great public interest. Over the coming years, if left uncorrected, the 10th District's decision is going to divert *billions* of dollars away from Ohio roads and highway infrastructure. The County Engineers as elected officials and the public they represent have an interest in enforcement of Section 5a. For these reasons the Court should accept jurisdiction over the appeal and take up its mantle as the final authority interpreting the Ohio Constitution.

ARGUMENT

Proposition of Law No. 1:

Article XII, Section 5a of the Ohio Constitution requires that all fees, excises, or license taxes relating to motor vehicle fuel must be appropriated consistent with the limitations set forth in the amendment. The phrase “all fees, excises, or license taxes relating to motor vehicle fuel” must be read to include taxes of general applicability like the Ohio commercial activity tax and the Ohio sales tax to the extent such taxes directly or indirectly burden sales of motor vehicle fuel, thereby directly competing with, and providing a substitute for, the Ohio motor fuel tax.

It is clear that the CAT is an “excise or license tax” as set forth in Section 5a. This phrase covers the gamut of transactional excise taxes (i.e., sales taxes) to business privilege taxes (i.e., the CAT and the Ohio motor fuel tax). Indeed, the term “license tax” is defined by Black’s Law Dictionary to include business privilege taxes. Thus, the 10th District correctly focused upon the phrase “relating to” as the portion of Section 5a that formed the crux of the legal question before it.

A. The Section 5a phrase “relating to” should be read in accordance with its plain meaning and in a way that allows Section 5a to accomplish its purpose.

The language of the Ohio Constitution is not to be interpreted in a strained or legalistic manner. *See State ex rel. Keller v. Forney*, 108 Ohio St. 463, 466 (“This is the simple language of the plain people and it is to receive such meaning as they give to it in political discussions and arguments.’ . . . Where the language is plain there is neither room nor right to construe. The court’s sole duty is to apply it to the facts found.”) (citation omitted).

In the instant case, the 10th District refused to interpret the phrase “relating to” in accordance with its plain meaning. Instead, without much discussion the court found the phrase “ambiguous” and based upon that finding resorted to a subjective explication of the history of Section 5a to hold that the phrase “relating to” does not apply to taxes of general applicability like the Ohio CAT (or presumably, the Ohio sales tax). The court selectively identified the

points of history it deemed important with regard to formulating its special definition for “relating to.” It alluded to the ballot language itself, which logically addressed the problematic tax at the time, the liquid fuel tax. Similarly, the court deemed it significant that revenue from the Ohio corporate franchise tax was not spent in accordance with Section 5a. The court did not analyze the characteristics of the corporate franchise tax (either historically or currently) and compare them to the CAT. Similarly, the court did not consider the fact that the CAT can displace the Ohio motor fuel tax in a way that the corporate franchise tax could never do. Thus, the court seemed to ignore the logical result of its conclusion (i.e., that motor fuel tax could be wholly displaced thereby writing the epitaph for Section 5a). The court simply assumed that corporate franchise tax was an appropriate analog for the CAT for purposes of historical discussion. Thus, it based its conclusions upon its own unsupported assumption in that regard. Notably, the court’s analysis of history ignored the language of a fuel tax amendment the voters rejected in 1934. Similarly, it ignored the treatment under Section 5a of other Ohio taxes in 1947 like the Ohio sales tax.

The phrase “relating to” has been interpreted a great deal by courts inside and outside Ohio. The seminal case defining the “plain meaning” of that phrase is *Morales v. Trans World Airlines, Inc.* (1992), 504 U.S. 374, 383 (“*TWA*”). The Court interprets the phrase to be of “sweeping breadth.” In that regard, the Court has consistently interpreted this phrase to mean “having a connection with, or reference to.” *Id.* at 384. Thus, under a plain meaning construction, a law of general applicability “relates to” a particular subject matter by virtue of its impact on that subject matter.

Similarly, this Court also has recognized the sweep of the phrase “relating to.” It did so well before enactment of Section 5a. In *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, at 467, the Court stated:

[I]t is self evidence that the word “relating,” and its synonyms, “pertaining to” or “concerning,” are much broader, much more comprehensive, than the word “provide,” and are so used in common conversation.

Thus, for nearly ninety years, it has been well settled in Ohio that use of the phrase “relating to” in an enactment implies a “broad” and “comprehensive” scope.

Lost in the 10th District’s selective and subjective parsing and denial of the sweeping breadth of the phrase “relating to” was the answer to a simple question, “would Ohio citizens in 1947 have expected Section 5a to apply to a generally applicable business privilege tax or transactional sales tax to the extent such taxes were applied to business of selling motor vehicle fuel or upon sales of motor vehicle fuel?” The answer to that question can be found in the history of Section 5a that was ignored by the 10th District, a history that contradicts the decision of the court.

B. The 10th District erred in its analysis of the historical context of Section 5a when it failed to consider the language of a prior fuel tax amendment that was rejected by the voters.

First, the 10th District’s recitation of history lesson completely ignored the most pertinent history available, the voter’s rejection of a fuel tax constitutional amendment in 1934. The language of that rejected amendment was as follows:

Sec. 5b. Excise taxes imposed upon the receipt, storage, use, disposition or purchase of fuel suitable for use in propelling motor vehicles or upon any two or more of same, shall be measured by a specific sum for each unit or quantity, which shall not exceed three cents per gallon, shall be applied only for public thoroughfare purposes, including the control and protection of traffic thereon, and shall not be diverted by transfer of funds or otherwise, to any object.

The language used in rejected Section 5b described the gallonage measured transaction-based fuel taxes of that time (i.e., the Ohio motor fuel tax and the liquid fuel tax) and was limited in application to those taxes. The language actually enacted by voters in 1947, however, was far broader in application as follows:

No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways.

The 10th District interpreted the much broader language of Section 5a as enacted in 1947 to mean precisely the same thing as the limited and entirely different language of Section 5b that was rejected in 1934. This raises the obvious question, if the voters had intended to enact the narrow language of Section 5b, why would they use the much broader language of Section 5a? Similarly, the voters' rejection of Section 5b in 1934 should be given effect by the court. It should not be judicially enacted in spite of voter rejection. The 10th District's decision to give Ohioans Section 5b instead of Section 5a cannot be correct.

This Court has long directed that when interpreting the Ohio Constitution, "[i]f the maxim 'expressio unius est exclusio alterius' is involved, we must consider it." *See Bd. of Elections v. State ex rel Schneider* (1934), 128 Ohio St. 273, 282, 191 N.E. 115, 119; *State ex rel. Robertson Realty Co. v. Guilbert, Auditor of State* (1906), 75 Ohio St. 1, 78 N.E. 931. 'Expressio unius est exclusio alterius' means that to express or include one thing implies the exclusion of the other, or the alternative. Contrary to this Court's directive, the 10th District simply ignored the import of the very different language between the two amendments. This was clear error on the part of the 10th District.

C. The 10th District erred in its analysis of the historical context of Section 5a when it failed to consider the Ohio sales tax as applied to motor vehicle fuel sales.

Second, had the 10th District considered the overall structure of Ohio taxes as applied to fuel sellers or sales of fuel in 1947, instead of a myopic focus solely on the corporate franchise tax (and an erroneous interpretation of that tax as well), the scope of the “relating to” language would have become even more apparent. Sales of motor vehicle fuel were statutorily exempted from sales tax in 1947. Indeed, sales of motor fuel that are subject to the Ohio motor fuel tax have always been statutorily exempt from Ohio sales tax even to this day. R.C. 5739.02(B)(6).

As expressed by the Court in *Haefner v. Youngstown* (1946), 147 Ohio St. 58, 64, sales tax was not applied to sales of motor vehicle fuel in 1946 because of “a legislative policy of exception from the sales tax proper sales already taxed in the same or similar way, namely the sales of motor vehicle fuel (taxed under Section 5727[, the old motor fuel tax statute]).” Thus, common understanding, circa 1947, was that the Ohio motor fuel tax preempted application of the “same or “similar” taxes like the Ohio sales tax, as a matter of legislative policy. It should be noted that legislative policy was not a legal bar to extension of the Ohio sales tax to sales of motor fuel.

Recall that when Section 5a was enacted, the liquid fuel tax was repealed, and the Ohio motor fuel tax was increased by the same amount. However, what if the liquid fuel tax was repealed, and instead of increasing the Ohio motor fuel tax (which was subject to Section 5a), the General Assembly extended the Ohio sales tax (a general revenue tax) to sales of motor vehicle fuel for the first time? Would such a transparent ploy have avoided Section 5a application? The answer is, “of course not.” Sales tax was understood in 1947 to relate to fuel in “the same or similar way” to the motor fuel tax. *Haefner, supra*. Thus, Section 5a would cover the Ohio sales

tax if extended to sales of motor vehicle fuel, and Ohio tax professionals have always understood that to be the case.

An even-handed analysis of history and the structure of Ohio taxes in 1947 shows that the obvious end run around an amendment like Section 5b that was limited to the Ohio motor fuel and liquid fuel taxes would be extension of the Ohio sales tax to sales of motor vehicle fuel. Thus, both the language used in Section 5a with its introduction of the sweeping phrase “relating to,” and historical context indicate that Section 5a must be understood to have applied to the Ohio sales tax in 1947 to block that obvious potential end run.

This brings us to the CAT. Because Section 5a applied to the Ohio sales tax, a tax of general applicability (which is contrary to the reasoning of the majority decision of the 10th District), then Section 5a also must block another obvious end run, a general business excise tax like the CAT. The CAT is simply the business tax analog of a sales tax. It should be clear that the CAT fits within the global “excise or license tax” language set forth in Section 5a in the same fashion that the Ohio sales tax does. If Section 5a reaches one, it necessarily must reach the other.

The motor fuel tax which was deemed “the same or similar” to the Ohio sales tax in 1947 was actually a privilege of doing business excise tax, not a transactional sales tax. Thus, the motor fuel tax is more closely “the same or similar” to the CAT, also a business privilege excise tax, than to the Ohio sales tax. With regard to the business of selling motor vehicle fuel, the CAT is addressed to precisely the same subject matter as the Ohio motor fuel tax. They are 100% coextensive. Exactly the same tax revenue result could be achieved by simply having a higher rate of Ohio motor fuel tax. The economic impact both to fuel sellers and the driving public is identical. Courts in 1947 would not have stood for replacement of the liquid fuel tax

with its generally applicable clone the CAT, just as they would have applied Section 5a to any attempt to impose sales tax on fuel. Section 5a would have accomplished nothing if such transparent ploys were permissible. Section 5a cannot be rendered meaningless.

D. The Ohio Corporate Franchise Tax was not an appropriate analog to the CAT for purposes of Section 5a analysis. The corporate franchise tax and the CAT address different subject matter. Unlike the CAT, the corporate franchise tax could not accomplish the mathematical equivalent of a motor fuel tax rate increase.

Instead of evaluating the Ohio sales tax and the obvious implications of Section 5a extending to that tax, the 10th District instead focused solely upon corporate franchise tax. Such focus was clear error. The court did not even discuss the nature and character of that tax as it existed in 1947. The corporate franchise tax has been understood for more than one hundred years to be a tax on corporations solely for the privilege of existing in corporate form. *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 595, 64 N.E. 564, 566 (Ohio 1902) (“An excise tax may also be imposed on corporations to compensate the state for the additional burden sustained by the state and the people by reason of property being held by artificial bodies, the persons comprising such bodies being exempt from liability to a great extent for the debts thereof.”). Indeed, this Court has repeatedly stated that the corporate franchise tax is not a tax on doing business at all. *LSDHC Corp. v. Zaino*, 98 Ohio St.3d 450, 454, ¶ 19, 786 N.E.2d 877, 881 (Ohio 2003) stating:

Lear Siegler's concentration on the January 1 date ignores this court's statement that "[t]he tax is not on doing business; the tax is levied on holding a corporate franchise which enables the corporation to do business in a corporate form." *Diamond Financial Holdings, Inc. v. Limbach* (1993), 67 Ohio St.3d 228, 231, 617 N.E.2d 670.

Further, in 1947 the corporate franchise tax was measured solely by net worth. It should be clear that the corporate franchise tax is very different than a general gross receipts tax. Thus, contrary to the 10th District's findings, longstanding failure to challenge corporate franchise tax under Section 5a means precisely nothing with regard to application of Section 5a to the CAT. The

CAT is not a tax upon existence in corporate form. It is a tax solely on the privilege of doing business measured in business done in the same fashion that the Ohio motor fuel tax is such a tax. The arguments defending the corporate franchise tax from application of Section 5a are far more persuasive than the arguments available to defend the CAT.

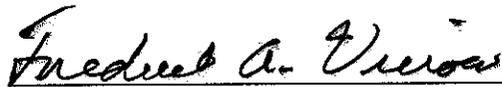
Whether plausible Section 5a arguments might have been asserted that the corporate franchise tax “related to” fuel is irrelevant and not a question that needs to be answered here. It was tortured and flawed logic for the 10th District to conclude that simply because the corporate franchise tax was never questioned under Section 5a, a gross receipts tax on all business must also therefore be outside Section 5a. Such “logic” ignores more than 100 years of Ohio and other states’ jurisprudence defining the subject matter of these very different taxes. Perhaps the best way to highlight the different subject matter of the CAT and the corporate franchise tax is with the observation that the CAT can be used as a *perfect* substitute for Ohio motor fuel tax as applied to fuel sellers. The corporate franchise tax could not accomplish that feat. Sellers that were not in corporate form paid no corporate franchise tax. Thus, the corporate franchise tax could not usurp and replace the Ohio motor fuel tax the way that the CAT has. In that regard, the 10th District’s “conclusions” based upon corporate franchise tax are not acceptably sound legal reasoning to support a decision that diverts \$140 million of tax revenue annually away from maintenance of the roads, and that has the effect of permanently marginalizing the Ohio motor fuel tax.

The decision of the 10th District is highly subjective and when scrutinized, appears to be little more than an unsupported guess based upon faulty assumptions and failures to consider pertinent facts and law. This Court should accept jurisdiction and hear the arguments of the parties.

CONCLUSION

The impact of the Tenth District's decision extends well beyond the parties to this appeal. Every citizen in Ohio is affected by the decision of the 10th District. The cost of gasoline is higher by virtue of application of a business excise tax. Yet the appropriations for road maintenance see no benefit from that enhanced cost. This is precisely the evil underpinning enactment of Section 5a by Ohio citizens. Section 5a was enacted in 1947 with an assumption in place that the Ohio motor fuel tax was the sole business excise tax applying to motor fuel sales as a matter of legislative policy. The death of that policy does not mean that Section 5a also died. Taxes that address the same subject matter and that are identical in impact to the Ohio motor fuel tax must be subject to Section 5a in the same fashion that the Ohio motor fuel is subject to Section 5a. Otherwise, Section 5a is simply dead. The 10th District failed to consider the logical result of its decision. It clearly erred. For the reasons set forth in this memorandum and the memorandum of Plaintiffs-Appellants, the Court should accept this appeal and restore Article XII, Section 5a to the position it had held until July 2007 as the protector of revenue for maintenance and repair of Ohio roads.

Respectfully submitted,



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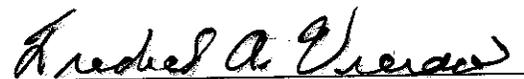
I certify that a copy of the foregoing *Memorandum in Support of Jurisdiction of Amicus Curiae County Engineers Association of Ohio* was served by U.S. mail, with sufficient postage, this 9th day of September, 2011, on the following:

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