

ORIGINAL

IN THE SUPREME COURT OF OHIO

11-1536

BEAVER EXCAVATING COMPANY,
et al.,

Plaintiffs-Appellants,

v.

RICHARD A. LEVIN,
TAX COMMISSIONER OF OHIO,

Defendant-Appellee.

Case No. _____

On Appeal from the
Court of Appeals,
Tenth Appellate District

Court of Appeals Case
No. 10-AP-581

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE
OHIO PETROLEUM MARKETERS AND CONVENIENCE STORE ASSOCIATION

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STATEMENT OF INTEREST OF AMICUS CURIAE

In existence since 1922, the Ohio Petroleum Marketers and Convenience Store Association (“OPMCA”) is the statewide trade association representing more than 500 independent small businesses in the petroleum and convenience industry. OPMCA’s members own and operate the overwhelming majority of Ohio’s 5,200 convenience stores and employ more than 55,000 Ohioans. Members on the wholesale side of the industry employ thousands more in commercial fueling facilities, transportation divisions, heating oil sales and corporate offices.

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 that section. Namely, such tax revenue must be devoted to maintaining Ohio roads and similar “highway purposes.” The recent decision by the 10th District Court of Appeals in *Beaver Excavating Co. v. Levin*, No. 10-AP-581 (July 26, 2011), allows \$140 million of annual Ohio commercial activity tax (“CAT”) revenue to be used outside Section 5a restrictions. Application of a generally applicable business excise tax to the business of selling motor fuel (i.e., gasoline and diesel fuel) in tandem with the existing Ohio motor fuel tax is unprecedented. Thus, this is the first time any court has spoken to the issue of how Section 5a applies to such taxes. The importance of the issue is manifest.

In this era of budget shortfalls there will be increasing scrutiny of ways to raise general revenue including various exactions burdening the motoring public, e.g., leasing the Ohio turnpike. The limits of Section 5a will continue to be tested. Thus, the OPMCA is concerned that the 10th District Court of Appeals’ (“10th District”) holding in *Beaver Excavating Co.* will

be the final word interpreting the phrase “relating to” within Section 5a when OPMCA believes this Court should provide its opinion. The lack of final authority from this Court will lead to uncertainty and instability for funding Ohio’s highway needs as well as the state’s general revenue needs. This Court should recognize the breadth and import of the issues involved in the 10th District decision, and provide that certainty.

STATEMENT OF THE CASE AND FACTS

The OPMCA adopts the Statement of Case and Facts set forth in the Plaintiffs-Appellants’ Memorandum in Support of Jurisdiction. However, at this time, the OPMCA takes no position with regard to the merits holding of the 10th District.

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

From a perspective of state economic health, motor fuel is one of the most important commodities, if not the most important commodity sold in Ohio. It should go without saying that the price of motor fuel is important to all Ohioans: but OPMCA is saying it now. It also should go without saying that the quality of Ohio’s highway infrastructure is important to all Ohioans. The health of Ohio business depends upon our roads, bridges and highways. Similarly, the safety of Ohio’s citizenry is at stake.

Given the importance of motor fuel as a commodity, many states have provisions in their constitutions applying to excise taxes that burden the cost of motor vehicle fuel (directly or indirectly) and requiring that the revenue from such taxes be directed back to maintaining the roads. In 1947, Ohioans enacted their own constitutional provision in that regard, Article XII,

Section 5a. The amount of tax revenue generated from fuel sales is massive. Thus, the question of how those funds are to be spent is necessarily weighty.

The General Assembly recognized the importance of the Section 5a question when it authored the CAT statutes. It enacted R.C. 5751.31 (allowing for a possible direct appeal of this issue to this Court at the discretion of the Tax Commissioner) and thereby acknowledged both that a Section 5a issue existed as to the CAT and its expectation that the Court would reach the issue. It is unusual for a statute to acknowledge potential legal flaws in the same act. The General Assembly was expressing its obvious view about the importance of the issues set forth in R.C. 5751.31. It clearly desired the Court to hear those issues, possibly on an expedited basis.

The question of whether \$140 million per year of tax revenue has been diverted from constitutionally mandated expenditure is manifestly one of great public interest. The question of whether generally applicable taxes like the Ohio sales tax or the CAT may be extended to burden sales of motor vehicle fuel outside the expenditure restrictions of Section 5a is a question that the 10th District answered in the affirmative. If this court declines jurisdiction, the 10th District's answer to that question will literally govern expenditure of *billions* of dollars of tax revenue in the coming years. However, the same issue will undoubtedly make its way back to the Court over a period of years through the normal channel of the Board of Tax Appeals and the right of direct appeal therefrom. In the interim, there will be great uncertainty. The General Assembly will have to formulate its budgets without knowing whether the CAT revenue from fuel sales will actually come to fruition, or be declared unconstitutional. Similarly, the question of potential tax refunds for past years will add to that budget uncertainty with each passing year. As sellers of motor vehicle fuel and primary payors of the tax, OPMCA members will be caught in the middle of this uncertainty with questions of filing protective refund claims and the like

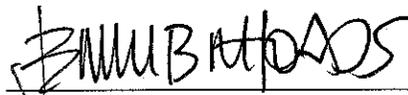
wasting both business and governmental resources for years to come. This needless waste of resources cannot be afforded by private or public interests in these days of tight budgets.

Thus, without regard to the Court's ultimate decision, there is great public interest in having this Section 5a question answered as soon as possible. For these reasons, in the interest of obtaining certainty sooner rather than later, the Court should accept jurisdiction over the appeal and take up its mantle as the final authority interpreting the Ohio Constitution.

CONCLUSION

The impact of the 10th District's decision extends well beyond the parties to this appeal. The Court should accept this appeal and provide certainty regarding Article XII, Section 5a for all Ohioans.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum in Support of Jurisdiction of Amicus Curiae Ohio Petroleum Marketers and Convenience Store Association* was served by U.S. mail, with sufficient postage, this 9th day of September, 2011, upon the following:

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