

ORIGINAL

In the  
Supreme Court of Ohio

OHIO TRUCKING ASSOCIATION, <i>et al.</i> ,	:	Case No. 2011-1757
	:	
Plaintiffs-Appellees,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
DIRECTOR THOMAS CHARLES	:	
[THOMAS STICKRATH], OHIO	:	Court of Appeals Case
DEPARTMENT OF PUBLIC SAFETY, <i>et</i>	:	No. 10AP-673
<i>al.</i> ,	:	
	:	
Defendants-Appellants.	:	

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**MERIT BRIEF OF DEFENDANTS-APPELLANTS  
DIRECTOR THOMAS CHARLES [THOMAS STICKRATH],  
OHIO DEPARTMENT OF PUBLIC SAFETY, *et al.***

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**FILED**  
 MAR 30 2012  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

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## INTRODUCTION

In 2009, the General Assembly raised the fee for certified driver abstracts from two dollars to five dollars. R.C. 4509.05, as amended in 2009 (“Amended Statute”), App’x Exh. G. Displeased with the fee increase, Plaintiffs-Appellees Ohio Trucking Association, Professional Insurance Agents Association, and Ohio Insurance Institute (together, “OTA”) sued, claiming that “[t]he Amended Statute imposes a tax in violation of Ohio Const. Art. XII § 5a.” Second Am. Compl. ¶ 23 (Supp. at S-7). OTA asked the court to invalidate the entire Amended Statute, cancel the three-dollar fee increase, and refund money already collected. *Id.*, prayer for relief (Supp. at S-7–8).

Both OTA’s constitutional claim and its requested relief reveal a fundamental misunderstanding of Section 5a. Section 5a restrains the General Assembly’s ability to *spend* revenue generated from fees “relating to registration, operation, or use of vehicles on public highways.” Ohio Const. art. XII, § 5a, App’x Exh. F. But the spending restraint in no way limits the General Assembly’s authority to raise revenue. OTA’s misunderstanding of Section 5a—and of the relationship between the Amended Statute’s revenue raising and spending provisions—animates all three reasons it cannot prevail in this action.

First, the Court need not reach the merits of OTA’s constitutional claim because OTA cannot establish standing. OTA’s purported injury—having to pay higher fees—is untethered from the constitutional violation it alleges—misspending fee revenue. As a result, OTA’s alleged injury could not possibly have been caused by a Section 5a violation, and it could not be redressed in this action. Instead, if the Court finds a Section 5a violation, the only proper remedy would be to enjoin further misspending. Because the distribution provision is severable from the Amended Statute, the fee increase would remain in effect. Accordingly, OTA cannot meet either

the causation or redressability requirements for standing. And OTA's unsuccessful attempt to invoke special fund standing cannot overcome these problems.

Second, even if OTA could overcome its threshold standing problem, its Section 5a claim fails on the merits. Contrary to OTA's broad reading of "relating to," Section 5a's text requires a closer connection between a fee and the operation or use of motor vehicles than exists here. The historical context of Section 5a's adoption confirms that Ohioans intended the spending restraint to restrict revenues only from fees targeting the general motoring public as a condition on using public roads, such as license fees and car registration fees. Certified abstract fees do not meet this standard, as no one needs to buy an abstract to use Ohio's roads. OTA's and the Tenth District's alternative interpretations of Section 5a cannot be correct, because each is unsupported by the provision's text and history and would lead to absurd results.

Finally, as mentioned above, even if OTA prevailed on the merits (and it should not), the Court would not be in a position to cancel the three-dollar fee increase or order a refund. Instead, the Court only could enforce Section 5a by restraining any improper spending of abstract fee revenues. After all, Section 5a restrains only spending, and the Amended Statute's distribution provision can be severed from the rest of the statute. Accordingly, the Court must leave the fee provision—which does not itself violate Section 5a—intact. If the Court did sever the distribution provision, all abstract fee revenues would be deposited in the bureau of motor vehicles fund ("BMV fund"), *see* R.C. 4501.25, which OTA agrees is consistent with Section 5a.

For these reasons, the Court should reverse the Tenth District's judgment and deny OTA relief for lack of standing or on the merits. If the Court does find a constitutional violation, however, it should confine the remedy to an order striking the Amended Statute's distribution provision.

## STATEMENT OF THE CASE AND FACTS

**A. The BMV has provided certified driver abstracts in exchange for a fee for more than 85 years.**

Since 1935, the Bureau of Motor Vehicles (“BMV”) Registrar has provided certified driver abstracts in exchange for a fee. Am. S.B. 67, 116 Ohio Laws 218, 228, § 24 (1935) (“Certified abstract of operating record; fee”) (Supp. at S-58); *see* Am. S.B. 298, 124 Ohio Laws 541, 565-66, 585 (1951) (recodifying G.C. 6298-24 as G.C. 6298-16); Am H.B. 1, 1953-1954 Ohio Laws 7, 61 (recodifying G.C. 6298-16 as R.C. 4509.05 during the 1953 recodification). In its present form, a certified abstract includes a driver’s personal identifying information and lists the driver’s convictions for traffic offenses and motor vehicle accidents. *See* Joint Stipulation of Facts (“Jt. Stipulation”), Exh. 1 (Supp. at S-16). The same information is available, in redacted form, via public records requests. O.A.C. 4501:1-12-02(D)(1)(a).

Over the years, the General Assembly has adjusted the fee for certified abstracts. In 1935, a certified abstract cost only fifty cents. 116 Ohio Laws 228, § 24 (Supp. at S-58). The fee was increased to one dollar in 1966 and to three dollars in 1989. S.B. 376, 131 Ohio Laws 1088 (1966) (one-dollar fee); Am. Sub. H.B. 381, 143 Ohio Laws 4697, 4829 (1989) (three-dollar fee). In 1990, the General Assembly reduced the fee to two dollars. *See* Am. Sub. S.B. 216, 143 Ohio Laws 1087, 1090 (1990). All revenues from the two-dollar fee were deposited in the BMV fund, which “pay[s] the expenses of administering the law relative to the powers and duties of the [BMV] registrar.” R.C. 4501.25 (directing the BMV to deposit in the BMV fund all BMV revenues not otherwise allocated).

In 2009, the General Assembly increased the certified abstract fee to five dollars. *See* Am. Sub. H.B. 2, 128th General Assembly (effective July 1, 2009), App’x Exh. H; R.C. 4509.05(B). As before, the Registrar credits two dollars of each fee collected to the BMV fund.

R.C. 4509.05(C). However, the additional three dollars collected for each abstract are now divided between five other funds:

- \$0.60 to the trauma and emergency medical services fund, established in R.C. 5502.03;
- \$0.60 to the homeland security fund, established in R.C. 5502.03;
- \$0.30 to the investigations fund, established in R.C. 5502.131;
- \$1.25 to the emergency management agency service and reimbursement fund, established in R.C. 5502.39; and
- \$0.25 to the justice program services fund, established in R.C. 5502.67.

*Id.* These funds support various public safety programs.

**B. OTA sued to challenge the 2009 fee increase for certified abstracts, claiming that the General Assembly's allocation of the revenue made the fee increase invalid.**

Plaintiffs are trade organizations whose members collectively purchase more than five million certified abstracts annually. *Jt. Stipulation*, ¶¶ 2-6 (Supp. at S-10-12). The Ohio Trucking Association represents the interests of Ohio trucking companies that employ commercial drivers. These companies regularly purchase certified abstracts as a way to check their employees' driving history. *See* Opinion, *Ohio Trucking Ass'n v. Stickrath*, Franklin C.P. No. 09CVH-07-10813, ¶ 15 (June 8, 2010) (“*Trial Ct. Op.*”), App'x Exh. E. The Professional Insurance Agents Association and Ohio Insurance Institute represent Ohio insurers, who purchase certified abstracts to assist them with claims investigation, anti-fraud activities, and rating or underwriting coverage. *Id.*

Soon after the 2009 fee increase, OTA sued the Director of the Ohio Department of Public Safety and the BMV's acting registrar (together, “BMV”), arguing that “[t]he Amended Statute is unconstitutional on its face.” Second Am. Compl. ¶ 6 (Supp. at S-3). Specifically, OTA objects that “[t]he Amended Statute imposes a tax in violation of [Section 5a].” *Id.* ¶ 23 (Supp. at S-7). Section 5a requires the General Assembly to use revenues “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” for highway-related purposes. Under the Amended Statute’s distribution scheme, only the revenues deposited in the BMV fund are used for Section 5a purposes. Jt. Stipulation, ¶ 12 (Supp. at S-13). The instant dispute turns on whether revenues from abstract fees are subject to Section 5a in the first place. In other words, do certified abstract fees “relat[e] to registration, operation, or use of vehicles on public highways”?

OTA seeks an order “[d]eclaring the Amended Statute unconstitutional on its face,” “[e]njoining the Amended Statute from being implemented and/or enforced,” “[r]equiring the disgorgement of all fees (in excess of two dollars) collected by the [BMV] under the Amended Statute,” requiring the BMV to pay reasonable attorney fees and costs, and “[p]roviding for any other remedies as this Court may deem proper.” Second Am. Compl., prayer for relief (Supp. at S-7–8).

OTA also stated a public records claim, *see id.* ¶¶ 26-29 (Supp. at S-7), which was dismissed and is now pending in a separate mandamus action. *State ex rel. Motor Carrier Serv., Inc. v. Rankin*, 10th Dist. No. 10APD-12-1178.

**C. The trial court and the appeals court ruled for OTA.**

The trial court agreed with OTA and struck the Amended Statute. First, the court concluded that OTA had standing to sue because its “members . . . have . . . both a legitimate and a special need for certified driver abstracts.” *Trial Ct. Op.* ¶ 23. Then, concluding that certified abstract fees are “relat[ed] to registration, operation, or use of vehicles,” the court invalidated the entire Amended Statute. *Id.* ¶ 28, 35. The court stayed its judgment pending appeal. Judgment, *Ohio Trucking Ass’n v. Stickrath*, Franklin C.P. No. 09CVH-07-10813 (June 18, 2010), App’x Exh. D.

A divided Tenth District panel affirmed on all grounds. *Ohio Trucking Ass'n v. Stickrath*, 10th Dist. No. 10AP-673, 2011-Ohio-4361 (“*App. Op.*”), App’x Exh. C. First, the court found standing because OTA’s members are “contributors to the BMV fund” and they “rely heavily on the BMV.” *Id.* ¶ 16. Next, the court held that, as applied to the trucking companies, the Amended Statute’s distribution of revenues violates Section 5a because the certified abstract fees are related to the operation of vehicles on public highways. *Id.* ¶ 39. Finally, it concluded that the unconstitutional provisions of the statute were not severable, and affirmed the trial court’s judgment striking the entire Amended Statute. *Id.* ¶ 46.

Judge Klatt dissented and would have upheld the Amended Statute. *Id.* ¶¶ 51-55 (Klatt, J., dissenting). He explained that the relationship between certified abstract fees and the operation or use of vehicles is “more attenuated than the type of taxes and fees that gave rise to Section 5a,” *id.* ¶ 54, and concluded that this relationship is “not direct enough to invoke Section 5a’s spending limitation.” *Id.* ¶ 55.

The appeals court stayed its judgment pending the outcome of this appeal. Journal Entry, *Ohio Trucking Ass'n v. Stickrath*, 10th Dist. No. 10AP-673 (Sept. 12, 2011). OTA is also pursuing, as a separate case, a putative class action seeking a refund of three dollars for each certified abstract purchased under the Amended Statute. *See* Am. Entry Staying Proceedings, *Ohio Trucking Ass'n v. Charles*, Franklin C.P. No. 11CVH-09-12088 (Feb. 16, 2012).

## 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 certified abstracts.<sup>1</sup>*

Ohio courts will decide a legal question only if the party seeking relief can "establish standing to sue." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 469 (1999). A party has standing if: (1) "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"; (2) "the law in question has caused the injury"; and (3) "the relief requested will redress the injury." *Id.* at 469-70. Because the plaintiffs are trade associations, their standing turns on whether their "members would . . . have standing to sue in their own right." *Ohio Contractors Ass'n v. Bicking*, 71 Ohio St. 3d 318, 320, 1994-Ohio-193. (The BMV does not dispute that plaintiffs meet the other requirements for associational standing. *See id.*)

OTA lacks standing to assert its sole claim. OTA alleges that the Amended Statute "imposes a tax in violation of [Section 5a]," and asks the Court to declare the entire "Amended Statute . . . unconstitutional on its face," enjoin its enforcement, and "disgorg[e] . . . all fees (in excess of two dollars)." Second Am. Compl. ¶ 25 & prayer for relief, ¶ (d) (Supp. at S-7, S-8). But this claim cannot satisfy the threshold requirements of causation and redressability because OTA's claimed injury—payment of a fee—is totally disconnected from the alleged constitutional violation—violation of a spending restraint. To show otherwise, OTA would have to persuade the Court that the Amended Statute's fee provision and distribution provision are inextricably

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<sup>1</sup> The BMV's Memorandum in Support of Jurisdiction mistakenly referred to "title abstracts" rather than "certified abstracts" in Proposition of Law No. 1. That error is corrected here.

linked. To the contrary, these provisions are distinct and severable. As a result, OTA's claimed injury is neither caused by the alleged spending violation nor redressable in this action.

Nor can OTA rely on special fund standing to overcome this problem. First, OTA does not qualify for this narrow doctrine. Second, even if the Court were to extend the doctrine as OTA suggests, special fund standing does not empower a plaintiff to challenge the collection of a tax or fee. Accordingly, even if OTA had special fund standing to bring *some* claim, it does not have standing to bring *this* claim.

**A. OTA's alleged injury is neither caused by the alleged violation of Section 5a's spending restraint, nor could it be redressed in this action.**

To have standing, OTA must show that its injury—paying increased fees—is both caused by the alleged violation of Section 5a's spending restraint and is redressable if the Court sustains OTA's constitutional challenge. OTA fails on both counts.

First, it is untenable to suggest that the General Assembly's decision about how to distribute revenue from certified abstracts *caused* the three-dollar fee increase. OTA baldly asserts that "the collection of the fee is inextricably part of how it is spent—three dollars of the fee cannot be collected . . . because the *only* way it can be spent violates the Ohio Constitution." *See* Mem. in Opp'n to Jurisdiction 8 ("Opp. Jur.") (emphasis in original). But that assumption is incorrect because the constitutionality of a fee increase does not turn on how the resulting revenue is spent. The General Assembly's powers to raise revenue and spend revenue are unquestionably distinct. *See* Ohio Const. art. II, §§ 1, 22; *see also State ex rel. Donahey v. Edmondson*, 89 Ohio St. 93, 114 (1913) (holding that a spending violation under an earmarking provision does not implicate the validity of a tax's collection); *Friedlander v. Gorman*, 126 Ohio St. 163, 168 (1933) (citing *Edmondson*); *State ex rel. Lampson v. Cook*, 44 Ohio App. 501, 512 (Ohio Ct. App. 1932) ("[C]onstitutional provisions relating to assessment and collection of taxes

have no application to distribution of the proceeds of the tax.”). Section 5a limits only the General Assembly’s spending authority; it does not restrain the General Assembly’s power to raise revenue. To find standing, then, the Court would have to both disregard a longstanding distinction between these two legislative functions and transform Section 5a’s proscription from a spending restraint into a limit on raising revenue.

Second, OTA’s purported injury is not redressable in this action because the appropriate remedy for violating a spending restraint is to enjoin the unlawful expenditures. *See, e.g., D.C. Common Cause v. District of Columbia*, 858 F.2d 1, 5 (D.C. Cir. 1988) (“By enjoining an illegal expenditure, . . . court[s] can redress [a] taxpayer’s injury caused by the misuse of public funds.”); *cf. also Grandle v. Rhodes*, 166 Ohio St. 197, 197-98 (1957) (per curiam) (permitting a taxpayer suit to enjoin an improper expenditure under Section 5a). An order enjoining expenditures, by definition, has no impact on the collection of the underlying revenue and therefore could not redress OTA’s objection to the increased fee.

OTA can overcome these fatal standing flaws only by persuading the Court that, in this case, the proper remedy for a Section 5a violation would be to invalidate the entire Amended Statute. *See* Opp. Jur. 7-8 (urging the Court to strike the entire Amended Statute and reinstate the prior version of R.C. 4509.05). In other words, OTA must show that the distribution and fee increase provisions are so connected that they rise or fall together. But it cannot do so. For the reasons explained in Proposition of Law No. 3, even if the distribution provision violates Section 5a, it is severable from the rest of the Amended Statute. If the provision were severed, three additional dollars of revenue for each certified abstract would go to the BMV fund, *see* R.C. 4501.25, which OTA concedes is spent for Section 5a purposes. Thus, regardless of the

theoretical merit of OTA's constitutional challenge, OTA's stated injury cannot be redressed in this action.

In short, OTA's standing is thwarted by the complete disconnect between its constitutional objection and its claimed injury. Because the only proper remedy for a Section 5a violation would be to enjoin the unconstitutional spending, OTA cannot establish the causation or redressability required for standing.

**B. OTA cannot establish a direct and concrete injury sufficient to establish standing, even by invoking the doctrine of special fund standing.**

OTA also cannot "show that [it] has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general." *Sheward*, 86 Ohio St. 3d at 469-70. OTA's status as a feepayer cannot suffice to establish such an injury and its attempts to invoke the narrow doctrine of special fund standing fall short.

OTA's claim of a direct and concrete injury must be evaluated against the backdrop of this Court's reluctance to recognize general taxpayer standing. As the United States Supreme Court has explained, a federal taxpayer's "interest . . . in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing."<sup>2</sup> *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 599 (2007); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (taxpayers generally lack standing to challenge expenditures from the treasury because that is "a grievance the taxpayer suffers in some indefinite way in common with people generally" (quotation omitted)). This general rule against taxpayer or feepayer standing is intended "to avoid speculation and to

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<sup>2</sup> "Ohio courts regularly follow [federal precedent] on matters of standing." *Brinkman v. Miami Univ.*, 12th Dist. No. CA2006-12-313, 2007-Ohio-4372, ¶ 43.

insist on particular injury.” *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1444-45 (2011).

Special fund standing is a narrow exception to this general rule. Under this doctrine, “[c]ontributors to a special fund”—regardless of whether the contributions occur in the form of taxes, fees, or other monies—“have a special interest in that fund for purposes of standing.” *Racing Guild v. Ohio State Racing Comm’n*, 28 Ohio St. 3d 317, syl. ¶ 2 (1986). Thus, someone who voluntarily pays a generally applicable fee—like OTA’s member companies—may have standing “to institute an action to enjoin the expenditure of public funds” if he “has some special interest therein by reason of which his own property rights are placed in jeopardy.” *State ex rel. Masterson v. Ohio State Racing Comm’n*, 162 Ohio St. 366, syl. ¶ 1 (1954). That said, the Court has discussed special fund standing in only a handful of cases and rarely applies it. *See, e.g., Racing Guild*, 28 Ohio St. 3d at 319 (holding that pari-mutuel clerks who contribute to the racing commission fund have “standing as contributors to a special fund”); *Brinkman*, 2007-Ohio-4372, ¶ 35 (“[I]f a challenged expenditure derives from a special fund, and if the plaintiff belongs to the class of individuals who contributed to the fund, the plaintiff has standing.”); *State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, 2006-Ohio-3677, ¶ 10 (“Dann arguably has a ‘special interest’ in the management of the Worker’s Compensation Fund because he had paid into that fund as an employer.”).

OTA argues that it qualifies for special fund standing because its members purchase millions of certified abstracts each year, *Jt. Stipulation*, ¶¶ 2-6 (Supp. at S-10-12), but these payments are not directed to a special fund. In fact, this Court’s analysis in *Dann* foreclosed the possibility of special fund standing here. Among other things, *Dann* argued that he had standing because he “paid gasoline taxes used to finance the operations of the Ohio Department of

Transportation and the State Highway Patrol.” *Dann*, 2006-Ohio-3677, ¶¶ 7, 9. Gasoline tax revenues were used solely for highway purposes, in accord with Section 5a, but the Court found that Dann’s payment of those taxes did not amount to a special interest sufficient for special fund standing. *Id.* ¶ 9. Likewise, even assuming revenues from certified abstract fees should be used solely for highway purposes (as OTA claims), the payers of those fees do not contribute to a “special fund” and cannot rely on their feepayer status as a basis for special fund standing. Concluding otherwise would allow a narrow exception to swallow this Court’s rule against general taxpayer standing.

Ultimately, the Court need not identify the metes and bounds of special fund standing to determine that OTA lacks standing here. Even if OTA did have a “special interest in a fund” (and it does not), special fund standing can only satisfy the requirements of causation and redressability if a plaintiff seeks a particular kind of relief: A plaintiff with “a ‘special interest’ in particular public funds” has standing *only* to seek “equitable relief . . . to remedy a wrong . . . in the management of those funds.” *Id.* ¶ 10; *see also Brinkman*, 2007-Ohio-4372, ¶ 35 (explaining that a plaintiff with special fund standing can challenge an “expenditure derive[d] from [the] special fund”); *cf. also Smith v. Jefferson Cty. Bd. of Sch. Comm’rs*, 641 F.3d 197, 211 (6th Cir. 2011) (permitting municipal taxpayer suit to enjoin illegal use of municipal moneys). That is not the remedy OTA seeks. Instead, OTA asks the Court to strike the entire Amended Statute and issue refunds to its members. Neither this Court nor the United States Supreme Court has recognized special fund standing (or taxpayer standing) as a basis for challenging the tax or fee itself.

In sum, the disconnect between OTA’s desired remedy and its Section 5a claim means that it cannot satisfy any of the three requirements for standing. Accordingly, OTA is “air[ing]

[its] grievances concerning the conduct of government” in the wrong forum. *Racing Guild*, 28 Ohio St. 3d at 321 (quotation omitted). Instead, OTA should direct its concerns about the fee increase to the General Assembly.

**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.*

OTA contends that the Amended Statute violates Section 5a, a constitutional limit on the General Assembly’s spending power. Section 5a provides:

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, § 5a. In short, revenues from fees and taxes “relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles” must be spent only for certain highway-related purposes.

Certified abstract fees do not trigger Section 5a’s spending restraint for several reasons. Viewed through the lens of well-established interpretive canons, Section 5a’s plain language confirms that the phrase “relating to” is not as broad as OTA contends. Instead, the spending restraint requires a more direct relationship between a fee and the operation or use of motor vehicles than exists here. History confirms as much, demonstrating that Section 5a’s adopters never intended the amendment to limit the spending of revenue generated from fees like this. Instead, Section 5a targeted fees and taxes levied on the general motoring public as a condition on using public roads. Moreover, adopting OTA’s broad reading of Section 5a would lead to

absurd and unworkable results. Therefore, the Court should reject OTA's constitutional challenge and hold that the relationship between these abstract fees and the operation or use of motor vehicles is simply too attenuated to trigger Section 5a's spending restraint.

**A. OTA can prevail only if there is no plausible way to interpret R.C. 4509.05 as consistent with Section 5a.**

Two well-established canons of interpretation frame the Court's analysis, and both tilt heavily in favor of upholding R.C. 4509.05. First, the Court has long recognized that exceptions to general laws must be strictly construed. *See State ex rel. Keller v. Forney*, 108 Ohio St. 463, syl. ¶ 1 (1923); *Martin v. City of Columbus*, 101 Ohio St. 1, 7 (1920). Accordingly, the Court reads constitutional grants of power broadly; anything "not clearly excluded from the[ir] operation . . . is clearly included therein." *Pioneer Linen Supply Co. v. Evatt*, 146 Ohio St. 248, 251 (1946).

The General Assembly has broad constitutional authority both to raise revenue, Ohio Const. art. II, § 1, and to make appropriations from the state treasury, Ohio Const. art. II, § 22. In fact, it has "sole and exclusive power and discretion" to decide how to allocate lawfully collected revenue. *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 327 (1895). As a limit on this spending power, Section 5a must be strictly construed. Accordingly, Section 5a's spending restraint applies only in situations "clearly defined" by the provision's plain language. *See Welfare Fed. v. Glander*, 146 Ohio St. 146, 176 (1945) (quoting *Bank of Commerce v. Tennessee*, 161 U.S. 134, 146 (1896)) (explaining that "[t]here must be no doubt or ambiguity in the language" of a tax exemption). As a result, the Court must uphold the Amended Statute "if [it] may *plausibly* be interpreted as permissible" under a strict construction of Section 5a. *Ohio Grocers Ass'n v. Levin*, 123 Ohio St. 3d 303, 2009-Ohio-4872, ¶ 11 (emphasis added). As explained below, the Amended Statute easily overcomes this hurdle.

Separately, the presumption that all statutes are constitutional dictates the same conclusion. *See Groch v. Gen. Motors Corp.*, 117 Ohio St. 192, 2008-Ohio-546, ¶ 25. To overcome this presumption, OTA bears a heavy burden to establish “beyond a reasonable doubt that the legislation and constitutional provision[] are clearly incompatible.” *Id.* (internal quotation omitted). Because OTA raises a facial constitutional challenge,<sup>3</sup> *see* Second Am. Compl. ¶ 25, it has to “demonstrate that there is no set of circumstances in which the statute would be valid.” *Groch*, 2008-Ohio-546, ¶ 26. It cannot do so.

“With these governing principles in mind, *at a minimum* it is plausible,” *Ohio Grocers*, 2009-Ohio-4872, ¶ 22 (emphasis in original), to read R.C. 4509.05 as consistent with Section 5a. OTA, “*at best*, urge[s] a competing plausible reading” of Section 5a, meaning that OTA cannot prevail. *Id.* ¶ 24 (emphasis in original). As long as a “plausible reading permits [the statute] to survive,” the Court must uphold R.C. 4509.05. *Id.* And here the BMV’s reading of Section 5a is not merely plausible; it is correct.

**B. The text, history, and intent of Section 5a all indicate that R.C. 4509.05 does not implicate Section 5a’s spending restraint.**

The success of OTA’s constitutional challenge turns on whether certified abstract fees are “relat[ed] to” the operation or use of a motor vehicle. Because the language of Section 5a, its history, and the adopters’ intent all confirm that “relating to” is not as broad as OTA claims, OTA’s constitutional challenge fails. Certified abstract fees do not implicate Section 5a’s spending restraint.

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<sup>3</sup> Without basis or explanation, the Tenth District construed OTA’s challenge as an as-applied constitutional challenge. *App. Op.*, 2011-Ohio-4361, ¶ 39. OTA has not embraced the Tenth District’s approach. Instead, it continues to pursue only the facial challenge raised in its complaint. *See* Opp. Jur. 11.

“[T]he polestar in the construction of constitutional . . . provisions is the intention of the makers and adopters thereof.” *Castleberry v. Evatt*, 147 Ohio St. 30, syl. ¶ 1 (1946). As with any statute, “[t]he 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) (per curiam). The Court reads undefined words in accord with “their usual, normal, or customary meaning,” *State ex rel. Taft v. Franklin Cty. Ct. of Common Pleas*, 81 Ohio St. 3d 480, 481, 1998-Ohio-333, and takes special care to read words in voter initiatives as “the simple language of the plain people,” assigning them “such meaning as [the people] usually give to [them] in political discussions and arguments,” *Keller*, 108 Ohio St. at 466 (quotations omitted). If “a provision is clear on its face,” the inquiry ends. *Maurer*, 71 Ohio St. 3d at 520. If the meaning is unclear, the Court may look to other evidence of intent, including the circumstances of an amendment’s adoption, its history, and the consequences of alternative constructions. *See Sheet Metal Workers’ Int’l Ass’n, Local Union No. 33 v. Gene’s Refrigeration, Heating & Air Conditioning, Inc.*, 122 Ohio St. 3d 248, 2009-Ohio-2747, ¶ 29; R.C. 1.49 (canons of statutory interpretation).

OTA’s success depends on the Court adopting a broad reading of “relating to.” However, Section 5a’s plain language shows that “relating to” cannot be as broad as OTA claims. Section 5a’s text offers little insight about just how close a relationship the provision does contemplate, but its history and circumstances confirm that Ohioans intended the provision to govern revenues from assessments charged to the general motoring public as a condition of using public roads. Section 5a’s adopters never intended to limit the expenditure of revenues from certified abstract fees, and interpreting Section 5a to cover these revenues would lead to absurd consequences.

1. **The fee for certified abstracts cannot, in itself, violate Section 5a because Section 5a restricts only the ability to spend revenue, not the ability to generate revenue.**

OTA alleges that the Amended Statute, by increasing the fee for certified abstracts, “imposes a tax in violation of Ohio Const. Art. XII § 5a.” Second Am. Compl. ¶ 23 (Supp. at S-7). This claim is most likely premised on OTA’s contention that R.C. 4509.05’s fee increase and distribution provisions are inextricably linked, such that the former cannot survive if the latter is struck. *See* Opp. Jur. 2. However, to the extent OTA suggests that Section 5a limits the General Assembly’s authority to enact (or increase) fees and taxes, the text of Section 5a forecloses such an argument. On its face, Section 5a clearly limits how revenues from certain fees, excises, and license taxes “shall be *expended*.” Ohio Const. art. XII, § 5a (emphasis added). It says nothing about the General Assembly’s ability to raise that revenue. Because certified abstract fees cannot themselves violate Section 5a, the question is whether they trigger its spending restraint.

2. **Section 5a’s plain language shows that Ohioans intended the spending restraint to apply only to taxes and fees that are more closely related than certified abstract fees to the operation or use of a motor vehicle.**

To determine whether certified abstract fees trigger Section 5a’s spending restraint, the Court must decide whether they are fees “*relating to* registration, operation, or use of vehicles on public highways.” Ohio Const. art. XII, § 5a (emphasis added). The plain language forecloses this possibility, however, because the Court could find such a relationship only by reading another clause out of Section 5a.

Section 5a limits the spending of money derived from “fees, excises, or license taxes relating to” either: “[1] registration, operation, or use of vehicles on public highways, *or* [2] to fuels used for propelling such vehicles.” *Id.* (emphasis added). Because “no portion of a written constitution should be regarded as superfluous,” the Court must give meaning to every word and

phrase of this provision. *Steele, Hopkins & Meredith Co. v. Miller*, 92 Ohio St. 115, 120 (1915); *see also Froelich v. Cleveland*, 99 Ohio St. 376, syl. ¶ 1 (1919) (“[T]he whole section should be construed together, and effect given to every part and sentence.”). Section 5a identifies two categories of fees, excises, or taxes and separates them by the word “or,” which conveys “that the two phrases were not intended to have the same meaning.” *Ohio Gov’t Risk Mgmt. Plan v. Harrison*, 115 Ohio St. 3d 241, 2007-Ohio-4948, ¶ 26; *see also Pizza v. Sunset Fireworks Co.*, 25 Ohio St. 3d 1, 4-5 (1986) (“‘[O]r’ . . . indicat[es] an alternative between different or unlike things.”). Because these phrases have different meaning, “relating to registration, operation, or use of vehicles” must be sufficiently narrow that it *excludes* taxes relating to motor vehicle fuel.

From this starting point, the first “relating to” clause must demand more than a minimal or attenuated connection between a fee and the operation or use of motor vehicles. Reading “related to” broadly—to mean any minimal connection—would render the gasoline tax clause meaningless because a gasoline tax is unquestionably “relat[ed] to . . . operation, or use of” motor vehicles as a practical matter: Drivers have to pay the tax to get motor vehicle fuel and they have to purchase that fuel in order to get on the road. Accordingly, the adopters must have intended the phrase “relating to registration, operation, or use of vehicles” to require a closer connection between a fee or tax and the use of a motor vehicle, rather than to include every tax or fee that is in some way related to the use of a motor vehicle.

If a gasoline tax does not “relat[e] to registration, operation, or use of vehicles” under Section 5a, then neither does a certified abstract fee. Unlike the fuel tax, which every Ohio driver must pay, Ohio drivers do not need to buy a certified abstract in order to operate or use a motor vehicle. *See App. Op.*, 2011-Ohio-4361, ¶ 38 (“[OTA has] 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 fact, most Ohio drivers *never* buy a certified abstract. Certified abstract fees are therefore not targeted at the general motoring public. Moreover, even if certified abstracts are helpful to the plaintiffs’ members, those companies are not legally required to purchase these abstracts and have alternative means of obtaining the same information, in redacted form. *See* O.A.C. 4501:1-12-02(D)(1)(a). Accordingly, the relationship between certified abstracts and the operation of motor vehicles is far “more attenuated” than the relationship between the gasoline tax and the operation or use of a vehicle, *App. Op.*, 2011-Ohio-4361, ¶ 35, and certified abstract fees do not “relat[e] to registration, operation, or use of vehicles” under Section 5a.

Only one state court has interpreted the “relating to” clause in a provision analogous to Section 5a, and it did so narrowly.<sup>4</sup> Maine’s Supreme Judicial Court has held that a fee for over-water transfers of petroleum products did not fall under an analogous constitutional limitation because it did not “focus on those who derived benefits as users of the highway system as the class subject to the tax.” *Portland Pipe Line Corp. v. Envtl. Improvement Comm’n*, 307 A.2d 1, 13 (Me. 1973) (analyzing Me. Const. art. IX, § 19). In short, Maine interprets its “relating to” clause to refer only to taxes that target public highway users. *See Beaver Excavating Co. v. Levin*, 10th Dist. No. 10AP-581, 2011-Ohio-3649, ¶ 52, *discretionary appeal allowed*, 130 Ohio St. 3d 1493 (2012) (concluding that, like Maine’s constitutional provision, Section 5a’s “relating to” clause refers to “taxes targeted at users of the public roads”).

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<sup>4</sup> Four states have adopted constitutional amendments virtually identical to Section 5a, but courts have not defined the “relating to” clause in those provisions. *See* Ariz. Const. art. IX, § 14 (“fees, excises, or license taxes relating to registration, operation, or use of vehicles” . . . or to fuels”); Ky. Const. § 230 (“fees, excise or license taxation relating to registration, operation, or use of vehicles”); Mass. Const., art. LXXVIII (“fees, duties, excises or license taxes relating to registration, operation or use of vehicles on public highways, or to fuels”); Wyo. Const. § 97-15-016 (“fees, excises, or license taxes . . . relating to registration, operation or use of vehicles . . . or to fuels”).

Judicial interpretations of other statutes using “relating to” confirm that the phrase is not easily defined by reference to statutory language alone. As the United States Supreme Court has explained, “[t]he ordinary meaning of [‘relating to’] is a broad one—‘to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.’” *Morales v. TransWorld Airlines*, 504 U.S. 374, 383 (1992) (quoting Black’s Law Dictionary 1158 (5th ed. 1979) (interpreting a federal law preempting state regulation in areas “relating to rates, routes, or services of any air carrier”). Although lower courts regularly cite this definition, the United States Supreme Court itself has rejected it as unhelpful. Just two years after defining “relating to” in *Morales*, the Court cautioned that its “prior attempt to construe the phrase ‘relate to’ does not give us much help drawing the line” between things that are related and things that are not. *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (interpreting ERISA’s preemption provision). Taken to the furthest extreme, the Court warned, “relate to” would encompass everything “for really, universally, relationships stop nowhere.” *Id.* (internal quotation omitted); *see also Cal. Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) (“[A]pplying the ‘relate to’ provision according to its terms was . . . doomed to failure, since . . . everything is related to everything else.”). As a result, the Court has repeatedly characterized ERISA’s “related to” preemption provision as both “expansive” and “unhelpful.” *Dillingham Constr.*, 519 U.S. at 324. Accordingly, the Court resorts to an analysis of both ERISA’s broader objectives and a state law’s impact on ERISA to determine whether a particular state law “relates to” an ERISA plan. *Id.* at 325.

In short, because it is difficult to assign precise meaning to “relating to” clauses, the United States Supreme Court finds it necessary to “go beyond the unhelpful text and the

frustrating difficulty of defining [this] key term” by looking to other evidence of legislative intent. *Travelers*, 514 U.S. at 656; *see also Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, 399 F.3d 692, 698 (6th Cir. 2005) (same); *Ky. Ass’n of Health Plans v. Nichols*, 227 F.3d 352, 357 (6th Cir. 2000) (observing that “[m]any courts, including the Supreme Court, have commented on the vexingly broad and ambiguous nature of the [‘relating to’] provisions” defining ERISA preemption). Although Section 5a’s “relating to” clause differs significantly from ERISA’s preemption clause, it is equally challenging to offer a precise meaning for the phrase in either context. Accordingly, to the extent this Court wishes to affirmatively define Section 5a’s “relating to” clause—rather than simply confirm that it does not embrace certified abstract fees—it should follow the United States Supreme Court’s lead and look beyond the provision’s text to other evidence of its purpose. As explained below, the history and circumstances of Section 5a’s adoption confirm that a narrow reading of “relating to” is correct, and that certified abstract fees do not implicate the spending restraint.

**3. Ohioans enacted Section 5a to stop the diversion of revenues from special taxes and fees imposed on motor vehicle owners and operators away from highway-related purposes.**

The history and circumstances of Section 5a’s adoption confirm a narrow interpretation of the “relating to” clause. Section 5a was adopted by a voter initiative with the intent to remedy a specific problem—the diversion of revenue from taxes and fees targeted at the general motoring public away from highway-related purposes. Ohioans wanted to ensure that when motor vehicle owners and operators pay special taxes and fees (originally levied to ensure that highway users bore some of the financial burden of highway building and maintenance), the revenues are used to benefit those taxpayers by maintaining and constructing highways. Section 5a was never intended to cover revenues from sources like R.C. 4509.05’s certified abstract fee.

Like other states, Ohio began imposing special taxes and fees on motor vehicle owners and operators in the early twentieth-century, as the exploding automobile industry increased highway-related expenses. See Chad D. Emerson, *All Sprawled Out: How the Federal Regulatory System Has Driven Unsustainable Growth*, 75 *Tenn. L. Rev.* 411, 438 (2008). The General Assembly enacted the first annual automobile license fee in 1906, H.B. 157, 98 Ohio Laws 320, 320-21, § 2 (Supp. at S-33); a gasoline tax in 1925, H.B. 94, 111 Ohio Laws 294, 295, § 2 (Supp. at S-44); and an additional gasoline tax in 1927, H.B. 206, 112 Ohio Laws 508, 508-12 (Supp. at S-53–57). Only a subset of Ohioans (automobile owners and operators) paid these taxes because they received special benefits from public roads and highways. See, e.g., *Foltz Grocery & Baking Co. v. Brown*, 111 Ohio St. 646, 653 (1924) (describing the license fee as “a special privilege tax”).

The General Assembly originally expended the proceeds of these assessments for highway-related purposes. See H.B. 157, 98 Ohio Laws 326, § 30 (license fee) (Supp. at S-40–41); H.B. 44, 111 Ohio Laws 299-300, § 12 (gasoline tax) (Supp. at S-48–49); H.B. 206, 112 Ohio Laws 510, § 8 (additional gasoline tax) (Supp. at S-55). With the onset of the Great Depression, however, Ohio desperately needed additional general revenue sources and decided to divert these proceeds to non-highway purposes. See 4 Ohio Constitutional Revision Commission Finance and Taxation Committee 1755 (Sept. 22, 1972) (“Const’l Revision Comm’n”) (Supp. at S-79). People sued to challenge the diversion of these revenues, and this Court advised the unsuccessful challengers to seek recourse through “constitutional or statutory amendment, or both.” *Calerdine v. Freiberg*, 129 Ohio St. 453, 462 (1935).

Around the same time, Congress enacted the Hayden-Cartwright Act, 48 Stat. 993 (1934) (Supp. at S-70), which created a strong incentive for Ohioans to guarantee that proceeds from

highway-user assessments were expended for highway-related purposes. The federal law prohibited states from diverting additional highway user tax revenues to other purposes if they wanted to continue receiving federal monetary assistance for highway maintenance and construction. *See id.* at 995, § 12 (Supp. at S-72). Congress reasoned that it was “unfair and unjust [for states] to tax motor-vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways.” *Id.*

In this atmosphere, Ohioans considered constitutional amendments to protect highway funding. *See* 4 Const’l Revision Comm’n 1755 (Supp. at S-79). In 1934, Ohio voters rejected dual ballot initiatives that would have dedicated revenue from motor vehicle license taxes and gasoline taxes to highway purposes. Ohio Sec’y of State Certified Ballot Language (Nov. 6, 1934) (Supp. at S-75). A new version of the amendment appeared on the ballot again in 1947, and more than 60 percent of voters approved Section 5a. *See* Ohio Sec’y of State Certified Ballot Language (Nov. 4, 1947) (Supp. at S-77); *A History of Statewide Issues in Ohio* at 9 (updated Dec. 19, 2011), *available at* <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf> (1,007,693 yes votes; 750,206 no votes) (last visited Mar. 30, 2012).

In keeping with Hayden-Cartwright’s language—discussing state revenues from “motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators,” 48 Stat. 993, 995, § 12 (Supp. at S-72)—Section 5a targets “fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to [motor vehicle] fuels.” Like Congress, Ohioans targeted special taxes and fees imposed on public highway users. Section 5a was “based on the simplistic theory that those who pay the highway taxes should be the ones who benefit from the expenditure of the funds so collected.” 4 Const’l Revision Comm’n 1755 (Supp. at S-79); *see* Ohio Sec’y of State Certified Ballot

Language (Nov. 4, 1947) (Supp. at S-77) (“This Amendment simply says you want your automobile license and gas tax money to go for better roads and streets.”).

The arguments in the Secretary of State’s official election publicity pamphlet confirm that Ohioans understood Section 5a as targeting special taxes on the general highway-using public. The amendment’s proponents and opponents both specifically referred to automobile license and gasoline taxes. The proponents said Section 5a would direct “special tax dollars”—namely, “automobile license and gas tax funds”—to “better roads and streets.” Ohio Sec’y of State, Certified Ballot Language (Nov. 4, 1947) (Supp. at S-77) (later referring to “motor vehicle taxes”). The amendment was hailed as Ohioans’ chance to hold the State to its “original[] promise[] that *automobile license and gas tax funds* would go for roads, street and related purposes.” *Id.* (emphasis added). Section 5a’s opponents likewise referred to “[t]axes levied upon automobile owners,” and specifically cited the “motor vehicle fuel tax,” “motor vehicle license fees,” and the “liquid fuel tax.” *Id.* Voters thus understood that Section 5a would target revenues from special fees and taxes paid by motor vehicle owners and operators. *See also Pro and Con Arguments on Gas Tax Use Offered*, The Coshocton, Ohio Tribune, Oct. 23, 1947, at 6 (Supp. at S-90) (explaining that Section 5a would apply to “funds . . . collected from those who used the highways and streets”); *Highway Bill One of Four Due for Vote*, Lima News, Oct. 26, 1947 (Supp. at S-91) (describing a proposed amendment that would “ earmark all state gasoline and fuel tax and auto license revenues exclusively for street and highway purposes”); *Committee to Back Tax Plan*, Marysville Tribune, Oct. 22, 1947 (Supp. at S-92) (describing a proposed amendment “designed to make certain that all state gasoline tax and motor vehicle license money shall be spent for highway and street maintenance, improvement and construction”).

Notably, *no one* mentioned certified abstract fees at the time of Section 5a's adoption, even though the Registrar had been collecting fees for certified abstracts since 1935. *See* 116 Ohio Laws 218, 228 (1935) ("The registrar of motor vehicles shall, upon request, furnish any person with a certified abstract" and "shall collect for each such certificate the sum of 50 ¢.") (Supp. at S-69).

This understanding of Section 5a endured. In 1969, the General Assembly created a Commission for Constitutional Revision to review and recommend changes to the Ohio Constitution. When discussing Section 5a, the Commission explained that the provision was intended to require "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 Const'l Revision Comm'n 1755 (Supp. at S-79). The Commission specifically identified taxes implicating Section 5a—such as the gasoline tax and the motor vehicle license or registration tax, *id.* at 1758 (Supp. at S-82)—but it did not mention certified abstract fees, which had then been collected for more than 40 years. The Commission's Final Report ultimately confirmed the understanding of Section 5a as "restrict[ing] the expenditure of *highway 'user' taxes* to highway purposes." Ohio Constitutional Revision Commission Final Report 194 (June 30, 1977) (Supp. at S-88) (emphasis added).

In short, history confirms that Ohioans intended Section 5a as a narrow restraint on the General Assembly's spending power: It "prevent[s] taxes and fees collected *from the motoring public* from being diverted to non-highway purposes." *App. Op.*, 2011-Ohio-4361, ¶ 34 (emphasis added); *Beaver*, 2011-Ohio-3649, ¶ 31 (same). These taxes were all targeted at highway users, who had to pay them as a precondition of driving on Ohio highways. By contrast, nothing about the circumstances of Section 5a's adoption suggests any intent to include taxes and fees that, like

certified abstract fees, are indirectly related to driving, not targeted at public highway users, and not required for drivers to get on the road. *See App. Op.*, 2011-Ohio-4361, ¶ 38 (“The Truckers have not shown that members of the general motoring public need certified abstracts to register, operate, or use their vehicles.”).

Far from “thwart[ing] the intention of the citizens of Ohio when they voted for Section 5a,” *id.* ¶ 29, the Court would fulfill Section 5a’s intent by concluding that certified abstract fees do not implicate this spending restraint.

**C. In addition to defying Section 5a’s text and history, OTA’s broad reading of “relating to” fails because it would lead to unreasonable or absurd consequences.**

In light of the above, there is no question that the BMV’s interpretation of Section 5a is plausible. OTA (and the Tenth District) “*at best*, urge a competing plausible reading,” which is not sufficient to carry the day. *See Ohio Grocers*, 2009-Ohio-4872, ¶ 24 (emphasis in original). In fact, neither of these competing interpretations is even plausible. In addition to disregarding Section 5a’s text and history, these alternatives are unworkable and would lead to absurd results. *See Castleberry*, 147 Ohio St. 30, syl. ¶ 2 (“In the construction of constitutional provisions . . . unreasonable or absurd consequences should, if possible, be avoided.”).

First, as the United States Supreme Court has cautioned, a broad, literal reading of “relating to” would have few limits. *Travelers*, 514 U.S. at 655. Relying on the United States Supreme Court’s definition in *Morales*, OTA claims that “relating to” “is a broad term.” *Opp. Jur.* 8 & n. 6. As explained above, Section 5a’s text itself forecloses a broad reading of “relating to” because that would render the gasoline tax clause meaningless. In addition, a broad construction of Section 5a also must fail because it “could lead to absurd results.” *App. Op.*, 2011-Ohio-4361, ¶ 29 (“Taken to the broadest possible extent, everything is related in some way to everything else.”) (citing *Dillingham Constr.*, 519 U.S. at 335-36 (Scalia, J., concurring)); *see also Beaver*, 2011-Ohio-3649,

¶ 26 (same). “[R]elating to” has to require more than just any minimal connection between a tax or fee and the operation or use of a motor vehicle, or Section 5a’s spending restraint could apply to virtually any tax or fee, thereby hamstringing the General Assembly’s spending power to a much greater extent than Ohioans ever intended. *See Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1188-89 (9th Cir. 1998) (explaining that even *Morales*’s broad definition of “related to” requires more than a tenuous or remote connection); *City of Columbus v. Garrett*, 10th Dist. No. 00AP-610, 2001 Ohio App. LEXIS 1422, at \*6-7 (Mar. 27, 2001) (same). In light of this difficulty alone, the Court must recognize that “related to” has some limits.

OTA and the Tenth District each propose some limits, but those parameters are also unworkable because they still expand the universe of taxes and fees subject to Section 5a’s spending restraint in unreasonable ways. OTA proposes a content-based explanation for why certified abstracts are “related to” the operation or use of motor vehicles: “[B]ecause a certified abstract is a driver’s record compiled from a driver’s complete driving history (information comprised solely from a driver’s operation or use of a vehicle), a certified abstract is ‘relating to’ the ‘operation, or use of vehicles.’” *Opp. Jur.* 10-11 (footnote omitted). OTA more fully explained this argument in the Tenth District, reasoning that because Section 5a applies to the fee for obtaining a driver’s license, it must also apply to fees for certified abstracts, which “contain[] the history of that license.” *Brief of Appellees, Ohio Trucking Ass’n v. Ohio Dep’t of Public Safety*, 10th Dist. No. 10APE-07-673, at 24 (Oct. 14, 2010).

OTA’s content-based theory fails because if a fee triggers Section 5a anytime the requested information pertains to the operation or use of a motor vehicle, then a variety of fees—which have never been challenged under Section 5a or expended for highway-related purposes—would also be

subject to the spending restraint. For example, Section 5a would apply to public records fees when someone requests a redacted driving abstract or local court records containing driving-related information. Similarly, it would apply to court fees whenever the underlying action involves the operation or use of a motor vehicle, as when someone pays a speeding ticket, files a civil action related to a traffic accident, or appeals a driver's license suspension. If Section 5a did apply to these fees, records custodians and local court clerks would have to examine every document requested to determine whether it involves automobile operation or use. If it does, the records custodian or clerk would have to segregate the fees for Section 5a purposes. Such a regime would be impractical and difficult for a host of state and local government officials to administer. More important, the implications of this content-based interpretation confirm that it strays far from the narrow intent of Section 5a.

The Tenth District offered an alternative, need-based explanation for a Section 5a nexus between certified abstracts and the operation or use of motor vehicles, which likewise would lead to absurd results. Initially, the court acknowledged that “the fee for a certified abstract is not related to registration, operation, or use” because “members of the general motoring public” do not “need certified abstracts to register, operate, or use their vehicles on public highways in this state.” *App. Op.*, 2011-Ohio-4361, ¶ 38. The court then, without explanation, transformed OTA's facial constitutional challenge into an as-applied challenge and held the Amended Statute is “unconstitutional and void when applied to” the Ohio Trucking Association's member companies because they “have . . . a more *particularized need* for certified abstracts of commercial drivers.” *Id.* ¶ 39 (emphasis added) (finding a direct relationship between the trucking companies' “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”). Without separately analyzing the plaintiff

insurance associations’ asserted need for the abstracts—to help set insurance rates and for other business purposes—the Court then invalidated R.C. 4509.05 as applied to *all* the plaintiffs. *Id.* ¶ 40.

The Tenth District’s reasoning is fundamentally flawed because Section 5a either applies to a tax or fee, or it does not. Ohioans never intended a restriction on the General Assembly’s broad spending power to turn on the individual circumstances, and indeed the particular intent, of the individual who is paying a tax or fee. Instead, if a tax or fee is—on its face—related to the operation or use of motor vehicles, the resulting revenues must be spent for highway-related purposes. Otherwise, Section 5a does not apply. Perhaps recognizing these (and other) difficulties with the Tenth District’s “particularized need” theory, OTA has declined to embrace that case-by-case approach and instead continues to pursue a facial constitutional challenge based on the content of certified abstracts. *See* Opp. Jur. 8-11 (making no mention of a “particularized need” test or an as-applied challenge).

In addition to this fatal flaw, the Tenth District’s “particularized need” standard is unworkable because it is confusing, burdensome for government officials and courts, and likely to lead to odd results. It is unclear whether the appeals court intended the test to apply only to persons with a particular *legal* need for information (as the trucking companies assert), or also to requestors with a particular *practical* need for information (as the insurers assert), but neither version of the test is workable. For example, if Section 5a covers all fees and taxes associated with a legal prerequisite for getting on the road, then all automobile sales and use tax revenues would be subject to Section 5a. After all, an automobile buyer has to pay all sales and use taxes before he can get a certificate of title for the vehicle. R.C. 4505.06(B)(1). Alternatively, a practical “particularized need” test would mean that any tax paid in conjunction with buying a car, buying

car parts, or repairing a car is subject to Section 5a: Ohioans cannot possibly drive on Ohio roads unless they have access to a car that works. Similarly, if an insurer's "need" for certified abstracts to set rates is sufficient to trigger Section 5a, then all insurance-related tax receipts (i.e., sales taxes on a driver's insurance premiums, gross-receipts taxes on insurance sales) would have to be set aside for Section 5a purposes, since a driver's need for automobile insurance is surely greater than an insurance company's "need" to obtain certified abstracts to set rates. Conversely, a particularized need standard could also mean that some assessments that ordinarily trigger Section 5a may *escape* the spending restraint. For example, motor vehicle fuel tax revenue might not be subject to Section 5a if the buyer intended to use the fuel in a generator. Taken to its logical conclusion, then, a particularized need standard could cut both ways.

Regardless of how it cuts, the Tenth District's rule would be hard to administer and would complicate financial planning for state and local governments. Dozens of local agents collect taxes and fees on the State's behalf. Whenever any of these agents collected a tax or fee, the payer would have to identify his particular "need" (or, worse, courts could make an agent responsible for determining that need). After identifying the need, the agent would then have to decide whether it is "relat[ed] to" the operation or use of a vehicle, and segregate the revenue accordingly. The release of identical records could sometimes trigger Section 5a and sometimes not, depending on a requestor's circumstances. Even if state and local administrative agencies could find a way to handle these case-by-case requests, their determinations would no doubt be challenged regularly in the courts. As here, courts would face the unenviable task of having to decide, on a case-by-case basis, whether particular taxpayers' or fee-payers' circumstances are sufficiently "relat[ed] to registration, operation, or use of vehicles" that a tax or fee triggers Section 5a.

That is no easy task, as the Tenth District’s own opinion confirms. Even as the Tenth District minted its “particularized need” test, it made several significant errors in application. Most fundamental, the court applied this standard to a single plaintiff (Ohio Trucking Association), *App. Op.*, 2011-Ohio-4361, ¶ 39, then invalidated the Amended Statute’s application to all plaintiffs, *id.* ¶ 40. Beyond that, even under a “particularized need” standard, these plaintiffs cannot prevail because none of them *needs* certified driving abstracts. None of the plaintiffs asserted a particular need to the BMV when requesting these abstracts. And neither state nor federal law requires the Ohio Trucking Association’s members to obtain certified abstracts before hiring commercial drivers. Federal law prohibits employers from knowingly allowing employees to operate commercial vehicles if a State has revoked, suspended or canceled their driver’s license, or disallowed them from operating a commercial vehicle, *see* 49 U.S.C. § 31304, but it says nothing about *how* employers verify a driver’s status. Trucking companies could obtain the same information through other channels, at a lower cost. *See, e.g.*, O.A.C. 4501:1-12-02(D)(1)(a). And commercial drivers do not themselves need certified abstracts in order to drive a commercial vehicle. Similarly, even if the information in certified abstracts is part of the business model established by plaintiff insurance associations’ members, insurers do not *need* certified abstracts. Like trucking companies, they could obtain the same information elsewhere. Thus, even applying the “particularized need” test, Section 5a does not apply here.

These flaws in the Tenth District’s application confirm that the “particularized need” test itself is unworkable. The scope of a constitutional limit on the General Assembly’s spending power cannot hinge on a standard that varies on a case-by-case basis, will be applied inconsistently by countless state agents making on-the-spot decisions, and will be difficult for courts to apply. In the end, the Tenth District’s test has the potential to widen a narrow exception

to the spending power into a gaping hole that could severely hamper the General Assembly's ability to exercise one of its most fundamental duties.

Both OTA's and the Tenth District's interpretations raise significant difficulties, without providing any concomitant benefit to the plaintiffs in the form of increased highway funding. Ohioans adopted Section 5a to ensure that revenue from motor vehicle-related assessments would be used for highway-related purposes. But OTA's interest here is unrelated to protecting the highways. Indeed, OTA does not even ask the Court to redirect abstract fee revenues to highway purposes. (Rather, OTA asks the Court to eliminate an unwelcome business expense.) As explained below, however, an injunction of improper spending is the only proper remedy if R.C. 4509.05 violates Section 5a.

**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.*

Even assuming the Amended Statute violated Section 5a's spending restraint, OTA cannot prevail because the remedy it seeks is unavailable. The proper remedy for violation of a spending restraint is to enjoin further misallocation of funds, not (as OTA asks) to cancel the collection of fees or issue a refund. *See* Second Am. Compl., prayer for relief (Supp. at S-8). And because nothing in the Amended Statute indicates the General Assembly's intent to link the otherwise distinct taxing and spending provisions, the Amended Statute's distribution provision is severable. Accordingly, the Tenth District erred by affirming the trial court's holding "that the BMV may no longer collect the \$5 fee under the 2009 amended statute." *Trial Court Op.*, ¶ 48, *aff'd*, *App. Op.*, 2011-Ohio-4361, ¶ 50.

**A. Legislative choices about the collection and expenditure of revenue are distinct and should conclusively be presumed to be severable.**

In Ohio, “statutory provisions are presumptively severable.” *Maurer*, 71 Ohio St. 3d at 523. As a result, “[i]f any provision[] of a section of the Revised Code . . . is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision.” R.C. 1.50. Courts should therefore sever an unconstitutional provision unless evidence indicates that “the General Assembly would have refused to adopt the statute with the invalid part thereof stricken.” *Emmons v. Keller*, 21 Ohio St. 2d 48, syl. ¶ 3 (1970), *overruled on other grounds*, *Kinney v. Kaiser Alum. & Chem. Corp.*, 41 Ohio St. 2d 120, 125 (1975); *see also Bowles v. State*, 37 Ohio St. 35, 44 (1881) (“[N]o reasonable ground exists for believing that the legislature would not have passed the act without the obnoxious provision.”).

This presumption is animated by separation of powers principles. Because “[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people . . . , a court should refrain from invalidating more of [a] statute than is necessary.” *Regan v. Time*, 468 U.S. 641, 652 (1984); *see also Cent. Ohio Transit Auth. v. Transp. Workers Union of Am., Local 208*, 37 Ohio St. 3d 56, 62 (1988) (observing that the related presumption of constitutionality is likewise essential to preserve separation of powers). As a result, this Court finds severance appropriate in all but the most extreme circumstances. *See, e.g., State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, ¶ 66; *State v. Sterling*, 113 Ohio St. 3d 255, 2007-Ohio-1790, ¶ 41; *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 8-9, 1999-Ohio-77.

These principles apply with greater force when, as here, a statute includes two revenue provisions, one increasing a fee and the other distributing the proceeds. Absent an express indication from the General Assembly that they should rise and fall together, provisions

generating and distributing revenue are presumed to be severable. Ohio courts have long recognized the fundamental distinction between these two legislative acts: “Distribution is separate from and independent of the levy of the tax, so . . . the validity or invalidity of the former does not affect the latter.” *Lampson*, 44 Ohio App. at 512 (quoting 4 Cooley on Taxation (4th Ed.), § 1813) (“Constitutional provisions relating to the “assessment” and “collection” of taxes have no application to a distribution of the proceeds of the tax.”). In light of this distinction, the Court in *Edmondson* held that the invalidity of a provision earmarking revenue for a specific purpose does not affect the validity of the fee that generated the revenue. *Edmondson*, 89 Ohio St. at 114. This is especially true when, as here, the fee was originally established more than 85 years ago before the enactment of the spending provision, and only the amount of the fee has changed.

Ultimately, the General Assembly—not this Court—bears responsibility for raising and spending revenue. The Court should hesitate to intrude on those legislative judgments, which reflect underlying policy decisions about how to allocate benefits and burdens among Ohioans. Accordingly, even when the General Assembly has improperly spent fee proceeds, the Court should not undo the legislative decision to impose the fee itself. Indeed, if the Court allows OTA to prevail in cancelling the certified abstract fee increase because the proceeds are being spent improperly, it would open the courthouse doors to a host of new claims. Statutes earmarking revenue for a particular purpose are presently enforced by interested parties who wish to restore funding to dedicated purposes. But under OTA’s regime, anyone who objects to paying a fee (or tax) could cite spending concerns as a way to avoid paying the fee in the first place, even if—as here—no one disputes that the fee is valid on its own. Instead OTA should voice its dissatisfaction with the body that increased the fee—the General Assembly.

For all these reasons, the Court should find that R.C. 4509.05's distribution provision is severable. It is hard to believe that the General Assembly would forego revenue rather than reallocate it in compliance with constitutional requirements. That is especially true here, where the certified abstract fee was one of several fees increased in the Ohio Department of Transportation's ("ODOT") 2009 budget bill. *See, e.g.,* Am. Sub. H.B. 2, 128th General Assembly, § 101.01 (increasing certificate of title fees, R.C. 1548.10; fees for information about drivers' license applications, R.C. 4501.34; fees for drivers' license renewals, R.C. 4507.24). These fee increases were all intended to generate additional revenue for ODOT. The Amended Statute's distribution provision was secondary to this larger goal; by definition, revenue cannot be distributed before it is raised. Moreover, the fact that the General Assembly simultaneously enacted the fee increase and the distribution provision is of no moment. If mere simultaneity were sufficient to overcome the presumption of severability, the above standards counseling restraint would be of little import. *See, e.g., State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, ¶ 66 (severing two simultaneously enacted provisions). Accordingly, the Court must assume the General Assembly would have increased the certified abstract fee even if it could not allocate the money precisely as specified in R.C. 4509.05(C).

In short, even if the Court concludes that the Amended Statute distributes revenue unlawfully, it has no basis to invalidate the fee increase. Instead, the fee must remain intact, and the Court must defer to the General Assembly on the question of distribution. *Friedlander*, 126 Ohio St. at 168 ("If the statutes providing for the distribution of [a lawful] tax are declared unconstitutional, then *the legislature* must provide constitutional ways and means [to apportion the revenue].") (Emphasis added)). As noted above, here the General Assembly has already established an alternative distribution scheme: R.C. 4501.25 directs any funds collected by the

BMV that are not otherwise allocated to the BMV fund. And OTA does not quarrel with abstract fee revenues being deposited in this fund. See Jt. Stipulation ¶ 12 (Supp. at S-13); see also *City of S. Euclid v. Jemison*, 28 Ohio St. 3d 157, 164 (1986) (observing that even if “the General Assembly may wish to amend portions of the statute” after severance, that does not counsel against severability). Thus, contrary to OTA’s claim, the BMV’s analysis does not “leave[] three dollars without any statutorily-designated home.” Opp. Jur. 14.

**B. Even under *Geiger*, the Amended Statute’s distribution provision is severable.**

The Tenth District (and OTA) argue that these presumptions do not carry the day, and instead urge the Court to apply the well-worn *Geiger* test for severability. See *Geiger v. Geiger*, 117 Ohio St. 451, 466 (1927). As explained above, *Edmondson* established a clear distinction between raising revenue and spending it, such that objections to the latter do not implicate the former. *Geiger* applies only when a more specific rule, like *Edmondson*’s, does not resolve the severability question. In any event, applying *Geiger* on its own terms leads to the same conclusion: Even the distribution provision is unconstitutional, it is severable, and the fee increase must stand.

“The test of severability is whether the remaining parts of the [statute], standing alone and without reference to the unconstitutional sections, can be effective and operable.” *State ex rel. King v. Rhodes*, 11 Ohio St. 2d 95, 101 (1967). To resolve this inquiry, *Geiger* asks three questions: (1) whether the constitutional and the unconstitutional parts of a statute are capable of separation so that each may be read and may stand by itself; (2) whether the unconstitutional provision is so connected with the general scope of the whole statute that it is impossible to give effect to the legislature’s apparent intention if that provision is stricken; and (3) whether the Court would need to insert words or terms to “separate the constitutional part from the

unconstitutional part,” and to give effect to only the constitutional provision. 117 Ohio St. at 466.

On all three points, *Geiger* points to a single conclusion: The Amended Statute’s distribution provision is severable from the fee provision.

**1. The Amended Statute’s distribution provision can be separated from its other provisions, so that each provision may stand on its own.**

*Geiger* first asks whether the unconstitutional and constitutional portions of a statute can be separated so that that each provision can stand alone. To answer this question, the Court looks only at the statute’s plain language. *See, e.g., City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, ¶ 127 (finding that remaining provisions could stand alone, even if they did not give full effect to the original legislative intent). After removing the unconstitutional portion of a statute, if the remaining provisions “are effective and can operate separately and independently,” the language stands. *Bd. of Lucas Cty. Comm’rs v. Waterville Twp. Bd. of Trs.*, 171 Ohio App. 3d 354, 2007-Ohio-2141, ¶ 47 (6th Dist.).

After severing the distribution language in paragraph (C), R.C. 4509.05 would read:

**4509.05 Information furnished by registrar – fee.**

(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 except accidents certified as described in division (D) of section 3937.41 of the Revised Code;

(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.

(C) The registrar may permit deputy registrars to perform a search and furnish a certified abstract under this section. A deputy registrar performing this function shall comply with section 4501.27 of the Revised Code concerning the disclosure of personal information, shall collect and transmit to the registrar the five-dollar fee

established under division (B) of this section, and may collect and retain a service fee of three dollars and fifty cents.

Excising the distribution provision in no way alters the meaning or operation of the remaining language. Paragraph (A) requires the Registrar to provide certified abstracts upon request. Paragraph (B) requires the Registrar to collect a five-dollar fee for each abstract. And the remaining language in paragraph (C) addresses the Registrar's ability to delegate this responsibility to deputy registrars. These provisions are all independently significant and easily read without reference to distribution provision. Accordingly, the distribution provision is capable of separation from the rest of R.C. 4509.05.

**2. The General Assembly's apparent intent is effectuated even if the distribution provision is stricken.**

Next, the Court must determine whether giving effect to the remaining language in R.C. 4509.05 would effectuate the General Assembly's intent. *Geiger*, 117 Ohio St. at 466. In some rare cases, stricken language is so connected to the general scope of the whole statute that its removal thwarts the legislative intent as to even the remaining provisions. But here the General Assembly's intent as to the remaining provisions is effectuated regardless of whether the resulting revenue can be distributed as the legislature originally intended.

When a court invalidates part of a law, it should strive to effectuate General Assembly's intent for the operation of the remaining provisions. *See* R.C. 1.47 (B) (establishing presumption that an "entire statute is intended to be effective"); *Livingston v. Clawson*, 2 Ohio App. 3d 173, 178 (2d Dist. 1982) (courts should strive to effectuate "the legislature's clear intent that other provisions of legislation not determined to be invalid"). After "the unconstitutional part is stricken out, [if] that which remains is complete in itself, and capable of being executed in

accordance with the apparent legislative intent, *wholly independent of that which is rejected*, it must be sustained.” *Bowles*, 37 Ohio St. at 44 (emphasis added) (quotation omitted).

This Court’s past applications of *Geiger* confirm that the relevant inquiry is the General Assembly’s intent for the *surviving* language. For example, in *Geiger*, the Court analyzed the error provision and the appeal provision of a statute expanding probate court jurisdiction and invalidated the appeal provision. See G.C. 10496. After determining that the error provision could stand on its own, the Court considered whether enforcing the error provision would effectuate “the apparent intention of the Legislature *as to the error provision*” and held that it would. *Geiger*, 117 Ohio St. at 466 (emphasis added). Likewise, in *Sterling*, 2007-Ohio-1790, the Court analyzed R.C. 2953.82, which gave inmates the right to request DNA testing under certain circumstances, outlined the process for making and responding to requests, and gave prosecutors final authority to disagree with an inmate’s testing request. The *Sterling* Court struck the prosecutorial authority provision and severed that language from the rest of the statute. *Id.* ¶¶ 36, 41. The remaining provisions gave inmates the right to request DNA testing and described the process for doing so. Thus, even if the General Assembly intended to provide this new right to inmates *only if* prosecutors (not courts) would have final authority to reject a request, the Court held that the General Assembly’s intent would nevertheless be effectuated without the prosecutorial authority provision. *Id.* ¶ 42.

Here, the remaining provisions of R.C. 4509.05 effectuate the General Assembly’s intent as to those provisions, making certified abstracts available upon request (paragraph A), setting a five-dollar fee for each abstract (paragraph B), and authorizing deputy registrars to issue certified abstracts (paragraph C). The statute’s text does not indicate a desire to overcome R.C. 1.50’s

presumption of severability, and the General Assembly's intent for these remaining provisions has *nothing* to do with the BMV's distribution of fees collected.

Even if the Court were to focus solely on the General Assembly's 2009 amendment (as the Tenth District did), the Court must sustain the fee increase to honor the General Assembly's intent. The Tenth District concluded that these fee increase and distribution provisions together evinced a singular legislative intent to generate revenue for specific purposes. But the 2009 amendment serves two goals: raising additional revenue and distributing that revenue in a certain manner. The acts of raising and distributing revenue are unquestionably distinct under Ohio law, *see Edmondson*, 89 Ohio St. at 114; *see also Friedlander*, 126 Ohio St. at 168; *Lampson*, 44 Ohio App. at 512, and there is no indication of the General Assembly's intent to make the fee increase and distribution provisions rise and fall together. In other words, there is no reason to believe the General Assembly would not have increased the certified abstract fee if it could not distribute the revenues as paragraph (C) provides. *See Bowles*, 37 Ohio St. at 44 (finding "no reasonable ground . . . for believing that the legislature would not have passed the act without the obnoxious provision"). To assume otherwise would ignore budgetary realities faced by state and local governments, particularly in times of economic turmoil.

In short, even though the General Assembly wanted to distribute new revenue in a certain way, the Court must sustain the revenue-generating measure in order to fulfill its "obligation to preserve as much of the General Assembly's handiwork as is constitutionally permissible." *State ex rel. Doersam v. Indus. Comm'n of Ohio*, 45 Ohio St. 3d 115, 121 (1989).

**3. The Court need not add words or terms to R.C. 4509.05 to sever the distribution provision and give effect only to the statute's remaining provisions.**

The fee increase provision also satisfies *Geiger*'s final prong, because the Court need not add words or terms to give it effect. As explained above, eliminating the distribution provision does not or alter or confuse the meaning of paragraph (A), paragraph (B), or the remaining language in paragraph (C).

The Court would not need to add any words or terms to replace the distribution provision for three reasons. First, the General Assembly can always impose a fee without directing the distribution of proceeds. Second, if the distribution provision is severed, the Revised Code already provides for the fees to go elsewhere—the BMV fund. *See* R.C. 4501.25. Third, even if eliminating the distribution provision did mean the Registrar would not know where to direct the fee revenue, that would be a problem for the General Assembly—and not this Court—to solve. *See Friedlander*, 126 Ohio St. at 168. And this Court should not hazard to guess how the General Assembly might respond in this situation. *See Ariz. Christian Sch. Tuition Org.*, 131 S. Ct. at 1444 (refusing to make assumptions, especially for standing purposes, about whether or how a legislature will respond to the injunction of a government expenditure).

Even if the General Assembly intended to direct the proceeds from the increased certified abstract fees to the funds listed in R.C. 4509.05(C), such imputed intent is irrelevant to *Geiger*'s third prong. This inquiry asks only whether it is possible to give effect to the remaining language, standing alone, without adding additional words or terms to the statute. *Geiger*, 117 Ohio St. at 466. It is.

## CONCLUSION

For these reasons, the Court should reverse the Tenth District's judgment. If the Court determines that OTA lacks standing, it should remand with instructions to dismiss OTA's complaint. If the Court finds standing, it should uphold R.C. 4509.05 as consistent with Section 5a, Article XII of the Ohio Constitution. If the Court does find a violation of Section 5a, however, it should enjoin the improper spending under R.C. 4509.05 and leave the fee increase for certified abstracts intact.

Respectfully submitted,

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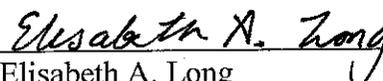
Counsel for Defendants-Appellants  
Director Thomas Charles [Thomas  
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Safety, *et al.*

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Defendants-Appellants Director Thomas Charles [Thomas Stickrath], Ohio Department of Public Safety, *et al.*, was served by U.S. mail this 30th day of March, 2012, upon the following counsel:

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Counsel for Plaintiffs-Appellees

  
\_\_\_\_\_  
Elisabeth A. Long  
Deputy Solicitor

# **EXHIBIT A**

In the  
Supreme Court of Ohio

11-1757

OHIO TRUCKING ASSOCIATION, *et al.*, :

Case No. \_\_\_\_\_

Plaintiffs-Appellees, :

On Appeal from the  
Franklin County  
Court of Appeals,  
Tenth Appellate District

v. :

DIRECTOR THOMAS CHARLES  
[THOMAS STICKRATH], *et al.*, [OHIO  
DEPARTMENT OF PUBLIC SAFETY], :

Court of Appeals Case  
No. 10AP-673

Defendants-Appellants. :

---

NOTICE OF APPEAL OF  
DEFENDANTS-APPELLANTS THOMAS CHARLES, *et al.*

---

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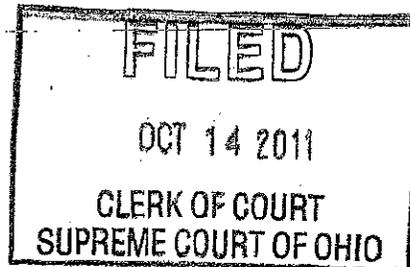
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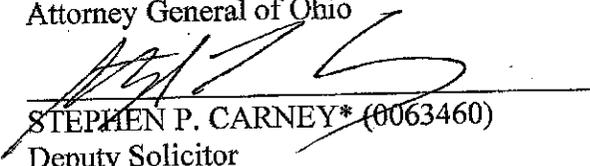
**NOTICE OF APPEAL OF  
DEFENDANTS-APPELLANTS THOMAS CHARLES, et al.**

Defendants-Appellants Thomas Charles, et al, give notice of their discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule 2.1(A)(3), from a decision of the Franklin County Court of Appeals, Tenth Appellate District, journalized in Case No. 10AP-673 on August 30, 2011. Date-stamped copies of the Tenth District's Judgment Entry and Decision are attached as Exhibits 1 and 2, respectively, to the Appellants' Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest and raises a substantial constitutional question.

Respectfully submitted,

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Attorney General of Ohio



STEPHEN P. CARNEY\* (0063460)  
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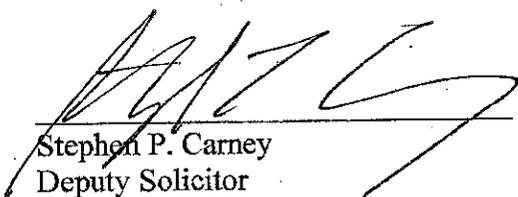
Counsel for Defendants-Appellants  
Thomas Charles [Thomas Stickrath],  
Director, Department of Public Safety, et al.

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Defendants-Appellants was served by U.S. mail this 14th day of October, 2011, upon the following counsel:

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# **EXHIBIT B**

FILED  
COURT OF APPEALS  
10/10/10  
2011 AUG 30 PM 12:40  
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

*Duf*

# **EXHIBIT C**

FILED  
COURT OF APPEALS  
MIDDLETOWN, OHIO

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT  
AUG 30 PM 12:36  
CLERK OF COURTS

Ohio Trucking Association et al.,	:	
	:	
Plaintiffs-Appellees/ [Cross-Appellants],	:	
	:	
v.	:	No. 10AP-673
	:	(C.P.C. No. 09CVH07-10813)
Director Thomas Stickrath et al., [Ohio Department of Public Safety],	:	(REGULAR CALENDAR)
	:	
Defendants-Appellants/ [Cross-Appellees].	:	
	:	

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.  
Damaser, and Barton A. Hubbard, for appellants.*

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. Camahan*, 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)<sup>1</sup> 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

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<sup>1</sup> 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. Forney* (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. *Harold* 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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# **EXHIBIT D**

TERMINATION NO. <u>6</u>
<u>YB</u> BY: <u>6-18-10</u>

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

**FINAL APPEALABLE ORDER**

OHIO TRUCKING ASSOCIATION,  
*et al.*,

*Plaintiffs,*

vs.

DIRECTOR THOMAS STICKRATH,  
*et al.*,

*Defendants.*

Case No. 09CVH-07-10813  
Judge Frye

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COMMON PLEAS COURT  
FRANKLIN CO. OHIO

**FINAL JUDGMENT**

For the reasons set forth in the court's Opinion filed on June 8, 2010, and on the record on June 18, 2010, judgment is hereby granted in favor of plaintiffs and against defendants on Count One of the Second Amended Complaint. Count Two of the Second Amended Complaint is hereby dismissed with prejudice.

The court finds and declares that Section 4509.05 of the Ohio Revised Code (as effective July 1, 2009) violates Article XII, section 5a of the Ohio Constitution. Accordingly, defendants including the Ohio Bureau of Motor Vehicles and all their agents are enjoined from collecting the \$5.00 fee under the July 2009 amendment of R.C. § 4509.05, or from otherwise enforcing that statute.

The court further finds and declares that the foregoing declaration causes, as a matter of law, the substance of § 4905.05 to revert to the version of that

statute (the \$2.00 fee) that had been in effect before the July 1, 2009 effective date of H.B.2.

The court specifically reserves for later determination all remaining questions including any right to restitution, attorneys fees due plaintiffs as the prevailing parties, or entitlement to further relief under the Second Amended Complaint.

Pursuant to Ohio Civ. R. 54(B), the court expressly determines that immediate appeal is in the public interest, and that there is no just reason for delay in entering this Final Judgment so that these important questions may promptly be addressed to the appellate courts.

The injunction granted in this Final Judgment against enforcement of the July 1, 2009 amendment to § 4509.05 is stayed, pursuant to Civ. R.62, pending appellate review. In addition, issues of restitution, attorney fees, or other relief are stayed pending completion of appellate review of the constitutional question.

**IT IS SO ORDERED.**

  
RICHARD A. FRYE, JUDGE

**Copies To:**

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# **EXHIBIT E**

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

OHIO TRUCKING ASSOCIATION,  
*et al.*,

*Plaintiffs,*

vs.

DIRECTOR THOMAS STICKRATH,  
*et al.*,

*Defendants.*

Case No. 09CVH-07-10813

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FRANKLIN CO. OHIO

**OPINION**

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Vorys Sater Seymour & Pease, LLP, Lisa Pierce Reisz, and Kenneth J. Rubin, for plaintiffs.

Richard Cordray, Attorney General, Hilary R. Damaser and Todd A. Nist, Assistant Attorneys General, for defendants.

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Frye, Judge.

**I. Introduction**

{¶1} An amendment to the state Constitution adopted in 1947 is entitled "Use of motor vehicle license and fuel taxes restricted." Ohio Constitution, Art. XII, §5a. As part of the biennial budget process in 2009 the General Assembly substantially increased a fee charged by the Ohio Bureau of Motor Vehicles ("BMV") for certified abstracts of driving records. The General Assembly also then allocated the new revenue in a manner which is argued to violate Section 5a, prompting this case.

{¶2} Abstracts are computer printouts of a driving record, including accidents or convictions for violating motor vehicle laws. See, R.C. 4509.05(A)(1) and (2). They are used to verify that drivers are licensed, to help insurers determine whether to bind automobile coverage or resolve claims, and for other purposes. In more-than-doubling the cost of an abstract the amended law specifically directed how portions of the increased fee would be allocated. Consistent with

the former law, \$2 from each abstract fee continues to go into the BMV Fund. However, the parties agree that none of the \$3 balance is expended for any highway or highway safety - related purpose specified in Section 5a. Joint Stipulation ¶ 12.

{¶3} In defending the amended law, the state defendants argue that the Constitutional provision is irrelevant, because the fees earned for a driver abstract do not relate to registration, operation, or use of vehicles on public highways, and therefore do not trigger any concern under Section 5a. In addition, defendants challenge plaintiffs' standing to sue over the constitutionality of the \$3 increase in the certified abstract fee. Because, as explained below the increased fee falls heavily upon the plaintiff trade associations whose members frequently obtain certified driving abstracts for legitimate business purposes, this court is satisfied that they have standing to sue on behalf of those members. Not only do plaintiffs have standing to sue, but in this court's opinion they are entitled to a judgment that the amended statute is unconstitutional and violates Section 5a. That being true, under well-established Ohio law the version of R.C. 4509.05 in effect prior to 2009 – which charged only \$2 per abstract and kept all proceeds within the BMV Fund – is resurrected, and deemed once again in force. It remains for later determination whether the plaintiffs may recover any financial restitution for millions of dollars paid since July 2009 for certified driver license abstracts under the invalid law, whether attorney fees may be awarded to plaintiffs' counsel, and whether a stay of this judgment should be in force pending anticipated appeal.

{¶4} A second discrete claim in this case concerns the public records policy of the BMV. It is argued BMV's policy violates Ohio law since complete driver license abstracts are not made available pursuant to a simple public records request (which, practically speaking, are provided for little or no cost.) Instead, BMV forces those seeking driver abstracts to cough-up the fee for a certified abstract, rather than getting substantially the same information for free.

{¶5} Defendants again challenge the standing of the plaintiffs on this public records issue, while also arguing that this case is procedurally defective because it was not brought in mandamus. Mandamus is the statutory remedy specifically

provided for public records disputes. While the court finds that at least one plaintiff association has standing to sue, it further finds that defendants must prevail because this case is not in a proper procedural posture. A writ of mandamus should have been sought.

{¶6} While this case was under submission Thomas Stickrath was nominated by the Governor, and confirmed by the Ohio Senate as Director of the Ohio Department of Public Safety. Pursuant to Civ. R. 25(D) he has been substituted for his predecessor Cathy Collins-Taylor.

## II. *Procedural and Factual Background*

{¶7} The parties have been well-represented by highly competent counsel. After much work they stipulated to the relevant facts, and then fully briefed the issues. Thereafter a merits hearing was conducted.<sup>1</sup> The court has considered all stipulations, agreed-upon documents, and arguments of counsel. For the ease of the reader, the court notes that the parties' first Joint Stipulation settled the following facts:

1. On April 1, 2009, Ohio enacted House Bill 2, which, in part, amended R.C. 4509.05(A) (the 'Amended Statute'). The amendment took effect on July 1, 2009.
2. Plaintiff the Ohio Trucking Association is a nonprofit, full-service trade association formed to promote and protect the interests of the trucking industry in Ohio. There are currently 970 members of the Ohio Trucking Association. Pursuant to 18 U.S.C. § 2721(b)(9) and R.C. 4501.27(B)(2)(j), members of the Ohio Trucking Association who request a certified driving abstract under R.C. 4509.05 are permitted to receive personal information under the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721 et seq. and R.C. 4501.27 as they are employers obtaining or verifying information relating to a holder of a commercial driver's license

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<sup>1</sup> Although several briefs cite Civ. R. 56 as the procedural vehicle for this journey, the parties agreed on the record that the March 19 hearing was the trial on the merits. This simplifies the procedural issues, and eliminates arguments made in Memoranda filed in February 2010.

that is required under the Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C. App. 2710, *et seq.*). Members of the Ohio Trucking Association purchase approximately 625,000 abstracts each year via internet accounts. Since the effective date of the Amended Statute, July 1, 2009, members of the Ohio Trucking Association pay five dollars (\$5.00) per abstract.

3. Plaintiff the Ohio Coalition for Open Government is a nonprofit Ohio corporation which is operated for charitable and educational purposes to support those who seek compliance with public access laws. Its members include daily and weekly newspapers, broadcasters, university journalism and mass communications faculty, local government representatives and citizens who share a common interest in informing the public about enforcing and studying open government laws in Ohio. Members of the Ohio Coalition for Open Government regularly request or support those who request public records from numerous public offices throughout Ohio, including, but not limited to state, county, city, village, township and school district units. Members of the Ohio Coalition for Open Government do not regularly make requests for certified abstracts under R.C. 4509.05(A), but rather do regularly obtain redacted copies of uncertified driving records through public records requests. The BMV cannot disclose personal information contained in BMV records to members of the Ohio Coalition for Open Government under the DPPA except as provided in R.C. 4501.27.

4. Plaintiff the Ohio Newspaper Association is a state trade association which represents all of Ohio's daily newspapers and weekly newspapers which qualify for periodicals class mail privileges. Members currently include 81 daily newspapers, 133 weekly newspapers, 12 college and university newspapers and 150 newspaper websites in Ohio. The Ohio Newspaper Association and its members regularly request public records from numerous public

offices throughout Ohio, including, but not limited to state, county, city, village, township and school district units. Members of the Ohio Newspaper Association do not regularly make requests for certified abstracts under R.C. 4509.05(A), but rather do routinely obtain redacted copies of uncertified driving records through public records requests. The BMV cannot disclose personal information contained in BMV records to members of the Ohio Newspaper Association under the DPPA except as provided in R.C. 4501.27.

5. Plaintiff the Professional Insurance Agents Association of Ohio, Inc. is the largest independent insurance agents' organization in Ohio representing professional independent insurance agencies and their owners and employees as well as associate members who are customers of those agencies. There are currently 1369 members of the Professional Insurance Agents Association of Ohio. Pursuant to 18 U.S.C. § 2721(b)(6) and R.C. 4501.27(B)(2)(g), members of the Professional Insurance Agents Association of Ohio who request a certified driving abstract under R.C. 4509.05 are permitted to receive personal information under the DPPA as they are insurers or insurance support organizations and they make the requests in connection with claims investigation activities, anti-fraud activities, rating or underwriting. Members of the Professional Insurance Agents Association of Ohio purchase thousands of abstracts each year via internet accounts or through the BMV directly. Since the effective date of the Amended Statute, July 1, 2009, members of the Professional Insurance Agents Association of Ohio pay five dollars (\$5.00) per abstract via internet accounts or as otherwise charged by a deputy registrar or the BMV Customer Service Center.

6. Plaintiff the Ohio Insurance Institute is a trade association representing property/casualty insurance companies and organizations conducting business in Ohio. Members of the Ohio Insurance Institute currently include 33 domestic property/casualty insurance companies, seven foreign property/casualty insurers and

reinsurers, eight insurance trade associations, and two insurance-related organizations Pursuant to 18 U.S.C. § 2721(b)(6) and R.C. 4501.27(B)(2)(g), members of the Ohio Insurance Institute of Ohio who request a certified driving abstract under R.C. 4509.05 are permitted to receive personal information under the DPPA as they are insurers or insurance support organizations and they make the requests in connection with claims investigation activities, anti-fraud activities, rating or underwriting,. Members of the Ohio Insurance Institute purchase approximately 4.5 million abstracts each year via internet accounts or through the BMV directly. Since the effective date of the Amended Statute, July 1, 2009, members of the Ohio Insurance Institute pay five dollars (\$5.00) per abstract via internet accounts or as otherwise charged by a deputy registrar or the BMV Customer Service Center.

7. Defendant Thomas Stickrath is the Director of the Ohio Department of Public Safety. His business address is 1970 West Broad Street, P.O. Box 182081, Columbus, Ohio 43218-2081.

8. The BMV is a division of the Department of Public Safety.

9. Defendant Carolyn Y. Williams is the Acting Registrar of the BMV. Her business address is 1970 West Broad Street, P.O. Box 16520, Columbus, Ohio 43216-6520.

10. The BMV considers its Customer Service Center, located at 1970 West Broad Street, Columbus, Ohio to be a Deputy Registrar for purposes of R.C. Title 45.

11. Records kept by the BMV, including those with information pertaining to automobile accidents, license suspensions, and citations, are subject to disclosure under Ohio public records law. The disclosure of personal information contained in a motor vehicle record is subject to the DPPA, the exceptions listed in R.C. 149.43 and other applicable federal and state statutes and rules.

12. Each "fund" listed in R.C. 4509.05(C) as receiving a portion of the proceeds from the five-dollar fee imposed under the statute is

established pursuant to statute. The monies 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.

13. The BMV charges Five Dollars (\$5.00) per request for a certified abstract for those who have bulk accounts with the BMV (requests made via internet accounts). All other requests under R.C. 4509.05, whether made to a Deputy Registrar or the BMV acting as a Deputy Registrar for purposes of Revised Code Chapter 45, are subject to the Five Dollar (\$5.00) fee as well as the Three Dollar and Fifty Cents (\$3.50) deputy registrar service fee established per the Amended Statute. \*\*\* Disclosure of information in these documents is subject to the provisions of the DPPA.

14. The BMV, upon request and pursuant to the Public Records Act, R.C. 149.43, regularly provides redacted copies of driving records which contain essentially the same information as that contained in a certified abstract furnished under R.C. 4509.05. The BMV redacts "personal information" as required under the DPPA. See R.C. 4501.27(F)(3); 18 U.S.C. 2725(3). \*\*\*

15. Any individual can obtain a three-year driving record of any licensee for free on the BMV website if he or she has information necessary to identify the licensee. Driving records obtained online do not contain "personal information" as defined under the DPPA. \*\*\*

16. Pursuant to the Ohio Department of Public Safety's public records policy \*\*\* public records responses of less than 40 pages

are provided at no cost and public records responses of greater than 40 pages are provided at the agency's cost of Five Cents (\$.05) per page. Almost all driving records are less than 40 pages and are therefore available at no cost.

17. Driving records obtained via public records requests are not certified documents.

{¶8} In January 2010 the parties filed a Second Joint Stipulation of Facts. It reflects that:

1. On November 17, 2009, Grange Mutual Casualty Company, a member of Plaintiff Ohio Insurance Institute, sent a public records request to the Acting Registrar of the Bureau of Motor Vehicles, Carolyn Williams, pursuant to R.C. § 149.43(b). \*\*\*
2. On December 4, 2009, the Ohio Bureau of Motor Vehicles provided redacted records in response to the public records request.

\*\*\*

{¶9} Additionally, attached to plaintiffs' January 6 Motion were: (1) an Affidavit of Dean Fadel (Vice President of Governmental Relations at the Ohio Insurance Institute); (2) an Affidavit of Sheryl D. Warner (Legal Counsel for the Ohio Trucking Association); (3) plaintiffs' First Request for Production of Documents and Interrogatory Responses to Marsh; and (4) an uncompleted form entitled "OBMV Record Request." Defendants stated on the record on March 19 that there were no objections to use of those attachments as evidence at trial.

{¶10} Affidavits of Mr. Fadel and attorney Warner attest that on November 17, 2009 Grange Mutual Insurance Company ("Grange") sent a public records request to the Acting Registrar of the BMV seeking the complete un-redacted driving record of one of its members and the request was denied. (Fadel Affidavit at ¶¶ 5-6; Warner Affidavit at ¶¶ 5-6). Because that request was denied, other members of the Ohio Insurance Institute and members of the Ohio Trucking Association never sought un-redacted drivers' records using ordinary public records requests. (Id. at ¶¶ 7-8; Id. at ¶¶ 7-8)

### III. *Analysis under Art. XII, § 5a of the Ohio Constitution*

{¶11} The new statute is R.C. 4509.05(A) - (C). It currently provides, in pertinent part, that “[u]pon request, the registrar of motor vehicles shall search and furnish a certified abstract \*\*\* [and] collect for each abstract a fee of five dollars.”<sup>2</sup> The second paragraph of R.C. 4509.05(C) as amended in 2009 specifies how the \$5 fee is to be distributed:

“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 \*\*\*.” [Internal references to Revised Code sections omitted.]

{¶12} Plaintiffs contend the \$3 fee allocation violates Ohio Const. Art. XII, § 5a, because such funds are “derived from fees \*\*\* relating to registration, operation, or use of vehicles on public highways.” Defendants respond that this money is not derived from such a fee. If plaintiffs prevail on that legal point, however, the parties have stipulated that expenditures are not being made for purposes

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<sup>2</sup> Although immaterial to this decision, for clarity the parties have agreed another fee sometimes is involved in obtaining a certified abstract. The first paragraph of R.C. 4509.05(C) requires a deputy registrar to “collect and transmit to the registrar the five dollar fee” and also permits a deputy registrar to “collect and retain a service fee of three dollars and fifty cents.” Thus, under some circumstances an overall fee of \$8.50 may be charged for a certified abstract,

specifically permitted by Section 5a.<sup>3</sup> Joint Stipulation ¶ 12.

{¶13} The threshold question to be addressed is whether plaintiffs have standing to challenge the constitutionality of the July 2009 amendment.

A. Plaintiffs' Standing to Sue

{¶14} The right to make a court challenge to government revenue-generating or spending legislation is circumscribed by the practical reality that few citizens like to pay taxes or fees, or agree entirely with how the legislative branch allocates public money. If the courthouse doors were open to litigation by anyone and everyone, elections and other means of influencing public policy might become far less important. So, the law allows litigation when public officers attempt to make an illegal expenditure of public money so long as the person going to court has a special interest in the subject matter, or is threatened with an injury different in character from that which will be suffered by the public generally.

{¶15} Each year members of the Ohio Insurance Institute purchase approximately 4.5 million certified abstracts; members of the Ohio Trucking Association purchase approximately 625,000 certified abstracts; and members of the Professional Insurance Agents Association of Ohio, Inc. also purchase thousands of abstracts. The BMV Customer Service Center here in the state capital is, so far as the record shows, the sole source for such data. Members of the Ohio Insurance Institute and the Professional Insurance Agents Association of Ohio, Inc. request abstracts in connection with claims investigation, anti-fraud activities, and rating or underwriting coverage. Stipulation ¶¶ 3, 5-6. Additionally, members of the Ohio Trucking Association are employers who need to verify information relating to commercial drivers license holders to assure compliance with the Commercial Motor Vehicle Safety Act of 1986. Stipulation ¶ 2. No person can lawfully operate or use a vehicle on public highways in Ohio

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<sup>3</sup> Section 5a provides:

"No moneys *derived from* fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels 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." (Emphasis added).

without a valid license and insurance. Thus, BMV certified abstracts play a direct role in the “registration, operation and use of [innumerable] vehicles on public highways.” Indeed, the sheer volume of such requests handled by the plaintiffs’ membership implicitly demonstrates that abstracts have become a key link in the overall transportation system of the state.

{¶16} “[T]o have standing, the litigant must show [1] he [or she] has suffered or is threatened with a direct and concrete injury that is different from the injury suffered by the general public, [2] that the law in question has caused the injury, and [3] that the relief requested will redress the injury.” *Stoyer v. Ohio Dep’t of Job & Family Servs.* (10<sup>th</sup> District), Case No. 09AP-236, 2009-Ohio-6662, ¶26, citing *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 469-70, 1999-Ohio-123, 715 N.E.2d 1062. Furthermore, “[a]n association has standing on behalf of its members when its members otherwise would have standing to sue in their own right, the interests it is trying to protect are germane to the organization’s purpose, and the participation of individual members is not necessary to either the claim asserted or the relief requested. [*Ohio Contractors Ass’n v. Bicking* [(1994), 71 Ohio St.3d 318,] 320, citing *Simon v. E. Kentucky Welfare Rights Org.* (1976), 426 U.S. 26, 40, 96 S.Ct. 1917, 1925, 48 L. Ed.2d 450.” *Ohio Concrete Constr. Ass’n v. Ohio Dept. of Transportation* (10<sup>th</sup> District), Case No. 08AP-905, 2009-Ohio-2400, ¶26.

{¶17} Defendants argue these plaintiffs have no special and concrete injury that is not shared with the general public, and therefore that this court cannot reach the merits of this case. Yet, the state Constitution is clear that money derived from fuel taxes or by BMV fees is to be expended exclusively for public highways or other specific purposes enumerated in Section 5s. That being true, it is more than a rhetorical question to ask how Section 5a could ever be monitored – other than by the General Assembly itself – if none of these plaintiff associations have standing to sue? The promise that “[t]he judiciary has both the power and the solemn duty to determine the constitutionality and validity of acts by other branches of the government” (*State v. Bodyke*, \_\_\_ Ohio St.3d \_\_\_, Slip Op. No. 2010-Ohio-2424, at ¶46) would be hollow if standing to sue were treated so parsimoniously.

{¶18} Defendants' premise is that certified driver license abstracts do not "relate to" the "registration, operation or use of vehicles on public highways" because such documents are not essential to register or operate a car or truck. Defendants argue an analogy to "vanity" plates. The revenue derived from selling basic license plates is conceded to "relate to" the registration, operation, and use of vehicles; but, defendants point out, the additional incremental fee(s) collected for vanity or specialty plates do not fall within Section 5a. Thus, the extra charge one can pay to drive a vehicle displaying a drawing of the Marblehead Lighthouse, or the seal of The Ohio State University, or a reference to the Cleveland Browns is discretionary and therefore not restricted by Section 5a. The extra cost merely reflects a charge collected by BMV for charitable, aesthetic or sentimental reasons.

{¶19} Specialty plates are not a relevant point of comparison. The driving abstracts at issue here are much more clearly essential to regular, lawful use of vehicles on public highways. Moreover, the fact that members of the plaintiff associations literally purchase millions of them each year surely differentiates them from the general citizenry who may have little or no idea what purposes certified abstracts serve.

{¶20} Certified abstracts are derived from records of the one-and-only government agency formally charged with administering Ohio's motor vehicle licensing and registration laws. R.C. 4501.02(A), 4507.01(B), 4509.03(A). Those seeking to verify that only licensed drivers are put in control of "18-wheelers," for example, have no place else to turn to authoritatively determine that status. There is a clear tie between the special interest of members of the Ohio Trucking Association in registering and operating trucks on Ohio's roadways and the controversy presented here.

{¶21} Insurers seeking to confirm whether someone is properly licensed, or has had a good driving record have a legitimate, direct interest in records of "registration, operation, or use of vehicles." The requirement that virtually everyone licensed in Ohio must carry liability insurance is primarily administered by the BMV and that, in turn, confers standing on the Professional Insurance Agents Assoc. of Ohio and the Ohio Insurance Institute. Understandably their

members intend to insure only lawfully licensed drivers, and they have a keen interest – for underwriting purposes if not others – in knowing about speeding tickets, past accidents, and other historical information reflected in BMV records. No other statewide repository authoritatively captures such factual information.

{¶22} Finally, the plaintiffs' standing is implicitly recognized in provisions found in the federal Driver's Privacy Protection Act ("DPPA"). 18 U.S.C. §2721.

{¶23} To sum up, members of the plaintiff associations have shown both a legitimate and a special need for certified driver abstracts regulated under R.C. 4509.05. Were defendants correct that these plaintiffs are not harmed sufficiently to seek judicial review in this case, then it would appear that absolutely no one could have standing to enforce Section 5a. The power of the judiciary extends to constitutional questions, and the standing doctrine is not a bar in this case.

B. Application of Section 5a

1. *The broad meaning of the phrase "relating to"*

{¶24} The Constitutional provision uses the words "relating to." It is settled that the operable term is broadly defined in both common usage and most legal contexts. The importance of common usage to understanding words in the Constitution has been stated for nearly a century. "This is the simple language of the plain people and it is to receive such meaning as they usually give to it in political discussions and arguments.'" *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, 466, 141 N.E. 16, quoting concurring opinion of Wanamaker, J. in *State, ex rel. Greenlund v. Fulton* (1919), 99 Ohio St. 168, 200, 124 N.E. 172, 181. See also, *State ex rel. King v. Summit Cty. Council*, 99 Ohio St.3d 172, 2003-Ohio-3050, at ¶ 35 and cases cited.

{¶25} The word "related" means "[s]tanding in relation; connected; allied; akin." *Black's Law Dictionary* 1452 (Rev'd 4<sup>th</sup> ed. 1968). Ohio courts, following "[t]he United States Supreme Court[,] ha[ve] defined 'relating to' as 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,' another." *Kagy v. Toledo-Lucas County Port Auth.* (6<sup>th</sup> Dist., 1998), 126 Ohio App.3d 675, 680-681, 711 N.E.2d 256,

quoting *Morales v. Transworld Airlines, Inc.* (1992), 504 U.S. 374, 383, 119 L. Ed. 2d 157, 112 S. Ct. 2031 citing Black's Law Dictionary 1158 (5th ed. 1979) ("The ordinary meaning of these words [relating to] is a broad one \*\*\*."); *Schumacher v. Amalgamated Leasing* (3<sup>rd</sup> Dist.), 156 Ohio App.3d 393 2004-Ohio-1203, 806 N.E.2d 189, ¶17 also citing *Morales*. *State ex rel. Keller v. Forney*, *supra*, observed that [i]t is self-evident that the word "relating," and its synonyms, "pertaining to" or "concerning," are much broader, much more comprehensive, than the word "provide," and are so used in common conversation." 108 Ohio St., at 467. See also, *State v. Gaddy* (C.P. Paulding Co. 1962), 89 Ohio L. Abs 513, 519, 184 N.E.2d 689, 693 ("Certainly in this community it is commonly understood that 'relating to' embraces much more than such words as 'directly connected to' or 'a part of'.")

## 2. Previous Judicial interpretations of Section 5a

{¶26} Just as this court does not write on a blank slate in determining what meaning to ascribe to the words "relating to" so too there is precedent on the proper interpretation of Section 5a. The Ohio Supreme Court has held that Section 5a restricts the expenditure of money derived from the registration, operation, or use of vehicles on public highways to "purposes *directly connected* thereto." *Knox Cty. Bd. of Commrs v. Knox Cty. Engineer*, 109 Ohio St.3d 353, 2006-Ohio-2576, 847 N.E.2d 1206, citing with approval *Grandle v. Rhodes* (1959), 169 Ohio St. 77, 157 N.E.2d 336. [Emphasis added.] Additionally, "[t]o be a statutory highway purpose, such purpose must, first, be one which is authorized by statute and, second, be one which is so related to the development of the highway system that it is within the power of the General Assembly to authorize the expenditure of public funds therefor." *State ex rel. Preston v. Ferguson* (1960), 170 Ohio St. 450, 461, 166 N.E.2d 365, 373. A casual or loose relationship between the highway system and the purpose for which expenditures otherwise subject to Section 5a are made is not permitted. That, of course, is consistent with the "generally accepted premise that courts must interpret the Constitution broadly in order to accomplish the manifest purpose of an amendment. [citation omitted]." *State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567, 570, 433 N.E.2d 217, 219.

{¶27} The parties have stipulated that nothing “directly connected” with the construction, maintenance and repair of highways and the enforcement of traffic laws is served by the various allocations costing \$3 of each \$5 fee in the newly amended statute. That is, funds that flow to the “trauma and emergency medical services fund,” or the “homeland security fund” or the “emergency management agency service and reimbursement fund” or the “justice program services fund” do not meet the constitutional test under Section 5a. (Joint Stipulation of Facts filed Oct. 30, 2009, at ¶ 12.) These purposes are too tangential. See, *e.g.*, R.C. 5502.62(C) where the justice program services fund is used to develop and maintain the Ohio incident-based reporting system to facilitate the sharing of information with the federal Bureau of Investigation and participating law enforcement agencies in Ohio.

{¶28} Accordingly, the court finds and declares that \$3 or 60% of the \$5 fee collected under R.C. 4509.05 as amended in 2009 is money “relating to” registration, operation, or use of vehicles on public highways in Ohio, but that such funds are not being “expended” consistent with the limited and specific purposes enumerated in Article XII, Section 5a of the Ohio Constitution. To that extent the 2009 amendment to R.C. 4509.05 is unconstitutional.

### C. The Appropriate Remedy

{¶29} The remedy that this court should impose if it concludes the 2009 statute runs afoul of Section 5a has been vigorously argued by counsel. Contemplating the possibility that the R.C. 4509.05 conflicts with Section 5a, defendants contend that the \$5 fee itself is not unconstitutional; instead, they say, only the distribution of the proceeds is unconstitutional. Defendants contend that the proper remedy is merely to strike the entire second paragraph of R.C. 4509.05(C) which practically speaking would allow the entire \$5 fee to be charged by the BMV. However, 60% of funds generated (\$3) would under this scenario remain unallocated, presumably building up as a large surplus until the General Assembly addressed the matter again. Plaintiffs argue that by striking the entire second paragraph, the court would be improperly striking a proper and constitutional portion of the 2009 amendment, which maintained the former law

in stating that “[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.”

{130} R.C. 1.50 recognizes that provisions within the Revised Code may be given effect despite an invalidity within a law. That is, sometimes provisions of a statute are “severable.” Earlier this month in *State v. Bodyke, supra*, at ¶ 65, the Court once again followed *Geiger v. Geiger* (1927), 117 Ohio St. 451, 466, 160 N.E. 28, 33. It set forth a three-part test for severability:

“(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?”

This has also been summarized to mean that “if an unconstitutional part of an Act is stricken, and if that which remains is complete in and of itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, the remaining part must be sustained. *Bowles v. State* (1881), 37 Ohio St. 35, 44; *State v. Kassay* (1932), 126 Ohio St. 177, 180 [184 N.E. 521, 523]; *State, ex rel. Herbert, v. Ferguson* (1944), 142 Ohio St. 496, 503 [27 O.O. 415, 418, 52 N.E.2d 980, 983].’ *Livingston v. Clawson* (1982), 2 Ohio App.3d 173, 177, 2 OBR 189, 193, 440 N.E.2d 1383, 1388.” *State v. McCallion* (11<sup>th</sup> Dist., 1992), 78 Ohio App.3d 709, 715, 605 N.E.2d 1289, 1293. This court concludes that merely striking the first portion of the second paragraph of amended R.C. 4509.05(C) is not an available option.

{131} Looking to the first prong of the *Geiger* test, the constitutional and unconstitutional parts of the second paragraph of R.C. 4509.05(C) are capable of separation. Each may stand by itself. The portion of R.C. 4509.05(C) that reads “[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 logically stand alone.

{¶32} However, the court finds under the second prong of the *Geiger* test that the remainder of the second paragraph is so interconnected with the general scope of R.C. 4509.05, as amended last summer, as to make it impossible to give effect to the apparent intention of the Legislature if only the offending clause or part is stricken. In adopting the new \$5 fee for abstracts the legislative intent was clear. The General Assembly wished to continue to collect \$2 to fund the BMV just like it did before the 2009 amendment. However, the total cost was increased to \$5, permitting distribute of another \$3 to purposes well-outside Section 5a that, traditionally, had been General Fund expenditures. (Effectively, this 2009 amendment was a disguised tax-increase on those using records of the BVM, with the proceeds allocated to General Fund expenses.)

{¶33} Merely striking the language distributing the \$3 increased fee so that the extra money is still collected but sits idle somewhere in the state treasury was never the intention of the Legislature. That part of the *Geiger* test - giving effect to the apparent intention of the Legislature if the unconstitutional part of the law is stricken - cannot be done here.

{¶34} Furthermore, the third prong of *Geiger* (that the insertion of words or terms is necessary to give effect to the constitutional portions of R.C. 4509.05(C)) presents a problem as well. After striking the unconstitutional portions of the second paragraph of R.C. 4509.05(C), new language about how the \$3 increased fee should be distributed - somewhere other than the BMV which remains entitled to only \$2 - would be needed. This court cannot make that expenditure decision for the legislature, but without some replacement language the \$5 fee is nonsensical. Therefore, the unconstitutional and constitutional portions of R.C. 4509.05 as amended in 2009 are not “severable.”

{¶35} Given that the court cannot perform surgery on R.C. 4509.05, the version in force since July 2009 must be stricken in its entirety. That does not leave a void in the law. The previous version of the same statute merely takes its place.

{136} Ohio has a well-settled rule that when an unconstitutional statute replaces a prior version of the same law, the repeal of the earlier (constitutional) statute generally is deemed invalid. Then, the law is as if the later offending statute (containing the repealer) never had been passed. *State v. Sullivan*, 90 Ohio St.3d 502, 2001-Ohio-6, 739 N.E.2d 788, syllabus paragraph two, held: “When a court strikes down a statute as unconstitutional, and the offending statute replaced an existing law that had been repealed in the same bill that enacted the offending statute, the repeal is also invalid unless it clearly appears that the General Assembly meant the repeal to have effect even if the offending statute had never been passed. (*State ex rel. Pogue v. Groom* [1914], 91 Ohio St. 1, 100 N.E. 477, paragraph three of the syllabus, approved and followed.)” *Sullivan* is among a number of decisions recognizing this rule. *State v. Parker* (1948), 150 Ohio St. 22, 24, 80 N.E.2d 490, 491; *Morton v. State* (1922), 105 Ohio St. 366, 138 N.E. 45, syllabus paragraph 2 and cases cited; *State ex rel. Walton v. Edmondson* (1914), 89 Ohio St. 351, 106 N.E. 41, syllabus paragraph three; *State ex rel. Wilmot v. Buckley* (1899), 60 Ohio St. 273, 54 N.E. 272, syllabus paragraph four.

{137} To determine whether a repealing clause is inoperative in this context, court decisions focus upon whether it “clearly” would have been the “expressed intention” of the legislature to change prior law even if the substitute, new law were invalid. That is a demanding test. When such clarity does not exist, the default rule is that repealing-language is inoperative so that the statutory law simply reverts to the old version of that statute.

{138} The prior version of RC 4505.09 was very similar to the 2009 statute. Only two significant differences are apparent: the prior version did not contain an allocation paragraph for anything but the BMV Fund; and it stated “two dollars” where H.B. 2 stated “five dollars.” Thus, it is sensible to invoke the longstanding rule recognized in *Sullivan* and many other decisions. This causes the law to revert to the version of R.C. 4505.09 in force before H.B. 2. That retains adequate funding for BMV since the same \$2 fee found in both the old and new law is retained, but leaves to the General Assembly the role of crafting legislation that allocates money consistent with Section 5a.

#### IV. *The Public Records Issue*

##### A. Plaintiffs' Standing

{¶39} Grange Mutual Casualty Company is a member of plaintiff Ohio Insurance Institute. In November 2009 Grange made a public records request to BMV. (Second Joint Stipulation, ¶ 1.) In early December BMV responded with redacted records. (Id., ¶ 2) This effort was intended to tee-up the legal question of whether someone must pay the \$5 fee to obtain an un-redacted certified driver's abstract, or whether it is available under the general Public Records Law.

{¶40} The court is satisfied that, at the least, the Ohio Insurance Institute has standing. At least one member of the Institute attempted to demonstrate a special interest in obtaining a court determination whether driver abstracts ought to be available under the Ohio public records law. See, *Brown v. Columbus City Schs. Bd. of Educ.* (1th District), Case No. 08AP-1067, 2009-Ohio-3230, citing *Brinkman v. Miami Univ.* (12th District), Case No. CA2006-12-313, 2007-Ohio-4372, ¶32, and *State ex rel. Masterson v. Ohio State Racing Comm.* (1954), 162 Ohio St. 366, 368, 123 N.E.2d 1.

{¶41} Whether the other plaintiffs also have standing to raise a challenge to the BMV's internal public records policy need not be decided.

##### B. Public Records Law and Mandamus

{¶42} In Ohio the subject of public records has been fundamentally addressed and managed by statute. Without R.C. Chapter 149 it is unclear whether there would be any common law right to public records.

{¶43} R.C. 149.43(A) defines what is a "public record" and exempts certain information from that definition. R.C. 149.43(B) sets forth the procedure for requesting and obtaining public records. When public records are not provided as required, R.C. 149.43(C)(1) clearly provides the remedy that "[i]f a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection \*\*\* the person allegedly aggrieved may commence a *mandamus action* to obtain a judgment that orders the public office or the

person responsible for the public record to comply \*\*\*.” (emphasis added.) Several recent decisions are emphatic that “[m]andamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio’s Public Records Act. [citation omitted].” *State ex rel. Perrea v. Cincinnati Public Schools*, 123 Ohio St.3d 410, 2009-Ohio-4762, at ¶ 13.

{¶44} More generally, Ohio law recognizes that “[m]andamus is an appropriate remedy where no statutory right of appeal is available to correct an abuse of discretion by an administrative body. [citation omitted].” *State ex rel. Lucas Cty. Bd. of Mental Retardation & Dev. Disabilities v. Pub. Emps. Retirement Bd.*, 123 Ohio St.3d 146, 2009-Ohio-4694, at ¶ 15.

{¶45} Nevertheless, plaintiffs argue that a declaratory judgment ought to be available to contest the BMV policy challenged here. This court disagrees. To be sure, the Declaratory Judgment Act is remedial, and serves a positive purpose in the law. Yet, it is not always available. It is a matter of judicial discretion whether to entertain such an action, assuming that it is within the spirit of the Act. *Swander Ditch Landowners’ Assn. v. Joint Bd. of Huron & Seneca Cty. Commrs.* (1990), 51 Ohio St.3d 131, 134-35; *Galloway v. Horkulic* (7<sup>th</sup> Dist.), Case No. 02JE52, 2003-Ohio-5145, 2003 Ohio App. LEXIS 4648.

{¶46} Here, Grange was the only member of any of the plaintiffs to request what it deemed to be a public record (unredacted drivers abstracts), but it elected to pursue a declaratory judgment rather than a mandamus action. The argument that the denial of the “public records request” is prospective – and that R.C. 149.43(C)(1) does not apply – is unavailing. Without a “public record request” that was “rejected,” a declaratory judgment action to enforce Ohio’s Public Records Laws would not be ripe for adjudication. Moreover, the specific remedy provided by the Legislature in creating a comprehensive public records scheme for Ohio is mandamus, and it ought to be used.

{¶47} In anticipation of the court’s finding mandamus as the exclusive avenue for challenging BMV’s application of Ohio’s Public Records Law, plaintiffs requested leave to amend their Second Amended Complaint with an explicit claim for mandamus. The request must be **DENIED** as untimely.

## V. *Conclusion*

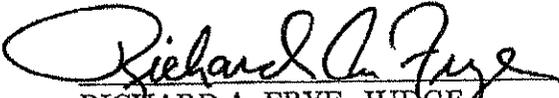
{¶48} A declaratory judgment will be **GRANTED** in favor of plaintiffs and against defendants on Count One of the Second Amended Complaint; Count Two will be **DISMISSED**. To implement this Decision the court will, in the near future, enter a Judgment finding that R.C. 4509.05, as amended in 2009, violates Section 5a; that the BMV may no longer collect the \$5 fee under the 2009 amended statute; but that BMV may continue to collect the old \$2 fee pursuant to the prior version of R.C. 4509.05. Both sides having partially prevailed, the costs of this action will be shared equally by plaintiffs and defendants. Counsel for plaintiffs shall promptly prepare and circulate a proposed Judgment that reserves for later determination questions of monetary restitution, attorney fees, or other relief sought by plaintiffs in the Second Amended Complaint and not fairly addressed in this Decision.

{¶49} Given the potential implications of this Decision for the state budget, the court will hold a conference with counsel before entering Judgment. If either side requests, the court will consider affidavits or other documentary evidence as to whether or not this court should proceed to make the declaratory judgment and an injunction immediately effective. Alternatively, under Civ. R. 62 the court has the authority to stay injunctive relief. Another procedural vehicle would be to certify the declaratory judgment on the Section 5a and the public records issues as final for appeal under Civ. R. 54 (B). Two difficulties are apparent to the court. First, this is not a class action to recover restitution for money paid under an unconstitutional statute. E.g., *Santos v. Ohio Bureau of Workers Compensation*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441. Second, so far as the court can tell no plaintiff before the court actually paid the unconstitutional \$5 fee; their members did. So, although plaintiffs' Second Amended Complaint seeks restitution it is not clear that the court can ever grant such relief. While an association may have standing to sue for prospective injunctive relief on behalf of its members, it appears to be the law that absent direct injury to itself an association cannot recover damages when the monetary loss fell only on members. *Warth v. Seldin* (1975), 422 U.S. 490, 515-16, 95 S.Ct. 2197, 2214, 45 L.Ed2d 343, 364-65. That being said, the absence of any possibility of

restitution at some later date if this Decision is upheld on appeal leaves the members of the plaintiff associations with a hollow victory. Absent injunctive relief from this court they will still be paying the higher fee to BMV for some period of time as this case drags out on appeal, but may well never get a refund. That raises an equitable question: why shouldn't the court immediately order BMV to cease collection of the extra \$3 fee?

{150} Counsel will be heard on the remedial issues on **FRIDAY JUNE 18, 2010, at 2:00 p.m. in Courtroom 8A**. Any briefs, affidavits or other factual material relative to how Judgment should be entered must be filed and served no later than 12 noon on June 17, with copies to chambers 8A.

**IT IS SO ORDERED.**

  
RICHARD A. FRYE, JUDGE

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# **EXHIBIT F**

## **The Ohio Constitution**

[The 1851 Constitution with Amendments to 2011]

### **§ 12.05a Use of motor vehicle license and fuel taxes restricted**

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.

(Adopted November 4, 1947; effective January 1, 1948.)

# **EXHIBIT G**

## **4509.05 Information furnished by registrar - fee.**

(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 except accidents certified as described in division (D) of section 3937.41 of the Revised Code;

(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.

(C) The registrar may permit deputy registrars to perform a search and furnish a certified abstract under this section. A deputy registrar performing this function shall comply with section 4501.27 of the Revised Code concerning the disclosure of personal information, shall collect and transmit to the registrar the five-dollar fee established under division (B) of this section, and may collect and retain a service fee of three dollars and fifty cents.

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 established in section 4501.25 of the Revised Code, sixty cents into the state treasury to the credit of the trauma and emergency medical services fund established in section 4513.263 of the Revised Code, sixty cents into the state treasury to the credit of the homeland security fund established in section 5502.03 of the Revised Code, thirty cents into the state treasury to the credit of the investigations fund established in section 5502.131 of the Revised Code, one dollar and twenty-five cents into the state treasury to the credit of the emergency management agency service and reimbursement fund established in section 5502.39 of the Revised Code, and twenty-five cents into the state treasury to the credit of the justice program services fund established in section 5502.67 of the Revised Code.

Amended by 128th General Assembly ch. 1, HB 2, § 101.01, eff. 7/1/2009.

Effective Date: 03-01-1990; 09-16-2004

# **EXHIBIT H**

(128th General Assembly)  
(Amended Substitute House Bill Number 2)

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**AN ACT**

To amend sections 121.51, 133.52, 151.01, 151.09, 151.40, 955.201, 1548.10, 1751.53, 2911.21, 2949.094, 3304.14, 3719.21, 3905.423, 3923.38, 4141.242, 4141.301, 4163.01, 4163.07, 4501.01, 4501.03, 4501.044, 4501.06, 4501.21, 4501.34, 4503.04, 4503.042, 4503.07, 4503.10, 4503.103, 4503.182, 4503.19, 4503.191, 4503.26, 4503.40, 4503.42, 4503.65, 4505.032, 4505.09, 4505.14, 4506.07, 4506.08, 4506.11, 4507.06, 4507.13, 4507.23, 4507.24, 4507.51, 4507.52, 4509.05, 4511.01, 4511.093, 4511.181, 4511.191, 4511.21, 4511.213, 4513.03, 4513.263, 4513.34, 4517.021, 4519.02, 4519.03, 4519.04, 4519.08, 4519.09, 4519.10, 4519.44, 4519.47, 4519.59, 4519.63, 4561.17, 4561.18, 4561.21, 4729.42, 4729.99, 4776.02, 4776.04, 4928.64, 4928.65, 4981.02, 5501.03, 5501.311, 5501.34, 5502.03, 5502.39, 5502.67, 5502.68, 5515.01, 5515.07, 5517.011, 5525.15, 5531.09, 5537.07, 5537.99, 5541.05, and 5571.20; to enact sections 5.24, 121.53, 122.077, 123.153, 3905.425, 3905.426, 4501.026, 4511.108, 4905.801, 4905.802, 4981.40, 5501.60, 5502.131, 5531.11, 5531.12, 5531.13, 5531.14, 5531.15, 5531.16, 5531.17, 5531.18, 5531.99, and 5537.30; to repeal sections 955.202 and 5902.09 of the Revised Code; to amend Section 229.10 of Am. Sub. H.B. 67 of the 127th General Assembly, as subsequently amended; and to amend Sections 217.10, 217.11, 239.10, 241.10, 243.10, 243.11, and 503.40 of Am. Sub. H.B. 562 of the 127th General Assembly to make appropriations for programs related to transportation and public safety for the biennium beginning July 1, 2009, and ending June 30, 2011, to provide authorization and conditions for the operation of those and other programs, to appropriate federal stimulus moneys received under the American Recovery Reinvestment Act of 2009, to repeal section 121.53 of the Revised Code on September 30, 2013, to further amend sections 1751.53 and 3923.38 of the Revised Code, effective January 1, 2010, to revive the law as it existed prior to this act, and to declare an emergency.

*Be it enacted by the General Assembly of the State of Ohio:*

**SECTION 101.01.** That sections 121.51, 133.52, 151.01, 151.09, 151.40, 955.201, 1548.10, 1751.53, 2911.21, 2949.094, 3304.14, 3719.21, 3905.423, 3923.38, 4141.242, 4141.301, 4163.01, 4163.07, 4501.01, 4501.03, 4501.044, 4501.06, 4501.21, 4501.34, 4503.04, 4503.042, 4503.07, 4503.10, 4503.103, 4503.182, 4503.19, 4503.191, 4503.26, 4503.40, 4503.42, 4503.65, 4505.032, 4505.09, 4505.14, 4506.07, 4506.08, 4506.11, 4507.06, 4507.13, 4507.23, 4507.24, 4507.51, 4507.52, 4509.05, 4511.01, 4511.093, 4511.181, 4511.191, 4511.21, 4511.213, 4513.03, 4513.263, 4513.34, 4517.021, 4519.02, 4519.03, 4519.04, 4519.08, 4519.09, 4519.10, 4519.44, 4519.47, 4519.59, 4519.63, 4561.17, 4561.18, 4561.21, 4729.42, 4729.99, 4776.02, 4776.04, 4928.64, 4928.65, 4981.02, 5501.03, 5501.311, 5501.34, 5502.03, 5502.39, 5502.67, 5502.68, 5515.01, 5515.07, 5517.011, 5525.15, 5531.09, 5537.07, 5537.99, 5541.05, and 5571.20 be amended and sections 5.24, 121.53, 122.077, 123.153, 3905.425, 3905.426, 4501.026, 4511.108, 4905.801, 4905.802, 4981.40, 5501.60, 5502.131, 5531.11, 5531.12, 5531.13, 5531.14, 5531.15, 5531.16, 5531.17, 5531.18, 5531.99, and 5537.30 of the Revised Code be enacted to read as follows:

\* \* \*

**Sec. 4509.05.** (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 except accidents certified as described in division (D) of section 3937.41 of the Revised Code;

(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 ~~two~~ five dollars.

(C) The registrar may permit deputy registrars to perform a search and furnish a certified abstract under this section. A deputy registrar performing this function shall comply with section 4501.27 of the Revised Code concerning the disclosure of personal information, shall collect and transmit to the registrar the ~~two-dollar~~ five-dollar fee established under division (B) of this section, and may collect and retain a service fee of ~~three dollars and twenty-five cents commencing on the effective date of this amendment. If the deputy registrar fees are increased on January 1, 2004, in accordance with section 4503.034 of the Revised Code, the deputy registrar may collect and retain a service fee of three dollars and fifty cents, commencing on that date.~~

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 established in section 4501.25 of the Revised Code, sixty cents into the state treasury to the credit of the trauma and emergency medical services fund established in section 4513.263 of the Revised Code, sixty cents into the state treasury to the credit of the homeland security fund established in section 5502.03 of the Revised Code, thirty cents into the state treasury to the credit of the investigations fund established in section 5502.131 of the Revised Code, one dollar and twenty-five cents into the state treasury to the credit of the emergency management agency service and reimbursement fund established in section 5502.39 of the Revised Code, and twenty-five cents into the state treasury to the credit of the justice program services fund established in section 5502.67 of the Revised Code.

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**SECTION 101.02.** That existing sections 121.51, 133.52, 151.01, 151.09, 151.40, 955.201, 1548.10, 1751.53, 2911.21, 2949.094, 3304.14, 3719.21, 3905.423, 3923.38, 4141.242, 4141.301, 4163.01, 4163.07, 4501.01, 4501.03, 4501.044, 4501.06, 4501.21, 4501.34, 4503.04, 4503.042, 4503.07, 4503.10, 4503.103, 4503.182, 4503.19, 4503.191, 4503.26, 4503.40, 4503.42, 4503.65, 4505.032, 4505.09, 4505.14, 4506.07, 4506.08, 4506.11, 4507.06, 4507.13, 4507.23, 4507.24, 4507.51, 4507.52, 4509.05, 4511.01, 4511.093, 4511.181, 4511.191, 4511.21, 4511.213, 4513.03, 4513.263, 4513.34, 4517.021, 4519.02, 4519.03, 4519.04, 4519.08, 4519.09, 4519.10, 4519.44, 4519.47, 4519.59, 4519.63, 4561.17, 4561.18, 4561.21, 4729.42, 4729.99, 4776.02, 4776.04, 4928.64, 4928.65, 4981.02, 5501.03, 5501.311, 5501.34, 5502.03, 5502.39, 5502.67, 5502.68, 5515.01, 5515.07, 5517.011, 5525.15, 5531.09, 5537.07, 5537.99, 5541.05, and 5571.20 of the Revised Code are hereby repealed.

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**SECTION 901.11.** This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity lies in the need, in these times of high unemployment, to provide assistance to those who have recently been working, while at the same time protecting the health and safety of the public. Therefore, this act shall go into immediate effect.