ORIGINAL

IN THE SUPREME COURT OF OHIO

BEAVER EXCAVATING COMPANY, et al., *Plaintiffs-Appellants,* v. 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 No. 10-AP-581

MERIT BRIEF OF AMICUS CURIAE OHIO CONTRACTORS ASSOCIATION IN SUPPORT OF APPELLANTS

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II. INTRODUCTION

The Ohio Contractors Association (the "OCA") is a statewide business and trade association representing approximately 500 Ohio companies engaged in the heavy highway and utility construction industries. These entities include general contractors and subcontractors, as well as those who supply contractors and who engage in such work as highway and bridge construction. The OCA's members are caretakers of Ohio's vast public works infrastructure, which includes: more than 116,200 miles of highways, roads, and streets; 42,000 bridges; and one million miles of water, sewer, energy, and telecommunication lines. As caretakers of this State's highways, bridges, and roads, the OCA has a keen interest in insuring Ohio's continued financial investment in infrastructure development, repair, and maintenance.

In 1947, Ohio voters adopted by referendum a broadly worded amendment to the Ohio Constitution, which 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.]" This broad restriction on the General Assembly was adopted by the people and stands as Article XII, Section 5a.

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 deference 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, representatives of the OCA approached members of the General Assembly regarding the same constitutional deficiencies of the CAT at issue in this lawsuit. Notably, the General Assembly recognized that inclusion of certain receipts in the definition of "gross

receipts" could render the CAT unconstitutional as applied to motor vehicle fuel. To address that concern, 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). 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. Unfortunately, the General Assembly later simply let the two-year exemption expire without constitutional resolution and punted the issue to the courts.

The decision of the Tenth District Court of Appeals, holding that Ohio's Commercial Activity Tax ("CAT") is unaffected by Article XII, Section 5a, 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. 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 gutted Article XII, Section 5a, rendering the constitutional amendment ineffective over generally applicable excise taxes, like the CAT and the Ohio sales tax. That decision, 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.

The Court's 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.

III. STATEMENT OF THE CASE AND FACTS

The OCA adopts and incorporates herein the Statement of the Case and Facts set forth in the Appellants' merit brief.

IV. ARGUMENT

> Proposition of Law No. 1: The Commercial Activity Tax, R.C. Chapter 5751, is a privilege-of-doing-business excise tax and the moneys derived therefrom relate in part to Motor Vehicle Fuel. Thus, the moneys derived from the CAT relating to Motor Vehicle Fuel must be appropriated solely for the purposes enumerated in Article XII, Section 5a of the Ohio Constitution.

A. The Court of Appeals' Decision Undermines Article XII, Section 5a, by Exempting Measuring-Stick Excise Taxes that Relate to Motor Vehicle Fuel.

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 of 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 public highways.

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), this 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 tax the drafters of Article XII, Section 5a intended to affect after its' adoption. *See* Hickok Oil Corp. v. Evatt, 141 Ohio St. 644 (1943). Section 5a provides no exception for privilege-of-doing-business measuring stick state excise taxes.

> Proposition of Law No. 2: The CAT is unconstitutional as applied to gross receipts from Motor Vehicle Fuel sales because the object of the CAT and appropriation of these moneys derived from the CAT are inconsistent with the mandates of Article XII, Section 5a.

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, 108 Ohio St. 463 (1923), 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, it 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 "relating to" 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 includes the CAT as applied to motor vehicle fuel gross receipts because it is an excise tax "relating to" motor vehicle fuel. Moneys derived from the CAT must be expended only as constitutionally permitted for highway use.

Section 5a restricts the legislature's attempt to apply the CAT to gross receipts from the sale of motor vehicle fuel. The legislative powers vested in the General Assembly are restricted by Section 5a. Cf. Baker v. City of Cincinnati, 11 Ohio State 534, 542 (1860) ("we must look to other provisions of the constitution to see how far, and to what extent, legislative discretion is qualified or restricted"). To be valid, legislative enactments must not contravene any constitutional prohibitions in regards to the subject matter in question. Ostrander v. Preece, 129 Ohio St. 625, 629, 196 N.E. 670 (1935).

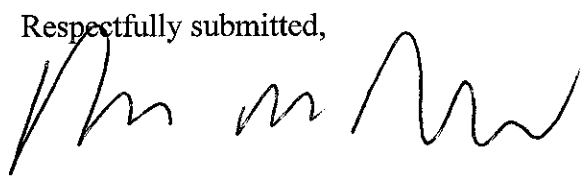
The CAT is an excise tax subject to the appropriation restriction of Section 5a, and the current allocation of the proceeds from the CAT on motor vehicle fuel is unconstitutional. Such

appropriation for non-highway purposes undermines the public's intent to preserve motor vehicle fuel taxes for the highway fund. Section 5a provides that revenue derived from motor vehicle fuel taxes is to be spent only on highway purposes. Grandle v. Rhodes, 169 Ohio St. 77, 157 N.E.2d 336 (1959).

V. CONCLUSION

The impact of the Tenth District's decision extends well beyond the parties to this appeal. The Court of Appeals' decision below threatens one of the foundations of Ohio's infrastructure. 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 the reasons set forth in this brief and the merit brief of Plaintiffs-Appellants, the Court should reverse the Court of Appeals' decision.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Merit Brief of Amicus Curiae Ohio Contractors Association* was served by U.S. mail, with sufficient postage, this 20th day of March, 2012, on the following:

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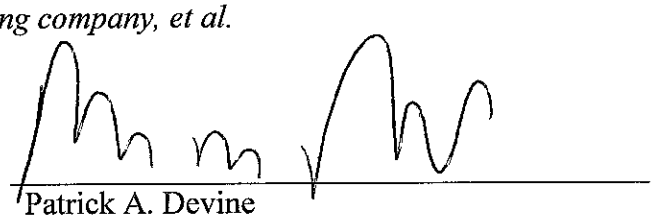

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