IN THE SUPREME COURT OF OHIO

VANDERCAR, LLC,	:	
	:	CASE NO. 2022-1312
Appellant,	:	
	:	On Appeal from the First District Court
v.	:	of Appeals
	:	
THE PORT OF GREATER CINCINNATI DEVELOPMENT AUTHORITY,	:	First District Case No. C210643
	:	(consolidated with C210665 and
	:	C220130)
	:	
Appellee.	:	

MERIT BRIEF OF *AMICI CURIAE* COLUMBUS-FRANKLIN COUNTY FINANCE AUTHORITY, DEVELOPMENT FINANCE AUTHORITY OF SUMMIT COUNTY, DAYTON-MONTGOMERY COUNTY PORT AUTHORITY, AND TOLEDO-LUCAS COUNTY PORT AUTHORITY IN SUPPORT OF APPELLEE THE PORT OF GREATER CINCINNATI DEVELOPMENT AUTHORIITY

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae, the Columbus-Franklin County Finance Authority, Development Finance Authority of Summit County, Dayton-Montgomery County Port Authority, and Toledo-Lucas County Port Authority (the "*Amici* Port Authorities") are among the largest and most active port authorities in the State of Ohio. They regularly engage in economic development activity and have a vested interest in the correct and consistent application of Ohio law to such activity, including with respect to immunity.

The *Amici* Port Authorities urge affirmance of the First District's decision below, which held, consistent with settled Ohio law, that Ohio port authorities are not subject to prejudgment interest in contract actions. Reversal of that decision would offend stare decisis and create unnecessary uncertainty in Ohio law regarding other remedies against public entities. The *Amici* Port Authorities also request that the Court's decision emphasize, contrary to the sweeping and incorrect language in Appellant's brief, that R.C. 4582.22 does not strip Ohio port authorities of "all" immunities, including specifically the statutory immunity provided to Ohio port authorities by the Political Subdivision Tort Liability Act.

INTRODUCTION

Appellant Vandercar, LLC ("Vandercar") argues that Ohio port authorities are subject to prejudgment interest in contract actions because of two provisions in R.C. 4582.22(A)—the statute authorizing the creation of new port authorities in Ohio. The first provision states that port authorities may "sue and be sued," and the second states that port authorities are not "immune from liability" just because the General Assembly deems their actions "essential governmental functions" of the State. *Id.* According to Vandercar, these provisions strip port authorities of "all immunities" and render them the equivalent of private litigants. Vandercar Br. at 8.

The problem for Vandercar is that this startling conclusion is not supported by either the plain text of R.C. 4582.22(A) or the relevant caselaw. Indeed, Vandercar's argument is contradicted by other statutes and a century of precedent from this Court construing the key language on which Vandercar purports to rely.

Vandercar's argument equating port authorities and other public actors to private litigants would, if accepted by this Court, dramatically rewrite Ohio law in other ways. For example, the Court would be implicitly overruling decades of precedent holding that public entities, unlike private litigants, are not subject to liability under quasi-contract theories. Vandercar offers this Court no good reason to disrupt Ohio law in this manner.

ARGUMENT

The *Amici* Port Authorities' Proposition of Law No. 1: R.C. 4582.22(A) does not waive all immunities for port authorities.

Vandercar's argument starts from the erroneous premise that "R.C. 4582.22(A) waives all immunities—including any immunity from paying prejudgment interest." Vandercar Br. at 8. Throughout its brief, Vandercar consistently uses sweeping language suggesting that Ohio port authorities have no immunity of any kind. *See, e.g.,* Vandercar Br. at 1 (asserting that port authorities possess "no form of immunity—sovereign or otherwise"); *id.* ("courts should treat port authorities just like . . . private entities"); *id.* at 7 ("General Assembly . . . intended to waive all immunity for port authorities"); *id.* at 8 ("the statute creating port authorities . . . eliminates all immunity for port authorities"); *id.* ("R.C. 4582.22(A) waives all immunities"); *id.* at 10 ("the General Assembly waived *all* immunity in the port authority statute") (emphasis in original); *id.* at 15 ("the General Assembly stripped the Port of all immunity").

These statements are demonstrably wrong in two ways. First, the General Assembly has expressly provided port authorities with statutory immunities. And second, the language of R.C. 4582.22(A) identified by Vandercar does not entirely waive port authorities' common-law immunities.

I. R.C. 4582.22(A) does not waive statutory immunities that the General Assembly has provided port authorities in the Political Subdivision Tort Liability Act.

The first reason R.C. 4582.22(A) does not waive "all immunities" for port authorities is because the General Assembly has expressly provided port authorities with statutory immunity under the Political Subdivision Tort Liability Act. *See* R.C. 2744.02–2744.11. That Act generally grants political subdivisions immunity from tort suits with limited exceptions. *See* R.C. 2744.02(A)(1). And the Act defines political subdivisions as including port authorities created by July 9, 1982, and those, like the Appellee Port of Greater Cincinnati Development Authority ("Cincinnati Port"), created after that date. *See* R.C. 2744.01(F).

The General Assembly enacted the Political Subdivision Tort Liability Act in 1985, *see* 1985 H 176, which was three years *after* the General Assembly enacted R.C. 4582.22, *see* 1982 H. 439. It therefore cannot be true that R.C. 4582.22(A) waives "all immunities" for port authorities. R.C. 4582.22(A). The Political Subdivision Tort Liability Act makes clear that, *at a minimum*, port authorities retain the robust statutory immunities provided therein. *See* R.C. 2744.02(A)(1). This is true even though R.C. 4582.22(A) contains sue-and-be-sued language. The later-enacted Political Subdivision Tort Liability Act specifically provides that **"[c]ivil liability shall not be construed to exist** under another section of the Revised Code merely … because of a general authorization in that section

that **a political subdivision may sue and be sued."** *See* R.C. 2744.02(C)(5) (emphasis added).

Even Vandercar acknowledges that the General Assembly provided port authorities with immunity under the Political Subdivision Tort Liability Act. *See* Vandercar Br. at 4. Any holding of the Court in this case should be limited to the issue of prejudgment interest in contract actions. Given Vandercar's sweeping assertions, this Court should emphasize that Ohio port authorities are not stripped of "all immunities" and they continue to enjoy statutory immunity under the Political Subdivision Tort Liability Act, as well as the common-law immunities discussed below.

II. R.C. 4582.22(A) does not waive all common-law immunities for port authorities.

The second reason R.C. 4582.22(A) does not waive "all immunities" for port authorities is because nothing in that statute displaces certain common-law immunities that port authorities enjoy, including the immunity from prejudgment interest in contract cases. *See Beifuss v. Westerville Bd. of Educ.*, 37 Ohio St. 3d 187 (1988). Vandercar disagrees, arguing that R.C. 4582.22(A) eliminates all common-law immunities for port authorities. *See* Vandercar Br. at 8–14.

Vandercar bases this conclusion on the following two italicized provisions of the statute:

> A port authority created pursuant to this section is a body corporate and politic which may *sue and be sued*, plead and be impleaded, and has the powers and jurisdiction enumerated in sections 4582.21 to 4582.59 of the

> Revised Code. The exercise by such port authority of the powers conferred upon it shall be deemed to be essential governmental functions of this state, *but no port authority is immune from liability by reason thereof*.

R.C. 4582.22(A) (emphasis added).

Vandercar claims that each of these provisions "totall[ly] waive[s]" port authorities' common-law immunity, including the common-law immunity from prejudgment interest in contract actions. Vandercar Br. at 2; *see also id.* at 8. But Vandercar is mistaken. Neither provision waives *all* common-law immunities for port authorities, including the immunity against prejudgment interest in contract actions.

A. The sue-and-be-sued phrase does not abrogate all common-law immunities for Ohio port authorities.

Regarding the sue-and-be-sued language in R.C. 4582.22(A), Vandercar notes that the "common and accepted meaning" of "sue" is "[t]o institute a lawsuit against (another party)." Vandercar Br. at 11 (citing Black's Law Dictionary 1733 (11th Ed. 2019)). Thus, according to Vandercar, the plain meaning of "sue and be sued" is "that a port authority can bring lawsuits and have lawsuits brought against it." *Id.* But even under Vandercar's acknowledged meaning, that language does not determine the extent of remedies or relief available in an action initiated by or against a port authority.

The General Assembly never intended it to determine that issue. R.C. 4582.22(A), like countless other statutes using similar language, was enacted against the backdrop of common-law immunities. It was the common law—not the statute—that delineated the types of claims and remedies that plaintiffs could pursue against political subdivisions.

By the time the General Assembly inscribed "sue and be sued" into R.C. 4582.22(A), it had long been settled in Ohio that the phrase "sue and be sued" did not displace these common-law immunities. *See, e.g.*, O*verholser v. National Home for Disabled Volunteer Soldiers*, 68 Ohio St. 236, 246–48 (1903); *Finch v. Board of Education of Toledo*, 30 Ohio St. 37, 45–46 (1876); *Hamilton Cnty. Board of Com'rs v. Mighels*, 7 Ohio St. 109, 117 (1857).

In *Overholser*, for example, a plaintiff brought a tort action against a federal agency that Congress had authorized to "sue and be sued in courts of law and equity." 68 Ohio St. at 247. The plaintiff argued that the sue-and-be-sued provision allowed him to pursue his tort claim against the agency, and this Court rejected the argument. *See id.* at 250. Under the common law, the Court explained, no sovereign was liable for tortious conduct "in the absence of express consent." *Id.* at 248. The Court was "not persuaded … that the power conferred upon [the agency] of suing and being sued … must be construed as a consent by Congress that this particular governmental agency may be sued upon any cause of action." *Id.* at 250; *see also* syllabus paragraph two. And the Court noted that it had already rejected similar arguments in *Finch* and *Mighels*. *Overholser*, 68 Ohio St. at 248–51; *accord Wolf v. Ohio State University Hospital*, 170 Ohio St. 49, 53 (1959); *see also Hadley v. Figley*, 2015-Ohio-4600, ¶¶ 17–18 (5th Dist.) (refusing to find waiver of immunity in sue-and-be-sued provision); *Horton v. City of Dayton*, 53 Ohio App.3d 68, 68 (8th Dist. 1990) (same).

As noted earlier, the General Assembly confirmed that this Court's longstanding interpretation of "sue and be sued" was correct when it enacted the Political Subdivision and Tort Liability Act. Under the Act, "[c]ivil liability shall not be construed to exist under another section of the Revised Code **merely … because of a general authorization in that section that a political subdivision may sue and be sued**." R.C. 2744.02(A)(5) (emphasis added). The Ohio General Assembly itself has indicated in plain terms that statutory "sue and be sued" language does not express a legislative intent to waive all immunity.

B. The last clause of R.C. 4582.22(A) likewise does not waive all common-law immunities for port authorities.

The final clause in R.C. 4582.22(A) does not waive all common-law immunities for port authorities either. Recall that the relevant portion of the statute states, "[t]he exercise by such port authority of the powers conferred upon it shall be deemed to be essential governmental functions of this state, *but no port authority is immune from liability by reason thereof*." R.C. 4582.22(A) (emphasis added).

Read in context, the words "but" and "by reason thereof" qualify the *preceding clause*, which states that the "exercise … of the powers conferred upon [the port authority] shall be deemed to be essential governmental functions of this state." R.C. 4582.22(A). The qualification is necessary because without it, the preceding clause could be construed as suggesting that every action a port undertakes is immune from liability because, under that clause, a port's activities are "deemed to be essential governmental functions of [the]

state." *Id.* The final clause merely indicates that the port is not immune from liability *solely because* its activities are "deemed to be essential governmental functions" pursuant to R.C. 4582.22(A). Nothing about this language suggests that it removes otherwise existing immunity.

The final clause in R.C. 4582.22(A) does not move the interpretive needle. It merely provides that, notwithstanding the preceding clause, port authorities can "be sued" and be held "liabl[e]" for at least *some* claims and *some* remedies. R.C. 4582.22(A). Thus, the final clause, like the "sue and be sued" phrase, does not constitute the type of clear statutory language that this Court deems necessary to displace common-law immunities. *See Wolf*, 170 Ohio St. at 53; *Overholser*, 68 Ohio St. at 247.

The *Amici* Port Authorities' Proposition of Law No. 2: Under the common law, port authorities, like other arms of the State, are immune from prejudgment interest in contract actions.

I. *Beifuss* bars Vandercar's pursuit of prejudgment interest against the Cincinnati Port.

Because the General Assembly has not completely abrogated common-law immunity for port authorities (or many other political subdivisions), Ohio's port authorities presently receive the benefit of such immunity. One such immunity is that arms and instrumentalities of the State are immune from prejudgment interest in contract cases. *See Beifuss v. Westerville Bd. of Educ.*, 37 Ohio St.3d 187, 189 (1988). This ancient rule has roots stretching back to at least the nineteenth century. *See, e.g.*, *State, ex rel. Parrott v. Bd. of Public Works* 36 Ohio St. 409, syllabus paragraph 4 (1881); *see also State, ex rel. Nixon*

v. Merrell, 126 Ohio St. 239, 246 (1933); *Lewis v. Benson* 60 Ohio St.2d 66, 67 (1979); *State, ex rel. Home Care Pharmacy, Inc. v. Creasy*, 67 Ohio St.2d 342, 344 (1981).

The plaintiff in *Beifuss*, like Vandercar here, sought to collect prejudgment interest in a contract action against an arm of the State (there, a school board). Like the statute creating the Port here, the statute creating the board in *Beifuss* contained a sue-and-be-sued provision. *See* 37 Ohio St.3d at 192 (Douglas, J., dissenting). The Court nonetheless rejected the plaintiff's argument, citing a wealth of authority for the proposition that prejudgment interest was not available in a contract action against an arm of the state. *Id.* at 189 (majority op.) (collecting cases).

In so doing, the Court rejected the plaintiff's argument that the immunity did not survive this Court's decision in *Carbone v. Overfield*, 6 Ohio St.3d 212 (1983). *Carbone* had held "[t]he defense of sovereign immunity [was] not available to a board of education in an action seeking damages for injuries allegedly caused by the negligence of the board's employees." *Beifuss*, 37 Ohio St. 3d at 190. But "while *Carbone* created tort exposure for public school boards, [the Court] refused to judicially expand a public school board's contractual liability." *Id.* The reason being that "[j]udicial intrusion into the matters of contracting parties is an extreme measure which should occur sparingly, if at all." *Id.* Were "such an expansion of a public school board's contractual liability" desired, it "should be created through clearly expressed legislation by the General Assembly or by the parties themselves at the bargaining table." *Id.*

Beifuss is in no way a "lone outlier." Vandercar's Br. at 12, 13. As the authorities cited above (and in *Beifuss*) show, the rule in *Beifuss* is rooted in *more than a century* of this Court's immunity jurisprudence. And in the years since this Court decided *Beifuss*, this Court has only reaffirmed *Beifuss*'s core holding: that arms and instrumentalities of the state cannot be liable for prejudgment interest in contract actions in the absence of express legislative consent. *See Ziegler v. Wendel Poultry Serv., Inc.*, 67 Ohio St. 3d 10 (1993); *Judy v. Ohio Bur. of Motor Vehicles*, 100 Ohio St. 3d 122, 2003-Ohio-5277, ¶¶ 31-32; *State ex rel. Stacy v. Batavia Loc. Sch. Dist. Bd. of Educ.*, 105 Ohio St. 3d 476, 2005-Ohio-2974, ¶ 62.

Vandercar claims that, three years after deciding *Beifuss*, this Court issued a conflicting opinion in *State ex rel. Tavenner v. Indian Lake Loc. Sch. Dist. Bd. of Educ.*, 62 Ohio St. 3d 88, 91 (1991) (holding that a plaintiff could seek *postjudgment* interest on a backpay claim against a school board). This Court *itself* explained why that was not so in *Judy v. Ohio Bur. of Motor Vehicles*, 100 Ohio St. 3d 122, 2003-Ohio-5277. In *Judy*, this Court reasoned that, "[u]nlike *Beifuss*, … *Tavenner* addressed whether R.C. 1343.13 required the state to pay *postjudgment* interest." 100 Ohio St. 3d at 130 (emphasis added). *Beifuss* and *Tavenner* were thus "clearly distinguishable." *Id.* The Court explained why its "distinction between prejudgment and postjudgment interest [was] born of good reason." *Id.* at 131. "Whereas the policy behind prejudgment interest is to encourage prompt settlement and to impose a civil sanction against a party who holds money against the lawful claim of another, the policy behind postjudgment interest is 'to

compensate the judgment creditor for the fact that he has not had the use of a certain sum of money that has been adjudged to be his.'" *Id.* The upshot is that this Court has already considered—and expressly rejected—Vandercar's argument that *Beifuss* and *Tavenner* are inconsistent.

Vandercar even goes so far as to say that *Ziegler v. Wendel Poultry Serv., Inc.*, 67 Ohio St. 3d 10, (1993), "limited [*Beifuss*] to its facts." Vandercar's Br. at 13. But the *opposite* is true. In *Ziegler*, this Court allowed a plaintiff to seek prejudgment interest from a school board in a *tort action*. In so holding, however, this Court unequivocally stated, "*Beifuss* is distinguishable." *Id.* at 1031. The Court did not base its distinction on the specific facts in *Beifuss*, as Vandercar asserts. On the contrary, the Court "distinguished [*Beifuss*] on the basis that *Beifuss* involved a *contractual action, not a tort action*." *Ziegler*, 67 Ohio St.3d at 19 (emphasis added). And the Court was clear that it was making that distinction based on a *legal* principle: because "[j]udicial intrusion into the matters of contracting parties is an extreme measure," the expansion of a state arm's "contractual liability should be created through clearly expressed legislation." *Id.* (quoting *Beifuss*, 37 Ohio St. at 190).

As it did in *Ziegler* and *Judy*, this Court once again reaffirmed *Beifuss*'s holding in *State ex rel. Stacy v. Batavia Loc. Sch. Dist. Bd. of Educ.*, 105 Ohio St. 3d 476, 2005-Ohio-2974, ¶ 62. Like the plaintiff in *Beifuss*, the plaintiff in *Stacy* sought prejudgment interest from a school board in a breach-of-contract action. The Court quickly dispensed with the

plaintiff's argument, citing its controlling decision in *Beifuss*. *Stacy*, 105 Ohio St. 3d at 490. Vandercar's unavailing arguments here should meet the identical fate.

II. The Court of Claims Act demonstrates that the General Assembly did not intend to waive the immunity against prejudgment interest in R.C. 4582.22(A).

To know what "clearly expressed legislation" abrogating prejudgment-interest immunity would look like, this Court need look no further than the Court of Claims Act. In the Court of Claims Act, the General Assembly created an *entire section*, R.C. 2743.18, addressing the availability of prejudgment interest in civil actions (both tort and contract) against the State in the Court of Claims.

Like R.C. 4582.22(A) does for port authorities, the Court of Claims Act expresses the State's "consent[] to be sued." R.C. 2743.02(A)(1). But the similarities largely end there. The Act expressly allows the State's liability to be determined "in accordance with the same rules of law applicable to suits between private parties." *Id.* And importantly for this case, the Court of Claims Act expressly provides that **"[p]rejudgment interest shall be allowed** with respect to a civil action on which a judgment or determination is rendered **against the state for the same period of time and at the same rate as allowed between private parties to a suit."** R.C. 2743.18(A)(1) (emphasis added). This rule was not compelled merely by the general language regarding the capacity of the State to be sued. Otherwise, there would have been no reason for the General Assembly to have created R.C. 2743.18(A)(1). Under Vandercar's reasoning, the specific language in R.C.

2743.18(A)(1) expressly allowing prejudgment interest against the State is mere surplusage.

Not surprisingly, R.C. 2743.18 reflects a balance of policy interests that the legislature—as the State's policy-making institution—is best suited to achieve. Vandercar wants this Court to read the language of the Court of Claims Act into R.C. 4582.22(A). But if that is what the General Assembly intended, it would have said so, just like it did in the Court of Claims Act. The language of that Act, unlike R.C. 4582.22(A), contains the type of clearly expressed legislative intention this Court has indicated is necessary to expand contractual liability for public entities. *Beifuss*, 37 Ohio St. 3d at 189; *accord Ziegler*, 67 Ohio St. 3d at 19.

III. This Court would overrule more than a century of precedent holding political subdivisions are not liable under theories of implied or quasi contract if it accepts Vandercar's arguments.

This Court should also keep in mind that, if it accepts Vandercar's arguments, it would be overruling more than just *Beifuss* and its progeny. It would also be overruling *another* common-law immunity that applies to political subdivisions: the immunity that bars political subdivisions from being liable under theories of implied or quasi contract. Recognition of the immunity goes back more than a century in Ohio caselaw. *See, e.g.*, *Schmitt v. Educational Serv. Ctr. of Cuyahoga Cty.*, 2012-Ohio-2208, ¶ 18 (8th Dist.); *Wright v. Dayton*, 2004-Ohio-3770 (2d Dist.); *see also Cleveland Hts. v. Cleveland*, 8th Dist. No. 79167, 2001 WL 1400015, at *4 (Nov. 8, 2001), (citing *Eastlake v. Davis*, 94 Ohio App. 71, 74 (7th

Dist. 1952)); *Wellston v. Morgan*, 65 Ohio St. 219, 228 (1901); *Cuyahoga Cty. Hosp. v. Cleveland*, 15 Ohio App.3d 70, 72 (8th Dist. 1984). Vandercar's total-waiver argument would effectively eliminate this immunity for every political subdivision with a sue-and-be-sued clause in its statute (many, if not most political subdivisions), were the Court to adopt Vandercar's unsupported argument that they be treated as the equivalent of private litigants.

IV. Vandercar's alternative argument also fails.

This Court should likewise reject Vandercar's alternative argument that a political subdivision enjoys no common law immunities over its "non-governmental commercial activities." Vandercar Br. at 15. Vandercar's alternative argument fails for a simple reason. There is no exception for "non-governmental commercial" contracts under *Beifuss*. When articulating the *Beifuss* rule, this Court has focused on only two issues relevant here: (1) whether the action is a *contract* action as opposed to a *tort* action, and (2) whether the plaintiff seeks *prejudgment* interest as opposed to *postjudgment* interest. *See Ziegler*, 67 Ohio St. 3d at 18 (1993); *Judy*, 2003-Ohio-5277, ¶¶ 31–32; *Stacy*, 2005-Ohio-2974, ¶ 62. Where this Court has determined that the plaintiff seeks prejudgment interest against an arm or instrumentality of the State in a contract action, this Court has not hesitated to deny the request. *See, e.g.*, *Stacy*, 2005-Ohio-2974, ¶ 62. Because it is undisputed here that Vandercar seeks prejudgment interest in a contract action against

an arm of the State, *Beifuss* dooms Vandercar's pursuit of prejudgment interest against the Cincinnati Port.

V. Vandercar's argument fails under the doctrine of stare decisis.

Yet another, independent problem with Vandercar's arguments is it fails under the doctrine of stare decisis. Even Vandercar seems to concede that it has been clear since *at least* this Court's decision in *Beifuss* that plaintiffs cannot seek prejudgment interest against arms of the state in contract cases. *Beifuss* is nearly *thirty-five* years old. Time and again, this Court has reaffirmed *Beifuss*'s holding and distinguished the decision from cases in which the Court has held that the immunity against interest does not apply. *See Ziegler*, 67 Ohio St. 3d at 18 (1993); *Judy*, 2003-Ohio-5277, ¶¶ 31–32; *Stacy*, 2005-Ohio-2974, ¶ 62. And the Court itself has clearly indicated that any change to the *Beifuss* rule should result only from clearly expressed legislative action.

For thirty-five years, political subdivisions have relied on the certainty provided by *Beifuss*. Vandercar asks this Court to disrupt settled Ohio law because it wishes to collect more money from its suit against the Port than the law allows. That is not how stare decisis works. It is a "fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices." Garner et al., The Law of Judicial Precedent

38 (2016)[1] at 389 (quoting *Trope v. Katz*, 902 P.2d 259, 269 (Cal. 1995)). This principle is based on the well-founded assumption that "certainty, predictability and stability in the law are the major objective of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law." *Id.* at 288-89.

Vandercar satisfies none of the standards this Court has traditionally considered before deciding to overrule a precedent. Under those standards, this Court considers whether (1) the prior decision was wrongly decided or whether circumstances no longer justify continued adherence to it, (2) the prior decision defies practical workability, and (3) abandoning the precedent would create an undue hardship for those who have relied upon it. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849 ¶ 48.

Beginning with the first factor, *Beifuss* was *not* wrongly decided. On the contrary, at the time *Beifuss* was decided, the decision was consistent with more than a century of precedent. Nor do present circumstances warrant revisiting *Beifuss*. The Political Subdivisions Tort Liability Act *expressly confirms* that the General Assembly does not—

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[1] Co-authored with Judge Carlos Bea, Judge Rebecca White Berch, then-Judge-now-Justice Neil M. Gorsuch, Judge Harris L. Hartz, Judge Nathan L. Hecht, then-Judge-now-Justice Brett M. Kavanaugh, then-Judge Alex Kozinski, Judge Sandra L. Lynch, Judge William H. Pryor Jr., Judge Thomas M. Reavley, Judge Jeffrey S. Sutton, and Judge Diane P. Wood.

and never did—intend a sue-and-be-sued provision to be a total waiver of immunity. *See* R.C. 2744.02(A)(5). Nor has the General Assembly passed a statute remotely suggesting its intent to waive prejudgment interest for political subdivisions in contract actions. That is all the more striking considering that the Court of Claims Act demonstrates that the General Assembly knows exactly how to draft such a statute.

As for the second factor, there can be no credible suggestion that the *Beifuss* rule defies practical workability. The rule is simple: if a plaintiff sues a state arm or instrumentality in a contract action, the plaintiff cannot recover prejudgment interest against the state arm or instrumentality. Whatever Vandercar might say about the *correctness* of the rule, it cannot be said the rule is difficult to *apply*.

Finally, abandoning the rule *would* create undue hardship for all the political subdivisions, like the Cincinnati Port, that have relied on the rule in maintaining litigating positions under the assumption that prejudgment interest was unavailable in contract. To change the rule now would be to sweep the rug out from underneath those political subdivisions.

In short, stare decisis, and the rule-of-law values served by that doctrine, should convince this Court to reject Vandercar's arguments regarding *Beifuss*, just as it has done in prior challenges. As the Court has observed many times, if the General Assembly wishes to change Ohio law regarding recovery of prejudgment interest against political subdivisions in contract cases, it can do so through clearly expressed legislation. That

policy change should not come from an opinion of this Court overruling decades of precedent, including this Court's prior holdings concerning the same subject.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Dated: April 12, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that under S.Ct.Prac.R. 3.02(A)(3) and S.Ct.Prac.R. 3.11(C)(1), the foregoing, Merit Brief of *Amici Curiae* Columbus-Franklin County Finance Authority, Development Finance Authority of Summit County, Dayton-Montgomery County Port Authority, and Toledo-Lucas County Port Authority, was filed electronically on April 12, 2023 with the Ohio Supreme Court via the Court's E-Filing Portal and served via email on April 12, 2023 on the following:

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