

IN THE SUPREME COURT OF OHIO

BEAVER EXCAVATING COMPANY,
et al.,

Plaintiffs-Appellants,

v.

RICHARD A. LEVIN
[JOSEPH W. TESTA],
TAX COMMISSIONER OF OHIO,

Defendant-Appellee.

Case No. 2011-1536

On Appeal from the
Court of Appeals,
Tenth Appellate District

Court of Appeals Case
Case No. 10-AP-581

**BRIEF OF AMICUS CURIAE INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 18 IN SUPPORT OF PLAINTIFFS-APPELLANTS BEAVER
EXCAVATING COMPANY, ET AL.**

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae, International Union of Operating Engineers, Local 18 (“Local 18”) is a labor union representing the interests of over 15,000 Ohioans engaged in the operation, maintenance, and repair of heavy equipment for Ohio’s heavy highway construction industry. Local 18, *About Us*, <http://www.iuoelocal18.org/about-us/> (accessed Mar. 14, 2012). Formed in 1939, Local 18 has long been involved in the development of some of Ohio’s most prominent roadways, such as the Columbia Parkway in Cincinnati, the Ohio Turnpike, and Interstate 71. Local 18, *History*, <http://www.iuoelocal18.org/history/> (accessed Mar. 14, 2012). More recently, in 2008 Local 18 members helped construct a 613 foot-long bridge – the largest covered bridge in the United States – located in Ashtabula County. Local 18, *Featured Projects*, <http://www.iuoelocal18.org/featured-projects/index.php> (accessed Mar. 14, 2012). Local 18 is committed to maintaining and improving the quality of its members’ economic welfare through the caliber of its service and business relationships with contractors throughout Ohio. Local 18, *About Us*, <http://www.iuoelocal18.org/about-us/> (accessed Mar. 14, 2012).

Plaintiffs-Appellants 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. Along with Plaintiffs-Appellants, Local 18 has a keen interest in ensuring Ohio’s continued financial investment in infrastructure development, repair, and maintenance of this State’s highways, bridges, and roads in order to uphold its commitments to its members and to the economic

viability of Ohio as a whole. Furthermore, Plaintiffs-Appellants are members of the Ohio Contractors Association (“OCA”), OCA, *Member Directory*, <http://www.ohiocontractors.org/sections/membership/Directory.aspx> (accessed Mar. 14, 2012), also *amicus curiae* in the instant case. Local 18 has a strong working relationship with the OCA; indeed, Local 18’s members have worked on projects with contractors honored as best work by the OCA in its annual awards program. Local 18, *Featured Projects*, <http://www.iuolocall18.org/featured-projects/index.php> (accessed Mar. 14, 2012). Thus, Local 18’s interests regarding its members and the economic prosperity of Ohio are inextricably linked with the interests of OCA and Plaintiffs-Appellants to ensure that their role as caretakers of Ohio’s public roadways are supported by the revenue generation via Article XII, Section 5a of the Ohio Constitution. Originally approved as a constitutional amendment by the people of Ohio in 1947, Section 5a simply mandates that all moneys derived from fees, excises, and license taxes relating to motor vehicle fuel used to propel vehicles on the public roads be appropriated for the construction, repair, and maintenance of those same roads.

Local 18 hereby offers this *amicus* brief and urges this Court to reverse the decision of the lower court, *Beaver Excavating Co. v. Levin*, 10th Dist. No. 10AP-581, 2011-Ohio-3649, at ¶ 34, holding that Ohio’s Commercial Activity Tax (“CAT”), R.C. 5751, et seq., is unaffected by Article XII, despite the fact that proceeds derived from the CAT relating to Motor Fuel Sales are appropriated for purposes contrary to the dictates of Article XII, Section 5a.

This brief is submitted pursuant to S.Ct. Prac. R. 6.6.

STATEMENT OF THE CASE AND FACTS

Local 18 adopts the Statement of Case and Facts set forth in Plaintiffs-Appellants’ Merit Brief.

ARGUMENT

As a preliminary matter, Local 18 adopts the Arguments of Law set forth in Plaintiffs-Appellants' Merit Brief.

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. Jeffrey Wray-Zanesville Times Recorder, *Ohio's \$1.6 Billion Highway Budget Shortfall: Where Do We Go From Here?*, <http://www.zanesvilletimesrecorder.com/article/20120312/OPINION02/203120311/Ohio-s-1-6-billion-highway-budget-shortfall-Where-do-we-go-from-here-> (accessed Mar. 14, 2012). 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 Mar. 14, 2012). 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. Indeed, Ohio's highway budget already faces a \$1.6 billion shortfall. Jeffrey Wray-Zanesville Times Recorder, *Ohio's \$1.6 Billion Highway Budget Shortfall: Where Do We Go From Here?*, <http://www.zanesvilletimesrecorder.com/article/20120312/OPINION02/203120311/Ohio-s-1-6->

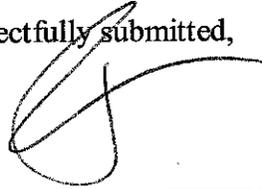
billion-highway-budget-shortfall-Where-do-we-go-from-here- (accessed Mar. 14, 2012). The Ohio Department of Transportation (“ODOT”) is well-aware that this is largely due to decreasing state motor fuel taxes. *Id.* Such a budget shortfall has the potential to delay large-scale and high priority highway construction projects. Bret Liebendorfer-Columbus Local News, *Worthington Asks Residents to Help Push for I-270 Work*, http://www.snponline.com/articles/2012/03/12/multiple_papers/news/allwohighw_20120312_0945am_30.txt (accessed Mar. 14, 2012). This is work that could otherwise be presently performed by Local 18 members, thereby improving Ohio’s economy, both by ensuring prosperity of its individual citizens via membership in organized labor and by facilitating efficient markets for Ohio businesses. There are dozens of applications pending before ODOT, yet are not even being considered, due to the State’s highway budget shortcomings. *Id.*

Thus, it is crucial that the Court consider this dispute and clarify Article XII, Section 5a’s reach and application. The Court’s proper resolution of this fundamental constitutional issue will have far-reaching implications, including guaranteeing the State’s economic future by maintaining adequate investment in Ohio’s highways and other traveling infrastructure via the creation of meaningful employment for Local 18 members.

CONCLUSION

For all the foregoing reasons, *amicus curiae* respectfully requests this Court to reverse the decision of the Tenth District Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

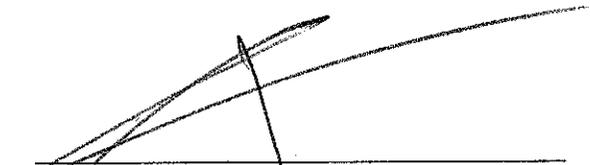
I certify that a copy of the foregoing *Brief of Amicus Curiae International Union of Operating Engineers, Local 18 in Support of Plaintiffs-Appellants Beaver Excavating, et al.* was served by U.S. mail, with sufficient postage, this 19th day of March, 2012, on the following:

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