

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

FILED
 SEP 09 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE
 INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18

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RECEIVED
 SEP 09 2011
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STATEMENT OF INTEREST OF AMICUS CURIAE

In 1947, the people of Ohio approved a constitutional amendment (now Article XII, Section 5a) mandating 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 (hereinafter “motor vehicle fuel”) be expended solely on the limited purposes enumerated in the amendment, including construction, improvement, and repair of such roads. It was a straightforward constitutional requirement – all moneys derived from fees, excises, and license taxes relating to motor vehicle fuel used to propel vehicles on the public roads must be appropriated for the construction, repair, and maintenance of those same roads.

The International Union of Operating Engineers, Local 18 (hereinafter “Local 18”) is a labor union representing the interests of nearly 15,000 Ohioans engaged in the operation, maintenance, and repair of heavy equipment for Ohio’s heavy highway construction industry. Plaintiffs-Appellants Beaver Excavating Company, Broshear Contractors, Inc., Gerken Paving, Inc., Independence Excavating, Inc., Kokosing Construction Company, Inc., Lykins Companies, Inc., Ohio Machinery Co., Inc., and the Prus Construction Company are Ohio companies that, in the course of their businesses, generate gross receipts relating to fuel used to propel vehicles on public highways. Because Local 18 has collective bargaining agreements with Plaintiffs-Appellants, and many Local 18 members are employed by Plaintiffs-Appellants, a large and tangible portion of the heavy highway construction work that Local 18’s members are employed to perform is funded, in part, by proceeds derived from taxes relating to motor vehicle fuel. This funding provides a means of livelihood for many of Local 18’s members and a source of union dues for Local 18 itself. As joint caretakers, along with Plaintiffs-Appellants, of

this State's highways, bridges, and roads, Local 18 has a keen interest in insuring Ohio's continued financial investment in infrastructure development, repair, and maintenance.

The decision of the Tenth District Court of Appeals, holding that Ohio's Commercial Activity Tax ("CAT") is unaffected by Article XII, undermines the people's express purpose in ensuring that moneys derived from taxes relating to use of the roadways or relating to motor vehicle fuel be put back into the roadways. Such a decision regarding the scope of Section 5a is plainly important to Local 18, to the voting public, and to all citizens that use the roads. Thus, it is crucial that the Court consider this dispute and clarify Article XII, Section 5a's reach and application. The Court's consideration and proper resolution of this fundamental constitutional issue will have far-reaching implications, including upholding the will of the voting public and maintaining adequate investment in Ohio's highways and other traveling infrastructure.

STATEMENT OF THE CASE AND FACTS

Local 18 adopts the Statement of Case and Facts set forth in Plaintiffs-Appellants' Memorandum in Support of Jurisdiction.

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

A. The Court of Appeals' decision is of public and great general interest because it undermines Article XII, Section 5a, by exempting measuring-stick excise taxes that relate to motor vehicle fuel.

In the 1930s, during the Great Depression, substantial revenue relating to the registration, operation, or use of vehicles on public roadways and the motor fuels used for propelling those vehicles was allocated by the General Assembly to purposes unrelated to the public highways. *Beaver Excavating Co. v. Levin*, 2011 WL 3074417 (Ohio App. 10 Dist.), 2011-Ohio-3649, ¶ 3. In response to concerns over increased automobile use and a lack of adequate funding for public highways, in 1934, Ohio voters for the first time considered an amendment to the Ohio

Constitution that would require the General Assembly to allocate certain specific appropriations to public roadways. It was an attempt by the people of Ohio to direct the General Assembly by a narrowly tailored constitutional mandate. That initiative petition, which was rejected by Ohio voters, Ohio Secretary of State, "Proposed Constitutional Amendments, Initiated Legislation, and Laws Challenged by Referendum, Submitted to the Electors," <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf> (accessed September 7, 2011), proposed the following limited amendment to the Ohio Constitution:

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.

Thus, the scope of the failed 1934 amendment was specifically targeted at excise taxes measured by the gallon "imposed upon" the use, transfer, or purchase of motor fuel.

Then in 1947, Ohio voters adopted by referendum a much more broadly worded amendment, which removed the narrow "imposed upon" language and included other forms of revenue. It also removed the fuel-gallonage measuring stick. The new broader language imposed spending restrictions on all appropriations of moneys derived from "fees, excises, or license taxes **relating to * * * fuels used for propelling [motor vehicles on public highways.]**" Section 5(A), Article XII, Ohio Constitution. (Emphasis added.) This broader restriction on the General Assembly was adopted by the people and stands as Article XII, Section 5a.

Following the enactment of Section 5a, the General Assembly moved quickly to comply with its provisions. First, the General Assembly repealed Ohio's liquid fuel tax, because the liquid fuel tax did not assign its revenues to appropriate Section 5a purposes. *See G.C. 5542-2* (repealed by Am. Senate Bill No. 358 eff. December 31, 1947). Like the CAT, this Court

recognized in *Hickok Oil Corp. v. Evatt* (1943), 141 Ohio St. 644, 652, 26 O.O. 202, 49 N.E.2d 937, that the liquid fuel tax was a measuring-stick, privilege-of-doing-business excise tax. Thereafter, the General Assembly increased the Ohio Motor Fuel Tax, another measuring-stick, privilege-of-doing-business excise tax – the allocations of moneys derived therefrom were already directed exclusively at permissible Section 5a purposes – in an amount to make up for lost liquid fuel tax revenues.

Thereafter, for more than fifty years, the General Assembly respected the will of Ohio voters by allocating moneys derived from fees, excises, and license taxes relating to the registration, operation, or use of motor vehicles and relating to motor vehicle fuel exclusively for the enumerated Section 5a purposes.

In 2005, that fealty to the will of Ohio voters changed. In fact, prior to its passage, the initially drafted CAT, as proposed by the General Assembly, wholly disregarded Article XII, Section 5a. In June 2005, the General Assembly amended the CAT's authorizing statute to exclude from the definition of gross receipts "any receipts for which the tax imposed by this chapter is prohibited by . . . the Constitution of Ohio," R.C. 5751.01(F)(2)(ff), seemingly addressing the concern that inclusion of certain receipts in the definition of "gross receipts" could render the CAT unconstitutional as applied to motor vehicle fuel. Because of the specific issue of the constitutionality of applying the CAT to gross receipts from the sale of motor vehicle fuel and appropriating the moneys derived therefrom to general revenue, the General Assembly temporarily excluded from the definition of gross receipts any receipts from the sale of motor vehicle fuel for a period of two years. *See* Am. Sub. H.B. No. 66. This temporary exclusion was intended to provide the General Assembly an opportunity to resolve the constitutional deficiencies of the CAT in light of Article XII, Section 5a. Unfortunately, the General Assembly

later simply let the two-year exemption expire without constitutional resolution and punted the issue to the courts.

Here, Plaintiffs-Appellants' lawsuit properly sought judicial relief to remedy the constitutional deficiencies of the CAT under the appropriation requirements of Article XII, Section 5a. Instead, the Court of Appeals' decision emasculated Article XII, Section 5a, rendering the constitutional amendment ineffective over generally applicable excise taxes, like the CAT and the Ohio sales tax. That decision, which effectively gives the General Assembly the green light to enact further measuring-stick taxes relating to motor vehicle fuel, undermines not only the purposes and provisions of Article XII, Section 5a, but also the initiative petition process and the will of the Ohio voters.

B. The Court of Appeals' decision threatens Ohio's economic competitiveness and its labor relations.

Local 18 recognizes that any improvement in Ohio's economy is dependent on strong and lasting infrastructure and the labor with which such infrastructure is built. Modern and reliable infrastructure built by a robust pool of unionized workers increases human mobility and facilitates efficiency. It allows a healthy economy to open and expand new markets for goods and services, speeds deliveries, drops the costs of transportation, and lowers costs for consumers. Indeed, the infrastructure built, preserved, and insured for us by past generations – the Ohio voters that passed Article XII, Section 5a – is one of the key reasons that Ohio has benefitted from its status as a major economic player in the United States and around the world.

Decisions that impact our investment in this State's infrastructure – such as the 10th District Court of Appeals opinion – threaten Ohio's future economic competitiveness and its labor relations. In fact, the recently released "Transportation Infrastructure Report 2011," created by a bipartisan coalition called Building America's Future, noted that between 2005 and

2010 this country has plummeted from No. 1 to No. 15 in the world in terms of the economic competitiveness of our infrastructure. Building America's Future Educational Fund, "Building America's Future: Falling Apart and Falling Behind – Transportation Infrastructure Report 2011," www.bafuture.com/sites/default/files/Report_0.pdf (accessed September 7, 2011). This reality has profound consequences nationally, and here in Ohio. For example, congestion plagues our freight corridors and acts as a drag on the State's economy. Delays in freight movement impose real costs on business, including a reduction in productivity, which translates into an increase in costs for consumers. According to UPS, for every five minutes of congestion delay its drivers incur, it costs the company \$100 million. Vikas Bajaj, "A High-Tech Titan Plagued by Potholes," *The New York Times*, August 25, 2010.

In response, businesses are forced to increasingly spend resources on logistics and supply management to control unnecessary transportation costs. The consequences of increasing costs by employers who have collective bargaining agreements with Local 18 may result in "bottom line" financial decisions which could severely curtail the means of livelihood for many of Local 18's members and union dues for Local 18 itself. This can contribute to the worsening of the labor relations climate, which has been shown to reduce worker productivity as a whole. Dale Belman, "Unions, the Quality of Labor Relations, and Firm Performance," eds. P. Voos and L. Mishel, in *Union and Economic Competitiveness*, Armonk, NY: M.E. Sharpe, 1995, 41-108.

The Court of Appeals' decision threatens the foundations of Ohio's infrastructure and labor market stability. In 1947, Ohio voters passed a constitutional amendment to guarantee the State's continued investment in infrastructure and its economic future. Allowing the General Assembly to ignore the will of Ohio voters and divert resources from the construction, maintenance, and repair of Ohio's roadways and bridges is not simply unconstitutional, it is a

danger to Ohio's economic recovery. For these reasons, this case is one of public and great general interest.

ARGUMENT

Proposition of Law No. 1: Article XII, Section 5a of the Ohio Constitution is not limited in effect to the motor fuel tax and liquid fuel tax in effect in 1947. Instead, all fees, excises, or license taxes relating to motor vehicle fuel must be appropriated consistent with the limitations set forth in the amendment.

In addressing the legal arguments in the context of whether to accept this case, Amicus Curiae urges the Court to consider the purpose and intent of Section 5a. Here, there can be no question that Article XII, Section 5a was drafted broadly to impact not only the 1947 motor fuel and liquid fuel taxes, but also future taxes that would be passed by the General Assembly relating to motor vehicle fuel. This is clear from the plain language of the amendment, which provides:

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 * * *

(Emphasis added.) The amendment broadly sets out three categories of assessments covered – namely, “fees,” “excises,” and “license taxes.” Ohio voters could not have been more clear that Section 5a was intended to cast a wide net, covering all taxes and fees relating to the enumerated items.

In the recent decision, *Ohio Grocers Ass'n v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶ 29 (“*Ohio Grocers*”) (interpreting another initiative petition constitutional amendment) the Court reasoned that if constitutional amendment “drafters had desired to [impact] excise taxes of every stripe, they simply could have [used the term] ‘excise taxes.’” Here, in Section 5a, the drafters did precisely that, including the language “[n]o moneys derived from * * *

excises * * * shall be expended * * *” (Emphasis added.) Thus, Section 5a uses the same broad, inclusive language that this Court has said it would expect to see if the drafters intended to include all types of excise taxes.

Moreover, the *Ohio Grocers* Court also properly determined that the CAT is a privilege-of-doing-business excise tax. *Ohio Grocers*, 2009-Ohio-4872, at ¶ 30. As a privilege-of-doing-business tax, the CAT is precisely the type of later adopted tax the drafters of Article XII, Section 5a intended to affect.

Proposition of Law No. 2: By using the broad term “relating to,” Ohio voters intended to and did make Article XII, Section 5a broad in scope and expansive in reach.

Because the CAT is an excise tax and Article XII, Section 5a applies, the constitutionality of the CAT as applied to motor vehicle fuel revenue turns on whether the State of Ohio collects moneys derived from the CAT which “relate to” motor vehicle fuel. As described below, Ohio law requires that the answer is a resounding “yes.”

Ohio law has made clear that the phrase “relating to” has an expansive meaning. For example, in *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, this Court considered whether certain legislation constituted laws “providing for” tax levies. Under Ohio’s Constitution, such tax laws are not subject to referendum. This Court, in its analysis, considered and rejected the argument that “providing for” should be interpreted as synonymous with more expansive constructions, such as “relating to” or “concerning.” The Court explained:

[I]t is self-evident 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.

108 Ohio St. at 467. Thus, the Court has made clear that the plain meaning of the phrase “relating to” is broad and comprehensive in scope.

In drafting the failed language of the 1934 amendment (“imposed upon”) and the adopted language of the 1947 amendment (substituting “relating to”), the people of Ohio had the benefit of this Court’s 1923 ruling on those terms. The people rejected the narrow language and adopted the more inclusive language of Section 5a.

Here, to the extent that the CAT is measured by a yardstick that includes motor vehicle fuel gross receipts, those moneys derived from the CAT “relate to” motor vehicle fuel. The Ohio voters’ use of the language “relating to” compels the conclusion – contrary to the opinion of the Tenth District – that Article XII, Section 5a is broad in scope and prohibits the CAT as applied to motor vehicle fuel gross receipts because it is an excise tax “relating to” motor vehicle fuel, and the moneys derived therefrom are not expended as constitutionally required.

CONCLUSION

The impact of the Tenth District's decision extends well beyond the parties to this appeal. For the reasons set forth in this memorandum and the memorandum of Plaintiffs-Appellants, 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

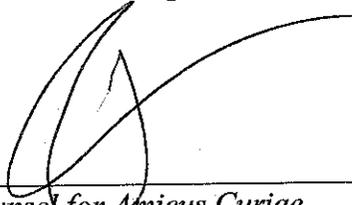
I certify that a copy of the foregoing *Memorandum in Support of Jurisdiction of Amicus Curiae International Union of Operating Engineers, Local 18* was served by U.S. mail, with sufficient postage, this ___ day of September, 2011, on the following:

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