

**IN THE SUPREME COURT OF OHIO**

PANTHER II TRANSPORTATION, INC. )	)	CASE NOS. 2012-1589, 2012-1592
Plaintiff-Appellee, )	)	(consolidated)
v. )	)	On appeal from the Ninth District
VILLAGE OF SEVILLE BOARD OF )	)	Court of Appeals, Medina County, Ohio
INCOME TAX REVIEW, <i>et al.</i> , )	)	Court of Appeals Case Nos. 11CA0092-M,
Defendants/Appellants. )	)	11CA0093-M (consolidated)

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**MEMORANDUM OF AMICUS CURIAE  
THE OHIO TRUCKING ASSOCIATION IN RESPONSE TO  
APPELLANTS' MEMORANDA IN SUPPORT OF JURISDICTION**

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**FILED**  
OCT 19 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

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**I. THE OHIO TRUCKING ASSOCIATION HAS AN INTEREST IN MAINTAINING STATEWIDE UNIFORMITY AND IN PREVENTING MUNICIPALITIES FROM CIRCUMVENTING EXPRESS STATUTORY PROHIBITIONS ON LOCAL TAXES.**

The Ohio Trucking Association has an interest in this case wherein a municipality has attempted to impose a net profits tax in contravention of a clear express statutory provision preempting the imposition of such a tax. As amicus curiae on behalf of Appellee Panther II Transportation, Inc. (“Panther”), the Ohio Trucking Association (“OTA”) submits this memorandum in opposition to jurisdiction.

The OTA has over 900 members and is consistently active in governmental affairs as an advocate on behalf of its members and the motor transportation industry. The membership of the OTA ranges from nationally-recognized carriers with thousands of commercial motor vehicles to small businesses that use one or two commercial motor vehicles. Ohio is especially fortunate to have a large transportation presence. In 2012, over 12,730 trucking companies were located in Ohio. American Transportation Research Institute, *Ohio Fast Facts*, <http://www.atri-online.org/state/data/ohio/OhioFastFacts.pdf> (accessed Oct. 18, 2012). Ohioans have also benefited from the 268,470 jobs that the trucking industry provided in Ohio in 2011. *Id.*

Over 4 million trucks were registered in Ohio in 2010. United States Department of Transportation, Federal Highway Administration, Office of Highway Policy Information, *Highway Statistics 2010*, Truck and Truck-Tractor Registrations 2010, Table MV-9, <http://www.fhwa.dot.gov/policyinformation/statistics/2010/mv9.cfm> (accessed Oct. 18, 2012). With over 82 percent of Ohio communities depending exclusively on trucks to move their goods, Ohio relies greatly on the large balanced

network of the trucking industry. American Transportation Research Institute, *Ohio Fast Facts*, <http://www.atri-online.org/state/data/ohio/OhioFastFacts.pdf> (accessed Oct. 18, 2012).

In addition to its large impact in Ohio, the motor transportation industry is heavily regulated. Motor transportation companies must comply with the many regulations regarding safety, vehicle maintenance, hours of service, hazardous materials, operating authority, and other aspects of operation. A review of Ohio laws demonstrates the extent to which the industry is regulated. *See* R.C. Chapter 4921., R.C. Chapter 4923., Ohio Adm.Code Chapters 4901:2-1 through 4901:2-21, inclusive. The overarching theme of these laws is that the State of Ohio oversees and regulates motor transportation companies in a uniform and consistent approach.

The General Assembly's decision to regulate motor transportation companies on a statewide approach abrogates all regulation at a local government level, save for specifically carved-out exceptions such as general property taxes and local police regulations. As part of the statewide regulation of motor transportation companies in Revised Code Chapter 4921., the General Assembly enacted Section 4921.25<sup>1</sup>, which is just one regulation regarding the taxation of the industry. Since 1923, Section 4921.25 and its predecessor versions established that all taxes assessed by local authorities, except the general property tax, are illegal and superseded by the Revised Code. *See, City of Springfield v. Krichbaum*, 88 Ohio App. 329, 330-31, 100 N.E.2d 281 (2nd Dist. 1950)

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<sup>1</sup> Throughout this memorandum, the OTA references R.C. 4921.25 as in effect during the time period at issue. The operative language of R.C. 4921.25 was recodified as R.C. 4921.19(J) effective June 11, 2012, pursuant to 129 H.B. 487.

(“The power to levy a tax on . . . common carriers, Section 614-98, General Code, has been pre-empted by the state.”)

Motor transportation companies, therefore, are not subject to municipal taxes, such as a net profits tax, if they comply with the statewide regulations that govern them. R.C. 4921.25. This is logical because motor carriers are already taxed heavily at the state level. As an example, motor carriers in Ohio paid over \$4.4 billion in state taxes and fees from 2000 to 2005. American Transportation Research Institute, *Ohio State and Federal Freight Motor Carrier Taxes and Fees Paid 2000 – 2005*, <http://www.atri-online.org/state/data/ohio/taxesandfees.htm> (accessed Oct. 18, 2012).

In contravention of the plain language of the statute, the Village of Seville (“Seville”) assessed Panther, a motor transportation company, with a net profits tax. Despite the demand of Panther for a refund, Seville refused. The arguments in support of such a tax require an interpretation of R.C. 4921.25 that controverts the plain language of the statute and defeats the intent of the General Assembly.

In the almost ninety years that this law has been in effect, this is the first time that the OTA – the voice of the industry – can recall this issue needing the guidance of the Board of Tax Appeals or a court of appeals. If the Court accepts jurisdiction and overturns the ruling below, then the clearly expressed intent of the General Assembly in regulating motor transportation companies on a uniform, statewide approach will be defeated. The statutory bar on local taxation would be lifted and all local authorities would have a new-found ability to impose multiple, and possibly overlapping, taxes against motor transportation companies.

The OTA is in the unique position of speaking for the only industry that will be *directly* impacted by a reversal of the decision of the appellate court. On behalf of its membership and the industry, the OTA respectfully requests that the Court decline to exercise jurisdiction in this appeal.

**II. THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT A MATTER OF PUBLIC OR GREAT GENERAL INTEREST.**

This case does not involve a substantial constitutional question. The Supreme Court of Ohio has recognized that the General Assembly has the authority under the Ohio Constitution to preempt by express statutory prohibition the taxing power of a municipality. *Cincinnati Bell Tel. Co. v. City of Cincinnati*, 81 Ohio St.3d 599, 601, 693 N.E.2d 212 (1998). The *Cincinnati Bell* court held that, “The power to restrict municipal taxing power as granted by Section 13, Article XVIII and Section 6, Article XIII of the Ohio Constitution requires the General Assembly to preempt municipal taxing power by express statutory provision.” 81 Ohio St.3d at 608. In *Cincinnati Bell*, the Court has already resolved any constitutional question regarding the preemption authority of the General Assembly and the taxing power of municipalities. As long as there is an express statutory provision, then the General Assembly is within its constitutional authority to preempt municipal taxing power. *Id.*

The issue in this case involves merely the interpretation to determine if under R.C. 4921.25 the General Assembly preempted municipal taxing power by an express statutory provision. If it did so, the General Assembly acted within its constitutional authority, as recognized by the *Cincinnati Bell* court, to preempt municipal taxing power. Such an inquiry does not involve a constitutional question of the General Assembly’s right to preempt. It instead involves a reading of the statute to determine whether the

General Assembly included an express statutory provision to do so. The case therefore does not involve a substantial constitutional question.

The case is also not a matter of public or great general interest. The plain language of R.C. 4921.25 indicates that the General Assembly intended to preempt local taxation (except for the general property tax) of motor transportation companies, as it declares that all taxes imposed by local authorities on such companies are illegal and superseded by other statutory provisions. R.C. 4921.25. The statute's clarity in expressly preempting local taxation was recognized by both the three-member panel of the Board of Tax Appeals and the three-judge panel of the Ninth District Court of Appeals in this case. Aug. 30, 2011 BTA Correcting Order at p. 8; Aug. 8, 2012 Decision and Journal Entry at p. 5.

This case also does not present the return of the doctrine of implied preemption, as forecast by the Appellants. Both the Board of Tax Appeals and the Ninth District Court of Appeals held that R.C. 4921.25, by its plain language, expressly preempted a municipality from imposing a net profits tax on motor transportation companies. Aug. 30, 2011 BTA Correcting Order at p. 9; Aug. 8, 2012 Decision and Journal Entry at p. 8. These decisions did not hold that R.C. 4921.25 preempted local taxation on the basis of *implied* preemption. As such, the warnings of Appellants that the Court must intervene to prevent the return of implied preemption are not supported by the record.

Since the General Assembly's enactment of this statutory provision in 1923, there has been no known court case or Board of Tax Appeals decision in which a municipality has directly challenged this express preemptory language. The plain language of the

statute has served as its own notice of the preemptory effect on municipal taxation of motor transportation companies.

A need for revenue, as asserted by Appellants and amicus curiae the Ohio Municipal League, does not raise the importance of this case. Nor does it justify the imposition of a tax where the General Assembly has expressly preempted municipalities from doing so. Moreover, the claimed adverse impact on other municipalities is unfounded. There is no evidence in the record that any tax revenues of other municipalities, let alone a substantial number of municipalities and substantial revenues, will be adversely affected. There is no record provided by Appellants or amicus Ohio Municipal League as to how many other municipalities, if any, impose a net profits tax in contravention of R.C. 4921.25. Regardless of the number of municipalities and the impact on tax revenues for them, the General Assembly articulated in clear language that any tax, except for the general property tax, imposed by local authorities is illegal and superseded by state law. R.C. 4921.25.

Because of the statute's clarity and the lack of demonstrated widespread impact, this case is not a matter of public or great general concern.

### **III. ARGUMENT**

**Response to Proposition of Law No. 1: In enacting R.C. 4921.25, the General Assembly expressly preempted municipal taxation of motor transportation companies in favor of statewide regulation.**

**A. The Plain Language of R.C. 4921.25 Demonstrates an Express Intent to Preempt Municipal Taxation of Motor Transportation Companies.**

“[A] tax enacted by a municipality pursuant to its taxing power is valid in the absence of an express statutory prohibition of the exercise of such power by the General

Assembly.” *Cincinnati Bell*, 81 Ohio St.3d at 601. Revised Code Section 4921.25 includes such an express statutory prohibition.

The intent of the General Assembly to expressly preempt all local taxation, except for general property taxes, is evident in the statutory language. The express preemptory language included in the first sentence of R.C. 4921.25 is: “*all fees . . . or taxes or other money exactions, except the general property tax, assessed, charged, fixed, or exacted by local authorities . . . are illegal and are superseded by sections 4503.04, 4905.03, and 4921.02 to 4921.32, inclusive, of the Revised Code.*” (emphasis added).<sup>2</sup>

The second sentence of R.C. 4921.25 fortifies the preemptory provisions of the first sentence by mandating that all local laws must cease to be operative to a motor transportation company that complies with the state motor transportation regulations. The General Assembly, however, provided a caveat in the second sentence of R.C.4921.25 that allows local subdivisions to make local police regulations that are not inconsistent with the state regulations. With these two exceptions, all local regulations and taxation of motor transportation companies are preempted under R.C. 4921.25.

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<sup>2</sup> Revised Code Section 4921.25, as in effect at the time relevant to this case, provides in full: “The fees and charges provided under section 4921.18 of the Revised Code shall be in addition to taxes, fees, and charges fixed and exacted by other sections of the Revised Code, except the assessments required by section 4905.10 of the Revised Code, but all fees, license fees, annual payments, license taxes, or taxes or other money exactions, except the general property tax, assessed, charged, fixed, or exacted by local authorities such as municipal corporations, townships, counties, or other local boards, or the officers of such subdivisions are illegal and, are superseded by sections 4503.04, 4905.03, and 4921.02 to 4921.32, inclusive, of the Revised Code. On compliance by such motor transportation company with sections 4503.04, 4905.03, and 4921.02 to 4921.32, inclusive, of the Revised Code, all local ordinances, resolutions, by laws, and rules in force shall cease to be operative as to such company, except that such local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with such sections.”

The provisions of R.C. 4921.25 were recognized by both the Board of Tax Appeals and the Ninth District Court of Appeals as being expressly preemptory. The Board of Tax Appeals found “the language of the statute to be clear.” Aug. 30, 2011 BTA Correcting Order at p. 8. Similarly, the Ninth District Court of Appeals relied upon “the plain language of R.C. 4921.25.” Aug. 8, 2012 Decision and Journal Entry at p.5. Thus, the expressly preemptory nature of the statute is buttressed by the consistency of both decisions, which recognize the plain language as controlling.

The express preemptory nature of the R.C. 4921.25 is also confirmed by history. Appellants cite no case before a court or the Board of Tax Appeals that controverts the express statutory provisions of R.C. 4921.25. The instant case is the only known case that directly addresses the issue of a municipality challenging the preemptory provisions of R.C. 4921.25 by imposing a net profits tax on a motor carrier. For the almost ninety years that the statutory provisions have been enacted, the plain language of R.C. 4921.25 has provided notice that municipalities are preempted by the General Assembly from imposing any tax, other than the general property tax, on motor transportation companies.

The recent amendments of Chapter 4921. are also indicative of the General Assembly’s intent. In Am.Sub.H.B. No. 487, the General Assembly recodified the provisions of R.C. 4921.25 as R.C. 4921.19(J). 2012 Am.Sub.H.B. No. 487. The General Assembly not only retained the express preemptory language, but it also replaced “fees” with “taxes” in the first sentence of R.C. 4921.19(J). While headings do not constitute any part of the law, R.C. 101.01, the fact that the heading of the applicable Revised Code Section mirrors the change in the statute from “fees” to “taxes” is also

indicative of the General Assembly's intent to affirm and retain the preemption of local taxation.

In amending Chapter 4921., the General Assembly had the opportunity to delete this provision if it believed that its provisions were being misinterpreted. *See, e.g., Clark v. Scarpelli*, 91 Ohio St.3d 271, 278, 744 N.E.2d 719 (2001) (“It is presumed that the General Assembly is fully aware of any prior judicial interpretation of an existing statute when enacting an amendment.”); *State ex rel. Huron Cty. Bd. of Edn. v. Howard*, 167 Ohio St. 93, 96, 146 N.E.2d 604 (1957) (“[A] legislative body in enacting amendments is presumed to have in mind prior judicial constructions of the section.”). Given the opportunity to correct any misinterpretations, the General Assembly retained the provision, reaffirming its intent to preempt local taxation.

**B. Revised Code Section 4921.25 is Part of a Designed Framework for Uniform, Statewide Regulation of Motor Transportation Companies.**

Chapters 4921. and 4923. of the Ohio Revised Code provide for many of the requirements and prohibitions for motor transportation companies. A review of these Chapters demonstrates the extent to which motor carriers are regulated on a uniform, statewide basis, including: requirement of a certificate of public convenience and necessity from the Public Utilities Commission of Ohio (“PUCO”) (R.C. 4921.03) and payment of the respective taxes (R.C. 4921.19); compliance with Unified Carrier Registration Plan (R.C. 4921.11)<sup>3</sup>; requirement of minimum insurance coverage (R.C. 4921.09); and monetary forfeitures to the PUCO for non-compliance with safety and registration rules.

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<sup>3</sup> Fees for the annual Unified Carrier Registration Plan (“UCR fees”) for motor carriers range from \$76.00 to \$73,346.00 on a sliding scale, depending upon the number of commercial motor vehicles. 49 C.F.R. 367.30.

Pursuant to its statutory authority under Revised Code Chapter 4921., the Public Utilities Commission has promulgated regulations that govern motor carrier operations: driver qualifications, including medical certification (Ohio Adm.Code 4901:2-5-04); safety standards (Ohio Adm.Code 4901-2-5-02); vehicle inspection mandates (Ohio Adm.Code 4901:2-5-11); vehicle marking requirements (Ohio Adm.Code 4901:2-5-11); adoption of the United States Department of Transportation safety standards (Ohio Adm.Code 4901:2-5-02). The federal safety standards adopted by Ohio include: mandatory vehicle safety standards (49 C.F.R. Part 393); maintenance standards (49 C.F.R. Part 396); record keeping (49 C.F.R. 390.9 through 390.37, inclusive); drug and alcohol testing (49 C.F.R. Part 382); and limits on driving time (49 C.F.R. 395). In promulgating these regulations, the PUCO has acted consistently with the statutory framework by regulating on a statewide basis.

The patent design of this statutory framework is that Ohio motor transportation companies are regulated on a uniform level by the State, including registration, taxation, and safety regulation. *See, e.g., City of Cleveland v. Pub. Util. Comm. of Ohio*, 130 Ohio St. 503, 512, 200 N.E. 765 (1936) (“It is most evident that the General Assembly since the creation of the Public Utilities Commission of Ohio has subordinated the right of the municipality to regulate transportation lines within its limits to the authority granted the Public Utilities Commission.”)

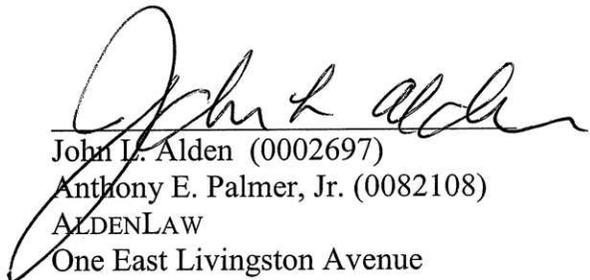
It is only logical that in Chapter 4921. – one of the chapters governing the operations of motor carriers – the General Assembly would include a tax law that is specific to motor transportation companies and that comports with the statewide regulatory approach to the industry. The General Assembly did not merely occupy the

field. It went further. It included an express provision in R.C. 4921.25 to preempt local taxation in favor of the statewide regulatory approach. Any other interpretation of the statute contorts not only the plain language of the statute, but also the entire uniform regulatory approach.

**IV. CONCLUSION**

Because this case does not involve a substantial constitutional question and is not a matter of public or great general interest, the OTA respectfully requests that the Court decline to accept jurisdiction of this appeal.

Respectfully Submitted,



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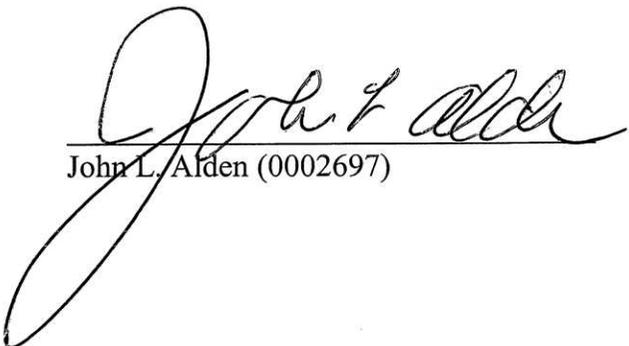
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