

In the
Supreme Court of Ohio

11-1757

OHIO TRUCKING ASSOCIATION, <i>et al.</i> ,	:	Case No. _____
	:	
Plaintiffs-Appellees,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
DIRECTOR THOMAS CHARLES	:	
[THOMAS STICKRATH], <i>et al.</i> , [OHIO	:	Court of Appeals Case
DEPARTMENT OF PUBLIC SAFETY],	:	No. 10AP-673
	:	
Defendants-Appellants.	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANTS-APPELLANTS THOMAS CHARLES, et al.**

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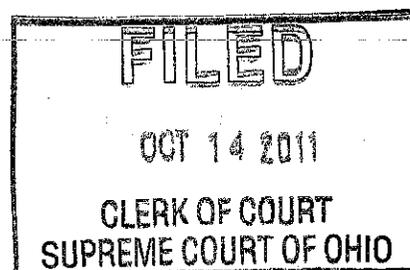


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INTRODUCTION

The decision below radically rewrote the meaning of an Ohio constitutional provision, and in doing so, it created an uncertain and unworkable standard, and also cut off funding for essential government services. Review is needed to reverse this decision, or, at a minimum, to ensure that such a major sea change in the law is reviewed by this Court. The provision at issue, Section 5a of Article XII, limits how certain state revenues may be *spent*: “No moneys derived from” certain taxes and fees on motorists “shall be expended for other than” highway purposes such as road construction and repair. The amendment applies to “fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways” or to motor fuels.

The court below held that Section 5a extended to a fee that is not paid by any driver to obtain a license or register a car, but is paid to buy *information*—certified driving record abstracts provided by the Ohio Bureau of Motor Vehicles (“BMV”). See *Ohio Trucking Ass’n v. Stickrath*, 2011-Ohio-4361 (“App. Op.”) (Ex. 2), ¶¶ 1, 39. The court said that the fee was “related to operation of vehicles” because some businesses bought the information to use in ways that linked to their employees’ or customers’ driving activity. Trucking companies checked to ensure that drivers had clean records; insurers checked drivers’ records to set insurance rates. The court admitted that this “relationship” is “attenuated,” but called it close enough to trigger Section 5a.

This overbroad view of the “related to” standard calls for review, as it is an uncertain and unworkable standard. This “attenuated” standard is so elastic as to make government planning unpredictable, and worse yet, it turns on how the purchaser of a document intends to use it, which is outside the state’s knowledge or control. And that is not even the worst part.

In a more radical step, the decision below transformed Section 5a’s *spending restraint* into a reason for invalidating the *collection* of a fee in the first place. That is, the court did not merely say that the revenue from abstract fees needed to be set aside for highway funding; it said that the

fee itself was unlawful. *Id.* at ¶ 34. That leap—from spending violation to invalidating the fee—defies the amendment’s plain text, which does not limit fees in any way. That leap also ignores this Court’s settled law, which says that challenges to the *expenditure* of revenue, based on “earmarking” or dedicated-use provisions, do not implicate the validity of *collecting* the revenue at issue. *State ex rel. Donahey v. Edmondson* (1913), 89 Ohio St. 93, 114; *Friedlander v. Gorman* (1933), 126 Ohio St. 163, 168. That leap also opens the door to a whole new body of litigation. Earmarking provisions will no longer be enforced by those interested parties who wish to restore funding to dedicated purposes. Instead, as here, those who object to paying a tax or fee can use spending issues as a way to avoid paying the tax or fee, even when no one disputes that the imposition of the tax or fee is perfectly valid on its own.

Indeed, the funding effects here are both an example of the problem and are an independent reason for review, because several essential government services will be crippled immediately without review. The fees here provide funding for emergency management, homeland security, and more, and those programs do not have alternate funding in place. And that crippling of essential programs does not even create some countervailing benefit of increasing highway funding, for, again, the court cancelled the fee rather than restrain the spending. Already, the Ohio Trucking Association (“OTA”), Plaintiff-Appellant here, has filed a followup lawsuit demanding the return of fees paid, causing a massive financial liability on top of everything else.

For these and other reasons below, the Court should review and reverse the decision below.

STATEMENT OF THE CASE AND FACTS

OTA claims that the BMV cannot apply the increased abstract fee to its members. It claims that the fee violates Section 5a’s earmarking of certain driving-related fees for highway

purposes. Thus, the relevant background includes the constitutional provision, the abstract fee that it wishes to invalidate in part, and the precise claims that OTA raises.

A. Ohio's Highway Spending Amendment, Section 5a, provides that revenues generated by certain taxes and fees, such as driver's-license and car-registration fees, are spent only on building highways and on other specified purposes.

In 1947, Ohio's voters adopted a constitutional amendment to ensure that revenue generated by certain taxes and fees imposed on motorists, such as gasoline taxes, driver's-license fees, and car-registration fees, would be spent only for certain purposes, such as building highways. Specifically, that "Highway Spending Amendment" provides as follows:

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 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 the public highways.

Ohio Const., art. XII, sec. 5a (emphasis added). When Ohio had first imposed a driver's-license tax in 1906 and a special gasoline tax in 1925, the General Assembly earmarked the resulting funds for use in building and maintaining highways. But such revenue was soon used to meet general needs, so the amendment was passed to "prevent taxes and fees collected from the motoring public from being diverted to non-highway purposes," and it "also allowed Ohio to receive matching federal funds for road construction." App. Op. at ¶ 34.

B. OTA sued to challenge an increase in abstract fees, saying that the allocation of the revenue made the fee increase invalid.

Ohio's R.C. 4509.05 had long provided for BMV to provide a certified abstract of an individual's driving record and to charge a two-dollar fee. App. Op. at ¶ 5. That fee funded BMV operations. In July 2009, the General Assembly raised the fee to five dollars, and it

allocated the revenue from the three-dollar increase to certain programs run by the Department of Public Safety (“DPS”). App. Op. at ¶¶ 1-7; R.C. 4509.05(C).

Plaintiffs sued to challenge the three-dollar fee increase; they do not challenge the two-dollar portion retained by BMV. Plaintiffs are the Ohio Trucking Association, the Professional Insurance Agents Association, and the Ohio Insurance Institute (together, “OTA”). Each trade group claimed that its members’ business needs require them to buy abstracts. App. Op. at ¶ 15. They sued the DPS director and the BMV’s acting director (together, “BMV”), challenging the fee increase. OTA alleged that the amended law “imposes a tax in violation of” Section 5a, on the theory that the fee is related to registration, and that the General Assembly’s allocation of the revenue to non-highway purposes renders the fee invalid. It did not seek any relief restraining the use of the revenue or reallocation to highway purposes, but instead sought “disgorgement of all fees (in excess of two dollars).” Second Amended Complaint at 8.

C. The trial court and the appeals court ruled for OTA; the appeals court held that the fee increase itself, not just the spending of the revenue, was invalid.

The trial court ruled for OTA, and the Tenth District Court of Appeals affirmed. First, the appeals court held that OTA had standing because the fee increase injured its members. Second, it held that the fee was “related to the operation of vehicles on public highways,” triggering Section 5a. App. Op. at ¶ 39. It described the relationship as “attenuated,” *id.* at ¶ 35, and noted that “[t]aken to the broadest extent, everything is related in some way to everything else,” *id.* at ¶ 29. OTA had argued that the abstracts were “related to” driving because they reflected a person’s driving record, but the court did not adopt that theory. Instead, the court held that the businesses use the information in a way that connects to driving. Trucking companies needed to check its drivers’ or potential drivers’ records, it said. *Id.* at ¶¶ 35-40. It noted the insurers’ claim that they needed the information to set rates, *id.* at ¶ 35, but it did not adopt or reject that

claim, *id.* at ¶ 39. Finally, the court held that statute's allocation of revenue was not "severable" from the fee increase, because it was "not possible" to implement the fee increase without the spending allocation. *Id.* at ¶ 44. Thus, it invalidated the fee increase, but it reinstated the prior version of R.C. 4509.05 and thus the prior two-dollar fee. *Id.* at ¶¶ 41-46.

THIS CASE RAISES SUBSTANTIAL QUESTIONS OF CONSTITUTIONAL LAW AND IS OF GREAT PUBLIC OR GENERAL INTEREST

A. Review is needed because the decision below created an uncertain and unworkable standard that threatens many of the General Assembly's and local governments' revenue and spending decisions.

Review is needed here not only because the result is wrong, but even if the result were somehow right on these facts, the decision sets a standard that is so uncertain and unworkable that myriad state and local budgeting structures are threatened. No one doubts that the government's power to collect revenue and to allocate spending are critical functions. *State ex rel. Zielonka v. Carrel* (1919), 99 Ohio St. 220, 222 ("[t]he right to impose taxes . . . is the highest and most necessary attribute of government"); *Bd. of Trs. of the Tobacco Use Prevention and Control Found. v. Boyce* (10th Dist.), 185 Ohio App. 3d 707, 2009-Ohio-6993, ¶ 33 (noting importance of allocation powers). Whatever policy disagreements exist on taxing and spending, we all need to know what the government can and cannot do, before we decide what it should do.

Here, the Tenth District's reading of Section 5a's "relating to" requirement is not just wrong, for the reasons detailed in the merits argument below, but it is uncertain and unworkable. The court itself acknowledged that the relationship it found was "attenuated," App. Op. at ¶ 35, and it even noted that "[t]he Truckers have not shown that members of the general motoring public need certified driving abstracts to register, operate, or use their vehicles," *id.* at ¶ 38. "In that sense," it said, "the fee for a certified abstract is not related to registration, operation, and use." *Id.* Nevertheless, it adopted the "attenuated" theory that *some* businesses use the

information in ways that link to driving, and it said that on the “existing set of facts” here, the fee is “void when applied to these facts.” *Id.* at ¶ 39. Judge Klatt’s well-reasoned dissent explained some of the problems with this standard. *Id.* at ¶¶ 51-56 (Klatt, J., dissenting).

The broad “related to” standard, especially by allowing for “as-applied” challenges based on how a given fee-payer *uses* an abstract, gives no concrete guidance for how state and local government could follow this ruling. First, even as to the abstract fee here, the State would need to know how a given requester will use the information, so it could know whether the revenues need to be segregated for highway purposes. After all, the restriction would not apply to fees from those who buy records for journalistic reasons (e.g., to write about traffic offenses) or for marketing a product, but it would apply only to fees from OTA and similar requesters.

Second, the reasoning below threatens not only abstract fees, but any fees from ordinary public-records requests, if the requester will use the information in a way “related to” driving. If the General Assembly abolished the specific abstract fee law, and the BMV treated abstracts like any other public record, charging a few cents per page, the reasoning below would still apply. Further, a trucking company or pizza delivery service or anyone might wish to ensure that its drivers have not committed other crimes, as it may not want to put sex offenders or violent felons behind the wheel or on customers’ doorsteps. So it could seek ordinary criminal-background-check records from county courthouses or sheriffs, as well as from state agencies, and the fees paid would “relate to” *that business’s use of the information to decide whether someone will operate a vehicle in a certain way*. Thus, every clerk providing a file will need to ask if a driving connection lurks in the background. Not only is that unworkable, but it rewrites a fundamental tenet of public records law: Public offices may *not* require a requestor to state her purpose in seeking a record. R.C. 149.43(B)(4)-(5). What was once forbidden will now be required.

Third, beyond affecting abstracts and public records, the reasoning below threatens various fees that are not directly imposed upon all drivers, but are indirectly linked to some drivers' ability to get on the road. For example, someone whose license is suspended after a DUI conviction must pay the BMV a license-reinstatement fee. See R.C. 4511.191(F)(2). And Ohio law also requires would-be drivers to pay certain criminal fines before obtaining a driver's license. R.C. 4510.22. The revenue from BMV's license-reinstatement fee is not dedicated to highway funding, but is distributed to a wide range of programs, including drug and alcohol abuse prevention and treatment, emergency medical services, and rehabilitation services for the disabled—some of which may result in matching federal funds. R.C. 4511.191(F)(2)(a)-(h). And of course, county courts do not set aside criminal fines for highway funding; they go to maintain our courts and for other local purposes.

Notably, the threat to these programs and to state and local government cannot be eliminated, for, again, the uncertainty is tied to "as-applied" variables that are outside the agencies' knowledge and control. Nor could these agencies (and the legislative authorities that govern them) avoid that uncertainty by setting *all* such funds aside prophylactically, because that is just not workable for categories as broad as all criminal fines. Moreover, even future changes cannot protect state and local agencies from the specter of multimillion-dollar demands for refunds of fees charged over the years, as OTA seeks here.

And none of this even has the "countervailing benefit" of restoring highway funding, as the decision below simply sends the money back to the fee payers, so funding for essential services is lost, without restoring a dime for highways. Not only would such an expansive approach and its drastic results be harmful, but even if that view were correct, the uncertainty calls for review sooner rather than later. If many funding programs must be restructured, everyone benefits if we

can start now, not after more years of uncertainty and growing liability for all state and local agencies with potential dedicated-funding issues.

B. Review is independently needed regarding the Tenth District’s remedy and standing holdings, as converting a spending-restraint issue into a fee-paying challenge creates a whole new category of litigation with massive implications.

Even if the appeals court’s ruling on the merits of the Section 5a issue were correct—and it is not—review is still needed here. The additional issues of standing and the remedy here are not minor procedural add-ons, but are fundamental issues that dramatically alter the landscape of all Section 5a cases—and all cases brought under analogous constitutional or statutory dedicated-funding provisions. Such cases typically involve attempts to restore funding to the “proper” purpose, and to stop “diversion” of funds. For example, Ohio’s Constitution (art. XV, sec. 6) requires lottery profits to be spent on education. So when a budgetary adjustment seemed to break that rule, citizens who had a concrete interest in education funding, such as a parent of a student, sued and obtained an order to restore the funds to schools. See *Ohio Roundtable v. Taft* (Franklin Com. Pl.), 119 Ohio Misc. 2d 49, 2002-Ohio-3669, ¶¶ 46, 130-32; *aff’d*, 2003 Ohio App. Lexis 3042, 2003-Ohio-3340, ¶¶ 59-62. Under the reasoning adopted below, by which “diverted spending” claims implicate the *collection* of the revenue in question, that case could have been brought by lottery players, who could have demanded their money back. If taxpayers and fee payers can demand such a remedy, such suits will of course grow, given the incentive for a refund, and the “protected cause” at issue will not see the money.

While standing is a threshold issue before the merits, and the remedy issue comes after the merits, the two are intertwined here because the standing issue depends upon looking ahead to the remedy issue—but the appeals court failed to recognize that. It found standing merely because OTA pays the fee, and it challenges the fee. But that reasoning is circular or

bootstrapping, letting plaintiffs grant themselves standing by asserting what they will win. If, as it should be, a court first acknowledges that the only available remedy is to restrain the spending, a court must then review the “causation” and “redressability” prongs of the standing inquiry in light of that result. Here, OTA’s purported injury—payment of fees—is not *caused* by the challenged allocation of funds, and the remedy available to OTA—enjoining the misallocation and reallocating the funds to a “proper” use—necessarily cannot redress their injury.

Further, on top of the appeals court’s failure to properly consider this mismatch at the standing stage, its remedy analysis needs review on its own terms, as it ignored this Court’s settled law. The Court has explained for a century that the collection and distribution of revenue are distinct acts, so that even when misspending occurs, that does *not* implicate revenue collection. *Edmondson*, 89 Ohio St. at 114; *Friedlander*, 126 Ohio St. at 168; see also *State ex rel. Lampson v. Cook* (1932), 44 Ohio App. 501, 512 (“Distribution is separate from and independent of the levy of the tax, so that the validity or invalidity of the former does not affect the latter.”). The appeals court did not even acknowledge these cases, let alone distinguish them, despite BMV’s citation of them.

Instead, the court applied a “severability” test under *Geiger v. Geiger* (1927), 117 Ohio St. 451, and it concluded that it was “impossible” to accept the fee hike without the spending allocation. But *Edmondson* and progeny say that it is not only possible, but certain, that revenue collection is separate from spending. And the *Geiger* test is to reflect legislative intent, and it defies common knowledge of budget realities to say that the General Assembly would say, “if we can’t use the money this way, we’d rather not have it at all, even for highway purposes.”

To the extent that OTA argued below, and the court referred to in passing, the notion of “special fund” standing, that is another reason for review. In some circumstances, a payer into a

fund has standing to address spending, even if it cannot cancel its own payment obligations. While OTA does not meet that test here, any questions on that score warrant review, as shown by the Court's recent decision to review that very issue—but it did not resolve it once the case was dismissed as improvidently allowed. See *State ex rel. N. Ohio Chapter of Associated Builders & Contractors, Inc. v. Barberton City Sch. Dist. Bd. of Educ.*, 128 Ohio St. 3d 539, 2011-Ohio-2252.

All of these reasons call for review, because of the doctrinal uncertainty alone, the opening for expanded litigation, and other reasons. In addition, the decision below is in tension with another recent Section 5a decision by the Tenth District, *Beaver Excavating Co. v. Levin* (10th Dist.), 2011-Ohio-3649, jurisdictional appeal pending, No. 2011-1536. While that case is distinct, for reasons that the Tax Commissioner has briefed in that case, the BMV notes here that this case is a better vehicle for resolving all related issues, as only this case involves a decision that explored the standing and remedy issues. The *Beaver* decision involved only the Section 5a merits issue there, so this case's review is needed to resolve all of the uncertainties.

C. Review is needed because the Tenth District's decision threatens funding for essential government services.

Review is also needed solely because of the practical effects of the decision below, as it causes the immediate cutoff of funding for essential services, including DPS programs related to emergency management and homeland security. In FY 2011, for example, revenue from the abstract fee increase comprised eighty-nine percent of the state operating funds for the Ohio Emergency Management Agency and almost two-thirds of the state operating funds for the DPS's Ohio Homeland Security and Ohio Emergency Medical Services divisions. Those agencies also pass through federal funding to local programs. But without state money to trigger federal matching funds, and without state-level personnel to process the grants, that money is

indirectly threatened as well. (The Tenth District, although erring on the merits, properly recognized the immediacy of the funding cutoff and granted a stay of its decision pending this Court's disposition. OTA, to its credit, did not oppose that stay.)

Likewise, the decision creates practical funding problems for other state and local agencies. As explained above, the decision below threatens other funds, and as a corollary, that creates funding concerns for those other agencies. In sum, this case needs to be reviewed.

ARGUMENT

Appellant BMV's Proposition of Law No. 1:

A party seeking to challenge a fee or tax has no standing to do so if its objection is based solely upon allegedly improper spending, as the alleged injury of paying fees is not caused by the alleged spending violation, and would not be redressed by restraining the challenged spending. Further, "special fund" standing does not exist for those who purchase title abstracts.

As explained above, the standing inquiry, although a threshold issue, turns upon looking ahead to the available remedies for a Section 5a violation, and then addressing standing in light of that. To establish standing, a plaintiff must demonstrate: (1) injury, (2) causation, and (3) redressability. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 469-70, 1999-Ohio-123. OTA fails on the second and third prongs. OTA lacks standing to bring this challenge because its members' asserted injury—fee payment—is not *caused* by the conduct it says is unconstitutional—the spending. Moreover, the only remedy to which it would be entitled—enjoining the spending—will not redress their injury. See, e.g., *Bonner Springs Unified Sch. Dist. No. 204 v. Blue Valley Unified Sch. Dist. No. 229* (Kan. Ct. App. 2004), 95 P.3d 655, 660. Nor could OTA alternatively establish standing based on the narrow "special fund" doctrine. OTA's members are not contributors to a special fund, just as the plaintiff who paid gasoline taxes used to fund the department of transportation and the highway patrol was not

a “special fund” plaintiff. See *State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, 2006-Ohio-367 ¶¶ 7, 9. Such an expansive view of “special fund” doctrine would swallow the rule and effectively create a right to generalized taxpayer standing, which the Court has rejected. *Id.* at ¶ 9.

OTA’s claim to standing is premised upon the idea that the fee increase and its spending objections are linked, but they are wrong. To be sure, the BMV concedes that *if* they are linked, standing exists, and the Court should proceed to the rest of the case. But here, as shown above and again in Proposition No. 3 below, the case for “nonseverability” fails, both on this Court’s settled precedent, and even applying the *Geiger* test that the Tenth District used.

The ultimate issue here is an implausible claim—namely, that the General Assembly would, if asked, prefer not to have the extra revenue at all, if it could use it only for highway funds and not for homeland security. Beyond that inherent implausibility, the Court has already drawn a sharp line between revenue collection and allocation. See *Edmondson*, 89 Ohio St. at 114; *Friedlander*, 126 Ohio St. at 168. Thus, because OTA could not seek invalidation of the fee, even if successful on showing a Section 5a violation, it has no standing.

Appellant BMV’s Proposition of Law No. 2:

Fees charged for obtaining drivers’ abstracts are not “related to” operating a vehicle, and thus do not trigger Section 5a’s spending restraint, because they are not fees generally charged to the motoring public as a condition on using public roads.

As an exception to the constitution’s general grant of legislative power, Section 5a must be narrowly construed. *Pioneer Linen Supply Co. v. Evatt* (1946), 146 Ohio St. 248, 250-51. Moreover, a strong presumption of constitutionality attaches to the legislature’s action. *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546 ¶ 25. The challenged revenue distribution must be upheld “if [it] may plausibly be interpreted as permissible” under Section 5a. *Ohio Grocers Ass’n v. Levin*, 123 Ohio St. 3d 303, 2009-Ohio-4872 ¶ 11.

Applying that standard, the fee here is not “related to” highway use. OTA presses for a broad interpretation of this phrase, but that is inconsistent with this Court’s requirement that such restraints be construed narrowly. More important, their position does little to answer the critical question presented by this case: which taxes and fees were intended to fall within Section 5a’s scope? When enacted, the intent of Section 5a was understood. As the Tenth District noted, Section 5a was meant to ensure that the motoring public, or road users, would bear the expense of the roads’ upkeep. App. Op. at ¶ 34. Thus, the nature of fee is dispositive. Section 5a applies only to a tax or fee that is assessed on users, registrants, or operators of motor vehicles—that is, members of the motoring public.

The abstract fees thus do not trigger Section 5a. OTA is correct that the abstracts themselves reflect information about an individual’s use of public roads. But the fee is a service fee. It has nothing to do with ensuring that individuals who use Ohio’s roads contribute to their upkeep. Nor is a relationship created because OTA’s members use abstracts to consider whether they will hire someone as a driver. That standard is untenable because it turns not on the legal relationship established by statute, but on facts that differ according to each person’s use of the information. That is not supported by the text or history here, and is not workable, either.

Appellant BMV’s Proposition of Law No. 3:

Absent an express statement by the General Assembly, the collection and expenditure of revenue are conclusively presumed to be severable, so the proper remedy for a Section 5a violation is to restrict spending, not collection.

The Tenth District overlooked the principle, explained above, that legislative choices regarding revenue collection and allocation are distinct and inherently severable. *Edmondson*, 89 Ohio St. at 114. Undoubtedly, the General Assembly is free to require that provisions raising revenue and disbursing that same revenue rise and fall together. But absent a clear statement, it

should be conclusively presumed that such was not its intent. After all, the General Assembly has mandated in R.C. 1.50 that statutory provisions are intended to be severable *where possible*. This rule of severability has particular force in the context of revenue collection and allocation. That a legislative choice concerning the latter is deemed improper should not justify setting aside the legislative choice concerning the former. This presumption also comports with budgetary reality. Absent an indication to the contrary, it is hard to believe that any legislature would elect to forgo revenue rather than simply reallocate it.

For its severability analysis, the Tenth District relied on *Geiger v. Geiger* (1927), 117 Ohio St. 451, rather than apply the above presumption. A correct reading of *Geiger* leads to the same result, however. The presumption is merely shorthand. The *Geiger* test asks three questions:

(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

Id. at 466. Subsections (B) and (C) of R.C. 4509.05 can each stand alone. The Tenth District erred in concluding that it was impossible to sever the two without frustrating legislative intent. The legislative intent in amending R.C. 4509.05 was twofold: (1) to raise additional revenue and (2) to distribute that revenue to specified programs. Striking the offending portion of subsection (C) affects only the latter, not the former.

Nor is it correct that in order for the fee increase to stand, a court would be required to insert language to give effect to the remaining portion of the statute. Obviously, striking the purportedly unconstitutional portion of subsection (C) would leave no statutory instructions for how that revenue is to be dispersed. But should that occur, BMV could simply continue to collect the abstract fee and await guidance from the General Assembly.

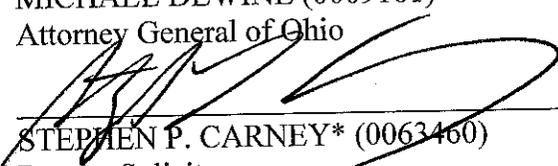
Thus, even if OTA is correct in showing a Section 5a violation, the Tenth District erred in concluding the proper remedy was to strike the entire amendment and to reinstate the prior version of R.C. 4509.05. When such a spending violation occurs, the proper remedy is to enjoin the spending. The task of identifying an alternative spending regime—or instead reversing the decision to raise revenue—rests with the legislature. At a minimum, therefore, that part of the judgment should be vacated and the case remanded with instructions to craft a proper remedy.

CONCLUSION

For the above reasons, the Court should accept jurisdiction, reverse the Tenth District and remand with instructions that OTA's complaint be dismissed.

Respectfully submitted,

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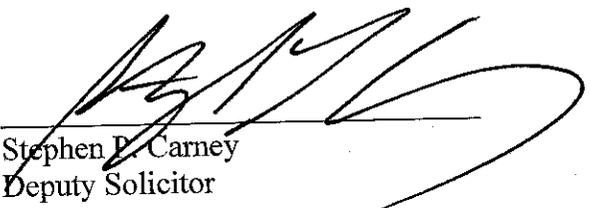
Director, Department of Public Safety, et al.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Defendants-Appellants Thomas Charles, et al., was served by U.S. mail this 14th day of October, 2011, upon the following counsel:

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APPENDIX

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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Ohio Trucking Association et al.,
:
Plaintiffs-Appellees/
[Cross-Appellants],
:
v.
:
Director Thomas Stickrath et al.,
[Ohio Department of Public Safety],
:
Defendants-Appellants/
[Cross-Appellees].
:

No. 10AP-673
(C.P.C. No. 09CVH07-10813)
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on August 30, 2010, appellants' assignments of error are overruled. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellants.

TYACK & CONNOR, JJ.

By *Gary Tyack*
Judge G. Gary Tyack

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FILED
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FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

Ohio Trucking Association et al.,
:
Plaintiffs-Appellees/
[Cross-Appellants],
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Director Thomas Stickrath et al.,
[Ohio Department of Public Safety],
:
Defendants-Appellants/
[Cross-Appellees].
:

No. 10AP-673
(C.P.C. No. 09CVH07-10813)

(REGULAR CALENDAR)

D E C I S I O N

Rendered on August 30, 2011

*Vorys, Sater, Seymour and Pease LLP, Lisa Pierce Reisz,
Thomas E. Szykowny and Kenneth J. Rubin, for appellees.*

*Michael DeWine, Attorney General, Todd A. Nist, Hilary R.
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APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} This case is a challenge to an amendment to R.C. 4509.05, which increased the fee charged by the Ohio Bureau of Motor Vehicles ("BMV") for obtaining certified abstracts of driving records. Plaintiffs-appellees claim that the increased fee that

allocates additional moneys to non-highway related purposes violates Section 5a, Article XII, of the Ohio Constitution ("Section 5a"). The trial court agreed that the amended statute violated the Ohio Constitution, and defendants-appellants ("the state") have appealed.

{¶2} The case originated as a complaint for injunctive relief and a declaratory judgment in the Franklin County Court of Common Pleas regarding a July 1, 2009 amendment to R.C. 4509.05. Plaintiffs-appellees, for this appeal, are the Ohio Trucking Association, the Professional Insurance Agents Association of Ohio, Inc., and the Ohio Insurance Institute. Collectively we shall refer to them as the ("Truckers"). The state defendants, now appellants, are the director of the Ohio Department of Public Safety and the acting registrar of the BMV.

{¶3} Section 5a, adopted by initiative petition in 1947, provides as follows:

Use of Motor Vehicle License and Fuel Taxes Restricted.

§5a 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 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 the public highways. (1947)

{¶4} As amended effective July 1, 2009, R.C. 4509.05 provides, in relevant part, as follows:

(A) Upon request, the registrar of motor vehicles shall search and furnish a certified abstract of the following information with respect to any person:

(1) An enumeration of the motor vehicle accidents in which such person has been involved * * *;

(2) Such person's record of convictions for violation of the motor vehicle laws.

(B) The registrar shall collect for each abstract a fee of five dollars.

* * *

Of each five-dollar fee the registrar collects under this division, the registrar shall pay two dollars into the state treasury to the credit of the state bureau of motor vehicles fund * * *, sixty cents into the state treasury to the credit of the trauma and emergency medical services fund * * *, sixty cents into the state treasury to the credit of the homeland security fund * * *, thirty cents into the state treasury to the credit of the investigations fund * * *, one dollar and twenty-five cents into the state treasury to the credit of the emergency management agency service and reimbursement fund * * * and twenty-five cents into the state treasury to the credit of the justice program services fund * * *.

{¶5} The prior version of R.C. 4509.05(B) required the registrar to collect a \$2 fee to be paid into the Bureau of Motor Vehicles fund ("BMV fund"). The BMV fund is "used to pay the expenses of administering the law relative to the powers and duties of the registrar of motor vehicles." R.C. 4501.25. The former statute, R.C. 4509.05(C), did not allocate collected fees to the other state funds enumerated in the revised statute. In other words, the current statute in section (B) substituted \$5 for \$2 and rewrote section (C).

{¶6} The Truckers also included a claim for declaratory and injunctive relief that the amended statute violated R.C. 149.43(B) and Ohio public policy regarding access to public records.

{¶7} The parties stipulated to the relevant facts and fully briefed the issues. The trial court conducted a hearing on the merits on March 19, 2010. On June 8, 2010, the trial court issued its opinion finding in favor of the Truckers on the claim that R.C. 4509.05 was unconstitutional and dismissing the public records claim.

{¶8} On appeal, the state has assigned the following as error:

[I.] Appellees do not have standing to assert their claim that R.C. 4509.05 violates Article XII, Section 5a of the Ohio Constitution because they suffer no harm from any potential constitutional violation.

[II.] The lower court erred in determining that R.C. 4509.05(C) violates Article XII, Section 5a of the Ohio Constitution because the statute does not authorize any expenditure and therefore cannot violate the Spending Restraint.

[III.] The Spending Restraint does not apply to revenue generated from the certified abstract fee because that fee does not relate to registration, operation, or use of a motor vehicle.

[IV.] The lower court erred when it determined that the distribution provision in R.C. 4509.05 is not severable from the remainder of the statute.

{¶9} The Truckers have filed a cross-appeal asserting the following:

~~The trial court erred in holding that Appellees cannot seek declaratory relief to determine whether records are public under R.C. § 149.43(C).~~

{¶10} In the first assignment of error, the state raises the issue of standing. The state contends that the Truckers do not suffer any harm from the alleged constitutional error, and therefore, they cannot challenge the statute under the general standing test set forth in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469, 1999-Ohio-123. The state further argues that the Truckers do not have any injury different from that shared by the general public and, accordingly, their lawsuit is merely a taxpayer action lacking standing.

{¶11} Lack of standing challenges a party's capacity to bring an action. It is well-established that, before an Ohio court may consider the merits of a claim, the party seeking relief must establish standing to sue. *Id.* Elements of standing are an indispensable part of a plaintiff's case. *Bourke v. Carnahan*, 163 Ohio App.3d 818, 2005-Ohio-5422, ¶10. The Supreme Court of Ohio has noted that, "[t]he requirement of standing is not designed to shield agencies and officials from accountability to taxpayers; instead, it denies the use of the courts to those who, while not sustaining a legal injury, nevertheless seek to air their grievances concerning the conduct of government. The doctrine of standing directs those persons to other forums." *Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317, 321.

{¶12} In *Ohio Academy of Trial Lawyers*, the Ohio Supreme Court stated as follows:

~~*** In order to have standing to attack the constitutionality of a legislative enactment, the private litigant must generally show that he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has~~

caused the injury, and that the relief requested will redress the injury. * * *

Id. at 469-70 (Citations omitted; emphasis added.)

{¶13} An injury, in fact, is defined as "an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent, not hypothetical or conjectural." *Bourke* at ¶10, citing *Lujan v. Defenders of Wildlife* (1992), 504 U.S. 555, 560, 112 S.Ct. 2130, 2136. With respect to declaratory relief, a party lacks standing to sue unless the party is affected by or has a material interest in the contested subject matter of the suit. *Murr v. Ebin* (May 6, 1997), 10th Dist. No. 96APE10-1406.

{¶14} In *Ohio Licensed Beverage Assn. v. Ohio Dept. of Health*, 10th Dist. No. 07AP-490, 2007-Ohio-7147, this court set forth the standing requirements in an action brought by a trade association:

* * * [A] trade association that has not suffered any injury nonetheless has standing on behalf of its members if (a) its members would otherwise have standing to sue in their own right; (b) the interests the association seeks to protect are germane to the association's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. * * *

Id. at ¶14, quoting *Thompson v. Hayes*, 10th Dist. No. 05AP-476, 2006-Ohio-6000, ¶56-57.

{¶15} Here, the Truckers are not simply taxpayers who are unhappy with a legislative enactment regarding the expenditure of their tax dollars. They are trade associations whose members collectively purchase millions of certified abstracts each year. According to the stipulated facts, members of the Ohio Insurance Institute purchase

approximately 4.5 million certified abstracts in connection with claims investigation, anti-fraud activities, and rating or underwriting coverage. The members of the Ohio Trucking Association purchase approximately 625,000 certified abstracts in order to verify information relating to commercial driver's license holders to assure compliance with the Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. 2710. Members of the Professional Insurance Agents Association of Ohio, Inc., also purchase thousands of abstracts. According to the record, the BMV Customer Service Center in Columbus, Ohio is the sole source for such data. The increase more than doubles the fees they must pay. The injury to the Truckers in the form of increased fees is different in degree than that suffered by the public at large due to the volume of request made annually.

{¶16} Assuming, for purposes of determining standing, that the fee increase is unconstitutional, the Truckers stand to lose millions of dollars if they must continue to pay the challenged fee. As contributors to the BMV fund created by R.C. 4501.25 and as entities that rely heavily on the BMV, the Truckers have a direct interest in determining the constitutionality of the amended statute. The allegedly unconstitutional fee jeopardizes their own property rights. As monetary contributors to the special funds, they have standing to challenge the fees because they have suffered monetary damages. The Truckers suffer the most if the legislature has piggybacked an unconstitutional fee increase on top of a lawful fee. In light of these facts, we find that the members of these associations would otherwise have standing to sue in their own right; the interests the associations seek to protect are germane to the associations' purposes; and, neither the

claims asserted nor the relief requested requires the participation of individual members in the lawsuit.

{¶17} Therefore, the first assignment of error is overruled.

{¶18} In the state's second assignment of error, the state argues that nothing in Section 5a prohibits the ability of the General Assembly to raise revenue or apportion funds, and therefore any constitutional violation arises from the expenditure of funds drawn from the treasury. For example, the state claims that the expenditure of funds from the Homeland Security fund occurs under R.C. 5502.03, not the statute at issue here, R.C. 4509.05.

{¶19} This argument is obviated by a stipulated fact that reads as follows:

Each "fund" listed in R.C. 4509.05(C)¹ as receiving a portion of the proceeds from the five-dollar fee imposed under the statute is established pursuant to statute. The moneys in each of those funds, other than the state bureau of motor vehicles fund established in R.C. 4501.25, are not expended for the "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 the public highways. Ohio Constitution, Article XII, §5a.

{¶20} In other words, the apportionment is tied to spending because it requires the money be spent in particular ways, and the parties have stipulated that the state

¹ As amended, R.C. 4509.05(C) provides for distribution of each \$5 certified abstract fee to the following "funds": the State Bureau of Motor Vehicles Fund (\$2); the Trauma and Emergency Medical Services Fund (\$.60); the Homeland Security Fund (\$.60); the Investigations Fund (\$.30); the Emergency Management Agency Service and Reimbursement Fund (\$1.25); the Justice Program Services Fund (\$.25).

spends the money in ways inconsistent with the Ohio Constitution. The second assignment of error is overruled.

{¶21} In its third assignment of error, the state argues that the fee increase does not violate Section 5a of the Ohio Constitution because the fee money at issue does not "relate to registration, operation, or use of a motor vehicle." The Truckers assert that the term "relating to" contained in Section 5a is a broad term that must be construed broadly to achieve the goal of the constitutional amendment. The issue becomes one of line drawing. The question we must answer is whether the \$3 fee increase relates to the registration, operation, or use of a motor vehicle.

{¶22} The pertinent language of the 1947 amendment to the Ohio Constitution, set forth in toto, reads as follows:

No moneys derived from fees * * * relating to registration, operation, or use of vehicles on public highways * * * 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 * * *.

{¶23} In *Beaver Excavating Co. v. Levin*, 10th Dist. No. 10AP-581, 2011-Ohio-3649, this court was called upon to address the constitutionality of Ohio's commercial activity tax ("CAT") in connection with motor fuel sold by contractors. We held that the CAT as applied to motor vehicle fuel sold by contractors did not violate Section 5a. Some of the analysis in that case is relevant to the instant case. Therefore, we shall apply much of the same reasoning and language used in *Beaver Excavating* without explicit citations to that decision but, rather, citations to the underlying cases.

{¶24} Any constitutional analysis must begin with the presumption of constitutionality enjoyed by all legislation. *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶25. Before a court may declare unconstitutional an enactment of the legislative branch, "it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Id.*, quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus. When a statute is challenged on the ground that it is unconstitutional as applied to a particular set of facts, the party making the challenge bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statute unconstitutional and void when applied to those facts. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶38.

{¶25} When the courts construe a statute or constitutional provision, "the object of the people in adopting it should be given effect; the polestar in the construction of constitutional, as well as legislative, provisions is the intention of the makers and adopters thereof." *Castleberry v. Evatt* (1946), 147 Ohio St. 30, paragraph one of the syllabus. The Ohio Supreme Court has described how to construe a constitutional amendment adopted by initiative petition as follows: "[T]his 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. Fomey* (1923), 108 Ohio St. 463, 466 (quoting *State ex rel. Greenlund v. Fulton* (1919), 99 Ohio St. 168, 200). Technical hair-splitting distinctions are not favored when applying the common words of the people. *Id.* at 201.

{¶26} "The first step in determining the meaning of a constitutional provision is to look at the language of the provision itself." *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 520, 1994-Ohio-496. "Words used in the Constitution that are not defined therein must be taken in their usual, normal, or customary meaning." *State ex rel. Taft v. Franklin Cty. Court of Common Pleas*, 81 Ohio St.3d 480, 481, 1990-Ohio-333.

{¶27} "If the meaning of the constitutional provision is clear on its face, courts will not look beyond the provision in an attempt to divine what the drafters intended it to mean." *Gough v. Triner*, 7th Dist. No. 05 CO 33, 2006-Ohio-3522, ¶15, citing *Sheward* at 520. However, if the meaning of the constitutional provision cannot be ascertained by its plain language, courts may look to the purpose of the amendment to determine its meaning. *Id.* Courts can look to the history of the time when it was passed, the circumstances at the time of its adoption, the need for the provision, the mischief sought to be avoided, and the remedy intended to be afforded. *Id.* citing *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, at ¶14; *Cleveland v. Board of Tax Appeals* (1950), 153 Ohio St. 97, 103.

{¶28} Here, the plain language of Section 5a states that fees, excise taxes, and license taxes relating to registration, operation, or use of a motor vehicle must be expended exclusively for specific purposes contained in the amendment.

{¶29} The "relating to" language of Section 5a can only be described as ambiguous. Taken to the broadest possible extent, everything is related in some way to everything else. See *California Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.* (1997), 519 U.S. 316, 335-36, 117 S.Ct. 832 (Scalia concurring).

An extremely broad construction of the "relating to" language could lead to absurd results. However, a narrow rendering could thwart the intention of the citizens of Ohio when they voted for Section 5a. In the ERISA preemption context the United State Supreme Court has stated, "[w]e simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* (1995), 514 U.S. 645, 656, 115 S.Ct. 1671.

{¶30} At the time Section 5a was submitted to the voters for their approval, the Ohio Secretary of State prepared and published, in accordance with Article II, Section 1g, Ohio Constitution and G.C. 4785-180b, an official publicity pamphlet, setting forth the arguments in favor of, and the arguments in opposition to, the proposed amendment. Ohio Atty.Gen.Ops. No. 82-084.

{¶31} The argument in favor stated, in pertinent part:

This Amendment simply says you want your automobile license and gas tax money to go for better roads and streets. Many Ohio highways are behind the times, and must be improved for post-war traffic.

Many streets are dangerous traffic bottle-necks.

We are disgusted with slow moving traffic in congested areas, dusty, winter mired-in roads in rural districts, and alarmed at the traffic toll on narrow roads and bridges with death inviting curves.

Ohio originally promised that automobile license and gas tax funds would go for roads, streets, and related purposes. But temptation was too great and millions of these special tax dollars have been and are being spent for other purposes. This is your chance to correct these conditions. The same thing happened in other states, but nineteen states, including

Michigan, Pennsylvania, Texas, Iowa, California, Minnesota, Oregon and Kentucky, have acted to protect their road funds by amending their constitutions. Ohio now has this opportunity.

....
Road and street improvement costs have increased. Ohio needs road money to tie-in with the promised federal highway program which will include many city streets and rural roads. It is imperative that motor vehicle taxes be used exclusively for roads and streets.

Remember, this Amendment does not increase the rate of any tax nor place restrictions on the allocation of revenues by the Legislature. It is your insurance for better roads and streets. Vote "YES" for the "Better Roads and Streets Amendment" and put Ohio on the honor roll of progressive states."

{¶32} The opponents argued as follows:

NO TAX REDUCTION. This amendment holds no promise of a tax reduction. If revenues thus provided for road purposes without specific appropriations exceed the actual needs for the roads, unnecessary expenditures and misuse of the excess funds will be encouraged.

....
BAD POLICY. This amendment places the Legislature in a strait-jacket and severely handicaps it in applying the revenue of the state to the needs of the state. The Legislature could not use highway revenues for emergency purposes and the revenues from such taxes will have to be spent for roads and streets and for no other purpose.

NOT NEEDED. Taxes levied upon automobile owners allocated by law for the construction and maintenance of roads and streets are the 3¢ motor vehicle fuel tax and motor vehicle license fees. The 1¢ per gallon liquid fuel tax is used to pay general governmental obligations. Liquid fuel tax revenues add approximately \$15,000,000 annually to the state general revenue fund. ~~Appropriations are now made~~ by the Legislature from this fund to the Department of Highways and political sub-divisions. Since the Legislature can and has appropriated this money for highway purposes, there is no need for the amendment.

{¶33} In 1972, the Ohio Constitutional Revision Committee Finance and Taxation Committee created a report containing information about the history and background of Section 5a, and how those types of "good roads" amendments have been interpreted in other states. The report summarized the purpose of Section 5a as requiring "that all of the revenues derived from the registration of motor vehicles and from the taxes imposed on the purchase of fuels for motor vehicles be expended on the requirements of the state's highway system." 4 Ohio Constitutional Revision Commission Finance and Taxation Committee at 1755 (Sept. 22, 1972). The report summarized three major earmarked taxes on the operation of motor vehicles and the use of the highways in the state. The taxes were the gasoline or motor vehicle fuel tax, the highway use tax, and the motor vehicle license or registration tax. A fourth tax, the transportation tax, was levied upon common and contract carriers. *Id.* at 1758.

{¶34} A review of this background and history shows that the objective of Section 5a was and is to prevent taxes and fees collected from the motoring public from being diverted to non-highway purposes. Without the constitutional amendment, the legislature was free to divert moneys for emergencies or other priorities. After Section 5a was enacted, it was clear that moneys derived from vehicle registration fees were to be used solely for highway purposes, as well as gasoline taxes and license fees. Having gas and license fees exclusively applied to highway purposes also allowed Ohio to receive matching federal funds for road construction. The effect of Section 5a is for those people who use the roads to bear the burden and expense of constructing and maintaining the roads.

{¶35} The relationship between certified abstracts and the registration, operation, or use of vehicles is more attenuated. One cannot legally operate a motor vehicle in this state without proof of financial responsibility. R.C. 4509.10.1. The Truckers argue that certified abstracts are needed to obtain driver information and history in order that insurance companies can set rates for drivers to be able to show proof of financial responsibility. The state argues that there must be a *direct* relationship between the fee and something necessary to register, operate, or use a vehicle. The Truckers argue that the state is reading the word "directly" into the constitutional provision.

{¶36} The Truckers also argue that certified abstracts are necessary to fulfill federal requirements for holders of commercial driver's licenses. For example, The Federal Driver's Privacy Protection Act regulates the use by states of information contained in motor vehicle records. 18 U.S.C.A. § 2721(b)(3)(B)(9) permits disclosure of personal information in connection with a motor vehicle record "[f]or use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49."

{¶37} 49 U.S.C.A. sec. 31304 states that:

An employer may not knowingly allow an employee to operate a commercial motor vehicle in the United States during a period in which the employee--

(1) has a driver's license revoked, suspended, or canceled by a State, has lost the right to operate a commercial motor vehicle in a State, or has been disqualified from operating a commercial motor vehicle; or

(2) has more than one driver's license * * *.

{¶38} The question thus becomes whether the \$3 increase in the certified abstract fee relates to the registration, operation, or use of vehicles on public roadways in such a way that Section 5a's prohibition on where such moneys may be spent is triggered. The Truckers have not shown that members of the general motoring public need certified abstracts to register, operate, or use their vehicles on public highways in this state. In that sense, the fee for a certified abstract is not related to registration, operation, or use.

{¶39} However, the Truckers have shown a more particularized need for certified abstracts of commercial drivers. Holders of commercial driver's licenses have to comply with stringent requirements, both state and federal, to be allowed to operate different types of commercial vehicles on public highways. Without the information from certified abstracts, their ability to operate commercial vehicles would be impaired. Even under the state's analysis, this is a direct relationship between the need for certified abstracts and the ability of holders of commercial driver's licenses to be legally allowed to operate a commercial vehicle on public highways. Accordingly, we conclude that fees to obtain certified abstracts are related to the operation of vehicles on public highways. Therefore, Section 5a requires that those moneys cannot be used for anything other than highway purposes. Since the state has conceded that the funds listed in R.C. 4509.05(C) that receive a portion of the proceeds from the \$5 fee imposed under the statute (other than the state BMV fund) are not expended for highway purposes, the Truckers have ~~presented evidence of a presently existing set of facts that make the statute~~ unconstitutional and void when applied to those facts. *Harrold* at ¶38.

{¶40} The third assignment of error is overruled.

{¶41} In their fourth assignment of error, the state contends that the trial court erred in striking amended R.C. 4509.05 in favor of its predecessor. The state argues that the offending portion of the statute (the allocations to funds other than the BMV fund) could be severed and the \$5 fee could remain. We disagree.

{¶42} The Supreme Court of Ohio follows a three-part test for severability. Recently, in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶65, the Supreme Court of Ohio reiterated the test as follows:

" * * * Three questions are to be answered before severance is appropriate. " ' "(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?" ' "

State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856, ¶93-95, quoting *Geiger v. Geiger* (1927), 117 Ohio St. 451, 466, quoting *State v. Bickford* (1913), 28 N.D. 36, 147 N.W. 407, paragraph 19 of the syllabus.

{¶43} Applying this test, the constitutional and unconstitutional parts of the second paragraph of R.C. 4509.05(C) are capable of separation, and each may stand by itself. The first part of the sentence "[o]f each five-dollar fee the registrar collects under this division, the registrar shall pay two dollars into the state treasury to the credit of the state bureau of motor vehicles fund established in section 4501.25 of the Revised Code * * *" is constitutional and may stand by itself.

{¶44} However, under the second part of the test, the rest of the paragraph is so tied to the general scope of the amended statute that it is not possible to give effect to the apparent intention of the legislature. If the unconstitutional portion is severed, the \$5 fee will still be collected but \$3 of that fee will not be allocated or disbursed. This was not the apparent intent of the General Assembly when it passed the amended statute. While it may be odd that the legislature chose to target the trucking industry and the insurance industry with the responsibility for funding the trauma and emergency medical services fund, homeland security, the investigation fund, the justice program services fund, and the emergency management agency service and reimbursement fund, we are only charged with deciding whether the legislature's exercise of its power comports with or violates the Ohio Constitution. *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, ¶30. As previously discussed, the present allocations do not comport with Section 5a of the Ohio Constitution. The effect of the amendment is to raise specific revenue for non-Section 5a funds by means of a fee increase on those using records of the BMV.

{¶45} With respect to part three of the severability test, additional words or terms are necessary to provide meaning and context to the statute if the offending language is removed. If the court were to strike just the unconstitutional language from the statute, new language would be needed to explain where the additional \$3 of the fee would be allocated. It is not clear whether the legislature would seek to raise the allocation to the BMV fund to \$5, or if the legislature would select a different amount. This is a task for the legislature and not for the judiciary.

{¶46} Having found the test for severability has not been met, the fourth assignment of error is overruled.

{¶47} The Truckers filed a cross-appeal claiming that the trial court erred in dismissing their claim for injunctive relief on their public records request. The Truckers contend that mandamus is not the sole remedy for a public records request and that they should have been granted a prospective declaration that the state cannot deny a public records request for an unredacted driving record.

{¶48} We find that the Trucker's request for a declaration is not the correct vehicle to obtain a judicial determination that certain documents are public records. R.C. 149.43(C)(1) states that the proper vehicle to seek compliance with a public records request is an action in mandamus. In this case, the request for an unredacted copy of an abstract was denied by the BMV. But there has been no judicial determination in mandamus as to whether the document in the form it was requested is a public record. A declaration that unredacted abstracts are public records bypasses the procedure set forth in R.C. 149.43(C)(1).

{¶49} The Truckers implicitly realized the statute calls for mandamus as the appropriate remedy because they sought to amend their complaint at the eleventh hour to add a claim for mandamus. The trial court was within its discretion to deny the request.

{¶50} Based on the foregoing, we overrule the state's four assignments of error, and we also overrule the cross-appellants' single assignment of error. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

CONNOR, J., concurs.
KLATT, J., dissents.

KLATT, J., dissenting.

{¶51} Because I do not agree that R.C. 4509.05 violates Section 5a, Article XII, Ohio Constitution, I respectfully dissent from the majority decision. I reach this conclusion for the following reasons.

{¶52} The lens through which we must assess an as applied constitutional challenge to a state statute is well-established. "All statutes have a strong presumption of constitutionality." *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶25. Before a court may declare unconstitutional an enactment of the legislative branch, "it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Id.*, quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus. The party challenging the statute bears a heavy burden of persuasion. *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶11. That party must show by clear and convincing evidence that the statute is unconstitutional and void as applied to the facts presented. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶38.

{¶53} In addition, because Section 5a is an exception to the legislature's general authority to spend state revenues for general purposes, it must be strictly construed. *Pioneer Linen Supply Co. v. Evatt* (1946), 146 Ohio St. 248, 250-51; *State ex rel. Keller v. Fomey* (1923), 108 Ohio St. 463, paragraph one of the syllabus. Therefore, we must uphold the revenue distribution set forth in R.C. 4509.05 "if [the distribution] may plausibly

be interpreted as permissible" under a strict construction of the constitutional language. *Ohio Grocers*, at ¶11.

{¶54} The majority decision correctly recognizes that "[t]he 'relating to' language of Section 5a can only be described as ambiguous." For the reasons cited in the majority decision, I am also persuaded that the original purpose of Section 5a was to reserve funds obtained from taxes and fees imposed on highway users for use on highway projects and for the administration of the laws pertaining to highway use. The majority decision also recognizes that the relationship between the fee for certified abstracts and the "registration, operation, or use of vehicles on public highways" is more attenuated than the type of taxes and fees that gave rise to Section 5a. I agree with the majority decision that there is an indirect relationship between the abstract fee and the registration, operation, or use of vehicles on public highways. The key issue boils down to how direct must that relationship be to trigger the spending limitation set forth in Section 5a.

{¶55} Here, the fee at issue is charged to persons who are purchasing information. This fee is not charged to users of public highways. Although there may be a logical connection between the reason this information is purchased and the registration, operation, or use of vehicles on public highways, we must give the words "relating to" a narrow construction in this context. Narrowly construing this limitation on the legislature's power to impose fees and to spend revenue, I believe the relationship between the fee at issue here and the registration, operation, or use of vehicles on public highways is not direct enough to invoke Section 5a's spending limitation. Therefore, I

cannot agree that R.C. 4509.05 is clearly unconstitutional. I would reverse the judgment of the trial court and uphold the constitutionality of R.C. 4509.05 as applied to these facts.

{¶56} I agree with the remaining portions of the majority decision.

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