

ORIGINAL

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. 2011-1536 : : On Appeal from the : Court of Appeals of Ohio : Tenth Appellate District : : Court of Appeals : Case No. 10-AP-581 : :
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**BRIEF OF AMICI CURIAE, THE OHIO AGGREGATES
 AND INDUSTRIAL MINERALS ASSOCIATION, FLEXIBLE
 PAVEMENTS, INC., AND OHIO READY MIX CONCRETE ASSOCIATION IN
 SUPPORT OF PLAINTIFFS-APPELLANTS,
 BEAVER EXCAVATING COMPANY, INC., ET AL.**

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Aggregates and Industrial Minerals Association (“Ohio Aggregates”), Flexible Pavements, Inc. (“Flexible”), and Ohio Ready-Mix Concrete Association (“Ready-Mix”) as amici curiae, (collectively “Amici,”) respectfully submit this brief in support of Plaintiff-Appellant, Beaver Excavating Company, Inc. in appealing the Tenth District Court of Appeals (“Tenth District”) decision in *Beaver Excavating Co. v. Levin*, No. 10-AP-581 (July 26, 2011), which allows \$140 million of annual Ohio Commercial Activity Tax (“CAT”) revenue to be used outside the restrictions imposed by Article XII, Section 5a of the Ohio Constitution (“Section 5a”). These restrictions require tax moneys derived from motor vehicles or their fuel sales be spent only on construction, repair and maintenance of Ohio’s roads and bridges. The membership of Amici have a great interest both individually and collectively in ensuring that the mandate of Section 5a is followed.

The Ohio Aggregates is a non-profit business association that represents all of Ohio’s mining operations, with the exception of coal. Ohio Aggregates members are essential suppliers of construction materials, both natural and manmade, such as limestone and sand and gravel aggregates, salt, clay, shale, gypsum, industrial sand, building stone, lime, cement, and recycled concrete. Statewide, the mineral and aggregate industry employs nearly 5,000 Ohioans and results in the indirect employment of another 40,000 Ohioans in supporting industries. Production of crushed stone, sand and gravel and supporting industries contribute an annual total of \$38 billion to the national economy. In Ohio, the industry’s non-fuel raw mineral production alone is valued at over one billion dollars. The asphalt paving and aggregate industries are highly interdependent, as nearly 95% of asphalt is comprised of aggregate materials.

Flexible is a non-profit business association comprised of approximately 90 producers, contractors, consultants, and manufacturers engaged in the Ohio asphalt pavement construction industry who live and work in every county in Ohio. The industry directly employs 6,000 Ohioans with a total payroll exceeding \$300 million. The industry indirectly creates and maintains thousands more Ohio jobs. Millions of Ohioans drive every day on roads that have been paved by Flexible's members. The asphalt industry currently has approximately 165 asphalt plants in Ohio.

Ready-Mix is a state-wide non-profit business association whose members are comprised of ready mixed concrete producers, admixture companies, cement manufacturers, engineering firms, laboratories and other suppliers to the concrete industry. Ready-Mix concrete is the most common form of concrete and accounts for nearly three-fourths of all concrete used for roads, and highways. Ready-Mix supplies a valuable construction product to the transportation, building sector, residential and other construction markets.

Together, Ohio Aggregates, Flexible and Ready-Mix members support infrastructure development in every corner of the state through the use of reliable and sustainable materials. In fact, many of the major users of aggregate and asphalt are the state, counties, townships and municipalities which depend on Amici's members to supply products and services efficiently and cost effectively. Aggregates, ready-mix concrete, and asphalt produced in Ohio generally stay in Ohio and support the state economy.

In addition, Amici's members are located across the state of Ohio and run the gamut in size and organization; some members are small, family-owned companies, whereas others are multi-national corporations. Despite these differences, Amici's members have unifying

characteristics: Ohio's motor fuel tax income and other Section 5a funds are used as traditional sources of revenue for the Amici's members. Limiting the effect and scope of Section 5a relating to the taxation of motor vehicle fuel not only harms the Amici's members, it harms all Ohioans. Thus, Amici's members have a significant interest in the outcome of this case. Amici respectfully request this Court reverse the decision of the Tenth District and restore full funding for highway improvements as mandated by Section 5a.

STATEMENT OF THE CASE AND FACTS

Amici adopts and supports the statement of the case and facts set forth in the Plaintiff-Appellant Beaver Excavating Company Merit Brief.

ARGUMENT

Section 5a safeguards the condition of Ohio's roadways by requiring that all moneys derived from fees, excise taxes, and license taxes relating to the registration, operation, or use of motor vehicles on public roads or relating to the fuel used to propel such vehicles be expended solely for the purposes set forth in the amendment, namely, construction, improvement, and repair of Ohio roads. The constitutional requirement is explicit and clear: tax revenue derived from use of motor vehicles or their fuel must be devoted to maintaining Ohio roads and similar infrastructure. Any other use is constitutionally prohibited. Despite the express prohibition, the Tax Commissioner of Ohio is allowing Commercial Activity Tax revenue generated from motor vehicle fuel to be deposited into three treasury funds unrelated to road repair and maintenance. This improper usage of CAT revenue specifically undermines the Constitution'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 Ohio roadways.

Amici also adopt the extensive legal argument offered by Appellant in its Merit Brief.

Proposition of Law No. 1: Improving Ohio's infrastructure is essential to the success and growth of the state. The Ohio Constitution as amended by Section 5a protects this necessary and essential funding. The law and public policy require that it be enforced.

A. Infrastructure is Essential to Ohio's Economy

Ohio's roads, highways and bridges are the backbone of the state's transportation system, providing its residents, visitors, and businesses daily access to their homes, jobs, shopping, and recreation.¹ Unfortunately, the conditions of Ohio's transportation systems are deteriorating and are in serious need of improvement. According to *Key Facts About Ohio's Surface Transportation System and Federal Funding*, prepared by the national research group, TRIP, twenty-six percent of Ohio's major roads are in poor or mediocre condition, and twenty-four percent of Ohio's bridges are structurally deficient or functionally obsolete.

Roads rated as poor mean they often show signs of deterioration, and usually include rutting, cracks and potholes. These roads are often in such disrepair that it is difficult to simply resurface, rather, these roads must be completely dug up and reconstructed. Roads rated in mediocre condition often show signs of significant wear and may also have some visible pavement distress. Such roads may be repaired by resurfacing but these roads often need more extensive reconstruction to return them to good condition. Even if such roads do not require complete reconstruction, the cost of resurfacing is not insignificant.

The quality of Ohio's highway infrastructure is important to all Ohioans. According to

¹ *Future Mobility in Ohio: Meeting the State's Need for Safe and Efficient Mobility*, (April 2011) <http://www.tripnet.org>.

TRIP, deficient roadways cost the average Ohio motorist up to \$933 a year.² Likewise, TRIP 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.³

Improving Ohio's roads, highways, and bridges ensures safety, increases travel, and enables the state to become more competitive and appealing, all of which stimulate Ohio's economy.

Ohio's businesses are dependent on an efficient, safe, and modern transportation system. Poor road conditions negatively affect Ohio's businesses by adding additional operating costs, delays, and prolonged shipping schedules.⁴ For the year 2007, the Bureau of Transportation indicates that \$563 billion in goods are shipped annually from Ohio and \$493 billion in goods are shipped to Ohio, usually by trucks.⁵ Of the goods being shipped, seventy-eight percent are carried by truck and another twelve percent are handled by shipping services, like UPS and the U.S. Postal Service, all of which use trucks for parts of their deliveries.⁶ If businesses are required to take into consideration the poor quality of Ohio roads in pricing and timing of the shipment of

² Batvia, *Poor Road Conditions Cost Ohioans Billions, Prompting New Business Push for Federal Highway & Transit Investments Bill*, PR Newswire, April 14, 2011.

³ *Future Mobility in Ohio: Meeting the State's Need for Safe and Efficient Mobility*, April 2011, <http://www.tripnet.org>

⁴ *Id.*

⁵ Bureau of Transportation Statistics, U.S. Department of Transportation. 2007 Commodity Flow Survey, State Summaries http://www.bts.gov/publications/commodity_flow_survey/2007/states/

⁶ *Id.*

goods, businesses may well choose to conduct business in other states, or increase prices to Ohioans. This illustrates the importance of maintaining Ohio's infrastructure in good condition and the drastic effect poor quality of roads, highways, and bridges have on the business community and citizens in this state.

B. The Construction, Repair, and Maintenance of Ohio's Infrastructure Creates Thousands of Ohio Jobs

Aside from the importance of providing predictability and reliability to businesses by maintaining a good transportation system, repair and reconstruction of Ohio's infrastructure creates jobs, which are essential to the state's ability to rebound from the high unemployment rate Ohio is currently facing.

According to the Federal Highway Administration, every \$1 billion of federal funding spent on highway construction nationwide creates nearly 28,000 jobs annually, including approximately 9,500 jobs in the construction sector, approximately 4,300 jobs in industries supporting the construction sector, and approximately 14,000 other jobs in non-construction related sectors of the economy.⁷ In addition, every dollar invested in transportation generates approximately six dollars in economic impact. Improving Ohio's transportation system will play a critical role in improving the state's economy by creating thousands of much needed jobs, which in turn will strengthen the productivity and competitiveness of the state.

C. Ohio Needs Safe Highways and the Money to Maintain Them

In addition to the creation of jobs, reconstruction and maintenance of Ohio's infrastructure helps ensure that safety of the traveling public. According to TRIP, roadway conditions are

⁷ *Key Facts About Ohio's Surface Transportation System and Federal Funding*, September 2011, <http://www.tripnet.org>

significantly related to highway safety in Ohio with poor roadway conditions being a factor in approximately one-third of traffic fatalities.⁸ According to the Federal Highway Administration, every \$100 million spent on highway safety improvements will save 145 lives over 10 years. As the quality of the roads improve, the safer the roads become, leading to less accidents, casualties, and deaths.

D. Funding at Current Levels is Too Low to Maintain Ohio's Roads

The Ohio Department of Transportation, ("ODOT,") is the state agency responsible for developing and maintaining all state and federal roadways in Ohio. ODOT has recently announced that its schedule of road construction projects will have to be pushed back by decades because there are currently more projects than funds available. ODOT is funded solely by state and federal motor fuel taxes. In order for Ohio to successfully compete in the regional, national and global economy, its surface transportation system must be significantly improved, which will require adequate funding.

The decision of the Tenth District Court of Appeals directly affects the ability of ODOT to fund highway infrastructure projects. If the Tax Commissioner continues to divert moneys to funds for purposes other than the ones mandated by Section 5a, then road construction projects will decline even more. If the road construction projects continue to decrease, Ohio roadways will continue to deteriorate; the cost of doing business in the state will continue to increase; the safety of the state's citizens will be at risk; and Ohio will be left with substandard road conditions, which will continue to plague Ohio's economy. In a word, Ohio will become the new Michigan.

⁸ *Id.*

Proposition of Law No. 2: 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.

Section 5a of the Ohio Constitution is clear. In plain and straightforward language,

Section 5a states:

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 . . . payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes. (Emphasis added.)

This Court, when construing the language of a tax provision, noted that, “This is the simple language of the plain people and it is to receive such meaning as they usually give to it in political discussions and arguments.” *State ex. Rel. Keller v. Forney* (1923), 108 Ohio St. 463, 466, 141 N.E.16. Further, the Court states that “When the language is plain there is neither the room nor the right to construe. The court’s sole duty is to apply it to the facts found.” *Id.*

Section 5a, as approved by the citizens of Ohio, requires that all moneys derived from all fees, excises, or license taxes relating to motor vehicles or fuel must be collected and distributed solely for purposes of construction, improvement, and repair of public roads. Any other interpretation is contrary to law and public policy.

This Court’s prior decision in *Ohio Grocers Ass’n. v. Levin*, 2009-Ohio-4872, provides the proper analysis for reaching the correct decision in this case. In *Ohio Grocers*, the Tax Commissioner’s decision to apply the CAT to gross receipts based on Article XII, Section 3(C) and Section 13 of the Ohio Constitution (“Food Amendments”) was challenged and the plaintiffs

sought an exemption from the CAT for gross receipts from food sales. This Court ultimately approved the Tax Commissioner's decision, but its legal analysis, when applied to this matter, yields an opposite result.

The primary difference between the outcome in *Ohio Grocers* and the necessary outcome in this case is the clear language of Section 5a. The Food Amendments plainly prohibited a tax (such as a sales tax) that is triggered by and imposed upon each "sale" of food. The Food Amendments do not, however, explicitly prohibit an excise tax or a "privilege of doing business" tax on food sellers, even if that privilege is measured by gross receipts that include proceeds from the sale of food. Therefore, this Court reasoned that if the drafters of the Food Amendments intended to impact and exclude excise taxes, the drafters would have included the phrase "excise taxes" in the Amendments. Because the drafters did not include such language, it can be assumed that the drafters did not intend for the Amendments to include excise taxes.

Section 5a is easily distinguished from the Food Amendments because Section 5a uses the precise word "excises" in describing what funds must be dedicated to road and infrastructure construction, repair, and maintenance. In the case at hand, the drafters and citizens of Ohio clearly intended that all excise taxes be included in Section 5a and that these funds be used to maintain Ohio's roads, highways, and bridges. Nothing could be more plain and simple.

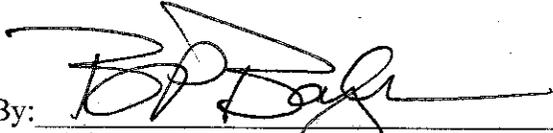
CONCLUSION

The impact of the Tenth District's decision extends well beyond the parties to this appeal. Every citizen in Ohio is will be affected by this Court's decision. For the reasons set forth above, Amici respectfully request that this Court overturn the decision of the Tenth District Court of Appeals and direct that all such moneys must be used for the maintenance and repair of Ohio roads,

bridges, and highways.

Respectfully submitted,

BRADY, COYLE & SCHMIDT, LTD.

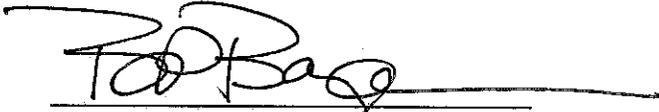
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum in Support of Plaintiffs-Appellants, Beaver Excavating Company, Inc. was sent this 19th day of March, 2012, via ordinary U.S. Mail, to:

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